COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK, ss. NO. SJ-2014-0005

KEVIN BRIDGEMAN,
and others

v.

DISTRICT ATTORNEY FOR THE SUFFOLK DISTRICT,
and others

AFFIDAVIT OF ANTHONY J. BENEDETTI

I, Anthony J. Benedetti, state as follows.

1. I am the Chief Counsel of the Committee for Public Counsel Services (CPCS).

2. Since the summer of 2012, when the scope of Annie Dookhan's misconduct was initially revealed, CPCS has taken every conceivable step within its means to

> preserve its clients' due process rights to the just and timely resolution of the many thousands of previously-adjudicated cases tainted by the systemic malfeasance and incompetence at the Hinton Drug Lab and to advocate for remedies that [would] restore the integrity of the criminal justice system.

Bridgeman v. District Attorney for the Suffolk District, 471 Mass. 465, 481 (2015) (internal quotation omitted).

3. Notwithstanding years of diligent efforts to assign counsel to represent Dookhan clients, CPCS's efforts to remedy the tens of thousands of individual injustices caused by Dookhan's misconduct has affected

only "the proverbial tip of the iceberg." Commonwealth v. Scott, 467 Mass. 336, 339 (2014). For all of the reasons set forth in the affidavits that CPCS has previously submitted in this matter and is submitting today, any case-by-case approach to the resolution of this debacle is inherently inadequate and doomed to compound the problem by incurring incalculable expense, by miring scarce resources in re-litigating tens of thousands of cases, and by causing systemic delay affecting the timely resolution of all cases.

4. Every second and every dollar that CPCS spends dealing with the previously-litigated cases which Dookhan and Farak intentionally mishandled is time and money that is unavailable for other compelling issues that cannot responsibly be deferred, including providing counsel to, for example, children and parents in emergency care and protection cases, mentally ill persons in involuntary commitment cases, and juvenile and adult defendants facing the loss of liberty and a plethora of "collateral" consequences in the event of a delinquency adjudication or criminal conviction.

5. In light of these realities, I focus here on issues demanding this agency's immediate attention, with the goal of underscoring why anything other than an across-the-board vacatur of the convictions Dookhan abetted will further injure the immediate victims of

her misconduct and harm many others who depend on CPCS to provide them with the assistance of counsel.

6. Most of the representation that CPCS secures for its clients is provided by private attorneys (bar advocates) who must agree to accept assignments at the hourly rates which the agency is authorized to pay.

7. Although CPCS reliably forecasts how much funding will be needed to pay private counsel for legal services rendered in a fiscal year, and requests an annual appropriation in accord with that forecast, the appropriation which the agency actually receives at the beginning of the fiscal year is invariably deficient by tens of millions of dollars.

8. This structural deficiency in the appropriation CPCS receives at the start of every fiscal year -- which has averaged approximately $36 million per year for each of the last five fiscal years -- forces the agency to continually request additional funding necessary to pay the bills throughout the fiscal year, and leaves the agency in an untenable position whenever circumstances beyond its control, such as this case, place unexpected demands on available resources.

9. Massachusetts' hourly rates for assigned counsel remain "among the lowest in the nation," Lavallee v. Justices in the Hampden Superior Court, 442

Mass. 228, 230 (2004), even though it been sixteen years since this Court identified the problem in Lavallee.

10. Case in point: When the number of care and protection cases requiring the assignment of counsel spiked in 2012, CPCS quickly found itself unable to find enough certified CAFL attorneys willing to accept the assignments. As a result, children and parents in care and protection cases are being deprived of their constitutional right to counsel right now. See Affidavit of Michael Dsida.

11. Although it is CAFL clients who happen to be most acutely affected at the moment, the agency's ability to find enough lawyers to handle assignments is precarious in certain geographic areas across the state and across various practice areas for which the agency is statutorily responsible.

12. Chronic underfunding continues to take its toll on staff as well. Starting salaries for Public Defender Division staff attorneys are among the lowest in the country. Many staff attorneys tend bar, drive Ubers, and work other off-hour jobs to make ends meet. Also, they look for other employment. The agency's inability to provide predictable raises has made retention difficult, as dozens of promising staff attorneys have left the agency in recent years for

financial reasons after the agency has expended substantial resources to prepare them to represent clients. Agency-wide, we currently have over twenty vacant case-taking attorney positions that we have deferred filling solely for budget reasons.

13. News from Beacon Hill suggests that the fiscal year we are about to enter will be harsh, as the Legislature is attempting to deal "with a revenue shortfall of as much as $750 million in fiscal 2017." Rosenberg: "Quite a Bit" May Need to Be Cut from Budget, State House News Service, June 20, 2016.

14. Against this backdrop, the necessity of a comprehensive remedy in this case is manifest. Then-Attorney General Coakley put it well:

> "The total costs to rectify Dookhan's actions have climbed into the millions with no end in sight, and the financial aspect does not even address the loss of liberty of affected individuals, the significant deleterious effect on the safety of the public or the breakdown of public trust in the system."

Katharine Q. Seelye and Jess Bidgood, Prison for a State Chemist Who Faked Drug Evidence, New York Times, Nov. 22, 2013. See also the memorandum submitted in support of the Attorney General's sentencing recommendation in Dookhan's case, Commonwealth v. Dookhan, 1284CR11155, in which she stated that, as of October 17, 2013, the fiasco had cost the Commonwealth "hundreds of millions of dollars."

15. In the fall of 2012, Governor Patrick's office asked CPCS, the District Attorneys, and other affected entities to estimate the costs they "may incur" as a result of the Dookhan debacle. Memorandum from Secretary Gonzalez, Hinton State Laboratory Cost Estimates, Sept. 27, 2012.

16. In response, CPCS provided the Governor and the Legislature with a cost estimate that incorporated various assumptions about the number of tainted convictions that would ultimately be discovered and the number of such tainted convictions that the District Attorneys would ultimately chose to re-litigate.

17. I emphasized these unknowns when I testified before the Legislature regarding the impact of the fiasco on CPCS's clients: "The number of cases the district attorneys choose to litigate, rather than dismiss, will determine the number of cases where CPCS will have to appoint counsel and, ultimately the total cost." Testimony of Anthony J. Benedetti to the House Committee on Post Audit and Oversight, Joint Committee on Public Health, and Joint Committee on Public Safety and Homeland Security, December 12, 2012.

18. The estimates we came to in the fall of 2012 ranged between $62.5 million and $332.4 million, depending on the number of Dookhan cases that the District Attorneys ultimately chose to re-litigate.

19. Unfortunately, nothing that has happened in the four years since I presented my concerns to the Legislature suggests we overstated the overall costs of a case-by-case approach to the resolution of each and every Dookhan-tainted case.

20. Indeed, in the fall of 2012, when we responded to Governor Patrick's request, the District Attorneys were typically agreeing to the allowance of motions to vacate. With the prosecution in agreement, such motions could be handled with relative ease and efficiency.

21. But whatever spirit of urgency and cooperation characterized the early days of this debacle had disappeared by March 2013, when CPCS moved to intervene in Charles. By then, the District Attorneys' insistence on case-by-case litigation, combined with their failure to either identify Dookhan defendants themselves or provide CPCS with the information needed for the agency to attempt to do so, had substantially impeded the resolution of significant numbers of individual Dookhan cases.

22. The Court permitted CPCS to intervene in this case because it recognized that the agency "has been and will be asked to expend significant resources to handle countless numbers of these cases." Bridgeman v. District Attorney for the Suffolk District, 471 Mass. 465, 486 (2015).

23. But, as the Court also recognized, the sheer

scope of the problem inevitably raises issues that "are fundamental to the mission and responsibilities of CPCS, and will impact defendants beyond those currently identified as [Dookhan] clients of CPCS." Id. at 486 n.31.

24. An indigent defense system that cannot provide enough competent lawyers to do the work is unconstitutional. Lavallee v. Justices in the Hampden Superior Court, 442 Mass. 228 (2004). We do not have the time, money, or resources necessary to provide counsel for anywhere near the number of individuals who have been harmed by the Hinton lab scandal. Nor, as a practical matter, do we have the wherewithal to successfully lobby the Legislature for the millions of additional dollars that the case-by-case approach will require while also ensuring that we have the resources necessary to effectuate the due process rights of existing clients.

25. I again urge the Court to adopt a comprehensive remedy.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 29th DAY OF JUNE, 2016.

Anthony J. Benedetti
Chief Counsel
COMMITTEE FOR PUBLIC COUNSEL SERVICES
44 Bromfield Street
Boston, MA 02108
(617) 482-6212

OCT 1 2012

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE FOR
ADMINISTRATION AND FINANCE
STATE HOUSE • ROOM 373
BOSTON, MA 02133

DEVAL L. PATRICK
GOVERNOR

TIMOTHY P. MURRAY
LIEUTENANT GOVERNOR

JAY GONZALEZ
SECRETARY

TEL: (617) 727-2040
FAX: (617) 727-2779
www.mass.gov/eoaf

TO: District Attorneys
Attorney General Martha Coakley
Chief Justice Robert Mulligan
Court Administrator Harry Spence
Chief Counsel Anthony Benedetti
Secretary Mary Beth Heffernan
Secretary Judy Ann Bigby
Special Counsel David Meier

FROM: Secretary Jay Gonzalez

DATE: September 27, 2012

Re: HINTON STATE LABORATORY COST ESTIMATES

As part of Governor Patrick's commitment to work with and support all affected parties to promptly identify and address the impacts of the breach at the Hinton State Laboratory, we need your help in developing an initial assessment of the nature and amount of costs that your agency may incur in connection with this effort. While we understand that the scope of work and related costs cannot be estimated with precision at this time, please provide me with the following information by not later than October 24, 2012 in order for us to develop a preliminary understanding of your potential funding needs:

1) A description of the scope, nature and timing of the anticipated work required of your agency in connection with this effort;
2) A description of your plan to perform this additional work, including the information, methodology, and analysis that support this resource plan; and
3) An estimate of costs necessary to perform this additional work, together with the anticipated times at which such costs will be incurred and all underlying assumptions and calculations used in developing such cost estimates.

Because this effort is one-time in nature, I expect the funding and budgeting of the costs associated with it to be handled accordingly by the Administration and Legislature. In order to ensure that any costs you incur in connection with this

effort are eligible for funding, please make sure to properly record and account for any such costs in a manner that clearly identifies them as related to the drug lab breach and retain all records necessary to support such designations. In the event that your agency has begun or will begin incurring unexpected and previously non-budgeted costs prior to the availability of any supplemental appropriation, please contact your fiscal analyst in my office for help in ensuring that temporary funding is made available from existing appropriations in anticipation of future reimbursement. A&F budget staff will also reach out to your budget staff following issuance of this memorandum to provide additional guidance.

Thank you in advance for your collaboration and cooperation in addressing this important matter.

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

ESSEX, ss.

NOS. SJ-2013-0066 &
SJ-2013-0083

COMMONWEALTH

v.

SHUBAR CHARLES

&

COMMONWEALTH

v.

HECTOR MILETTE

AFFIDAVIT OF ANTHONY J. BENEDETTI IN SUPPORT OF COMMITTEE FOR PUBLIC COUNSEL SERVICES' MOTION TO INTERVENE

I, Anthony J. Benedetti, state as follows;

1. I am the Chief Counsel of the Committee for Public Counsel Services (CPCS).

2. The facts set forth in this motion to intervene are true and accurate to the best of my knowledge, information, and belief.

3. Attached to this affidavit and incorporated by reference herein is a copy of my testimony on December 12, 2012, before the House Committee on Post Audit and Oversight, the Joint Committee on Public Health, and the Joint Committee on Public Health and Homeland Security, which Committees were charged with launching the Legislature's investigation into the Hinton Lab fiasco (Attachment A).

4. Also attached is a copy of a letter to Speaker DeLeo, dated November 8, 2012, and accompanying outline and spreadsheet pertaining to CPCS's initial

assessments of the nature and costs related to the potential universe of Hinton Lab cases, which were also submitted to the Committees on December 12, 2012, testimony (Attachment B).

Summary

5. For present purposes, I draw the Court's attention to the following points:

(a) The Commonwealth has acknowledged that Annie Dookhan's hands were directly involved in at least 34,000 Hinton Lab cases.

(b) CPCS estimates that there may be as many as 190,000 previously-adjudicated cases tainted by the Hinton Lab scandal. This number includes, in addition to the cases that Annie Dookhan personally touched, all other cases that emanated from the Hinton Lab during Dookhan's tenure;

(c) At this point, the number of cases that will actually be re-litigated is unknown and within the sole discretion of the District Attorneys.

(d) CPCS must provide counsel to every poor person whose basic right to a fair and reliable adjudication of the charges has been sabotaged by malfeasance and incompetence at the Hinton Lab, whether that number is large or small.

(e) Given fiscal and human resource realities, it is a given that every second and every dollar that CPCS spends providing counsel in previously-litigated Hinton Lab cases is time and money taken away from other compelling needs, including (but not limited to) providing counsel to children and parents in emergency care and protection matters, to mentally ill persons in involuntary commitment cases, to juveniles facing commitment to DYS, and to defendants facing the loss of liberty and a plethora of "collateral consequences" to criminal conviction.

(f) When I testified before the Legislature in December, I was still hopeful that the justice system would come together to repair the extraordinary harm inflicted on the people of Massachusetts by virtue of this fiasco, if only because it was clear to so many that the systemic costs of case-by-case re-litigation would be

disastrous.

(g) Regrettably, that hopefulness has evaporated, as the system has failed even to identify many thousands whose rights have been violated, as critical discovery of drug certificates has been thwarted, and as the determination of District Attorneys to handle individual cases as if this were "business as usual" has hardened.

(h) CPCS therefore seeks to intervene in order to advocate for specific ways in which this Court can and should exercise its superintendence and equitable authority to preserve the due process rights of those who will otherwise have to wait years to receive justice and to limit the otherwise incalculable costs to the Commonwealth that will be incurred in identifying, prosecuting, defending, and resolving many thousands of tainted Hinton Lab cases, all of which have already been once litigated and adjudicated.

Difficulties identifying affected clients

6. Following exposure of the Hinton Lab failure, CPCS staff attorneys and bar advocates who had represented indigent defendants in drug cases during Dookhan's tenure -- 2003 through 2012 -- have attempted to determine which of those clients might be entitled to relief, so that they might endeavor to counsel those clients. But the task of such identifying clients has proven to be extremely difficult.

7. In September of 2012, CPCS was provided a copy of an electronic database from the Hinton Lab which purported to contain information identifying approximately 34,000 defendants in all cases handled by Annie Dookhan.

8. The information in that database included a name (sometimes an alias, nickname, or merely a notation stating "unknown"), a town or county, and a date or year that the sample was delivered to the lab.

9. The DPH database did not include docket numbers or dates of birth. Nor did it even incorporate the putative names of all defendants in a given case; in cases involving co-defendants, many defendants' names did not appear at all.

10. Because the date a sample was delivered to the Hinton Lab may have been months either before or after the date of arraignment of a CPCS client, the Private Counsel Division of CPCS (which was responsible for assigning counsel in over ninety percent of these cases) developed a formula for matching the data in the DPH database with CPCS' private counsel electronic billing data, so that all available data points could be used to identify affected clients.

11. Using this information, CPCS was able to identify about 5,600 clients out of the 34,000 "Dookhan cases" provided by DPH, i.e., under seventeen percent.

12. CPCS reopened and assigned counsel in each of these cases.

13. It should be noted that a great deal of information that might be helpful in identifying defendants impacted by the Hinton Lab scandal is CORI-protected. Although CPCS staff attorneys may legally access such data, assigned private attorneys must first obtain special CORI clearance in order to use such information to identify former clients in need of relief.

14. In an effort to identify additional injured clients, CPCS set up a free telephone hotline for prisoners and other former clients to call to request counsel if they believed their cases had been tainted by Hinton Lab misconduct.

15. The hotline was staffed with temporary employees of the Private Counsel Division, and temporary lawyers were contracted to oversee the services in these additional cases.

17. As of this date, CPCS has assigned counsel in approximately 8,000 previously-litigated cases impacted by the Hinton Lab fiasco. This number includes cases that have been assigned within the Public Defender Division.

16. The Public Defender Division of CPCS similarly sought to identify affected clients, initially by generating a list of all drug cases handled by staff attorneys during Dookhan's tenure.

17. But because the Public Defender Division's case management system is based on a single "lead charge" entry, the lists generated failed to capture any

case in which a drug count was not the lead charge.

18. Spreadsheets prepared from the DPH database, purporting to list cases in which Dookhan was involved in the analysis of alleged drugs as a primary or secondary chemist, were made available to all Public Defender Division staff attorneys.

19. These spreadsheets proved to be highly problematic, for many of the reasons identified above: The identifying information in the DPH database from which the spreadsheets were generated did not include identifying information other than a name and a lab case number, so attorneys could not make reliable determinations regarding clients with common names. And where, as noted above, the spreadsheets did not include all co-defendant names in a given case, many defendants' names did not appear at all.

20. The DPH data proved to be unreliable in other ways. Defendants in some cases where it was known that Dookhan was involved in the analysis of the alleged drugs were, inexplicably, not included on the lists, even where there were no co-defendants. In other instances, the data appeared over-inclusive, including names of defendants in cases where all certificates of analysis had been obtained and indicated that Dookhan was neither the primary nor secondary chemist.

21. With no definitive, reliable list of cases in which Dookhan was directly involved in the analysis of the alleged drugs, staff attorneys were left to piece together their own lists through inefficient and time-consuming means.

22. On the private side, CPCS created and provided to each bar advocate receiving assignments in one of the affected counties a list of all Superior Court cases involving G.L. c.94C charges to which the bar advocate was assigned from 2003 through 2012, and has requested that attorneys seek to identify impacted clients.

23. However, CPCS has no legal authority to compensate bar advocates for the time required to retrieve and comb through closed files in an effort to identify clients harmed by the Hinton Lab misconduct.

Difficulties obtaining discovery of certificates of analysis

24. The task with which all CPCS attorneys, private and public, were faced involved a manual search of closed case files. These files typically had to be brought back to offices from storage facilities.

25. In the first instance, attorneys searched for the DPH certificates of analysis, which are supposed to include the names of the primary and secondary chemists involved in the analysis of the alleged drugs. See, e.g., Exhibit "G" to Request to Reserve and Report.

26. For a variety of reasons, many closed files did not contain drug lab certificates. Therefore, in many instances, attorneys have sought to obtain copies of the certificates from the Commonwealth.

27. Attorneys have found it extremely difficult and, in many cases, impossible to get copies of certificates of analysis from the Commonwealth.

28. In Suffolk County, from which the lion's share of Hinton Lab cases during Dookhan's tenure originated, the District Attorney's office has only been able to provide certificates in the most active cases, i.e., cases involving incarcerated defendants where there is reason to believe that Dookhan was directly involved in the analysis of the alleged drugs.

29. Attorneys have also endeavored to counsel indigent clients in other circumstances, e.g., those on probation or parole, and those suffering significant, often devastating, collateral consequences arising out of drug convictions.

30. Copies of the drug certificates are essential in order to assess these cases and counsel these clients.

31. The District Attorney's office has not been able to perform the work needed to produce drug certificates in what they see, correctly, as a vast number of cases.

32. The problem is exacerbated by the fact that the certificates of analysis, where copies cannot be found either by defense attorneys in their closed files or by

prosecutors in their closed files, must be obtained from the local police department that performed the underlying investigation.

33. Incredibly, copies of certificates of analysis are not part of the files maintained by the Department of Public Health. Rather, they are stored with the alleged drugs themselves in local police department evidence rooms or storage facilities.

34. CPCS is aware of only a handful of cases in which attorneys have managed to persuade officials in local police departments to produce drug certificates in Hinton Lab cases.

35. Nor are discovery motions a solution, because certificates must be sought not in pending cases but in previously-litigated cases in which clients' rights may have been violated as a result of the Hinton Lab failure. Certificates are necessary in these many cases so clients may be properly counseled regarding the potential merits of a motion for new trial in light of the Hinton Lab failure.

36. While broad-based production of certificates of analysis would go a long way towards enabling attorneys to identify clients with possible Hinton Lab failure claims, the certificates alone often will not suffice. The certificates frequently list only one of multiple co-defendants and do not include police case numbers. Drug receipts, which include lab case numbers, and police case numbers, are necessary to connect drug certificates to the appropriate police reports which reflect the names and identifying information of all defendants.

37. Materials from the Hinton Lab, including the drug receipts and other documentation pertaining to chain of custody and the analyses of the substances themselves, have been inaccessible to the indigent defense bar. These materials would indicate -- or purport to indicate -- which lab personnel handled the substances and which were involved in the analyses thereof.

38. These materials are, so far as CPCS has been able to determine, stored at four different places. The "work materials" of Dookhan herself are in the custody of the Attorney General -- these materials were taken from the Hinton Lab

in connection with the Attorney General's investigation and prosecution of Dookhan. It is not known to CPCS what documents are encompassed in "work materials" nor is it clear how it was determined what "work materials" were attributable to Dookhan. (The most recent installment of discovery provided to CPCS staff attorneys litigating pending Hinton Lab cases includes grand jury minutes and exhibits in the criminal cases now pending against Dookhan, which include work materials in fewer than 20 of the Hinton Lab cases in which Dookhan was involved.)

39. Hinton Lab documents relating to the analyses of alleged drugs during a portion of Dookhan's tenure, (2010 through the summer of 2012), are at the Massachusetts State Police Lab in Sudbury.

40. Upon information and belief, most other Hinton Lab materials remains at the lab itself. The Inspector General's Office, in connection with its investigation of the Hinton Lab failure, is reportedly scanning many thousands of pages of documents from the Hinton Lab's files. (The number 8,000,000 has been cited.) It appears that the scanned documents will be subjected to an optical character recognition process to convert the scanned documents into a searchable form.

41. CPCS has been advised that these materials will not be accessible to it for an estimated four to six months.

42. Some Hinton Lab materials from the Dookhan era may be stored in archives.

Problems with Hinton Lab litigation

43. The above-described problems accessing materials necessary to identify clients who may have claims of relief extend to the litigation of the cases of clients in which motions for a new trial or motions for a stay of sentence have been filed.

44. Some, but not all, courts in counties affected by the Hinton Lab failure are entertaining post-conviction discovery motions. When motions are heard for

the discovery of, e.g., documents relating to chain of custody and the documentation underlying the analyses of the alleged drugs, prosecutors are advising courts that these materials are not in their custody or control.

45. In these circumstances and in circumstances where judges or special magistrates are unwilling to entertain discovery motions, defense attorneys must file motions under Rule 17 for orders directed at third parties.

46. These Rule 17 motions, directed at the State Police and the Executive Office of Public Safety, the Department of Public Health, the Inspector General's Office and the Attorney General's Office, entail work for these entities, and, as such, result in extensive delay.

47. None of these entities appear to be equipped to respond to a myriad of requests for discovery materials. At the State Police Lab in Sudbury, for example, which has been tasked with taking over the work previously performed at the Hinton Lab, "seven chemists . . . are struggling to keep up with a backlog of drug samples that mushroomed from 400 to 14,000 in the seven months since [the Dookhan scandal arose.]" See Attachment F to this affidavit.

48. The backlog in Sudbury bodes ill for the case-by-case litigation of cases arising out of the Hinton Lab failure going forward.

49. Some District Attorneys in the eight affected counties, including Suffolk, have indicated that they may seek to have the alleged drugs re-tested in cases where defendants are granted new trials, in spite of the issues raised by the nature and scope of Dookhan's misconduct and systemic failures in the management of the Hinton Lab.

The failure of the system's efforts to insure that "no one falls through the cracks"

50. While early pronouncements and efforts by Commonwealth officials and appointees promised an efficient solution to the problem of identifying all defendants impacted by the Hinton Lab failure, such a solution has not materialized.

