

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY
No. SJ-2014-0005

KEVIN BRIDGEMAN, ET AL.,

Petitioners,

v.

DISTRICT ATTORNEY FOR THE SUFFOLK DISTRICT, ET AL.,

Respondents.

**PETITIONERS' AND INTERVENOR'S REQUEST FOR RESERVATION AND REPORT
REGARDING COMPREHENSIVE REMEDY FOR DOOKHAN DEFENDANTS**

Petitioners and the Committee for Public Counsel Services (CPCS) respectfully request that the Single Justice reserve and report the following question to the full Court: whether all cases involving misconduct by Annie Dookhan should be dismissed or subjected to a court-imposed deadline.

One year ago, the full Court declined to implement a comprehensive remedy for Dookhan defendants "at this time." Bridgeman v. District Attorney for the Suffolk Dist., 471 Mass. 465, 487 (2015). Since then, under the Single Justice's supervision, the District Attorneys have produced lists identifying more than 24,000 Dookhan cases resulting in adverse dispositions. Although there remain challenges in synthesizing these lists, the District Attorneys' efforts have been substantial and valuable. Consequently, nearly five years after Dookhan's misconduct became known to the Commonwealth, it will soon be possible to notify the defendants.

But what should the notice say? Because this question marks the moment when Dookhan defendants will formally hear from the Commonwealth, it is now an appropriate time to resolve the question left open in Bridgeman.

The Single Justice has asked the parties to attempt to agree on a draft notice. However, petitioners and CPCS cannot agree, on behalf of the thousands of people affected by this scandal, to any notice that depends on providing individual assignments of counsel to handle individual post-conviction motions. Put simply, notice cannot truthfully tell Dookhan defendants, who are often indigent and entitled to appointed counsel, that lawyers are available to handle their cases.

We now know that Dookhan's cases comprise one-sixth of all adverse drug cases in the Commonwealth over a ten-year period. Meanwhile, Sonja Farak's misconduct may have affected an even greater number of cases. Handling Dookhan's cases alone in any timeframe that might be consistent with due process is not a matter of "scaling up" or securing resources; it is an impossibility. Indeed, a notice premised on case-by-case adjudication could "succeed" only if it is not received or read by the vast majority of its intended recipients. Such a notice is simply a prescription for failure and cannot begin to restore the integrity of the criminal justice system in the Commonwealth.

Due process demands instead that Dookhan defendants finally receive notice that their convictions have been vacated and that the underlying charges have been dismissed. Petitioners and CPCS

respectfully request that the full Court take up the question of a comprehensive remedy and that it do so now. Otherwise, thousands of people might be sent a misleading notice with a promise of justice that the Commonwealth cannot keep.

I. Background

Dookhan was removed from her duties as a chemist at the Hinton drug lab in June 2011. Commonwealth v. Scott, 467 Mass. 336, 338-39 (2014). She later admitted to misconduct calling into question thousands of convictions. Id. at 339-40. Beginning in 2012, CPCS warned of the inadequacy of a case-by-case approach, estimating that - even if attorneys were available to handle such a large volume -- an individualized, piecemeal approach to an estimated 35,000 cases would require an additional \$63 million for CPCS alone. Nov. 8, 2012 Letter to Speaker DeLeo, included in CPCS Mot'n to Intervene at Ex. B to Benedetti Affidavit, Commonwealth v. Charles, 466 Mass. 63 (2013).

A. The Superior Court

The Massachusetts courts attempted to respond. These efforts began with motions to stay sentences brought by people who were then incarcerated in Dookhan cases. Charles, 466 Mass. at 65. In the fall of 2012, judges handled 589 hearings, which placed "an enormous burden on the Superior Court." Id. Next, over a four-month period, five retired Superior Court judges appointed as special magistrates presided over more than 900 hearings. Id. at 66-67. The Superior Court correctly recognized that the volume of Dookhan cases could yield unconstitutional delay. Cf. Br. for the Justices of the Superior Court at 46, Charles, 466 Mass. 63 (asserting that, without special

procedures, it might not be possible to address this initial tranche of motions "in a timeframe that comports with the defendants' constitutional rights").

