



**OFFICE OF SUFFOLK COUNTY
DISTRICT ATTORNEY RACHAEL ROLLINS**

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March 22, 2021

Hon. Michael D. Ricciuti
Suffolk County Superior Court
Judge's Lobby
Three Pemberton Square
Boston, MA 02108

RE: *Commonwealth v. Justino Escobar*
Docket No. 0984CR10059

Dear Judge Ricciuti,

Today, I filed the attached response on behalf of District Attorney Rachael Rollins in the above-named case. As always, I am grateful for your time and consideration.

Most Sincerely,

Donna Patalano

Enc.

Cc: James McKenna, Esq.
Clerk's Office

COMMONWEALTH OF MASSACHUSETTS
Trial Court Department

SUFFOLK, ss.

Superior Court
Docket No. 0984CR10059

COMMONWEALTH OF MASSACHUSETTS

v.

JUSTINO ESCOBAR,
Defendant

**COMMONWEALTH'S RESPONSE TO
THE DEFENDANT'S MOTION FOR NEW TRIAL**

The Commonwealth respectfully submits this response to the Defendant Justino Escobar's Motion for New Trial. This case is unfortunately one of too many where the integrity of the conviction is now suspect due to the notorious misconduct that plagued the state's main forensic testing facility, the William A. Hinton State Laboratory Institute ("Hinton Lab"), for nearly a decade. As such, the Commonwealth agreed in this case last year that further discovery of materials from the Office of the Inspector General (OIG) was required to determine whether agencies of the Commonwealth met their duty to investigate certain Hinton Lab chemists, and specifically Della Saunders, the primary chemist assigned to the Defendant's case. Following review of these OIG materials and for reasons unrelated to the conduct of Saunders, or to the sufficiency of the OIG investigation into the Hinton Lab, the Commonwealth respectfully assents

to the Defendant's motion.¹

After a decade, we still cannot fully grasp the enormous impact the Commonwealth's multiple drug lab crises have had on the criminal legal system. In the words of the OIG, "the most glaring factor" that led to the crisis at the Hinton Drug Lab was a catastrophic "failure of management." *Investigation of the Drug Laboratory at the William A. Hinton State Laboratory Institute 2002-2012* p. 114 (March 4, 2014).² "The now well-known saga surrounding the [Hinton Lab] stemmed from the egregious misconduct of former laboratory employee Annie Dookhan." *Commonwealth v. Escobar*, 479 Mass. 1010 n.1 (2018), citing *Bridgeman v. District Attorney for the Suffolk Dist.*, 476 Mass. 298, 300 (2017) (setting forth protocol to address legacy of Dookhan's misconduct and to protect rights of affected defendants) ("*Bridgeman II*". That misconduct, of course,

¹ With the assistance of the OIG, the Commonwealth reviewed the OIG's investigative files, including materials identified as "Exhibit 1" that were transferred to the Commonwealth as a result of the Hon. Michael D. Ricciuti's modification of a protective order in *Commonwealth v. Eugene Sutton*, Middlesex Superior Court No. 0481CR00986. The Commonwealth also reviewed the OIG's investigatory materials through Summation, a discovery software program, with access provided by the OIG. During its investigation, the OIG generated 63 file boxes of paper records and 22.3 gigabytes of electronic data. During its review through Summation, the Commonwealth did not identify any actual or potential inculpatory material, including material specifically regarding the sufficiency (or lack thereof) of the OIG's investigation into the work of Ms. Saunders.

² In 2012, at the request of then-Governor Deval Patrick, the OIG conducted an investigation into the Hinton Lab. That investigation resulted in a 2014 OIG report and a supplemental report in 2016. The Commonwealth appended both reports to its discovery response in the Defendant's case filed on December 14, 2020. The Commonwealth is not persuaded by the Defendant's arguments related to the scope and adequacy of the OIG investigation and its assent today is in no way intended to criticize that investigation.

was only the first of three separate related scandals to rock the Commonwealth. In 2014, chemist Sonja Farak pled guilty to multiple counts of tampering with evidence, which stemmed from her consumption of previously seized drugs when she worked at the Commonwealth's drug laboratory in Amherst. See *Commonwealth v. Ware*, 471 Mass. 85, 86-89 (2015). Farak's outrageous, criminal conduct was further exacerbated by alleged prosecutorial misconduct by the Office of the Attorney General that is now the subject of multiple petitions before the Board of Bar Overseers. The combined scandals and alleged prosecutorial misconduct have resulted in tens of thousands of overturned convictions, and have cost the Commonwealth approximately \$30 million. See *Memorandum of Decision and Judgment* at 7 n.9, *Commonwealth v. Eugene Sutton*, (2019) (No. 0481CR00986), citing St. 2013, c. 3, § 2A, line 1599-0054.³

District Attorney Rollins believes that justice demands an end to the saga of the Hinton Lab. The time has come to fully address the impact of systemic misconduct in the Hinton Lab. In doing so, the Commonwealth embraces the high standard that our Constitution requires, starting with