51. On August 30, 2012, according to the Boston Herald, the Commonwealth's 11 District Attorneys released a joint statement requesting a list of the criminal cases identified as part of the State Police audit of the Hinton Lab, and stating that they would "take the appropriate action necessary to ensure that justice is done."

52. Governor Patrick stated in a September 11, 2012, letter responding to the concerns of the District Attorneys, "To get the job done right, prosecutors and defense attorneys will have to work together with staff from the Departments of Correction, Parole, Probation, Youth Services and the Trial Court to assure that the list [of affected defendants] is comprehensive." Patrick added, "We will assist in these efforts by creating a central office with a dedicated team for that task or, if you have other ideas, we are open to those." Boston Herald, September 12, 2012

53. In early September, the press reported that lists of cases of defendants whose cases "might be affected" by the lab failure were sent to the District Attorneys across the Commonwealth. According to a report in the Boston Globe, the State Police stated that they were "contacting other agencies -- including the state Trial Court, the Department of Corrections and the Parole Department, seeking to cross - reference information about defendants with drug case information, so that defendants might be contacted by counsel.

54. On September 12, 2012, Governor Patrick met with CPCS staff along with Secretary of Health and Human Services Secretary JudyAnn Bigby and Department of Public Safety and Security Secretary Mary Elizabeth Heffernan. The agenda was to move forward in collecting information related to the drug lab and to encourage cooperation between the District Attorney, the defense bar, and the judicial system.

55. On September 20, 2012, the Governor announced the appointment of former prosecutor David Meier to lead a team to "review thousands of criminal cases potentially tainted by the mishandling of drug evidence at the Hinton Lab."

(Boston Globe, September 20, 2012). Patrick stated, at a press conference with Meier, "The job of the office is to make sure no one falls through the cracks." (Boston Glove, September 21, 2012.)

56. Meier's job also involved the creation of a centralized "war room" to encourage discussion as to how best to secure the needed identifying information, and to disburse the information to the District Attorneys and the defense bar as the information became available.

57. The initial "war room" meetings involved all of the stakeholders; representatives from CPCS, the District Attorneys, the State Police, and Secretary Hefferman as well as members of the EEOPS senior staff. Attorney Meier provided lists of cases extrapolated form the computer database of the Hinton lab and other state agency databases.

58. It soon became apparent that the manner in which data was stored for DPH lab drug test processing did not include the information needed for identifying the defendants. Recognizing this problem, Attorney Meir encouraged CPCS and the District Attorneys to begin reviewing their case files in order to identify affected defendant. Several District Attorney offices reported reviewing these files, other offices stated that they were we overwhelmed with the work involved in preparing for hearings on motion to stay the sentences of those incarcerated on so-called "Dookhan cases," and could not then undertake the task of reviewing files to identify affected defendants. Both District Attorney representatives and CPCS highlighted the need for additional resources to undertake this task.

59. Meier also provided lists of those presently serving sentences in the Department of Correction, the Houses of Correction, and those presently committed to the Department of Youth Services to facilitate preparation of counsel for the stay hearings to take place in special Hinton Drug Lab sessions created by the trial court.

60. Attendance at the Meier "war room" meetings began to fall off as the

difficulties inherent in the task of reliably identifying all affected defendants became apparent. There has not been a "war room" meeting since November 15, 2012.

61. Information provided by Meier at a meeting with Superior Court Chief Justice Rouse on February 28, 2013, indicates that prospects for the imminent production of information that would reliably identify all of the defendants whose cases were handled by Annie Dookhan are grim.

62. Meier reported at that meeting that his ongoing review of the paper files from the Hinton lab is not revealing sufficient data in most cases to identify defendants whose cases were handled by Dookhan.

CONCLUSION

63. To date, CPCS has assigned counsel in approximately 8,000 Hinton Lab cases, a small fraction of the number of persons whose due process rights have been violated by the fiasco.

64. If the trench warfare approach to the resolution of these cases is not averted, litigation of these cases will continue for many years at an incalculable cost to the people directly affected by the fiasco and the citizens of the Commonwealth.

65. The District Attorney for Middlesex County has recently rescinded the laudable policy that had guided his office's initial response to the Hinton Lab fiasco of assenting to (most) new trial motions and filing a nol prosequi in those cases in which it could be confirmed through discovery of all of the necessary drug lab papers that suspected contraband had been tested by Annie Dookhan.

66. For an example of the nol prosequi obtained by the few lucky defendants in Middlesex County Hinton Lab cases, see Attachment D to this affidavit.

67. The concluding paragraph of Middlesex County's now unobtainable nol pros provides a fitting summary of the reasons this systemic issue requires the immediate exercise of this Court's superintendent and equitable powers:

The Commonwealth's filing of this Nolle Prosequi is due to these documented shortcomings and failures, at the DPH JP Hinton Lab, and by those responsible for the supervision and management of that Lab. These documented shortcoming and failures have compromised the MDA's ability to prosecute this case legally and factually, and raises issues of fundamental fairness in the pursuit of justice. Therefore, because the MDAO, on behalf of the public and consistent with our role and responsibility, needs to rely on evidence that is free from taint and that satisfies the required burdens of proof and persuasion, in a way that would be sufficient to obtain and sustain a criminal conviction beyond a reasonable doubt, we find that it is necessary to end this prosecution in a manner consistent with the law.

For the foregoing reasons, in the interest of justice, the Commonwealth will not further prosecute this case.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 12th DAY OF MARCH 2013.

Anthony J. Benedetti
BBO No: 564057
Chief Counsel
Committee for Public Counsel Services
44 Bromfield Street
Boston, MA 02108
(617) 482-6212

ATTACHMENT A

The Commonwealth of Massachusetts

Committee for Public Counsel Services

44 Bromfield Street, Boston, MA 02108-4909

TEL: (617) 482-6212
FAX: (617) 988-8495

ANTHONY J. BENEDETTI
CHIEF COUNSEL

Crime Lab Testimony of the Committee for Public Counsel Services
Anthony J. Benedetti, Chief Counsel
Presented before the
House Committee on Post Audit and Oversight
Joint Committee on Public Health
Joint Committee on Public Safety & Homeland Security
December 12, 2012

Chairman Linsky, Chairman Naughton, Chairman Sanchez, and members of the Committee thank you for inviting me to testify before you today. My name is Anthony Benedetti and I am the Chief Counsel for the Committee for Public Counsel Services (CPCS).

As you know, CPCS is the state agency constitutionally and statutorily mandated to provide representation for indigent persons in Massachusetts which includes the right to counsel for those charged with a criminal offense. We are deeply troubled by the scandal at the William Hinton State Laboratory (Hinton Lab) and the impact it is having on our justice system. We are especially troubled that the pervasive misconduct may have resulted in the violation of the fundamental rights of thousands, specifically the right to a fair and reliable adjudication of the charges brought against them. Many of these individuals have been convicted when they should not have been. Many have had to serve longer sentences as a result of drug weights being altered by Hinton Lab chemist Annie Dookhan. Many have suffered not only unjust imprisonment, but have also been subjected to severe collateral consequences, including job loss, exclusion from public housing, loss of federal student aid, termination of parental custody, and deportation.

The primary goal in trying to rectify this unprecedented scandal must be to ensure that every single individual affected by this breakdown in the criminal justice system is afforded the relief that he or she deserves. This needs to be accomplished in the fairest, least burdensome, and most expedient way possible. Only if every single individual is afforded relief will the Commonwealth be able to restore public confidence in the criminal justice system.

When CPCS first learned last summer about the extent of Annie Dookhan' s egregious mishandling of suspected drug evidence, we took the following steps:

1 We asked our staff attorneys and the private bar to search through past cases to try to locate any that were handled by Dookhan and to identify the original counsel assigned to each case.
2 We contacted district attorneys in impacted counties and asked them to share with us any docket numbers and drug certifications, the true names of defendants who were only identified by nicknames or aliases, and the names of any codefendants involved in cases who were not already identified.
3 We set up a hot line for anyone who believed they had been wrongly convicted by misconduct at the Hinton Lab to call to obtain legal assistance.

Not long after we began these initiatives, we were invited to be a participant in the "Boiler Room" set up by Governor Patrick to assist in identifying individuals whose cases have been tainted. Although the job of accurately identifying these individuals is still proving to be extremely challenging, the initial meetings brought all relevant parties together and set the stage for collaboration.

In addition, CPCS met with all levels of the Trial Court – Superior, District, and Boston Municipal – to discuss best procedures to handle these cases and be fully informed of the Court's decision on the scheduling of initial hearings. We established teams in every county so that bar advocate programs and public staff attorneys were prepared for these hearings and we introduced a training module to educate our attorneys on how to handle these unique cases.

As more information on the scandal was released, CPCS became aware of the incredible magnitude of the problem. Like others, we were stunned by the initial assessment that Dookhan was associated with over 34,000 cases, most of which involve CPCS clients. Regrettably, as more facts emerged through the distribution of discovery compiled by the state police investigation we discovered that in addition to the intentional fraud committed by Dookhan in her own cases, there was also opportunity for her to affect results produced by other chemists throughout the lab. The information revealed system-wide defects in security, reporting, QA/QC, and oversight. It exposed a lax laboratory culture that not only permitted Dookhan's conduct, but allowed other inconsistencies and inaccuracies to flourish, which inevitably tainted the entire Hinton lab.

Details of the specific misconduct related to Dookhan, and the lax policies and procedures at the Hinton lab are numerous. Facts gleaned from the discovery reveal information that is clearly exculpatory. With the disclosure of exculpatory information, individuals must be afforded the right to argue to have their convictions overturned because of the tainted evidence. Examples of some of the exculpatory information revealed thus far:

- Dookhan prepared false drug reports without doing any testing, what is referred to as "dry-labbing."
- Dookhan accessed the evidence safe unsupervised and apparently had the key to do so her entire career at the Hinton Lab. This of course gave her the opportunity to contaminate, alter, or in any way tamper with any sample in the lab.
- Dookhan intentionally contaminated drug samples to get the result that she wanted, including comingling of samples. She could easily have done the same to any other sample in the lab to which she had access.
- The security system for the lab was very lax and not at all secure. There were frequent gaps in evidence room coverage and absences. The evidence safe was left unattended and open at times. This was attested to by multiple chemists and evidence officers in their interviews in the state police investigation.
- Based on the discovery we know that chemists' keys opened the evidence safe. We know that Dookhan accessed the safe unsupervised and it is unclear which other chemists knew their keys opened the safe.
- The discovery says that there were times when the evidence safe was overflowing with samples and so they could not be properly stored in the safe at all. This immense backlog existed for most of Dookhan's time in the lab and resulted in Middlesex county samples being officially reassigned to the Massachusetts State Police Lab in Sudbury.

- Chemists kept multiple samples of drugs from multiple cases in their own work lockers for weeks and months at a time. There is no documentation to prove that these were stored in a manner that would prevent contamination.

- Dookhan kept multiple cases open at her work bench at the same time. She would "batch" samples by taking out large groups of the same drug and attempting to analyze them all at once. It is easy for drug particles to become airborne and to contaminate other samples not only on the same bench, but even within the same lab.

- Additionally, we know that at times she wouldn't test all of the samples but just test some of them. A confirmatory chemist would then analyze the samples to confirm and if one sample came back negative, they would just send it back to Dookhan to retest. There are no records of when or how often this happened. She admits that as a result of her "dry-labbing" she went back and doctored results and this batch-testing process presents the same dynamic for fraud.

- When performing the role of the preliminary chemist, Dookhan would seemingly do as much of the job of the confirmatory chemist as she could and then forge the initials of the confirmatory chemist on this preparatory work.

- Finally, the Hinton Lab standard operating procedures did not include an acceptable level of comprehensive quality assurance (QA) and quality control (QC) policies and procedures, and insufficient documentation that any procedures were followed.

In light of this discovery, CPCS realized that the potential number of tainted cases could be far greater than the 34,000 that was initially discussed. To try to determine the potential number and in turn how many cases CPCS may have to handle (provide counsel for) we had to perform a budget and staffing assessment.

We began by running a report from our private attorney billing records for the years 2003 to 2012 requesting the number of cases (NACs) that had any drug charge issued in the eight counties served by the Hinton Lab. The report revealed that there were a total of 182,111 such cases. After factoring in an estimate for the number of cases handled by staff attorneys and an estimate of the number of Middlesex County drug cases in or after 2009 that were not tested at the Hinton Lab, we concluded that our possible exposure – the universe of cases out of the Hinton lab was approximately 190,000 cases. That said, of the estimated 190,000 cases, some may have been conducted by the state police in conjunction with local law enforcement and tested at the State Police Lab and not at Hinton. Our understanding is that only investigations that involved multiple police departments or crossed county lines would have gone to the State Police Lab. If this proves true, our projected universe would be somewhat smaller.

CPCS disclosed this number to the Executive Office of Administration & Finance (ANF) at the end of October in response to their request for an assessment of our initial and projected related costs. In presenting the information to ANF we divided the nature and costs into three categories work and costs associated with an initial assessment of the 7,500 cases that we knew of at the time of the request, work and costs related to the later acknowledged 34,000 cases, and the possible work and costs generated by the worst case scenario, the need for counsel to individually litigate 190,000 cases. The total number of cases that will be individually litigated will, in large part, be dependent on prosecutorial decisions. The number of cases the district attorneys choose to litigate, rather than dismiss, will determine the number of cases where CPCS will have to appoint counsel and, ultimately, the total cost. Shortly after providing this information to ANF, we delivered and discussed it with the staff of the House and Senate Committees on Ways & Means, Leadership in both branches, and several members of this Committee.

To help you better understand how we built our assessment of the potential work and related costs, both long and short term, I am submitting to the Committee an outline of our initial assessment of the nature and costs related to the Hinton Lab and a related spreadsheet.

No one knows exactly how many cases this scandal will ultimately generate. To date, a universally accepted methodology to determine the total number has not been established. CPCS firmly believes that informing the Administration and the Legislature of our projected possible universe of cases and the potential costs related to this worst case scenario was the best, most honest position from which to start, especially because CPCS will have no control over the number of cases litigated. To present a smaller, more palatable, but inaccurate number, and then be required to request additional assistance as this smaller, less troublesome number grows, would be misleading and much less productive.

The most critical decision that will drive the overall number of cases and ultimately the cost, as I mentioned above, will be made by the District Attorneys of the Commonwealth. The DAs must find a cost-effective alternative to a case-by-case adjudication of all cases to avoid protracted litigation of thousands of cases over several years and their related costs. A case-by-case adjudication will result in staggering costs to taxpayers without any substantial benefit. For instance, in cases where defendants have served more than half of their sentences, District Attorneys should resolve the cases by dismissals. In cases where Ms. Dookhan analyzed the samples and individuals are not also charged with a violent crime or a weapons offense, District Attorneys should resolve the cases by dismissals.

If the District Attorneys in each county impacted by tainted drug samples exercise their discretion in this manner, then the time and cost associated with these cases will be diminished greatly and justice will be well served. While some cases will certainly require individual treatment, many others demand a broad-based approach, and one that will assure consistency and provide justice to those convicted on tainted evidence while at the same time save taxpayer dollars. A broad based approach will substantially reduce the burden on CPCS attorneys, assistant district attorneys and the court system, allowing all to focus on litigating the more serious cases. It will allow public defenders and prosecutors to focus on cases being litigated for the first time, rather than on post-conviction cases where the primary conviction is tainted based on the misconduct of a prosecution witness.

Before closing, I would like to address one last critical issue. It does not resolve the immediate problem created by the Hinton Lab scandal, but it will help to prevent similar problems from occurring in the future. I believe all agree that there must be a process put in place that prevents a recurrence of this debacle. Although the breadth of our problem is unprecedented, sadly, we are not the first state to have issues with the veracity or certainty of samples tested by crime labs. The Innocence Project, a national litigation and public policy organization dedicated to exonerating wrongfully convicted persons, has been documenting cases for years and is leading the fight to establish meaningful oversight of labs in every state across the nation. A number of states have come to rely on autonomous forensic commissions or advisory boards that provide independent and expert review of labs. The assistance provided and the auditing conducted by these independent entities help curtail incidents of misconduct and even reduce incidents of errors that often lead to serious miscarriages of justice.

The Innocence Project reports, and I quote, "improper forensic science is a leading cause of wrongful convictions. In more than 50% of the DNA exonerations nationwide, unvalidated or improper forensic science have contributed to underlying wrongful convictions." Because of this, the Innocence Project encourages states to establish independent panels that include a wide range of experts who understand the needs of the forensic community.

CPCS is committed to helping prevent such a scandal from undermining our criminal justice system ever again. We offer our assistance to work in collaboration with members of your committees, the entire Legislature, the Executive branch, the Court, law enforcement, and the defense community to explore the possibility of an independent board to oversee all crime labs in the Commonwealth. The present situation makes it all too evident that something must be done as we move forward. Only then can Massachusetts be

confident that the misconduct that occurred at the Hinton Lab and the subsequent slow reaction to informing the public of that misconduct will not happen again.

In addition, although some Massachusetts laboratories are accredited, the Hinton Lab was not. In fact, it never was, and its procedures and protocols were generalized and lacked specificity. We urge that action be taken to assure that all Massachusetts crime laboratories are subject to thorough and higher quality system certifications. The Massachusetts State Police Lab is moving toward a higher standard, and should be commended for it. The interests of a balanced and just legal system would seem to dictate that each of the Commonwealth's forensic laboratories be held to the same standards.

We also ask that concerns raised in a report by the National Academies of Science, Engineering, and Medicine be given serious consideration. The report, "Strengthening Forensic Science in the United States: A Path Forward," funded by the U.S. Department of Justice and published in 2009, cautions that crime lab systems administered by law enforcement are problematic and, I quote, "lead to significant concerns related to the independence of the laboratory and its budget." A number of states, among them Connecticut, Virginia and Rhode Island, as well as the District of Columbia and two Texas counties, have established independent crime labs. Other states, such as New Mexico and North Caroline are considering legislation on this matter. While the Massachusetts State Police should be applauded for playing a key role in investigating and exposing the scandal at the Hinton Lab, it does not immunize Massachusetts from problems that arise when labs lack autonomy from law enforcement.

If we truly want to expend the effort and energy to establish safeguards at our crime labs then let us do so in a way that ensures we will not be exposed to future miscarriages of justice. The effort expended in establishing these safeguards will be minimal in comparison to the effort we are all now exerting to undo the miscarriages of justice caused by the lack of oversight at the Hinton Lab. After all, this scandal has revealed much more than just the malfeasance of a single chemist. It has revealed a laboratory-wide cascade of failures. It has uncovered lapses in documentation, oversight, security, and meaningful quality control and assurance. These lapses would seem to have been too numerous to count and that no one in the lab was interested in doing the counting. Indeed, there was no DPH-wide Quality unit, no third-party certifying body, and no state or federal agency whose duty it was to audit any of the procedures and policies that were in place and, most importantly, to make sure they were being followed.

I would like to thank the Committee for inviting me to testify before you today. If you have any questions for me I will do my best to answer them.

ATTACHMENT B

The Commonwealth of Massachusetts
Committee for Public Counsel Services
44 Bromfield Street, Boston, MA 02108-4909

ANTHONY J. BENEDETTI
CHIEF COUNSEL

TEL: (617) 482-6212
FAX: (617) 988-8495

November 8, 2012

Honorable Robert A. DeLeo
Speaker of the House of Representatives
State House, Room 356
Boston, MA 02133

Dear Speaker DeLeo:

I write to update you on the status of the William Hinton State Laboratory scandal, and the steps that the Committee for Public Counsel Services (CPCS) has taken since it became public and to provide information on our initial estimation of the potential costs associated with it.

When the scandal first broke in the waning days of August, CPCS began the process of trying to identify the cases and people affected. We quickly began working in conjunction with other concerned parties to create a system to help those whose cases may have been compromised by the tainted evidence.

As more and more information was uncovered, the incredible magnitude of the problem became obvious. We, like others involved, were aghast at the initial determination that over 60,000 drug samples may have been corrupted affecting over 34,000 cases, many of which involve CPCS clients. Now, after more facts have been revealed, we are deeply concerned that all of the cases processed through the Hinton Lab during the time in question may have been affected and will need to be scrutinized. We estimate that number to be upwards of 190,000 cases.

To facilitate the most expeditious scheduling of hearings for the initially identified cases of those presently incarcerated, which number over 1,000, we worked, and continue to do so, in cooperation with the Commonwealth's District Attorneys and members of Governor Patrick's staff, under the direction of David E. Meier, special counsel to the Governor. We also met with all levels of the Trial Court – Superior, District, and Boston Municipal. We established teams in every county so that bar advocate programs and public defenders were prepared for initial hearings scheduled with district attorneys. Also, we established a training module to educate our attorneys on how to handle these unique cases.

On October 25, 2012, CPCS sent to Secretary of Administration & Finance (A&F) Jay Gonzales, in response to a request, our preliminary assessment of the potential costs associated with dealing with indigent defendants whose convictions were potentially impacted. I have requested a meeting with Chairman Dempsey to brief him on the request and hope to have that opportunity now that the busy election season is behind us. My staff and I have met with the senior staff of the Ways and Means committee, as well as House Counsel Jim Kennedy, to explain the request and review the details.

Attached is a copy of a spreadsheet* sent to A&F and provided to House staff that estimates our costs through December 2012. It delineates costs by each activity CPCS may be obligated to perform in order to effectively respond to the problems created by the lab and its tainted evidence. It also includes a breakdown of what might be needed depending upon the true scope of the problem and how the various cases proceed through the courts.

It is my intention that by providing you with this information you will have a better, more informed understanding of what CPCS has been doing and must continue to do in reaction to the William Hinton State Laboratory scandal. I welcome the opportunity to meet with you to discuss this matter fully, and to get your thoughts and suggestions on this critical matter. As always, thank you for your continued support of CPCS.

Very truly yours,

Anthony J. Benedetti

Enclosures: Spreadsheet and initial assessment of the nature and amount of costs

*Second document delivered to A&F after review and revision

Initial Assessment of the Nature and Amount of Costs Related to the Problems at the Hinton State Laboratory

The following is an outline of how the Hinton State Laboratory problem has translated into costs to the Committee for Public Counsel Services (CPCS) and the Commonwealth.

While many of the activities described below will occur concurrently, we have broken them down into three parts:

I. Research and Identification

Staff immediately began analyzing available data to identify affected individuals and, where possible, identify their original counsel. Both private attorneys and staff attorneys will need to search available data and case files to identify the individuals who are affected by the lab crisis. Paper and electronic files will have to be retrieved and reviewed to ascertain the nature of the impact on each case. In many of these cases, individuals will have to be located and informed that they are affected. Additional IT staff and private investigators will need to be employed in this phase.

II. Case Management and Administration

We estimate that three additional attorneys will be needed to supplement the time of the eight senior staff attorneys who are performing the triage necessary to properly assign cases. Temporary support staff will be employed to manage and track paper file reviews. A document management system will be necessary to make the volume of documents involved securely and readily accessible statewide. Bar Advocate Programs in the affected counties will require additional support. Back room functions in accounting, IT and audit and oversight are proportionally impacted by caseload volume. It will also be important that we provide training, mentoring and support of defense attorneys with limited experience in handling post-conviction cases.

III. Litigation

We have applied a conservative estimate for the time involved for all affected clients to be granted a full and fair hearing. This includes costs for attorneys, investigators and experts. Cost estimates associated with litigation are divided between two phases: 1) Initial Rule 30/motion for new trial phase; and 2) Retrial phase where the district attorneys would attempt to retry the original charge.

All of these estimates are based on the information available at this time. Receipt of additional information in the possession of law enforcement would reduce that amount of time and resulting costs necessary to research each case. Information from our research and information and decisions from others will also impact the need for some of this work. Based on the District Attorneys' representation that each case will be considered individually instead of dismissing categories of tainted cases, we are preparing to represent all affected cases. If there are cases where the district attorney retries the original offense, and wins, there is a right to appeal, but it is impossible to estimate the number of cases where this will happen and the potential cost.