B. The Supreme Judicial Court

The full Court has also been called upon to address Dookhan's cases. First, recognizing the "extraordinary circumstances" presented and the "significant concerns about the administration of justice," the Court in Charles upheld the authority of judges to stay the execution of sentences pending the resolution of post-conviction motions and the role of special magistrates in helping to process cases. 466 Mass. at 77, 89-91. Charles did not decide, however, whether to implement a broader range of equitable remedies.

Although the defendants had called for such remedies, the Single Justice declined to report these questions to the full Court. The Single Justice reasoned that doing so was "premature" at that time, though it "may be appropriate for the full court to consider [a comprehensive approach] at some point." Mar. 22, 2013 Reservation and Report 4. The Single Justice also denied CPCS's motion to intervene, which predicted that the effects of case-by-case litigation would be "disastrous." Benedetti Affidavit at 2-3, CPCS Mot'n to Intervene, Charles, 466 Mass. 63.

The following year, the full Court adopted a conclusive presumption that egregious government misconduct had occurred in all cases in which Dookhan was the primary or secondary chemist. Scott, 467 Mass. at 338. In an amicus brief filed by CPCS, the ACLU of Massachusetts, and others, the Court was again asked to adopt a

broader remedy, including dismissals of all cases, with a limited opportunity for the Commonwealth to re-prosecute. CPCS Amicus at 26-27, Scott, 467 Mass. 336. The amici also called attention to the challenges that CPCS faced in identifying Dookhan defendants. Id. at 44-47. They asked the Court to order that District Attorneys' offices and police departments identify Dookhan defendants. Id. at 46. The Scott decision, however, did not directly address these requests.

Last year, in Bridgeman, the Court exercised its superintendence power to adopt a second rule applicable to all Dookhan cases: defendants granted a new trial as a result of Dookhan's misconduct could not be charged with a more serious offense than the offense of conviction or receive a sentence more severe than that originally imposed. 471 Mass. at 468. The Court declined to adopt a comprehensive remedy -- including deadlines -- "at this time." Id. at 487. But the Court acknowledged that efforts to provide post-conviction relief had been "hampered by the inability of CPCS to ascertain which cases may have been tainted by Dookhan's misconduct," and urged the District Attorneys to assist in identifying those cases. Id. at 480.

The identification of Dookhan defendants is now nearly complete. In May 2016, the seven District Attorneys with Dookhan cases completed a substantial effort of producing lists identifying more than 24,000 Dookhan cases in which defendants were convicted or received other adverse dispositions. All told, that figure represents one in every six Massachusetts cases in which a drug conviction (or other adverse disposition) was obtained between 2003 and 2012.

C. The Farak Scandal

When it decided Bridgeman, the Court had "no basis" to conclude that Farak, who had been arrested in January 2013, had committed misconduct "comparable to the enormity" of Dookhan's, Commonwealth v. Cotto, 471 Mass. 97, 111 (2015), but it instructed the Commonwealth to conduct an investigation of this latest drug lab scandal, Commonwealth v. Ware, 471 Mass. 85, 95 (2015); Cotto, 471 Mass. at 112.

Since then, the Attorney General's Office has confirmed that the scope of Farak's misconduct was far greater than initially asserted. The Attorney General's report -- released May 3, 2016, more than three years after Farak's arrest -- reveals that Farak committed misconduct for eight years and may have compromised many thousands of cases, including cases handled by other chemists.

II. The Full Court Should Now Consider a Comprehensive Remedy.

If there is ever to be a moment for this Court to decide whether the case-by-case approach to Dookhan cases is unworkable and a comprehensive remedy is warranted, that moment is now.

