COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FAR NO._____

APPEALS COURT NO. 2019-P-0217

COMMONWEALTH

v.

JEAN TOUSSAINT

ON APPEAL FROM A POST-CONVICTION ORDER
OF THE SUFFOLK SUPERIOR COURT

APPELLANT'S APPLICATION FOR FURTHER APPELLATE REVIEW

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Appeals Court unpublished decision: Add-50
Commonwealth v. Toussaint,
97 Mass. App. Ct. 1119, 2019-P-0217
(May 19, 2020)(Rule 1:28 decision)

Toussaint's Appellate Brief 2019-P-0217, Add-65
which includes in the addendum
the Superior Court Order denying
Toussaint's new trial motion
(Order,12/11/18, Ullmann, J.)

1. Request to obtain further appellate review

Pursuant to Mass. R. App. P. 27.1, the appellant Jean Toussaint respectfully requests that this Honorable Court grant further appellate review of Commonwealth v. Toussaint, 97 Mass. App. Ct. 1119, 2019-P-0217 (May 19, 2020)(Rule 1:28 decision). Toussaint requests further appellate review of the Appeals Court decision which affirmed the Superior Court judge's denial of Toussaint's Motion For A New Trial. In his Motion For A New Trial, Toussaint sought to withdraw his guilty plea to a drug charge for which Annie Dookhan was the primary chemist.

This is one of the exceedingly rare drug convictions where a new trial was not granted even though Dookhan was the primary chemist, even though Toussaint should have been told of Dookhan's misconduct so he could make an intelligent, informed decision about whether or not to accept the plea offer, and even though this case does not involve any non-Dookhan charges or any non-drug charges. Dookhan was the one who had custody of the substance, she handled it, she tainted it, and the Commonwealth induced Toussaint to plead guilty based on Dookhan's certificate of analysis.

Toussaint's guilty plea was not intelligently or voluntarily

entered. There is a reasonable probability that Toussaint would have rejected that plea agreement and gone to trial or sought a better plea deal or pursued a motion to dismiss if Toussaint had been properly informed of Dookhan's misconduct (particularly because Dookhan was the primary chemist for this case and Dookhan was also involved in Toussaint's prior BMC-Roxbury probation matter which influenced his plea in this case).

But what makes this case unique and appropriate for further appellate review is the reasoning of the lower courts in denying Toussaint constitutional relief. The reasoning of the lower courts is deeply flawed, it is unjust, and it is subject to repetition unless this Court clarifies the applicable constitutional law.

As discussed in more detail later herein, one of the ways that the Commonwealth induced a guilty plea in this case (besides using Dookhan's drug certificate) was to offer to make this sentence start forthwith so that it would wipe out the 2 year jail sentence that Toussaint received for violating probation on his earlier BMC-Roxbury case (he violated probation because of his arrest on this case). That BMC-Roxbury case also involved Annie Dookhan, and Toussaint's BMC-Roxbury conviction was

vacated and dismissed pursuant to Bridgeman. With that prior conviction vacated, the plea offer in this case looks much less attractive to the defense. Toussaint would have rejected the plea offer in this case if he knew that Dookhan's misconduct invalidated his BMC-Roxbury conviction.

The Appeals Court panel held that if part of the reason why Toussaint would have rejected the guilty plea offer in this case was because his BMC-Roxbury prior conviction was vacated due to Bridgeman, then Toussaint unknowingly had an additional burden of proof on his new trial motion. The Appeals Court panel held that Toussaint had the burden in this case to litigate the Scott factors as to his BMC-Roxbury case, and to prove (during the new trial motion in this case) that Dookhan's misconduct affected his plea in the BMC-Roxbury case, even though the BMC-Roxbury conviction was already vacated and dismissed because of Dookhan.

Specifically, as to these special circumstances surrounding the BMC-Roxbury prior conviction and Dookhan, the Appeals Court panel held:

> The defendant makes the critical assumption that mere knowledge of Dookhan's misconduct would itself have

> sufficed to allow him to consider the BMC case as "no longer an issue," secure in the knowledge that that guilty plea would ultimately be vacated. But this assumption depends on many facts not in the record. *The Scott factors have never been applied to the defendant's guilty plea in the BMC case*. For example, the record does not disclose whether the Commonwealth's case was so strong, even absent Dookhan-tainted drug certificates, that the defendant would have pleaded guilty nonetheless. The April 2017 order vacating the BMC conviction was based not on any Scott-factor analysis as to whether the defendant would have pleaded guilty had he known of Dookhan's misconduct but, instead, was based on the District Attorney's determination that, assuming the defendant's plea were to be vacated, the District Attorney could not or would not reprosecute. See Bridgeman v. District Attorney for the Suffolk Dist., 476 Mass. 298, 326-327 (2017). *Such a determination could have been based on any number of factors, including those related to the passage of time, and in no way establishes that the BMC guilty plea, when entered, would have been vulnerable to a Dookhan-based challenge. Thus, because the defendant has not shown (as is his burden here, see Scott, 467 Mass. at 354-355) that he could have counted on the BMC case evaporating*, the "forthwith" aspect of the sentence to which the Commonwealth agreed here still had considerable value to him.

Commonwealth v. Toussaint, 97 Mass. App. Ct. 1119, 2019-P-0217 (May 19, 2020)(Rule 1:28 decision)(slip op. at 10-11).

That Appeals Court holding requires further appellate review. This Court held in Scott that the Scott factors (factors to consider when deciding whether a defendant would have rejected

a plea had they known about Dookhan's misconduct) should be applied to the present case, to the specific conviction that a defendant seeks to vacate. See Commonwealth v. Scott, 467 Mass. 336,344 (2014). The Appeals Court panel went even further, holding that Toussaint needed to also apply the Scott factors to his already-vacated BMC-Roxbury case, and that Toussaint had a burden of proving that he would not have pled guilty in his already-vacated BMC-Roxbury case had he known about Dookhan's misconduct. That holding subverts this Court's implicit intent in Bridgeman, that defendants like Toussaint not bear the entire of burden of correcting the unconstitutional convictions caused by Dookhan's misconduct. See Bridgeman v. District Attorney for the Suffolk Dist., 476 Mass. 298, 326-327 (2017).

If defendants like Toussaint (who challenge the constitutionality of a conviction in part because Dookhan's misconduct caused a prior or predicate conviction to be vacated) are required to litigate Scott factors *as to the already vacated convictions*, then respectfully this Court needs to make that

clear.

This Court should grant further appellate review to clarify this important issue which affects many defendants who have prior convictions impacted by Dookhan. If the reasoning of this Appeals Court panel decision remains un-checked and uncorrected, this will leave a dangerous, persuasive (albeit non-binding) authority for these types of cases (cases where a prior conviction or predicate conviction involving Dookhan is vacated in light of Bridgeman and that vacatur impacts the constitutionality of a subsequent case).

If this panel's reasoning is relied on by Superior Court judges hearing new trial motions, even as persuasive authority, then one of two things will happen. Either (1) the Superior Courts will be swamped with even more time-consuming litigation (where prior convictions that were already vacated pursuant to Bridgeman will need to be examined and litigated within every new trial motion that raises the vacatur of those prior convictions as a ground for relief) or (2) motion judges will deny meritorious new trial motions because defendants did not

litigate the Scott factors as to their already vacated convictions (even though those defendants were not on notice of such a requirement, and even though many of those defendants did not receive appointed appellate counsel for their prior vacated convictions, because Bridgeman made it unnecessary to appoint counsel in many cases that were vacated and dismissed with prejudice).

This is an important issue that has the potential to harm numerous similarly situated defendants across the state. Although the initial wave of so-called Dookhan defendants has passed, there is a second group of defendants challenging cases where Dookhan's misconduct impacted a prior or predicate conviction. See Commonwealth v. Williams, 89 Mass. App. Ct. 383,389 (2016).

Additionally, the Appeals Court panel decision reflects that the panel treated Bridgeman relief in a troubling manner. The panel revealed its opinion that convictions vacated pursuant to Bridgeman were vacated only because the Commonwealth could not have re-prosecuted them and not because they were unjust or

vulnerable to a Dookhan challenge. Specifically, the panel explained:

> *The April 2017 order vacating the BMC conviction* was based not on any Scott-factor analysis as to whether the defendant would have pleaded guilty had he known of Dookhan's misconduct but, instead, *was based on the District Attorney's determination that, assuming the defendant's plea were to be vacated, the District Attorney could not or would not reprosecute*. See Bridgeman v. District Attorney for the Suffolk Dist., 476 Mass. 298, 326-327 (2017). Such a determination could have been based on any number of factors, including those related to the passage of time, and *in no way establishes that the BMC guilty plea, when entered, would have been vulnerable to a Dookhan-based challenge*.

Commonwealth v. Toussaint, 97 Mass. App. Ct. 1119, 2019-P-0217 (May 19, 2020)(Rule 1:28 decision)(slip op. at 11)(emphasis added).

However, this Court held in Bridgeman II:

> Upon the issuance of this opinion, each district attorney shall commence an individualized review of every *Dookhan case* in his or her district that was included on the list that the district attorney earlier submitted to the single justice…The second letter shall identify all of the drug convictions on the list that the district attorney moves to vacate and dismiss with prejudice as a result of his or her individualized review. These shall include *both the convictions that the district attorney wishes to vacate and dismiss with prejudice, regardless of whether the case could be successfully reprosecuted if a new trial were ordered*, and the convictions that the district attorney could not

> successfully reprosecute if a new trial were ordered. Once these drug convictions are vacated and dismissed with prejudice, the defendants shall be notified of the action taken.

See Bridgeman v. District Attorney, 476 Mass. 298,327-328 (2017)(Bridgeman II). Here, Toussaint was notified that his BMC-Roxbury case was vacated and dismissed because of Dookhan. But Toussaint was never notified that he would still need to prove, in all future proceedings, that the vacated conviction was "vulnerable to a Dookhan challenge" even though the conviction was already vacated because of Dookhan. The panel viewed Bridgeman relief as mere administerial relief for the prosecution rather than a remedy to help vacate unjust convictions without overwhelming our court system. And that thinking seems to have led to the panel erroneously holding that Toussaint and his prior appellate counsel should have fully litigated the Scott factors for his already-vacated BMC-Roxbury case (even though Toussaint was not assigned appellate counsel for his BMC-Roxbury case because it was vacated per Bridgeman).

In addition, this Court should grant further appellate

review because the Appeals Court erred in the manner in which it analyzed Dookhan's misconduct. The Appeals Court analyzed Dookhan's misconduct as if she simply did not exist in this case and concluded that Dookhan's misconduct had no exculpatory value at all. The Appeals Court panel concluded:

> "It is reasonable to conclude that, if the case had gone to trial, the Commonwealth would not have used Dookhan's testimony or certificates as evidence, and *this rendered her misconduct essentially irrelevant and of no exculpatory value*."

Commonwealth v. Toussaint, 97 Mass. App. Ct. 1119, 2019-P-0217 (May 19, 2020)(Rule 1:28 decision)(slip op. at 10). That conclusion is erroneous, particularly as applied to the facts of this case. Dookhan's misconduct is not rendered irrelevant and "of no exculpatory value" simply because the Commonwealth might not have called Dookhan to testify at trial if her misconduct had been timely revealed.

Further, this Court should grant further appellate review because Mr. Toussaint's conviction is unconstitutional. Toussaint did not plead guilty intelligently or voluntarily. There is a reasonable probability that Toussaint would have rejected

the plea offer had he and his plea counsel known of Dookhan's misconduct. Justice was not done.

Finally, the Appeals Court panel decision failed to address the fact that Toussaint's co-defendant Anderson on this case had his conviction vacated and dismissed with prejudice because of Dookhan's involvement in this case. Two young men involved in the same alleged incident. Anderson eventually received constitutional justice after Dookhan's misconduct was revealed. Toussaint is still waiting for his constitutional justice.

This application is founded upon substantial reasons affecting the interests of the public and the interests of constitutional justice. Further appellate review is needed to correct the injustice to Toussaint in this case as well as the larger public interest ramifications of the Appeals Court decision.

For all of the foregoing reasons, Jean Toussaint respectfully requests further appellate review.

2. Statement of prior proceedings

Toussaint is seeking further appellate review of his appeal

from the denial of his Motion For A New Trial in Suffolk Superior Court. A-10.[1]

On August 3, 2009, Toussaint was indicted as follows:

Count 1 – trafficking in cocaine over 28 grams, M.G.L. c.94C § 32E (b)(2)

Count 2 – school zone violation, M.G.L. c.94C § 32J

A-6. Toussaint pled not guilty to both counts. A-10.

On May 25, 2010, *the day of trial*, Toussaint was induced to plead guilty and he entered a guilty plea by agreement. A-8. The plea was entered before the Honorable Cratsley, J. A-8.

As negotiated by the prosecution and plea counsel for Toussaint (without any knowledge that Dookhan's misconduct created a strong defense for this case or that her misconduct invalidated Toussaint's prior BMC-Roxbury conviction), the terms of the plea agreement were as follows:

[1] Citations to the Record Appendix filed in the Appeals Court are A-page#. Citations to the Addendum are Add-page #. Citations to the evidentiary hearing transcript are T-page#.

Count 1- Toussaint pled guilty to the lesser included trafficking in cocaine over 14 grams (M.G.L. c.94C § 32E (b)(1)[2], in exchange for a minimum mandatory sentence of 3 years to 3 years and a day in state prison, to be served forthwith notwithstanding a jail sentence Toussaint was currently serving on a BMC-Roxbury case.

Count 2 - dismissed

A-8. As such, the Commonwealth offered, and Toussaint accepted, a plea for 3 years in prison before the parties learned about Dookhan's misconduct or how it impacted this case. A-8.

On March 15, 2018, after Annie Dookhan's egregious misconduct had been discovered and Toussaint had learned of that misconduct and what it meant for his case, Toussaint filed a Motion For A New Trial. A-9. The plea judge who handled the guilty plea colloquy was *not* the motion judge for the new trial motion. A-9.

[2] The statutory weights for cocaine trafficking under M.G.L. c.94C § 32E (b)(1) and (b)(2) were changed after Toussaint's 2009 indictment and 2010 plea. A defendant indicted for trafficking between 18-36 grams of cocaine faces only a two year minimum mandatory sentence, and a defendant indicted for trafficking 36-100 grams faces only a 3 ½ year minimum mandatory sentence.

Toussaint was represented by prior appellate counsel[3] on his Motion For A New Trial. A-9,35. The Motion For A New Trial was supported by exhibits, including an affidavit of plea counsel. A-83.

On August 3, 2018, the Commonwealth filed an Opposition to the Motion For A New Trial. A-90. On November 30, 2018, an evidentiary hearing was held in Suffolk Superior Court. A-9,99.

On December 11, 2018, just eleven days after the evidentiary hearing and before the transcript of the hearing was ready, the motion judge (the Honorable Ullmann, J., who was not the plea judge) denied the Motion For A New Trial. A-9,125. Toussaint filed a timely notice of appeal. A-10.

Toussaint then appealed the denial of his new trial motion to the Massachusetts Appeals Court. Add-1. On May 19, 2020, a

[3] Although Toussaint's prior appellate counsel arguably should have made a better record in the Superior Court as part of the new trial motion (including by introducing the grand jury minutes and plea colloquy transcript and more evidence regarding the likelihood of a better plea offer), the record is still sufficient to conclude that there is a reasonable probability Toussaint would have rejected the plea offer had he been told of Dookhan's misconduct.

panel of the Appeals Court affirmed the denial of Toussaint's Motion For A New Trial in an unpublished opinion. See Add-50: Commonwealth v. Toussaint, 97 Mass. App. Ct. 1119 2019-P-0217 (May 19, 2020)(Rule 1:28 decision).

In light of covid-19 court orders tolling certain deadlines, and because the Appeals Court decision and the procedural rule deadline to seek further review both fell in between March 17, 2020 and June 30, 2020, this matter was effectively tolled until July 1, 2020. As such, this application for further appellate review is timely filed within 21 days of July 1, 2020, in light of the covid-19 orders. See Mass. R. App. P. 27.1. See also April 1, 2020 Order Regarding Court Operations Under The Exigent Circumstances Created By The COVID-19 Pandemic; May 4, 2020, Updated Order Regarding Court Operations.

3. Statement of relevant facts

Toussaint herein recites relevant facts, including facts that the Appeals Court overlooked or characterized differently:

The alleged crime and plea

On February 28, 2009, members of the Boston Police

Department arrested 18-year-old Jean Toussaint (a young black male) for allegedly trespassing at 95 Milton Avenue in Dorchester.[4] A-81.

Police allegedly observed Toussaint and Rohan Anderson standing outside an apartment building at 95 Milton Avenue. A-36,81. Having received a prior complaint about young men trespassing outside the building, police approached Toussaint and Anderson. A-81. According to the police, the two young men buzzed doorbells until the door to the building opened. A-81. Police followed them into the building at 95 Milton Avenue. A-81. One officer followed Anderson and seized him at the back of the building. A-81. Another officer followed Toussaint. According to the police, Toussaint was allegedly seen attempting to enter an apartment. A-36,81.

Toussaint was arrested for trespassing, handcuffed, and taken into custody. A-81. Police allegedly observed Toussaint

[4] The factual record below was primarily based on a police report submitted with the new trial motion. Neither prior appellate counsel nor the Commonwealth submitted the grand jury minutes or the plea transcript as part of the record. A-36.

with a box of sandwich bags. A-81.

At the police station, Toussaint was placed in a holding cell. Toussaint was still handcuffed. A-81. Boston Police Officer Michael Brown (who had only been in the Drug Unit for one month when this incident occurred) observed some trash on the floor of Toussaint's holding cell, including a partially eaten ham and egg sandwich that had already been in the cell prior to Toussaint's arrival. A-37,81. Officer Brown claimed he looked inside the sandwich and saw a substance that appeared to be consistent with crack cocaine. A-81.

Officer Brown allegedly ordered Toussaint to put everything he had on him out for police to seize. A-37. The police report alleged that Officer Brown asked Toussaint if he had any cocaine on his person and Toussaint responded yes and produced a bag. A-81. However, in the grand jury transcript (which was cited by the parties but not produced as evidence below), Officer Brown admitted that rather than asking Toussaint if he had any crack on his person in the holding cell, the officer really asked "Everything you have on you – we want it. Put it in the bag" after

which Toussaint produced a bag. A-37, citing GJ 21-23.

According to Officer Brown, Toussaint physically removed a bag from his pants. A-81. Inside that bag was a rock-like substance appearing to be "consistent with" cocaine. A-81. As such, the police found one bag of a substance inside a sandwich on the floor of the cell, and a different second bag was on Toussaint's person. A-81.

The police did not perform any field tests on the substances that were attributed to Toussaint. A-81.

The police also allegedly found a quantity of a substance believed to be cocaine on the person of Rohan Anderson. A-81. Police also allegedly observed Anderson carrying a firearm. A-81. Police claimed Anderson threw the firearm in the back of the building. A-81.

Toussaint and Anderson were both indicted in Suffolk Superior Court. A-11,23,26. After Annie Dookhan allegedly analyzed the substances as the primary chemist in June 2009 and drug certificates of analysis were produced in discovery (A-13-15), the Commonwealth listed Dookhan on the witness list as

an expert witness and the only chemist that would testify at the scheduled trial. A-20.

Toussaint initially pled not guilty and vigorously fought the indictments. A-7. Toussaint filed a motion to suppress and a motion to dismiss. A-8. After those motions were denied, Toussaint's case was eventually scheduled for trial. A-8.

However, on May 25, 2010, on the day of trial, Toussaint entered a guilty plea by agreement. A-8. Even though the prosecution presumably did not yet know about Dookhan's misconduct or how Dookhan's misconduct dramatically weakened the Commonwealth's case and the Commonwealth's ability to prove the chemical composition or identity of the substance beyond a reasonable doubt at a trial, the prosecutor was still willing to offer Toussaint 3 years in prison in exchange for a guilty plea. A-8.

At the time of Toussaint's 2009 arrest and 2010 guilty plea, Annie Dookhan was committing egregious misconduct at the Hinton Lab

The actions of former chemist Annie Dookhan at the Hinton Lab, which came to light in 2012, are now widely known. As the

S.J.C. summarized in Scott:

> Perhaps most concerning, Dookhan admitted to "dry labbing" for two to three years prior to her transfer out of the lab in 2011, meaning that she would group multiple samples together from various cases that looked alike, then test only a few samples, but report the results as if she had tested each sample individually. *Dookhan also admitted to contaminating samples intentionally, including turning negative samples into positive samples on at least a few occasions*. Moreover, Dookhan has acknowledged to investigators that she may not be able to identify those cases in which she tested the samples properly and those in which she did not.

See Commonwealth v. Scott, 467 Mass. 336, 339-340 (2014)(emphasis added).

In 2013, after Toussaint had unknowingly pled guilty without knowledge of Dookhan's misconduct, Dookhan pleaded guilty to twenty-seven counts of criminal misconduct, including tampering with evidence, perjury, and obstruction of justice. Commonwealth v. Rodriguez, 92 Mass. App. Ct. 774,776 (2018).

Dookhan's admitted wrongdoing in the form of "dry labbing" and converting "negatives to positives" took place while Dookhan was serving as the primary chemist responsible for

those samples. Scott, 467 Mass. 336,341 (2014).[5]

What that means in clearer terms is this: in some unknown cases when Dookhan was the primary chemist, Dookhan took substances that were not cocaine (perhaps substances that were counterfeit or legal substances) and she contaminated the samples to make them render a positive drug result. Scott, 467 Mass. at 339-340. As the primary chemist, Dookhan would then give a sample from the now-contaminated sample to a confirmatory chemist. Id. Thus, the substance tested by the confirmatory chemist was tainted. See id.

