Supreme Judicial Court for the Commonwealth FAR: FAR-27820 Filed: 9/4/2020 3:38 PM

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPREME JUDICIAL COURT #
APPEALS COURT # 2019-P-0876

COMMONWEALTH

v.

CHRISTOPHER HENRY

DEFENDANT-APPELLEE'S APPLICATION FOR FURTHER APPELLATE REVIEW

REQUEST FOR LEAVE

Now comes the defendant-appellant, Christopher Henry, and respectfully requests that this Honorable Court grant him leave to obtain further appellate review pursuant to Mass. R. App. P. 27.1.

This case presents an issue of first impression for the Supreme Judicial Court. The Appeals Court has incorrectly applied this Court's precedent and narrowed the available relief for Dookhan's and Farak's misconduct to charges where a drug certificate bears Dookhan / Farak's name, and denies relief in remainder of those cases, regardless of the circumstances of the plea. Such a case affects the public interest, will affect thousands of defendants that continue to litigate these drug lab cases, and is deserving of further appellate review.

STATEMENT OF PRIOR PROCEEDINGS

This case came before the Appeals Court on appeal following the denial of a Motion to Withdraw a Guilty Plea and for a New Trial in Suffolk Superior Court.

On June 21, 2011, a grand jury returned indictments charging the defendant with eight separate indictments. Commonwealth v. Henry, slip op. at p. 2.

Henry filed a Motion to Suppress Physical Evidence and Photographic Identification on February 6, 2012. R-25 The Motion to Suppress was denied (Sanders, J.) on March 13, 2012. R-13. The Defendant's Motion to Reconsider and Interlocutory appeals, too, were denied. R-13, 27.

On July 13, 2012, Mr. Henry entered into a guilty plea to both Dookhan and non-Dookhan affected counts. Henry was sentenced to three years to three years and one day, with probation for two years from and after the sentence on offense 1. Henry, slip op. at 2.

Henry filed a Motion to Withdraw his Guilty Pleas on July 21, 2015. R-39. The motion litigation was stayed for a period of time due to the pending the Bridgeman litigation. R-13. On April 19, 2017, Counts (7) and (8) were vacated and the charges dismissed with prejudice "per order of the Supreme Judicial Court." R-13. On February 6, 2019, a non-evidentiary hearing was held on

the defendant's motion, and the court granted an evidentiary hearing, which was held on March 21, 2019. The motion was denied on March 21, 2019. R-13. A Notice of Appeal was timely filed. R-140.

On August 14, 2020, the Appeals Court affirmed.

STATEMENT OF RELEVANT FACTS

The Factual Allegations Against Henry

The Commonwealth's allegations against Henry are recited by the Appeals Court at page 2 of the slip opinion.

In discovery, Mr. Henry received three drug certificates; Annie Dookhan, as the primary chemist, signed each drug certificate verifying that the substances were narcotics. R-62.

Shortly after Mr. Henry was sentenced, it came to light that a disturbing amount of fraud, forgery, and unreliable and unsupervised testing occurred at the Hinton State Laboratory, in Jamaica Plain. Commonwealth v. Scott, 467 Mass. 336 (2014) (detailing Dookhan's misconduct). Annie Dookhan engaged in "insidious" misconduct, "which belie[d] reconstruction, [was] a lapse of systemic magnitude in the criminal justice system." Id. at 352.

As is now well documented throughout Commonwealth case law, Ms. Dookhan confessed to faking test results at the Hinton drug lab, "dry labbing", forging the initials of other employees, mixing samples from different cases, and intentionally turning negative samples into positive samples. See Scott, 437 Mass. at 339-41. This misconduct likely took place while Dookhan was serving as the primary chemist responsible for drug samples like Henry's. Id.

The Office of the Inspector General conducted an independent evaluation of the operation and management of the Drug Lab from 2002 to 2012. The report "described massive deficiencies by the Department of Public Health (department) in its oversight and management of the Hinton lab. These deficiencies included a lack of accreditation and inadequate chemist training; distant or uninterested supervisors; inconsistent testing practices; deviation from chain-of-custody guidelines; and faulty security." Bridgeman v. District Attorney, 476 Mass. 298, 303 n.6 (2017); Commonwealth v. Charles, 366 Mass. 63, 89 (2013).

The Motion to Suppress Identification

Henry moved to suppress all fruits of the warrantless search of apartment 4 at 637 Walk Hill

Street in Mattapan, Massachusetts on March 24, 2011. Police entered the apartment under the guise of having a warrant for another man, and seized Henry, searched, and arrested him, and then secured a search warrant. R-25. The suppression motion judge found the warrantless intrusion justified on grounds of officer safety. R-29.

Henry also moved to suppress the photo array shown to Robert Moody as unduly suggestive, and conducive to a misidentification. R-25.

If either of these motions had been allowed, it would have been dispositive on at least some counts. These issues were preserved and available appellate issues for Henry after a trial.

The Change of Plea Hearing

On July 13, 2012, Mr. Henry elected to change his plea. The court (Brassard, J.) conducted a standard plea colloquy. The court asked the prosecutor during the change of plea whether he was aware of any collateral consequences aside from DNA collection that Mr. Henry faced. R-88. The Commonwealth reported that Mr. Henry would have license ramifications; Mr. Henry had not been previously advised of this. Id. No mention was made about possible future sentencing enhancements under the

federal sentencing guidelines or the habitual offender statutes. Id.

During the colloquy, the following exchange occurred:

> The defendant: Does that change the fact of me pleading guilty if I say the facts are true or not true?
> The court: Mr. Curley is going to describe the facts that form the basis for the charge. If I think those facts support a plea of guilty, then I will accept your plea guilty. If you don't admit those facts are true, I may or I may not accept your plea of guilty. If you tell me everything he is about to tell me is false, I will not accept your pleas of guilty and we'll go to trial.
> The defendant: Oh
> The court: Does that answer your question?
> The defendant: Yes, your honor.

R-95.

