MOTION TO VACATE PLEA PURSUANT TO 28 U.S.C. 2255

Defendant moves under 28 U.S.C. 2255 to vacate his guilty plea. As grounds, defendant states that his rights to due process were violated where (1) his plea was not knowing, voluntary and intelligent under Brady v. United States, 397 U.S. 742 (1970) and Ferrara v. United States, 456 F.3d 278 (1st Cir. 2006) because he entered the plea unaware of government misconduct at the Hinton Drug Lab, and (2) the prosecutor failed to disclose the misconduct in accordance with his obligations under Brady v. Maryland, 373 U.S. 83 (1963).

BACKGROUND

**I. YOUR FACTS**

$ Examples of Facts to Consider:

$ Plea date, crime

$ Before he entered his guilty plea(s), defendant was provided with certificates of analysis stating under oath that \_\_\_.

$ More - Defendant has authored an affidavit stating that he relied upon the testing in his decision to plead guilty, attorney authored an affidavit saying would not have counseled D to plead guilty?

$ The governments case against [defendant] rested squarely on the testing conducted by the MDPH Laboratory chemists and their conclusion that the suspected drug evidence contained [drug]. The content and weight of the suspected drug evidence was a critical piece of the governments case.

$ During [defendants] plea colloquy, the government summarized the results it would have presented at trial, including the results of [Dookhans] testing, [after hearing those facts, the Court found \_\_\_\_].

$ [More - can you say something compelling about what the case against D would have looked like without this drug evidence?]

**II. MISCONDUCT AT THE HINTON LABORATORY**

On August 30, 2012, the Massachusetts Department of Public Healths (MDPH) William A. Hinton Laboratory (the lab) was abruptly closed after investigation revealed that Annie Dookhan, the labs most prolific chemist, engaged in widespread official misconduct which compromised the validity of thousands of drug test results. Dookhan was later charged with twenty-nine separate crimes, including perjury, obstruction of justice, tampering with evidence, and falsely claiming to hold a degree (Exhibit A). Shortly after the lab closed, Dookhans immediate superior was fired and both the labs director and the Commissioner of Public Health were forced to resign (Exhibits B & C). Governor Patrick ordered a file-by-file review of every case Dookhan handled, and assigned Inspector General Glenn Cunha to conduct a comprehensive review of the lab (Exhibits D & E). These investigations are ongoing. The lab remains closed and the remaining analysts are on administrative leave and have not been allowed to resume testing duties. The Inspector Generals report is expected later this year.

**A. Background of the Hinton Drug Lab Scandal.**

In June 2011 Annie Dookhans immediate superiors discovered that she had accessed the evidence safe without authorization, removed 90 drug samples, and subsequently forged a co-workers initials on the evidence log after the breach was discovered. Dookhans superiors did not report her misconduct to the MDPH Commissioners Office or General Counsel for almost six months, due to their perception that Dookhan was a high-achieving, reliable employee and that this was an isolated incident.[[1]](#footnote-1) Instead, Dookhan was allowed to finish her outstanding tests, then removed from testing duties and assigned to write protocols for the laboratory.

MDPH General Counsel first learned of Dookhans misconduct in December 2011 during planning meetings in preparation for the previously-scheduled transfer of the forensic drug laboratory to the State Police Crime Laboratory.[[2]](#footnote-2) At that point MDPH conducted a limited internal investigation into the incident which concluded that Dookhan failed to follow laboratory protocols for the transfer of samples and subsequently created a false record of the transfers.[[3]](#footnote-3) In February 2012 Linda Han, MDPHs Bureau of Laboratory Sciences Director, sent two letters to prosecutorial agencies associated with the 90 samples about Dookhans breach and her subsequent falsification of logs.[[4]](#footnote-4) Dookhan was placed on administrative leave of absence on February 21, 2012 and formally terminated as of March 9, 2012.[[5]](#footnote-5)

In August 2012 EOPSS and the Attorney General began their own criminal investigation of Dookhan, which quickly resulted in the labs closure.

**B. Dookhans Misconduct.**

To date, several thousand pages of discovery have been produced regarding Dookhan and the lab.[[6]](#footnote-6) In broad strokes,

 the discovery reveals that, among other things, Dookhan:

a) Admitted to law enforcement that for several years, she had been dry-labbing(i.e., simply certifying, without testing, that the substance was the suspected drug) (Exh. I at 71-74, 77);

b) Admitted that she laid out samples from different cases on her bench at the same time and grouped them by the type of suspected drug (Id.). This allowed for cross-contamination as well as compromising the chain of custody;

c) Admitted that she batched samples together and tested some but not others, then simply labeled the others as the drug she suspected it of being (Id.);

d) Admitted that when the gas chromatograph / mass spectrometer (GC/MS) machine did not confirm her result, she would intentionally contaminate the sample by using a known drug from a completed test which she stored at her bench (Id.)[[7]](#footnote-7);