Dookhan admitted she could not identify which cases she tested properly and which cases she engaged in misconduct as the primary chemist. Id. The Commonwealth has conceded it could not prove that Dookhan did not tamper with or contaminate a substance in any particular case. See

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[5] Dookhan also engaged in multiple additional forms of egregious misconduct at the lab when she was a confirmatory chemist. The Inspector General's report on the Hinton Lab investigation is available at: http://www.mass.gov/ig/publications/reports-and-recommendations/2014/investigation-of-the-drug-laboratory-at-the-william-a-hinton-state-laboratory-institute-2002-2012.pdf

Commonwealth v. Gardner, 467 Mass. 363, 367 (2014).

Annie Dookhan was the primary chemist for Toussaint's case

Dookhan was the primary chemist assigned to the custody, handling, and testing of the substances in Toussaint's case. A-13. As the primary chemist, Dookhan was responsible for testing the bag found inside the sandwich in the holding cell, the bag that was on Toussaint's person, and the quantity of substance found on Anderson. A-13-15.

The drug certificates of analysis reveal the substances were received by the Hinton Lab on March 3, 2009. A-13. The certificates state Dookhan analyzed the substances as the primary chemist on June 22, 2009. A-13. As such, the drug certificates were signed before Toussaint's guilty plea. A-13.

According to Dookhan, one bag tested positive as cocaine with a weight of 27.17 grams. The other bag also allegedly tested positive as cocaine with a weight of 29.05 grams. A-13,14. Notably, when the police had weighed those same substances at the station before Dookhan got her hands on the evidence, Bag A weighed 31 grams and Bag B weighed 35 grams (*six grams more*

than Dookhan's claimed weight). A-81.

The Suffolk District Attorney's Office agreed to vacate and DISMISS the co-defendant Anderson's drug charges in the interests of justice but not Toussaint's charges

As this Court is aware, the scope and magnitude of Dookhan's misconduct caused the S.J.C. to order the District Attorneys to agree to vacate and dismiss certain drug cases where Dookhan was the primary or confirmatory chemist and the Commonwealth could not re-prosecute if a new trial was granted. See Bridgeman v. District Attorney, 476 Mass. 298,326 (2017)(Bridgeman II).

Although Annie Dookhan was the primary chemist on Toussaint's case, former Suffolk County District Attorney Daniel Conley's Office did not agree to vacate Toussaint's conviction. A-90. Toussaint's case was one of the rare convictions where a new trial was not vacated by agreement even though Dookhan was the primary chemist. A-90.

Alarmingly, even Toussaint's co-defendant Anderson had his case vacated. A-30,31. See Commonwealth v. Anderson, 0984-CR-10724 (April 19, 2017 Order, Gaziano, J.)(drug

indictments vacated and dismissed with prejudice). Anderson's case involved the same incident, with the substance seized from Anderson going to the Hinton Lab on the same date as the substances attributed to Toussaint. A-13-15,81. Dookhan was the primary chemist for all the substances and purportedly tested them all on the same date. A-13-15. Yet the Commonwealth agreed to vacate and *dismiss* Anderson's charges in the interests of justice while unfairly refusing to allow Toussaint to obtain even a new trial. A-30.

The main difference between Toussaint's case and Anderson's case was the quantity of the substances allegedly found on their persons. A-13,15. The constitutional error (Dookhan's withheld misconduct) and the Commonwealth's lack of ability to re-prosecute appear to be the same for both Toussaint and Anderson's cases (there were no field tests, informants, or controlled buys, Dookhan was the primary chemist with custody of the substances, and Dookhan admitted she could not identify which cases she tampered with). A-81.

Toussaint sought to withdraw his guilty plea and testified at an evidentiary hearing in support of his Motion For A New Trial

After learning of Dookhan's misconduct and post-Bridgeman notification of how Dookhan impacted his case, Toussaint sought to withdraw his guilty plea and go to trial on the indictments. A-9,32. Toussaint submitted a sworn affidavit in support of his Motion For A New Trial. A-87. Toussaint also testified at the evidentiary hearing. A-99-123, T-4.

Toussaint was 28 years old at the time of the evidentiary hearing (he was only 18 years old at the time of his arrest on this case). T-4. Toussaint was a high school graduate who had completed some college courses. T-5.

Toussaint candidly acknowledged that for this Superior Court drug case, he was facing a five-year minimum mandatory prison sentence and two and a half years for the school zone violation. T-7. Toussaint pled guilty in exchange for a sentence of three years to three years and a day, with the sentence being imposed forthwith so he would not have to do more time on his BMC-Roxbury matter. T-7.

When Toussaint pled guilty, one of his main concerns was that he would not do more jail or prison time for a probation violation on his prior BMC-Roxbury case. T-8. At the time Toussaint was arrested for this Suffolk Superior Court case in 2009, Toussaint was already on probation for a prior possession with intent to distribute cocaine case out of BMC-Roxbury (0802-CR-000571). T-5.

As a result of this new case, Toussaint's probation was revoked on the BMC-Roxbury case. T-6. On May 13, 2010, two weeks before his plea in this Superior Court case, Toussaint received a probation violation sentence of two years in the house of correction for that BMC-Roxbury case. T-14.

Toussaint had the same plea attorney for this case and his BMC-Roxbury case. T-14. As part of the plea deal in Superior Court for this case, Toussaint's jail sentence for the BMC-Roxbury matter was effectively wiped out by his forthwith prison sentence on this Superior Court case. T-7.

A major incentive for Toussaint to plead guilty to this case in Superior Court was the part of the plea agreement that made

the sentence forthwith to help eliminate the BMC-Roxbury jail sentence. T-14. But what Toussaint did not know was that for his BMC-Roxbury drug case, Dookhan was the chemist and that BMC-Roxbury case was ultimately vacated and dismissed with prejudice. T-11, A-76.

Before his guilty plea in Superior Court on this case, Toussaint reviewed the discovery and he was aware the Commonwealth was claiming the substances were cocaine. T-9. Toussaint knew the substances were tested at the drug lab. T-9, A-13. Toussaint mistakenly thought he could not have challenged the drug testing results. T-10, A-13,20.

Before he pled guilty, Toussaint did not know anything about Dookhan. T-10. After his plea, Toussaint learned about the misconduct that Dookhan admitted to committing. T-11.

If Toussaint had known about Dookhan's misconduct at the time of his guilty plea, Toussaint would not have entered the guilty plea. T-11, A-83,87. Toussaint would have asked his plea attorney to file further motions. T-11, A-89. Toussaint would have told his plea attorney to seek discovery and to seek

dismissal. T-12,13, A-89.

If Toussaint had known Dookhan was also involved in his BMC-Roxbury case, he would have asked his plea attorney to stay his conviction or jail sentence. T-12, A-89. If he knew about Dookhan on both cases, Toussaint would have sought alternatives to the plea offer. T-13, A-89.

The Commonwealth did not call any witnesses or introduce any exhibits to rebut Toussaint's testimony or the defense exhibits. A-99-124.

Plea counsel's unrebutted affidavit

In addition to Toussaint's testimony, Toussaint offered a sworn affidavit from his plea attorney. A-83-85.

Plea counsel's affidavit averred that if he knew about Dookhan's misconduct, he would have advised Toussaint to NOT accept the guilty plea offer on May 25, 2010, he would have pursued additional discovery, pursued a motion to dismiss this case, attempted to vacate Toussaint's BMC-Roxbury conviction, and obtained an expert to challenge the claimed identity and weight of the substances, or sought further plea concessions

based on Dookhan. A-83-85.

Plea counsel's sworn affidavit was admitted into evidence without objection. T-17. The Commonwealth specifically did not object to the defense admitting plea counsel's affidavit as evidence at the evidentiary hearing. T-17. The Commonwealth did not argue that plea counsel's affidavit was untruthful or introduce any rebuttal evidence. T-17.

The motion judge's decision

An evidentiary hearing was held in Suffolk Superior Court on November 30, 2018. A-9,99. Eleven days later, the motion judge issued a decision on December 11, 2018. A-99. The transcript of the evidentiary hearing was not produced until January 23, 2019, after the judge made a decision. A-124.

4. Points on which further review is sought:

i. Whether a defendant challenging the constitutionality of a guilty plea (because Dookhan's misconduct caused a prior or predicate conviction to be vacated pursuant to Bridgeman and that vacated conviction was material to the challenged guilty plea) must prove the Scott factors as to the already vacated conviction (even though it was already vacated per Bridgeman), in addition to proving the Scott factors for the conviction the defendant is challenging in his new trial motion.

ii. Whether Toussaint established a reasonable probability that he would have rejected the plea offer in this case if he had known about Dookhan's egregious misconduct, given Dookhan's crucial role in this case and in Toussaint's prior BMC-Roxbury case.

iii. Whether plea counsel's averment - that had he known about Dookhan's misconduct at the time of the plea in the instant case, he would not have advised Toussaint to plead guilty to the charges on May 25, 2010 – supports the conclusion that Toussaint probably would have rejected that plea offer because his lawyer would have told him to reject it, or whether (as the Appeals Court panel found) Toussaint also needed to prove that plea counsel's alternatives to this plea were "reasonably likely to have borne any fruit."

iv. Whether the Appeals Court and the motion judge erred by analyzing this case as if Dookhan simply disappeared and did not testify at a hypothetical trial, overlooking how Dookhan's misconduct has exculpatory value to the defense because it created a strong trial defense as to the identity of the substance (even if the Commonwealth chose not to call Dookhan as a witness), and because it created additional leverage to resolve the case with a better plea on more favorable terms.

v. Whether, if the prosecution made Toussaint a plea offer for 3 years in prison before the parties knew about Dookhan's misconduct, there is a reasonable probability that the parties could have reached a better plea agreement upon learning of Dookhan's misconduct, given her role as the primary chemist on this case along with the lack of any field testing or testimony from anyone who ever actually ingested the substances (to prove it was cocaine instead of a counterfeit substance or a different uncharged drug).

vi. Whether the motion judge erred and abused any conceivable discretion in denying Toussaint's motion for a new trial because Toussaint's guilty plea was not intelligently or voluntarily entered and is unconstitutional.

vii. Whether it matters – at least to fans of constitutional justice - that Toussaint's co-defendant on this case had his conviction vacated and dismissed because of Dookhan's misconduct, while Toussaint has not even been permitted to withdraw his guilty plea that he did not intelligently or voluntarily enter.

5. Statement why further review is appropriate:

First, the Appeals Court panel erred in holding that Toussaint had the burden of proving that he would not have pled guilty on his prior BMC-Roxbury conviction had he known of Dookhan's misconduct, even though that prior conviction was already vacated pursuant to this Court's second Bridgeman decision.

Toussaint was on probation for an earlier BMC-Roxbury conviction. Because of the indictments in this case, Toussaint's probation was revoked and he was ordered to serve his previously suspended two-year sentence. The Commonwealth induced Toussaint to plead guilty in this case by offering Toussaint a deal where his sentence in this case would run

forthwith (notwithstanding the sentence in the BMC case) such that the sentence on this case would essentially wipe out those 2 years for the BMC-Roxbury case.

Dookhan was also involved in the BMC-Roxbury case, and that conviction was eventually vacated and dismissed because of Dookhan's misconduct. If Toussaint had known he had grounds to get the BMC-Roxbury conviction vacated because of Dookhan's misconduct, he would not have been motivated to accept the plea deal in this case to wipe out the two extra years jail time on the BMC-Roxbury case. A-85,89.

As to these special circumstances surrounding the BMC-Roxbury prior conviction and Dookhan, the Appeals Court panel affirmed Toussaint's conviction because "*The Scott factors have never been applied to the defendant's guilty plea in the BMC case*." See Toussaint, 97 Mass. App. Ct. 1119 (slip op. at 10-11). The panel held Toussaint had the burden in this case to litigate Scott factors as to his BMC-Roxbury case, and to prove (during the new trial motion in this case) that Dookhan's misconduct affected his plea in the BMC-Roxbury case, and that he would

not have pled guilty on the BMC-Roxbury case (if he had known of Dookhan's misconduct), even though the BMC-Roxbury conviction was already vacated and dismissed because of Dookhan.

Toussaint and his prior appellate attorney had no notice of such a burden of proof at the new trial motion stage of this case, if any such burden exists. But the law is not clear that any such burden does exist. Although certain burdens of proving contested facts have been placed on defendants filing new trial motions, it was undisputed that Toussaint's BMC-Roxbury conviction was previously vacated per Bridgeman because of Dookhan's misconduct. A-76.

This Court held in Scott that Scott factors should be applied to the conviction being challenged by the defendant. See Scott, 467 Mass. 336,344 (2014). The Appeals Court panel went even further and held Toussaint needed to also apply the Scott factors to his already-vacated BMC-Roxbury case if he wanted to challenge his conviction on this Superior Court case.

The Appeals Court holding in this case subverts this

Court's implicit intent in Bridgeman, that defendants like Toussaint not bear the entire burden of correcting the unconstitutional convictions caused by Dookhan's misconduct. See Bridgeman, 476 Mass. at 326-327. If defendants like Toussaint (who challenge the constitutionality of a conviction in part because Dookhan's misconduct caused a prior or predicate conviction to be vacated) are required to litigate Scott factors as to already vacated convictions, then this Court needs to make that clear.

This Court should grant further review to clarify this important issue which affects many defendants. The Appeals Court panel's error is capable of repetition for this class of cases (cases where a prior or predicate conviction involving Dookhan is vacated in light of Bridgeman and that vacatur impacts the constitutionality of a subsequent case).

It is noteworthy that the full Appeals Court does not require defendants to litigate the Scott factors as to prior convictions if those convictions were vacated *because of a successful new trial motion* and not because of Bridgeman relief.

See Commonwealth v. Williams, 89 Mass. App. Ct. 383,389 (2016). Contrarily, the panel here held Toussaint needed to litigate the Scott factors for his BMC-Roxbury conviction (a conviction that was vacated because of Bridgeman and without the appointment of appellate counsel). If one of the goals of the admirable second Bridgeman decision was to streamline justice, the panel of the Appeals Court is undoing this Court's fine work.

This issue matters. There is a reasonable probability Toussaint would have rejected this plea offer if he was intelligently informed that Dookhan's misconduct invalidated his BMC-Roxbury conviction and that Dookhan's misconduct also provided a strong defense to this case. Dookhan's misconduct pervaded both cases, Toussaint did not know that when he entered the plea here, and he and his counsel both averred they would have rejected the plea offer had they known. A-83-89.

In addition, further review is needed because the Appeals Court erroneously analyzed the case as if Dookhan simply disappeared. The panel concluded:

> "It is reasonable to conclude that, if the case had gone to trial, the Commonwealth would not have used Dookhan's testimony or certificates as evidence, and *this rendered her misconduct essentially irrelevant and of no exculpatory value*."

Toussaint, 97 Mass. App. Ct. 1119 (slip op. at 10).

The panel erroneously assumed that if the Commonwealth did not call Dookhan as a trial witness, Dookhan would not be relevant at all. That erroneous reasoning overlooks the fact that if the case went to trial, the defense had a viable "Dookhan defense" and could have introduced evidence of Dookhan's dry-labbing and tampering, and called witnesses to highlight Dookhan's misconduct, Dookhan's access to the evidence in this case, and the Commonwealth's arguably suspicious decision not to call Dookhan or introduce any testing results at trial. The defense also could have impeached police witnesses with the fact that substances are usually tested at the Hinton Lab because police cannot identify a substance for certain merely by sight. The panel did not analyze the exculpatory value of Dookhan's misconduct as a trial defense for the element of the identity and chemical composition of the substances as cocaine. That is a

strong, viable, rational ground of defense.

Additionally, the panel implicitly analyzed the circumstantial evidence to determine whether the evidence was legally sufficient without Dookhan, but the real issue is whether an intelligently informed Toussaint would have rejected this guilty plea offer. Dookhan's misconduct was not "irrelevant" or "of no exculpatory value" to Toussaint's decision about whether to accept or reject the plea offer. Dookhan's misconduct was material to Toussaint's subjective decision to reject the plea offer if properly informed. A-85-89.

Further, the Appeals Court panel conceded that knowledge of Dookhan's misconduct would have caused plea counsel to advise Toussaint not to accept the plea offer and Toussaint would not have accepted the offer. A-83. Yet the panel went on to erroneously conclude that proposed alternatives to that plea offer "were not reasonably likely to have borne any fruit." If Toussaint's attorney would have advised Toussaint to reject this plea (if he had known of Dookhan's misconduct) and if Toussaint rationally would have rejected this plea if he was properly

informed, and if Toussaint did not enter this plea intelligently or voluntarily, then the plea is unconstitutional. See Brady v. U.S., 397 U.S. 742,748-49 (1970); Boykin v. Alabama, 395 U.S. 238,243 (1969); Scott, 467 Mass. 336,344 (2014). Toussaint should not need to prove he would win at trial or win at a motion to dismiss or that he would negotiate a specific plea. See Commonwealth v. Clarke, 460 Mass. 30,47-48,n.18 (2011); U.S. v. Fisher, 711 F.3d 460,469 (4th Cir. 2013). All that should be required of Toussaint is that he establish a reasonable probability he would have rejected this plea had he known of Dookhan's misconduct (and Toussaint established that reasonable probability) and that it would have been rational to do so (and it was rational to do so).

Relatedly, the Appeals Court erred in affirming the conclusion that Dookhan's misconduct did not create any leverage to obtain a better plea agreement. If the prosecution was offering 18-year-old Toussaint 3 years in prison (before the parties learned about Dookhan's misconduct and how it drastically weakened the Commonwealth's proof that the substance was cocaine), there is a reasonable probability the

Commonwealth would have improved the plea offer, even slightly, if Dookhan's misconduct had been properly revealed before Toussaint's plea.

In fact, a different Appeals Court panel concluded drug certificates containing Dookhan's name do create additional leverage for a better plea deal. See Commonwealth v. Williams, 93 Mass. App. Ct. 1121 (July 26, 2018)(Rule 1:28)("The tainted certificate at least would have given him leverage to negotiate a better deal..."). It is unclear why that sound logic was not applied fairly and equally to all defendants. It is unreasonable and an abuse of discretion to conclude Dookhan's misconduct was irrelevant and created no leverage at all. The Commonwealth had strong motivation to resolve cases where Dookhan was the primary chemist after news of the scandal broke.

The mere fact that the Commonwealth had already made a concession to offer 3 years (before Dookhan's misconduct was known) does not change the reasonable probability that the parties could have reached a better plea agreement for less than 3 years if Dookhan's misconduct had not been withheld. There is

a reasonable probability that if Dookhan's misconduct had been timely disclosed, Toussaint would have rejected the offer and the parties could have negotiated a better plea deal.

Moreover, Dookhan's misconduct had exculpatory value (and created leverage for a better plea offer) because it substantially weakened the Commonwealth's evidence on the element of whether the substance was actually cocaine or counterfeit or another uncharged drug. In a case where there was no field-testing of the substances, and no witnesses who ever used the substances and could testify it was actually cocaine, the Commonwealth would have been left only with evidence of the packaging and the defendant's alleged production of a bag when allegedly asked if he had anything on him (which still did not prove the identity of the substance, as there was no evidence Toussaint ever personally ingested the substance and no evidence that Toussaint knew for certain the substance was cocaine and not counterfeit). See Commonwealth v. Scott, 428 Mass. 362,363 (1998) (defendant sold "bag which purportedly contained cocaine but actually contained baking soda");

Commonwealth v. Dawson, 399 Mass. 465,467 (1987).

A different panel of the Appeals Court held that an alleged dealer's statement that drugs are real has little evidentiary value. See Commonwealth v. Golding, 93 Mass. App. Ct. 1113 (June 6, 2018)(Rule 1:28)(without tainted drug certificates, what remained of Commonwealth's case was weak as to proof of identity of substances; "an alleged drug dealer's statements that his drugs are real is worth little…"). Yet here this panel erroneously reached the opposite conclusion, even though the Commonwealth's case as to identity of the substance was weak without credible chemical testing. See Commonwealth v. Fluellen, 456 Mass. 517,527 (2010). Given the exculpatory impact of Dookhan's misconduct on this case, there was a reasonable probability Toussaint would have rejected this plea offer, and that he would have obtained a better plea deal, pursued a motion to dismiss, or gone to trial. See Scott, 467 Mass. at 347.

Next, the panel failed to address the fact that Toussaint's co-defendant Anderson had his conviction vacated and dismissed

with prejudice because of Dookhan's involvement. Two young men were involved in the same alleged incident. Anderson eventually received constitutional justice after Dookhan's misconduct was revealed. Toussaint is still waiting for constitutional justice.

Finally, the conviction was induced by the Commonwealth, without Toussaint having knowledge of Dookhan's egregious misconduct or how it impacted his defenses and potential sentencing and his BMC case, which resulted in an unintelligent, involuntary plea and violated Toussaint's rights to due process per the 5th and 14th Amendments and Article 12. See Kyles v. Whitley, 514 U.S. 419,433-434 (1995); Brady, 397 U.S. at 748; Boykin, 395 U.S. at 243; Ferrara v. U.S., 456 F.3d 278 290 (1st Cir.2006); CPCS v. Attorney General, 480 Mass. 700 (2018); Scott, 467 Mass. at 344. Toussaint further relies on his addendum and appellate brief.