The Motion to Withdraw His Pleas

After learning about Annie Dookhan's misconduct, Mr. Henry filed a motion to withdraw his plea. In support of his motion, Henry filed an affidavit in which he stated that: prior to his plea, he felt that he had strong appellate issues from the denial of his Motion to Suppress Identification that he intended to pursue if he was unsuccessful at trial. R-64. He felt that he had a strong identification defense at trial on the firearm and robbery charges. Henry explained that he believed he had a strong identification defense because, prior to

his plea, he learned from his counsel that a private defense investigator had interviewed the alleged victim, and the victim expressed that he was not confident in his identification. Id.

Because Henry believed that he had a strong misidentification case, he wanted to go to trial on the robbery and gun charges. Id. Henry believed that the inconsistencies in the description given by the alleged victim, and his appearance at arrest would have been helpful at trial. Henry expected the trial evidence would show that he was not wearing the clothes, nor did he have the hairstyle described by the victim upon his arrest hours after the incident. Id.

Further, Henry asserted that the Commonwealth's evidence of the non-drug charges was weak. Despite that Mr. Henry was charged with the ballistics items found hidden in the apartment at 637 Walk Hill Avenue, Mr. Henry's criminal record offender information listed an address on Capen Street in Dorchester, and not on Walk Hill Avenue as his address. Further, information in the possession of defense counsel demonstrated that Mr. Henry had a viable third-party culprit defense had the armed robbery charge proceeded to trial. On November 26, 2010, another man reported to police that he, too, was

robbed at gunpoint outside of 637 Walk Hill Avenue. Two other men were arrested for that robbery. R-67. Sharon Tibeau, a tenant at 637 Walk Hill Avenue, was in the apartment where the gun was found during both incidents. Id.

Henry averred, however, that he was concerned with proceeding to trial on all charges because the Commonwealth alleged that there were drugs found on his person and in his clothing, and he did not have a defense to the drug charge or the school zone enhancement. R-64.

Henry averred that he learned from his counsel that even if he was successful in defending against the robbery and firearm charges, he was still facing significant jail time on the drug charges.

Henry was never made aware of the evidence regarding Annie Dookhan and the Jamaica Plain drug lab prior to his plea. Henry asserted that had he been told that Ms. Dookhan was the primary chemist in his case, had access to all of the substances in this case, was responsible for handling the quality control of the entire drug lab, and may have tampered with evidence and mixed samples from different cases, he would not have

pled guilty to this plea agreement, and would have insisted upon a trial.

Henry explained that he believed that he had strong defenses to all of the charges except for the drug charges. Had he known that he had a strong defense to the drugs because of Ms. Dookhan's misconduct, he would not have pled guilty. R-64.

Henry further averred that he was also not advised of potential sentencing enhancements that could arise because of his guilty plea. R-64.

Further, Henry filed an affidavit from Attorney Tonomey Coleman. R-133. At the evidentiary hearing, the Court admitted the affidavit of Attorney Coleman substantively and without objection from the Commonwealth. II-5. Attorney Coleman averred: that he represented Mr. Henry in the plea at issue. He corroborated Mr. Henry's assertion that had the case proceeded to trial, the defense would have asserted a defense of misidentification to the robbery, assault and battery with a dangerous weapon and firearm offenses. However, as to the drugs found in Mr. Henry's clothing and the attendant school zone, Attorney Coleman did not feel like there was a strong defense to those charges. R-133.

Attorney Coleman averred that prior to a resolution of the case, neither he nor Mr. Henry were aware of any problems with Dookhan or at the Hinton Lab. Attorney Coleman indicated that the misconduct of Dookhan would have been material to Henry in his decision to enter this plea. Attorney Coleman averred that had he known about Dookhan, this would have changed the advice that he gave Mr. Henry about trial and trial defenses. The new Dookhan-defense to the drug charges could have been combined by an identification / Bowden or third party culprit defense on the robbery and firearm offenses.[1] Attorney Coleman averred that his advice would have been "markedly different" had he known about the Dookhan misconduct, and he cannot say that Mr. Henry would have entered the same plea had he known about the misconduct. R-133.

Additionally, Henry admitted an investigative report authored February 18, 2012 where a defense investigator detailed his February 16, 2012 conversation with the alleged victim, Robert Moody. R-137. In the interview, Mr. Moody told the investigator that he was returning home from a store walking down Walk Hill

[1] A few months prior to Henry's arrest, four individuals -- fitting Moody's description -- were arrested in and around 637 Walk Hill Avenue for an armed robbery. R-67.

Avenue when he saw a guy come off of the porch at 637 Walk Hill and approach him. Another guy came out of nowhere and said, "what you got in your pockets?" When Mr. Moody responded that he did not have anything, the second guy pulled out a gun. Mr. Moody only saw the second guy for a second or two before diverting his eyes to the ground because he did not want to "piss the guy off." Moody did not recognize the guy from the neighborhood.

Moody told the investigator that he remembered seeing "small dred-locks" but he did not really get a good look at the guy with the gun. Moody told the investigator he was 60% or maybe 70% sure that the guy that he picked out in the photo array was the one who robbed him. Moody never received any of his property back and as far as he knew, police never recovered it.

Mr. Henry also testified at the hearing. Henry was 30 years old. II-10. In 2011, around the time of his arrest in March of 2011, Henry was going to school at Bunker Hill Community College. II-10.

Henry testified that he was charged with armed robbery, possession with intent to distribute, assault and battery with a dangerous weapon, and firearm offenses. Henry knew that he faced a sentence of over 20

years and the possibility of life imprisonment. II-11. Henry knew he faced some mandatory minimum sentences. II-12.

Prior to his change of plea, he spoke with his attorney about his possible defenses. II-13. Henry testified he had "a strong alibi." II-14. Henry testified that, "I had went to school that day and I was dropped off at–to my–I was dropped off by my mother to my girlfriend's house at that time, and I was with my girlfriend the whole time…" II-14.

Additionally, Henry believed that he had a strong defense to the robbery and gun charges because the victim was unsure that he was the perpetrator. II-14. The descriptions that the victim gave fit the description of persons that had been arrested for prior robberies at that residence. II-14. See R-67 (11/26/2010 armed robbery occurred at 637 Walk Hill Avenue, and black men in the height range described by Moody arrested).