 e) Had a key to the evidence safe;[[8]](#footnote-8)

f) Admitted that she had access to the evidence database (Exh. I at 72);[[9]](#footnote-9)

g) Admitted that when she was discovered in possession of 90 drug samples that were not properly signed out to her, she falsified an evidence officer's initials in the evidence log book (Exh. I at 71-72);

h) Admitted that she falsified other chemists' initials on quality control documents for the GC/MS machine (Exh. I at 72);[[10]](#footnote-10)

i) Failed to properly run the quality control test samples for the GC/MS machine, and instead falsely certified that she had done so (Exh. H at 8 13 & 22 5);

j) Failed to properly calibrate balances, which are used to ensure the accuracy of the drug weights measured by the chemist (Exh. H at 23 9);

k) Communicated directly with prosecutors about specific cases, and displayed a prosecutorial bias.[[11]](#footnote-11)

l) Falsely stated on her curriculum vitae that she had received a Master of Science in Chemistry from the University of Massachusetts (Exhs. A & M);

m) Falsely testified under oath on a number of occasions (Exh. A).

The laboratorys internal statistics revealed that Dookhans testing volume was vastly out of proportion with the other chemists: In 2004, the first full year she was on the job, Dookhan tested 9,239 samples, while the next most productive chemist tested only 6,262 samples (Exh. F at 342). In 2005, she tested 11,232 samples, and the next most productive chemist tested only 6,053 samples (Id.). One chemist told investigators that while most chemists were testing 50 to 150 samples per month, Dookhan was testing over 500 samples per month, but that there were not enough slides in her discard pile to correspond with those high numbers (Exh. H at 19 4-5). Another noted that he never saw her in front of a microscope, although that is how the chemists performed micro-crystal tests on cocaine samples (Exh. H at 21 1).[[12]](#footnote-12) Although the productivity of the other lab chemists decreased after the Supreme Courts decision in Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009) because of time spent on court appearances, Dookhans productivity actually increased: In 2010 Dookhan tested 10,933 samples while the second most prolific chemist tested 3,839 (Exh. F at 342). In total, Dookhan was responsible for 25% of the laboratorys total analyses and completed 21.8% of all tests conducted by staff (Exh. F at 341-342).

 Given the lack of adequate documentation and quality control procedures at the laboratory, the true scope of Dookhans misconduct may never be fully known. What is known is that Dookhans excessively high testing volume belies her self-serving statement to law enforcement, when confronted with proof that she had falsified the results in a specific case, that she only contaminated samples a few times. (Exh. I at 73). Throughout her tenure at the lab Dookhan had unfettered access to evidence: Her key opened the evidence safe (Exh. J; Exh. H at 32 8). She also had access to the evidence database.[[13]](#footnote-13) She had unrestricted access to drug standards (known samples of particular drugs used in the CG/MS machine for comparison (Exh. H at 22 2)).[[14]](#footnote-14) Moreover, Dookhans access to the laboratory, safe, and the database continued even after she was removed from testing duties in June 2011.[[15]](#footnote-15)

 **C. Lack of Quality Control At the Laboratory**.

The Inspector General is currently conducting a comprehensive review of the laboratory in general, and a report

is expected to be released later this year. MDPHs own internal review, conducted in the wake of the labs closure, found a number of vulnerabilities at the lab, including lack of accreditation, insufficient quality control oversight, outdated and vague protocols, insufficient safeguards on access to the evidence room and safe, absence of camera surveillance, lack of a mechanism to track chemists discrepancies or adverse results, and lack of close supervision from supervisors (Exh. F). Accreditation would have required standards for training, personnel, equipment and instrumentation, and would also have required chemists to keep more detailed data regarding the testing process (Exh. F at 333). However MDPH purportedly lacked the funds necessary to pursue accreditation. Id. The protocols that the lab did have in place were both outdated and too generalized to guarantee[] the type of integrity needed to deliver high-quality forensic drug analyses. (Id. at 332-333).[[16]](#footnote-16) In addition, in 2008 budget cuts had forced MDPH to eliminate their quality control division, which oversaw all 18 MDPH laboratories within the Bureau of Laboratory Sciences, and to decentralize the quality control function to each individual laboratory (Id. at 333). Essentially, these laboratories, including the forensic lab at issue here, were left to police themselves. Ironically, Dookhan herself had quality control responsibilities at the lab (Exh. I at 71 at 1; Exh. H at 22 at 2; Exh. Q).