CONCLUSION

For all of the aforementioned reasons, and in the interests of constitutional justice, Jean Toussaint respectfully requests that this Court vote to grant further appellate review.

SIGNATURE

Respectfully Submitted,
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CERTIFICATE OF COMPLIANCE

Pursuant to Mass. R. A. P. 16(k), I hereby certify that to the best of my knowledge the foregoing document complies with the rules of court that pertain to the filing of applications for further appellate review, including, but not limited to Mass. R. A. P. 27.1, Mass. R. A. P. 16, and Mass. R. A. P. 20; and

This application complies with the type-volume limitation of Mass. R. App. P. 27.1(b) because it was prepared in Microsoft Word and the portion of the application that is subject to page limits or a word count (the brief statement indicating why further appellate review is appropriate) contains less than 2,000 words (1,997) in a proportionally spaced font in 14-point or greater (Century Schoolbook 14-point).

/s/ Dennis M. Toomey
Dennis M. Toomey

CERTIFICATE OF SERVICE

2019-P-0217

I certify that this brief was served upon the attorney of record for each party by complying with this Court's directives on electronic filing, electronic service to:

Kathryn Sherman, ADA, Suffolk District Attorney's Office
One Bulfinch Place, Boston, MA 02114

Dated: 7/21/20 Signed: /s/ Dennis M. Toomey

ADDENDUM

Addendum Table Of Contents:

Appeals Court unpublished decision: Commonwealth v. Toussaint, 97 Mass. App. Ct. 1119, 2019-P-0217 (May 19, 2020)(Rule 1:28 decision)	Add-50
Toussaint's Appellate Brief 2019-P-0217, which includes in the addendum the Superior Court Order denying Toussaint's new trial motion (Order,12/11/18, Ullmann, J.)	Add-65

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-217

COMMONWEALTH

vs.

JEAN G. TOUSSAINT.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

In 2009, the defendant, Jean Toussaint, was indicted on two charges: trafficking twenty-eight grams or more of cocaine, G. L. c. 94C, § 32E (b) (2), and doing so in a school zone, G. L. c. 94C, § 32J. On May 25, 2010, he pleaded guilty to a reduced charge of trafficking fourteen to twenty-eight grams of cocaine, G. L. c. 94C, § 32E (b) (1), and was sentenced to three years to three years and one day in State prison, to be served forthwith. The school zone indictment was dismissed. Once the defendant learned that the primary chemist who signed the drug certificates in his case was Annie Dookhan, whose malfeasance has been well documented by the courts of this Commonwealth, he moved for a new trial in 2018. After an evidentiary hearing, a judge denied the motion. The defendant appeals, arguing that the evidence established a reasonable probability that he would

not have entered the same guilty plea had he known about Dookhan's misconduct. We affirm.

Background. We recite the relevant facts as found by the judge, supplemented by undisputed evidence in the record. Police observed the defendant and his codefendant standing outside an apartment building as to which the police had received a prior complaint about young men trespassing. As police approached the two, the defendant began "frantically buzzing" doorbells and pulling on the building door until it opened. Police followed them inside and confronted the defendant as he tried to enter an apartment. He was holding a box of sandwich bags. Once it was determined that the defendant did not know the resident of the apartment, he was arrested for trespassing and was brought to the police station, where he was placed in a holding cell.

Subsequently, one of the officers noticed a partially-eaten sandwich on the floor of the holding cell, inside of which he found a large yellow rock resembling "crack" cocaine. According to the police report, the officer then asked the defendant if he had "any more crack on him"; the defendant replied, "Yes," and produced three "large yellow rocks" from inside the back of his

pants.[1] Police weighed the substances, finding that the rock from the sandwich weighed thirty-one grams and the rocks from the defendant's pants weighed thirty-five grams. They were then sent to the Hinton Drug Laboratory, where Dookhan signed the drug certificates as the primary chemist.

After the defendant's motions to suppress and dismiss were denied, the case was scheduled for trial on May 25, 2010. The Commonwealth listed Dookhan as an expert witness and the only chemist who would testify. However, on the day set for trial, the defendant entered a guilty plea with an agreed-upon disposition.

Relevant to that disposition was the fact that, twelve days earlier, based on the indictments in this case, the defendant's probation had been revoked in a separate Boston Municipal Court (BMC) drug case, and he had been ordered to serve his previously suspended two-year sentence imposed after his guilty plea in that case. As part of his plea agreement in the current case, the defendant received a sentence of three years to three years and one day, ordered to run forthwith, i.e., notwithstanding the sentence in the BMC case. See G. L. c. 279, § 27; Dale v. Commissioner of Correction, 17 Mass. App. Ct. 247, 249-251

[1] The defendant claims that the grand jury testimony contradicts the police report, but that testimony was not in the record before the motion judge or us, so we do not discuss it further.

(1983). Thus, one benefit of the plea agreement at issue here was that the defendant avoided serving nearly two years of prison time for the BMC case. Notably, that case also involved Dookhan as the primary chemist; the BMC conviction was later vacated and the case dismissed with prejudice in April 2017.

At the evidentiary hearing on the motion for new trial in this case, the defendant testified that his main incentives for the plea were that he would not do any more prison time in the BMC case, and that he would not stop getting credit for time on this case. He also acknowledged that he "got a better deal" by "avoid[ing] the minimum mandatories" in this case, which at the time of the offenses were seven and one-half years in total. See the 2008 versions of G. L. c. 94C, § 32E (b) (2) (five-year minimum mandatory sentence), and G. L. c. 94C, § 32J (two and one-half year minimum mandatory sentence, consecutive to sentence on underlying drug crime).

Additionally, the defendant testified that had he known about Dookhan's misconduct at the time of his plea in this case, he would not have accepted the plea offer and instead would have wanted his attorney both to file further motions in this case, and to file further motions to stay his sentence in, and attack the basis of, the BMC case. In plea counsel's affidavit submitted in support of the defendant's motion for new trial, counsel stated that had he "known about Dookhan's misconduct at

the time of the plea in the instant case, [he] would not have advised [the defendant] to plead guilty to the charges on May 25, 2010." "Similarly, [he] would have challenged the validity of the testing in [the BMC case] and [he] would have moved to vacate that conviction rather than recommend that [the defendant] accept the violation of probation and its sentence."

Discussion. 1. Governing standards. "A motion to withdraw a guilty plea is treated as a motion for a new trial pursuant to Mass. R. Crim P. 30 (b)." Commonwealth v. Resende, 475 Mass. 1, 12 (2016). "A motion for a new trial is . . . committed to the sound discretion of the judge." Id., quoting Commonwealth v. Scott, 467 Mass. 336, 344 (2014). Therefore, we review "to determine whether the judge abused that discretion or committed a significant error of law." Resende, supra, quoting Scott, supra. On factual issues, because the motion judge was not the plea judge, we are "in as good a position as the motion judge to assess" the record, and defer only on matters of credibility. Commonwealth v. Sylvain, 473 Mass. 832, 835 (2016), quoting Commonwealth v. Grace, 397 Mass. 303, 307 (1986).

Under the framework for evaluating motions to withdraw guilty pleas based on Dookhan's misconduct, our focus in this

case is the second prong of the Ferrara[2] analysis. See Scott, 467 Mass. at 354-355. "[T]he defendant must demonstrate a reasonable probability that he would not have pleaded guilty had he known of Dookhan's misconduct." Id. The defendant also must demonstrate that it would have been rational not to plead guilty. See id. at 356. In Scott, the Supreme Judicial Court identified a nonexhaustive list of factors that may be relevant to the reasonable probability test, but emphasized that this is a "totality of the circumstances" determination. Id. at 358. "Ultimately, a defendant's decision to tender a guilty plea is a unique, individualized decision, and the relevant factors and their relative weight will differ from one case to the next." Id. at 356. "The reasonable probability analysis must be based on the actual facts and circumstances surrounding the defendant's decision at the time of the guilty plea in light of the one hypothetical question of what the defendant reasonably may have done if he had known of Dookhan's misconduct." Id. at 357.

2. Scott factors. The defendant argues that the judge abused his discretion by limiting his focus to three Scott

[2] See Ferrara v. United States, 456 F.3d 278, 290 (1st Cir. 2006) (defendant must show that "some egregiously impermissible [governmental] misconduct attended the entry of [the] plea," and "that the misconduct influenced [the] decision to plead guilty").

factors and that he erred in analyzing those factors. We are not persuaded.

a. Strength of the Commonwealth's case. First, the defendant argues that the judge, in concluding that the Commonwealth's trafficking case was strong, overlooked the difficulty of proving beyond a reasonable doubt the identity of the two substances as cocaine. See Commonwealth v. Francis, 474 Mass. 816, 828 (2016). However, "[p]roof that a substance is a particular drug need not be made by chemical analysis and may be made by circumstantial evidence." Commonwealth v. Dawson, 399 Mass. 465, 467 (1987).

Here, the circumstantial evidence included the sandwich bags initially found on the defendant, the consciousness of guilt evidence from his initial encounter with police, the officer's discovery of a large yellow rock in the defendant's holding cell, and the officer's query whether the defendant had "any more crack on him," to which the defendant said, "Yes," and then pulled three large yellow rocks out of his pants. Compare Commonwealth v. Marte, 84 Mass. App. Ct. 136, 144 (2013) (circumstantial evidence insufficient to prove identity of substance where, among other things, defendant made no "incriminatory admission[s] about" substance). The judge did not err or abuse his discretion in concluding that the Commonwealth's case was strong.

b. Plea benefit versus exculpatory value of Dookhan's misconduct. The defendant next argues that the judge erred in concluding that the benefit of the plea agreement clearly outweighed the exculpatory value of Dookhan's misconduct. The defendant argues that, had he known of the misconduct, he would have pursued dismissal of the charges, sought a better plea agreement, and "may have gone to trial." We see no error. The defendant benefited considerably from the plea agreement, as he was able to avoid minimum mandatory sentences totaling seven and one-half years as well as having his sentence run forthwith, effectively negating the two-year sentence in the BMC case. The defendant's three-year sentence was less than half of the total minimum mandatory sentence he could have received in this case, see Commonwealth v. Antone, 90 Mass. App. Ct. 810, 818-819 (2017), and less than a third of the nine and one-half years he faced in the aggregate.

As for the exculpatory value of Dookhan's misconduct, the defendant and plea counsel assert that knowledge of the misconduct would have caused the defendant, on counsel's advice, not to accept the plea offer on May 25, 2010. Be that as it may, it was within the judge's discretion to consider plea counsel's proposed alternative measures and to conclude that they were not reasonably likely to have borne any fruit. See Scott, 467 Mass. at 357 ("a court attempting to answer this

question must use a wide-angled lens"). It is not enough that, if informed of Dookhan's misconduct just before pleading guilty on May 25, 2010, the defendant would not have gone through with the plea on that day and instead would have pursued further motions and negotiations. The defendant must show that those measures themselves would ultimately have created "a reasonable probability that he would not have pleaded guilty" and "would have insisted on taking his chances at trial." Id. at 355, 358. See Commonwealth v. Cotto, 471 Mass. 97, 117 (2015); Commonwealth v. Wallace, 92 Mass App. Ct. 7, 12-13 (2017).

The defendant's potential motion to dismiss the indictments would have been unlikely to succeed because the evidence that the defendant admitted he had more crack, and then pulled three large yellow rocks out of his pants, would have sufficed to establish probable cause. Compare Commonwealth v. McCarthy, 385 Mass. 160, 163 (1982) (grand jury must hear sufficient evidence to find probable cause to indict). Similarly, moving pursuant to Commonwealth v. O'Dell, 392 Mass. 445, 448-449 (1984), would have been unlikely to succeed because the prosecutor did not offer the Dookhan-related evidence knowing that it was tainted, and "our cases have required a showing that false or deceptive evidence was given to the grand jury knowingly and for the purpose of obtaining an indictment" (emphasis added). Commonwealth v. Mayfield, 398 Mass. 615, 621 (1986).

Nor do we see any abuse of discretion in the judge's conclusion that Dookhan's misconduct would not have provided sufficient leverage to obtain a better plea agreement. It is reasonable to conclude that, if the case had gone to trial, the Commonwealth would not have used Dookhan's testimony or certificates as evidence, and this rendered her misconduct essentially irrelevant and of no exculpatory value.

c. Special circumstances. The defendant also argues that the judge erred in concluding that knowledge of Dookhan's involvement in the BMC case would not have significantly influenced the defendant's decision to accept the guilty plea in this case. He claims that, had he known he had grounds to move to vacate the BMC conviction and dismiss that case, the "forthwith" aspect of the sentence agreed upon here, which essentially negated the BMC sentence, would have had no value and thus reduced his motivation to accept the plea agreement in this case. Again, we see no error.

The defendant makes the critical assumption that mere knowledge of Dookhan's misconduct would itself have sufficed to allow him to consider the BMC case as "no longer an issue," secure in the knowledge that that guilty plea would ultimately be vacated. But this assumption depends on many facts not in the record. The Scott factors have never been applied to the defendant's guilty plea in the BMC case. For example, the

record does not disclose whether the Commonwealth's case was so strong, even absent Dookhan-tainted drug certificates, that the defendant would have pleaded guilty nonetheless.

The April 2017 order vacating the BMC conviction was based not on any Scott-factor analysis as to whether the defendant would have pleaded guilty had he known of Dookhan's misconduct but, instead, was based on the District Attorney's determination that, assuming the defendant's plea were to be vacated, the District Attorney could not or would not reprosecute. See Bridgeman v. District Attorney for the Suffolk Dist., 476 Mass. 298, 326-327 (2017). Such a determination could have been based on any number of factors, including those related to the passage of time, and in no way establishes that the BMC guilty plea, when entered, would have been vulnerable to a Dookhan-based challenge. Thus, because the defendant has not shown (as is his burden here, see Scott, 467 Mass. at 354-355) that he could have counted on the BMC case evaporating, the "forthwith" aspect of the sentence to which the Commonwealth agreed here still had considerable value to him.

Additionally, as the judge here concluded, even if the BMC conviction could have been vacated at the time, that would not have negated the defendant's probation violations in that case, involving actions unrelated to Dookhan's misconduct. The violations were based on the defendant's arrest in this case, in

which he was initially charged not only with drug offenses but with trespass, breaking and entering in the daytime, and unlawful possession of a firearm and ammunition. Had the defendant gone to trial in this case and been convicted, the sentencing judge could have taken those nontainted probation violations as evidence that the defendant was less amenable to rehabilitation and thus deserving of sentences exceeding the mandatory minima. By accepting the plea agreement here, the defendant avoided that risk of longer sentences. See Resende, 475 Mass. at 18-19.

3. Additional Scott factors. The defendant also argues that the judge abused his discretion in overlooking six relevant Scott factors and failing to consider the corresponding evidence for those factors. See Scott, 467 Mass. at 355-358; Antone, 90 Mass. App. Ct. at 814-817. We see no error or abuse of discretion.

First, it bears repeating that "the relevant factors and their relative weight will differ from one case to the next." Scott, 467 Mass. at 356. In his decision, the judge listed the Scott factors and then discussed the strength of the Commonwealth's case without any discussion of what Dookhan's testimony and certificates would add to it. That discussion, in which the judge implicitly assumed that none of Dookhan's

evidence would be offered at trial, subsumed three of the Scott factors that the defendant argues were overlooked.[3]

Nor was it an abuse of discretion for the judge not to expressly address three other factors, where they would have added little to the analysis. One factor that added virtually nothing is "whether the drug-related charges were a minor component of an over-all plea agreement." Scott, 467 Mass. at 357. There were no nondrug indictments here, and thus no reason for the judge to discuss this factor.

As for "whether evidence of the government misconduct could have detracted from the factual basis used to support the guilty plea," id. at 355, there is no question that had the drug certificates been used as that factual basis, evidence of Dookhan's misconduct could have detracted from it. However, because the defendant did not offer the transcript of the change of plea hearing in evidence, he has not shown whether the prosecutor relied on the certificates, or the defendant's statements and actions in the holding cell, or both. Thus, because it would have been sufficient if the prosecutor had relied solely on the defendant's statements, the defendant has

[3] Those subsumed factors are: whether Dookhan's misconduct could have been used in potentially outcome-determinative witness impeachment; whether the misconduct was cumulative of preexisting evidence; and whether the misconduct would have influenced counsel's recommendation regarding a plea offer. See Scott, 467 Mass. at 355-356.

not met his burden of showing that this factor weighs in his favor. See id. at 354-355.

As for "whether the defendant had a substantial ground of defense that would have been pursued at trial," id. at 356, the defendant suggests that the weight of the cocaine would have been a significant issue. But the Commonwealth did not need the Dookhan evidence to prove the weight, because the police had weighed the substances at the police station. Furthermore, any issue as to weight had already been taken into account in the Commonwealth's charge concession, allowing the defendant to plead guilty to a reduced charge of trafficking fourteen to twenty-eight grams of cocaine.

4. Credibility findings. The defendant argues that the judge erred in not making explicit credibility determinations regarding the defendant or plea counsel. But the judge was free to discredit the defendant's self-serving affidavit, and he did so at least as to the defendant's version of events in the holding cell. Otherwise, no credibility findings were required, because the judge could have reached the result he did here even after crediting the defendant's and plea counsel's statements regarding what they would have done had they known of Dookhan's misconduct.

5. Due process violations. Finally, the defendant argues that, in light of Dookhan's misconduct, his plea violated his

due process rights under both the United States Constitution and art. 12 of the Massachusetts Declaration of Rights. But the defendant has not articulated a due process argument that is independent of his argument that the Dookhan evidence rendered his plea unintelligent and involuntary. Because the Scott analysis has produced the conclusion that the defendant ultimately was not likely to have rejected the plea agreement, we see no separate basis for a claim that the plea was not knowing and voluntary. See Scott, 467 Mass. at 358-362.

Order denying motion for new trial affirmed.

By the Court (Meade, Sacks & Englander, JJ.[4]),

Joseph F. Stanton

Clerk

Entered: May 19, 2020.

[4] The panelists are listed in order of seniority.

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No. 2019-P-0217

COMMONWEALTH

v.

JEAN TOUSSAINT

ON APPEAL FROM A POST-CONVICTION ORDER
OF THE SUFFOLK SUPERIOR COURT

BRIEF OF THE APPELLANT

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ISSUES PRESENTED

1. In cases where Annie Dookhan was the primary chemist and her egregious misconduct was unknown to the defense, a motion to withdraw a guilty plea must be allowed if there is a reasonable probability that the defendant would not have entered the same plea agreement with knowledge of Dookhan's misconduct. Here, the motion judge erred and overlooked several crucial factors supporting a reasonable probability that Jean Toussaint would not have entered the same plea if he had known about Dookhan's misconduct or the strong defenses that misconduct created. Must this Court reverse the denial of Toussaint's Motion For A New Trial?

STATEMENT OF THE CASE

Toussaint is appealing the denial of his Motion For A New Trial. A-10.[1]

On August 3, 2009, Toussaint was indicted as follows:

Count 1 – trafficking in cocaine over 28 grams, M.G.L. c.94C § 32E (b)(2)

Count 2 – school zone violation, M.G.L. c.94C § 32J

A-6. Toussaint pled not guilty to both counts. A-10.

[1] Citations to the Record Appendix are A-page#. Citations to the Addendum are Add-page #. Citations to the evidentiary hearing transcript are T-page#.

On May 25, 2010, the day of trial, Toussaint entered a guilty plea by agreement. A-8. The plea was entered before the Honorable Cratsley, J. A-8. As negotiated by plea counsel (without knowledge that Dookhan's misconduct created a strong defense), the terms of the agreement were as follows:

Count 1- Toussaint pled guilty to the lesser included trafficking in cocaine over 14 grams (M.G.L. c.94C § 32E (b)(1)[2], in exchange for a minimum mandatory sentence of 3 years to 3 years and a day in state prison, to be served forthwith notwithstanding a jail sentence Toussaint was currently serving on a BMC-Roxbury case.

Count 2 - dismissed
A-8.

On March 15, 2018, after Annie Dookhan's egregious misconduct had been discovered and Toussaint had learned of that misconduct and what it meant for his case, Toussaint filed a Motion For A New Trial. A-9. Toussaint was represented by prior appellate counsel on the Motion For A New Trial. A-9,35.

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[2] The statutory drug weights for cocaine trafficking under M.G.L. c.94C § 32E (b)(1) and (b)(2) have since been changed after Toussaint's 2009 indictment and 2010 plea, such that now any defendant indicted for trafficking between 18-36 grams of cocaine faces only a two year minimum mandatory sentence, and a defendant indicted for trafficking 36-100 grams now faces only a 3 and ½ year minimum mandatory sentence.

The Motion For A New Trial was supported by exhibits, including an affidavit of plea counsel. A-83.

On August 3, 2018, the Commonwealth filed an Opposition to the Motion For A New Trial. A-90. On November 30, 2018, an evidentiary hearing was held in Suffolk Superior Court. A-9,99.

On December 11, 2018, just eleven days after the evidentiary hearing and before the transcript of the hearing was ready, the motion judge (the Honorable Ullmann, J., who was not the plea judge) denied the Motion For A New Trial. A-9,125. Toussaint filed a timely notice of appeal. A-10. Represented by successor appellate counsel, Toussaint appeals.

STATEMENT OF RELEVANT FACTS

The alleged crime and plea

On February 28, 2009, members of the Boston Police Department arrested Jean Toussaint for allegedly trespassing at 95 Milton Avenue in Dorchester.[3] A-81.