Moreover, Henry stated that despite that the police arrested him and searched the apartment the night of the robbery, the police did not find the clothing described by the victim. II-14.

The police report included the victim's description of the two perpetrators of the robbery of Moody on March 24, 2011. II-17. Henry was charged as being the person holding the firearm. II-18. The description given by Moody to police of the perpetrator with the gun was black shoes, gray hoodie, and five feet eight inches. II-16. Henry is six feet tall. II-18. Henry believed this discrepancy in his height versus the perpetrator's described height was important to his misidentification defense. II-18.

Further, Henry learned that a defense investigator had spoken to Mr. Moody and he said that he was unsure that he picked out the right individual. Mr. Moody told the investigator that he was only 60-70% sure that he had selected the correct individual. II-19.

Henry further indicated that Moody's opportunity to observe him was important to his defense of misidentification. II-19. Moody told the investigator that "he only saw the guy for a second or two and then he diverted his eyes to the ground…" R-137. Moody told the investigator that "he didn't really get a good look at the guy".... Id.

Henry also knew that the victim was not particularly cooperative with the Commonwealth, and had

told the Commonwealth that he did not want Henry to get any time. II-20.

The building that the robbery occurred in front of was a 6-unit apartment building. II-15. Henry's girlfriend and her mother lived in the building, but Henry did not know who occupied the other apartments. II-15. Henry did not live there; he lived at 124 Capen Street with his mother. II-15.

Finally, Henry felt that he had a third-party culprit or Bowden defense at trial because there was another robbery that happened at that apartment building, and the individuals had recently been released when the robbery of Moody occurred. This was important to Henry as a potential defense to the robbery at trial because, in many respects, the descriptions matched. II-20.

With regard to the firearm, Henry felt that he had a strong defense to the firearm possession as well because the firearm was found secreted under a mattress in an apartment that was not his. II-29. There were multiple residents that did live in that apartment. II-29.

Henry felt, however, that he did not have any defense to possession with intent to distribute charges

when he pled guilty on July 12, 2012. II-20. The drugs were found on his person, in his pockets, with his identification. II-29. Henry also felt that he had no defense to the school zone charge since he was arrested with drugs in his pocket in a school zone. II-21.

Prior to his plea, Henry spoke with his attorney about what he faced after a trial on the possession with intent to distribute charge and understood that he faced ten years in prison. II-21. In addition to the mandatory minimum school zone enhancement, He believed he would get the full ten years after a trial on the possession offense. Id. Henry was offered a three-year sentence, and he had been held for two years, so he decided to take it. II-21. Henry specifically testified that his drug charges drove his decision to plead guilty. II-31.

At the time that he pled guilty. Henry had not learned about any misconduct at the Hinton Lab or with the chemist in his case, Annie Dookhan. II-22.

The first time that he heard about the problems with the lab and with Annie Dookhan were once he got to Walpole and saw it on the news. He then got a letter under his cell door explaining that his case was directly affected. II-22.

If he had known of Annie Dookhan's misconduct on July 12, 2012, he would have gone to trial because "[he] had a strong defense for all the other charges and [] developed a stronger defense for the intent to distribute." II-23.

Henry indicated that he had asked his lawyer about moving to sever the drug charges from the armed robbery charges so that he could go to trial on the robbery charges prior to his plea but he was told by his lawyer that the prosecutor wouldn't allow it. II-23. At the time that he pled guilty, Henry understood that if he went to trial on the robbery charges, he had to go to trial on the drug charges. II-23.

Henry acknowledged that he faced significant time on the robbery and firearm charges as indicted. II-28. Henry acknowledged that he had a probation surrender that same day for which he received a two-and-a-half-year sentence. Even given all of that, however, Henry was adamant that had he known about Dookhan's misconduct that would not have been enough to entice him to plea to the three years to three years and a day. II-24. Henry testified that his probation surrender was tracking his criminal case, and probation was waiting until the resolution of his case to resolve his pending probation

surrender. Henry was confident that if he "beat [his] case" probation would not have violated him because they were waiting to see what happened with the pending case to act. II-24.

Henry did not learn about possible sentencing enhancements or the habitual offender law in Massachusetts or that he faced federal sentencing enhancements based upon these convictions. II-25. He has since been subjected to sentencing enhancements that he was unaware of at the time of his plea. II-25. Henry testified that when considering his plea counsel's advice now, he does not feel like he got a good deal particularly because of the sentencing enhancements that he later faced and that he was not advised about.

Henry adamantly testified that he did not plead guilty because he was guilty. Instead, he plead guilty because he had to plead guilty or else, he would face more time after a trial on the drug charges alone. II-32.

The Findings of the Motion Judge

From the bench following an evidentiary hearing, the motion judge, who was not the plea judge, rejected Henry's testimony that the drug offense drove his decision to plead guilty rather than the other charges

for which he faced significant sentences if convicted. II-40.

The court found that Mr. Henry's testimony that he had a defense to the firearm "rings hollow" because at the colloquy it was stated that his fingerprints were found on the ammunition found in a bedside table. II-41. The court found, "[i]t rings more hollow when I look at the Court's specific inquiries to Mr. Henry after the recitation of facts where the Court asks specifically whether or not Mr. Henry committed the robbery with which he was charged and he answered yes, that was true. Similarly was asked whether he had possessed and possessed with the intent to distribute the drugs at issue, and answered yes." II-41.

The court did not find the failure to advise Mr. Henry about collateral consequences relating to the potential for increased penalties in federal court as a result of the state court convictions was sufficient to warrant vacating an otherwise voluntary plea. II-42.

