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Honorable Margot Botsford
Associate Justice
Supreme Judicial Court
John Adams Courthouse
One Pemberton Square
Boston, MA 02108

RE: *Bridgeman v. District Attorney for the Suffolk District*
SJ-2014-0005

Dear Justice Botsford:

We write to respond to the proposal submitted by the District Attorneys for the Suffolk and Eastern Districts for identifying and notifying Dookhan defendants. *See* Letter to Justice Botsford, Dec. 22, 2015 (paper no. 77, filed Dec. 23, 2015) (DA proposal).

While thoughtful and well-intended, the District Attorneys' proposal is essentially a proposal for what other people should do. As a plan for dealing with a lab scandal caused by the Commonwealth, foisting the mess onto defendants, the courts, and CPCS cannot be right. To the contrary, ensuring that the Commonwealth remains primarily responsible for remedying the problems for which it bears ultimate responsibility is the only effective way to deter future scandals, repair the justice system's integrity, and ensure that the prosecutors who relied on Dookhan's tainted work product meet their ethical and constitutional obligations.

Identification

The District Attorneys have identified thousands of docket numbers, after being asked to do so by this Court. We previously have pointed out the gaps in the data provided by the Suffolk County and Essex County District Attorneys, as well

as the inexplicably low match rate between this data and the Trial Court docket data. *See* Petitioners' and Intervener's Request for Briefing and Hearing Concerning Identification and Notification, at 5 (paper no. 55, filed Nov. 10, 2015). We have also repeatedly highlighted the incompleteness of the Meier list with respect to cases involving multiple defendants, and have underscored the need for the District Attorneys to address this problem in a consistent and comprehensive fashion. *See id.* The District Attorneys' present proposal provides no indication of a willingness to fill any of these gaps or correct any of these deficiencies.

Indeed, the proposal addresses these crucial issues only in the vaguest terms, when the District Attorneys state: "Each of the counties will then utilize [the G.L. c.94C data to be provided by the Trial Court] to perfect the existing lists – including filtering out any case which resulted in a non-conviction." DA proposal, at 2. But using the G.L. c.94C data to "filter[] out any cases which resulted in a non-conviction" will not, and cannot, fix the problems with the "existing lists." Those gaps and deficiencies still cry out, almost three and one-half years after the Hinton lab was shut down, for corrective action.

Notice

Effective notice to Dookhan defendants cannot take place without accurate and comprehensive identification of those defendants. The District Attorneys' proposal largely sidesteps this problem by proposing a two-tiered approach to notice. If the gaps and deficiencies in the data are not addressed, however, thousands upon thousands of Dookhan defendants will fall into the District Attorneys' "second tier," thereby qualifying only for "general" or "non-specific" notice. Such notice, by definition, will not tell people whether they are Dookhan defendants. Instead, it will advise defendants who may have been wrongfully convicted to call CPCS to ascertain the nature of the legal claims "which *may* be available to them" *if* they are in fact Dookhan defendants. DA proposal at 3 (emphasis supplied).

For the reasons previously set out in the petitioners' and CPCS' letter dated November 30, 2015, the District Attorneys' "two-tier notice" proposal is a non-starter. CPCS staff responding to inquires triggered by "second-tier notice"

> would have no ready means to determine whether the caller's drug conviction was obtained with a drug certificate signed by Dookhan. CPCS staff would thus be left to piece together the puzzle, which would require obtaining police reports and cross-referencing existing

> Hinton data, and, ultimately, researching and responding to inquiries from thousands of individuals whose identify as Dookhan defendants could not be ascertained or who turned out not to have Dookhan-involved convictions.
>
> The content of these notices also would be problematic. Notice that is not case-specific and that includes conditional language is, in our view, likely to be either ignored or met with skepticism. Indeed, it would sound more like a solicitation ("You may be a Dookhan defendant! Call 1-800-DRUG-LAB to find out now!") than a concrete advisory of the recipient's post-conviction rights and the information needed to decide whether to take action.