[3] The factual record below was primarily based on a police report submitted with the new trial motion. Neither prior appellate counsel nor the Commonwealth submitted the grand jury minutes or the plea transcript as part of the record. A-36.

Police allegedly observed Toussaint and Rohan Anderson standing outside an apartment building at 95 Milton Avenue. A-36,81. Having received a prior complaint about young men trespassing outside the building, police approached Toussaint and Anderson. A-81. According to the police, the men buzzed doorbells until the door to the building opened. A-81. Police followed the men into the building at 95 Milton Avenue. A-81. One officer followed Anderson and seized him at the back of the building. A-81. Another officer followed Toussaint. According to the police, Toussaint was allegedly seen attempting to enter an apartment. A-36,81.

Toussaint was arrested for trespassing, handcuffed, and taken into custody. A-81. Police allegedly observed Toussaint with a box of sandwich bags. A-81.

At the police station, Toussaint was placed in a holding cell. Toussaint was still handcuffed. A-81. Boston Police Officer Michael Brown (who had only been in the Drug Unit for one month when this incident occurred) observed some trash on the floor of Toussaint's holding cell, including a partially eaten ham

and egg sandwich that had already been in the cell prior to Toussaint's arrival. A-37,81. Officer Brown claimed he looked inside the sandwich and saw a substance that appeared to be consistent with crack cocaine. A-81.

Officer Brown allegedly ordered Toussaint to put everything he had on him out for police to seize. A-37. The police report alleged that Officer Brown asked Toussaint if he had any cocaine on his person and Toussaint responded yes and produced a bag. A-81. However, in the grand jury transcript (which was cited by the parties but not produced as evidence below), Officer Brown admitted that rather than asking Toussaint if he had any crack on his person in the holding cell, the officer really asked "Everything you have on you – we want it. Put it in the bag" after which Toussaint produced a bag. A-37, citing GJ 21-23.

According to Officer Brown, Toussaint physically removed a bag from his pants. A-81. Inside that bag was a rock-like substance appearing to be "consistent with" cocaine. A-81. As such, the police found one bag of a substance inside a sandwich on the floor of the cell, and a different second bag was on

Toussaint's person. A-81. The police did not perform any field tests on the substances. A-81.

The police also allegedly found a quantity of a substance believed to be cocaine on the person of Rohan Anderson. A-81. Police also allegedly observed Anderson carrying a firearm. A-81. Police claimed Anderson threw the firearm in the back of the building. A-81.

Toussaint and Anderson were both indicted in Suffolk Superior Court. A-11,23,26. After Annie Dookhan allegedly analyzed the substances as the primary chemist in June 2009 and drug certificates of analysis were produced in discovery (A-13-15), the Commonwealth listed Dookhan on the witness list as an expert witness and the only chemist that would testify at the scheduled trial. A-20.

Toussaint pled not guilty and vigorously fought the indictments. A-7. Toussaint filed a motion to suppress and a motion to dismiss. A-8. After those motions were denied, Toussaint's case was eventually scheduled for trial. A-8.

However, on May 25, 2010, on the day of trial, Toussaint

entered a guilty plea by agreement. A-8.

At the time of Toussaint's 2009 arrest and 2010 guilty plea, Annie Dookhan was committing egregious misconduct at the Hinton Lab

The actions of former chemist Annie Dookhan at the Hinton Lab, which came to light in 2012, are now widely known. As the S.J.C. summarized in Scott:

> Perhaps most concerning, Dookhan admitted to "dry labbing" for two to three years prior to her transfer out of the lab in 2011, meaning that she would group multiple samples together from various cases that looked alike, then test only a few samples, but report the results as if she had tested each sample individually. *Dookhan also admitted to contaminating samples intentionally, including turning negative samples into positive samples on at least a few occasions*. Moreover, Dookhan has acknowledged to investigators that she may not be able to identify those cases in which she tested the samples properly and those in which she did not.

See Commonwealth v. Scott, 467 Mass. 336, 339-340 (2014)(emphasis added).

In 2013, after Toussaint had unknowingly pled guilty without knowledge of Dookhan's misconduct, Dookhan pleaded guilty to twenty-seven counts of criminal misconduct, including tampering with evidence, perjury, and obstruction of justice. Commonwealth v. Rodriguez, 92 Mass. App. Ct. 774,776 (2018).

Dookhan's admitted wrongdoing in the form of "dry labbing" and converting "negatives to positives" took place while Dookhan was serving as the primary chemist responsible for those samples. Scott, 467 Mass. 336,341 (2014).[4]

What that means in clearer terms is this: in some unknown cases when Dookhan was the primary chemist, Dookhan took substances that were not cocaine (perhaps substances that were counterfeit or legal substances) and she contaminated the samples to make them render a positive drug result. Scott, 467 Mass. at 339-340. As the primary chemist, Dookhan would then give a sample from the now-contaminated sample to a confirmatory chemist. Id. Thus, the substance tested by the confirmatory chemist was tainted. See id.

Dookhan admitted she could not identify which cases she tested properly and which cases she engaged in misconduct as

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[4] Dookhan also engaged in multiple additional forms of egregious misconduct at the lab when she was a confirmatory chemist. The Inspector General's report on the Hinton Lab investigation is available at: http://www.mass.gov/ig/publications/reports-and-recommendations/2014/investigation-of-the-drug-laboratory-at-the-william-a-hinton-state-laboratory-institute-2002-2012.pdf

the primary chemist. Id. The Commonwealth has conceded it could not prove that Dookhan did not tamper with or contaminate a substance in any particular case. See Commonwealth v. Gardner, 467 Mass. 363, 367 (2014).

Annie Dookhan was the primary chemist for Toussaint's case

Dookhan was the primary chemist assigned to the custody, handling, and testing of the substances in Toussaint's case. A-13. As the primary chemist, Dookhan was responsible for testing the bag found inside the sandwich in the holding cell, the bag that was on Toussaint's person, and the quantity of substance found on Anderson. A-13-15.

The drug certificates of analysis reveal the substances were received by the Hinton Lab on March 3, 2009. A-13. The certificates state Dookhan analyzed the substances as the primary chemist on June 22, 2009. A-13. As such, the drug certificates were signed before Toussaint's guilty plea. A-13. According to Dookhan, one bag tested positive as cocaine with a weight of 27.17 grams. The other bag also allegedly tested positive as cocaine with a weight of 29.05 grams. A-13,14.

The Suffolk District Attorney's Office agreed to vacate the co-defendant Anderson's drug charges in the interests of justice but not Toussaint's charges

As this Court is aware, the scope and magnitude of Dookhan's misconduct caused the S.J.C. to order the District Attorneys to agree to vacate and dismiss certain drug cases where Dookhan was the primary or confirmatory chemist and the Commonwealth could not reprosecute if a new trial was granted. See Bridgeman v. District Attorney, 476 Mass. 298,326 (2017)(Bridgeman II).

Although Annie Dookhan was the primary chemist on Toussaint's case, former Suffolk County District Attorney Daniel Conley's Office did not agree to vacate Toussaint's conviction. A-90. Toussaint's case was one of the rare convictions where a new trial was not vacated by agreement even though Dookhan was the primary chemist. A-90.

Alarmingly, even Toussaint's co-defendant Anderson had his case vacated by agreement. A-30,31. See Commonwealth v. Anderson, 0984-CR-10724 (April 19, 2017 Order, Gaziano, J.)(drug indictments vacated and dismissed with prejudice).

Anderson's case involved the same incident, with the substance seized from Anderson going to the Hinton Lab on the same date as the substances attributed to Toussaint. A-13-15,81. Dookhan was the primary chemist for all the substances and purportedly tested them all on the same date. A-13-15. Yet the Commonwealth agreed to vacate and *dismiss* Anderson's charges in the interests of justice while unfairly refusing to allow Toussaint to obtain even a new trial. A-30.

On information and belief, the only difference between Toussaint's case and Anderson's case was the quantity of the substances allegedly found on their persons. A-13,15. The constitutional error (Dookhan's withheld misconduct) and the Commonwealth's lack of ability to re-prosecute appear to be the same for both Toussaint and Anderson's cases (there were no field tests, informants, or controlled buys, Dookhan was the primary chemist with custody of the substances, and Dookhan admitted she could not identify which cases she tampered with). A-81. The Commonwealth's Opposition to Toussaint's new trial motion was filed before the new Suffolk County District Attorney

took office. A-98.

Toussaint sought to withdraw his guilty plea and testified at an evidentiary hearing in support of his Motion For A New Trial

After learning of Dookhan's misconduct and post-Bridgeman notification of how Dookhan impacted his case, Toussaint sought to withdraw his guilty plea and go to trial on the indictments. A-9,32. Toussaint submitted a sworn affidavit in support of his Motion For A New Trial. A-87. Toussaint also testified at the evidentiary hearing. A-99-123, T-4.

Toussaint was 28 years old at the time of the evidentiary hearing (he was only 18 years old at the time of his arrest on this case). T-4. Toussaint was a high school graduate who had completed some college courses. T-5.

Toussaint candidly acknowledged that for this Superior Court drug case, he was facing a five-year minimum mandatory prison sentence and two and a half years for the school zone violation. T-7. Toussaint pled guilty in exchange for a sentence of three years to three years and a day, with the sentence being imposed forthwith so he would not have to do more time on his

BMC-Roxbury matter. T-7.

When Toussaint pled guilty, one of his main concerns was that he would not do more jail or prison time for a probation violation on a BMC-Roxbury case. T-8. At the time Toussaint was arrested for this Suffolk Superior Court case in 2009, Toussaint was already on probation for a prior possession with intent to distribute cocaine case out of BMC-Roxbury (0802-CR-000571). T-5.

As a result of this new case, Toussaint's probation was revoked on the BMC-Roxbury case. T-6. On May 13, 2010, two weeks before his plea in this Superior Court case, Toussaint received a probation violation sentence of two years in the house of correction for that BMC-Roxbury case. T-14.

Toussaint had the same plea attorney for this case and his BMC-Roxbury case. T-14. As part of the plea deal in Superior Court for this case, Toussaint's jail sentence for the BMC-Roxbury matter was effectively wiped out by his forthwith prison sentence on this Superior Court case. T-7.

A major incentive for Toussaint to plead guilty to this case

in Superior Court was the part of the plea agreement that made the sentence forthwith to help eliminate the BMC-Roxbury jail sentence. T-14. But what Toussaint did not know was that for his BMC-Roxbury drug case, Dookhan was the chemist and that BMC-Roxbury case was ultimately vacated and dismissed with prejudice. T-11, A-76.

Before his guilty plea in Superior Court on this case, Toussaint reviewed the discovery and he was aware the Commonwealth was claiming the substances were cocaine. T-9. Toussaint knew the substances were tested at the drug lab. T-9, A-13. Toussaint mistakenly thought he could not have challenged the drug testing results. T-10, A-13,20.

Back in 2010 before he pled guilty, Toussaint did not know anything about Dookhan. T-10. After his guilty plea, Toussaint learned about the misconduct that Dookhan admitted to committing. T-11.

If Toussaint had known about Dookhan's misconduct at the time of his guilty plea, Toussaint would not have entered the guilty plea. T-11, A-83,87. Toussaint would have asked his plea

attorney to file further motions. T-11, A-89. Toussaint would have told his plea attorney to seek discovery and to seek dismissal. T-12,13, A-89.

If Toussaint had known Dookhan was also involved in his BMC-Roxbury case, he would have asked his plea attorney to stay his conviction or jail sentence. T-12, A-89. If he knew about Dookhan on both cases, Toussaint would have sought alternatives to the plea offer. T-13, A-89.

The Commonwealth did not call any witnesses or introduce any exhibits to rebut Toussaint's testimony or the defense exhibits. A-99-124.

Plea counsel's unrebutted affidavit

In addition to Toussaint's testimony, Toussaint offered a sworn affidavit from his plea attorney. A-83-85.

Plea counsel's affidavit averred that if he knew about Dookhan's misconduct, he would have advised Toussaint to not accept the guilty plea offer on May 25, 2010, he would have pursued additional discovery, pursued a motion to dismiss this case, attempted to vacate Toussaint's BMC-Roxbury conviction,

and obtained an expert to challenge the claimed identity and weight of the substances, or sought further plea concessions based on Dookhan. A-83-85.

Plea counsel's sworn affidavit was admitted into evidence without objection. T-17. The Commonwealth specifically did not object to the defense admitting plea counsel's affidavit as evidence at the evidentiary hearing. T-17. The Commonwealth did not argue that plea counsel's affidavit was untruthful or introduce any rebuttal evidence. T-17.

The motion judge's decision

The evidentiary hearing was held in Suffolk Superior Court on November 30, 2018. A-9,99. Just eleven days later, the motion judge issued a decision on December 11, 2018. A-99. The transcript of the evidentiary hearing was not produced until January 23, 2019. A-124.

SUMMARY OF THE ARGUMENT

The motion judge erred as a matter of law and abused any discretion in denying Toussaint's Motion For A New Trial. Dookhan was the primary chemist on this case, Dookhan had

exclusive control of the substances for much of the time they were in the lab, Dookhan's claimed testing was the only evidence of chemical composition of the substances, and Toussaint would not have knowingly entered that plea if he had been properly informed of Dookhan's egregious misconduct or how it created additional defenses. As such, Toussaint's plea was not intelligently or voluntarily entered and the conviction violates his constitutional due process rights.

Of the numerous factors to be considered in these types of motions listed in Commonwealth v. Scott and raised by Toussaint, the motion judge considered only three of the relevant factors. As to those factors, the judge's analysis was clearly erroneous and an abuse of any discretion. pp.23-48.

As to the relevant factors the motion judge overlooked, the failure to consider those factors was an error of law and an abuse of any discretion. The overlooking of those factors requires, at a minimum, a remand for further findings. pp.49-64.

However, when the overlooked factors are actually analyzed in connection with the evidence presented and the circumstances

of this case, it is clear Toussaint's plea was not intelligently or voluntarily entered. There is a reasonable probability Toussaint would not have entered the same plea if he had been properly informed of Dookhan's egregious misconduct. As such, justice was not done. This Court should reverse the denial of the Motion For A New Trial and order that the Motion For A New Trial be allowed. pp.65-67.

ARGUMENT

Long ago, the United States Supreme Court held that reviewing courts have a duty "to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity." Mesaroah v. United States, 352 U.S. 1, 14 (1956). Here, Dookhan tainted the waters of justice and caused Toussaint to unintelligently and involuntarily enter a guilty plea.

1. **The motion judge committed an error of law and an abuse of any discretion in denying Toussaint's Motion For A New Trial.**

A. Standards of review.

A motion to withdraw a guilty plea is treated as a motion

for a new trial under Mass. R. Crim. P. 30(b) and should be allowed if "it appears that justice may not have been done." Commonwealth v. Scott, 467 Mass. 336,344 (2014). Appellate courts ordinarily review the denial of a motion to withdraw a guilty plea to determine whether the judge committed a significant error of law or an abuse of discretion. Id. See also L.L. v. Commonwealth, 470 Mass. 169,185 n.27 (2014).

However, because Toussaint raised constitutional due process claims in his motion, this Court should "exercise its own judgment on the ultimate factual as well as legal conclusions." See Commonwealth v. Salvati, 420 Mass. 499,500 (1995); A-34. Additionally, because the motion judge was not the plea judge, this Court is "in as good a position as the motion judge to assess" the record, and this Court defers to the motion judge only on matters of credibility. Commonwealth v. Sylvain, 473 Mass. 832, 835 (2016); Commonwealth v. Golding, 93 Mass. App. Ct. 1113 (June 6, 2018)(Rule 1:28). This Court will accept the judge's findings of fact only if supported by the evidence. Scott, 467 Mass. at 344.

A motion judge “has no discretion to deny a new trial" if the original proceeding was “infected with prejudicial constitutional error." See Earl v. Commonwealth, 356 Mass. 181, 184 (1969); Commonwealth v. Nieves, 429 Mass. 763, 770 (1999). A motion judge has no discretion to deny such a motion if it appears a guilty plea was not entered voluntarily or intelligently. See Brady v. United States, 397 U.S. 742,748-49 (1970); Scott, 467 Mass. at 344; Huot v. Commonwealth, 363 Mass. 91, 96 (1973).

Due process requires that "a guilty plea or admission should not be accepted, and if accepted must be later set aside," unless the defendant's plea was intelligently and voluntarily made. Commonwealth v. Foster, 368 Mass. 100, 102 (1975), citing Boykin v. Alabama, 395 U.S. 238 (1969).

The Commonwealth always bears the burden of establishing that a guilty plea was intelligently and voluntarily made. Commonwealth v. Furr, 454 Mass. at 107 (2009); Commonwealth v. Duquette, 386 Mass. 834, 841-843 (1982).

Additionally, for cases involving chemist Dookhan where a claim of unknown egregious misconduct is made, this Court

applies a two-part test for analyzing a motion to withdraw a guilty plea: the defendant must show (1) "egregious government misconduct preced[ing] the entry of his guilty plea" and (2) "a reasonable probability that he would not have pleaded guilty had he known of Dookhan's misconduct." Scott, 467 Mass. at 347, 354-358.

With respect to the first Scott prong, "the defendant is entitled to a conclusive presumption that egregious government misconduct occurred" if he presents a drug certificate from his case that was signed by Dookhan as an analyst. Id. at 352. In Toussaint's case, Dookhan was the primary chemist who had custody of the substances (A-13), and so this Court presumes the existence of egregious government misconduct in Toussaint's case. See id.

As such, this appeal focuses on the second Scott prong – whether there is a reasonable probability that Toussaint would not have entered that guilty plea if he had known about Dookhan's misconduct. Scott, 467 Mass. at 354-358.

A defendant need not establish that he absolutely would

have ended up going to trial. Instead, a defendant must show only that he would have rejected the plea agreement that entered. See United States v. Fisher, 711 F.3d 460, 469 (4th Cir. 2013)(plea must be vacated because if defendant had known of misconduct, he would have pursued a motion to suppress instead of entering that guilty plea); Scott, 467 Mass. at 354-355; Commonwealth v. Clarke, 460 Mass. 30, 47-48, n.18 (2011)(prejudice may also be shown where, if defendant and counsel had been properly informed, counsel would have negotiated a different plea agreement).

B. The evidence established a reasonable probability that Toussaint would not have intelligently entered the same guilty plea if he knew about the egregious misconduct of former chemist Annie Dookhan, who was the primary chemist on Toussaint's case.

i. For the three Scott factors that the motion judge did consider, the judge's conclusions are clearly erroneous.

The motion judge's decision erroneously focused on just three of the factors relevant to the analysis of whether there is a reasonable probability that Toussaint would not have entered that guilty plea had he known about Dookhan's misconduct. See

Scott, 467 Mass. at 355-358 (setting forth non-exclusive list of factors to consider).

The motion judge made a clear error of judgment in weighing these factors. The judge erred as a matter of law and abused any discretion. This Court should exercise its own judgment and reverse the motion judge's decision.

a. The motion judge made a clear error of judgment in weighing the strength of the Commonwealth's case.

The motion judge concluded Toussaint still would have entered the same exact guilty plea even if he knew about Dookhan's misconduct because "the evidence of Toussaint's drug trafficking activity, in concert with Anderson, was extremely strong." A-129. The motion judge's analysis of the strength of the Commonwealth's case was an error of law, an error of judgment, and an abuse of any discretion.

The motion judge was wrong that the Commonwealth's trafficking case is strong. The Commonwealth's overall case was certainly stronger before we knew about Dookhan's misconduct. And the Commonwealth does still have some evidence of

possession of a substance and circumstantial evidence of intent. But those are not the only elements to the crime of trafficking.

The motion judge entirely overlooked the element of proving beyond a reasonable doubt the chemical composition or identity of the two substances (the bag in the ham sandwich on the floor and the bag allegedly on Toussaint's person) as cocaine. Because of Dookhan's misconduct, the Commonwealth's case is very weak when it comes to proving the substances were actually cocaine.

For trafficking in cocaine, the relevant elements are possession of a substance, identity of the substance as cocaine, intent to distribute, and proof of the requisite quantity or weight. See Commonwealth v. Francis, 474 Mass. 816, 828 (2016). Most relevant here, the Commonwealth needed to prove the substance was actually cocaine and not a counterfeit or non-narcotic or non-cocaine substance.

The evidence of Dookhan's misconduct included evidence that Dookhan intentionally turned negative drug samples into positive samples. Because Dookhan was the primary chemist in

Toussaint's case and she had custody of the substances, evidence of Dookhan's misconduct substantially weakens the ability of the Commonwealth to prove the identity of the substance beyond a reasonable doubt (and to prove Dookhan did not tamper with the substance).

In light of Dookhan's misconduct, the strength of the Commonwealth's case should be viewed as if Dookhan's drug certificate and testimony were inadmissible and as if there was no re-testing. In Toussaint's case, the motion judge entirely failed to analyze what other evidence the Commonwealth had to prove the identity of the substances if the drug certificates and Dookhan's testimony were inadmissible. That error is important because direct evidence of the identity of the substance as cocaine (besides Dookhan's tainted drug certificate) was lacking and circumstantial evidence was weak at best.