The laboratorys documentation procedures were so poor that potentially exculpatory data was not disclosed to either prosecutors or defense attorneys on a regular basis. As noted above, the laboratory did not maintain an adverse events log. Thus they did not have a mechanism in place to capture instances where secondary GC/MS testing failed to confirm a primary chemists conclusion. In those instances, the confirmatory chemist would return the sample to the primary chemist for the primary chemist to resolve the discrepancy (Exh. F at 341; Exh. H at 6 6). Dookhan has admitted to resolving her discrepancies by contaminating evidence. There was no procedure in place to reconcile or even compare the data of a second run of a sample on the CG/MS machine with the first, to ensure the results of the second run were accurate. The only place that a discrepancy between the primary chemists result and confirmatory CG/MS testing might be noted was on the back of an index card known at the control card. However, the chemists, who typically provided discovery to the prosecuting attorneys on their own cases, apparently only transmitted the *fronts* of the control cards in the discovery packet.[[17]](#footnote-17) Thus, any discrepancy would presumably be unknown to both the prosecutor and, in turn, to the defense attorney.

The lack of evidentiary integrity is further evidenced by the fact that the lab supervisor later discovered that a number of chemists keys, not just Dookhans, opened the safe door, despite the fact that only evidence officers were authorized to access the safe,[[18]](#footnote-18) as well as the fact that after the labs closure investigators found drug samples scattered about the lab, including in desk drawers, taped to lab cabinets, and even within boxes of files the Attorney General sent for scanning (Exh. P). Finally, it is clear that oversight and supervision were practically non-existent, as demonstrated by the lab supervisors failure to monitor Dookhans unusually high volume of testing (Exh. F at 341-342); failure to respond appropriately to information that she falsified coworkers initials on quality control documents (Exh. H at 6 4, 15 9 and 22 5); failure to report Dookhans breach of the evidence safe and falsification of logs to the MDPH Commissioners Office for six months (Exh. F at 336-339, 343); and failure to safeguard the evidence safe until six months after the breach (Exh. J). The Hinton laboratorys vulnerabilities were systemic and pervasive and compromised the reliability of all its test results.

GROUNDS FOR RELIEF

**A. DEFENDANTS GUILTY PLEA SHOULD BE VACATED UNDER 28 U.S.C. 2255 BECAUSE IT WAS NOT VOLUNTARY, KNOWING, AND INTELLIGENT**

A prisoner may move a court to vacate or set aside his conviction and/or sentence under 28 U.S.C. 2255 where he is in custody under sentence of a court established by Act of Congress, and claims that the sentence was imposed in violation of the Constitution or laws of the United States. 28 U.S.C. 2255; United States v. Colon-Torres, 382 F.3d 76, 85, n. 8 (1st Cir. 2004). Fed. R. Crim. P. 11(e) provides that a guilty plea may be set aside under 28 U.S.C. 2255 (After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.).

Because a defendant who enters a guilty plea simultaneously waives several constitutional rights, McCarthy v. United States, 394 U.S. 459, 466, (1969) due process requires that the defendants entry of a guilty plea be a voluntary, knowing, and intelligent act, done with sufficient awareness of the relevant circumstances and likely consequences. United States v. Noriega-Millan, 110 F.3d 162, 166 (1stCir. 1997).

In addition, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts. McCarthy, 394 U.S. at 466. McCarthy went on to explain that, aside from directing the judge to inquire into the defendants understanding of the nature of the charge and the consequences of his plea, Rule 11 also requires the judge to satisfy himself that there is a factual basis for the plea. Id. at 467.

A guilty plea is involuntary if induced by misrepresentation. Brady v. United States, 397 U.S. 742, 755 (1970). Citing Brady, the First Circuit has held that a guilty plea is involuntary where (1) the government or its agents committed some egregiously impermissible conduct that antedated the entry of the plea; and (2) the misconduct was material to the defendants choice to plead guilty. Ferrara v. United States, 456 F.3d 278, 290 (1st Cir. 2006). In analyzing whether the misconduct was material to the defendants choice to plead guilty, a court must determine whether there is a reasonable probability the defendant would not have pleaded guilty had he known about the misconduct. Id. at 294.

**1. Government misconduct**

A. Agents of the Government

Due process cases in government misconduct contexts consider agents of the government to encompass actors well beyond the prosecuting attorneys. For example, the Due Process clause forbids convictions based on deliberate deceptions. See Limone v. Condon, 372 F.3d 39, 45 (1st Cir. 2004) (citing Brown v. Mississippi, 297 U.S. 278, 286 (1936)) (where civil rights action under 42 U.S.C. 1983 alleged that law enforcement officers deliberately fabricated evidence and framed individuals for crime, officers not entitled to qualified immunity). A violation of the duty to refrain from procuring convictions by false evidence does not depend upon guilty knowledge by the prosecuting attorney. Id. at 47. The First Circuit in Limone noted that the Supreme Court ascribes this duty broadly to the sovereign and its agents. Id., citing Napue v. Illinois, 360 U.S. 264, 269 (1959) (attributing the duty to representatives of the State); Pyle v. Kansas, 317 U.S. 213, 216 (1942)(attributing the duty to State authorities); Mooney v. Holohan, 294 U.S. 103, 112 (1935)(attributing the duty to the State). Likewise, Brady v. Maryland 373 U.S. 83 (1963) requires a prosecutor to learn of and disclose any exculpatory or impeachment evidence known to other government agents who are acting on the governments behalf. Kyles v. Whitley, 514 U.S. 419, 433-34 (1995).