³ See also Danny McDonald, 24,000 charges tossed because they were tainted by former Amherst lab chemist's misconduct, *Boston Globe* (September 25, 2019), <https://www.bostonglobe.com/metro/2019/09/25/charges-tossed-because-they-were-tainted-former-amherst-lab-chemist-misconduct/MUPgdHeLy8bdrzl5KGtvIN/story.html>; Jon Schuppe, Epic Drug Lab Scandal Results in More Than 20,000 Convictions Dropped, *NBC NEWS* (Apr. 18, 2017), <https://www.nbcnews.com/news/us-news/epic-drug-lab-scandal-results-more-20-000-convictions-dropped-n747891>.

the case at bar.⁴ It may never be early enough to address such egregious and systemic misconduct, but it is never too late to rectify the injustice suffered by so many individuals. The Commonwealth, therefore, announces the Office's Hinton Lab Initiative, pledging to collaborate with the defense bar to identify a global resolution for any controlled substance conviction resulting from any analysis conducted at the Hinton Lab between May 1, 2003, and August 30, 2012, when the Hinton Lab was finally shuttered following the discovery of Dookhan's misconduct.⁵ Simply put, the Commonwealth intends to classify every Hinton Lab drug conviction, regardless of the chemist that performed the analysis, as a "List Two" case under the *Bridgeman* protocol. See *Bridgeman II*, 476 Mass. at 328.

In 2017, the Supreme Judicial Court directed those District Attorneys' offices that had relied on testing performed by Dookhan, to

⁴ District Attorney Rollins ran on a platform and a promise to speak out against corruption, misconduct, and racial disparities, bringing integrity back to the criminal legal system and rebuilding trust with the communities most often impacted by this Office. The Hinton Lab, which is located in Suffolk County, is a dark chapter in our history and a stain on our Commonwealth. Every minute spent responding to defense motions challenging egregious misconduct coming from the Hinton Lab is a minute her staff could use to solve a homicide, uplift and support youth in our community, and proactively work to disrupt violence. Accordingly, the District Attorney in her executive function is creating the Hinton Lab Initiative and will no longer use her limited resources to defend misconduct that has tarnished evidence created by the Hinton Lab.

⁵ The Commonwealth chose the specific timespan of eight years and one month to correlate with the period during which the Hinton Lab employed either Farak or Dookhan, or both. See *Committee for Pub. Counsel Servs. v. Attorney General*, 480 Mass. 700, 706 (2018) (Farak employed at Hinton Lab from May 2003 until August 2004); see also <http://badchemistry.legacy.wbur.org/timeline>.

review their respective Dookhan-involved prosecutions. The Court directed that those cases, in which the District Attorney elected to move forward with and could prove at a retrial without the evidence tainted by Dookhan, would be designated as “List Three” convictions. *See id.* at 328.⁶ At the direction of the SJC, the DAs also designated “List Two” defendants for those Dookhan-related convictions that the DAs moved to vacate and dismiss with prejudice, whether or not the case might be successfully re-prosecuted if a new trial were ordered. *Id.* at 327-328.⁷ In an exercise of her prosecutorial discretion, and in recognition of the harm inflicted on the criminal legal system by “a lapse of systemic magnitude”, the District Attorney will now work to treat every defendant with a Hinton Lab drug conviction in the same manner as “List Two” individuals: their convictions

⁶ On November 17, 2020, the Commonwealth asked the Single Justice in *Bridgeman* to reclassify the Suffolk County “List Three” convictions as “List Two” cases in an assented to motion with the Committee for Public Counsel Services (“CPCS”). See Paper #277, *Bridgeman v. District Attorney for the Suffolk District*, Docket No. SJ-2014-0005. Similarly, the Middlesex County District Attorney’s Office moved to reclassify its six “List Three” cases in *Bridgeman* just last week.

⁷ A *Bridgeman*-type protocol was not required for Farak defendants because the DAs agreed to the vacating and dismissal of “all convictions based on evidence that was tested at the Amherst lab on or after January 1, 2009, regardless of the chemist who signed the drug certificate, and all methamphetamine convictions where the drugs were tested during Farak’s tenure at the Amherst lab.” *Committee for Pub. Counsel Servs. v. Attorney General*, 480 Mass. 700, 729 (2018). The relief District Attorney Rollins identifies today through the Hinton Lab Initiative is similar to the global resolution crafted for the Amherst Lab. As in that matter, the Commonwealth intends the relief to only extend to controlled substance convictions and not to other charges prosecuted at the same time (*e.g.*, illegal firearm possession or crimes of violence). This is because the Hinton Lab reviewed and tested the controlled substances and had no involvement with the other charges.

should be vacated and dismissed with prejudice.⁸ *Commonwealth v. Scott*, 467 Mass. 336, 352 (2014).