Here, there were no police field tests. Contrast Commonwealth v. Connolly, 454 Mass. 808, 831 (2009). There were no controlled buys, no informants, and none of the police officers ever observed the effects of the substances on anyone

ingesting them. See Commonwealth v. Dawson, 399 Mass. 465, 467 (1987). Even if the non-expert police officers involved in the arrest suspected the substance looked like crack cocaine, the Commonwealth needed more evidence. See Commonwealth v. Vasquez, 456 Mass. 350, 365 (2009)("it would be a rare case in which a witness's statement that a particular substance looked like a controlled substance would alone be sufficient to support a conviction."); Commonwealth v. LaVelle, 414 Mass. 146, 148 (1993) (undercover bought a substance which detectives "presumed to be cocaine" but a lab test proved it was not).

Even though the Commonwealth had some evidence tying Toussaint to wrongdoing or drug-dealing, the Commonwealth still needed to prove the identity of the substance beyond a reasonable doubt. Although sometimes circumstantial evidence has been deemed sufficient to prove chemical identity in other cases, any such circumstantial evidence of identity was weak and lacking in this case.

Even if Toussaint allegedly possessed a substance, and even if the Commonwealth alleged that Toussaint himself

suspected the substance might be cocaine or produced a bag when asked if he had any cocaine[5], that possession does not prove that Toussaint actually knew the substance in that bag was definitely crack cocaine. Even if the police believed Toussaint thought the bag was crack cocaine, there was no evidence that Toussaint had ever ingested the substance to be sure it was actually cocaine and not counterfeit. See Commonwealth v. Golding, 93 Mass. App. Ct. 1113 (June 6, 2018)(Rule 1:28)(without the tainted inadmissible drug certificates, what remained of the Commonwealth's case was weak as to proof of identity of substances; "an alleged drug dealer's statements that his drugs are real is worth little…").

The only direct evidence of the identity of the substance would have come from trustworthy chemical analysis. Dookhan's misconduct erases any claim of credible testing. See Commonwealth v. Gaston, 86 Mass. App. Ct. 568,574 (2014)

[5] Officer Brown admitted that rather than asking Toussaint if he had any "crack cocaine" on his person in the holding cell, he really asked "Everything you have on you – we want it. Put it in the bag" after which Toussaint did allegedly produce a bag. A-37.

("[P]roof of Dookhan's wrongdoing as it related to the defendant's case provides its own shadow of reasonable doubt about the nature of the substances tested"). The substances and the testing results are both tainted.

Without Dookhan or chemical testing, the Commonwealth could have attempted to prove identity of the substance with only circumstantial evidence. However, without chemist testing, the Commonwealth's case was weak on the element of identity of the substance. That weakness (and Dookhan's misconduct) creates a complete defense to trafficking, and supports the probability that Toussaint would have rejected the plea.

Moreover, when performing this analysis, which the motion judge failed to do, the S.J.C. has instructed that the possibility of retesting in the future done by another chemist may not be considered.[6] See Scott, 467 Mass. at 357-358. Instead, motion

[6] Although speculation about re-testing is not permitted, re-testing does not appear to be a viable option here. See Gardner, 467 Mass. at 367 (2014)(Commonwealth concedes it cannot prove Dookhan did not tamper with certain substances). This is not a case where Dookhan was merely the confirmatory chemist or where another chemist had custody of the substance that could be retested without any fear that it had been tampered with.

judges are supposed to look at whether there was other sufficient circumstantial evidence of identity. Here that evidence was lacking. As such, the motion judge erred and abused any discretion in concluding the Commonwealth's case was strong.

Further, when analyzing the strength of the Commonwealth' case, the judge also entirely overlooked the value of a so-called Dookhan trial defense. If the case went to trial without a drug certificate and without expert chemist testimony and without any retesting, the defense would also be entitled to present a strong, complete defense arguing that Dookhan tampered with substances in this case. See Commonwealth v. Chester Williams, 93 Mass. App. Ct. 1121 (July 26, 2018)(Rule 1:28)(noting motion judge's focus on the generosity of the plea deal "presupposes that, had he gone to trial, he both would have been incarcerated and would have been found in violation of probation…he had a substantial ground of defense on both counts and therefore very well could have avoided incarceration on them.").

For these reasons, the motion judge erred and abused any

discretion. The weakness of the Commonwealth's case, on the element of identity of the substance, supports the reasonable probability that Toussaint would not have entered this guilty plea if he knew of Dookhan's misconduct. As such, this Court should reverse the motion judge's decision.

b. The motion judge made a clear error of judgment in weighing whether the exculpatory value of Dookhan's misconduct was outweighed by the benefits of the plea agreement.

The motion judge erred in concluding the benefit of the plea agreement clearly outweighed the exculpatory value of Dookhan's misconduct.

Toussaint was facing a sentence of 7 ½ years in prison (five years mandatory for the trafficking over 28 grams and two and one-half years for the school zone violation) if he was convicted at trial. Under the terms of the plea agreement, Toussaint received a prison sentence of three years to three years and a day. Before anyone knew about Dookhan's misconduct, the plea agreement did provide some benefit, in that it removed the risk of an additional 4 ½ years in prison.

But three mandatory years in state prison (with no parole and minimal programming at that time) was still a long time for Toussaint to serve in state prison. That sentence was particularly harsh for someone like Toussaint who had never served a state prison sentence before. A-84 ("I considered this plea offer good but not exceptional, especially given that this was Mr. Toussaint's first state prison incarceration.").

Based on the benefit of getting less years in prison *before anyone knew about Dookhan's misconduct*, the judge reasoned such a plea concession "strongly supports a conclusion that the defendant chose voluntarily to plead guilty." A-130.

The main error of law and judgment in the judge's conclusion is that the judge did not ever actually analyze the exculpatory value of Dookhan's misconduct. The judge saw there was a benefit to the plea (in terms of the number of years in prison), and then the judge did not take the next step of comparing the plea concession to the value of Dookhan's misconduct.

Dookhan's egregious misconduct had an exculpatory value

that substantially outweighed the benefit of getting a plea offer for three years in state prison. The nature of Dookhan's evidence tampering (intentionally changing negative samples into positives and admittedly not being able to identify which cases she did that in), combined with her crucial, custodial role in Toussaint's case, created multiple strong grounds of defense. With knowledge of Dookhan's misconduct, Toussaint and plea counsel would have rationally pursued dismissal or a plea agreement for less than three years or gone to trial. A-84-89.

Dookhan's misconduct had value in that it created grounds for a motion to dismiss for failure to introduce exculpatory evidence at the grand jury in this case (and in support of the complaint for the BMC-Roxbury case). See Fisher, 711 F.3d 460, 469 (4th Cir. 2013). The Commonwealth introduced Dookhan's drug certificate of analysis at the grand jury as the only evidence proving the two substances (the bag in the ham sandwich and the bag allegedly on Toussaint's person) were actually cocaine. The S.J.C. has held Dookhan is an agent of the prosecution for discovery purposes and thus Dookhan's knowledge of her own

tampering is attributable to the Commonwealth. See Bridgeman v. District Attorney, 476 Mass. 298, 315 (2017)(Bridgeman II)("prosecutors had a responsibility timely and effectively to disclose Dookhan's misconduct"); Scott, 467 Mass. 336 (Dookhan is an agent of the Commonwealth for discovery); Commonwealth v. Martin, 427 Mass. 816,823 (1998).

Because Dookhan was an agent of the Commonwealth for Toussaint's case, the Commonwealth had a duty to present the exculpatory evidence about Dookhan's misconduct to the grand jury before they decided whether the substances were actually cocaine. Commonwealth v. O'Dell, 392 Mass. 445,447 (1984). Instead, the Commonwealth introduced Dookhan's drug certificate of analysis at the grand jury without telling the grand jury she changed negative samples into positives. A-13 (certificate with grand jury exhibit sticker). Although this case involves a ham sandwich, and although it has been said that a skilled prosecutor could get a grand jury to indict a ham sandwich, a motion to dismiss (based on the failure to present Dookhan's misconduct) had merit. O'Dell, 392 Mass. at 447.

Where Dookhan hid her misconduct until after the indictments in Toussaint's case, it would have been rational to pursue a meritorious motion to dismiss. Toussaint and his plea counsel both averred they would pursue a motion to dismiss if they had been properly informed. A-85-89.

Dookhan's misconduct also had great value in that it provided strong leverage for the defense to seek a better plea agreement. See Clarke, 460 Mass. 30, 47-48, n.18. If the prosecution was willing to offer Toussaint a deal for three years in prison before anyone knew about Dookhan's misconduct, what kind of deal would the prosecution honestly have been willing to offer after it was revealed that Dookhan was committing egregious tampering misconduct and Dookhan was the primary chemist in this case?

And while appellate courts performing a Scott analysis are not supposed to consider the possibility of retesting the substances, it is relevant here that Dookhan was the primary chemist with custody of the substance (this is not a case where another chemist had custody and the substance could be re-

tested with a claim that Dookhan never accessed it). It is reasonable to believe the Commonwealth would have made an improved plea concession to Toussaint in light of Dookhan's misconduct and her primary role in this case. Dookhan's misconduct had great value and changes the entire tenor of this case. See Commonwealth v. Williams, 93 Mass. App. Ct. 1121 (July 26, 2018)(Rule 1:28)("The tainted certificate at least would have given him leverage to negotiate a better deal...").

Dookhan's misconduct also had tremendous value as a trial defense. See Scott, 467 Mass. at 355-358; Ferrara v. United States, 456 F.3d at 290-297. If Toussaint knew about Dookhan's misconduct, he would not have entered the plea that he entered. A-85,89. If a motion to dismiss or renewed plea negotiations had not resulted in a more favorable result, Toussaint may have gone to trial. A-89. That assertion is further supported by the fact that Toussaint vigorously fought this case with pretrial motions and only pled guilty on the day of trial. A-8.

At a trial, evidence of Dookhan's misconduct had great exculpatory value. Dookhan was the primary chemist with

exclusive custody of the substances. See Commonwealth v. Resende, 475 Mass. 1,8 (2016)(discussing important role of primary chemist). Because Dookhan was the primary chemist and had custody of the substances, there was a strong defense argument that the jury should not credit Dookhan's testing results. That is an extremely valuable defense theory because Dookhan's testing results were the only direct evidence to prove the identity & chemical composition of the substances.

Based on the facts of this case and Dookhan's role, Toussaint had a strong, unknown defense theory that the Commonwealth could not prove the chemical identity of the substance beyond a reasonable doubt. As such, the exculpatory value of Dookhan's misconduct is extremely high. See Commonwealth v. Fluellen, 456 Mass. 517,527 (2010)(drug conviction reversed; although jury could possibly infer the identity of a substance based on defendant conveying to police that items he procured were crack cocaine, it is the chemist drug certificates of analysis that make such an inference of identity inescapable); Commonwealth v. Charles, 456 Mass. 378,383

(2010)(defendant's actions of attempting to hide a substance is circumstantial evidence but does not relieve Commonwealth of burden of proving chemical identity of substance beyond a reasonable doubt).

Dookhan's misconduct also had exculpatory value in that it would have influenced the advice of plea counsel. Plea counsel essentially averred that at the time of the 2010 plea, he credited Dookhan's drug certificate and he advised Toussaint to enter the plea. A-84. Yet after plea counsel learned of Dookhan's misconduct, plea counsel would have advised Toussaint to "not" take that plea offer on May 25, 2010. A-85.

The judge overestimated the benefit of the plea agreement. The judge compounded that error by failing to compare the benefit of the plea to the exculpatory value of Dookhan's misconduct. When that comparison is done, the plea terms do not look as favorable as they did before anyone knew about Dookhan's misconduct, and the assertions of Toussaint and his plea attorney seem even more credible and rational.

If Toussaint had known about Dookhan's misconduct before

his guilty plea hearing, Toussaint would not have entered the plea. And based on the exculpatory value of Dookhan's misconduct, it would have at least been rational to reject that plea offer. The plea was therefore not intelligently or voluntarily entered and must be vacated. This Court should reverse the motion judge's decision.

c. The motion judge erred in weighing whether any special circumstances would have impacted Toussaint's decision to reject the plea agreement.

The motion judge erred in concluding that Dookhan's involvement in Toussaint's BMC-Roxbury case would not have influenced Toussaint's decision to accept the same guilty plea in this case.

Before this case began, Toussaint had a prior case. Toussaint was arraigned on or about January 31, 2008 for possession with intent to distribute class B and a school zone violation on Commonwealth v. Toussaint, 0802CR000571 (BMC-Roxbury). A-72. Dookhan was the chemist on the BMC-Roxbury case, although at that time Dookhan's misconduct was still

unknown. On January 20, 2009, Toussaint pled guilty to the BMC-Roxbury charges in exchange for a two-year jail sentence, with the sentence suspended for two years and Toussaint on probation for that time period. A-75.

However, on February 28, 2009, Toussaint was arrested for the charges on this case. As a result of that new arrest on this case, Toussaint faced a probation violation on his BMC-Roxbury case starting on March 2, 2009. On May 13, 2010, Toussaint was sentenced to serve the two years in jail for the probation violation in the BMC-Roxbury case. A-75.

Thus, at the time that this Suffolk Superior Court case arrived at the trial date on May 25, 2010 (the date of the plea), Toussaint had already begun serving his two-year jail sentence on the BMC-Roxbury case that also involved Dookhan. A-75. It is important to realize that Toussaint was already in jail and already serving a jail sentence on the day of his plea in this case. Those circumstances, and the fact that he did not know Dookhan's misconduct impacted the BMC-Roxbury case, are essential to understanding why Toussaint would not have

entered the guilty plea in this case if he had known that Dookhan's misconduct affected both of his cases.

On May 25, 2010, Toussaint entered the guilty plea in this case. A major incentive for this guilty plea was that the state prison sentence would be imposed forthwith, meaning that it would begin running notwithstanding the jail sentence that he had just started. T-7,14. Toussaint mistakenly was motivated to accept this plea because it would in effect save him from doing the two years jail time on the BMC-Roxbury case.

Why that matters is because Dookhan's involvement in the BMC-Roxbury case eventually resulted in that case being vacated and dismissed. A-73. On April 19, 2017, the BMC-Roxbury conviction was vacated and dismissed with prejudice because of Dookhan's misconduct and her role in Toussaint's BMC-Roxbury case. A-73,76.

If Toussaint had known that he had grounds to get the BMC-Roxbury conviction vacated and dismissed because of Dookhan's misconduct, he would not have been motivated to accept this plea deal in order to avoid the two extra years jail

time on the BMC-Roxbury case. A-85,89.

Toussaint should have been informed of Dookhan's misconduct before he pled guilty on the BMC-Roxbury case and before he pled guilty on this case. Because Toussaint did not know that Dookhan's misconduct provided strong defenses to the BMC-Roxbury case and this case, Toussaint's guilty plea was not intelligently or voluntarily entered.

The judge erroneously concluded "the forthwith sentence in this case eliminated the entire balance of Toussaint's house of correction sentence, *which had the same effect for purposes of total incarceration that dismissal of the BMC case would have had*." That analysis is deeply flawed. Although the judge is correct that the plea in this case essentially erased two years of a jail sentence for the BMC-Roxbury case, the motion judge missed the crucial point – Toussaint would not have knowingly entered this same guilty plea if he knew he could have gotten the BMC-Roxbury case dismissed. There would have been no need or motivation or incentive to negotiate a forthwith plea in this case if Toussaint had been properly informed of Dookhan's misconduct

leading to dismissal in the BMC-Roxbury case.

The motion judge also erroneously found that the BMC case "had potential liability for Toussaint if he went to trial, because the sentencing judge in this case could have considered that Toussaint violated his conditions of probation in the BMC case, *a violation which had no connection to Dookhan."* However, the record reflects that the BMC-Roxbury case was a drug case involving Dookhan and then the probation violation was caused by this present case which also involved Dookhan. A-75,84.

Moreover, for the judge to speculate that Toussaint could have gotten more than a mandatory minimum sentence if he lost at trial on this case (under the speculative theory that a sentencing judge would have used a different, vacated Dookhan case as a reason to enhance Toussaint's sentence here) is wrong and again misses the point. It would be unfair for a sentencing judge to use a vacated Dookhan case to enhance a sentence. See Bridgeman v. District Attorney for Suffolk Dist., 471 Mass. 465 (2015)(Bridgeman I). But more importantly, this appeal was not supposed to involve the motion judge speculating about

Toussaint's sentence at trial. This case is about whether Toussaint entered an intelligent, voluntary guilty plea in light of him not being properly informed of Dookhan's misconduct or how that misconduct dramatically changed the landscape and available defenses for this case and the BMC-Roxbury case.

Dookhan's involvement in Toussaint's BMC-Roxbury case, and the role that the BMC-Roxbury case played in the sentencing negotiations for the plea in this case, is a special circumstance that would have impacted the defendant's decision to plead guilty or reject that plea agreement. See Scott, 467 Mass. at 355-358. The defense erroneously and un-intelligently thought that the BMC case provided a strong incentive to accept the Superior Court plea deal instead of going to trial or seeking a better deal. In fact, Toussaint had no reason to take a plea deal that saved him a jail sentence because that BMC-Roxbury jail sentence was a wrongful conviction that would ultimately be vacated. A-76.

Because the motion judge erred in analyzing the special circumstances of the BMC-Roxbury case, this Court should reverse the judge's decision. See Commonwealth v. Williams, 89

Mass. App. Ct. 383,389 (2016)(judge erred in denying new trial motion, defendant thought he was facing more time but predicate was vacated because of Dookhan).

ii. The motion judge erred as a matter of law under Scott and abused any discretion by failing to consider relevant factors.

The motion judge erred as a matter of law and abused any discretion by overlooking most of the relevant Scott factors and failing to consider the corresponding evidence for those factors. See Scott, 467 Mass. at 355-358; L.L. v. Commonwealth, 470 Mass. 169,185 n.27 (2014).

a. The relevant factors that a motion judge is supposed to consider:

In Scott and subsequent decisions, a number of non-exhaustive factors were identified that are relevant to the totality of the circumstances analysis for the second Scott prong (whether there is a reasonable probability that the defendant would not have entered the same guilty plea if he had known about Dookhan's misconduct). Scott, 467 Mass. at 355-358. Relevant factors here are:

(1) whether the evidence of Dookhan's misconduct could have detracted from the factual basis used by the Commonwealth to support the guilty plea,

(2) whether the evidence of Dookhan's misconduct could have been used to impeach a witness whose credibility may have been outcome-determinative,

(3) whether the evidence of Dookhan's misconduct was cumulative of other evidence already in the defendant's possession,

(4) whether the evidence of Dookhan's misconduct would have influenced plea counsel's recommendation as to whether to accept a particular plea offer,

(5) whether the exculpatory value of the evidence of Dookhan's misconduct was outweighed by the benefits of entering into that plea agreement,

(6) the strength of the Commonwealth's case,

(7) the availability of a substantial ground of defense that could be raised at trial,

(8) whether any special circumstances would have impacted the defendant's decision to plead guilty or reject that plea agreement, and

(9) whether the defendant was indicted on any non-drug charges and whether the drug-related charges were merely a minor component of an over-all plea agreement.

See Scott, 467 Mass. at 355-358; Commonwealth v. Clarke, 460 Mass. 30,47-48 (2011); Commonwealth v. Antone, 90 Mass. App. Ct. 810,814-817 (2017); Commonwealth v. Chester Williams, 93

Mass. App. Ct. 1121 (July 26, 2018)(Rule 1:28). See also Ferrara, 456 F.3d at 290-297.

In this case, Toussaint would not have entered that guilty plea if he knew about Dookhan's misconduct. A-89. Plea counsel would have told Toussaint to not take that plea. A-85.

The motion judge overlooked numbers 1, 2, 3, 4, 7, and 9 of the Scott factors referenced above. A careful analysis of the evidence relating to those factors supports a reasonable and inescapable probability that Toussaint would not have intelligently or voluntarily entered the same guilty plea if he knew about Dookhan's misconduct.

b. The motion judge failed to consider that the credibility of the lab drug testing was outcome-determinative.

The motion judge failed to consider that the evidence of Dookhan's misconduct could have been used to impeach a witness whose credibility may have been outcome-determinative (so-called Scott factor #2). See Scott, 467 Mass. at 355-358.

The credibility of the lab testing was outcome-determinative in this case. Dookhan's misconduct impacts her

own credibility and could have been used to impeach her. Dookhan was the only chemist on the Commonwealth's trial witness list and she was listed as an expert. The case was scheduled for trial until Toussaint pled guilty on the day of trial. Ferrara, 456 F.3d at 290-297 ("prejudice is especially likely to transpire where, as here, the witness's testimony is both uncorroborated and vital to the prosecution's case.").

The Commonwealth misrepresented the quality of the scientific evidence in this case. The newly discovered evidence of Dookhan's misconduct could have impeached if not destroyed Dookhan's credibility as an expert witness in this case. And Dookhan's credibility was outcome determinative.

As the primary chemist, Dookhan had control of the substances and was responsible for the initial drug analysis. The confirmatory chemist was dependent on Dookhan's work and any work by the confirmatory chemist would be tainted in cases where Dookhan tampered with evidence. As such, the substances in this case were forever tainted by Dookhan's handling of them.

Since the Commonwealth needed Dookhan to prove the substance was cocaine and not a counterfeit or non-narcotic powder, her credibility was outcome-determinative. Now we know that Dookhan does not deserve to be credited at all, particularly in cases like Toussaint's where Dookhan was the primary chemist during the time period that she was actively and intentionally contaminating negative samples and she could not remember all of the cases that she did that in.

By failing to consider this relevant factor, the judge erred and abused any discretion. Proper consideration of this factor supports the conclusion that Toussaint would have rejected this plea offer he had known of Dookhan's misconduct.

c. The judge failed to consider that evidence of Dookhan's misconduct was not cumulative of any other evidence.