An Ohio state decision ascribed the duty to refrain from procuring convictions by false evidence to a member of a police department crime lab and granted a new trial where the expert witness testified falsely concerning credentials, training, and whether or not any testing had been performed. See Ohio v. Defronzo, 394 N.E.2d 1027 (Ohio 1978).

In vacating guilty pleas on the due process grounds articulated in Ferrara, Massachusetts courts have found that the chemist in the instant case, Annie Dookhan,/Annie Dookhan, a chemist at the Hinton Lab/ was an agent of the government on the basis of evidence concerning her role at the Hinton Drug Lab. See Commonwealth v. Rodriguez, No. 2007-00875, 2013 WL 2420416 at \*3 n. 5 (Mass. Super. May 29, 2013);[[19]](#footnote-19) Commonwealth v. Baez-Franco, No. 2009-01151, slip. op. at 6 (Mass Super. April 25, 2013) (attached as Exhibit S).[[20]](#footnote-20) See also United States v. Fisher, 711 F.3d 460, 465-466 (4th Cir. 2013)(noting that Brady v. United States does not limit government misrepresentations to prosecutorial promises designed to elicit a guilty plea and vacating on Ferrara grounds where police officer obtained search warrant based upon falsehoods).

Here, Dookhan was acting as an agent of the government. At the time, the Hinton laboratory was required by statute to perform chemical analyses of drugs upon request from law enforcement agencies. M.G.L. c 111 12-13. In addition, discovery demonstrates that Dookhan had an unusually close

relationship with prosecutors, having direct communication with them, agreeing to act quickly and out of order on cases for them, and directing them concerning what questions they should and should not ask her on direct examination.

B. Egregiously impermissible conduct

Under the Ferrara standard, egregiously impermissible conduct encompasses threats, blatant misrepresentations or untoward blandishments by government agents. Ferrara, 456 F.3d at 290; Brady v. United States, 397 U.S. at 755. There is no requirement that the impermissible conduct occur in a case in which the defendant claims actual innocence. Fisher, 711 F.3d at 467, (citing United States v. Garcia, 401 F.3d 1008, 1013 (9th Cir. 2003)(noting that while courts can consider a claim of innocence in support of a motion to withdraw a plea, a defendant may have valid reasons for withdrawing a plea that have nothing to do with innocence)).

In Rodriguez, the Massachusetts Superior Court found that the evidence of Dookhans misconduct is sufficiently egregious to satisfy this prong of the Ferrara test. Rodriguez, 2013 WL 2420416, at \*3.[[21]](#footnote-21) Baez-Franco likewise found that Dookhans malfeasance constitutes precisely the sort of egregiously impermissible misconduct that is sufficient to implicate due process concerns and satisfy the requirements in Ferrara. See Exh. S at 9.

Dookhan engaged in blatant misrepresentations concerning the composition and weight of seized substances in drug prosecutions. She has admitted to, inter alia, dry labbing, forging, recording false data, and intentionally contaminating sample substances that had tested negative for drugs in order to make them positive. She has compromised the validity of thousands of drug test results and has been charged with twenty-nine separate crimes, including perjury, obstruction of justice, and tampering with evidence. Her behavior constitutes egregiously impermissible conduct.

Here, Dookhans conduct antedated the entry of petitioners guilty plea. [Your Facts Here + relevant Dookhan misconduct timing]

**2. Reasonable probability that defendant would have gone to trial**

Assessing the reasonable probability that a defendant would have elected to go to trial involves limited scrutiny. In a Rule 11 error context, the Supreme Court has addressed the showing required for determining whether a defendant would have pleaded guilty absent error. See United States v. Dominguez Benitez, 542 U.S. 74 (2004). As in the case of a constitutional error, the defendant must show reasonable probability that, but for the error, he would not have entered the plea. Id. at 83. However, Dominguez Benitez noted that where the claim of a plea error is a constitutional one, e.g., that the guilty plea was not knowing and voluntary, . . . we do not suggest that such a conviction could be saved even by overwhelming evidence that the defendant would have pleaded guilty regardless. Id. In any event, the point of the question is not to second-guess a defendants actual decision; if it is reasonably probable he would have gone to trial absent the error, it is no matter that the choice may have been foolish. Id. at 85.

 Relying on Dominguez-Benitez, the First Circuit vacated a guilty plea where the defendant was not informed of the maximum penalty for his offense at his plea hearing. See United States v. Ortiz-Garcia, 665 F.3d 279 (1st Cir. 2011). In accordance with Dominguez-Benitezs explanation of prejudice, the court said It is not for us . . . to assess whether a defendant would likely have succeeded at trial had he elected not to plead guilty in the absence of a Rule 11 error. Id. at 286.