First, resolving this question before notice is sent to the Dookhan defendants offers the best hope of respecting the defendants' due process rights and the resources of the Court and the parties. CPCS has acknowledged that identifying Dookhan defendants with adverse dispositions is "obviously essential if any response, whether case-by-case or comprehensive, is to work." Br. of CPCS at 14 n.2, Bridgeman, 471 Mass. 465. But notice is different. If a notice is sent out telling defendants about case-by-case adjudication, and the Court later concludes that such adjudication is impossible, then undoing the

damage done and confusion created by such a notice will require substantial effort.

Second, it is now clear that a notice based on a promise of case-by-case representation would be irresponsible. The Commonwealth, CPCS and the Court cannot make such a promise. With the Dookhan lists and Farak revelations, CPCS confronts misconduct that may have jeopardized a substantial portion of the drug convictions in Massachusetts for a decade. Meanwhile, CPCS is already facing a counsel crisis in its Children and Family Law division due to an unprecedented increase in Care & Protections petitions filed by the Department of Children and Families. Children removed from their homes are experiencing weeks of delay in the scheduling of their mandatory 72-hour temporary custody hearings because parties do not have counsel and court sessions are unavailable. CPCS is prepared to demonstrate with affidavits that it cannot come close to providing adequate representation in post-conviction motions for all Dookhan defendants in any reasonable time.¹ And it could not ethically attempt that feat, which would jeopardize its representation of existing clients.

Indeed, no one in this case -- not even the District Attorneys -- has said that CPCS can actually litigate all these cases. True, as an assistant district attorney said at a recent meeting of the Single Justice working group, some Dookhan defendants might now be dead or prepared to stand pat with potentially tainted convictions. But it must be presumed that almost any Dookhan defendant who is not dead has

¹ CPCS anticipates that it will be able to submit affidavits supporting this Request by June 13, 2016. In the interest of time, this Request is being submitted now.

an interest in at least speaking with a lawyer about post-conviction relief. And, in the experience of counsel for petitioners and CPCS, defendants who are advised of their rights usually pursue that relief. Given Bridgeman's holding that a defendant who challenges his or her conviction cannot be punished further, and given that a successful challenge can alleviate the crippling collateral consequences of a wrongful conviction, Dookhan defendants have much to gain from filing post-conviction motions. For that reason, the "case-by-case" plan is really a misnomer. Its success hinges on the perverse hope that large numbers of people will not receive or respond to the notice and that, as a result, the criminal justice system will never have to reckon with the damage done by this scandal. Petitioners and CPCS cannot support that approach or agree to issue any notice that endorses it.

Third, addressing a comprehensive remedy now will not delay the ultimate resolution of this case. To the contrary, a ruling on the proposed remedy for Dookhan defendants is necessary for the notice process to move forward, whatever these individuals will ultimately be told. Petitioners and CPCS cannot agree to a notice that relies on an untenable premise of case-by-case litigation. And it seems unlikely that the District Attorneys will agree to notice of a comprehensive remedy. Because both sides might be unable to proceed without a court order, reporting the question now may avoid unnecessary delay later.

Addressing the comprehensive remedy now is also efficient because further work is still necessary before any notice can be sent. The lists provided by the District Attorney's offices, while invaluable, appear to use inconsistent definitions of "adverse disposition."

Moreover, some are organized by case; one by charge; one by drug certificate, with multiple docket numbers in a single row. While the lists reflect a substantial effort, preparing a final list that can be used to generate notice still requires some significant work. Even then, notice cannot proceed without appropriate funding, including funds for locating defendant addresses, mailing notices, and staffing a hotline.

III. Conclusion

Petitioners and CPCS respectfully request that the Single Justice reserve and report to the full Court the question whether all cases involving misconduct by Annie Dookhan should be dismissed or subjected to a court-imposed deadline.

Respectfully submitted,

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Dated: May 20, 2016

AFFIDAVIT OF SERVICE

I, Daniel L. McFadden, counsel for petitioners-appellants Kevin Bridgeman, Yasir Creach, and Miguel Cuevas, do hereby certify under the penalties of perjury that on this 20th day of May, 2016, I caused a true copy of the foregoing document to be served by U.S. Mail and electronic mail on the following counsel for the other parties:

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