The Commonwealth's abject failure to adequately and appropriately manage a forensic agency that's primary function is to provide prima facie evidence used to convict defendants constitutes misconduct egregious enough to demand the result here. As the Supreme Judicial Court explained:

This particularly insidious form of misconduct, which belies reconstruction, is a lapse of systemic magnitude in the criminal justice system. Thus, it is incumbent upon us to exercise our superintendence power to fashion a workable approach to motions to withdraw a guilty plea brought by defendants affected by this misconduct. We must account for the due process rights of defendants, the integrity of the criminal justice system, the efficient administration of justice in responding to such potentially broad-ranging misconduct, and the myriad public interests at stake. Moreover, in the wake of government misconduct that has cast a shadow over the entire criminal justice system, it is most appropriate that the benefit of our remedy inure to defendants.

Scott, 467 Mass. at 352. Here, the Commonwealth does not assent because it has identified any additional identified misconduct by individual Hinton

⁸ In the meanwhile, the Commonwealth is reviewing current cases in which a Hinton Lab conviction serves as the predicate offence for an enhanced sentence on a subsequent state or federal indictment and recognizes that those prosecutions will be impacted by the District Attorney's decision regarding the original Hinton Lab convictions. Additionally, the individuals who eventually receive relief by a potential global resolution of all Hinton Lab convictions may be entitled to the refund of fines, fees, court costs, and restitution paid as a result of invalidated drug convictions, as is being contemplated for the "the putative class of Dookhan and Farak defendants. *Foster vs. Massachusetts*, U.S. Dist. Ct., Civ. No. 18-10354-IT (D. Mass., filed Feb. 23, 2018, amended Sept. 6, 2018)." *Commonwealth v. Martinez*, 480 Mass. 777, 797 (2018).

Lab employees or any insufficiency of the Hinton Drug Lab investigation.⁹ Rather, the Commonwealth assents because this case is one of thousands tainted by systemic corruption and misconduct.¹⁰ The District Attorney must balance “the necessity for preserving society's interest in the administration of justice” against the rights of the Defendant. See *Commonwealth v. Cronk*, 396 Mass. 194, 199 (1985). Here, both require the same result. Specifically, in these circumstances, where the misconduct was egregious, presumptive prejudice arises and imposition of the sanction of granting a new trial is appropriate in order to allow the Commonwealth to file a *nolle prosequi*. See, e.g., *Cronk*, 396 Mass. at 199. The Commonwealth’s request now, and its filing of a *nolle prosequi* should this Court grant the Defendant’s motion for new trial, is the most

⁹ The OIG “conducted a high-level review of the lab’s operation and management, and not an investigation specifically targeted to any individual’s conduct” (internal quotations omitted). *Sutton – Single Justice Decision* at 8. That investigation supports the District Attorney’s action now because it revealed the abject failure of Hinton Lab management. Again, the decision is based on the systemic mismanagement rather than the conduct of any one individual or the scope of the investigation.

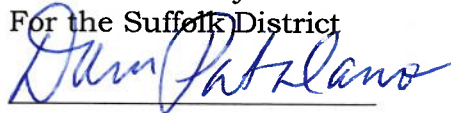
¹⁰ The Commonwealth is in the process of identifying the precise number of individuals who have convictions based on Hinton Lab certifications. The Hinton Lab processed about 190,000 cases in total from 2003 until when it was shuttered in 2012. See <http://badchemistry.legacy.wbur.org/timeline>. According to discovery provided during the prosecution of disgraced chemist Annie Dookhan, the Hinton Lab conducted approximately 82,851 test analysis in Suffolk County cases. Following dismissals with prejudice from the Dookhan conviction, there remains approximately 74,848 test analysis that may be subject to relief through the Hinton Lab Initiative. Because one certification can be used for multiple defendants or one defendant can have multiple certifications, the precise number of defendants impacted by the Hinton Lab Initiative is still to be determined.

appropriate action to deter such misconduct in the future. See, e.g., *Bridgeman II*, 476 Mass. at 316-317. In this calculus, and with this decision, the District Attorney contends that any conviction based on a forensic agency's gross negligence, deliberate indifference, and criminal misconduct must not stand.

No defendant harmed in this ignominious chapter of Massachusetts law enforcement history should continue to bear the burden and be marked with the brand of the Commonwealth's extensive wrong doing. In now-retired SJC Justice Geraldine Hines's wise words, "[t]he only fitting end to this blight on the integrity of our criminal justice system is vacatur and dismissal with prejudice of the convictions" of *all* Hinton Lab defendants. *Bridgeman II*, 476 Mass. at 334-335 (Hines, J., dissenting). For all these reasons, the Commonwealth proudly assents to the Defendant's motion and respectfully requests the Court grant him a new trial so that the Commonwealth may file a *nolle prosequi* for his trafficking conviction.

Respectfully Submitted,
FOR THE COMMONWEALTH

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For the Suffolk District



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March 22, 2021

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was e-filed and sent to the defendant's counsel James P. McKenna, Esq. via email to James.P.McKenna.Esquire@aol.com and OIG General Counsel Susanne O'Neill via email to Susanne.M.ONeil@mass.gov.



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General Counsel

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