Because each defendants decision whether to enter a guilty plea is personal and, thus, unique, the First Circuit has said that no checklist of factors bearing on the reasonable probability that a defendant would have elected to go to trial can be determinative. Ferrara, 456 F.3d at 294. As a general matter, however, it noted that nondisclosure of powerful impeachment evidence is apt to skew the decisionmaking of a defendant who is pondering whether to accept a plea agreement. Id. at 296. Moreover, if the evidence substantially detracts from the factual basis of the plea, or if knowledge of the evidence would have prompted defense counsel to seek a better plea bargain, there is support for the reasonable probability that the defendant would have elected to go to trial. Id.

Accuracy of drug testing is critical in a drug prosecution.

The notarial jurat on each drug certification states that the contents [of the certification] are truthful and accurate to the best of . . . the affiants . . . knowledge and belief. The replication of G.L. c. 111 13 on each certificate states:

This [drug analysis] certificate shall be sworn to before a Justice of the Peace or Notary Public, and the jurat shall contain a statement that the subscriber is the analyst or assistant analyst of the department. When properly executed, it shall be prima facie evidence of the composition, quality, and the net weight of the narcotic or other drug, poison, medicine, or chemical analyzed, and the court shall take judicial notice of the signature of the analyst or assistant analyst, and of the fact that he/she is such.

Each analysis and certification was a testimonial substitute for use in court proceedings, necessary to establish an element of the offense.

Ferrara prejudice is met here where the information about Dookhans misconduct is powerful impeachment evidence which could have resulted in a better plea deal, or could have supported a decision to go to trial, because it severely undercut the validity of drug certifications used to establish an element of the offense. Cf. Commonwealth v. Baez-Franco, supra at 12-13 (vacating plea where the defendant and counsel should have had the information about Dookhans misconduct to inform them as to what kind of plea bargain to seek and/or accept or whether to reject a plea bargain and go to trial); Commonwealth v. Rodriguez, 2013 WL 2420416 at \*4 (second prong of Ferrara satisfied where . . . the evidence of Ms. Dookhans misconduct calls into question not only Ms. Dookhans credibility as a witness, but also the reliability of the drug certificate itself, thereby potentially jeopardizing the Commonwealths ability to meet its burden at trial of proving beyond a reasonable doubt that the substance is a particular drug. ).

 Ferrara prejudice is not defeated here by the possibility that independent retesting of samples seized from defendants could provide evidence that they possessed and sold cocaine. Although the court in Wilkins relied heavily on the possibility of independent retesting of the remaining plastic bags contained within the samples in finding Ferrara prejudice unmet (Wilkins at 18), any retesting of samples initially delivered to the Hinton Lab must be regarded as highly suspect. Dookhans specific admission that she routinely laid out multiple samples from different cases on her bench and grouped them together according to the type of suspected drug (Exh. I at 73 8, 77 2) undermines any claim that any portion of a sample she handled retained its integrity. Given her admission, there can be no assurance that drugs that were collected by law enforcement in a specific case are the same drugs available for retesting.[[22]](#footnote-22) In addition, Dookhans access to both the safe and the evidence database ensured that she had access to any sample, even those not specifically assigned to her.

Moreover, the Hinton Lab itself is the subject of a forensic investigation being conducted by Massachusetts Inspector General Glenn Cunha. Periodic releases of discovery by the Massachusetts Attorney Generals Office have indicated that the laboratory lacked any type of independent accreditation, maintained outdated operating procedures, and lacked any independent and meaningful quality assurance or quality control procedures. There were insufficient safeguards on access to the evidence room, safe, and the evidence database. A number of chemists keys opened the evidence safe. In addition, recent discovery indicates that drugs were found scattered throughout the lab, including on the floor, in desk drawers and filing cabinets, and within files that were sent by the Inspector General for scanning by an independent vendor (Exh. P). A large amount of what appeared to be marijuana and other miscellaneous samples were found, not secured in the evidence safe, but in a cabinet (Exh. P at 1767, 1772-3). Protocols did not limit a chemist to removing and analyzing samples from a single case and returning them to the evidence safe before removing and analyzing samples from another case. The danger of even inadvertent cross-contamination from the fact that a chemist could have samples from any number of cases at his/her workstation at any one time suggests that the chain of custody vital to the evidentiary integrity of any retesting has been severely, if not fatally, compromised. The availability of independent retesting of samples that have been in the Hinton Laboratory should not be a basis for determining that there is no reasonable probability that a defendant who plead guilty would have opted to go to trial. Cf. Ex Parte Patrick Lynn Hobbs, 393 S.W.3d 780 (Tex. 2013)(habeas granted on due process grounds in drug possession case where forensic scientist did not follow accepted standards when analyzing evidence; though evidence remained to retest, because the evidence had been in custody of technician, custody was compromised, and due process violated).

