

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPREME JUDICIAL COURT
No. SJ-

COMMONWEALTH

v.

RICKY SIMMONS, ISRAEL CEDENO MARTINEZ & OTHERS¹

**COMMONWEALTH'S APPLICATION FOR RELIEF
PURSUANT TO G.L. c. 211, § 3**

INTRODUCTION AND STATEMENT OF ISSUES PRESENTED FOR REVIEW

On December 22, 2020, Ricky Simmons filed a motion to withdraw his guilty plea to drug charges (0481CR1176), which were based on drugs tested by former chemist Sonja Farak while she worked at the Hinton Lab. His motion relies heavily on findings by Justice Michael D. Ricciuti, in the case of Commonwealth v. Eugene Sutton (0481CR00986).

In Sutton, discussed more fully below, Justice Michael D. Ricciuti ordered the District Attorney's Office to review the files of the Office of the Inspector General's investigation into the Hinton Lab. He ultimately concluded that the OIG's investigation and the District Attorney's extensive review of the OIG's files related to it did not meet

¹ The two named defendants are involved in post-conviction litigation in Middlesex based on drugs tested by Sonja Farak at the Hinton lab. According to our records, there were 1,912 Middlesex samples tested by Farak at Hinton. There are 1,320 dockets tied to those samples. Of those cases, at least 961 resulted in a guilty finding or an admission to sufficient facts. Other defendants received pretrial probation, were acquitted, had the case dismissed or nolle prossed or are in default. In some instances, no charges were brought based on the samples. Farak tested 9,792 total samples during her time at Hinton.

the Commonwealth's obligation to provide exculpatory information, and that the Commonwealth could not rely upon the findings of the OIG investigation to meet its obligation to identify and provide exculpatory evidence.

Relying on Justice Ricciuti's rulings in the Sutton case, Simmons filed a motion to withdraw his guilty plea, stating, "Farak Defendant's [sic] have arrived. The Commonwealth's failure to fully investigate whether Farak's work and conduct at the Hinton Drug Lab impaired the integrity of alleged drug samples at the Hinton Drug Lab, has been found to be egregious government conduct. See Sutton, No. 0418CR986."² (Simmons, MNT, p. 61). Clearly, the implications of Justice Ricciuti's holding are neither limited to the Sutton case nor necessarily limited to Sonja Farak. If the OIG's investigation cannot be relied on by the Commonwealth to fulfill its discovery obligations to provide exculpatory evidence, this conclusion would likely be the same for any other chemist employed by the lab from 2002-2012 (the period covered by the OIG investigation) since the OIG's investigation focused on the lab as a whole rather than on any individual chemist.

Simmons is just one of approximately 961 Middlesex County cases where a conviction was based on testing by Farak while she was employed at the Hinton

² Justice Ricciuti did not find egregious misconduct related to Farak's work at Hinton or the investigation into that work. Rather, he found that "the Commonwealth bears an unfulfilled duty to determine whether there is more discoverable evidence that can be known about Farak's performance at Hinton, since the OIG's investigation could not be relied upon for this purpose. That the evidence to date shows egregious misconduct by Farak at the Amherst lab but does not yet show a similar level of misconduct in the Hinton lab does not somehow relieve the Commonwealth from its discovery burden in this case." (Exhibit 4: 4/14/2020 decision, p. 29). The 4/14/2020 order further states, "The question then becomes whether the District Attorney's breach of its duty to conduct the required review for exculpatory evidence is the type of egregious misconduct warranting dismissal. On these facts, it is not." (Exhibit 4: 4/14/2020 decision, p. 30).

Laboratory. At present, a cloud of doubt hangs over that work and over all testing performed at the Hinton Lab. There are approximately 17,200 convictions in Middlesex arising from Hinton lab testing, in total.

The Office of the Inspector General's ("OIG") investigation into the Hinton Lab found many failures and problems at the lab, including lack of resources, lack of accreditation, lack of oversight, lack of training, lack of protocols, and chain of custody concerns. (See Exhibit 1, OIG report dated March 4, 2014). This raises questions about the reliability of all testing performed at Hinton.