The motion judge failed to consider that the evidence of Dookhan's misconduct was not cumulative of any other evidence already in the defendant's possession (so-called Scott factor #3). See Scott, 467 Mass. at 355-358. At the time Toussaint pled guilty, the defense did not possess any evidence that could have

been used to challenge the identity of the substance as cocaine. The defense was not made aware of Dookhan's misconduct or any of the exculpatory problems at the Hinton Lab. All of that exculpatory, material evidence was hidden from Toussaint.

Where the evidence of Dookhan's misconduct was not cumulative of any other evidence possessed by the defense, and based on the facts of this case and the averments, there is a reasonable probability that Toussaint would not have entered that guilty plea if he had been properly informed.

d. The judge failed to consider that Dookhan's misconduct would have influenced plea counsel's advice.

The motion judge failed to consider that evidence of Dookhan's misconduct would have influenced plea counsel's recommendation as to whether to accept a particular plea offer (so-called Scott factor #4). See A-85. See also Scott, 467 Mass. at 355-358. This was a crucial error.

To be fair, the judge's decision does indicate that the judge did read plea counsel's sworn affidavit. However, the judge did not analyze plea counsel's sworn statement that plea counsel

would not have advised Toussaint to enter that guilty plea if counsel had known about Dookhan's misconduct. A-85. Instead, the judge only analyzed one part of plea counsel's affidavit, the part where plea counsel indicated that if a motion to dismiss was unsuccessful then counsel would have sought a better plea deal in light of Dookhan's misconduct.

Plea counsel's sworn affidavit states in pertinent part that before plea counsel knew about Dookhan's misconduct, "…I recommended that he accept the deal." A-84. Plea counsel's affidavit further avers that knowledge of Dookhan's misconduct would have influenced his advice to Toussaint, and that "If I had known about Dookhan's misconduct at the time of the plea in the instance case, I would not have advised Mr. Toussaint to plead guilty…". A-85. Plea counsel would have advised Toussaint to not plead guilty and then pursued a motion to dismiss, sought a different plea agreement, and sought an expert to attack the testing and identity of the substance. A-84,85.

Plea counsel's averment is directly relevant to the second Scott prong. If Toussaint had known that Dookhan's misconduct

created additional options and defenses, and if Toussaint's own lawyer advised him to not take that deal, then it is rational and reasonable and probable that Toussaint would not have accepted that plea deal. By overlooking the importance of plea counsel's affidavit, the motion judge erred and abused any discretion.

And for the only portion of plea counsel's affidavit that the judge did consider – the possibility of seeking a more favorable plea deal – the motion judge believed that there was no basis to conclude that Toussaint could have gotten a better deal. But that reasoning misses the point of the second prong of Scott.

The issue is not simply whether Toussaint would have been successful in the other avenues that he would have chosen to pursue if he had been properly informed of Dookhan's misconduct. The issue is not whether Toussaint would have won his motion to dismiss or succeeded in getting a better plea deal or whether he would have won at a trial.

The real issue is whether there is a reasonable probability that Toussaint would have rejected the plea offer on May 25, 2010 (and whether it would have been merely rational to do so,

not whether Toussaint would have been successful in other avenues). If plea counsel would have advised Toussaint to not enter that plea, and if Toussaint would not have knowingly entered that plea, then the plea was not intelligently or voluntarily entered. See Brady, 397 U.S. 742,748,755 (1970); Scott, 467 Mass. at 344.

By failing to consider this relevant factor about plea counsel's advice, the motion judge erred and abused any discretion.

e. The motion judge failed to consider that Toussaint had available defenses.

The motion judge overlooked the relevant factor that Toussaint had an available, substantial ground of defense that could be raised at trial (so-called Scott factor #7 on the prior list). See Scott, 467 Mass. at 355-358.

As discussed previously, given the lack of direct evidence of the identity of the substance, the Commonwealth needed Dookhan's testing to prove beyond a reasonable doubt that the substance allegedly possessed by Toussaint (and the substance

found on the floor in the sandwich) was actually cocaine rather than a counterfeit substance like baking powder.

Dookhan's misconduct, and her role as the primary chemist in this case, created a strong ground of defense. The defense could have credibly argued that Dookhan could have tampered with the substance and turned a negative sample into a positive sample. *The Commonwealth cannot prove Dookhan did not tamper with the substance in this case*.

And even before Dookhan's misconduct was revealed, Toussaint had an available defense that dovetails now with a Dookhan defense. Toussaint was accused of possessing two bags – one was produced from his own person, but the other bag was found on the ground of the holding cell in a sandwich. The police admitted that Toussaint was handcuffed and that trash had already been on the floor of the holding cell before Toussaint was placed in the cell. A-36,37,81.

Although the Commonwealth alleged that Toussaint must have somehow bent down and hid the substance inside the sandwich while handcuffed, the facts created an available and

substantial defense theory as to constructive possession. The defense theory would be that the Commonwealth could not prove beyond a reasonable doubt that Toussaint possessed the substance inside the sandwich, and that the Commonwealth could not prove that the sandwich substance did not come from whoever was in the holding cell before Toussaint.

That available defense (that Toussaint possessed only one of the two bags) becomes even stronger when combined with Dookhan's misconduct. The Commonwealth needed Dookhan to prove not just the identity of the substance as cocaine but also the weight or quantity. At that time, the Commonwealth needed Dookhan to prove that the substance weighed more than 28 grams.

According to Dookhan's drug certificate, the substance in the sandwich weighed roughly 27 grams without packaging, and the substance allegedly possessed on Toussaint's person weighed 29 grams. 29 grams is perilously close to the former statutory minimum of 28 grams. See Commonwealth v. Francis, 474 Mass. 816,828 (2016)(noting that the weight was close to the statutory

limit). If Dookhan made any mistakes or tampered or combined substances, her claimed weights could have been wrong. As such, Toussaint had a second, related defense – that the Commonwealth could not prove that the substance in the bag on Toussaint's person weighed more than 28 grams.

If the Commonwealth dared to bring this case to trial with knowledge of Dookhan's egregious misconduct, her role as the primary/custodial chemist in this case, and her admission that she could not identify all the cases that she tampered with when she was a primary chemist, the substantial grounds of defense would have been thus: (1) the Commonwealth cannot prove that Dookhan did not tamper with the substance here and therefore the Commonwealth cannot prove beyond a reasonable doubt that the substances were really cocaine to begin with, (2) the Commonwealth cannot prove beyond a reasonable doubt that Toussaint possessed the substance found on the floor inside the sandwich, and (3) the Commonwealth cannot prove beyond a reasonable doubt that the weight of the substance allegedly possessed on Toussaint's person was more than 28 grams.

Those are rational, non-frivolous defenses. For someone who had never been to state prison before, it would be at least rational for Toussaint to reject the plea deal based on the existence of those defenses as well as the available motion to dismiss. Proper consideration of this factor supports the reasonable probability that Toussaint would have rationally rejected this plea if he had known of Dookhan's misconduct.

f. The motion judge failed to consider the relevance of Toussaint not facing any non-drug or non-Dookhan charges.

The motion judge erred by failing to consider whether the defendant was indicted on any other non-drug charges and whether the drug-related charges were merely a minor component of an over-all plea agreement (so-called Scott factor #9). See Scott, 467 Mass. at 355-358.

Toussaint was not indicted on any non-drug charges. A-4-10. Toussaint was not charged with possession of a firearm or any crimes of violence. The trafficking indictment and the related drug school zone violation were the only indictments. A-11,12. The fact that Toussaint's case involved only the drug

charges makes Dookhan's misconduct even more material to Toussaint's decision as to whether or not to plead guilty.

Proper consideration of this factor supports the reasonable probability that Toussaint would have rationally rejected this guilty plea offer if he had known of Dookhan's misconduct.

g. The motion judge failed to consider that Dookhan's misconduct detracts from the factual basis of a plea.

The motion judge erred by failing to consider that the evidence of Dookhan's misconduct detracted from the factual basis used by the Commonwealth to support the guilty plea (so-called Scott factor #1). See Scott, 467 Mass. at 355-358.

In order to establish a factual basis for a plea, the Commonwealth needed to establish that the substance was actually cocaine. Because Dookhan was the primary chemist, evidence of Dookhan's misconduct detracts from the factual basis for proving the identity of the substance as cocaine. This Court should reverse the motion judge's decision.

h. The judge failed to make necessary credibility findings as to Toussaint and his plea attorney.

As referenced previously, Toussaint and his plea attorney both asserted that instead of entering that guilty plea, they would have done things very differently. A-85,89.

Toussaint averred that "If I had known about Dookhan's misconduct, I would not have pleaded guilty to the instant charges on May 25, 2010." A-89. Toussaint further averred that he would have asked his plea attorney to file additional motions in this case, and to attempt to vacate the conviction on his BMC-Roxbury case (which also involved Dookhan, that he would have asked his attorney to seek additional plea concessions, and that given the potential defenses and flaws in the testing Toussaint may have gone to trial. A-89. Toussaint also testified at the evidentiary hearing on November 30, 2018. A-101.

Notably, the motion judge's findings do not explicitly state whether or not the judge credited some, all, or none of Toussaint's testimony at the evidentiary hearing. While we can infer (from the denial of the new trial motion) that the motion judge did not believe Toussaint would have rejected the Commonwealth's plea offer (if he knew about Dookhan's

misconduct), the judge's findings do not explain why the judge did not believe Toussaint's testimony or whether the judge believed any parts of the testimony.

The motion judge also did not make credibility findings for plea counsel's sworn affidavit. Although the judge considered whether plea counsel would have succeeded in obtaining a better plea deal, the judge did not consider whether plea counsel was telling the truth (about how plea counsel would have advised Toussaint to not plead guilty at the plea hearing).

Where the motion judge was not the plea judge, credibility analysis would be the only part of a decision entitled to any deference. Yet here the motion judge did not make any explicit credibility determinations for Toussaint's testimony or Toussaint's affidavit or plea counsel's affidavit. While the judge concluded that he thought Toussaint would have still taken the same plea, we don't know why the judge did not believe Toussaint or his plea counsel. That is just another reason why the motion judge erred and abused any discretion. This Court should reverse.

iii. When the judge's erroneous conclusions are corrected and the overlooked relevant factors are considered, there is a due process violation and a reasonable probability that Toussaint would not have pled guilty.

The motion judge made a clear error of judgment in weighing the factors relevant to the decision, failing to take into account the totality of the circumstances and the full context of Toussaint's uninformed, unintelligent, involuntary decision to take that guilty plea offer. To the extent this Court finds that the judge had any discretion to deny the motion, the motion judge abused that discretion by overlooking crucial factors.

However, as Toussaint argued in his Motion For A New Trial, the conviction was induced and obtained by the Commonwealth, without knowledge of Dookhan's egregious misconduct, resulting in an unintelligent involuntary plea and violated Toussaint's rights to due process pursuant to the 5th and 14th Amendments to the U.S. Constitution and Article 12 of the Mass. Declaration of Rights. A-34. See also Kyles v. Whitley, 514 U.S. 419,433-434 (1995); Brady, 397 U.S. 742,748-49 (1970); Boykin, 395 U.S. 238,243 (1969); Ferrara, 456 F.3d

278 290 (1st Cir.2006); United States v. Avellino, 136 F.3d 249,255 (2d Cir.1998); Committee for Public Counsel Services v. Attorney General, 480 Mass. 700 (2018); Scott, 467 Mass. 336, 344 (2014); Commonwealth v. Foster, 368 Mass. 100,102 (1975). Because Toussaint raised constitutional due process claims in his motion, this Court should "exercise its own judgment on the ultimate factual as well as legal conclusions." See Commonwealth v. Salvati, 420 Mass. 499,500 (1995).

When the motion judge's erroneous analysis is corrected, and the overlooked factors are considered, and this Court exercises its own judgment, it is clear that Toussaint would not have entered the same guilty plea on May 25, 2010 if Toussaint and his plea counsel knew about Dookhan's egregious misconduct. And it is equally clear that it would have been at least rational to reject the plea on that date.

Because there is a reasonable probability that Toussaint would have rejected that particular plea agreement if he had been properly informed of Dookhan's egregious and exculpatory misconduct, the strong defenses it created, and its impact on the

prior BMC-Roxbury matter, Toussaint's guilty plea is unconstitutional. The Commonwealth failed to meet is burden of proving that the plea was intelligently or voluntarily entered. The motion judge erred as a matter of law and abused any discretion in denying the Motion For A New Trial.

CONCLUSION

Jean Toussaint respectfully requests that this Court reverse the lower court decision. This Court should enter an order granting Toussaint's Motion For A New Trial. Alternatively, this Court should reverse and remand for additional findings.

SIGNATURE

Respectfully Submitted,
JEAN TOUSSAINT
By his attorney

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Date: 7/3/19

CERTIFICATE OF COMPLIANCE

Pursuant to Mass. R. A. P. 16(k), I hereby certify that to the best of my knowledge the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to Mass. R. A. P. 16, Mass. R. App. P. 18, and Mass. R. A. P. 20; and

This brief complies with the type-volume limitation of Mass. R. App. P. 20(a)(2)(A) because it was prepared in Microsoft Word and the portions of the brief that are subject to page limits or a word count contain less than 11,000 words (10,892) in a proportionally spaced font in 14-point or greater (Century Schoolbook 14-point).

/s/ Dennis M. Toomey
Dennis M. Toomey

CERTIFICATE OF SERVICE

2019-P-0217

I certify that this brief was served upon the attorney of record for each party by complying with this Court's directives on electronic filing, electronic service to:

John Zanini, ADA, Suffolk District Attorney's Office
One Bulfinch Place, Boston, MA 02114

Dated: 7/3/19 Signed: /s/ Dennis M. Toomey

ADDENDUM

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23

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 0984-CR-10725

COMMONWEALTH
vs.

JEAN TOUSSAINT,
Defendant.

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR NEW TRIAL

The defendant, Jean Toussaint ("Toussaint"), moved for a new trial for the purpose of withdrawing his May 25, 2010 plea of guilty in this case to a cocaine trafficking charge. Toussaint argues that his plea was not voluntary, because at the time of his plea he was unaware of chemist Annie Dookhan's ("Dookhan's") malfeasance at the Hinton Drug Laboratory. This Court held a hearing on November 30, 2018, at which Toussaint testified and offered in evidence an affidavit of plea counsel (Exhibit 1), two drug certifications signed by Dookhan as the primary analyst (Exhibit 2), and the docket sheet for a Boston Municipal Court drug case (the "BMC case") in which Toussaint was serving a house of correction sentence at the time of his plea in this case (Exhibit 3). For the reasons set forth below, Toussaint's motion is **DENIED**.

RELEVANT FACTS

The afternoon of February 28, 2009, Boston Police Department ("BPD") officers Hasan and Brown were patrolling in a police cruiser in the vicinity of 95 Milton Avenue in the Dorchester section of Boston. There had been a report of shots fired earlier that day in that immediate area. Around 4:25 p.m., the officers saw Toussaint and another

man, Rohan Anderson ("Anderson"), standing in front of the building at 95 Milton Avenue. When Officer Brown exited the police cruiser, Toussaint began "frantically buzzing" the doorbells and pulling on the front door, attempting to enter the building. As Brown approached the two men, they opened the door and ran into the building. Anderson tried to pull the door closed, but Brown was able to open the door and follow both men inside, along with Officer Hasan. Hasan apprehended Anderson, who was trying to escape out the back door. Police recovered from Anderson's person a firearm, crack cocaine and methadone.

Officer Brown found Toussaint attempting to enter an apartment. Toussaint was holding a box of sandwich bags. After Brown determined that the resident of the apartment did not know Toussaint, Brown arrested Toussaint for trespassing.

At the police station, police put Toussaint alone in a holding cell to await his booking. When Officer Brown searched Toussaint as part of the booking process, he noticed on the floor a partially eaten sandwich. Inside the sandwich he found a large rock resembling crack cocaine. Brown asked Toussaint if he had any more crack on him, and Toussaint said yes. Toussaint reached into the back of his pants and pulled out three rocks of crack cocaine which resembled the substance in the sandwich. The drugs in the sandwich weighed around 27 grams. The drugs that Toussaint gave to Brown weighed around 29 grams. All of the suspected cocaine was tested at the Hinton Drug Laboratory. Dookhan was the primary analyst.

On August 3, 2009, a Suffolk County grand jury indicted Toussaint on charges of trafficking 28-99 grams of cocaine (Count 1) and a school zone violation (Count 2). On May 25, 2010, Toussaint pled guilty to a reduced charge of trafficking 14-28 grams of

cocaine. Count 2 was dismissed. Toussaint received a state prison sentence of 3 years to three-years-and-one-day. The sentence was ordered to be served forthwith, which had the effect of wiping out the balance of the house of correction sentence that Toussaint was serving in the BMC case.[1]

In March 2018, long after completing his state prison and house of correction sentences, Toussaint filed the pending motion. This Court held a hearing on November 30, 2018, at which Toussaint testified that, had he known of Dookhan's misconduct, he would not have accepted the Commonwealth's plea offer. Toussaint also submitted the drug certifications, the docket sheet for his District Court conviction, and an affidavit of his plea counsel stating that, had plea counsel known of Dookhan's misconduct, he would have filed additional motions and sought further plea concessions. Exhibit 1 at ¶¶ 19-21.

LEGAL DISCUSSION

A motion for new trial under Mass. R. Crim. P. 30(b) is the proper vehicle by which to seek to vacate a guilty plea. Commonwealth v. Fernandes, 390 Mass. 714, 715 (1984). Ordinarily, a motion for new trial is committed to the sound discretion of the motion judge who must determine if it appears that justice may not have been done. Commonwealth v. Moore, 408 Mass. 117, 125 (1990). One basis for such a motion is newly discovered evidence of egregious misconduct by the government. Ferrara v. United States, 456 F.3d 278 (1st Cir. 2006). The defendant bases his motion to vacate his guilty plea on the misconduct of chemist Annie Dookhan, who was the sole or primary analyst on all of the certificates of analysis.

[1] In April 2017, Toussaint's conviction in the BMC case was vacated. See Exhibit 3. It appears to be undisputed that the reason for vacating the conviction was Dookhan's role as one of the analysts who tested the relevant drugs. The Court addresses the significance of Dookhan's role in the BMC case in the Legal Discussion, *infra*.

In Commonwealth v. Scott, 467 Mass. 336 (2014), the Supreme Judicial Court ("SJC") adopted a protocol for the handling of motions for new trial based on Dookhan's misconduct. The SJC adopted the two-pronged standard created in Ferrara, stating that a defendant seeking new trial, "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 336, quoting Ferrara, 456 F.3d at 290. The Court further ruled that the level of misconduct at the Hinton lab, particularly insofar as Dookhan was involved, as revealed through several exhaustive investigations by the Massachusetts State Police, the attorney general and the inspector general, was so extensive and far reaching that a conclusive presumption of prejudice would apply to any case where Dookhan served as either the primary or secondary testing chemist. Toussaint is clearly entitled to this conclusive presumption and therefore satisfies the first prong of a Ferrara analysis.

Toussaint must also demonstrate a reasonable probability that had he known of Dookhan's misconduct he would not have accepted the Commonwealth's plea agreement. The SJC endorsed five non-exclusive factors relevant to this determination drawn from Ferrara:

> (1) whether the evidence of misconduct would have detracted from the factual basis for the plea;
>
> (2) whether the evidence could have been used to impeach a material witness;
>
> (3) whether the evidence was cumulative of other evidence in the defendant's possession;
>
> (4) whether the evidence would have influenced counsel's recommendation regarding the desirability of a particular plea bargain; and,

(5) whether the exculpatory value of the evidence would have been outweighed by the benefits of a particular plea bargain.

Scott, 467 Mass. at 356, citing Ferrara, 456 F.3d at 294.

Additionally, noting the parallels between a reasonable probability standard and the prejudice standard applicable to a claim of ineffective assistance of counsel, the SJC identified additional factors, drawn from Commonwealth v. Clarke, 460 Mass. 30, 46-47 (2011), that may apply to a claim that but for the withheld evidence of misconduct the defendant would not have tendered a guilty plea. These include the strength of the Commonwealth's case, the availability of a substantial ground for defense, and whether other special circumstances were present that would have impacted the defendant's decision to plead guilty. "The reasonable probability analysis must be based on the actual facts and circumstances surrounding the defendant's decision at the time of the guilty plea in light of the one hypothetical question of what the defendant reasonably may have done if he had known of Dookhan's misconduct." Scott, 467 Mass. at 357.

Applying the factors set forth in Scott, the Court finds that Toussaint has failed to establish a reasonable probability that he would have rejected the Commonwealth's plea offer had he known of Dookhan's misconduct, for two compelling reasons.

First, the evidence of Toussaint's drug trafficking activity, in concert with Anderson, was extremely strong. Toussaint and Anderson were together in the front of 95 Milton Avenue and they fled police together. Police saw Toussaint holding plastic bags, the most common method for packaging crack cocaine for distribution. Anderson was apprehended with a firearm and crack cocaine. Crack cocaine was found in a sandwich on the floor of the cell where Toussaint was being held alone awaiting booking.

When Officer Brown found the cocaine, Toussaint immediately admitted that he had more crack cocaine on his person. Toussaint also had over $100 in currency. The amounts of cocaine on the holding cell floor and on Toussaint's person were both clearly distribution quantities. Each quantity of cocaine was roughly double the amount necessary to bring a cocaine trafficking charge. In light of this evidence, no amount of cross-examination of Dookhan would have obscured the reality that Toussaint was selling crack cocaine that day. Moreover, Toussaint had litigated a motion to suppress the seized evidence, and the motion had been denied.