[DETAILED APPLICATION TO YOUR CASE WITH GROUNDS FOR BELIEVING CLIENT WOULD HAVE/COULD HAVE GONE TO TRIAL]

[NOTE - IF YOUR CLIENT PLED/WAS TRIED AFTER FEBRUARY 1, 2012 WHEN PROSECUTORS WERE FIRST NOTIFIED OF IRREGULARITIES IN THE LAB, YOU MAY BE ABLE TO MAKE OUT A CLAIM UNDER BRADY v. MARYLAND. HOWEVER, BECAUSE THERE ARE PROBLEMATIC LEGAL ISSUES INVOLVED WITH THIS CLAIM, WE RECOMMEND YOU SEEK US OUT FOR FURTHER DISCUSSION]

**B. THE FAILURE TO DISCLOSE THE MISCONDUCT AT THE HINTON LAB VIOLATED DEFENDANTS RIGHT TO DUE PROCESS UNDER BRADY V. MARYLAND**

Brady v. Maryland 373 U.S. 83 (1963) requires a prosecutor to learn of and disclose any exculpatory or impeachment evidence known to other government agents who are acting on the governments behalf. Kyles v. Whitley, 514 U.S. 419, 433-34 (1995). Failure to do so violates due process. Brady, 373 U.S at 87.

Where evidence is wrongly withheld in violation of Brady, the defendant must show:

(1) the evidence at issue is material and favorable to the accused; (2) the evidence was suppressed by the prosecution; and (3) the defendant was prejudiced by the suppression in that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

Strickler v. Greene, 527 U.S. 263, 280 (1999).

Suppression for Brady purposes occurs when the government fails to turn over even evidence known only to investigators and not to the prosecutor. See Youngblood v. West Virginia, 547 U.S. 867, 869-70 (2006). In the context of this federal prosecution using state law enforcement officers and laboratory personnel, a decision by the Massachusetts Supreme Judicial Court (Commonwealth v. Woodward, 427 Mass. 659, 679 (1998)) that a similarly situated professional is a government agent and a member of the prosecution team is entitled to respectful consideration particularly when that courts conclusion conforms to published Department of Justice guidance on the topic. See Guidance for Prosecutors Regarding Criminal Discovery, issued January 4, 2010 by Deputy Attorney General David W. Ogden (the Ogden Memo), U.S.A.M. 9-5.001(Prosecution team members include federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant).

Where the defendant entered a guilty plea, the showing of prejudice from the withheld evidence is that there is a reasonable probability that but for the withholding of the information [he] would not have entered the guilty plea but would have insisted on going to a full trial. Ferrara v. United States, 384 F.Supp. 2d 384, 421 (D. Mass. 2005) (quoting Miller v. Angliker, 848 F.2d 1312, 1322 (2d Cir. 1988)) affd on other grounds, 456 F.3d 278 (1st Cir. 2006).

The due process right described in Brady v. Maryland is applicable in this plea context. The district court in Ferrara found the right applicable in the plea context. Though the Supreme Court in United States v. Ruiz, 536 U.S. 622 (2002) earlier held that the government need not disclose impeachment information prior to entering into a plea agreement with a defendant, the information at issue here went beyond impeachment. Here the information withheld concerned the validity of drug certificates issued by Annie Dookhan attesting to whether seized substances were in fact drugs and the weight of the substances. This information goes directly to an element of the drug conviction. Cf. Commonwealth v. Baez-Franco, supra at 13 (Although evidence of Dookhans misconduct could certainly have been used to impeach her credibility . . . it can hardly be said that this evidence is merely impeaching.); Commonwealth v. Rodriguez, 2013 WL 2420416 at \*4 (noting that the evidence of Dookhans misconduct calls into question not only Ms. Dookhans credibility as a witness, but also the reliability of the drug certificate itself . . . .).

[Application of the law to your case, beginning, e.g., Here, defendant did not receive any information concerning the misconduct of chemists working at the state drug lab who produced the drug certificate(s) in his case. The misconduct included falsification of test results,. . . [ ]. These certificates were the primary government evidence that [ ]]

CONCLUSION

Defendant may seek to supplement this motion at a later date when more facts are discovered about Ms. Dookhans misconduct and the conduct of others at the laboratory. Defendant files this motion based on the urgency of newly-discovered evidence and does not intend to waive any other claims.

Defendant respectfully requests that the court vacate defendants plea and order a new trial; and further that the court allow defendant to supplement this motion with additional material uncovered by further investigation of the drug lab and discovery received from the government.