Initial Assessment of the Nature and Amount of Costs Related to the Problems at the Hinton State Laboratory

This same group of clients has endured other civil consequences based on the unjust convictions in that they were excluded from public schools or public housing, and subjected to deportation proceedings and proceedings to terminate their parental rights. These people should be entitled to representation to assist them in remedying these consequences. Within the scope of our mandate, individuals whose parental rights have been impacted will be represented by CPCS. While it is difficult to estimate the exact number of cases this will result in, we do know that many of our family law cases resulted in the termination of parental rights because of drug convictions. Therefore, many of these cases will need to be reviewed and possibly retried.

A spreadsheet detailing our estimate of costs based on the information we have today is provided. We are aware of approximately 190,000 cases emanating from the Hinton State Laboratory, including 35,000 that were connected to Annie Dookhan between 2003 and when this matter came to light. The spreadsheet includes a preliminary cost projection for the first few months.

	Cases	35,000	150,000	Estimated Cost Through December 2012 7500		
Research Costs						
PC file review to find impacted clients						
Number of PC *2/3		1335	1335			
Number of hours		6	6			
Rate		$50	$50			
		$400,500	$400,500	$400,500	This is ongoing and must be completed as quickly as possible	
Programmer for reporting and data mining		$42,000	$42,000	$42,000	This is a new hire that can be brought of as soon as mid-November.	
Investigator Costs						
1/3 of the cases		11,550	62,700			
Hours		4	4			
Rate		$50	$50			
		$2,310,000	$12,540,000	$462,000	Assume 28%	
TOTAL		$2,752,500	$12,982,500	$904,500		
Case administration						
Three attorneys to triage case assignments		$259,000	$259,000	$259,000	These are new hires that can be brought of as soon as mid-November.	
4 FTE support staff for 7 county Bar Advocate Programs		$149,760	$349,760	$149,760	Temporary staff that have already been brought in.	
Temporary Clerical Staff		$112,320	$112,320	$112,320	Temporary staff that have already been brought in.	
Paralegals and/or secretaries in 5 local PD offices		$127,680	$127,680	$127,680	Temporary staff that have already been brought in.	
Document Management		$300,000	$300,000	$300,000	Purchase and set up costs.	
Training						
1340 Attorneys one day training		$47,000	$47,000	$47,000	One day training	
2 hrs mentoring @ $60 for 1340 Attorneys		$160,800	$160,800	$80,400	Assume 50%	
Proportional increase in Audit and Billing		$201,374	$1,087,215	$100,000	One new staff for each of Audit and Oversight and Billing.	
TOTAL		$1,357,934	$2,213,775	$1,176,160		
Litigation						
Motion for new trial - 7 hours		$12,250,000	$66,500,000	$2,625,000		
New trial - 10 hours		$17,500,000	$95,000,000	$3,750,000		
Experts						
CPCS rates for drug analysts are $75-$142.50 (average=$108.75, round to $100) to estimate of preparation and testimony and travel to court would be 5 hours=$500.		17,500,000	95,000,000	3,750,000		
Investigators						
Investigation of inadequate drug lab procedures impacting an individual case, estimate 4 hours by PI =$200, by Drug Analyst=$400, average=$300 *		10,500,000	57,000,000	2,250,000		
Interpreters						
Assume 10% of the cases Cost/Hour $40, 5 hours		700,000	3,800,000	150,000		
TOTAL		$58,450,000	$317,300,000	$12,525,000		
GRAND TOTAL		$62,560,434	$332,496,275			
Cost per case for Appeals $2,500						
* This estimate has been reviewed and revised upward						

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK, ss.

NO. SJ-2013-

PETITIONERS

v.

COMMONWEALTH

AFFIDAVIT OF ANTHONY J. BENEDETTI

I, Anthony J. Benedetti, state as follows;

1. I am the Chief Counsel of the Committee for Public Counsel Services (CPCS).

2. "In June, 2011, allegations of misconduct at the William A. Hinton State Laboratory Institute in Jamaica Plain . . . [first] surfaced regarding work performed by Annie Dookhan . . . ." Commonwealth v. Charles, 466 Mass. 63, 64 (2013).

3. Over the ensuing two and one-half years, CPCS's ability to carry out its core mandate has been affected by the criminal justice system's case-by-case response to the "burgeoning crisis." Id. at 89.

4. I am submitting this affidavit in support of the petitioners in this case to ensure that this Court is aware

of how the case-by-case approach is impeding this agency's ability to carry out its core statutory mandate: to "establish, supervise and maintain a system for the appointment or assignment of counsel at any stage of a proceeding, either criminal or noncriminal in nature," for all indigent persons entitled to counsel in this Commonwealth. G.L. c.211D, §5.

5. By way of background, on March 12, 2013, CPCS sought to intervene in the Charles and Milette cases then before the single justice (Botsford, J.) to:

> protect its clients' due process rights to the just and timely resolution of the many thousands of previously-adjudicated cases tainted by systemic malfeasance at the Hinton Drug Lab . . . , to protect its clients from the devastating fiscal and human costs attendant to the case by case approach to the resolution of those cases . . . , and to advocate for remedies that will restore the integrity of the criminal justice system.

Commonwealth v. Charles, SJ-2013-0066 & Commonwealth v. Milette, SJ-2013-0086 (Committee for Public Counsel Services' Motion to Intervene at 1) (March 12, 2013).

6. A copy of my affidavit in support of CPCS's motion to intervene is attached hereto and is incorporated by reference herein.

7. Charles and Milette asked the single justice to report the following question to the full Court:

> Where ongoing disputes in litigation caused by corrupt practices in the Hinton Lab have compounded the injustices of that scandal, whether this Court, pursuant to its extraordinary powers and superintendence capacity, should direct and endorse a range of equitable judicial remedies designed to protect the due process rights of affected, to restore the integrity of the affected judicial system, and to ensure the public's confidence therein.

Commonwealth v. Charles, SJ-2013-0066, Commonwealth v. Milette, SJ-2013-0086, & Commonwealth v. Superior Court, SJ-2013-0092 (Reservation and Report at 4) (March 22, 2013).

8. The single justice denied CPCS's motion to intervene, "without prejudice to renewal," and declined to report to the full Court questions pertaining to the "systemic impact" of the Hinton Lab fiasco, on the rationale that such efforts at reaching a "global solution" to the problem were "premature." Id. "The work of David Meier . . . is not yet complete. Nor is the investigation of the Inspector General complete." Ibid.

9. The single justice nonetheless "retain[ed] . . . jurisdiction so that the individual defendants and CPCS

will have an opportunity to renew their motions before me at an appropriate time." Id.

10. On August 20, 2013, Attorney Meier released the results of his investigation, which concluded that the "criminal cases of 40,323 people may have been tainted." David Abel, John R. Ellement, and Martin Finucane, "Annie Dookhan, Alleged Rogue State Chemist, May Have Affected 40,323 People's Cases, Review Finds," Boston Globe, August 20, 2013.

11. We still await the Investigator General's report.

12. As of this date, CPCS has assigned counsel in approximately 8,700 previously litigated cases impacted by the Hinton Lab fiasco. This number includes cases that have been assigned to private counsel through bar advocate programs and Public Defender Division staff counsel.

13. In my view, now is the appropriate time for this Court to frame an appropriate global response to the Hinton Lab fiasco.

14. The Charles and Milette cases have been resolved. For this reason, CPCS is unsure whether Justice Botsford retains jurisdiction to consider a renewed motion to intervene in those cases.

15. Notwithstanding this uncertainty as to the

appropriate procedural vehicle, I am more convinced than ever that anything other than a global resolution of the Hinton Lab crisis will fail to deliver justice to many thousands of indigent defendants whose rights have been violated and will require CPCS to obtain millions of additional dollars in funding targeted to the DPH Lab fiasco.

16. For the reasons discussed in the affidavit of Attorney Nancy Caplan, CPCS believes that the Meier report undercounts the number of tainted cases. Moreover, the Meier report does not even purport to count all Hinton Lab cases that may have been tainted by the systemic incompetence and malfeasance which infected the lab during the years that Annie Dookhan worked there, regardless whether Ms. Dookhan handled the case personally. CPCS estimates that there are approximately 190,000 such cases.

17. Whether or not the Meier number ultimately proves to be accurate, the Attorney General's office has plausibly estimated that the fiasco has already resulted in the expenditure by the Commonwealth of "hundreds of millions of dollars." Commonwealth v. Annie Dookhan, SUCR2012-11155 (Commonwealth's sentencing memorandum, filed October 17, 2013).

18. Although CPCS and the District Attorneys

received some supplemental funds for Hinton Lab-related expenditures last fiscal year, those funds represent only a small fraction of what the growing crisis will likely cost the agency in the future.

19. Moreover, the time that CPCS Public Defender Division staff attorneys and support staff expend to provide counsel in previously-litigated Hinton Lab cases is time that is diverted from other cases. This redistribution of staff time is an unquantifiable impediment to our ability to carry out our core mission.

20. Similarly, CPCS's two-attorney Forensic Services Unit has devoted countless hours on Dookhan-related matters since news regarding the crisis broke. That work has been essential to CPCS's efforts to vindicate the rights of clients whose due process rights have been violated. But, the development of substantive forensic resources needed by <u>all</u> of CPCS's clients have had to be put on hold as the Forensic Unit's time has been increasingly monopolized by Hinton Lab-related matters.

21. CPCS's core function is to provide counsel at the pre-trial and trial level. But the indigent defendants whose due process rights have been violated by the Hinton Lab fiasco require the assistance of post-conviction counsel. Such representation is specialized,

time-consuming, and expensive. Moreover, post-conviction work is not the kind of representation that most public defenders and bar advocates have been trained to provide.

22. There are no more than 300 qualified attorneys in Massachusetts who are willing to handle post-conviction cases at the low hourly rates that CPCS is authorized to pay. Unless there is a global resolution of the Hinton Lab cases, CPCS will need to recruit, train, and provide support to a small army of newly-qualified post-conviction attorneys to represent each of the tens of thousands of Hinton Lab clients whose cases have been affected.

23. Such an effort would take months if not years, cost millions of dollars, and cause incalculable damage to CPCS, its clients, and Massachusetts' criminal justice system.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 6th DAY OF JANUARY 2014.

Anthony J. Benedetti
Chief Counsel
Committee for Public Counsel Services
44 Bromfield Street
Boston, MA 02108
(617) 482-6212

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPREME JUDICIAL COURT
SJ-2014-0005

KEVIN BRIDGEMAN,
& others

v.

DISTRICT ATTORNEY FOR THE SUFFOLK DISTRICT,
and another

AFFIDAVIT OF ANTHONY J. BENEDETTI IN SUPPORT OF JOINT REQUEST OF PETITIONERS AND INTERVENOR THE COMMITTEE FOR PUBLIC COUNSEL SERVICES CONCERNING THE IDENTIFICATION AND NOTIFICATION OF DOOKHAN DEFENDANTS

I, Anthony J. Benedetti, state as follows.

1. I am the Chief Counsel of the Committee for Public Counsel Services (CPCS).

2. Nancy J. Caplan, the attorney-in-charge of CPCS's Drug Lab Crisis Litigation Unit, and I are submitting affidavits in support of the instant motion to provide the Court with information as to what CPCS would require in the way of additional resources to complete the task of providing actual notice to an estimated 20,000 previously-identified Dookhan defendants of their rights under *Commonwealth v. Scott*, 467 Mass. 336 (2014), and *Bridgeman v. District Attorney for the Suffolk Dist.*, 471 Mass. 465 (2015).

3. Some background is needed to put this information in context.

4. Nearly four and one-half years have elapsed since "allegations of misconduct at the [Hinton drug lab] . . . surfaced regarding work performed by Annie Dookhan," *Commonwealth v. Charles*, 466 Mass. 63, 64 (2013), leading to a crisis of "systemic magnitude in [our] criminal justice system." *Scott*, 467 Mass. at 352.

5. In the years since the extent of Dookhan's misconduct was made known, CPCS has maintained – and reiterates here – that this systemic problem will only be resolved through a comprehensive remedy which calls for the automatic dismissal of all Dookhan-tainted convictions unless the Commonwealth makes an adequate showing, by a time certain, as to why dismissal with respect to a particular conviction is not warranted.

6. Indeed, because Dookhan's "egregious governmental misconduct," *Scott*, 467 Mass. at 352, tainted so many convictions, the inherent delay and prohibitive cost of the case-by-case approach has itself become a chief reason why, years later, the Hinton drug lab failure continues to "stain our judicial system and mock the ideal of justice under law." *State v. Gookins*, 135 N.J. 42, 50 (1994).[1/] See Dahlia Lithwick, Crime Lab Scandals Just Keep Getting Worse, Slate

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[1/]In *Gookins*, breathalyser evidence was falsified by an agent of the prosecution. The Supreme Court of New Jersey ordered that the tainted cases be dismissed and required on remand that "[t]he prosecution shall certify to the [trial] court all the evidence that it considers to be untainted that would sustain the prosecution of these cases." *Gookins*, 135 N.J. at 51.

Magazine (Oct. 29, 2015) (available at http://www.slate.com/articles/news_and_politics/crime/2015/10/massachusetts_crime_lab_scandal_worsens_dookhan_and_farak.html). Given the countless number of Dookhan defendants convicted with fraudulent evidence, the usual case-by-case approach simply takes too long and costs too much.

7. The full Court granted CPCS's request to intervene in these proceedings based on its recognition that the agency "has a substantial and immediate interest in these proceedings given its current and future responsibility for providing representation to thousands of indigent Dookhan defendants who want to pursue postconviction relief from their drug convictions." *Bridgeman*, 471 Mass. at 481.

8. As a practical matter, however, CPCS cannot discharge its current and future responsibility for providing post-conviction counsel to those indigent Dookhan defendants who wish to seek to vacate their tainted convictions unless those defendants have first received actual notice that their convictions are in fact tainted, and have then made an informed decision to seek relief.

9. "The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense." *Bridgeman*, 471 Mass. at 480, quoting Mass. R. Prof. C. 3.8 (d), 426 Mass. 1397 (1998).

10. Prosecutors' special *Brady* obligations arise from the

recognition that "our system of the administration of justice suffers when any accused is treated unfairly," which occurs when any prosecutor does not give the defendant "favorable" information that is in the prosecutor's possession, custody, or control. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). For this reason, the duties of prosecutors "to administer justice fairly . . . go beyond winning convictions." *Commonwealth v. Ware*, 471 Mass. 85, 95 (2015), quoting *Commonwealth v. Tucceri*, 412 Mass. 401, 402-403 (1992).

11. In the context of the Amherst drug lab fiasco, the Court made clear that the Commonwealth's *Brady* obligations extend to "cases in which defendants already had been convicted of crimes involving controlled substances that [Sonja] Farak had analyzed." *Commonwealth v. Cotto*, 471 Mass. 97, 112 (2015), quoting *Ware*, 471 Mass. at 95.

12. The fact that a defendant's drug conviction is tainted because it was obtained with fraudulent evidence is "obviously exculpatory." *Ware*, 471 Mass. at 95, quoting *Commonwealth v. Tucceri*, 412 Mass. 401, 402-403 (1992).

13. For these reasons, it is my view that the ethical and constitutional obligation of identifying each and every Dookhan defendant and providing those individuals with actual notice of the "favorable" fact that their drug convictions are tainted and subject to a motion to vacate falls squarely on the Commonwealth, in particular

the District Attorneys who used Dookhan's fraudulent evidence (albeit unwittingly) to obtain convictions.

14. The District Attorneys do not share my view, as most recently made clear at the oral argument before the full Court in this case.[2/] The position that the respondents have taken – that they have "*voluntarily* expended time and resources . . . to identify potentially affected defendants," DAs' brief in *Bridgeman* at 58 (emphasis supplied), but that they have no legal or ethical obligation to do so – is regrettable, because that position, in my view, is a significant factor in how unacceptably slow and piecemeal the response of the criminal justice system to the Hinton drug lab failure has been.

15. Although the duty of notification, like the duty of identification, lies with the District Attorneys, it would be preferable if that notification were provided by CPCS. I read the *Bridgeman* decision as endorsing this position. See *Bridgeman*, 471 Mass. at 480 ("The ability of CPCS to identify clients and to assign them attorneys who will represent their interests in postconviction proceedings is crucial to the administration of justice in the Hinton drug lab cases").

16. For a description of what the task of locating identified

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[2/]When pressed by Chief Justice Gants as to whether there exists any "duty of a prosecutor to provide exculpatory information after conviction," the District Attorney for Essex County answered, "That is the *Brady* law, your Honor, which is not on point with these circumstances." As noted in ¶¶9 and 11, *supra*, the Court rejected this view implicitly in *Bridgeman* and explicitly in *Ware* and *Cotto*.

Dookhan defendants and notifying them of their rights looks like, see the affidavit of Attorney Nancy J. Caplan being submitted in support of the instant motion. Based on this experience, we have estimated that it would cost approximately $1.4 million to lease, open, staff, and equip an office tasked with tracking down and providing actual notice to 20,000 identified Dookhan defendants of their rights under *Scott* and *Bridgeman*, with a goal of completing that task within one year from the time that the office was up and running.

17. I must emphasize that our existing appropriation is not sufficient to permit us to take on this task. On November 2, 2015, the Governor signed a supplemental budget that authorized the expenditure of up to $1.235 million by all state agencies incurring costs related to the Hinton drug lab breach. St. 2015, c.119, §2C.I, line item 1599-0054. See also St. 2013, c.3, §2A, line item 1599-0054. We do not know how much of these funds will be made available to CPCS. However, there are more than twenty qualifying state entities other than CPCS that have incurred Hinton lab-related costs. In light of the number of agencies involved, the portion of this recent appropriation ultimately made available to CPCS is certain to be far less than the cost of the location-notification task described in Attorney Caplan's affidavit.

18. Moreover, this agency has a plethora of existing responsibilities and obligations regarding matters unrelated to the

Hinton drug lab fiasco that cannot be deferred. Re-allocating existing agency resources in order to take on the task of tracking down 20,000 Dookhan defendants and providing notice to them of their post-conviction rights could not be accomplished without ignoring those responsibilities and obligations and undercutting other clients' right to the assistance of counsel. In short, robbing Peter to pay Paul is not a reasonable, responsible, or constitutionally permissible approach. Therefore, I would not recommend to CPCS's governing Committee that the agency "voluntarily" take on the location-notification task in the absence of an additional appropriation that is adequate and targeted for that purpose.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS ___ DAY OF NOVEMBER, 2015.

Anthony J. Benedetti
BBO# 564057
Chief Counsel
Committee for Public Counsel Services
44 Bromfield Street
Boston, MA 02108
(617) 482-6212

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK, ss. NO. SJ-2014-0005

KEVIN BRIDGEMAN,
and others

v.

DISTRICT ATTORNEY FOR THE SUFFOLK DISTRICT,
and others

AFFIDAVIT OF NANCY T. BENNETT

I, Nancy T. Bennett, state the following.

1. I am the Deputy Chief Counsel of CPCS's Private Counsel Division.

2. The Private Counsel Division is responsible for assigning, certifying, overseeing, supporting, training, and paying -- at the hourly rates approved by the Legislature, see Lavallee v. Justices in the Hampden Superior Court, 442 Mass. 228, 229-230 (2004) -- the private attorneys (bar advocates) who handle adult criminal cases in Massachusetts, both at the trial level and post-conviction.

3. I am submitting this affidavit to provide the Court with information regarding (a) the limitations of CPCS's capacity to assign attorneys to handle post-conviction cases generated by the Hinton lab and Amherst lab fiascos, and (b) the agency's evolving appreciation of the need to assign contested motions to

vacate convictions tainted by drug lab misconduct only to attorneys who have been certified to handle post-conviction matters.

A. CPCS lacks the capacity to assign post-conviction counsel for more than about 1,500 cases per year.

4. In a typical year, CPCS assigns counsel for about 1,500 post-conviction cases, including rule 30 motions and direct appeals.

5. About ninety-five percent of these assignments go to private assigned counsel certified to accept post-conviction assignments by the Criminal Appeals Unit of the Private Counsel Division (the post-conviction panel). Approximately five percent are handled by the Appeals Unit of CPCS's Public Defender Division.

6. The post-conviction panel currently includes the names of approximately 300 attorneys. This panel continually accepts new appellate defenders who have applied for certification to accept such assignments. There is no waiting list and no qualified appellate defender is turned away.

7. To be accepted onto the post-conviction panel, the applicant must have sufficient background, training, and education in Massachusetts criminal law to appear qualified to do criminal appellate work, acceptable references, and must submit at least two

acceptable writing samples.

8. The fact that an attorney is on the panel does not mean that she is obliged to accept any particular post-conviction assignment. Panel attorneys are responsible for managing their own caseloads to assure that they are in compliance with applicable performance standards and rules of professional conduct. They may also have responsibilities with respect to privately retained clients and any number of other matters to consider in deciding whether to take a case.

9. Therefore, there are far fewer than 300 post-conviction panel members who are available to accept a new assignment at any given time.

10. The hourly compensation rate for post-conviction cases is the same as it is for pre-trial assignments: fifty-three dollars per hour for a District Court case and sixty dollars per hour for a Superior Court case. The Superior Court rate has not changed since 2005. The District Court rate was increased by three dollars in 2015, effective July 1, 2016.

11. At the public compensation hearings that CPCS is required to hold at least once every three years, private attorneys have overwhelmingly testified that the existing rates are insufficient to support a private practice.

12. Finding attorneys who are willing and able to accept new post-conviction assignments is a primary day-to-day responsibility of the Private Counsel Division's Criminal Appeals Unit.

13. It generally takes the Criminal Appeals Unit between eight and sixteen weeks to find post-conviction counsel willing to accept an assignment to handle a rule 30 motion.

14. Thus, the Criminal Appeals Unit's assignment coordinator spends much of her time importuning attorneys to accept assignments.

15. I have been informed that lists submitted by the District Attorneys in this case indicate that there are over 24,000 Dookhan-tainted cases that will require the assignment of post-conviction counsel if a comprehensive remedy is not adopted.

16. There is no reason to expect that the annual volume of about 1,500 non-Dookhan cases in need of assigned appellate counsel will decrease significantly in the foreseeable future.

17. Even if the Private Counsel Division's Criminal Appeals Unit could somehow expand its assignment capacity by thirty-three percent, and thereby make an additional 500 post-conviction assignments each year, it would take forty-eight years, i.e., until 2064, to assign post-conviction certified

lawyers for all of the 24,000 cases tainted by Dookhan's misconduct (24,000 ÷ 500 = 48).

18. I have been informed that there are likely many thousands of more drug cases that have been tainted as the result of egregious government misconduct associated with Sonja Farak and the Amherst drug lab.

19. Although CPCS endeavors to work diligently to find counsel for every client in need of representation, the pressures of assigning post-conviction counsel for tens of thousands of defendants harmed by the Commonwealth's drug lab failures will overwhelm CPCS's post-conviction assignment capacity and could not be accomplished without sacrificing the rights of existing and future clients.

B. Contested motions to vacate convictions tainted by the Hinton and Amherst drug lab fiascos should be assigned to attorneys certified to handle post-conviction matters.

20. In the late summer and early fall of 2012, when the Hinton drug lab fiasco became front page news, CPCS made every effort to respond immediately, especially for individuals incarcerated on Dookhan cases.

21. In September 2012, CPCS received a rough data dump from the Department of Public Health, through David Meier, which purported to identify about 34,000

people whose alleged drug samples had been assigned to Dookhan (the DPH data). This data contained one row for every drug sample that the Hinton lab received from various police departments.