Letter to ADAs DeMore & Weld, Nov. 30, 2015, at 4 (paper no. 72, filed Dec. 1, 2015.

The "two-tiered" notice plan that the District Attorneys now propose is no different than the "over-inclusive" approach that they proposed at the hearing held on November 13, 2015. As we have indicated, the practical problems that this approach would create for CPCS, absent a complete and accurate Dookhan defendant database to which staff handling inquiries could refer, are enormous. The District Attorneys suggest that some of these difficulties might be obviated by funneling inquiries from those who receive "general" notices to, in effect, a different CPCS line than that dedicated to inquiries from those who receive specific notice, stating that "this will facilitate prioritization at CPCS." DA proposal at 3. A two-tiered CPCS *response* to defendant inquiries holds no promise. If the data deficiencies are left unaddressed, thousands of Dookhan defendants will receive non-specific notice. Thus, CPCS cannot properly relegate inquiries from those who have received a general notice to some sort of second-class response system.

In fact, although the District Attorneys have constitutional and ethical duties to provide adequate notice (as well as exculpatory evidence) to Dookhan defendants, their proposal promises no substantive assistance whatsoever to CPCS with respect to such notice. Moreover, while suggesting that CPCS should provide notice, the proposal ignores the impossible fiscal burden that this would impose on CPCS, and it fails even to commit to joining CPCS in a request to the Legislature for appropriate funding.

Guiding Principles

Going forward, any realistic attempt to resolve these issues must be accompanied by deadlines and the understanding that it is unacceptable and impracticable to insist on case-by-case litigation without case-by-case identification and notice to Dookhan defendants. Moreover, approaches that might have been appropriate had they been adopted when the scandal broke (e.g., general letters to attorneys of record and public postings) cannot supply the foundation for a process that will get underway over three and one-half years later.

As the petitioners and CPCS have previously stated, any agreement must include an enforceable, finite identification and notice period. Letter to ADAs DeMore & Weld, Nov. 30, 2015, at 5. The identification and notification process has dragged on for over three years—long enough for another drug lab scandal to emerge (i.e., the Farak scandal). Case-by-case litigation should be permitted, at most, for defendants who are identified and notified by a date certain. Dookhan defendants identified or notified after that date—for example, when brought to court on another matter—should be entitled to have their Dookhan-tainted convictions vacated and dismissed with prejudice. We propose that the identification and notice period be brought to a close by June 30, 2016.

If the District Attorneys who relied upon Dookhan-tainted evidence are unable to identify thousands upon thousands of defendants who have been harmed, the case-by-case approach to resolving these cases must be abandoned. Over the objections of the petitioners and CPCS, the District Attorneys opted for case-by-case litigation when Dookhan's misconduct was publicly disclosed in 2012. But a defendant who is not provided with actual notice that his conviction is Dookhan-tainted lacks a meaningful opportunity to challenge that conviction in court. The District Attorneys indicate that the complete identification of Dookhan defendants is not possible, and unfortunately that might be true. The question, then, is what to do about a criminal justice system that is incapable of ascertaining which defendants, in particular, it wrongfully convicted. The answer is clear: *Any Dookhan defendant not identified and notified by the close of the June 2016 identification and notice period should be entitled to automatic vacatur and dismissal with prejudice of his or her Dookhan-tainted conviction(s).*

This approach would not be new; once it was determined that it was impossible to make a case-specific determination of which cases Dookhan tainted, this Court ruled that all Dookhan defendants were entitled to a conclusive presumption of egregious government misconduct. *Commonwealth v. Scott*, 467 Mass. 336, 352 (2014). The reason was simple: neither defendants nor defense

counsel should be made to bear the burden of egregious government misconduct so widespread that it has proven impossible to identify many thousands who have been harmed.

Respectfully submitted on behalf
of the petitioners and CPCS,

sl by Bottle.

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