1. Exhibit F at 337-338. [↑](#footnote-ref-1)
2. Exhibit F at 337. The functions and personnel of the Hinton forensic drug lab were to be transferred to the Executive Office of Public Safety and Security (EOPSS) and become part of the State Police Crime Laboratory effective July 1, 2013. As staff on the proposed transfer list were reviewed, Dookhans immediate superiors shared information about her misconduct with MDPH and identified Dookhan as someone who would not be part of the transfer. [↑](#footnote-ref-2)
3. Exhibit F at 338. [↑](#footnote-ref-3)
4. Exhibit G. [↑](#footnote-ref-4)
5. Exhibit F at 339. [↑](#footnote-ref-5)
6. The United States Attorneys Office has transmitted discovery produced by the Massachusetts Office of the Attorney General. Selected portions of the discovery are submitted as Exhibits F through Q. References will be made to specific bates numbered pages, as well as paragraphs, where appropriate. [↑](#footnote-ref-6)
7. At the time the lab utilized a two-chemist system: The primary chemist (also known as the custodial chemist) was responsible for weighing the sample and conducting bench-top tests such as reagent color tests, microcrystalline analyses, and ultraviolet visualization. After conducting these tests the primary chemist prepared a vial containing a small amount of the sample and transferred that vial to the secondary chemist to run it through the CG/MS machine. The primary chemist retained the remaining portions of the evidence samples (Exh. F at 334-335). [↑](#footnote-ref-7)
8. Investigators determined that Dookhans key opened the evidence safe, and that supervisors did not replace the safes lock until December 2011, six months after her initial misconduct was discovered in June 2011. See Exhibit J. Dookhan also admitted to a co-worker that she knew the evidence safe code, an alternative way to access the safe. See Exhibit H at 32 8. [↑](#footnote-ref-8)
9. A computerized database kept a record of samples that were submitted to the lab. When a sample was signed out to a chemist for testing, a record of the transfer was recorded in both the database and a separate logbook stored in the evidence office. When a chemist returned samples after testing this was documented in both the database and the logbook (Exh. F at 334-335). [↑](#footnote-ref-9)
10. See also Exh. H at 5-6 & 22 4 (Dookhan forged Daniel Renczkowskis initials on a GC/MS control sheet); Exh H at 40 3 (Dookhan forged Nicole Medinas initials on a GC/MS tune report); Exh. H at 45 2 (Dookhan forged Kate Corbetts initials on GC/MS batch sheets on a number of occasions). [↑](#footnote-ref-10)
11. Dookhan communicated directly with prosecutors about specific samples, agreeing to analyze them more quickly, out of order, despite the fact that this was not proper procedure. (Exh. H at 24, 1 & 4, 29 11, 32 4, 37 3, 40 5 and Exh. I at 72 6). Dookhan also provided lists of predicate questions for prosecutors to ask her during direct examinations, sometimes advising prosecutors to avoid questions that deal with accreditation, publications, and external training. See Exh. K (select Dookhan emails providing predicate questions).