22. Upon review, it was apparent that the DPH data was both under- and over-inclusive. For example, if there were multiple co-defendants on a case, generally only the first co-defendant's name was provided. Some rows did not contain any name while others contained nicknames or first names only. And Dookhan certificates were located with respect to individuals, many of whom contacted CPCS through a CPCS drug lab hotline, whose cases did not involve a co-defendant and whose names were not included in the DPH data.

23. Starting with this flawed data -- which did not contain docket numbers, dates of birth, or social security numbers -- CPCS attempted to match the information provided to the electronic case assignment information (notice of assignment of counsel or NAC form) that it receives from the courts.

24. We declared a "match" if a name in the DPH data was uniquely the same as or within defined parameters of a name on a NAC and if the date that Dookhan tested the sample (according to the DPH data) was within one year of the date that the NAC was

issued. Using this algorithm, CPCS initially identified approximately 6,000 NACs that "matched" a name on the DPH list.

25. By the end of 2012, CPCS had identified approximately 7,000 Dookhan matches, representing almost ninety percent of the Dookhan-tagged NACs opened to date.

26. For every NAC so identified, CPCS automatically reopened the case for billing purposes, sent notice to the attorney who had previously been assigned to the case, and asked that attorney to take a number of steps, which are outlined below.

27. Attorneys Donald Bronstein and Terry Nagel (respectively, the Director and Senior Staff Attorney of the Private Counsel Division's Criminal Appeals Unit) drafted basic sample motions for a new trial/withdraw guilty plea and for discovery, asserting "newly discovered evidence" and "Brady" claims.

28. Each attorney who had a NAC identified by the process described above was sent these sample motions and was asked to look at each identified NAC and seek to determine if Dookhan was in fact a chemist on the case. If it was determined that Dookhan was the chemist, we asked the attorney to attempt to locate and contact the client. If contact was made and the client wanted to litigate the Dookhan issue, the attorney was

advised to use the motions drafted by Attorneys Bronstein and Nagel as a starting point.

29. Over a third of the approximately 8,000 NACs that CPCS has identified and opened as Dookhan cases have never resulted in any actual representation, for various reasons. Some were "false hits", and were not Dookhan cases at all; in other cases, the attorney was retired or deceased or for some other reason did not receive the notice from CPCS; in other situations, the cases were so old that files had been destroyed and the attorney had no way to proceed. In many cases, CPCS has no information as to why no representation occurred.

30. In the initial stages of CPCS's attempts to respond to the Hinton lab crisis, there was an expectation that tainted Dookhan convictions, once identified, could be vacated without significant litigation. For example:

a. On August 30, 2012, according to the Boston Herald, the Commonwealth's eleven District Attorneys released a joint statement requesting a list of the criminal cases identified as part of the State Police audit of the Hinton Lab, and stating that they would "take the appropriate action necessary to ensure that justice is done";

b. The Middlesex County District Attorney's

office initially assented to (most) new trial motions and filed nol prosequi in cases where it could be confirmed through discovery that suspected contraband had been tested by Dookhan;

c. On September 29, 2012, the Cape Cod Times quoted Barnstable District Attorney Michael O'Keefe as saying that his office was manually looking through all of its files to identify Dookhan defendants, and that he expected all of the Dookhan defendants in his jurisdiction who were in custody to be released after court hearings.

31. In this climate, CPCS initially believed that non-appellate certified trial level attorneys would be willing and able to address the legal issues related to Dookhan cases even though they were not certified to handle post-conviction assignments. Reassigning Dookhan cases to previous plea counsel, who were presumably familiar with the cases and the clients, also made sense in light of the urgency of the matter, the previously-described limitations on CPCS's capacity to assign post-conviction cases, and the District Attorneys' initial willingness to dismiss tainted Dookhan convictions.

32. However, by early 2013, the sense of urgency and cooperation which characterized the early days had evaporated, as the District Attorneys began contesting

Dookhan defendants' motions to stay the further execution of their sentences and vacate their pleas, and Dookhan-related litigation became increasingly complex.

33. The fact that so many of the NACs that we identified as Dookhan "matches" did not result in any representation supports my conclusion that many trial level attorneys, unfamiliar with the specialized litigation necessary to move a contested Dookhan motion to vacate forward, simply declined to undertake postconviction representation which they had neither sought nor agreed to take on.

34. The oral argument before the SJC in the Scott suite of cases (Scott, Davila, Bjork, Rodriguez, and Torres) took place on October 10, 2013. The motions to vacate that were before the Court on that date had been filed by plea counsel who were not certified to handle post-conviction matters. The impact of trial attorneys' unfamiliarity with postconviction litigation revealed itself in the Scott cases, in which the Court noted with disapproval (at the oral arguments and in some of the opinions in those cases) the failure of the motions to have been supported by affidavits from the defendants.

35. This judicial underscoring of deficiencies in the way that some of these early Dookhan motions to

vacate were handled, despite the best efforts of the attorneys to handle unfamiliar litigation which they could have declined, reinforced our belief that Dookhan defendants needed lawyers who had not only the willingness but also the experience and relevant qualifications to properly handle contested post-conviction motions.

36. The lawyers necessary to handle all of these tainted cases one by one simply do not exist. Consequently, a failure to adopt a comprehensive remedy will be ruinous not only for Dookhan defendants but for many others whose right to the assistance of counsel is dependent on this agency's ability to manage its limited resources.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS ____ DAY OF JUNE, 2016.

Nancy T. Bennett
BBO #037700
Deputy Chief Counsel
Private Counsel Division
COMMITTEE FOR PUBLIC COUNSEL SERVICES
44 Bromfield Street
Boston, MA 02108
(617) 482-6212
nbennett@publiccounsel.net

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK, ss. NO. SJ-2014-0005

KEVIN BRIDGEMAN,
and others

v.

DISTRICT ATTORNEY FOR THE SUFFOLK DISTRICT,
and others

AFFIDAVIT OF NANCY J. CAPLAN

I, Nancy J. Caplan, state the following upon information and belief:

1. I am the Attorney in Charge of the Committee for Public Counsel Services' Drug Lab Crisis Litigation Unit (DLCLU), created in April of 2013 to handle indigent defense matters arising out of the misconduct of chemist Annie Dookhan at the Department of Public Health (DPH) Hinton Drug Lab.

2. This affidavit is based upon my personal knowledge and information communicated to me by the attorneys I have supervised, other CPCS staff attorneys and bar advocates.

3. The attorneys of the DLCLU (which have numbered between two and five, including myself) have been representing indigent defendants convicted in drug cases where the alleged narcotics were tested by Annie Dookhan or where the alleged narcotics were tested at

the Hinton Drug Lab during Dookhan's 2003-2012 tenure. On behalf of these individuals, we have been seeking relief under Mass. R. Crim P. 30(b) (R. 30(b)) from convictions based upon evidence tainted by Dookhan's misconduct and the mismanagement of the Hinton Drug Lab.

4. DLCLU attorneys also provide advice and training to bar advocates and CPCS staff attorneys handling so-called "lab cases."

5. DLCLU has also intermittently been staffed by a paralegal who has worked with available DPH data, along with "people search" software, to locate and contact indigent Dookhan defendants who had not yet received the advice of counsel to ascertain whether or not they wished to speak to counsel about the possibility of seeking relief from their tainted convictions.

Efforts to train, advise and support bar advocates handling lab cases

6. By the time the DLCLU was created, CPCS was already looking to trial (as opposed to post-conviction) certified bar advocates to represent Dookhan defendants in their motions to stay their sentences and/or vacate their convictions.

7. Where my background was as a practitioner in the trial courts, new trial motion practice (the

claims, the requirements for pleadings, the nature of the process) was terra incognita. Thus, my two DLCLU attorney colleagues and I immediately prepared for ourselves an ersatz "crash course" in the jurisprudence of R. 30(b), receiving guidance along the way from post-conviction experts. We spent numerous hours learning the fundamentals.

8. We also began to fashion a model for the litigation of motions to vacate Dookhan-tainted convictions. It became clear to us that the case of Ferrara v. United States, 456 F.3d 278 (1st Cir. 2006), represented the most promising model for a due process claim based on the misconduct of government chemist Annie Dookhan, though it was not clear to us that this would in fact become the working litigation model, and we spent much time researching, developing, and dispensing advice with respect to common-law newly-discovered-evidence claims, as well as claims based on the withholding of exculpatory evidence per Brady v. Maryland, 373 U.S. 83 (1963), and its progeny.

9. By the end of May, 2013, we had developed training materials for trial court practitioners (bar advocates and CPCS staff) which attempted to explain R. 30(b) fundamentals and recommend appropriate claims, especially the due process claim based upon Ferrara. We began to disseminate these materials via listserves

and hold training sessions in various counties.

10. As it became generally known that CPCS had set up a unit to handle drug lab cases, we began to receive phone calls and emails, mostly from trial court practitioners, requesting advice. We fielded countless requests for advice in 2013 and early 2014. The attorneys who wrote and called needed, for the most part, basic information and we attempted to answer the need through conversations and emails in which we explained the fundamentals, and through the provision of the training materials we had developed.

11. As we developed pleadings in our own cases, we began to make sample pleadings available to other practitioners, while explaining the need to tailor pleadings for a given defendant to the facts and circumstances of that defendant's case. We also disseminated practice advisories as the lab litigation landscape changed.

12. While many bar advocates attended our trainings and many others sought and received our advice, we were under no illusion that we were reaching all trial practitioners who were handling post-conviction drug lab cases or those who might have reason to initiate R. 30(b) proceedings on behalf of persons they had previously represented who had been convicted on Dookhan-tainted evidence. When we

appeared in court on our own drug lab cases, we had occasion to witness, at times, lab case representation that suffered from a lack of knowledge of the law.

13. This Court's issuance of the Scott decision, 467 Mass. 336, in March of 2014, established the framework for the litigation of new trial motions based on the misconduct of Annie Dookhan. The pace of lab case litigation in the trial courts picked up considerably at this point.

14. As a consequence, so did the demand for our advice. We prepared practice advisories and conducted trainings explaining the Scott framework. In the trainings we conducted, we also continued to cover R. 30(b) fundamentals. The flood of advice calls and emails we received post-Scott continued to reflect a need for basic "how to litigate a R. 30" advice, in addition to questions about Scott itself.

The role of the risk of additional punishment in motion counsel's advice/Dookhan defendants' decisions whether or not to pursue relief

15. A significant part of the approach we promoted to the litigation, under R. 30(b), of drug lab cases, before this Court's 2015 decision in Bridgeman, focused on the risks inherent in the litigation. Many of the Dookhan defendants we counselled pleaded guilty in the face of mandatory minimum prison sentences and received some measure of relief from the full force of

those penalties as a result of their guilty pleas. Pre-Bridgeman, those defendants incurred considerable risk by pursuing relief from their tainted convictions and we advised them accordingly. The advice and training we provided to other attorneys featured a discussion of the risks of "pushing the re-set button," in effect.

16. Once the Bridgeman petition was filed, with its claim for an exposure cap as relief, some Dookhan defendants reasonably chose, after receiving our advice relative to the risk involved in the litigation of a motion to vacate under existing law, to "wait for [a decision in] Bridgeman" before deciding whether or not to proceed.

17. The Bridgeman decision, 471 Mass. 465, issued in May, 2015, removed, in most cases, the risk-based impediment to the ability of Dookhan defendants' to pursue relief from their tainted convictions.

18. As a spokesman for Suffolk County District Attorney Dan Conley stated in response to the issuance of the Bridgeman decision, Dookhan defendants "now have nothing to lose and everything to gain" by attempting to vacate their convictions. See John R. Ellement, *"SJC ruling limits carges, jail time in fallout from state drug lab scandal,"* Boston Globe, May 18, 2015.

19. With nothing to lose and much to gain, the

only logical answer to the question put to a Dookhan defendant, "Do you want to speak to an attorney about the possibility of vacating your drug conviction tainted by the fraud of Annie Dookhan?" had become "yes."

20. Unfortunately, due to limited resources - at times one paralegal and at others, including the present, none - the DLCLU has not been able to locate and contact many Dookhan defendants, among the multitude who have not yet been counselled.

21. Those Dookhan defendants we have been able to contact have, almost invariably, stated that they did, indeed, wish to speak with counsel.

22. Once we, as attorneys, speak with Dookhan defendants and explain the Scott presumption of egregious government misconduct and the Bridgeman protection from additional punishment, we find, with very few exceptions, that they choose to pursue relief.

23. We have found that Dookhan defendants in all circumstances tend to opt to pursue relief, including: those whose tainted convictions date back multiple years, those who have other drug convictions that pre-date or post-date their Dookhan-tainted convictions, those who have criminal convictions equal in seriousness or more serious than the Dookhan tainted conviction(s), those who have no other criminal

convictions, and those who no longer live in Massachusetts, including those who have been involuntarily deported from the United States.

> The litigation, under R. 30(b), of a motion to vacate a plea or a post-trial motion for new trial based on the misconduct of Annie Dookhan is typically time consuming and labor intensive.

24. Attorneys representing apparent Dookhan defendants who wish to vacate their tainted convictions must first assemble a set of documents that will enable them to evaluate the case and advise the client as to the merits of the anticipated motion and the risks that may be associated with the vacatur of any non-Dookhan drug counts and/or non-drug counts in the case. These documents, of course, then come into play as the attorney endeavors to prepare pleadings, testimony (where necessary) and argument for hearing. A basic set of documents would include, but not be limited to:

- Drug certificates
- Criminal complaint or indictments
- Docket sheet
- Police report(s)
- Grand jury minutes (for Superior Court cases)
- Transcript of the plea colloquy [maybe]
- Search warrant papers (where applicable)
- Defendant's criminal record

25. The drug certificate will generally enable an attorney to establish that the Scott misconduct prong can, indeed, be satisfied. In the not-uncommon "plea before analysis" scenario, where the date of analysis reflected on the drug certificate post-dates the date the defendant pleaded guilty, the actual Hinton drug lab testing documents should be obtained and examined to determine whether the substances were actually in the hands of Annie Dookhan before the date of the plea.

26. The testing documents can also operate to reveal significant Dookhan involvement in the testing of the substances in cases where she was not one of the analysts who signed the certificate.

27. The other documents listed above are necessary to the evaluation and presentation of the defendant's case relative to the Scott materiality prong, which this Court has called a "totality of the circumstances test," calling for a "fact intensive analysis" which considers the "range of circumstances" surrounding the defendant's "individualized" decision to plead guilty. (Scott at 357-358). Among other factors, relevant circumstances may include "whether the defendant had a substantial ground of defense that would have been pursued at trial" and "whether the Commonwealth possessed [ ] circumstantial evidence [other than the Dookhan analysis] tending to support

the charge of drug possession." (Scott at 355-357.)

28. While some of these documents can be obtained fairly easily (Superior Court docket sheets; complaints, docket sheets and police reports in District Court cases and defendant CORI's) the process of getting the other documents is often lengthy and extremely frustrating.

29. Attorneys for Dookhan defendants may start by attempting to get needed materials from plea counsel. Unfortunately, phone calls and emails to these attorneys sometimes go unanswered and multiple attempts must be made, often to no avail.

30. When contact with plea counsel is made, motion counsel is often informed that the files in question have been destroyed or that they cannot be readily accessed.

31. Motion counsel must then approach the relevant district attorney's office to request that old, closed files be unearthed and discovery materials be provided therefrom.

32. Several district attorney's offices have hired or tasked paralegals to respond to such requests. In two of these counties, communication is very good and discovery is provided fairly quickly.

33. Other district attorney's offices appear to rely on ADA's, who are expected to handle lab case work

in addition to their regular caseloads, to respond to discovery requests. Our experiences in these counties have varied considerably, court to court, ADA to ADA. Multiple requests for documents often go unanswered for months; pleading reminders failing to make a difference.

34. Drug certificates and drug lab testing documents, essential to the litigation of drug lab new trial motions, are the materials most difficult to obtain. Where plea counsel cannot (or will not) provide drug certificates and the ADA in question (assuming a response) does not find the certificate(s) in the office's closed file, the certificate(s) must be sought from the relevant police department. In some counties, ADA's readily take this additional step. In other counties, they do not. Motion counsel must then draft a request under the Massachusetts public records law (FOIA) and direct it to the police department. Production of the drug certificates in response to such FOIA requests are rarely timely. Sometimes, there is no response at all.

35. In some cases we are informed that drug certificates have been destroyed, perhaps along with the substances, though this is not stated. In such cases, motion counsel attempts to obtain copies of the actual testing documents that underlie the drug

certificate, in order to demonstrate Dookhan's role in the analysis of the substances. As indicated above at paragraph 25, Hinton drug lab testing documents are also sought in cases in which the analyses of the substances appeared to have post-dated the defendant's guilty plea.

36. The Hinton drug lab database, which includes sample-specific testing documents, was created in connection with the Inspector General Office's (OIG) investigation of the Hinton Drug Lab. While the OIG did not issue its report until March, 2014, the database became operational in the summer of 2013. Motions and other requests for materials from the database were handled first by a succession of four attorneys operating out of the Governor's Office of Legal Counsel. (An attorney from the Department of Public Health now handles such motions/requests.) Throughout, requests for case-specific drug lab testing documents made directly by defense attorneys have not been entertained. We have been consistently instructed by this office that requests must come from district attorneys.

37. Our ability to get sample-specific testing documents from the database via district attorney's offices, through reasonable efforts, within a reasonable period of time, varies considerably from

county to county and, often, from court to court. (See paragraphs 31-33.)

38. An attorney litigating a motion to vacate a plea on behalf of a Dookhan defendant must, per Scott, address the question "whether the [Dookhan misconduct] evidence would have influenced [plea] counsel's recommendation [to the defendant] as to whether to accept a particular plea offer." (Scott at 356.)

39. Best practice is to incorporate in the R. 30(b) pleadings, an affidavit from plea counsel which substantively addresses this issue based on the facts and circumstances of the individual Dookhan defendant's case.

40. In order to do this, motion counsel must be able to make contact with plea counsel. As indicated above, this is sometimes difficult and it is often time consuming. Given the fact that the cases of Dookhan defendants date back between four and twelve years, motion counsel must, at times, attempt to track down attorneys who no longer practice law or who have left the Commonwealth.

41. Having tracked down plea counsel, motion counsel must ask the attorney to review the case documents so s/he can engage in a conversation relative to the question in issue. Attorneys busy with their active cases are not always able or willing to take the time to do this in cases they resolved years before. Even where plea counsel is willing and able, motion

counsel must still expend time and effort to work with plea counsel through the process of discussing the issue, drafting an affidavit that s/he is able to sign and, where necessary, preparing him/her for hearing testimony.

42. I have averred previously that the approach district attorneys have taken to the litigation of Dookhan-based motions to vacate guilty pleas has varied from county to county. In some counties, district attorneys have opposed the admission into evidence of defendant and plea counsel affidavits, demanding an opportunity to cross-examine the affiants. In other counties, district attorneys routinely agree to the admission of such affidavits. As such, the work involved and the challenges inherent in preparing for and presenting evidence at new trial motion hearings is variable.

43. Other variances between counties affect the ability of motion counsel to resolve Dookhan defendants' cases expeditiously. Shortly after the issuance of the Scott decision, one district attorney's office indicated that it would not contest Dookhan defendant new trial motions in District/Municipal Court cases, except in certain categories of cases, including cases in which the conviction in issue was a predicate in a pending state prosecution or figured in some manner in a sentence imposed or one that might be imposed in a federal prosecution. Assent in cases

within the "zone of agreement" could be reached easily, once the prosecutor, having been approached by motion counsel, found the time to attend to the case. Such cases could then be resolved before a court, by agreement, on minimal pleadings. The vacatur in these cases, in this county, is typically followed by the filing of a nolle prosequi.

44. The practice I have just described exists, to my knowledge, in only one county. In other counties the approach is, for the most part, "case by case" and/or "file your pleadings and we'll look at them." In some counties, the policy appears to be that all Dookhan-based motions to vacate are contested.

45. All of the above presupposes that Dookhan defendants have come forward or been found, and have been assigned counsel who can act on their behalf. For thousands of Dookhan defendants this, quite simply, has not happened.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 29th DAY OF JUNE, 2016.

Nancy J. Caplan
BBO #072750
COMMITTEE FOR PUBLIC COUNSEL SERVICES
Drug Lab Crisis Litigation Unit
7 Palmer Street
Boston, MA 02119
(617) 445-7581
ncaplan@publiccounsel.net

COMMONWEALTH OF MASSACHUSETTS

KEVIN BRIDGEMAN, et al.,

Petitioners,

v.

DISTRICT ATTORNEY for Suffolk County, et al.,

Defendants.

SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY
DOCKET NO.:

I, 1/6/14

AFFIDAVIT OF NANCY J. CAPLAN

Now comes Nancy J. Caplan and states upon information and belief that:

1. I am the Attorney in Charge of the Committee for Public Counsel Services' Drug Lab Crisis Litigation Unit (CPCS/DLCLU), created in April of 2013 to handle indigent defense matters arising out of the shutdown of the Department of Health's Hinton Drug Lab and the associated allegations of wrongdoing by chemist Annie Dookhan.

2. This affidavit is based upon my personal knowledge and information gleaned from communication with the attorneys I

supervise, communications with other CPCS staff attorneys and bar advocates, and my review of pleadings and decisions in post-conviction proceedings initiated as a result of the Dookhan misconduct and the shutdown of the Hinton Drug Lab.

3. The attorneys of the DLCLU, myself and two staff attorneys, have been representing indigent defendants convicted in drug cases where the alleged narcotics were tested by Annie Dookhan or where the alleged narcotics were tested at the Hinton Drug Lab during Dookhan's 2003 - 2012 tenure. On behalf of these individuals, we have been seeking relief from convictions based upon evidence tainted by Dookhan's misconduct and the mismanagement of the Hinton Drug Lab.

4. DLCLU attorneys also provide advice and training to CPCS staff attorneys and bar advocates handling so-called "lab cases."

5. DLCLU attorneys, along with one staff investigator, are also working on identifying, locating and counseling indigent defendants convicted in Dookhan cases, who have not yet received the advice of counsel, about the possibility of seeking relief from their tainted convictions.

6. Our work spans the eight counties affected by the Hinton failure, but it is concentrated in Suffolk, Plymouth, Essex, Middlesex and Norfolk Counties.

7. Prosecutorial approaches to the litigation of lab cases have varied from county to county. In Middlesex County, for a period of time (fall 2012 to mid-spring 2013) the District Attorney's Office agreed to motions to vacate guilty pleas in drug cases where Annie Dookhan was one of the analyzing chemists and, thereafter, filed nolle prosequis relative to all drug counts. Since the spring of this year, the Middlesex District Attorney's Office's has filed oppositions to lab case new trial motions, pressing courts to continue or refrain from acting on the motions until the Supreme Judicial Court decides the Bjork suite of cases.

8. Prosecutors' approaches to lab case stays and bails have varied considerably. In Essex County, substantial bails were often requested by prosecutors and imposed in lab cases, leaving persons with meritorious new trial motions in custody pending resolution of those motions. In Suffolk County, bail amounts requested by prosecutors have tended to be more nominal.

9. In Suffolk County, prosecutors have generally been willing to agree to "re-plea" deals, for less incarceration than that imposed originally, in cases where Annie Dookhan was the primary or the secondary chemist in the analysis of the alleged narcotics. Plymouth County operated similarly until May of this year, when an individual was arrested on murder charges after

having been released from prison upon the vacating of his Dookhan-analysis based drug conviction and the dismissal of charges (due to the destruction of the alleged narcotics). Since that time, reasonable deals have been extremely hard to come by and have been limited to, generally, cases in which Dookhan acted as the primary chemist.