Most of the current challenges to work performed at Hinton (including the named defendants) are to cases where Sonja Farak performed the testing, given her egregious misconduct at the Amherst lab. However, the challenges brought to convictions in Middlesex are not limited to Farak cases. Questions have been raised about the work of other chemists employed at Hinton. See Commonwealth v. Escobar, 479 Mass. 1010, 1010–11 (2018). Given the failures identified by the OIG, there is a question as to whether any testing performed at the Hinton lab is reliable.³

Middlesex District Attorney Marian Ryan brings this petition in her role as the head of a "public trust" seeking clarity with regard to these cases. See Attorney Gen. v. Tufts, 239 Mass. 458, 489 (1921). It is the duty of the District Attorney to ensure that convictions arising in her jurisdiction are fair and just. Id. (office of the district attorney

³ "Suffolk District Attorney Rachael Rollins to drop charges, convictions in tens of thousands of cases tied to troubled state lab" Dugan Arnett and Maggie Mulvihill Globe Staff Updated March 22, 2021; <https://www.bostonglobe.com/2021/03/22/metro/suffolk-district-attorney-rachael-rollins-drop-charges-convictions-tens-thousands-cases-tied-troubled-state-lab/>

“is to be held and administered wholly in the interests of the people at large and with an eye single to their welfare”).

Without review from the Supreme Judicial Court, this issue –whether the Commonwealth can properly rely on the OIG’s investigation to fulfill its discovery obligations relating to the chemists at the Hinton Lab - could be re-litigated well over a thousand times, with potentially disparate results. This would be inefficient and unfair to the defendants involved.

A systemic issue requires a systemic resolution, not piecemeal litigation. Just as the misconduct by Annie Dookhan was addressed in the Bridgeman litigation, and misconduct by Farak at Amherst has been addressed by this Court, the Court’s guidance is needed here. The Commonwealth has limited authority in post-conviction matters and this Court’s involvement is necessary to address this class of defendants. The Commonwealth requires the direction and guidance of the Supreme Judicial Court to ensure that justice was done in the cases of thousands of citizens of this Commonwealth arising from testing at the Hinton Lab. For that reason, the Commonwealth asks that the Supreme Judicial Court determine whether prosecutors may rely upon the Office of the Inspector General’s investigation of the Hinton Lab to meet their fundamental duty to seek and provide exculpatory evidence concerning chemists at the Hinton Lab, and ultimately, to ensure that justice has been done on behalf of the citizens of the Commonwealth.

STATEMENT OF THE CASE

The OIG's Investigation of The Hinton Laboratory

In response to revelations about misconduct by former chemist Annie Dookhan while she was employed at the Hinton Laboratory, former Governor Deval Patrick called upon the OIG to conduct an independent, comprehensive investigation of operations at the Hinton drug lab. John R. Ellement, Drug Lab Investigation Getting New Leader, Boston Globe (November 5, 2012) <https://www.bostonglobe.com/metro/2012/11/05/governor-deval-patrick-taps-inspector-general-glenn-cunha-investigate-closed-drug-lab/kd7eQVrId4eztLtqZjgJtK/story.html>. Governor Patrick announced that the OIG would hire independent forensic experts “to determine whether potential failures at the drug lab impact cases beyond those handled directly by Dookhan.” *Id.* Following the Governor’s announcement, Inspector General Glenn A. Cunha stated “[t]he integrity and credibility of the criminal justice system requires a comprehensive and thorough review of the drug lab. . . My office is prepared to conduct such a review. . .” *Id.*

The OIG issued two reports, the first, dated March 4, 2014 and a second, Supplemental report, dated February 2, 2016. Those reports, attached as Exhibit 1 and Exhibit 2, summarize the OIG’s investigation of Hinton Lab. The OIG’s March 4, 2014 report made numerous conclusions about management failures, training inadequacies and other shortcomings at the Hinton Lab. The report specifically found that “management failures of DPH lab directors contributed to Dookhan’s ability to commit her acts of malfeasance. The directors were ill-suited to oversee a forensic drug lab, provided almost no supervision, [and] were habitually unresponsive to chemists’ complaints and suspicions.” (Exhibit 1, p. 1). The OIG’s review ultimately found that Annie Dookhan

was the sole “bad actor” at the Hinton Lab. (Exhibit 1: 1, 113-114). However, despite Farak’s egregious malfeasance at the lab she worked at immediately after she left Hinton, the OIG investigation did not focus on Sonja Farak. Nor did the OIG’s report explain why other chemists with high testing numbers (comparable to Annie Dookhan) were found not to have committed misconduct. The OIG did not clearly explain why, despite the numerous failures of the lab, they were confident that the testing performed was accurate and the convictions arising out of the lab were reliable.