STATEMENT OF THE ISSUES

A. The Appeals Court's Ruling that the Scott Presumption – that With A Dookhan-Signed Drug Certificate a Defendant is Entitled to a Presumption of Misconduct "in his case" – is Nonetheless Limited to the Specific Dookhan Drug Charge Only, Despite Scott's Plain Language to the Contrary, Requires Reversal

B. The Appeals Court’s Finding that No Defendant Can Meet his Burden to Withdraw his Entire Plea to Non-Drug Charges Stemming From the Same Case, and Pled to Simultaneously With a Tainted Dookhan Drug Charge, Requires Reversal, Particularly Where Henry Met his Burden Here

C. Where Henry Demonstrated that The Drug Related Charges Drove his Decision to Plead Guilty, he is Entitled to Vacate his Plea

STATEMENT AS TO WHY FURTHER REVIEW IS WARRANTED

A. The Appeals Court Has Incorrectly Held that the Scott Presumption Does Not Apply to Henry's Case and Only Applies to the Dookhan-Affected Drug Charge "In His Case"

Raising the issue sua sponte for the first time on appeal, the Appeals Court decided that Henry was not entitled to the Scott presumption.[2]

The Henry Court held:

> Although the threat of prosecution in what turns out to be a Dookhan-tainted drug case may well lead a defendant to plead guilty to other charges as well as to the Dookhan-tainted drugs charges in a package plea deal, subsequent to the briefing in this case our court held in Lewis, 96 Mass. App. Ct. at 360-361, that to determine a defendant's entitlement to the conclusive presumption contained in what is referred to as the "first prong" of the Ferrara-Scott analysis, we ask whether Dookhan committed misconduct in relation to the particular "charge" to which the defendant seeks to withdraw his plea.

Henry, Slip op. at. P. 3 (citing Commonwealth v. Lewis, 96 Mass. App. Ct. 354 (2019).

This ruling directly contradicts this Court's language in Scott, creating dangerous law, which will affect

[2] The motion judge concluded that Henry met the first prong. The Commonwealth did not challenge the motion court's finding. This issue was raised for the first time by the Court at oral argument.

still hundreds or perhaps thousands of Dookhan / Farak defendants is of paramount importance.[3]

In Commonwealth v. Scott, this Court held: "that where Dookhan signed the certificate of drug analysis as

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[3] In Bridgeman v. District Attorney for the Suffolk Dist., 476 Mass. 298, 301 (2017) (*Bridgeman II*), this Court fashioned a remedy to address Dookhan's misconduct, which still "substantially burdened the due process rights" of over 20,000 defendants who, "even if they [had] served their sentences, continue[d] to suffer the collateral consequences" of their tainted convictions. Similarly, in Committee for Pub. Counsel Servs. v. Attorney Gen., 480 Mass. 700, 704 (2018) (CPCS v. AG), this Court concluded that Sonja Farak's "widespread evidence tampering compromised the integrity of thousands of drug convictions apart from those the Commonwealth agreed should be vacated and dismissed," and fashioned a remedy for Farak's malfeasance and the prosecutorial misconduct that compounded it. Notably, Bridgeman II and CPCS v. AG only addressed drug convictions in which Dookhan or Farak (broadly defined) were involved. But in thousands of these cases, defendants simultaneously pleaded guilty to other charges. Convictions for these charges still stand, even in cases where the defendant's decision to plead guilty was driven by more serious Dookhan- or Farak-tainted drug charges. Significantly, these ancillary convictions often have collateral consequences of their own, particularly in the immigration realm and the federal sentencing context. For justice to be done in these cases, and for Dookhan and Farak defendants to get the meaningful relief from egregious government misconduct envisioned by this Court in Bridgeman II and CPCS v. AG, there must be a framework within which *individual* defendants can seek vacatur of ancillary convictions obtained at the same time as the Dookhan- or Farak-involved conviction(s). This Court has not previously issued a decision which provided such a framework. The Appeals Court's decisions in Henry and Lewis practically eviscerate defendants right to seek such relief.

either the primary or secondary chemist in the defendant's case, the defendant is entitled to a conclusive presumption that Dookhan's misconduct occurred in his case." 467 Mass. 336, 338 (2014)(emphasis added). The Scott Court did not, as Henry now holds, parse out charges within a case.

Contradicting this Court's precedent, the Appeals Court determined it was bound by a previously unpublished opinion by a separate panel of the same court: Commonwealth v. Lewis, 96 Mass. App. Ct. 354 (2019), which deems all Dookhan drug charges divisible from all other charges in the same case, regardless of context, unless the parties had the foresight to declare them indivisible at the time of plea.[4] This Court must

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[4] No Massachusetts published case squarely addresses the question of whether a plea can be found indivisible. Lewis, the unpublished opinion upon which the Henry Court relies, does allow for the possibility that indivisibility might be established, but only if, in the course of the plea colloquy, the parties, "with the assent of the plea judge, state that the guilty pleas are indivisible." This analysis flies in the face of the realities of trial court guilty plea proceedings. The charges to which Lewis and Henry pleaded guilty were all part of a single criminal case. Discussions about "indivisibility" would have been unnecessary and out of place in such circumstances. It also is patently unfair to now require defendants to have foreseen that the Appeals Court would later declare that they must affirmatively state that pleas were indivisible where that was not the practice at the time that Henry nor Lewis pled guilty.

grant further appellate review to fix this error and re-affirm Scott's holding, that where Dookhan has "signed the certificate of drug analysis as either the primary or secondary chemist . . . the defendant is entitled to a conclusive presumption that Dookhan's misconduct occurred in his case, that it was egregious, and that is attributable to the Commonwealth." 467 Mass. at 338 (emphasis added).

Any other result would be disastrous for the many remaining defendants litigating these issues because, absent the Scott presumption, "such a nexus may be impossible for the defendant to show." Scott, at 351.

Further appellate review is warranted here because, just as the "Dookhan counts" should not be considered in isolation, so too should they not be splintered off in vacating a plea. See Commonwealth v. Williams, 89 Mass.App.Ct. 383 (2016).

B. Even If the Scott Presumption Does Not Apply, Henry Met the Fist Prong of the Ferrara Standard Because he Proved Dookhan's Misconduct on the Pivotal Indictment Drove his Decision to Plead to the Non-Drug Charges

The Appeals Court's conclusion that, simply because Henry could show no Dookhan-related misconduct "occurred in relation to" his non-drug charges, Henry could not meet his burden on the first prong of the Ferrara

analysis, was error.[5] This narrow and erroneous application of Scott and Ferrara requires further appellate review.