10. Significant aspects of the new trial motion process have varied between counties due to variances in prosecutorial practice. In Essex, Plymouth and Middlesex Counties, defendants are generally able to submit into evidence, at new trial motion evidentiary hearings, their own affidavits and affidavits of plea counsel, without objection by the Commonwealth. In Suffolk County, prosecutors have indicated that they will not agree to the admission of such affidavits, except under unusual circumstances (e.g. defendant in Federal custody).

11. The availability of discovery has changed over time. Prior to June, 2013, defendants litigating new trial motions were unable to get the Hinton Lab documents uniquely associated with the analyses of the alleged narcotics in their cases. Starting in June, 2013, prosecutors have become increasingly able to provide such documents within a reasonable time frame.

12. Discovery *not* tagged to particular sample numbers, yet significant to the litigation of lab case new trial motions, has

been much more difficult to obtain. The provision of discovery relating to quality control/quality assurance measures called for relative to lab instruments, standards and re-agents, for example, has been spotty, at best.

13. Defendants have also had difficulties obtaining *definitive sets* of "training materials" and lab operation protocols and policies for any particular time frame. These problems seem to arise, in part, out of the fact that the scanning of Hinton Drug Lab records (performed by the Inspector General's Office) was geared to find and produce case-specific testing documents, to be searched for by sample number. While a "key word" search is also available, categorical searches for materials in the above-described areas have not produced results that can be relied upon as complete or comprehensive - the Commonwealth has assiduously refrained from assuring defense attorneys in lab cases that what has been provided represents a "complete set."

14. The scanned data from Hinton is problematic in other ways. I have been told that handwritten documents (reagent logbooks, for example) were not amenable to optical character recognition (OCR) processes so they are not searchable.

15. I have also been advised that documents with GC/MS graphs are only searchable by sample number even though the

initials of the GC/MS operator appear in text at the top of the page. (GC/MS "graphs" are the actual data output of GC/MS analysis. See affidavit of Anne Goldbach at paragraphs 34 - 36 regarding the nature and significance of GC/MS testing in general and paragraphs 26 - 33 regarding GC/MS processes at Hinton.)

16. I have discovered several instances where Dookhan set up and executed GC/MS runs but did not appear on the certificates of analysis as the secondary chemist. CPCS has asked for disclosure of all instances in which Dookhan played this significant role. Because of the limitations of the scanned Hinton data described above, obtaining this information is likely to prove extremely difficult.

17. CPCS has attempted to obtain materials, such as those described above, broadly relevant to the litigation of lab case new trial motions. To date, there has been no mechanism for accomplishing this goal. Very recently, the possibility of progress along these lines has arisen but production of needed materials will be challenged by the difficulties and limitations of the scanned data.

18. We encounter many defendants who would like to seek relief from drug convictions tainted by Dookhan's misconduct and the mismanagement of the Hinton Drug Lab. We evaluate the merits

of each defendant's new trial motion and assess the risk for each defendant in the "re-opening" of his case should his plea be vacated.

19. Many defendants received charge concessions in exchange for their guilty pleas. Quite often, these charge concessions involved the dismissal of counts carrying mandatory periods of incarceration, school zone violations for example. In other cases, charge concessions involved the elimination of sentencing enhancements carrying mandatory prison sentences (e.g. subsequent offender) and/or the reduction of a drug trafficking count to a lower level trafficking offense or to a drug offense with no mandatory.

20. Many defendants seeking relief in this area have finished their prison sentences and/or completed their periods of probation.

21. Based on concerns about how courts might interpret the law, we must advise defendants who wish to proceed with lab case new trial motions, that a successful new trial motion could result in the re-activation of all counts as originally charged. On hearing this, many defendants, fearing further or increased incarceration, decide not to pursue seek relief from their tainted drug convictions.

22. Many of the defendants who so decide are suffering from the collateral consequences of the tainted convictions (e.g. in the areas of housing and employment). They decide they will continue to suffer these collateral consequences rather than risk further incarceration.

23. The fears that motivate defendants to withdraw or refrain from filing lab case new trial motions were realized in the Essex County case of Commonwealth v. Angel Rodriguez (ESCR07-0875).

24. Mr. Rodriguez was indicted in 2007 for trafficking in cocaine over 100 grams. In early 2008 he pleaded guilty to a reduced charge of trafficking in cocaine over 28 grams, receiving a state prison sentence of 5 to 7 years.

25. In October of 2012, after the revelations of Annie Dookhan's misconduct and the mismanagement of the Hinton Drug Lab, Mr. Rodriguez filed a motion to vacate his 2008 guilty plea (Dookhan had been involved in the analysis of the alleged narcotics in his case). In May of 2013, his motion was allowed. In November of 2013, Mr. Rodriguez went to trial before a jury on the indictment as originally charged: trafficking in cocaine over 100 grams. He was convicted and sentenced to 8 years to 8 years and 1 day in state prison.

26. The conviction and sentencing of Mr. Rodriguez, after what was probably the first trial of a defendant whose plea was vacated due to the Dookhan misconduct, received media attention. Defendants in Essex County and beyond have heard about what happened to Mr. Rodriguez. Attorneys representing defendants in lab cases use the Rodriguez case as an illustration of the risks inherent in the litigation of a new trial motion, particularly in cases where charge concessions made in connection with the original guilty plea resulted in the elimination of some or all mandatory prison sentences.

27. The example of Angel Rodriguez adds to the fears of defendants who might file lab case new trial motions, that their pursuit of relief from a conviction tainted by government misconduct might result in the imposition of even harsher punishment than that previously imposed.

28. CPCS staff have been engaged in the process of attempting to identify and locate indigent defendants convicted in drug cases in which Annie Dookhan was involved in the analysis of the alleged drugs.

29. In September, 2012 a Task Force established by Governor Patrick was established to identify all persons "affected by the alleged conduct of Chemist Annie Dookhan at the Hinton Drug Laboratory. . . from 2003 to the present." Attorney

David Meier was appointed to lead the Task Force. (*The Identification of Individuals Potentially Affected by the Alleged Conduct of Chemist Annie Dookhan at the Hinton Drug Laboratory, Final Report to Governor Deval Patrick, David E. Meier, Special Counsel to the Governor's Office, August 2013,)* (Meier Report, p. 2).

30. The purpose of the Task Force, as stated by Meier in his Final Report, was to "ensure that prosecutors, defense attorneys and judges were provided with as much information as possible about the identity of those individuals potentially affected, so as to enable them to respond appropriately to the alleged misconduct from their respective positions within the criminal justice system." (Meier Report, p. 2.)

31. In September, 2012, Meier's group generated, from Hinton data, a list of about 37,500 individuals whose samples of alleged narcotics had been tested by Dookhan, as primary or secondary chemist, between 2003 and 2012.

32. This list was provided to CPCS and CPCS then began the process of identifying and locating past and present clients who might have claims for relief.

33. Shortcomings in the "manner in which information and data were recorded and maintained at the Hinton Laboratory" necessitated that additional measures be taken towards the goal

of "accurately identify[ing] by true full name as many of the individuals on the list as possible." (Meier Report, p. 5.)

34. In August, 2013, Meier issued a revised, updated list of 40,323 individuals whose samples of alleged narcotics had been tested by Dookhan, as primary or secondary chemist, between 2003 and 2012 (Meier list). Meier indicates, in the report which accompanies the list, that he was able to amplify the September lists through a "by-hand, file-by-file review of individual [Hinton Drug] laboratory documents." (Meier Report, p. 9.)

35. This list was provided to CPCS and other criminal justice entities. With this updated list, CPCS has continued its efforts to identify and locate past and present clients who might have claims for relief from convictions based upon evidence tainted by Dookhan's misconduct and the mismanagement of the Hinton Drug Lab.

36. Since the Meier list is based solely upon Hinton Lab data, it lacks information that is highly significant to the process CPCS must undertake. The list contains no birthdates or social security numbers for the 40,323 names it reflects. Where common names are involved, some names are misspelled, or compound names incorrectly noted, in the absence of more precise identifiers accurate identification is compromised.

37. Drug Receipts - forms filled out by police officers upon the submission of substances to the lab - attached to the Meier list as PDF's, provide addresses for some of the names on the list. The Drug Receipt form most commonly used outside of Boston did not call for addresses. The Boston Police Department form *did* call for addresses but some versions of this form suffer from the fact that they contained only two lines for defendants, causing the list to be under-inclusive in some cases involving more than two defendants.

38. Many of the addresses reflected in the drug receipts are, by definition, as much as ten years old and, as such, are of limited utility in locating individuals in a low-income population in which few own their own homes and many make frequent moves. The old addresses are also of limited utility in accurately identifying individuals, compared with the more precise identifiers of birthdates and social security numbers.

39. Defendants' birthdates and social security numbers are typically part of police incident reports and/or booking sheets. These documents were not part of the Hinton Lab files reviewed by Meier's group and thus the information they contain is not part of the Meier list. The drug receipts attached to the Meier list as PDF's, however, provide police reference numbers - police department case numbers - thus providing a link between

the Hinton Drug Lab case (sample) numbers and the number for the police reports associated with those samples.

40. The Meier list does not contain docket numbers or dispositional information. Where CPCS must focus its "identify and locate" efforts on indigent defendants *convicted* in Dookhan-involved drug cases, the list provides no ready means of determining which list entries represent convictions.

41. As a result, CPCS staff must obtain docket numbers by attempting to match Meier list names with internal data. Given the difficulties with names described above, and the lack of more precise identifiers, this matching process is inexact.

42. Assuming docket numbers are obtained, CPCS staff must obtain dispositional information. In cases originally handled by CPCS staff attorneys, internal dispositional data is accessible. In cases originally handled by private counsel assigned through bar advocate programs - and these represent the lion's share of the cases associated with the 40,323 names on the Meier list - dispositional information must be sought from the courts.

43. Superior Court dispositional data can be efficiently obtained via the AOTC's on-line information system. Accurate District Court dispositional information, on the other hand, can now only be obtained from the individual courts' clerk's offices. CPCS requests for docket information in thousands of

cases threaten to further strain under-staffed district court clerk's offices. (N.B. District court cases represent the lion's share of the cases associated with the 40,323 names on the Meier list.)

44. Assuming CPCS staff are able to identify and locate individuals with potential claims for relief from drug convictions and ascertain that they wish to speak to counsel, attorneys will be assigned. Where assigned counsel did not handle the underlying case, s/he will have to assemble a file of documents essential to advising the client relative to the merits of a possible new trial motion, such as police reports and certificates of [drug] analysis.

45. As indicated above, police incident reports, unlike drug receipts, were *not* part of the Hinton Drug Lab files and are *not* attached to the Meier list as PDF's.

46. Certificates of analysis of the alleged controlled substances (the so-called "drug certs"), reflecting the results of the analysis, the names of the two chemists and the role played by each (primary or secondary chemist), *were not part of the Hinton Drug Lab file*. As such, the certificates are *not* attached to the Meier list as PDF's.

47. Counsel assembling files for purposes of advising clients as to the merits of possible new trial motions will have

to seek these essential documents from District Attorney's offices, which will, in turn, have to request the documents from the appropriate police departments. Alternatively, defense counsel will have to obtain certificates via FOIA requests directed to police departments.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 6th DAY OF JANUARY 2014.

Nancy J. Caplan
Committee for Public Counsel Services
7 Palmer Street
Roxbury, MA 02119
(617) 445-7581

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK, ss. NO. SJ-2014-0005

II,
5/27/14

KEVIN BRIDGEMAN,
and others

v.

DISTRICT ATTORNEY FOR THE SUFFOLK DISTRICT,
and others.

AFFIDAVIT OF NANCY J. CAPLAN
IN SUPPORT OF MOTION TO INTERVENE

1. I am the Attorney-in-Charge of the Committee for Public Counsel Services' Drug Lab Crisis Litigation Unit (DLCLU), which was created in April of 2013 to handle indigent defense matters arising out of the failure of the Hinton drug lab and associated disclosures of wrongdoing by chemist Annie Dookhan.

2. I filed an affidavit in support of the petition for relief pursuant to G.L. c.211, §3, filed by the petitioners in this case on January 6, 2014 (R. 231-245), which affidavit and its attachments are incorporated by reference herein.

3. Four full-time Public Defender Division attorneys now staff the DLCLU. We represent indigent defendants convicted in drug cases in which the alleged narcotics can be shown to have been analyzed by Dookhan (Dookhan cases) or to have been tested by the Hinton

lab during Dookhan's tenure there from 2003 until 2012 (whole lab cases).

4. DLCLU staff attorneys also provide advice and training to public defenders and bar advocates handling Hinton lab cases, and seek to identify and locate indigent defendants with tainted Hinton lab drug convictions and advise those who have not received the advice of counsel about the possibility of seeking post-conviction relief.

The impact of *Commonwealth v. Scott*

5. Commonwealth v. Scott, 467 Mass. 336 (2014), released on March 5, 2014, erects a framework for the litigation of motions to vacate guilty pleas in those Hinton lab cases in which the defendant can show that Dookhan analyzed the alleged narcotics.

6. More specifically, Scott creates "a conclusive presumption" that egregious misconduct attributable to the government infected the case of any defendant whose motion to vacate is supported by a Hinton lab drug certificate (a) "from the defendant's case," and (b) "signed by Dookhan on the line labeled 'Assistant Analyst.'" Commonwealth v. Scott, 467 Mass. at 353.

7. But Scott does "not relieve the defendant of his burden . . . to particularize Dookhan's misconduct to his decision to tender a guilty plea." Id. at 354.

8. To the contrary, in order to obtain relief, a

defendant whose conviction has been shown to have been tainted under the first prong of Scott still must "demonstrate a reasonable probability that he would not have pleaded guilty had he known of Dookhan's misconduct." Id. at 354-355.

9. Scott "emphasize[s]" that litigation of this "materiality" prong must address "the full context" of a Dookhan defendant's decision to plead guilty, that the "relevant factors and their relative weight will differ from one case to the next," and that motion judges ruling on Dookhan motions to vacate must engage in a "fact-intensive analysis" which considers the "range of circumstances" surrounding the defendant's "individualized" decision to plead guilty. Id. at 357-358.

Problems with the case-by-case approach after *Scott*

10. Prosecutorial approaches to the litigation of Dookhan motions to vacate have varied widely from county to county following Scott.

11. In Essex County and Middlesex County, defendants have submitted into evidence, at evidentiary hearings on motions to vacate guilty pleas, their own affidavits and affidavits of plea counsel, without objection by the Commonwealth.

12. In Suffolk County, on the other hand,

prosecutors routinely object to the admission of such affidavits and demand an opportunity to question the affiants under oath.

13. The Suffolk County approach has created substantial challenges for Dookhan defendants, for the following reasons.

14. Following revelation of Dookhan's misconduct and the closure of the Hinton lab in 2012, CPCS made thousands of assignments of counsel to defendants with potential claims for relief. The vast majority of these assignments were made to the same attorneys who had represented the defendants at the plea stage.

15. In light of the language in Scott calling for an exploration of the "full context" of the plea decision, the Suffolk County approach has raised the question whether an attorney who represented a Dookhan defendant at the plea stage may represent that defendant at a Scott hearing without running afoul of Mass. R. Prof. C. 3.7(a), which provides that a "lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness," unless certain exceptions apply.

16. In April 2014, Attorney Michael Roitman, who has been assigned by CPCS to represent five Suffolk County Dookhan defendants whom he had represented at the plea stage, sought guidance relative to this issue

from the Massachusetts Bar Association's Committee on Professional Ethics.

17. In response, Timothy Dacey, vice-chair of the committee, stated,

> [I]f the evidence you will give is critical to your client's case and you expect that you will be subject to cross-examination by the district attorney, you should assume that Rule 3.7 applies. Assuming that Rule 3.7 does apply, you may not act as both advocate and witness unless one of the exceptions to the Rule applies. The only exception which seems to apply in your case is Rule 3.7(a)(3), which permits [a] lawyer to testify if disqualification will "work a substantial hardship on the client."

18. Attorney Roitman consulted with my office to further explore this issue, which he recognized had implications for every Dookhan defendant represented by plea counsel attempting to show that the plea decision probably would have been different had the defendant been aware of Dookhan's criminal misconduct.

19. We directed Attorney Roitman to Smaland Beach Ass'n v. Genova, 461 Mass. 214 (2012), in which the Court stresses that the "primary purpose" of Rule 3.7 is to "prevent the jury as fact finder from becoming confused by the combination of roles of attorney and witness." Id. at 220, quoting Steinert v. Steinert, 73 Mass. App. Ct. 287, 291 (2008).

20. Smaland further states that Rule 3.7 is not implicated

> in every case in which counsel could give testimony on behalf of his client on other than formal or uncontested matters.... Rather, our framework requires a more searching review to determine whether the lawyer's continued participation as counsel taints the legal system or the trial of the case before it.

Id. at 220-221 (internal citations omitted).

21. Attorney Dacey had not considered Smaland. Accordingly, Attorney Roitman sent him a copy of the opinion, and asked whether it changed his Rule 3.7 analysis.

22. Attorney Dacey responded that he did not think Smaland "settle[d] the issue," and reiterated his advice that Attorney Roitman bring the matter to the attention of the judge considering the motion to vacate.

23. The e-mail exchange between Attorneys Roitman and Dacey (a copy of which is attached hereto as Attachment A) was made available to judges, special magistrates, defense attorneys, and prosecutors handling Dookhan motions to vacate in Suffolk County.

24. In another post-Scott Suffolk County Dookhan case (Commonwealth v. Robert Newton, SUCR2010-10406), Attorney Anne Rousseve, who had represented the

defendant at the time of the plea, was prepared to proceed with an evidentiary hearing in a dual role (with her client's informed consent and with other counsel standing ready to handle her direct examination).

25. The Commonwealth objected on grounds that the procedure would violate Rule 3.7. After receiving memoranda from the parties, the special magistrate ruled that it "would be improper" under Rule 3.7 and "unfair to the Commonwealth" if counsel, having testified about the advice that she gave to Newton in connection with his decision to plead, were permitted to argue her own credibility. Commonwealth v. Robert Newton, SUCR2010-10406, Memorandum of Decision, at 3 (May 6, 2014) (Attachment B). Accordingly, the special magistrate ruled that "plea counsel may testify and may argue her client's credibility and that of any other witness except herself." Id. at 4 (emphasis supplied).

26. In a hearing held on a motion to vacate in one of Attorney Roitman's cases (Commonwealth v. Hipolito Cruz, SUCR-2009-10595), the special magistrate permitted Attorney Roitman to testify, as plea counsel, in narrative form, but ordered that he not argue his own credibility. Accordingly, Attorney Roitman, who did not have other counsel to assist him, refrained from arguing that his testimony should be credited.

27. Requiring re-assignments of counsel in these cases, or requiring that co-counsel be assigned to conduct direct examinations of plea counsel and make argument relative to plea counsel's credibility, would add to the significant delay that has already been endured by Hinton lab defendants, some of whom initiated their pursuit of post-conviction relief in the fall of 2012.

28. Of even greater concern is the practical impossibility of finding a sufficient number of new or additional attorneys to represent the thousands of defendants whose ability to obtain relief will be affected if the Suffolk County approach takes hold.

29. In addition to the Rule 3.7 issue, the Suffolk County approach requires that defendants themselves consider testifying in order to meet their burden of proving that Dookhan's misconduct was material to the decision to plead guilty.

30. The scope of permissible cross-examination where the defendant has taken the stand has been problematic. Defendants have taken the position that cross-examination relative to the facts of the case should be limited to the defendant's understanding of the nature and extent of the prosecution's evidence, whereas prosecutors have argued that the "full context" of a defendant's plea decision under Scott opens the

door to an inquiry encompassing the defendant's factual guilt of the offense pleaded to.

31. Rulings by special magistrates on this issue have varied widely. In Cruz (referenced ante at ¶26), the special magistrate permitted the prosecutor, over objection, to cross examine the defendant about his culpability for the offense -- what he had done, said, and known with respect to the alleged contraband in question -- and to conclude the cross examination by asking the defendant whether it was not true that he had pleaded guilty because in fact he was guilty.

32. Dookhan defendants are extremely concerned about the issue of scope, where testimony from Scott hearings may be admissible in the Commonwealth's case-in-chief should a case go to trial following allowance of a motion to vacate, and where special magistrates' rulings as to whether prosecutors may compel Dookhan defendants to incriminate themselves at such hearings have varied.

33. Uncertainty as to this question threatens to deter Dookhan defendants from pursuing viable motions to vacate.

Problems with whole lab cases following release of the Inspector General's report

34. In addition to cases in which the defendant

can produce a certificate of analysis signed by Dookhan, attorneys in my unit are counseling clients seeking relief from Hinton lab convictions that do not appear to involve Dookhan as either the primary or secondary chemist.

35. Such "whole lab" claims are premised on evidence of the Hinton lab's gross mismanagement, which, among other things, permitted Dookhan essentially unfettered access to all suspected drug evidence held at the lab.

36. On March 4, 2014, the Office of the Inspector General (OIG) released its much-anticipated report of its investigation of the Hinton lab, "Investigation of the Drug Laboratory at the William A. Hinton State Laboratory Institute, 2002 -- 2012" (available through the OIG's website, http://www.mass.gov/ig/) (last visited May 21, 2014).

37. The bulk of the report is devoted to a description of multiple grave and systemic deficiencies in the operation of the unaccredited lab, including the following:

- Managers were ill-suited to oversee a forensic lab, and provided virtually no supervision. Report at 1, 21-26 and 114-115.
- A lack of any "formal and uniform protocols" concerning basic lab operations, including testing methods and chain of custody.

Report at 1, 31-33 and 115.

- Training of chemists that was "wholly inadequate." Report at 2, 27-30 and 115.

- A quality control system that was "ineffective in detecting malfeasance, incompetence and inaccurate results." Report at 2, 43-47 and 116.

- Inadequate security measures, including a vulnerable "drug safe." Report at 2, 49-52 and 117.

38. Seemingly tacked on to its detailed and damning findings of top-to-bottom deficiencies in the Hinton lab's management and operations are the report's conclusions that "Dookhan was the sole bad actor," and that only cases involving samples assigned to Dookhan as primary chemist needed to be viewed "with any increased suspicion because of Dookhan's involvement." Report at 1, 3, 113, 120.

39. To establish a due process violation in a non-Dookhan Hinton lab case, it will be necessary for the defendant to refute the OIG's suggestion that the justice system need not concern itself with Hinton lab cases in which the alleged narcotics were analyzed by chemists other than Dookhan.

40. But the report does not include any of the underlying facts forming the basis for its conclusions that Dookhan was the "sole bad actor" and that only

those cases in which Dookhan was the primary chemist warrant "increased suspicion." Nor does the report describe the methodology by which OIG reached these conclusions.

41. Notwithstanding the absence of this information, the report raises glaring questions as to whether justice has been done in non-Dookhan cases.

42. For example, OIG reviewed an unstated number of unidentified transcripts and audiotapes of testimony given by Hinton lab chemists in criminal trials.

43. The report faults Hinton lab supervisors for failing to oversee such testimony, noting that

> multiple chemists testified to being 95% confident that their analytical results were correct in situations in which there was no statistical support for those statements. Chemists also described significant aspects of the testing process differently from one another and often in ways that the forensic drug analysis community would not support.

Report at 24 (emphasis supplied).

44. But the report does not identify either the "multiple chemists" who testified "in ways that the forensic drug community would not support" or the defendants against whom they so testified.

45. I have asked the Office of the Inspector General for access to evidence in its custody or control which is necessary for non-Dookhan defendants

to vindicate their due process rights, including identifying information regarding the above-described cases in which chemists other than Dookhan were found by the OIG to have provided scientifically suspect testimony.

46. To date, the Office of the Inspector General, has declined to make any such evidence available to CPCS, on grounds that it is "confidential." A copy of my e-mail exchange with the OIG's General Counsel regarding this issue is attached hereto (Attachment C).