Sonja Farak’s malfeasance

Sonja Farak’s employment history, her misuse of lab samples at the Amherst Lab, and the related investigation are summarized in Committee for Pub. Counsel Servs. v. Attorney Gen., 480 Mass. 700 (2018), which is attached as Exhibit 3 (hereinafter, “CPCS v. AG”). As that case reflects, Farak was investigated by the Attorney General’s office and she ultimately pleaded guilty to four counts of evidence tampering, four counts of theft of a controlled substance, and two counts of unlawful possession of cocaine based on conduct at the Amherst Lab. Id. at 712-713.

Farak worked at the Hinton Lab prior to working at Amherst and tested a large volume of drugs, leading to questions about whether she, too, was “dry labbing” at Hinton. See Commonwealth v. Cotto, 471 Mass. 97, 113 (2015) (“The defendant posits that Farak must have engaged in misconduct while she was working at the Hinton drug lab from the summer of 2003 until the summer of 2004. . . because her high volume of drug testing rivaled that of Dookhan”). In December of 2017, Justice Richard J. Carey presided over a six-day evidentiary hearing addressing the scope of the governmental misconduct related to Farak and the investigation into Farak at Amherst. See

Commonwealth v. Cotto, 2007-770; Memorandum of Decision and Order on Motions for Post-Conviction Relief, Richard J. Carey, June 26, 2017. There is also evidence of illegal drug use by Farak prior to her employment at Amherst.⁴

Commonwealth v. Eugene Sutton, and production of the OIG records

From 2018 through 2020, this Office litigated post-conviction motions in Commonwealth v. Eugene Sutton (Superior Court Docket 0481CR00986). The defendant Sutton argued that the OIG’s investigation, which did not focus specifically on Sonja Farak, was insufficient to fulfill the Commonwealth’s obligation to investigate whether Farak was committing malfeasance while testing drugs at the Hinton Lab, prior to her work at the Amherst Lab. During the course of the Sutton case, the OIG was deemed an agent of the Commonwealth, the District Attorney was ordered to review the extensive OIG case file for any exculpatory evidence, and as a result, a large volume of materials from the OIG’s investigation was produced to the defendant.

Ultimately, Justice Michael D. Ricciuti concluded that the OIG’s investigation and the District Attorney’s review of the OIG’s files did not fulfill the District Attorney’s duty to conduct an investigation of Farak’s work at Hinton for exculpatory information. (Exhibit 4: 4/14/2020 decision, p. 27-29). Although the OIG’s report found that Dookhan was the sole bad actor at Hinton, Justice Ricciuti’s decision found that “the Commonwealth bears an unfulfilled duty to determine whether there is more discoverable

⁴ See CPCS v. AG, 480 Mass. at 706 (“Farak began using alcohol and marijuana regularly around the year 2000, while she was in her first year of a Ph.D. program. She occasionally experimented with other drugs, including cocaine, methylenedioxy methamphetamine (also known as “MDMA” or “Ecstasy”), and heroin); Commonwealth v. Cotto, No. 2007770, 2017 WL 4124972, at *6 (Mass. Super. June 26, 2017 – Exhibit 5) (“From January of 2002 until May of 2003, Farak . . . continued and perhaps increased her consumption of alcohol and recreational drugs, including MDMA and marijuana, and she first tried methamphetamine”).

evidence that can be known about Farak's performance at Hinton, since the OIG's investigation could not be relied upon for this purpose." (Exhibit 4: 4/14/2020 decision, p. 29).

The defendant's motion to vacate his pleas was allowed and on October 7, 2020, the Commonwealth filed a nolle prosequi in the Sutton case, citing the unique circumstances of the defendant's case but also acknowledging unresolved questions regarding Sonja Farak's conduct at the Hinton Lab and the adequacy of the investigation into the Hinton Lab by the Office of Inspector General.

OIG records and other challenges

Following the discovery produced in Sutton, a large volume of documents from the OIG records have been made available to the other Massachusetts District Attorneys and to the defense bar. Defense attorneys have found information in the OIG records that they believe has exculpatory value, including emails discussing high testing numbers and information regarding accessibility and security of the drugs stored in the lab. Challenges have also been made to other chemists (beyond Dookhan and Farak) employed at Hinton who showed high productivity.