Due process requires that a plea be intelligently and voluntarily entered. Scott, 467 Mass. at 345. Without consideration of these guiding principles, the Henry ruling suggests it is immaterial that a defendant, who was unaware when he pled guilty to multiple charges, that the charges that drove his decision-making would have to be dismissed due to egregious governmental misconduct. Lacking this information seriously undermines the voluntariness and intelligence of plea, and is a due process violation.

Henry showed that his plea (in its entirety) was not intelligently and voluntarily entered where he proved that Dookhan had engaged in "particularly pernicious" misconduct, had signed the drug certificates in his case, and those drug certificates were material to the defendant's decision to plead guilty. See Scott, 467 Mass. at 346-48, 354-55 (citing Ferrara, 456 F.3d at

[5] This Court has never held such a narrow view and have, in many instances, considered the overall plea agreement when assessing whether the plea is to be withdrawn. See Commonwealth v. Resende, 475 Mass. 1, 16-19 (2016); Commonwealth v. Scott, 467 Mass. 336, 357 (2014).

290, 291). While Henry had strong defenses to the non-drug charges, he faced a mandatory minimum sentence (and a sentence that exceeded the time imposed after his plea) on the drug / school zone charges; he had no defense to conviction on the drug charge but had strong defenses to the other charges. Henry outlined for the Appeals Court that Dookhan's misconduct detracted from the factual basis of his plea, it would have been material to impeach a material witness (Dookhan), it was not cumulative of other evidence, the value of the evidence outweighed the benefit of the global plea because it gave him defenses to the sole charges to which he had no defense, and that his plea counsel's recommendation would have changed. As such, Henry met his burden on prong one.

Application of the five Ferrara factors indicates that Dookhan's misconduct, and the concealment thereof, was material to Mr. Henry's decision to enter this guilty plea to all charges. Further appellate review to correct this error is required.[6]

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[6] Allowing Henry to withdraw the full plea would be consistent with appellate decisions from other states. See Whitaker v. State, 881 So. 2d 80, 82 (Fla. 5th DCA 2004) (holding that where several cases are disposed of simultaneously by a plea bargain and the defendant has cause to withdraw his plea as to one count or case, then

C. Henry Demonstrated that the Motion Judge's Flawed Reasoning Constituted an Abused its Discretion and Henry Demonstrated A Reasonable Probability that He Would Have Rejected this Plea Had he Known of Dookhan's Misconduct

The motion judge erroneously almost singularly focused on Henry's admission of guilt at the change of plea hearing in finding his lengthy explanation of why he would not have plead guilty "r[ang] hollow." As found by the Appeals Court, this is not a proper consideration, and where the judge apparently gave this factor great weight, he abused his discretion.

Henry asserts that Dookhan's misconduct violated his rights and requires that his plea withdrawn in three alternative ways: First, as addressed infra, Henry asserts that his due process right, which requires that a guilty plea be intelligently and voluntarily entered, was violated. Brady v. United States, 397 U.S. 742, 747 n. 4 (1970). Second, Henry has alleged that, where the Suffolk County District Attorney's Office knew about Dookhan's misconduct, in conjunction with the failures of the Hinton Laboratory generally, prior to Henry's

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the defendant must be allowed to withdraw from the entire plea agreement); State v. Harmon, 2008 Iowa App. LEXIS 83; United States v. Lewis, 138 F.3d 840, 842 (10th Cir. 1998) (recognizing habeas court's power "to vacate an entire plea agreement when a conviction that is part of the plea package" successfully challenged).

plea, and failed to disclose that evidence, he is entitled to withdraw his plea. See Commonwealth v. Murray, 461 Mass. 10, 19 (2011); Commonwealth v. Antone, 90 Mass. App. Ct. 810, 819-20 (2016) (detailing knowledge of Dookhan's misconduct). Third, Dookhan's misconduct constitutes newly discovered evidence that casts real doubt on the justice of Henry's conviction. Commonwealth v. Grace, 397 Mass. 303, 305 (1986). As the Appeals Court recognized, Henry's success on each argument comes down to prejudice.

Henry "must show that the misconduct influenced his decision to plead guilty, or, put another way, it was material to that choice. In mounting an inquiry into these elements, a court must consider "the totality of the circumstances surrounding the plea." Ferrara, 456 F.3d at 290 (citations omitted). Here, Henry showed the misconduct was material to his choice to plead guilty.

The motion court abused its discretion in deciding that Henry had not shown a reasonable probability that he would enter this plea. In its flawed analysis, the court found two reasons to discredit Henry's testimony. First, that in the plea colloquy, the Commonwealth stated his fingerprint was found on a box of ammunition. II-41. Notably, however, the box of ammunition was not

with the firearm, which was secreted under the mattress. Moreover, possession of ammunition carries a significantly shorter penalty than armed robbery, possession of a firearm, or even possession with intent to distribute. Finally, the ammunition charge did not carry with it any sentencing enhancements. Henry's ability to distance himself from the ammunition even with his partial fingerprint being found there rendered his decision-making still reasonable. The court's focus on this single partial fingerprint, and failure to consider Henry's other available defenses, was an abuse of discretion.

Second, the motion court found that, because the plea judge specifically inquired whether Henry was guilty of the charges during the plea colloquy, and Henry answered yes, his later testimony was not credible. II-41.

While the Appeals Court recognized that this second focus of the motion judge's decision-making was flawed and constituted an abuse of discretion, the Appeals Court failed to consider other errors raised by Henry in its conclusion that, overall, the judge's conclusion did

not constitute an abuse of discretion.[7] However, it is not the conclusion that warrants review – it is the judge's analysis – which, here, was insufficient and cannot be said to be a proper exercise of discretion. The motion judge's ruling must be reversed because Henry has shown that he would not have pled guilty had he known of Dookhan's misconduct, and the motion judge committed "a significant error of law or other abuse of discretion." Scott, 437 Mass. at 344 (internal citations omitted).