Continuing problems identifying Dookhan defendants

47. CPCS staff attorneys have continued to seek to identify, locate, and offer counsel to indigent Dookhan defendants.

48. Our belief in the importance of this work has been strengthened by Scott, which recognizes that Dookhan's misconduct has "cast a shadow over the entire criminal justice system," Scott, 467 Mass. at 352, and has tainted every case that she touched "as either the primary or secondary chemist." Id. at 349.

49. My affidavit in support of the petition before the Court describes the difficulties that CPCS has encountered in identifying Dookhan defendants, and explains why the Meier list of 40,323 individuals whose samples of alleged narcotics were tested by Dookhan

lacks information needed to identify and locate defendants in cases that resulted in convictions (R. 239-244 [Affidavit of Nancy J. Caplan at ¶¶28-43]).

50. To address the deficiencies in the Meier list, Chief Counsel Benedetti has asked the District Attorneys of each of the seven affected counties to provide CPCS with the police report and booking sheet, docket number, and drug analysis certificate(s) of the Meier list entries associated with their county.

51. Without the requested information from the District Attorneys, it will difficult if not impossible, and would in any event take many years, for CPCS to identify, locate, and offer counsel to the many thousands of unidentified Dookhan defendants on the Meier list.

Continuing uncertainty as to whether Dookhan defendants whose guilty pleas have been vacated may thereafter be punished more harshly

52. My affidavit in support of the instant petition describes why, following the Rodriguez case, many defendants have been deterred from seeking relief from their Dookhan-tainted convictions by the fear that a successful motion to vacate may ultimately lead to the imposition of additional punishment after a trial (R. 236-239 [Affidavit of Nancy J. Caplan, at ¶¶18-27]).

53. This issue has created a significant impediment to our efforts to secure justice for Dookhan defendants whose due process rights have been violated, and continues to deter defendants with viable motions to vacate under Scott from pursuing such relief.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 27th DAY OF MAY 2014.

Nancy J. Caplan
BBO# 072750
Committee for Public Counsel Services
Drug Lab Crisis Litigation Unit
Roxbury, MA 02119
(617) 445-7581

III

11/15 (conformed copy)

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPREME JUDICIAL COURT
SJ-2014-0005

KEVIN BRIDGEMAN,
& others

v.

DISTRICT ATTORNEY FOR THE SUFFOLK DISTRICT,
and another

AFFIDAVIT OF NANCY J. CAPLAN IN SUPPORT OF JOINT REQUEST OF PETITIONERS AND INTERVENER THE COMMITTEE FOR PUBLIC COUNSEL SERVICES CONCERNING THE IDENTIFICATION AND NOTIFICATION OF DOOKHAN DEFENDANTS

I, Nancy J. Caplan, state as follows.

1. I am the Attorney-in-Charge of the Committee for Public Counsel Services' Drug Lab Crisis Litigation Unit (DLCLU), which was created in April of 2013 to handle indigent defense matters arising out of the failure of the Hinton drug lab and associated disclosures of wrongdoing by chemist Annie Dookhan. At present, the Unit consists of me, one staff attorney, and an administrative assistant. This affidavit is submitted to (a) provide the Court with information regarding the deficiencies in the Dookhan defendant data provided to date – data essential to the accurate identification and notification of Dookhan defendants – and the quantum of such data that is still

outstanding; (b) describe, based on DLCLU's experience, what is entailed in locating an already-identified Dookhan defendant and providing the defendant with actual notice of his or her rights to post-conviction relief under the cases pertaining to the Hinton Lab failure, see *Commonwealth v. Scott*, 467 Mass. 336 (2014), and *Bridgeman v. District Attorney for the Suffolk Dist.*, 471 Mass. 465 (2015); and (c) to provide the Court with our best estimate of what additional resources would be required if CPCS were to have sole responsibility for providing notice to an estimated 20,000 Dookhan defendants who have not already received such notice.

2. With respect to the issue described in ¶1(c), *supra*, at the oral argument before the full Court in the case held on January 8, 2015, ADA Weld indicated that the respondents have estimated that there exist approximately 20,000 Dookhan defendants who have not been provided with notice of or the advice of counsel relative to their post-conviction rights. I do not know how the respondents arrived at this estimate. For purposes of this affidavit, however, I have used the figure provided by the respondents to estimate what additional resources would be required in order for CPCS to locate and notify Dookhan defendants who have not yet been counseled of their post-conviction rights.

3. Please note that this estimate *presumes* that CPCS has been provided with adequate information (including accurate names, dates

of birth, case docket numbers, and, where feasible, social security numbers) to permit us to make reasonable location efforts with respect to 20,000 verified Dookhan defendants.

4. Please note as well that I have *not* attempted to calculate the additional resources that would be required to enable CPCS to actually provide counsel to those indigent Dookhan defendants who, having received notice of their rights, elect to seek to vacate their tainted conviction(s).

Deficiencies in the Dookhan defendant data.

5. The task of identifying all defendants convicted of Dookhan-involved drug offenses is, shockingly, far from complete. Today, more than three years after Dookhan's misconduct was revealed and the Hinton drug lab was closed, we still do not have a complete and accurate list of Dookhan defendants and their Dookhan-involved cases.

6. In September, 2012, then Governor Deval Patrick appointed Attorney David Meier to lead a team to "identify all of the individuals who potentially could have been affected by the [then alleged] conduct of Annie Dookhan at the Hinton Drug Laboratory." The Identification of Individuals Potentially Affected by the Alleged Conduct of Chemist Annie Dookhan at the Hinton Drug Laboratory, Final Report to Governor Deval Patrick, David E. Meier, Special Counsel to the Governor's Office, August 2013, at 2. At a press conference with

Attorney Meier announcing this initiative, Governor Patrick stated, "[t]he job of the office is to make sure no one falls through the cracks." Boston Globe, September 21, 2012.

7. As has been highlighted in the course of this litigation, the list compiled by Meier's team, issued in August of 2013, along with the above-cited report, lacks the data necessary for accurate defendant and case identification and is incomplete in many cases involving co-defendants. Thus, Dookhan defendants have undoubtedly fallen thorough the cracks.

8. The Meier list was based entirely on data maintained by the Hinton drug lab. The universe of defendants' names in the list is limited to those listed by police officers on the "drug receipts" that they submitted to the lab with suspected drug evidence. Thus, where police officers failed to list all defendants in a multi-defendant case, or where they used the abbreviation "et al." after the name of only one defendant, co-defendant names are absent from the Hinton drug lab data and, therefore, are absent from the Meier list.

9. Our experience in the DLCLU responding to inquiries from individuals asking whether Annie Dookhan was involved in their drug convictions proves that the Meier list is incomplete with respect to co-defendants.

10. Our experience with the co-defendant problem motivated us to ask, via two sets of letters from Chief Counsel Benedetti, dated

February 11, 2014 and April 11, 2014, that the District Attorneys of each affected county provide us with the police reports associated with their Meier list Dookhan sample entries. It was our view that a comparison of defendants' names in police reports to names on the Meier list and the incorporation of previously omitted names of co-defendants into that list was the only reliable way to remedy the problem. No District Attorney has provided us with police reports in response to our requests.

11. The Meier list does not include defendants' birth dates or case docket numbers (again, for the reason that such data did not exist in the Hinton drug lab data on which the Meier list is based). CPCS sought the docket numbers associated with the Meier list samples and the police reports which would have reflected defendants' birth dates in its 2014 letters to the District Attorneys because, without such information, CPCS would be unable to accurately identify the defendants or the cases associated with the Dookhan samples reflected in the Meier list. No District Attorney's office provided docket numbers in response to CPCS's letters. As a result of this litigation, however, the Suffolk County District Attorney's office and the Essex County District Attorney's office made considerable efforts to provide docket numbers. And, at the behest of this Court, the docket numbers provided were run through the Trial Court's information systems to provide dispositional data and defendants' birth dates.

12. Unfortunately, the Suffolk and Essex District Attorneys were unable to provide docket numbers for over 8,000 Dookhan-involved samples pertaining to their counties' Dookhan cases. Equally concerning, less than fifty percent of the docket numbers provided by the Suffolk and Essex County District Attorneys yielded a match with Trial Court data.

13. The match rate for Suffolk County – twenty percent – was particularly low. This low match rate may have been due, at least in part, to the fact that, at the time the analysis was performed, Boston Municipal Court (BMC) docket information had not been entered into the MassCourts system.

14. The match rate for Essex County Dookhan cases – forty six percent – while better than Suffolk County's match rate, is far from satisfactory.

15. The Trial Court information system analysis did not generate any Superior Court Dookhan case number data. This fact accounts for some small percentage of the low match rates in Essex and Suffolk Counties, but it represents a problem in its own right insofar as it impairs our ability to notify any Dookhan defendants convicted in Superior Court.

16. The Suffolk and Essex County District Attorneys' offices have indicated that their procedure for matching Meier list entries with docket numbers accounted for the names of all co-defendants.

Thus, the enhanced lists produced by both offices should include the names of all defendants prosecuted for offenses associated with a given sample.

17. To test this proposition, CPCS performed an analysis of the data provided by the Suffolk County and Essex County District Attorneys with data from police reports that we were able to obtain from a limited number of closed staff attorney cases. We determined that Essex and Suffolk had not remedied the co-defendant problem, i.e., co-defendant names remain missing from the data provided by Suffolk and Essex.

18. Mark Prior, Supervisor of the Trial Court Information Services, has indicated that his systems do not have the capacity to generate names and docket numbers for co-defendants associated with the docket numbers provided by the Suffolk County and Essex County District Attorneys.

19. At the request of this Court, some but not all of the District Attorneys' offices that are not parties to this litigation have produced Dookhan-sample associated docket numbers. The District Attorneys from Norfolk, Bristol, and the Cape and the Islands produced docket numbers in May, July, and August, 2015, respectively. This essential data was provided nearly three years after Dookhan's fraud was publicly revealed and more than one year after Chief Counsel Benedetti twice requested the data. (It is worth noting that Chief

Counsel Benedetti's second request was made after this Court issued its Scott decision. As such, he was able to point out to the District Attorneys that all of the Dookhan defendants whose docket information he was seeking had viable claims for relief.) This Court transmitted the data to the Trial Court Information Services so that defendants' birth dates and case dispositional information could be generated. As of this date, we have not received that data from the Trial Court.

20. To my knowledge, the Middlesex County District Attorney's Office and the Plymouth County District Attorney's Office have not provided this Court with any docket numbers associated with their Meier list entries. (The Meier list includes 10,999 samples associated with Middlesex County and 8,531 samples associated with Plymouth County.)

Locating and providing Dookhan defendants with notice of their post-conviction rights

21. In April of 2015, CPCS was able to hire one paralegal (at a salary of $32,000) to begin working on the process of locating Dookhan defendants, notifying them that they appeared to have a fraud-tainted conviction and that they had the right to pursue relief from that conviction, and ascertaining whether they wished to consult with an attorney. After a period of training, this paralegal worked with a CPCS attorney with IT expertise to develop a tool to manage and track

a process in which the paralegal would conduct multiple Dookhan defendant searches at the same time, each at a different stage of completion.

22. This tool enabled the paralegal to focus on locating and notifying only those defendants who had been convicted in Dookhan-involved cases. The paralegal's work was restricted to Essex and Suffolk County Dookhan defendants (the only counties from which we had any dispositional data).

23. The paralegal worked on locating and notifying Dookhan defendants in those counties for a short time between the completion of the search management tool and July 31, 2015, one month after funding from the Hinton drug lab reserve was discontinued, leaving CPCS without the capacity to fund his position.

24. Since July 31, 2015, DLCLU has not had a paralegal or any other staff person to continue the Dookhan defendant location-notification work, which the one paralegal had barely started.

25. Still, even that limited experience has given us a good sense of what steps are involved in the location-notification process, and of how much time it takes to obtain good contact information and make a solid attempt to contact a Dookhan defendant.

26. The paralegal's search efforts focus on entries in the database that include a defendant's name, birth date, a docket number, and a conviction on one or more of the drug counts associated

with the Dookhan-involved sample. The paralegal must first determine whether the defendant has already received post-conviction, lab case representation. To do this, he checks the name and docket number against information from the CPCS private counsel "E-bill" system and the CPCS public defender case management system.

27. Where it is determined that a Dookhan defendant has not received post-conviction lab case representation through CPCS, the paralegal looks for current contact information for that defendant.

28. The defendant's birth date is a key identifier in virtually all of the subsequent searches conducted by the paralegal. It should be noted that we still do not have dates of birth in many Essex and Suffolk County cases. And we have yet to receive any such essential Dookhan defendant data from any of the other affected counties.

29. CORI checks are performed where appropriate. CORI's can yield evidence that a Dookhan defendant has a pending case. In such instances, the paralegal can contact the appropriate court, learn the name of the defendant's attorney and get defendant contact information from or attempt to contact the defendant through that attorney. CORI's can also indicate that a Dookhan defendant is on probation. When this occurs, the paralegal can contact the probation officer to obtain the defendant's current contact information.

30. RMV checks can sometimes yield current contact information for individuals who maintain driver's licenses, car

registrations, or official Massachusetts identification cards (and who make timely address change updates).

31. Our paralegal found that he obtained the most valuable defendant contact information through the use of Thompson Reuters' "CLEAR" investigative software. CLEAR searches draw from multiple public and proprietary records, yielding addresses and, in many cases, mobile phone numbers for an individual and, in some cases, for that individual's close relatives.

32. With this information, the paralegal begins the process of attempting to contact a Dookhan defendant. Letters are sent out to what appear to be good, current addresses, phone calls are made, and messages are left.

33. It should go without saying that some of these efforts fail to yield results. Letters are returned as undeliverable. Messages left with family members fail to lead to calls from defendants. The paralegal will attempt alternate means of contacting a Dookhan defendant, drawing from the CLEAR search results, once first attempts have failed.

34. The search process is complicated by the fact that the Dookhan defendant population includes a great many low-income individuals who do not own homes or maintain stable addresses.

35. Still, at a certain point, a judgment to cease efforts must be made once the most current contact information has been obtained and

best efforts have been made to make contact.

36. Once the paralegal makes contact with a Dookhan defendant, he informs that individual that he appears to have a Dookhan-involved drug conviction and that he has the right to pursue vacatur of that conviction. The paralegal also explains that, due to the Bridgeman exposure cap, the Dookhan defendant need not fear that pursuing relief might subject him to additional punishment . The paralegal explains to the Dookhan defendant that, if he is determined to be indigent, he will not have to pay the costs of this post-conviction representation. Finally, the paralegal asks the defendant if he wishes to consult with an attorney.

37. If the Dookhan defendant states that he wants to be advised by counsel, the paralegal assists the defendant in obtaining an indigency determination from the appropriate court, by providing him with a pro se motion, and explains how he can be connected with appointed counsel once determined to be indigent.

38. In his brief tenure with the DLCLU, our paralegal was able to conduct roughly five new searches a day, while simultaneously following up on efforts to make contact with Dookhan defendants for whom he had previously obtained some contact information.

Additional resources required to locate and provide notice to 20,000 Dookhan defendants.

39. Assuming approximately 250 workdays in a year, had CPCS

had the funds to continue his employment, our paralegal would likely have been able to conduct roughly 1,250 searches over a twelve-month period.

40. Given how long Dookhan defendants have had to wait to receive actual notice, let alone relief, we think the pace of notification should increase to the degree that we could reasonably expect to provide actual notice to 20,000 Dookhan defendants within one year.

41. It would take sixteen paralegals working for twelve months to attempt to locate and contact 20,000 identified Dookhan defendants and inform those individuals that their drug convictions are tainted and that they have the right to pursue relief from their convictions.

42. I have been exploring ways in which the location-notification process might be streamlined, such that more searches might be accomplished with fewer paralegals. This would involve contracting out, at a price, computer-based elements of the search process that can be accomplished in batches. At this point, however, I do not know whether any of these approaches are likely to be effective nor whether the costs will be prohibitive.

Conclusion

43. I will close by returning to the problems with the data. If the Commonwealth is unable to remedy the problem of missing Dookhan co-defendants and cannot generate actionable data with respect to more than half of those individuals who have been harmed

as a result of the Hinton lab failure, those unidentified Dookhan defendants will not be told that their convictions are tainted and will remain without true notice and uncounselled as to their rights to seek vacatur of their unconstitutional convictions.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS ___ DAY OF NOVEMBER, 2015.

Nancy J. Caplan
BBO# 072750
Committee for Public Counsel Services
Drug Lab Crisis Litigation Unit
7 Palmer Street, Suite 302
Roxbury, MA 02119
(617) 445-7581

IV, 5/31/16

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK, ss. NO. SJ-2014-0005

KEVIN BRIDGEMAN,
and others

v.

DISTRICT ATTORNEY FOR THE SUFFOLK DISTRICT,
and others.

AFFIDAVIT OF NANCY J. CAPLAN
IN SUPPORT OF MOTION TO MODIFY IMPOUNDMENT ORDER

1. I am the Attorney-in-Charge of the Committee for Public Counsel Services' Drug Lab Crisis Litigation Unit (DLCLU), which was created in April of 2013 to handle indigent defense matters arising out of the shutdown of the Hinton drug lab and associated wrongdoing by chemist Annie Dookhan.

2. Through my work with the DLCLU, I have become familiar with events following the arrest of state chemist Sonja Farak, including events that have impeded for a period of years the ability of thousands of defendants to pursue relief from convictions that may have been tainted by her misconduct.

3. Farak was first employed as a state chemist at the Hinton drug lab, and then, for a period of about eight years (from late 2004 until January 2013), at the DPH Amherst drug lab. She was arrested by the

Massachusetts State police on January 19, 2013, based on evidence found at her Amherst lab workstation and in her car indicating that she had tampered with samples of suspected drugs submitted to the lab for analysis.

4. A search of Farak's car also yielded substance abuse treatment materials, including a "ServiceNet Diary Card" reflecting drug theft and use by Farak dating back to December, 2011.

5. On February 14, 2013, Sergeant Joseph Ballou of the State police sent an e-mail with the subject heading "FARAK admissions" to AAG Anne Kaczmarek, who had been assigned to prosecute Farak, and AAG John Verner, who was the chief of the criminal bureau of the office of the Attorney General (OAG). The Ballou e-mail stated, "Here are those forms with the admissions of drug use I was talking about," and had eleven pages of documents attached to it. Attachment A.

6. The "forms" attached to Sergeant Ballou's e-mail included the ServiceNet Diary Card reflecting Farak's drug use in December 2011 and other substance abuse treatment records.

7. Nevertheless, State troopers described this evidence as "assorted lab paperwork" in the sworn return filed with the District Court that had issued the search warrant and in the investigative report

which purported to reflect a complete and accurate inventory of the evidence they had seized.

8. The OAG did not present any evidence of the substance abuse treatment materials found in Farak's car to the grand jury investigating her misconduct in 2013.

9. And when, in March 2013, the OAG prepared a packet of investigative materials from the Farak case, which it provided to district attorneys throughout the state "[p]ursuant to this Office's continuing obligation to provide potentially exculpatory information to the District Attorneys," neither the December 2011 ServiceNet Diary Card or other substance abuse treatment records seized from Farak's car were included.

10. In August and September of 2013, defense attorneys preparing for a consolidated multi-defendant new trial motion hearing before Judge Kinder in Hampden Superior Court -- at which the focus of inquiry was to be the timing and scope of Farak's misconduct -- sought access to the evidence seized from Farak's car. They also sought evidence of third parties with knowledge of Farak's illegal behavior.

11. The OAG successfully opposed defense efforts to access the car evidence, making statements that were not accurate. For example, on September 16, 2013, AAG

Kris Foster stated in a letter to Judge Kinder that all documents in Sergeant Ballou's possession had "already been disclosed" to defense attorneys. And on September 17, 2013, AAG Foster claimed in an e-mail to defense attorney Luke Ryan that evidence seized from Farak's car was "irrelevant to any case" other than the Commonwealth's case against Farak. But, in fact, paperwork from Farak's car, including the December 2011 ServiceNet Diary Card, had not been disclosed to the defense and was highly relevant to whether Farak's misconduct was limited to a few months in 2012.

12. Similarly, in a Superior Court filing dated October 1, 2013, AAG Foster asserted that a request by defense attorneys to subpoena AAG Kaczmarek and Farak-related documents in her possession -- which of course included the December 2011 ServiceNet Diary Card -- amounted to a "fishing expedition."

13. Consequently, the consolidated hearing before Judge Kinder took place in September and October 2013, with defendants left unaware of the true nature of the "paperwork" seized from Farak's car, or the existence of the December 2011 ServiceNet Diary Card. The Commonwealth argued that there was no evidence to indicate that Farak's misconduct had started before July, 2012, and Judge Kinder so found. Defendants who pleaded guilty before that date were denied relief.

14. After Farak pleaded guilty in January 2014, Attorney Ryan, who had been involved in the consolidated hearing before Judge Kinder, was granted leave to view the evidence seized from Farak's car in a Hampshire County drug case in which the substances had been submitted to the Amherst lab prior to Farak's arrest.

15. Attorney Ryan examined this evidence on October 30, 2014.

16. Thereafter, on November 13, 2014, the OAG issued a 289-page discovery disclosure to District Attorneys across the Commonwealth, consisting of copies of the substance abuse treatment materials and other exculpatory papers seized from Farak's car one year and ten months earlier.

17. Defense attorneys were thereafter granted access to Farak's mental health treatment records from providers linked to the treatment records seized from Farak's car and in the custody of the Hampden County Sheriff's Department, which then had custody of Farak.

18. The records were produced in March, 2015, subject to a protective order. The records made clear that Farak stole, consumed, and tampered with all manner of drug evidence and lab standards while working at the Amherst lab, and that she did so not for six months but for her entire eight-year tenure at the lab.

19. On May 13, 2015, the protective order was modified on the motion of ADA Jane Montori of the Hampden County District Attorney's office and with the assent of the defendants so that the records could be provided to other district attorneys offices.

20. Meanwhile, on April 8, 2015, the Supreme Judicial Court decided Cotto and Commonwealth v. Ware, 471 Mass. 85 (2015), noting that the Commonwealth had yet to ascertain the "magnitude and implications" of the Amherst Lab scandal, id. at 95, reminding prosecutors of their "duty to learn of and disclose to a defendant any exculpatory evidence that is held by agents of the prosecution team," Cotto, 471 Mass. at 112, and ordering the Commonwealth to notify Judge Kinder by May 8, 2015, whether it intended to "thoroughly investigate the timing and scope of Farak's misconduct at the Amherst drug lab in order to remove the cloud that has been cast over the integrity of the work performed at that facility, which has serious implications for the entire criminal justice system." Id. at 115.

21. On April 23, 2015, representatives from the criminal defense bar and civil rights organizations met with Deputy Attorney General Colin Owyang and Criminal Bureau Chief Kimberly West to discuss how the OAG might respond to the Court's exhortation in Cotto for a

thorough investigation into the timing and scope of Farak's misconduct.

22. In other discussions with representatives of the OAG, citing delays in identifying and notifying defendants affected by the Hinton Lab scandal, defense organizations also emphasized the need to identify and notify defendants affected by Farak's misconduct. Deputy AG Owyang subsequently indicated that he might convene a meeting with District Attorneys to discuss how the injustices caused by Farak's misconduct could best be remedied.

23. On April 28, 2015, the OAG advised Judge Kinder that it would indeed conduct the Cotto-prescribed investigation.

24. On June 4, 2015, defense attorneys Luke Ryan and Rebecca Jacobstein wrote to ADA Montori, copying the district attorneys of the ten other counties, urging her to join their motion to entirely vacate the protective order still in place relative to the treatment records produced in March. The attorneys stated, "We believe that any prosecutor presently in possession of the records has an ethical and constitutional duty to seek the removal of any impediment currently preventing the disclosure of this evidence to post-conviction defendants." Attachment C.