In Commonwealth v. Escobar, 479 Mass. 1010, 1010–11 (2018) the defendant filed a motion for new trial, alleging that Della Saunders's high testing numbers raised the question of whether Saunders, like Dookhan, engaged in misconduct. Escobar's motion also claimed that the Hinton Lab was never properly investigated by the OIG. The SJC declined to reach the merits and the case was remanded back for hearings and further discovery at the Suffolk Superior Court. The Suffolk DA's Office has filed a written assent to the defendant's motion for new trial, but not because of any evidence of

misconduct by Della Saunders – leaving unanswered questions about the significance of the high testing numbers and whether the OIG’s investigation can be relied on by the Commonwealth to ensure the integrity of criminal convictions arising out of the Hinton Laboratory.

The defendants

This petition addresses the integrity of convictions arising from drugs tested at the Hinton Lab. In addition to the defendant’s case, there are approximately 961 similarly situated defendants in Middlesex – whose drugs were tested by Farak while she was employed at the Hinton Lab and potentially 9,792⁵ statewide. Expanding the group to consider all defendants whose drugs were tested at Hinton, there are approximately 17,200 convictions in Middlesex. There were 256,004 samples tested at Hinton statewide. Defendants Ricky Simmons and Israel Cedeno-Martinez pleaded guilty to drug charges based on drug certificates signed by Sonja Farak, while she worked at the Hinton Lab. Both defendants are now involved in post-conviction litigation in Middlesex related to those convictions.

Ricky Simmons (0481CR1176) filed a motion to withdraw his guilty plea on December 22, 2020, based on Sonja Farak’s malfeasance and on a purported failure to investigate Farak’s work at Hinton. Simmons asks the trial court to find that he is entitled to a conclusive presumption that Farak was engaged in egregious conduct while she was employed at Hinton. (Simmons MNT p.7-8). Israel Cedeno-Martinez (0381CR1623) has not yet filed a motion to withdraw his plea but has filed a discovery

⁵ This number reflects the number of samples Farak tested state-wide, not the number of convictions.

motion seeking information regarding the OIG investigation, in anticipation of such a motion.

Simmons, procedural history

On May 11, 2004, Ricky Simmons was indicted (MICR2004-1176) on 5 counts: 001, traffick in a controlled substance of Cocaine over 100 grams, in violation of G.L. c.94C, § 32E(b)(3); 002, Possess with the Intent to Distribute Cocaine, Second or Subsequent Offense in violation of G.L. c.94C, § 32A(d); 003-004, drug violation within a school zone, in violation of G.L. c. 94C, §32J; 005, possession of marijuana in violation of G. L. c. 94C, §34. He was arraigned on August 20, 2004. On April 27, 2005 there was an evidentiary hearing on a Motion to Suppress before Judge Regina Quinlan, which was denied October 17, 2005. On July 16, 2008 Justice S. Jane Haggerty allowed a Motion to Dismiss Indictment 004, a school zone violation. On September 16, 2008 a motion to suppress the defendant's statements was allowed as to the defendant's response concerning a key, and was denied in all other respects.

On September 24, 2008, the defendant pleaded guilty before Justice Haggerty and was sentenced as follows: 001, trafficking cocaine over 100 grams, 10 years to 10 years plus 1 day in the state prison; 002, possession with intent to distribute cocaine, second or subsequent offense, 5 years to 5 years plus 1 day in the state prison (concurrent with 001); 003, school zone violation, 2 ½ - 2 ½ years plus 1 day (from and after count 001); count 005, 9 months house of correction (concurrent with counts 001 and 002). The defendant filed two previous motions for new trial, which were both denied (6/3/14 & 10/21/14).

In order for the Commonwealth to address motions for new trial in the defendants' cases, the Commonwealth would rely on the OIG's investigation of the Hinton Lab. Given Justice Ricciuti's rulings and the expanding doubt surrounding Hinton, it is no longer clear whether the Commonwealth can rely on the investigation and its conclusions. The claim by Simmons, that he is entitled to a conclusive presumption that Farak was engaged in egregious misconduct while she was employed at Hinton, is a claim best addressed under this Court's superintendence powers. The issues presented here are not specific to any defendant or the facts of any defendant's case, but rather, present the question of whether this class of defendants is entitled to relief.

ARGUMENT

The Commonwealth submits that these questions of law—questions that relate to the justness of thousands of convictions across the Commonwealth-- are “so important or doubtful” as to require the attention of the SJC. Mass. R. Crim. P. 34. They would be appropriate for direct appellate review to the Supreme Judicial Court because they are “questions of first impression or novel questions of law which should be submitted for final determination to the Supreme Judicial Court.” Mass. R. App. P. 11(a) (effective March 1, 2019). “[A] report[s] may be appropriate when the alternatives are a prolonged, expensive, involved, or unduly burdensome trial or a dismissal of the indictment.” Commonwealth v. Cavanaugh, 366 Mass. 277, 279 (1974). Here, review by the full court would address a systemic problem in a comprehensive way, and would avoid burdensome, piecemeal litigation across the Commonwealth, during which each court, in each defendant's case, would review the OIG's extensive investigation in order to

conclude whether that investigation could be relied on to conclude that Annie Dookhan was the sole bad actor at the Hinton Lab..