Second, in light of the charges, the strength of the Commonwealth's case, and the terms of the plea agreement, the benefits to Toussaint of his plea agreement far outweighed the exculpatory value of the evidence. As part of the plea, the Commonwealth reduced the trafficking charge and dropped the school zone charge. Toussaint faced a 7½-year mandatory minimum sentence on the charges, and could have received a higher sentence given the total quantity of cocaine and his co-venturer's possession of a firearm. Instead of receiving a minimum 7½-year sentence, Toussaint received a 3-year to three-years-and-one-day sentence. A highly favorable concession to the defendant from the Commonwealth strongly supports a conclusion that the defendant chose voluntarily to plead guilty. See Commonwealth v. Furr, 454 Mass. 101, 112 (2009); Commonwealth v. DeCologero, 49 Mass. App. Ct. 93, 94 (2000).

The Court had reviewed the affidavit of Toussaint's plea counsel stating that, had plea counsel known of Dookhan's misconduct, he would have filed additional motions and sought further plea concessions. See *supra* at 3. The Court assumes that plea counsel would have sought additional plea concessions, but there is no basis to conclude

that plea counsel would have succeeded, given the strength of the Commonwealth's case and the fact that the plea deal was already highly favorable to Toussaint.

The Court has also considered the above-noted fact that Dookhan was one of the analysts in the BMC case. This knowledge of Dookhan's wrongdoing could have further enhanced the defendant's bargaining position because a prior conviction was vulnerable to attack. However, this added factor does not change the Court's analysis, for two reasons. First, the forthwith sentence in this case eliminated the entire balance of Toussaint's house of correction sentence, which had the same effect for purposes of total incarceration that dismissal of the BMC case would have had. Second, notwithstanding Dookhan's role in the BMC case, the case had potential liability for Toussaint if he went to trial, because the sentencing judge in this case could have considered that Toussaint violated his conditions of probation in the BMC case, a violation which had no connection to Dookhan. See Exhibit 3.

In sum, applying the factors set forth in Scott, the Court finds that Toussaint has failed to establish a reasonable probability that he would have rejected the Commonwealth's plea offer had he known of Dookhan's misconduct, and therefore his plea was voluntary.

CONCLUSION

For the above reasons, defendant's Motion for New Trial (Docket # 17) is **DENIED**.

Dated: December 11, 2018

Robert L. Ullmann
Justice of the Superior Court

Commonwealth v. Williams

Appeals Court of Massachusetts

July 26, 2018, Entered

17-P-957

Reporter

93 Mass. App. Ct. 1121 | 107 N.E.3d 1257 | 2018 Mass. App. Unpub. LEXIS 611

COMMONWEALTH *vs.* CHESTER WILLIAMS.

Notice: SUMMARY DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS RULE 1:28, AS AMENDED BY 73 MASS. APP. CT. 1001 (2009), ARE PRIMARILY DIRECTED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, SUCH DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO RULE 1:28 ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT. SEE *CHACE* V. *CURRAN*, 71 MASS. APP. CT. 258, 260 N.4, 881 N.E.2d 792 (2008).

PUBLISHED IN TABLE FORMAT IN THE MASSACHUSETTS APPEALS COURT REPORTS.

Subsequent History: Appeal denied by Commonwealth v. Williams, 480 Mass. 1111, 2018 Mass. LEXIS 738 (Mass., Nov. 8, 2018)

Judges: Rubin, Wendlandt & Englander, JJ.

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, Chester Williams, entered into two plea agreements — one in 2010, the other in 2011 — that included drug charges infected by the misconduct of former William A. Hinton State Laboratory Institute (Hinton Lab) chemist Annie **Dookhan**.[1] He moved in Superior Court to vacate his guilty pleas. A special judicial magistrate entered proposed findings and an order denying his motions, which were adopted by a judge. He now appeals. We affirm the order with respect to the 2010 plea agreement but reverse with respect to the 2011 plea agreement.

Background. 1. *2010 plea agreement*. On October 3, 2008, Williams was charged with possession of cocaine with intent to distribute, subsequent offense, along with a school zone enhancement, which would have subjected him to a minimum mandatory sentence of five years for the possession with intent to distribute charge and two and one-half years from and after on the school zone enhancement (2008 case).[2] See G. L. c. 94C, § 32A(*d*), as in effect prior to St. 2012, c. 192, § 14;[3] G. L. c. 94C, § 32J. The case went to trial, at which a judge granted Williams's motion for a required finding of not guilty on the school zone enhancement and the jury hung on the possession charge. This resulted in a mistrial.

At the plea hearing on February 17, 2010, the prosecutor represented that the Commonwealth would prove that, on August 20, 2008, police officers observed Williams sitting on a wall at a bus stop for about fifteen minutes in the Chinatown area of Boston. During that time, he had a conversation with someone who appeared to the officers to be a drug user, got on his bike, which was nearby, pedaled about sixty feet, and looked around in all directions. He stepped into an indentation in the wall, boosted himself up, reached behind the wall with his left arm, came down off the wall, and placed something in his mouth. He returned to the bus stop. Officers went to "where he had been," and recovered one plastic bag containing four smaller plastic bags, each of which contained twenty-five individually wrapped pieces of what was later tested to be cocaine. **Dookhan** was not involved in this case.

On January 1, 2009, Williams was indicted for distribution of cocaine, subsequent offense, with a school zone enhancement, which would have subjected him to a minimum mandatory sentence of five years on the distribution charge and two and one-half years from and after on the school zone enhancement (2009 case).[4] See G. L. c. 94C, § 32A(*d*), as in effect prior to St. 2012, c. 192, § 14; G. L. c. 94C, § 32J. At the same plea hearing as the 2008 case, the prosecutor represented that the Commonwealth would prove that, on December 9, 2008, officers observed Williams being approached by approximately six people "in the area of Washington Street and Kneeland Street." One of them, George Macintosh, extended his hand to Williams, retracted it, and put something in his mouth. Officers approached Macintosh soon afterwards, and something fell out of his mouth, which was later tested to be cocaine. Macintosh telephoned someone he claimed was Williams, directed that person to a McDonalds, Williams appeared, and the officers arrested him. **Dookhan** was listed as the assistant analyst on the drug certificate in this case.

Williams pleaded guilty in the 2008 and 2009 cases in a single hearing. In exchange for his pleading guilty in both cases, the parties agreed that the Commonwealth would eliminate the subsequent offense portions of the charges in both cases, dismiss the school zone enhancement in the 2009 case, and recommend the following sentences: in the 2008 case, Williams was to receive one year in the house of correction, 290 days deemed served, the balance suspended for three months; in the 2009 case, he was to receive three months probation concurrent with the suspended sentence in the 2008 case. The judge followed the parties' joint sentencing recommendation.

2. *2011 plea agreement*. On September 16, 2010, Williams was indicted for possession of cocaine with intent to distribute, subsequent offense (count I), and distribution of cocaine, subsequent offense (count III), each count with a park zone enhancement (2010 case).[5] He faced a minimum mandatory sentence of five years on the distribution and possession charges, and two and one-half years from and after on the park zone enhancements. See G. L. c. 94C, §§ 32A(*d*) & 32J.

At the plea hearing on June 8, 2011, the prosecutor represented that the Commonwealth would prove with respect to count III that, on March 31, 2010, officers observed Williams, whom they had known from previous cases, walking near the Haymarket Massachusetts Bay Transportation Authority (MBTA) station, which was close to Holocaust Memorial Park. As he walked across the street, he spat some items into his hand and put them back in his mouth. He then met up with a man identified in the indictment as Bruce Shonefeld. The men exchanged something and split apart. The police detained, Mirandized, and recovered drugs from Shonefeld, who told the officers that he paid his dealer sixty dollars in three twenty-dollar bills, and provided the dealer's phone number. The drugs were later tested to be cocaine. The officers then arrested Williams, who was found with sixty dollars in three twenty-dollar bills in his front right pocket. Police recovered an additional $225 in cash. Williams provided an address of a homeless shelter. The police recovered two cellular telephones from Williams, one of which rang during booking. **Dookhan** was listed as the assistant analyst on the drug certificate corresponding to this count.

With respect to count I, the prosecutor represented that the Commonwealth would prove at trial that, on April 12, 2010, Williams's social worker called the West End Shelter at the Eric Lindemann Center — which was not the shelter whose address Williams had provided to police on March 31 — to collect his belongings. Some of his belongings were in a locker; the prosecutor did not say whether the locker was locked or unlocked.[6] When shelter employees opened the locker, they found a small plastic bubble gum container, in which they found twenty-one individually-wrapped bags containing what appeared to be drugs and four to five loose rocks, all of which was later confirmed to be cocaine. **Dookhan** was not involved in the testing of these drugs.

At this plea hearing, Williams expressed some hesitation in his decision to plead guilty. Although he never stated that he intended to plead not guilty on count III, and initially indicated that he would be pleading guilty on it, he then asked for "more time to think it over." The judge granted a recess, after which Williams reaffirmed his intent to plead guilty on count III. However, after the prosecutor represented what the Commonwealth would prove with respect to count I, Williams initially said that he was not guilty of that offense and that he wanted a trial. After a recess at which he conferred with counsel, counsel reaffirmed that Williams wanted a trial on count I. The judge then heard arguments on whether to grant an evidentiary hearing on Williams's motion to suppress the drugs found at the West End Shelter, and took another recess. After this recess, but before the judge rendered a decision, Williams pleaded guilty to count I.

In exchange for his pleas, the Commonwealth agreed to drop the subsequent offender portions of both charges, as well as the park-zone enhancements. The parties also agreed to a sentencing recommendation of three years in State prison on count III and one year of probation from and after on count I. This agreement also required Williams to admit to violating his probation in the 2009 case, for which he received a sentence of three years concurrent with the sentence on count III. The judge accepted this recommendation.[7]

Analysis. A motion to vacate a guilty plea is treated as a motion for a new trial under Mass.R.Crim.P. 30(b), as appearing in 435 Mass. 1501 (2001), which we review for a "significant error of law or other abuse of discretion." *Commonwealth* v. *Scott*, 467 Mass. 336, 344, 5 N.E.3d 530 (2014), quoting from *Commonwealth* v. *Sherman*, 451 Mass. 332, 334, 885 N.E.2d 122 (2008). "The judge's findings of fact are to be accepted if supported by the evidence, and he is the 'final arbiter of matters of credibility.'" *Ibid.*, quoting from *Commonwealth* v. *Schand*, 420 Mass. 783, 787, 653 N.E.2d 566 (1995).

To succeed, motions for a new trial based on government misconduct, such as this one, must satisfy two prongs. First, the defendant must show that "egregious government misconduct preceded the entry of his guilty plea and that it is the sort of conduct that implicates the defendant's due process rights." *Id.* at 347. In cases where **Dookhan** signed a certificate of analysis in the role of assistant analyst, the defendant is entitled to a "conclusive presumption" of "egregious government misconduct." *Id.* at 352. As the judge and special judicial magistrate found, Williams satisfied this prong by introducing certificates of analysis with respect to the 2009 case, and count III of the 2010 case, on which **Dookhan**'s signature appears on the "assistant analyst" line.

To satisfy the second prong, the defendant must show a "reasonable probability that he would not have pleaded guilty had he known of **Dookhan**'s misconduct." *Id.* at 355. In *Scott*, the Supreme Judicial Court identified as many as thirteen nonexhaustive factors that are relevant to the reasonable probability test, but emphasized that this is a "totality of the circumstances" determination. *Id.* at 358. The reasonable probability determination 'must be based on the actual facts and circumstances surrounding the defendant's decision at the time of the guilty

plea in light of the one hypothetical question of what the defendant reasonably may have done if he had known of **Dookhan**'s misconduct." *Id.* at 357. Williams's argument, essentially, is that the special judicial magistrate and the judge abused their discretion by overestimating the benefits of the deals to Williams and underestimating his "substantial ground[s] of defense," both of which are relevant factors under *Scott*. *Id.* at 356.

1. *2010 plea agreement*. This plea agreement presents a knotty problem. We agree with the defendant that, without the certificate of analysis in the 2009 case, the Commonwealth's case as to the 2009 charges would have been extremely weak; indeed, there may well have been insufficient evidence to support a conviction. See *Commonwealth* v. *Gaston*, 86 Mass. App. Ct. 568, 574, 18 N.E.3d 1118 ("[P]roof of **Dookhan**'s wrongdoing as it related to the defendant's case provides its own shadow of reasonable doubt about the nature of the substances tested"). We have been told by the Supreme Judicial Court that in these circumstances we may not consider the possibility that the drugs could be retested (something that, in any event, raises a serious question given **Dookhan**'s handling of evidence in the Hinton Lab). See *Scott*, 467 Mass. at 357-358. Furthermore, there is no evidence of a field test of the alleged drugs, nor a witness who might have testified to the nature of the substances. Given this, the Commonwealth likely would have had insufficient evidence of the composition of the substance that it alleged was cocaine.

Yet, however weak the evidence was in the 2009 case, the fact remains that, as a result of this package deal in which the 2008 charges were also resolved, Williams received what effectively amounted to time served and a seventy-five day sentence suspended for three months for a crime that carried a five-year minimum mandatory sentence in the 2008 case, and nothing additional on this count. Though we have no details, the fact that the jury had hung on the 2008 charge means that there was some risk of conviction after retrial, which would have been a genuine concern, rendering time served and a seventy-five day sentence suspended for three months an excellent bargain. On top of that, the three months of probation Williams received in the 2009 case were concurrent with the suspended sentence in the 2008 case.

Although we have some difficulty concluding with respect to a case that very likely could not have been won at trial, that there was no "reasonable probability that he would not have pleaded guilty had he known of **Dookhan**'s misconduct," there may have been reluctance on Williams's part in this case to upset the apple cart of the package deal. It may well be that we should not take into account the fact that in such a circumstance a prosecutor might withdraw a deal on one charge despite a refusal to plead to a charge on which such thin evidence remained, but given our standard of review — which is for abuse of discretion — in the absence of further guidance from the Supreme Judicial Court on the issue we do not think the motion judge is foreclosed from doing so. We therefore hold that there was no abuse in discretion in finding that, had Williams known of **Dookhan**'s misconduct, he would nonetheless have entered into the 2010 plea agreement.

2. *2011 plea agreement*. With respect to the **Dookhan**-infected count III at issue in the 2011 plea agreement, we also think the remaining case was weak. In describing the evidence on this count, the special judicial magistrate said,

> "The incident that occurred on March 31, 2010[,] was observed by a number of police officers. The buyer was found with cocaine on his person, and he immediately identified the defendant as the person who sold him the drugs. The defendant had [sixty dollars] in his right front pocket, consistent with the amount the buyer had stated he gave the defendant in exchange for the drugs. The grand jury minutes indicate that the buyer gave the police the phone number by which he had contacted the defendant."

Although there was certainly evidence that a transaction involving drugs had occurred, we agree with the defendant that in the absence of the **Dookhan**-tainted certificate, the Commonwealth would have been hard-pressed to identify the drug as cocaine, which is a necessary element of the offense. Once again, there is nothing to indicate that the Commonwealth performed a field test on the substance, nor was there a witness who had used it and could testify to what it was. Even had the Commonwealth been able to track down Shonefeld, he could have refused to testify by asserting his privilege against self-incrimination. Given the absence of other evidence of composition, Williams might well have had prevailed at trial on this count. Indeed, the transcript of the plea hearing indicates that he was reticent to go to trial even without knowing of **Dookhan**'s misconduct.

As our analysis above suggests, given that this was a package deal on counts I and III, the strength of the Commonwealth's case with respect to count I, the non-**Dookhan**-tainted charge

is also relevant to our analysis since, had Williams rejected the deal, he would have had to proceed to trial on it as well. Although there is no reason to doubt the accuracy of the certificate of analysis here, we agree with the defendant that the Commonwealth's case was not strong. The drugs were found in a locker in a homeless shelter when a third party went to retrieve some of Williams's belongings some twelve days after the defendant was arrested. The prosecutor did not proffer any evidence that the locker was locked or that only Williams (and shelter staff) had access to it. Nor did the prosecutor even proffer evidence of when Williams was last at the West End Shelter. He gave a different address to police on March 31 suggesting that he did not stay there consistently.[8] The absence of such evidence could have provided the requisite reasonable doubt as to whether the drugs found in the locker belonged to Williams. Further, that Williams himself and through his counsel twice indicated that he would plead not guilty on this count is still more evidence of the weakness of the Commonwealth's case as he understood it and his willingness to take his chances at trial, both of which are relevant to the reasonable probability analysis under *Scott*. See *Scott*, 467 Mass. at 355.

The special judicial magistrate also found that Williams received a "generous" deal in part because it allowed him to dispose of his probation violation without adding any incarceration beyond what he was getting as a result of his guilty plea on count III. But the generosity of this term presupposes that, had he gone to trial, he both would have been incarcerated and would have been found in violation of probation. Our analysis above shows that he had a substantial ground of defense on both counts and therefore very well could have avoided incarceration on them. Furthermore, the basis for Williams's alleged probation violation was the crimes he pleaded guilty to committing at the hearing. Although it would have been easier for the Commonwealth to prove a probation violation given the lower standard of proof that applies to probation violations, see *Commonwealth* v. *Holmgren*, 421 Mass. 224, 226, 656 N.E.2d 577 (1995) (Commonwealth need only prove probation violations by preponderance of evidence), the **Dookhan**-tainted certificate in count III, and the general weakness of the Commonwealth's case in count I, suggest that Williams had a chance of prevailing here as well. The tainted certificate at least would have given him leverage to negotiate a better deal on the probation violation.

In addition, the **Dookhan**-tainted count in the 2011 plea agreement accounted for the entirety of Williams's incarceration in that case (apart from the probation violation), which suggests that it was the "driving force behind the plea," *Commonwealth* v. *Williams*, 89 Mass. App. Ct. 383, 389, 50 N.E.3d 206 (2016), as does the fact that, absent the **Dookhan** taint, the Commonwealth's case on count III was much stronger than it was on count I.

In these circumstances, it would have been rational for Williams to proceed to trial. This, plus the fact that he had almost already done so, implies that, had he known of **Dookhan**'s misconduct, there is a reasonable probability that he would have chosen to go to trial.

Conclusion. The order denying Williams's motion to vacate his guilty pleas in the 2010 plea agreement is affirmed. The order denying Williams's motion to vacate his guilty pleas in the 2011 plea agreement is reversed, and the findings are set aside.

So ordered.

By the Court (Rubin, Wendlandt & Englander, JJ.[9]),

Entered: July 26, 2018.

Footnotes

[1] For an overview of **Dookhan**'s misconduct, see *Commonwealth* v. *Scott*, 467 Mass. 336, 5 N.E.3d 530 (2014).

2 Superior Court docket number 2008-10946.

3 In 2012, the Legislature reduced the minimum mandatory sentence under G. L. c. 94C, § 32A(*d*), to three and one-half years.

4 Superior Court docket number 2009-10069.

5 Superior Court docket number 2010-10982.

6 At the evidentiary hearing before the special judicial magistrate, the attorney who represented Williams at the 2011 plea hearing testified that he believed there were no locks on the lockers. Neither the special judicial magistrate nor the judge made a finding on this issue.

7 The judge also terminated Williams's probation in the 2008 case at the request of the probation officer.

8 That Williams's social worker had to request West End Shelter staff to retrieve his belongings suggests that Williams was unable to do so. It is thus also likely that Williams had been held in jail since his March 31 arrest, such that he had not been at the West End Shelter for, at a minimum, nearly two weeks before the drugs were discovered.

9 The panelists are listed in order of seniority.

Content Type: Cases

Document: Commonwealth v. Golding

Commonwealth v. Golding

Appeals Court of Massachusetts

June 6, 2018, Entered

16-P-1081

Reporter

93 Mass. App. Ct. 1113 | 104 N.E.3d 682 | 2018 Mass. App. Unpub. LEXIS 462

COMMONWEALTH *VS.* CHRISTOPHER **GOLDING**.

Notice: SUMMARY DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS RULE 1:28, AS AMENDED BY 73 MASS. APP. CT. 1001 (2009), ARE PRIMARILY DIRECTED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, SUCH DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO RULE 1:28 ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT. SEE *CHACE* V. *CURRAN*, 71 MASS. APP. CT. 258, 260 N.4, 881 N.E.2d 792 (2008).

PUBLISHED IN TABLE FORMAT IN THE MASSACHUSETTS APPEALS COURT REPORTS.

Judges: Rubin, Henry & Lemire, JJ.

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant entered unagreed guilty pleas to five drug charges. After learning of assistant lab analyst Annie Dookhan's misconduct,[1] he filed a motion for new trial seeking to withdraw the guilty pleas. A judge of the Superior Court denied the motion. We reverse.

Facts. We recite the relevant facts as found below.[2] Around January 29, 2009, officers at the Billerica police department received information from two confidential informants that the informants had purchased drugs, including OxyContin, from the defendant. One informant also told the officers that the defendant sourced his OxyContin from an eighty year old woman living on Gorham Street in Lowell who had a prescription for them and who had recently been robbed.[3]

On February 3, 2009, one of the informants, in the presence of a Drug Enforcement Agency (DEA) agent, bought five pills allegedly containing morphine from the defendant as part of a controlled buy. The DEA agent then conducted three more controlled buys on February 6, 9, and 13, 2009. At each buy, he purchased two pills that the defendant stated were OxyContin, and drove with the defendant to what, according to the defendant, was his supplier's house on Gorham Street in Lowell. Over the course of the buys, the defendant told the DEA agent, as he had the confidential informant, that his supplier was an eighty year old woman with a prescription for OxyContin who had recently been robbed. The police had a record of a robbery of OxyContin from the Gorham Street house of an eighty year old woman.