25. Judge Kinder vacated the protective order on June 16, 2015, and the true scope of Farak's misconduct was soon thereafter reported in the media. See Evan Allen and John Ellement, State chemist may have affected more drug cases than previously known, Boston Globe (July 2, 2015).

26. On August 13, 2015, AAG Thomas Caldwell, who had been assigned to lead the investigation, advised Judge Kinder that he was disseminating the Farak treatment records to state and federal law enforcement agencies.

27. On September 25, 2015, attorneys from the MBA, MACDL, ACLUM, and CPCS wrote to Deputy AG Owyang offering to participate in the discussion with district attorneys that he had said he might convene. The organizations emphasized the obligation of prosecutors to identify and notify affected defendants, as well as the wisdom of "developing alternatives to costly case-by-case litigation." Attachment D.

28. On November 5, 2015, AAG Caldwell filed papers in Hampden County Superior Court in which he affirmed that Farak began using controlled substances regularly in the last quarter of 2004 and that she was under the influence of controlled substances during the vast majority of the hours that she worked at the Amherst lab from that time until her removal from the

lab on January 18, 2013. Attachment E. The following day, AAG Caldwell informed Attorney Jacobstein that he had shared this information with the District Attorneys. Attachment F.

29. The OAG's report of its investigation into the timing and scope of Farak's misconduct was filed with the Hampden Superior Court on April 1, 2016. Attachment G. An impoundment order initially in place relative to that report was vacated on May 3, 2016.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 31st DAY OF MAY 2016.

Nancy J. Caplan
BBO# 672750
Committee for Public Counsel Services
Drug Lab Crisis Litigation Unit
Roxbury, MA 02119
(617) 445-7581

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK, ss. NO. SJ-2014-0005

KEVIN BRIDGEMAN,
and others

v.

DISTRICT ATTORNEY FOR THE SUFFOLK DISTRICT,
and others

AFFIDAVIT OF BENJAMIN B. SELMAN

I, Benjamin B. Selman, do submit the following:

1. I am a staff attorney with the Committee for Public Counsel Services (CPCS), Public Defender Division, Somerville Superior Court Trial Unit.

2. This affidavit is submitted to provide the Court with information about the work that is involved in training and advising attorneys handling Dookhan cases and some of the unanswered legal issues to be litigated if the Court does not order a comprehensive remedy.

3. I have worked full-time as a public defender with CPCS since October, 2006.

4. Between April 1, 2013, and May 26, 2015, I served as a staff attorney with the CPCS Drug Lab Crisis Litigation Unit (DLCLU), based in Roxbury.

5. Prior to joining the DLCLU, I litigated two post-conviction motions pursuant to Mass. R. Crim. P.

30(a), and two post-conviction motions pursuant to Mass. R. Crim. P. 30(b). None of these cases involved the Hinton drug lab scandal.

6. During my tenure with the DLCLU, about half of my time was devoted to direct representation of Dookhan defendants, and the other half to training and advising other attorneys regarding the mechanics and substance of litigating Dookhan-related rule 30(b) motions.

7. Between September 18, 2013 and April 9, 2014, I maintained a log which documented advice events (phone calls and e-mails, primarily) in which I provided litigation support to other defense attorneys as well as the occasional clinical professor or law student handling Dookhan cases. I recorded 129 such events, and noted the approximate time spent on each. Most events lasted between fifteen and thirty minutes, though many involved an hour or more of work.

8. I discontinued my log in April 2014 as the result of exhaustion -- the time spent documenting advice events added enough of a "drag coefficient" that I decided my time and energy would be better reserved for substantive representation and advice-giving.

9. The stream of advice requests continued throughout the remainder of my tenure at the DLCLU at roughly the same pace as it did during the seven months that I kept my log.

10. Even though I am no longer part of the DLCLU, I continue to receive regular requests for advice regarding Dookhan cases to this day. Although the flow has slackened as word has spread that I am back to trial work full time, I still typically receive between one and three Dookhan-related advice inquiries per week.

11. Many, perhaps most, of the Dookhan-related advice questions that I fielded from attorneys raised basic issues -- e.g., what is the procedural vehicle for seeking to vacate a plea, which court should the pleading be filed in, etc.

12. The DLCLU spent a great deal of time and resources creating and disseminating basic training materials and sample papers to those attorneys who requested such assistance.

13. Along with basic procedural questions, I received many advice requests (and still do) from attorneys who were simply trying to ascertain whether their clients' drug convictions were in fact Dookhan-tainted, often because DA's offices had failed to respond to their requests for copies of certificates. Answering these questions has not been easy given the nature of the data that we have had to work with (the Meier list and DPH Hinton testing data), which lacks docket numbers and unique defendant identifiers (such

as birth dates and social security numbers) and is incomplete in cases involving multiple defendants. Due to these deficiencies, it has often been necessary to get additional information from court papers, to be referenced against the lab data, in order to determine if there was Dookhan involvement in a given case.

14. Although this Court's decisions in Scott and Bridgeman have clarified certain issues attendant to Dookhan related litigation, as well as streamlined the process to some extent, there are many scenarios presenting questions which have not been resolved by this Court's jurisprudence to date. These include, but are not limited to:

- whether the Scott presumption applies to a conviction entered after trial, as opposed to a plea;
- whether the Scott presumption attaches in a case where the plea antedated Dookhan's analysis of the relevant sample;
- whether the Scott presumption attaches in a case where the Dookhan analysis antedated the entry of the plea, but the certificate of analysis was not provided in discovery in advance of the plea;
- whether a multi-count plea in which Dookhan analyzed some samples but not others is severable for purposes of rule 30(b) litigation (i.e., whether a multi-count plea may or must be vacated in toto due to

Dookhan involvement on some counts);

- whether the procedural protections established in Bridgeman attach to non-Dookhan counts vacated along with Dookhan counts;

- whether the Scott presumption attaches in a case where the lab paperwork indicates that Dookhan was an analyst, but the certificate itself has been lost;

- whether the Scott presumption attaches in a case where Dookhan did not sign the certificate of analysis but the lab paperwork indicates that she performed some of the tasks associated with the secondary analyst's duties, and;

- whether, post-vacatur, a defendant who paid monies (e.g., probation supervision fees, victim-witness assessment fees, driver's license reinstatement fees) may or must be reimbursed for such fees.

15. Questions such as these constitute the substance of many of the advice requests I now receive, and my inability to provide definitive answers to them contributes substantially to the amount of time and energy which I must expend to respond to them.

16. I am aware that the District Attorneys have suggested in this case that litigating a Dookhan case is a simple matter. On the basis of own experience, I

can say that nothing is further from the truth.

I affirm the foregoing to be true to the best of my knowledge and belief. Signed under penalty of perjury this 21 day of June, 2016.

BENJAMIN B. SELMAN
BBO #662289
COMMITTEE FOR PUBLIC COUNSEL SERVICES
Public Defender Division
21 McGrath Highway
Somerville MA 02143
(617) 623-0591

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK, ss. NO. SJ-2014-0005

KEVIN BRIDGEMAN,
and others

v.

DISTRICT ATTORNEY FOR THE SUFFOLK DISTRICT,
and others

AFFIDAVIT OF CHRISTOPHER K. POST

I, Christopher K. Post, state the following on knowledge, information, and belief:

1. I am a staff attorney with CPCS' Drug Lab Crisis Litigation Unit.

2. This affidavit is submitted to provide the Court with information regarding the estimated number of adverse drug dispositions tainted by the Amherst lab scandal.

Summary

3. If the government misconduct surrounding Sonja Farak and the Amherst drug lab is found sufficiently egregious to affect the integrity of all of the suspected drug evidence handled by the Amherst lab during Farak's tenure, and if the rate at which this misconduct generated adverse dispositions is comparable to Dookhan's "sample-to-adverse-disposition ratio" of approximately twenty-eight percent, then I estimate

that the Amherst lab scandal has affected 18,303 cases with adverse dispositions. If only the evidence that Farak herself was assigned to is considered, then I estimate the misconduct generated 8,411 cases with adverse dispositions.

Background data

4. Farak was employed as a chemist at the Hinton lab from July 1, 2003 to July 31, 2004, and at the Amherst lab from August 1, 2004, until her arrest in January of 2013.

5. The Office of the Attorney General previously provided CPCS with Hinton lab data from 2003 to 2012 and Amherst lab data from approximately the second half of 2008 to the end of 2012. These databases contain information pertaining to the testing of suspected drugs at both labs with fields such as chemist's name, police department of origin, date of receipt, date of analysis, and the purported test results.

6. The data shows that, from July 2008 through 2012, chemists at the Amherst lab were assigned to 24,058 suspected drug samples originating from western and central Massachusetts, as follows:

a. Farak was assigned to 9,185 samples during that period, with a monthly average of approximately 170 samples and a yearly average of approximately 2,040 samples.

b. Rebecca Pontes was assigned to 9,900 samples during that period, with a monthly average of approximately 183 samples and a yearly average of approximately 2,196 samples.

c. James Hanchett was assigned to 4,973 samples during that period, with a monthly average of approximately 92 samples and a yearly average of approximately 1,104 samples.

7. CPCS does not been provided with any data regarding samples from western and central Massachusetts assigned to Amherst lab chemists from 2004 to late June 2008. However, an application of each chemist's average numbers from the time period for which data is available yields an estimated total of 20,915 samples assigned to Amherst lab chemists from the time that Farak began working there on August 1, 2004, through June 30, 2008, as follows:

a. Farak would have been assigned to approximately 7,990 samples, based on her yearly average of 2,040 samples and monthly average of 170 samples;

b. Pontes would have been assigned to approximately 8,601 samples, based on her yearly average of 2,196 samples and monthly average of 183 samples, and;

c. Hanchett would have been assigned to

approximately 4,324 samples, based on his yearly average of 1,104 samples and monthly average of 92 samples.

8. In addition to samples submitted by police departments in western and central Massachusetts, Amherst lab chemists were assigned to handle "overflow" samples from the Hinton lab. The data indicates that, from 2005 to 2012, Amherst lab chemists were assigned to test 9,315 Hinton lab overflow samples, as follows:

a. Farak was assigned to 2,341 Hinton lab overflow samples;

b. Pontes was assigned to 2,634 Hinton lab overflow samples;

c. Hanchett was assigned to 4,277 Hinton lab overflow samples, and;

d. Two other chemists, who did not otherwise test any Amherst lab samples during that time period, were assigned to 63 Hinton lab overflow samples.

9. I did not attempt to estimate the number of overflow samples processed by the Amherst lab during the five-month period for which we do not have data, because the degree of variation among the numbers from year to year appeared too great for averages to be meaningful. In this respect, my estimate likely undercounts the number of Amherst lab cases impacted by Farak's misconduct.

10. Based on the known number of Hinton overflow samples assigned between 2005 and 2012 (9,315), the known number of samples from western and central Massachusetts assigned between July 2008 and the end of 2012 (24,058), and the estimated number of samples assigned from August 1, 2004, through the end of June 2008 (20,915), I estimate that Amherst lab chemists collectively were assigned 54,288 samples from the time that Farak began working there until her arrest.

11. Of this total, an estimated 19,516 samples were assigned to Farak (2,341 Hinton lab overflow samples, 9,185 western and central Massachusetts samples between July 2008 and the end of 2012, and an estimated 7,990 samples between August 2004 and June 2008), and an estimated 34,772 samples were assigned to chemists other than Farak (6,974 Hinton lab overflow samples, 14,873 western and central Massachusetts samples between July 2008 and 2012, and an estimated 12,925 samples between August of 2004 and June 2008).

12. The Hinton lab data also shows that Farak was assigned to 10,049 samples while she was working there in 2003 and 2004.

13. The total estimated number of samples assigned to Farak throughout her career is therefore 29,565, which is remarkably close to Farak's own estimate before the grand jury of "[a]pproximately 30,000" samples. Grand jury testimony of Sonja Farak, 14 (Sept. 16, 2015).

14. The sum of Farak's Hinton lab samples (10,049) and all samples processed by the Amherst lab during Farak's tenure there (54,288) yields a grand estimated total of 64,337 samples.

15. For the seven years from 2004 to 2010 that Farak's and Dookhan's employment as DPH chemists overlapped, the Amherst lab processed an estimated 42,651 samples (7,800 Hinton lab overflow samples and an estimated 34,851 samples from western and central Massachusetts, based upon known data and individual chemist monthly and yearly averages), and Farak herself was assigned to an additional 5,559 samples at the Hinton lab, for a total of 48,210 Dookhan-Farak overlap samples (20,961 of which were assigned to Farak).

Application of Dookhan samples-to-adverse-dispositions ratio to Amherst lab numbers

16. There are 86,061 Dookhan-involved samples on the Meier list.

17. There are at least 24,483 cases with adverse dispositions on the DAs' lists submitted in response to Justice Botsford's interim order of May 11, 2016. See affidavit of Paola Villarreal.

18. These numbers yield a sample-to-adverse-disposition ratio of 0.28488, i.e., approximately twenty-eight percent of the samples that Dookhan was assigned to resulted in cases with adverse dispositions.

19. CPCS has not been provided with case

dispositional information related to the Amherst lab scandal.

20. I applied the ratio derived from the Dookhan data to the Amherst lab numbers to estimate the number of Amherst lab cases with tainted adverse dispositions, recognizing that the true number would likely be affected by factors that the Dookhan ratio does not capture.

21. When applied to the estimated number of samples processed by Farak during the course of her career (29,565), the above-described ratio yields a total of approximately 8,411 cases with adverse dispositions, including 5,963 which occurred during the 2004-2010 period that Dookhan and Farak were both working as DPH chemists.

22. Application of the same ratio to the number of samples assigned to Farak solely during her time at Amherst (19,516) yields a total of approximately 5,552 cases.

23. When applied to the estimated number of samples assigned to Farak and chemists other than Farak at the Amherst lab during Farak's tenure there (54,288), the ratio yields a total of approximately 15,444 cases with adverse dispositions.

24. When applied to the estimated number of samples assigned to Farak and chemists other than Farak at the Amherst lab during the years that Farak worked there, plus the number of samples that Farak was

assigned to at the Hinton lab (64,337), the ratio yields a grand total of approximately 18,303 cases with adverse dispositions, 13,734 of which occurred during the 2004-2010 period that Dookhan and Farak were both working as DPH chemists.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 29th DAY OF JUNE, 2016.

Christopher K. Post
BBO #681841
Drug Lab Crisis Litigation Unit
COMMITTEE FOR PUBLIC COUNSEL SERVICES
7 Palmer Street, Suite 302
Roxbury, MA 02119
(617) 516-5825
cpost@publiccounsel.net

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK, ss. NO. SJ-2014-0005

KEVIN BRIDGEMAN,
and others

v.

DISTRICT ATTORNEY FOR THE SUFFOLK DISTRICT,
and others

AFFIDAVIT OF DAVID COLARUSSO

I, David Colarusso, state the following.

1. I am a Data Scientist for the Committee for Public Counsel Services.

2. From 2011 until 2014, I was a staff attorney in the Lowell District Court office of CPCS's Public Defender Division.

3. Before graduating from Boston University School of Law in 2011, I worked as a software engineer and science educator. For nine years, I was the president and CEO of a software design firm. I taught high school physics for six years. I hold a master's degree in education from the Harvard Graduate School of Education and a bachelor's degree from Cornell University, where I was an independent major focusing on physics and science education.

4. This affidavit is submitted to provide the Court with information regarding the completeness

of the lists of Dookhan defendants submitted by the respondents pursuant to Justice Botsford's interim order of May 11, 2016 (the DAs' lists).

5. In making that assessment, I sought to measure the DAs' lists against the Meier list, based on the assumption that, if the DAs' lists captured every Dookhan defendant, then every entry that appears on the Meier list would correspond to an entry on the DAs' lists, assuming the DAs' lists include all adverse and non-adverse dispositions.

6. I determined, however, that such an assessment is impossible with what has presently been provided, because, with the exception of Middlesex County and Norfolk County, the DAs' lists do not include the associated Meier list sample number. (Also, the Plymouth County DA's list contains nothing at all about about non-adverse dispositions.)

7. Without this information, it is not possible to confirm whether a particular name on the DAs' lists corresponds to a particular entry on the Meier list, and, consequently, there is no reliable way of testing whether Dookhan defendants may have fallen through the cracks.

8. In order to properly assess the completeness of the DAs' lists, I would need to have, at a minimum, the Meier list sample numbers associated with each of

the names on the DAs' lists.

9. An assessment of the thoroughness of the DAs' lists would also be facilitated if I knew what methodology was used by the DAs to construct their respective lists.

10. As an example of the issue described in ¶6, the name "Luis Castro" appears seventeen times in the subset of Meier list entries from Bristol County. It appears on the Bristol DA's list thirteen times. Without Meier list sample numbers, or some other identifier, it cannot be determined which of the seventeen instances on the Meier list correspond to which specific names on the Bristol DA's list. Furthermore, based on date of birth, the Bristol DA's list includes three different individuals named Luis Castro. The fact that a Castro listed on the Meier list could be none or any of the Castros listed on the Bristol DA's list illustrates why, without a sample number from the Meier list, one cannot make a direct one-to-one mapping of Meier and DA entries.

11. With respect to the lists submitted by the Middlesex DA and Norfolk DA, both of which include Meier list sample numbers, I found matches for 5,919 and 3,201 distinct name-sample pairings, respectively. That is, there were 5,919 entries on the Meier list that shared both a name and a sample number with

entries on the Middlesex DA's list; and 3,201 entries on the Meier list that shared both a name and a sample number with entries on the Norfolk DA's list. This corresponds to 54% and 33% of the Meier list entries from these two counties. Figure 1 and Table 1, attached, illustrate county-based name-sample matches as well as entry counts.

12. I was able to ascertain how many of the names included on the Meier list appeared on the DAs' lists. However, given the limitations described above, it is not possible to tie many of these names to a specific Meier list entry. Roughly 32% of the names on the Meier list are missing from the DAs' lists. Figure 2 and Table 1, attached, show how these lists compare in more detail.

13. To limit the number of non-matches resulting from the use of different name formats across lists (e.g., inclusion or exclusion of suffixes), I created an algorithm to "scrub" the names on the DAs' lists and on the Meier list, reformatting them to conform to a standard style.

14. After reformatting, I found 12,376 distinct names appearing on the Meier list -- i.e., 32% percent of the total number of distinct names on the Meier list -- that do not match to a name on the DAs' lists; and 2,793 distinct names appearing on the DAs' lists

that do not match to a name on the Meier list. (A different cleaning algorithm would likely produce different numbers. I am happy to provide a copy of the algorithm I used to the Court and the respondents upon request.)

15. These numbers likely underestimate the number of people who are missing, because a single distinct name may be shared by multiple individuals.

16. A cursory reading of the "names" on the Meier list that do not appear on the DAs' lists reveals about 5,000 which obviously do not refer to individuals, e.g., "controlled buy," "unreadable," or "operation zombie."

17. It is therefore clear that non-matches between the Meier list and the DAs' lists are not solely the result of different spellings. If they were, we would expect the number of names on the Meier list (after removing placeholders like "controlled buy") that do not appear on the DAs' lists to be the same as the number of names on the DAs' lists that do not appear on the Meier list. The former, however, is roughly 7,000 (i.e., 12,376 minus approximately 5,000) while the latter is 2,794.

18. As noted in prior filings, the Meier list does not include co-defendants whose names did not appear on drug receipts. By looking at data from

CPCS's Public Defender Division, I generated a list of potentially missing co-defendants, i.e., names of individuals who may have Dookhan-involved cases that do not appear on the Meier list.

19. A subset of the names on my list of potential co-defendants appeared on the lists submitted by the Barnstable, Essex, Middlesex, Norfolk, and Suffolk County DAs, and none of them appeared on the lists submitted by the Bristol and Plymouth County DAs. (No CPCS co-defendant data was available for Dukes County).

20. The inclusion of previously missing co-defendants in the DAs' lists accounts for some of the names on these lists that do not match to names on the Meier list.

21. I would need to know the methodology used by the DAs to identify co-defendants in order to properly assess whether previously missing co-defendants have been accounted for.

22. In order to provide a robust check of the DAs' lists for completeness, additional information is needed. Each entry on the DAs' lists should include:

- Name as it appears on the Meier List
- Name as it appears in the DAs' records
- Docket number
- Meier list sample number
- Date of birth

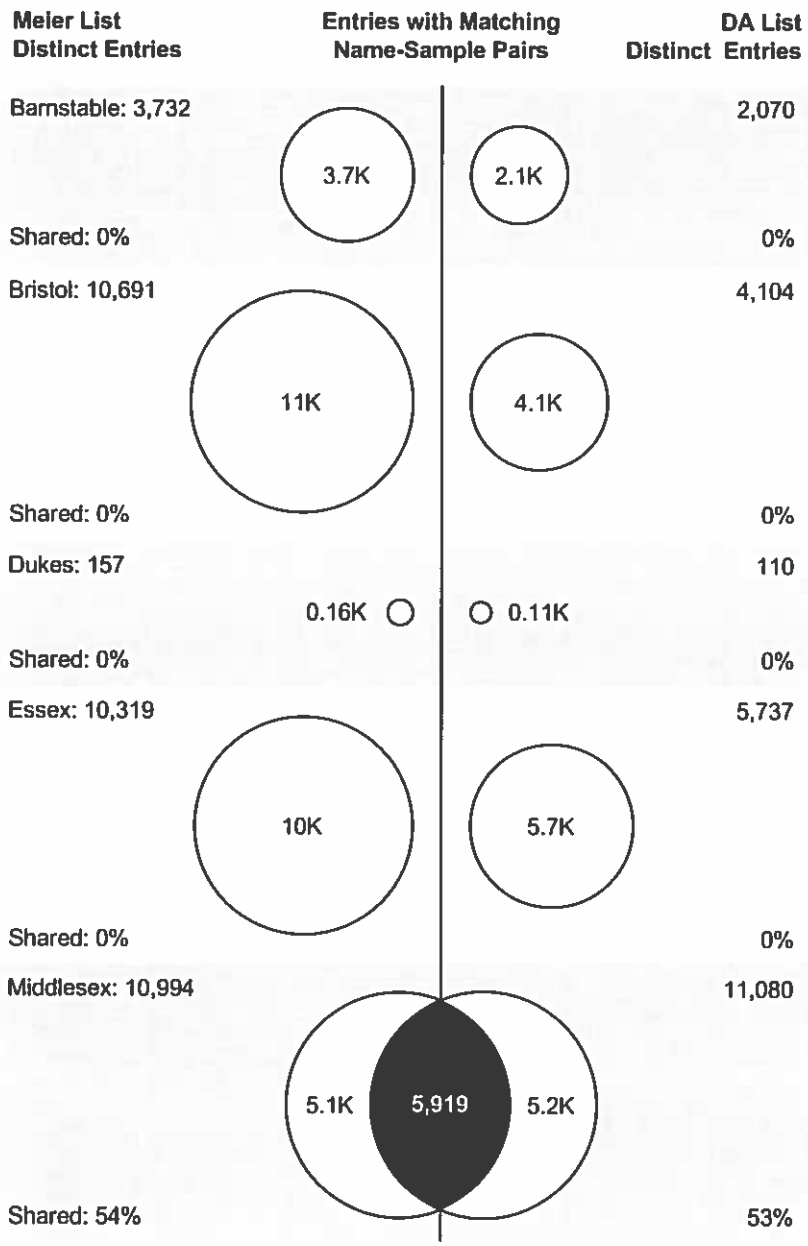
- Social security number
- Whether the outcome of the case was adverse, non-adverse, or whether no action was taken.

23. As explained in the affidavit of Paola Villareal, it appears that the DAs used more than one definition of what counts as an "adverse" disposition. This issue should be resolved before the information identified in ¶22 is provided.