 In addition, many of Dookhans emails show her bias toward the

prosecution. For example, after Dookhan faxed information on two of his cases, one federal prosecutor commented Annie - thanks. Sorry to be bothersome lately. But the Summer approaches and we need to take some of these guys off. Dookhan responded: No problem. I have the same attitude . . . get them off the streets. In another example, Dookhan commented Haha!! My all time favorite excuse, Boston case Its not mine, I was holding it for my girlfriend. Dookhan also comments that it "sucks" that a prosecutor received a hung jury; congratulates a prosecutor who tells her that the defendants in her case pleaded guilty and "will be enjoying Dedham House of Corrections soon"; comments that a prosecutor should "[t]ell the defendant, he is getting an extra 5 years for p-off the chemist" and states that "all defendants that default needs to get an additional 10 years". Ms. Dookhan also received e-mails from prosecutors which refer to various defendants as (1)"this jack @ss"; (2)"idiot(s)"; (3) a "habitual criminal"; (4) "very bad guys"; (5) "the nitwit"; and (6) "kind of a jerk." See Exh. L (select Dookhan emails evidencing bias). [↑](#footnote-ref-11)
12. See also Exh. H at 32 6 (Hevis Lleshi, Dookhans trainee reported that Dookhan would appear to obtain micro-crystal results quickly, but would not let Lleshi look at the crystals under a microscope. Lleshi was unable to replicate the speed at which Dookhan obtained the crystals. When Dookhan did let Lleshi look under Dookhans microscope, it would take her a much longer time to obtain the crystals). [↑](#footnote-ref-12)
13. Dookhan admitted to law enforcement that she had access to the evidence database (Exh. I at 72). Co-workers also reported that Dookhan could access the database (Exh. H at 42 3, 46 4). Dookhan was also seen going into the safe alone, giving out samples, and entering data on the evidence computer (Exh. H at 12 5, 50 5-6). It is presently unknown whether Dookhan accessed the evidence safe on other occasions and altered the database to hide her conduct. [↑](#footnote-ref-13)
14. Part of Dookhans responsibilities at the lab was to prepare vials of these standard drugs for use in the CG/MS machine Id. [↑](#footnote-ref-14)
15. Dookhan admitted to law enforcement that she continued to access the evidence database after being removed from testing duties (Exh. I at 72). She also boasted to a state court prosecutor in an email in November 2011 that I have access to anything and everything. See November 15, 2011 Email to Debra Payton (see Exhibit L). Other chemists observed her in the lab (Exh. H at 23 12, 35 6, and Exh. I at 86 3;), in the GC/MS area (Exh. H at 40 5, 46 5) and compiling data for discovery (Exh. H at 46 5) after June 2011. [↑](#footnote-ref-15)
16. The labs protocols were drafted in 2004 and based upon the recommendations of the Scientific Working Group for the Analysis of Seized Drugs (SWGDRUG). Although SWGDRUG recommendations have been consistently updated, most recently in 2011, the labs protocols had not followed suit. In addition, MDPHs review noted that even if the lab had complied with the SWGDRUG guidelines, those guidelines were too vague and inadequate to guarantee[] . . . the type of integrity needed to deliver high quality forensic drug analyses. (Exh. F at 332). [↑](#footnote-ref-16)
17. See Exhibit N at 669-670 (only the fronts of the evidence control card sent in the discovery packet); Exh. O at 641 (stating that the only place [a return to chemist] would be documented is on the original control sheet and on the back of the card, neither of which is sent to lawyers in the discovery packet and also noting that a different confirmatory chemist might analyze the sample the second time); See also Id. at 645-646. [↑](#footnote-ref-17)
18. Exh. J; Exh. F at 340; Exh. H at 12 4, 23 13, 37 8, and 38 12). [↑](#footnote-ref-18)
19. The Massachusetts Supreme Judicial Court recently ruled that opinions issued by a Special Magistrate in drug lab cases should be treated as reports and recommendations to the Superior Court. Judge Lus opinion in Rodriguez accepted the proposed findings of Special Judicial Magistrate John Cratsley which were issued on March 28, 2013 and are attached as Exhibit R. The Special Magistrate also specifically found that Annie Dookhan was an agent of the government for the purpose of the Ferrara analysis. See Exh. R at 4-5. [↑](#footnote-ref-19)
20. The Superior Court adopted the findings of facts and rulings of law in Baez-Franco on May 28, 2013. No separate opinion was issued. [↑](#footnote-ref-20)
21. In finding Dookhans misconduct sufficiently egregious to satisfy the first prong of Ferrara, Rodriguez explicitly disagreed with the opinion in United States v. Wilkins, F.Supp.2d , 2013 WL 1899614 (D.Mass. May 8, 2012)(Stearns, J.). Rodriguez, 2013 WL 2420416, at \*3 & n.4. Wilkins found that Dookhans misconduct did not rise to the level of the egregious misconduct in Ferrara, which involved coercion compromis[ing] . . . a claim of factual innocence. Wilkins at \*6. The district court in Wilkins has subsequently granted a Certificate of Appealability, saying that although the conduct of the government cannot fairly be compared with the blatant wrongdoing in Ferrara, and while there is no claim by Wilkins of actual innocence, a reasonable jurist might well disagree with this court and find that prophylactic considerations merit a granting of Wilkins petition to withdraw his guilty plea. Wilkins, No. 11-10217, Memorandum and Order on Application for Certificate of Appealability, June 6, 2013. (Wilkins co-defendant, Ronald Merritt, was in a different procedural posture. His case raises issues related to the MDPH lab on direct appeal). In any event, the standards articulated in Brady v. United States, and Ferrara contain no requirement of actual innocence or coercion, and as noted above, courts applying Ferrara have eschewed such requirements. See Fisher, supra; Rodriguez, supra; Baez-Franco, supra. [↑](#footnote-ref-21)
22. Drugs such as cocaine and heroin are often packaged in multiple, small baggies. A police officer collecting such evidence and documenting chain of custody would not typically initial each small baggie, but instead group them into a larger heat-sealed bag and label the outside of that larger bag. Unless each individual baggie was labeled by the individual who collected it, there can be no assurance that the drugs that passed through Dookhans hands are the same drugs submitted to the laboratory under that specific sample number, given Dookhans admission that she opened evidence bags from multiple cases simultaneously and intermingled the evidence on her work bench. Other discovery also supported Dookhans statement that she mixed bags from multiple cases. See Exh. H at 24 16 (statement of chemist Peter Piro noting that when heroin began to be packaged in plastic bags rather than glassine bags he noted a higher instance of Dookhan misidentifying heroin samples as cocaine).

While the court in Wilkins noted that the chemist who retested the evidence authored an affidavit stating that the remaining thirty-one plastic bags appeared to have never been opened (Wilkins, at \*2 n.3), it ignored the fact that these bags may not have been the same ones originally submitted to the lab by the police department. [↑](#footnote-ref-22)