The motion courts analysis – considering only two issues – was not a proper exercise of discretion where the court failed to consider a plethora of factors deemed important by this Court. For instance, the Court never mentioned the Scott / Ferrara factors, and the

[7] The Appeals Court agreed that it was error when the motion judge placed undue emphasis on Henry's statement at the time of his change of plea that he was guilty. Before his plea, Henry specifically asked the judge what would happen if he did not admit guilt, and the judge told him that he could not accept the plea. R-95. So, Henry said what he needed to say to have the plea accepted. This is not uncommon. Commonwealth v. Bridgeman, 471 Mass. 465, 491-92 (2015). The failure to recognize that there are many reasons why defendants plead guilty aside from actual guilt, constituted an abuse of discretion.

judge failed to consider that Attorney Coleman's advice to Henry, too, would have changed. R-133.

The record here clearly establishes that the sentences Mr. Henry received for the firearm and robbery charges were indivisible components of an overall package deal, the heart of which was the mandatory minimum sentence for the school zone charge coupled with the possible 10-year sentence on possession to which Mr. Henry had no defense. The charges were subsumed in one case and were treated jointly by the court and parties. Here, considering the motion judge's decision-making as a whole, the judge made "a clear error of judgment in weighing" the factors relevant to the decision. LL v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

Henry has demonstrated a reasonable probability that he would not have pleaded guilty had he known of Dookhan's misconduct.[8]

For all the above-stated reasons, this Honorable Court should grant this application for further appellate review.

[8] Henry sought to sever the drug and robbery charges, but his counsel told him it was not possible. During the plea, Henry asked the plea judge, in essence, what would occur if he denied facts attendant to the global plea, and he was told, "we'll go to trial." R-95.

Respectfully Submitted,
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Certificate of Compliance

I certify that this brief complies with the rules of appellate procedure that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

Dated: September 4, 2020 Signed: /s/ Amy Codagnone

CERTIFICATE OF SERVICE

I hereby certify a true copy of the appellant's brief and record appendix were electronically served through the Appeals Court's Tylerhost system upon:

Paul Linn
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Dated: September 4, 2020
Signed: /s/ Amy Codagnone

APPEALS COURT

COMMONWEALTH VS. CHRISTOPHER HENRY

Docket:	19-P-876
Dates:	March 3, 2020 - August 14, 2020
Present:	Rubin, Maldonado, & Shin, JJ.
County:	Suffolk
Keywords:	Assault and Battery by Means of a Dangerous Weapon. Robbery. Firearms. Controlled Substances. Practice, Criminal, Plea, Conduct of government agents, Assistance of counsel. Evidence, Guilty plea, Certificate of drug analysis. Constitutional Law, Assistance of counsel, Conduct of government agents, Plea.

Indictments found and returned in the Superior Court Department on June 21, 2011.

A motion to withdraw pleas of guilty and for a new trial, filed on July 21, 2015, was heard by Jeffrey A. Locke, J.

Amy Codagnone for the defendant.

Paul B. Linn, Assistant District Attorney, for the Commonwealth.

RUBIN, J. This is an appeal from an order denying the defendant's motion to withdraw his guilty pleas on nondrug-related charges tendered as part of a package plea deal that included two drug charges in each of which the relevant drug certificates were signed on the "Assistant Analyst" line by Annie Dookhan. The Supreme Judicial Court has, as a result of Dookhan's misconduct, see Commonwealth v. Scott, 467 Mass. 336 (2014), vacated the conviction on the drug charge to which the defendant pleaded guilty as part of the deal and dismissed both it and the other drug charge, which was nol prossed. Under Commonwealth v. Lewis, 96 Mass. App. Ct. 354, 360-361 (2019), decided during the pendency of this appeal, we are required to affirm the order denying the motion to withdraw the guilty pleas on the other charges.

Background. An armed robbery occurred in front of an apartment building located in the Mattapan section of Boston around 9:10 P.M. on March 24, 2011.[1] Boston police officers responded to a call about the armed robbery and spoke with the victim. The victim reported that he had been approached by two males in front of the apartment building. The victim saw one male come out of the building; he then took a revolver out of his pocket and held the revolver to the victim's head. The other male took the victim's cell phone, wallet, silver ring, and about $575 in cash. The victim provided a physical description of the male who had held the revolver to his head and indicated that he had seen a person standing on the front balcony of one of the apartments in the building just before the robbery.

Based on this information and additional facts indicating that individuals living in apartment four of this building may have committed prior armed robberies or may have outstanding warrants[2] and that the balcony on which the victim saw someone standing just before the robbery was outside of apartment four, police officers went to apartment four and knocked on its door. When a woman answered the door, the officers identified themselves as police officers. The woman indicated that she lived in the apartment. The officers, still outside the door, then learned from one of the other two women in the apartment that her boyfriend was in a bedroom; one of the officers asked her to have her boyfriend step out of the bedroom. The women said that he was changing his clothes. After several minutes, the officers asked the man, later identified as the defendant, to come out of the bedroom and identify himself. Because the man was taking much longer than necessary to change clothes, one officer entered the apartment due to officer safety concerns. When he entered the apartment, the defendant came out of the bedroom and identified himself.

At that point, the officer believed that the defendant matched the victim's description of the armed male who helped to rob him: a man standing about five feet, nine inches tall, with a dark complexion and shoulder length braids. The defendant had a dark complexion, was approximately though not exactly the height described, and appeared to wear his hair in braids.

Officers conducted a walk-through of the apartment and asked one of the women to retrieve weather-appropriate clothes for the defendant. She gave the officer a pair of jeans and the officer checked the pockets for weapons. In one of the pockets, the officer found a small bag of what appeared to be "crack" cocaine. The defendant was then arrested for possession of a class B substance. During a search following that arrest, the officers found more of what appeared to be crack cocaine in the defendant's shorts. These substances, believed to be crack cocaine, were sent to the William A. Hinton State Laboratory Institute (State laboratory) and drug certificates signed by Dookhan reported them to contain cocaine.

After arresting the defendant on the drug charges, officers returned to apartment four with a search warrant. During the search, the officers found eleven plastic bags of what appeared to be cocaine. The substances in these bags were analyzed at the State laboratory, which issued a drug certificate signed by Dookhan that indicated the substances contained cocaine. The officers also found a loaded .22 caliber revolver and a box of .22 caliber ammunition in the bedroom from which the defendant had emerged. While police found no fingerprints on the revolver, they did recover a pair of black gloves from the apartment; the victim had indicated that the perpetrator holding the revolver wore black gloves. The Commonwealth represented during the defendant's plea hearing that the defendant's fingerprints were found on the box of ammunition.