24. This additional information, along with a description of the methodology used and steps taken by the DAs to compile their lists, would permit me to, in effect, "cross off" individual Meier list entries (which cannot be done with the DAs' lists now), and make a better assessment of the completeness of the DAs' lists.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 29 DAY OF JUNE, 2016.

David Colarusso
BBO #683292
COMMITTEE FOR PUBLIC COUNSEL SERVICES
44 Bromfield Street
Boston, MA 02108
(617) 482-6212
dcolarusso@publiccounsel.net



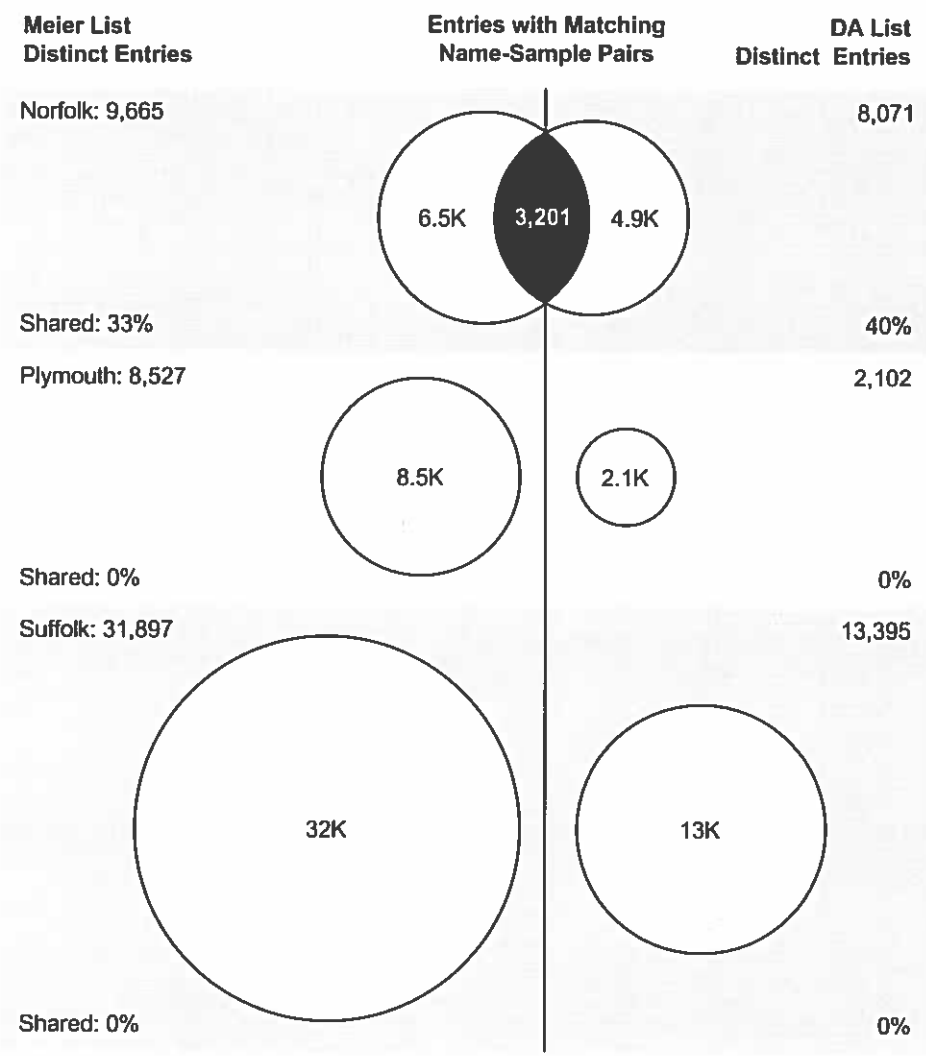
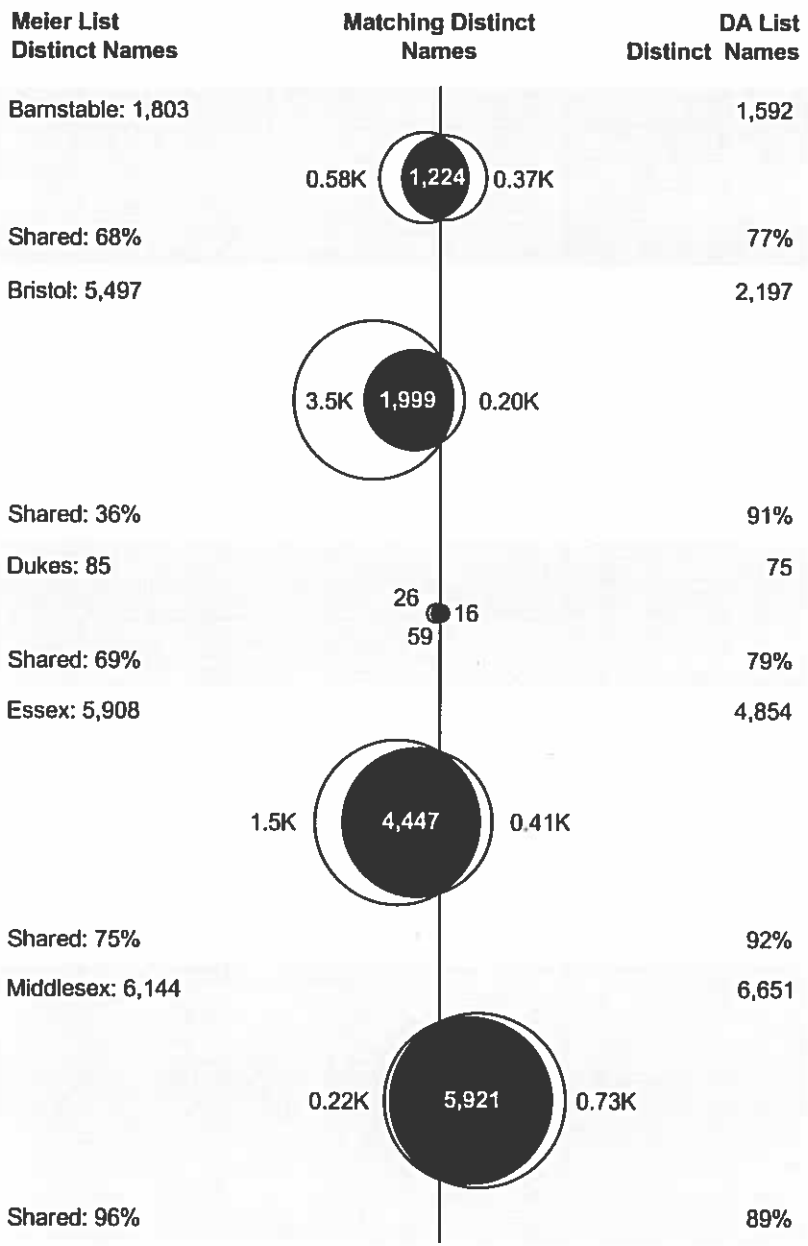


Figure 1: Distinct Entry Comparisons

Note: Distinct DA list entries exclude entries with duplicate county-docket-sample-name-DOB-SSN pairings.



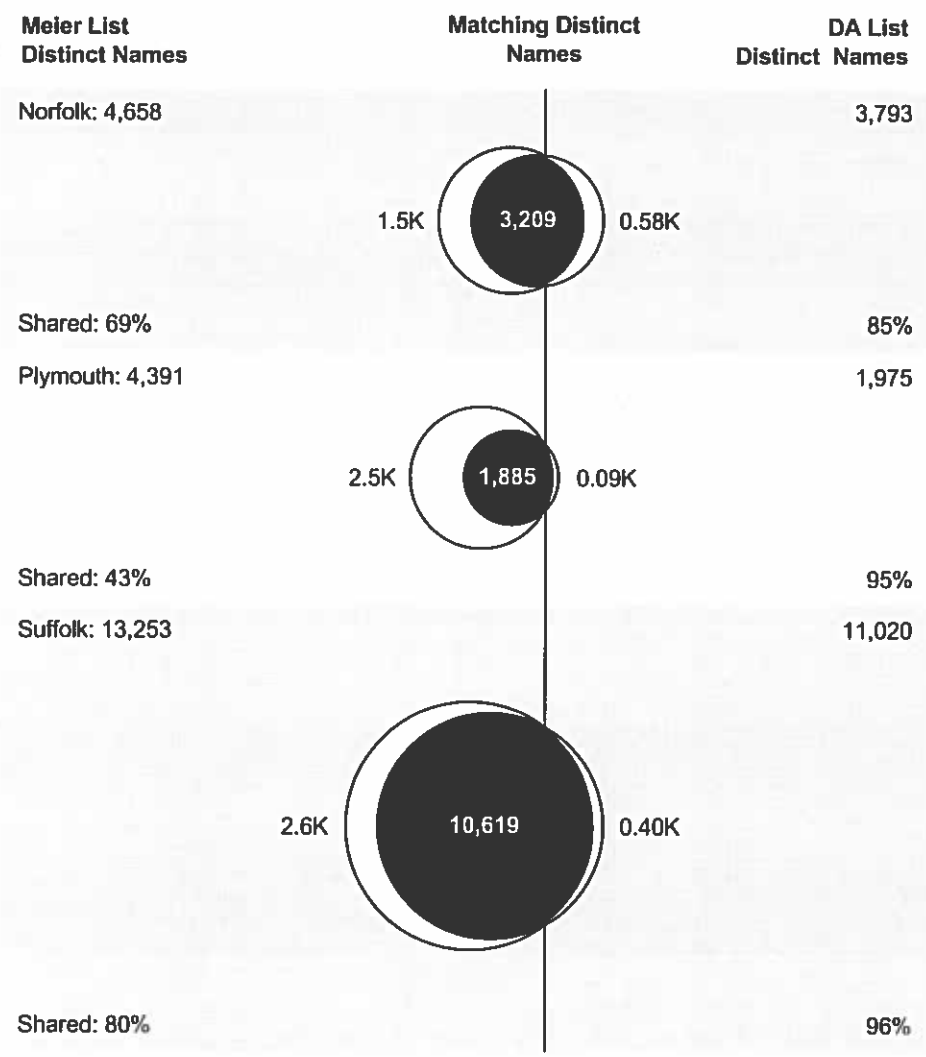


Figure 2: Distinct Name Comparisons

Distinct Values	Barnstable	Bristol	Dukes	Essex	Middlesex	Norfolk	Plymouth	Suffolk	TOTAL*
Meier Entries	3,732	10,691	157	10,319	10,994	9,665	8,527	31,897	85,982
Meier Names	1,803	5,497	85	5,908	6,144	4,658	4,391	13,253	38,884
Meier Samples	3,341	8,319	138	8,131	9,104	7,845	7,457	23,146	67,481
DA Entries**	2,070	4,104	110	5,737	11,080	8,071	2,102	13,395	46,669
DA Names	1,592	2,197	75	4,854	6,651	3,793	1,975	11,020	32,157
DA Samples	0	0	0	0	9,102	6,444	0	0	15,546
Name-Sample Matches	0	0	0	0	5,919	3,201	0	0	9,120
Name Matches	1224	1,999	59	4,447	5,921	3,209	1,885	10,619	29,363
Meier Names Missing from DA	579	3,498	26	1,461	223	1,449	2,506	2,634	12,376
DA Names Missing from Meier	368	198	16	407	730	584	90	401	2,794

Table 1: Comparative Counts

* The TOTAL column is a sum of the preceding columns. As such, it does not represent the total distinct counts across all counties but rather the sum of each county's distinct counts. For example, if the name *John Doe* appeared multiple times in each county's original data, it would be counted once in each county and multiple times in the total (once for each county).

** Distinct DA list entries exclude entries with duplicate county-docket-sample-name-DOB-SSN pairings.

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK, ss. NO. SJ-2014-0005

KEVIN BRIDGEMAN,
and others

v.

DISTRICT ATTORNEY FOR THE SUFFOLK DISTRICT,
and others

AFFIDAVIT OF MICHAEL DSIDA

I, Michael Dsida, state the following:

1. I am the Deputy Chief Counsel of CPCS's Children and Family Law Division (CAFL).

2. CAFL is responsible for providing counsel to children and indigent parents in care and protection and other child welfare and family law matters in which there is a right to counsel.

3. The number of care and protection petitions filed by the Department of Children and Families (DCF) pursuant to G.L. c.119, §24, has increased by fifty-nine percent since July 2012.

4. This spike has made it impossible, in many instances, for counsel to be assigned in a timely manner because there are not enough certified CAFL bar advocates and CAFL staff attorneys available to take all of the cases.

5. The crisis is particularly acute because care

and protection cases invariably involve multiple parties -- each of whom is entitled to counsel, G.L. c.119, §29 -- and because the statute states that a temporary custody hearing is to be held within seventy-two hours from the time that DCF removes the child from the home pursuant to an ex parte emergency order.

6. Even though G.L. c.119, §24, "requires [the] . . . hearing to be held within seventy-two hours," Care & Protection of Robert, 408 Mass. 52, 55 n.3 (1990), it now often takes weeks to assign the lawyers necessary for so-called 72-hour hearings to take place.

7. The shortage of available attorneys is now most acute in Hampden County, where at any given time there are scores of individuals who have been deprived of their right to a timely 72-hour hearing.

8. The interests at stake in care and protection proceedings are fundamental, Department of Pub. Welfare v. J.K.B., 379 Mass. 1, 3 (1979), and the 72-hour hearing is a critical stage of the process at which decisions affecting the ultimate custody determination must be made. See Vivek S. Sankaran, No Harm, No Foul? Why Harmless Error Analysis Should Not Be Used to Review Wrongful Denials of Counsel to Parents in Child Welfare Cases, 63 S.C. L. Rev. 13, 18-24 (2011).

9. But the right to counsel that exists in CAFL

cases "is of little value unless there is an expectation that counsel's assistance will be effective," Care & Protection of Stephen, 401 Mass. 144, 149 (1987), and is denied completely when, as a result of "underfunding of the assigned counsel system administered by CPCS, there [is] no longer a sufficient number of certified private attorneys . . . willing to accept assignment in the [parties'] cases." Lavallee v. Justices in the Hampden Superior Court, 442 Mass. 228, 231 (2004).

10. Although it is CAFL clients who have been most directly harmed, the counsel crisis resulting from the sharp rise in care and protection filings affects CPCS's ability to carry out its assignment responsibilities with respect to all practice areas.

11. For example, in response to the current emergency, we recently transferred four staff attorneys from CPCS's Public Defender Division to the CAFL offices in Worcester, Springfield, and Pittsfield. The criminal cases that would have been handled by those public defenders do not disappear; they are added to the existing caseloads of other attorneys.

12. CPCS has no control over the number of care and protection petitions that are filed. These cases are demanding, stressful, and not for everyone. The rate at which CPCS has been authorized to pay CAFL attorneys has been fifty dollars per hour since 2005

and will go up by five dollars per hour as of July 1, 2016. These rates have been insufficient to attract enough qualified attorneys to handle the increased number of care and protection cases coming into court. As a result, many of our CAFL clients are not receiving the due process to which they are entitled.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 22nd DAY OF JUNE, 2016.

Michael Dsida
BBO #600956
Deputy Chief Counsel
Children and Family Law Division
COMMITTEE FOR PUBLIC COUNSEL SERVICES
44 Bromfield Street
Boston, MA 02108
(617) 482-6212

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK, ss. NO. SJ-2014-0005

KEVIN BRIDGEMAN,
and others

v.

DISTRICT ATTORNEY FOR THE SUFFOLK DISTRICT,
and others

AFFIDAVIT OF WENDY WAYNE

I, Wendy Wayne, do hereby state the following to be true to the best of my knowledge and belief:

1. I am the Director of the Immigration Impact Unit (IIU) of the Committee for Pubic Counsel Services (CPCS). The IIU provides training, support and advice on individual cases to CPCS staff attorneys and bar advocates on the immigration consequences of criminal conduct, distributes written training and resource materials, and engages in post-conviction and appellate litigation regarding the interplay of criminal and immigration law.

2. This affidavit is submitted to provide the Court with information regarding the impact that Dookhan-tainted convictions have on CPCS's noncitizen clients.

3. Drug convictions cause some of the most severe immigration consequences to noncitizen defendants. A conviction for any controlled substance offense, except

one conviction for thirty grams or less of marijuana, causes a noncitizen to be permanently inadmissible to the United States; such inadmissibility means a permanent bar to lawful permanent resident status (a "green card") and exclusion to those trying to enter the United States, even long-term green card holders who travel briefly out of the United States to visit family. 8 U.S.C. §1182(a)(2)(A)(i)(II). With the exception of one conviction for possession of thirty grams or less of marijuana, controlled substance convictions also cause noncitizens, including long-term green card holders, to be deportable. 8 U.S.C. §1227(a)(2)(B). A conviction for anything more than simple possession of a federally controlled substance also is considered an "aggravated felony," 8 U.S.C. § 1101(a)(43)(B), which bars all forms of relief from removal except for extremely rare grants of relief under the United Nations Convention Against Torture.

4. Since 2012, when I first became aware that a substantial number of drug convictions had been tainted by the actions of former chemist Annie Dookhan, the IIU has attempted to identify noncitizens who are currently in removal proceedings or have been deported as a result of such convictions. Our largely unsuccessful attempts have included a FOIA request to Immigration Customs and Enforcement (ICE), and discussions with

David Meier during his "war room" meetings in 2012, who told me that he had tried unsuccessfully to obtain from ICE the names and identifying information of noncitizens deported due to Dookhan convictions. The IIU also e-mailed CPCS staff attorneys and bar advocates requesting that they notify us of any clients who had Dookhan-tainted drug convictions.

5. While I have heard of other individuals in removal proceedings and deported due to Dookhan-tainted drug convictions, I am personally aware of three noncitizens who were deported due solely on this basis. All three individuals were long-term green card holders prior to their removals. One individual lived in the United States for fifty years after coming here as an infant. He was deported to Italy approximately seven years ago for a conviction of possession with intent to distribute class E (prescription drugs). Although his conviction was vacated in 2014, this noncitizen is still trying to return to the United States. Another individual was deported to the Dominican Republic in 2010. I represented him on a motion to vacate his conviction -- the motion was allowed and the charges were subsequently dismissed. I am currently working to reopen his removal order and bring him back to the United States. This is an arduous and often unsuccessful process, described in more detail below.

I am aware of only one individual to date who has been returned to the United States after deportation on the basis of a Dookhan-tainted conviction. See Boston College Law School Magazine, Another Post-Deportation Victory: Crime Lab Chemist's Tampering Leads to Deportee's Return, 6 (Fall/Winter 2013).[1/]

6. For a noncitizen deported due to a drug conviction (including long-term green card holders who had lived lawfully in the United States for many years), it is extremely difficult to return to the United States, even after the drug conviction has been vacated and subsequently dismissed. Unless it is filed jointly by the noncitizen and ICE, a motion to reopen removal proceedings may be barred by a ninety-day time limit, unavailable to individuals who have already been deported ("post-departure bar"), or available only in exceptional circumstances and barred from judicial review. For a detailed discussion of post-departure motions to reopen, see Boston College Law School, Post-Deportation Human Rights Project, Post-Departure Motions to Reopen or Reconsider (2016).[2/]

[1/]Available at http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1082&context=bclsm (last visited June 22, 2016).

[2/]Available at http://www.bc.edu/content/dam/files/centers/humanrights/pdf/Post-Departure-Motions-Reopen-Reconsider-2016.pdf (last visited June 22, 2016).

7. Even if a motion to reopen is allowed and removal proceedings are subsequently terminated, there is no guarantee than an individual who has already been deported will be able to return to the United States. The Department of Homeland Security announced a policy several years ago to facilitate the return of individuals wrongfully deported, ICE Policy Directive, Number 11061.1 (Feb. 24, 2012); however, the process is slow and the case law in some Federal Circuit Courts of Appeals regarding the "post-departure bar" to motions to reopen makes return virtually impossible. See Chicco, Kanstroom & Monnet, Equitable Tolling of Motions to Reopen (2013);[3/] National Immigration Project, Return to the United States after Prevailing on a Petition for Review or Motion to Reopen or Reconsider (Apr. 27, 2015);[4/] Post Departure Motions to Reopen or Reconsider, supra.

8. While the process to return to the United States after wrongful deportation is difficult even if removal proceedings have been reopened and terminated, return is even less likely if the conviction has been

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[3/]Available at https://www.bc.edu/content/dam/files/centers/humanrights/pdf/Equitable%20tolling%20of%20motions%20to%20reopen_FINAL.pdf (last visited June 22, 2016).

[4/]Available at https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/fed/2015_27Apr_return-advisory.pdf (last visited June 22, 2016).

vacated but the drug case remains pending. The ICE Policy Directive referenced above does not apply to an individual whose vacated conviction has not been dismissed. Even if a motion to reopen is allowed because the individual is no longer deportable, the defendant could be denied entry based on a "reason to believe" that she is a drug trafficker if the pending case is more than simple drug possession, 8 U.S.C. § 1182(a)(2)(C). Alternatively, admission could be deferred until the drug case is resolved and, if it results in a new conviction, the defendant would be ordered removed again. See Matter of Valenzuela-Felix, 26 I. & N. Dec. 53 (2012). In addition, an attorney with Boston College Law School's Post-Deportation Human Rights Project told me that, based on her experience, ICE is much less likely to assist in returning a noncitizen with a pending drug charge to the United States, in part because of the likelihood that the individual will merely be convicted and thus deported again.

9. Without a comprehensive remedy of vacatur and dismissal for Dookhan cases, noncitizens often face insurmountable obstacles to litigating post-conviction motions and defending against subsequent prosecutions of Dookhan drug cases. Such litigation must be conducted in absentia. Judges hearing post-conviction

motions and prosecutors opposing them may not agree to proceed with the defendant in absentia, and the inability of a defendant to testify or be available for cross-examination may result in denial of an otherwise meritorious motion. See Commonwealth v. Sylvain, 473 Mass. 832, 835 & n.3 (2016) (appropriate for motion judge to give Commonwealth opportunity to challenge factual testimony upon filing of motion to reconsider allowance of motion to vacate conviction).

10. If vacatur is ordered and the Commonwealth chooses to re-prosecute, noncitizen Dookhan defendants are further disadvantaged. If the trial court does not permit the defendant to proceed in absentia and videoconferencing is not available in the court or in the country to which the defendant was deported, a judge may issue a warrant. As described above, a noncitizen with an open warrant for a drug charge, even if his removal order has been reopened and terminated, will likely be unable to reenter the United States. See also, Luo & McMahon, Victory Denied: After Winning on Appeal, An Inadequate Return Policy Leaves Immigrants Stranded Abroad, 19 Bender's Immigration Bulletin 1061 (2014).[5/]

[5/]Available at http://www.law.nyu.edu/sites/default/files/upload_documents/19%20Benders%20Immigr%20Bull%201061_Victory%20%282%29.pdf (last visited June 22, 2016).

11. The rules allow for a trial to proceed in absentia only after the defendant has appeared "at the beginning of the trial." Mass. R. Crim. P. 18(a)(1). The rules do not permit a trial to proceed wholly in absentia. Moreover, a defendant who is unable to be present and defend herself cannot receive a fair trial, as such presence is necessary to fully exercise her due process rights, to assist with her defense, to hear the evidence against her, to assess the credibility of the witnesses, and to testify if she so chooses. See, e.g., Commonwealth v. Campbell, 83 Mass. App. Ct. 368, 374 (2013).

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 23rd DAY OF JUNE, 2016.

Wendy Wayne
BBO #555665
COMMITTEE FOR PUBLIC COUNSEL SERVICES
Immigration Impact Unit
21 McGrath Highway
Somerville, MA 02143
(617) 623-0591
wwayne@publiccounsel.net

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[5](...continued)
http://www.law.nyu.edu/sites/default/files/upload_documents/19%20Benders%20Immigr%20Bull%201061_Victory%20%282%29.pdf (last visited June 22, 2016).