In Commonwealth v. Cotto, considering Farak’s work at the Amherst Lab, the SJC stated “given the absence of a thorough investigation into the matter by the Commonwealth, and the cloud that overshadows the integrity of drug analyses performed by Farak at the Amherst drug lab, we conclude that the defendant is entitled to a measure of relief.” 471 Mass. 97, 108 (2015). This cloud of doubt now extends to Farak’s work at Hinton and to all work at Hinton. The Commonwealth has relied on the OIG’s investigation and its conclusion; a conclusion that appears to have been accepted by the SJC. In 2018, in Comm. for Pub. Counsel Servs. v. Attorney Gen., this Court considered the scope of Farak’s misconduct while at the Amherst Laboratory. 480 Mass. 700, 726 (2018). However, while the Court was also aware of Farak’s high testing numbers while she was at the Hinton Laboratory, the petitioners did not request and the Court did not consider whether she engaged in misconduct while at the Hinton Laboratory immediately prior to her employment at Amherst. *Id.* at 725 (“The petitioners contend that all convictions based on drug samples tested at the Amherst lab during Farak's tenure should be vacated and dismissed with prejudice, regardless of whether Farak signed the drug certificate.”).

The ACLU and numerous members of the defense bar have raised legitimate concerns about the adequacy of the OIG investigation and the justness of convictions resulting work while at Hinton. Farak’s misconduct at the Amherst Lab was egregious. She stole and personally used laboratory drug standards. She also stole and used drugs that both she and other chemists were responsible for testing. As a result, thousands of

convictions were set aside. Farak's malfeasance at the Amherst Lab occurred shortly after she left the Hinton Lab, raising questions and "red flags" about whether she had engaged in similar misconduct at the Hinton Lab before she left. Hinton was a lab with many serious problems, as detailed in the OIG's report, and had virtually no managerial presence or oversight. (See Exhibit 1, p. 23-24). Given this, and Justice Ricciuti's conclusion that the Commonwealth cannot rely on the OIG investigation to fulfil its discovery obligations, there are serious questions requiring attention.

This is a statewide, systemic problem meriting attention from the SJC and one in which "subsequent proceedings in the trial court will be substantially facilitated" by appellate review. See Crim. Proc., Rule 34 Reporter's Notes, Commonwealth v. Gopaul, 86 Mass. App. Ct. 685, 686 (2014). Statewide, the justness of thousands of convictions arising out of Farak's work at the Hinton Laboratory have now been called into question, including nine hundred and sixty-one (961) Middlesex County cases. Each one of these cases raises the same fundamental issue about whether the OIG's investigation may be relied upon to determine whether chemists other than Dookhan engaged in misconduct, and more importantly, whether the convictions resulting from testing at Hinton can be considered just and fair. Just as the SJC addressed Dookhan's misconduct and Farak's misconduct at the Amherst Lab, guidance is needed here.

The District Attorney is charged with ensuring that justice is done, convictions are obtained fairly, and the public has confidence in the integrity of those convictions. To ensure justice and promote public confidence in our justice system, this Court's guidance is necessary. This petition "involve[s] matters of great import not only to the defendant but also to the Commonwealth," (Blaisdell v. Commonwealth, 372 Mass. 753, 755

(1977)) and the Commonwealth therefore requests this Court use its superintendence power to provide guidance on this matter of statewide, systemic importance. Justice requires no less.

CONCLUSION

For the foregoing reasons, and because this is an issue of statewide importance requiring the SJC's superintendence powers, the Commonwealth requests that the Supreme Judicial Court exercise its superintendence powers to ensure that justice has been done on behalf of the citizens of the Commonwealth.

Respectfully submitted
For the Commonwealth,

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Dated: March 26, 2021

CERTIFICATE OF SERVICE

I hereby certify under the pains and penalties of perjury that I have made service on the defendant's attorney of record by electronic mail to:

JGregoryBatten@msn.com – Attorney for Ricky Simmons

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/s/ Marian T. Ryan

Marian T. Ryan
Assistant District Attorney

Dated: March 26, 2021