After the defendant's arrest, officers prepared a photographic array including the defendant to show to the victim. The victim selected the photograph of the defendant as the person who had held the revolver to his head.

The defendant was charged in eight indictments[3] with the following offenses: armed robbery, in violation of G. L. c. 265, § 17 (indictment one); assault and battery by means of a dangerous weapon, in violation of G. L. c. 265, § 15A (indictment two); unlawful possession of a firearm, in violation of G. L. c. 269, § 10 (a), as an armed career criminal, G. L. c. 269, § 10G, and as a subsequent offense (indictment three); unlawful possession of ammunition, in violation of G. L. c. 269, § 10 (h) (indictment four); unlawful possession of a loaded firearm, in violation of G. L. c. 269, § 10 (n) (indictment five); possession of a firearm while in the commission of a felony, in violation of G. L. c. 265, § 18B (indictment six); possession of a class B substance, cocaine, with the intent to distribute, in violation of G. L. c. 94C, § 32A (c) (indictment seven); and violation of the controlled substance laws in a school zone, in violation of G. L. c. 94C, § 32J (indictment eight).

On July 13, 2012, the defendant pleaded guilty to the lesser included offense of robbery (indictment one); assault and battery by means of a dangerous weapon (indictment two); the lesser included offense of possession of a firearm without a license (indictment three); and possession of cocaine with the intent to distribute (indictment seven). The Commonwealth filed a nolle prosequi on each of the remaining charges. As per his plea deal the defendant was sentenced to from three years to three years and one day in a State prison (indictment one); two years' probation from and after his sentence on indictment one (indictment two); from three years to three years and one day in a State prison, to run concurrently with his sentence on indictment one (indictment three); and from three years to three years and one day in a State prison to run concurrently with his sentence on indictment one (indictment seven). Based on these guilty pleas, the defendant was also found to have violated his probation from a 2008 conviction; he was ordered to serve two and one-half years in a house of correction, to run concurrently with his other sentences. Because the defendant was given credit for time served, he was eligible for release from prison and was discharged on June 3, 2014 -- less than two years after his plea.

The defendant subsequently discovered that the two drug certificates relevant to the cocaine charges were signed on the assistant analyst line by Annie Dookhan. See Scott, 467 Mass. 336 (detailing Dookhan's misconduct). The defendant filed a motion to withdraw his pleas. While that motion was pending, on April 19, 2017, his conviction of possession of a class B substance with the intent to distribute was vacated and both of the drug charges were dismissed with prejudice by order of the Supreme Judicial Court. After an evidentiary hearing, a judge of the Superior Court (motion judge), other than the plea judge, denied the motion to withdraw the remaining guilty pleas. The defendant has now appealed from that order.

Discussion. The pleas that the defendant seeks to withdraw were entered in nondrug cases resolved along with the Dookhan-tainted drug charges in a package plea deal. "[W]hen a defendant seeks to vacate a guilty plea as a result of underlying government misconduct, rather than a defect in the plea procedures, the defendant must show both that 'egregiously impermissible conduct . . . by government agents . . . antedated the entry of his plea' and that 'the misconduct influenced his decision to plead guilty or, put another way, that it was material to that choice.'" Scott, 467 Mass. at 346, quoting Ferrara v. United States, 456 F.3d 278, 290 (1st Cir. 2006). Under Scott, supra at 352, "in cases in which a defendant seeks to vacate a guilty plea under Mass. R. Crim. P. 30 (b) as a result of the revelation of Dookhan's misconduct, and where the defendant proffers a drug certificate from the defendant's case signed by Dookhan on the line labeled 'Assistant Analyst,' the defendant is entitled to a conclusive presumption that egregious government misconduct occurred in the defendant's case."

Although the threat of prosecution in what turns out to be a Dookhan-tainted drug case may well lead a defendant to plead guilty to other charges as well as to the Dookhan-tainted drugs charges in a package plea deal, subsequent to the briefing in this case our court held in Lewis, 96 Mass. App. Ct. at 360-361, that to determine a defendant's entitlement to the conclusive presumption contained in what is referred to as the "first prong" of the Ferrara-Scott analysis, we ask whether Dookhan committed misconduct in relation to the particular "charge" to which the defendant seeks to withdraw his plea. Here, as the charges with respect to which the defendant seeks to withdraw his guilty pleas are not the Dookhan-tainted drug charges, but the other charges to which he pleaded as part of the plea deal that included resolution of the Dookhan-tainted charges, we are required under Lewis to conclude that he is not entitled to the presumption articulated in Scott.

At argument, recognizing the stumbling block presented by Lewis to the defendant's claim, the defendant's counsel argued that even without the presumption, the first prong of a claim for withdrawal of a plea based on egregious government misconduct has been met here. Under Ferrara, 456 F.3d at 289-290, the defendant must show that egregiously impermissible conduct preceded his plea, implicating due process concerns. "[U]nder the first prong of the analysis, the defendant must demonstrate that the misconduct occurred in his case." Scott, 467 Mass. at 350. The obstacle the defendant faces is the very one that led the Supreme Judicial Court in Scott to articulate a conclusive presumption rather than requiring a case-by-case assessment: there is no way for him to show that Dookhan engaged in misconduct in his case. As Scott, supra at 351-352, recognized:

"In cases arising out of Dookhan's misconduct, however, such a nexus may be impossible for the defendant to show. Unlike the government misconduct in Fisher or Ellis, Dookhan, who was the only witness to her misconduct in most instances, has indicated that she may not be able to identify those cases that involved proper testing and those that involved 'dry labbing' or other breaches of protocol. See [Commonwealth v.] Ellis, 432 Mass. [746,] 764 [(2000)]; [United States v.] Fisher, 711 F.3d [460,] 463 [(4th Cir. 2013)]. Additionally, Dookhan appears to have been motivated primarily by a desire to appear highly productive, not by a desire to target particular defendants she can now identify. Thus, even if Dookhan herself were to testify in each of the thousands of cases in which she served as primary or secondary chemist, it is unlikely that her testimony, even if truthful, could resolve the question whether she engaged in misconduct in a particular case. What is reasonably certain, however, is that her misconduct touched a great number of cases."