Later, after selling a nonfunctioning hand grenade to one of the aforementioned informants, the defendant expressed to the informant an interest in purchasing machine guns, a handgun, and a silencer "to make that up to you." The informant set him up with an undercover agent from the Bureau of Alcohol, Tobacco, and Firearms (ATF).

Over the course of three recorded telephone calls on March 4, 2009, the defendant and ATF agent agreed to exchange the weapons for sixty-three OxyContin pills. During these conversations, the defendant advised the agent to swab test the pills to ensure that they were real. They agreed to meet the next day, at which point the ATF agent tendered the weapons and the defendant tendered a bag of green-colored pills that the ATF agent believed to be OxyContin. The defendant was arrested. The meeting was videotaped pursuant to a search warrant.

The drugs were sent for testing to the William A. Hinton State Laboratory Institute. Dookhan was the primary analyst for all the drugs, and her signature appears on the "Assistant Analyst" line in all the drug certificates. Dookhan concluded that (1) five pills (from the first buy) contained morphine, (2) six pills (two each from the second, third, and fourth buys) contained oxycodone, (3) each pair of oxycodone pills weighed .53 grams, (4) sixty-three pills (from the final buy) contained oxycodone, and (5) the sixty-three pills weighed 16.80 grams.

The defendant was indicted on drug- and weapons-related charges to which he initially pleaded not guilty. On the first day of trial, he changed his pleas on the drug charges to guilty, without any deal or agreement with the Commonwealth. The charges to which he pleaded guilty were one charge of trafficking in oxycodone, fourteen grams or more, G. L. c. 94C, § 32E(*c*) (as then in effect) (charge 4), one charge of distribution of morphine, subsequent offense, G. L. c. 94C, § 32A(*b*) (charge 5), and three charges of distribution of oxycodone, subsequent offense, G. L. c. 94C, § 32A(*b*) (charges 6-8). On the trafficking charge, he faced a mandatory minimum sentence of five years with a possible maximum of twenty years; on the distribution charges, he faced a mandatory minimum sentence of three years with a possible maximum of ten years. After a bench trial, the defendant was convicted of possession of a machine gun while in the commission of a felony, G. L. c. 265, § 18B (charge 1), two charges of possession of a machine gun, G. L. c. 269, § 10(*c*) (charges 2-3), and possession of a silencer, G. L. c. 269, § 10A (charge 13). Sentencing on all charges occurred after the trial. The defendant received sentences of five to ten years in prison on charges 1-3, five years to five years and one day in prison on charges 4-8, and five years' probation on charge 13. All prison sentences were concurrent.

After sentencing, the defendant filed a motion for new trial seeking to withdraw his guilty pleas. He submitted an affidavit averring that (a) he did not know of Dookhan's misconduct when he entered his guilty pleas, and (b) had he known of her misconduct, he would not have pleaded

guilty to the drug charges. Hearings were conducted by a special judicial magistrate and, later, a motion judge. The motion judge followed the magistrate's recommendation in denying the motion because the judge concluded the defendant failed to demonstrate a reasonable probability that, had he known of Dookhan's misconduct, he would not have pleaded guilty to the drug charges. The defendant timely appealed.

Discussion. "A motion for a new trial is the appropriate device for attacking the validity of a guilty plea." *Commonwealth* v. *Fernandes*, 390 Mass. 714, 715, 459 N.E.2d 787 (1984). "A motion for a new trial is . . . committed to the sound discretion of the judge." *Commonwealth* v. *Scott*, 467 Mass. 336, 344, 5 N.E.3d 530 (2014). Therefore, we review "to determine whether the judge abused that discretion or committed a significant error of law." *Commonwealth* v. *Resende*, 475 Mass. 1, 12, 54 N.E.3d 521 (2016). See *Scott*, *supra* at 344; *Commonwealth* v. *Antone*, 90 Mass. App. Ct. 810, 814, 67 N.E.3d 718 (2017). Because the motion judge was not the plea judge, we are "in as good a position as the motion judge to assess" the record, and defer only on matters of credibility. *Commonwealth* v. *Sylvain*, 473 Mass. 832, 835, 46 N.E.3d 551 (2016), quoting from *Commonwealth* v. *Grace*, 397 Mass. 303, 307, 491 N.E.2d 246 (1986). "[I]t is plainly not an abuse of discretion simply because a reviewing court would have reached a different result," *L.L.* v. *Commonwealth*, 470 Mass. 169, 185 n.27, 20 N.E.3d 930 (2014); rather, we will reverse a discretionary judgment only when the appellant demonstrates an error of law, or "a clear error of judgment in weighing the factors relevant to the decision such that the decision falls outside the range of reasonable alternatives." *Ibid.* (quotation omitted).

1. *Legal standard*. Because due process permits judges to accept guilty pleas only if they are intelligent and voluntary, see *Commonwealth* v. *Cotto*, 471 Mass. 97, 105, 27 N.E.3d 1213 (2015), a defect in the intelligence or voluntariness of a guilty plea justifies its withdrawal. The defendant argues on appeal that his guilty pleas were involuntary.

Pleas can be rendered involuntary by "external circumstances or information that later comes to light," *Scott*, *supra* at 345, including information relating to misconduct by government officials. In *Scott*, the Supreme Judicial Court, following the United States Court of Appeals for the First Circuit in *Ferrara* v. *United States*, 456 F.3d 278, 290-297 (1st Cir. 2006), articulated a two-prong test for vacating a defendant's guilty plea in these situations. First, the defendant must show "egregious misconduct by the government that preceded the entry of the defendant's guilty plea." *Antone*, *supra* at 815. See *Scott*, *supra* at 347. Defendants are entitled to a conclusive presumption of egregious government misconduct when, as is the case here, Dookhan's signature appears on the "Assistant Analyst" line of a drug certificate that predates the defendant's guilty plea. See *Scott*, *supra* at 352; *Commonwealth* v. *Ruffin*, 475 Mass. 1003, 1004, 55 N.E.3d 960 (2016).

Second, "the defendant must demonstrate a reasonable probability that he would not have pleaded guilty had he known of Dookhan's misconduct." *Scott*, *supra* at 354-355. The defendant also must demonstrate that it would have been rational not to plead guilty. *Id.* at 356.

Although the motion judge may consider a wide range of factors, he or she may consider only "the facts and circumstances actually known to the defendant at the time of his guilty plea." *Id.* at 358. For example, the judge may consider existing evidence such as recordings and potential witnesses, but may not consider the possibility that the Commonwealth would retest the alleged drugs. See *id.* at 357. If the defendant has demonstrated a reasonable probability that he would not have pleaded guilty had he known of Dookhan's misconduct, the denial of his motion for new trial must be reversed. See *id.* at 355.

2. *Analysis*. a. *The benefit from the unagreed pleas*. The analysis in this case is controlled by our recent decision in *Antone*, which involved a plea deal. In *Antone*, the court weighed the benefit of the plea bargain against the strength of what the government's case would have been in the absence of the Dookhan evidence, which can "not be used against" a defendant at trial. *Antone*, 90 Mass. App. Ct. at 817. Accord *Scott*, *supra* at 357 ("[A] particular case may give rise to consideration of additional relevant factors . . . such as whether the defendant was indicted on additional charges and whether the drug-related charges were a minor component of an over-all plea agreement"); *Bridgeman* v. *District Attorney for the Suffolk Dist.*, 476 Mass. 298, 328, 67 N.E.3d 673 (2017) (***Bridgeman II***) (in Dookhan cases subject to *Bridgeman II* protocol, before district attorney may retry Dookhan defendant, he or she must "certify that . . . the district attorney could produce evidence at a retrial, independent of Dookhan's signed drug certificate or testimony, sufficient to permit a rational jury to find beyond a reasonable doubt that the substance at issue was the controlled substance alleged in the complaint or indictment").

The defendant emphasizes the fact that he received no plea bargain. While obviously this is

significant — he was promised no benefit for pleading guilty — this fact alone cannot be dispositive. Indeed, in *Resende*, the court affirmed the denial of a motion for new trial by a Dookhan defendant who had entered an unagreed plea. See *Resende*, 475 Mass. at 17-19. Still, the lack of a plea bargain is entitled to significant weight, for the benefit of unagreed pleas is far more uncertain and speculative than that of agreed pleas. The court in *Resende* determined that the defendant there received a lenient sentence because of the guilty pleas. *Id.* at 18-19. But in this case, there is no evidence in the record to support such a conclusion. Perhaps misunderstanding this, the motion judge relied on a conclusion that "[b]y pleading guilty, the defendant avoided the risk of consecutive maximum sentences on each count, which would have substantially exceeded the sentences that he received." This may reflect the judge's reading of the recommendation of the magistrate, whose findings the judge adopted, who erroneously referred to "the favorable terms of the defendant's plea agreement (i.e., concurrent five year sentences)."

But, since there was no plea agreement, he did not avoid that risk. Compare *Antone*, 90 Mass. App. Ct. at 819 (holding that defendant would have pleaded guilty because "the value of the evidence of Dookhan's misconduct was outweighed by the benefits of entering into a favorable plea agreement that eliminated potentially ten additional years in prison"). Since the magistrate's entire analysis here turned on what he described as the favorable terms of the nonexistent plea agreement, we conclude the judge erred in weighing this as a benefit of the plea.

The Commonwealth argues nonetheless that, even though the pleas were unagreed, they should not be disturbed because the drug charges were a "minor" part of the overall case. But the language from *Scott* on which the Commonwealth would rely states only what is logical: that the court should consider "whether the defendant was indicted on additional charges and whether the drug-related charges were a minor component of an over-all plea agreement." *Scott*, 467 Mass. at 357. As the Commonwealth acknowledges, the pleas here were not part of any overall agreement. That the pleas were unagreed, then, remains significant.

b. *The strength of the Commonwealth's remaining case*. The defendant was required to show a "reasonable probability" he would not have pleaded guilty had he known of Dookhan's misconduct. The Commonwealth argues that its case would have been so strong, even without the tainted certificates, that it would not have been rational for the defendant to go to trial, and that there is no reasonable probability that the defendant would not have pleaded guilty.

Obtaining the speculative, uncertain benefit of the unagreed pleas in this case would have been worthwhile only if, even in the absence of the inadmissible Dookhan certificates, the Commonwealth's case would have been an exceptionally strong one. Thus, for example, in *Resende*, where the court affirmed the denial of the motion to withdraw unagreed pleas, four certificates of analysis relating to different samples had been entered in evidence, and only one of them was signed by Dookhan, and with respect to the sample tested by Dookhan, there had been a positive field test for cocaine. See *Resende*, 475 Mass. at (police detective "conducted five controlled buys, each of which involved a hand-to-hand exchange of cash for two 'twenty bags' or one 'forty' bag of an off-white rock-like substance. Not only could a rational jury have inferred that [the detective] received what he had requested from the defendant, but field tests conducted on the substances indicated the presumptive presence of cocaine . . . . [Given] the fact that all but one of the drug certificates were signed by chemists other than Dookhan, evidence of her misconduct would not have detracted from the factual bases supporting the defendant's guilty pleas").

As described above, the magistrate's entire analysis relied on his erroneous belief that there had been a favorable plea agreement. But even if that error alone would not require reversal, what remained of the Commonwealth's case here was much weaker than in *Resende*. And, although, on this side of the scale the motion judge asserted that "[t]he defendant has not suggested any viable defense that he would have pursued had he not [pleaded] guilty" — which is what the magistrate said — in the absence of the evidence contained in the drug certificates of the weighing and testing of the drugs, an argument to the jury that the evidence is too weak to support a conviction might well be a sufficiently viable defense to create a reasonable probability that the defendant would have chosen trial over an unagreed plea.

(i) *Trafficking charge and the pills' weight*. We address first the most serious charge, that of trafficking. The substance and weight are both elements of this offense. Dookhan's drug certificate identifies the substance (oxycodone) contained in, and the total weight (16.80 grams) of, the sixty-three pills.

The drug certificate is the only evidence of the pills' weight, and it indicates that the weight is

only 2.80 grams above the statutory minimum — approximately the weight of a penny. This difference suggests that a fact finder could not determine beyond a reasonable doubt, without scientific testing, that the pills weighed at least fourteen grams. See *Commonwealth* v. *Francis*, 474 Mass. 816, 827-828, 54 N.E.3d 485 (2016) (jury could not determine, without scientific testing, that cocaine allegedly weighing 38.7 grams exceeded twenty-eight gram threshold). In the absence of the drug certificate there is no other evidence of the pills' weight, which the Commonwealth concedes, and thus a reasonable probability that the defendant would not have pleaded guilty to the trafficking count, with its five-year mandatory minimum sentence. The fact that all the Dookhan-signed certificates indicate roughly (although, significantly, not exactly) the same per-pill weight is irrelevant, since all were signed by Dookhan. The defendant has met his burden of showing a "reasonable probability" he would not have pleaded guilty to this charge had he known the drug certificates were inadmissible.

The Commonwealth argues that there is no evidence that Dookhan tampered with drugs in tablet form. This is part of what led the magistrate to conclude, in a finding adopted by the judge, that "any perceived weaknesses in the Commonwealth's case resulting from Dookhan's participation in the testing of the underlying substances would have been minimal." The magistrate concluded that "the fact that the drugs were in pill form diminishes the probability of Dookhan's misconduct."[4]

While the Commonwealth likewise couches its argument as one that the prejudice to the defendant is "greatly diminished" because the drugs were in tablet form, to even reach the question would require us to ignore the Supreme Judicial Court's admonition that certificates signed by Dookhan as assistant analyst are subject to a conclusive presumption of egregious governmental misconduct, regardless of the substance in question. See *Scott*, 467 Mass. at 354. These certificates are inadmissible, see *Antone*, *supra* at 817, and the Commonwealth does not suggest that there is any other basis (aside from "eyeballing" the pills, see *supra*) on which the jury could have found a weight over fourteen grams. The magistrate, and the judge who adopted his findings, thus miscalculated the strength of the Commonwealth's case in the absence of the certificates.

Given this, we think the judge's conclusion that the defendant failed to demonstrate a reasonable probability that because of the lack of other evidence of weight, which is essential to a trafficking charge, he would not have pleaded guilty to the trafficking charge had he known of Dookhan's misconduct, represents "a clear error of judgment in weighing the factors relevant to the decision such that the decision falls outside the range of reasonable alternatives." *L.L.* v. *Commonwealth*, 470 Mass. at 185 n.27 (quotation omitted).

The Commonwealth does not suggest it could have reweighed the pills, nor could it make such an assertion in a case like this. "[I]n assessing the likelihood of whether the defendant would have tendered a guilty plea, a judge may not consider any assertion by the Commonwealth that it would have offered to retest the substances at issue in the defendant's case if the defendant had known of Dookhan's misconduct. The reasonable probability analysis must be based on the actual facts and circumstances surrounding the defendant's decision at the time of the guilty plea in light of the one hypothetical question of what the defendant reasonably may have done if he had known of Dookhan's misconduct. To permit further hypothetical arguments to factor into the analysis, such as the results of any retesting the Commonwealth might have offered to undertake, would require a court to heap inference upon inference and will bring the inquiry under this prong too far afield of the facts and circumstances actually known to the defendant at the time of his guilty plea." *Scott*, *supra* at 357-358.

(ii) *Charges 4, 6, 7, and 8, and the contents of the alleged oxycodone pills*. The Commonwealth also would have needed to prove beyond a reasonable doubt that the pills that formed the basis for the charges of trafficking in and distribution of oxycodone in charges 4, 6, 7, and 8 contained oxycodone and were not counterfeits. As we explained in *Antone*, *supra* at 817, although the defendant would have been warranted in concluding the certificates could not be admitted against him, we do not ignore the other evidence with respect to the fact asserted in the certificates — here the composition of the substance.

The drug certificates were not the only evidence of this fact. According to the DEA agent, the agent conducted three controlled buys at which the defendant claimed to be selling OxyContin. Also, according to the DEA agent, the defendant identified his supplier, to both the DEA agent and one of the confidential informants, as an eighty year old woman with a prescription who had recently been robbed, and thrice drove the DEA agent to her residence. The police also had a record of that person's house as one that had been robbed of OxyContin. Finally, the defendant was recorded several times claiming to the ATF agent that the pills contained oxycodone, and he

urged the ATF agent to test the sixty-three pills. 5

To take the last evidence first, an alleged drug dealer's statements that his drugs are real is worth little, especially where the Commonwealth acknowledges the defendant had previously sold a counterfeit or inoperative hand grenade. To be sure, there could be grievous consequences for selling fake drugs — in this case to a person with access to weaponry including machine guns — but any sale of fake drugs carries substantial risks of retaliatory physical violence. Strong assertions that the drugs are real is something, but with this as the primary evidence of the composition of the pills, the Commonwealth's case would have been much, much weaker without the drug certificates. The statements about the supplier, corroborated to some degree by the evidence that she was robbed of OxyContin, add more to the Commonwealth's case. But there was no evidence of the prescription or the bottle, and the evidence had to prove the composition of these pills beyond a reasonable doubt. Cf. *Commonwealth* v. *Alisha A.*, 56 Mass. App. Ct. 311, 313-314, 777 N.E.2d 191 (2002) ("The jury reasonably could have inferred that the distributed substance was Klonopin" even in the absence of a certificate, from, inter alia, "the juvenile's statements . . . that she would be bringing Klonopin pills into school and distributing them to others, and that they were in her home by prescription, a fact confirmed by the juvenile's mother, who testified that she had discovered seventeen pills missing that day. The juvenile's display of pills and a prescription bottle to . . . other students the next day also supports the conclusion that the juvenile carried out her stated intention." [Footnote omitted]). Perhaps the Commonwealth could have marshaled some additional evidence, but again, as *Scott* instructs, "To permit further hypothetical arguments to factor into the analysis . . . would require a court to heap inference upon inference and will bring the inquiry under this prong too far afield of the facts and circumstances actually known to the defendant at the time of his guilty plea." *Scott, supra* at 357-358.

While the Commonwealth had some case to present on the content of the pills, it was far weaker than one featuring certificates of analysis. The magistrate's conclusion, and thus the judge's, was infected by the same error in weighing the strength of the case without the certificates. Given the speculative nature of the benefit from an unagreed plea, we think the defendant has met his burden to demonstrate all he must: that with respect to the relevant charges, in the absence of the drug certificates, there would have been a "reasonable probability" he would not have entered the unagreed plea. Contrast *Antone, supra* at 818 (the Commonwealth had "significant additional evidence" the substance was cocaine — a different chemist had performed primary testing and identified the substances as cocaine; two controlled buys had been conducted, of substances that field-tested positive for cocaine; a room in the defendant's house had "all the requisite supplies, tools, and instruments specific to cooking, processing, and packaging cocaine for distribution; the defendant pointed out the 'drugs' to the police; and an experienced detective, based on his training and experience, was potentially available to testify"). With its clear errors in assigning weight to both the value of the pleas to the defendant, and the strength of the Commonwealth's case without the certificates, the judge's conclusion to the contrary was outside the range of his sound discretion.

(iii) *Charge 5 and the contents of the alleged morphine pills*. Finally, the only direct evidence that the pills related to the charge of distribution of morphine contained morphine is Dookhan's drug certificate. There is no circumstantial evidence supporting that conclusion. There were no recorded conversations between the defendant and the confidential informant who conducted the controlled buy, and there is nothing in the record about the source of the morphine. Indeed, the Commonwealth raises no independent argument about the contents of the pills alleged to be morphine. Again, weighing the factors properly, the defendant has demonstrated a reasonable probability he would not have pleaded guilty had he been aware of Dookhan's misconduct, and for the reasons spelled out above, the judge's conclusion to the contrary must be reversed.

Order denying motion for new trial reversed.

By the Court (Rubin, Henry & Lemire, JJ. 6),

Entered: June 6, 2018.

Footnotes

1

See *Commonwealth* v. *Scott*, 467 Mass. 336, 349-350, 5 N.E.3d 530 (2014) (describing Dookhan's misconduct).

2 For ease of expression, we treat the special judicial magistrate's findings of fact and conclusions of law as findings and conclusions of the motion judge, the latter having adopted them.

3 The record is unclear whether the defendant was buying pills from the woman or had robbed her.

4 The magistrate also relied, in determining the strength of the Commonwealth's remaining case, on the admissibility of the second analyst's "confirmatory analysis, the integrity of which is not in doubt." The Commonwealth does not rely on the confirmatory analysis, presumably because there is, in fact, nothing in the record indicating whether or not the confirmatory analysis was reliable and independent of Dookhan's tests. Compare *Antone*, 90 Mass. App. Ct. at 816-817 (affidavit of another analyst showing that she "performed at least two tests that indicated the substances were consistent with cocaine and that her role in testing and storing the substances was entirely independent of the testing done by Dookhan" important to defendant's decision to plead guilty).

5 The Commonwealth also would rely on the ATF agent, who was familiar with oxycodone, recognizing the pills as oxycodone, but where the issue is whether the pills are or are not genuine, this adds little to the Commonwealth's side of the scale.

6 The panelists are listed in order of seniority.

Content Type: Cases

Terms: Golding

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