We therefore conclude, in the absence of any evidence that egregious government misconduct occurred in relation to the defendant's robbery, assault and battery by means of a dangerous weapon, and possessing a firearm without a license charges, that the defendant has not met this burden. Consequently, there was no error in the denial of his motion.

Were we to find that the defendant was entitled to the presumption, or had otherwise satisfied the first prong of Ferrara, we would nonetheless affirm the judge's order denying the motion to withdraw the guilty pleas. The charges with respect to which the defendant now seeks to withdraw his pleas included armed robbery, a conviction for which would have exposed him to a maximum sentence of imprisonment for life, G. L. c. 265, § 17; assault and battery by means of a dangerous weapon, which carried a maximum sentence of ten years in State prison, G. L. c. 265, § 15A; and unlawful possession of a firearm, G. L. c. 269, § 10 (a), as an armed career criminal, G. L. c. 269, § 10G, and as a subsequent offense, G. L. c. 269, § 10 (d), which carried a maximum sentence of fifteen years in State prison. If he went to trial, the defendant also faced possible convictions on the charges of possession of a firearm while in the commission of a felony, which carried a mandatory minimum sentence of five years, G. L. c. 265, § 18B, and unlawful possession of a loaded firearm, which could have added an additional two and one-half years after his sentence for possession of a firearm without a license, G. L. c. 269, § 10 (n). Although the charge with respect to which the evidence was strongest, the ammunition charge, G. L. c. 269, § 10 (h), carried only a maximum penalty of two years, the defendant faced a substantial risk, even if not a certainty, of conviction on the more serious charges. This is true despite the fact that when the defendant's investigator interviewed the victim, he reported that he was only sixty to seventy percent certain of his photograph identification of the defendant. The defendant also faced two and one-half years in a house of correction if his probation, which he was on at the time of the alleged commission of the other crimes, was revoked, which it could have been based on any of the charges against him, as a probation violation need only be proved by a preponderance of the evidence. See Commonwealth v. Eldred, 480 Mass. 90, 101 (2018).

The motion judge erroneously considered the fact that the defendant had admitted at his plea colloquy the facts underlying each of his guilty pleas in determining the probability that the defendant would have accepted this plea even had he known of Dookhan's misconduct and its implications for the drug charges. See Scott, 467 Mass. at 358 (motion judge must "determine whether, in the totality of the circumstances, the defendant can demonstrate a reasonable probability that had he known of Dookhan's misconduct, he would not have admitted to sufficient facts and would have insisted on taking his chances at trial" [emphasis added]). Cf. Commonwealth v. Lavrinenko, 473 Mass. 42, 61 n.22 (2015) ("The question is not whether the defendant was satisfied with the plea bargain at the time, . . . but whether there is a reasonable probability that . . . a reasonable person in the defendant's position would have chosen to go to trial"). The motion judge's finding that the defendant's testimony was not credible when he said that the drugs

charges were the driving force behind his decision to plead, however, has not been shown to be clearly erroneous. Given the lengthy incarceration the defendant potentially faced, the plea deal gave him credit for the time that he had served awaiting trial and assured his release less than two years thereafter. Consequently, were we to reach the question, we would conclude that the defendant has not shown a reasonable probability that had he known of Dookhan's misconduct, he would not have pleaded guilty to the charges before us. Scott, supra at 356.

The defendant also argues on appeal that evidence of Dookhan's misconduct constitutes withheld or newly discovered evidence that requires us to vacate his guilty pleas. For the same reasons that we conclude that the defendant has not shown a reasonable probability that he would not have pleaded guilty, these arguments must fail. As this court held in Commonwealth v. Antone, 90 Mass. App. Ct. 810, 821 (2017), "[w]here we have found that . . . the defendant had failed to satisfy his burden of demonstrating a reasonable probability that he would not have pleaded guilty had he known of Dookhan's misconduct, we similarly conclude that he has not satisfied his burden on his prosecutorial nondisclosure and newly discovered evidence claims concerning that same misconduct."

In his motion to withdraw his guilty pleas, the defendant also argued that his plea counsel provided him ineffective assistance because, he alleges, counsel did not inform him that, if he were convicted of additional crimes in the future, he would be subject to certain sentencing enhancements as a result of having pleaded to and been found guilty of these charges. The defendant, however, has not provided us with any support for his claim that counsel, in order to be considered constitutionally effective, must inform the defendant of these sentencing enhancements that may apply to him, were he to be convicted of more crimes in the future. At least on the record before us, the defendant has not demonstrated that counsel's failure to inform him of these relatively remote contingent possible consequences constitutes "behavior . . . falling measurably below that which might be expected from an ordinary fallible lawyer." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). Accordingly, there is no basis to vacate the order on this ground.

Order denying motion to withdraw guilty pleas and for a new trial affirmed.

footnotes

[1]The facts in this and the following paragraphs are taken from the Commonwealth's recitation of the facts that provided the basis for the defendant's guilty pleas, as well as from the findings of the judge (suppression judge) who, following an evidentiary hearing, denied the defendant's motion to suppress. The defendant's motion for reconsideration and his interlocutory appeal from that order were both denied.

[2]After interviewing the victim, the officers found that in November of 2010, Boston police officers had searched apartment four and had arrested two individuals there for an armed robbery. One of those individuals was known to police to possess a shotgun. There was also an outstanding arrest warrant for another man who listed the address of the apartment building as his. (These individuals were not found to be present at the apartment when the police arrived on March 24, 2011.) The suppression judge found that where the officers (1) were investigating a recent armed robbery in this area, (2) knew of two men previously arrested in this apartment for a past armed robbery, and (3) knew one of those men was known to be armed with a shotgun, the officers were justified in entering the apartment without a warrant due to "real safety concerns."

[3]The indictments are numbered consecutively "#001," "#002," etc., for example, "SUCR 2011-10599 INDICTMENT-#001." For ease, we refer to them as indictment one, two, etc.