COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

SUFFOLK, SS SJ-2014-0005

KEVIN BRIDGEMAN, et al.

v.

DISTRICT ATTORNEY FOR THE SUFFOLK DISTRICT, et al.

DISTRICT ATTORNEYS' MOTION TO ENFORCE IN-COURT AGREEMENT AND INTERIM ORDER REGARDING ADDITIONAL NOTICE TO DOOKHAN DEFENDANTS AND OPPOSITION TO RESERVATION AND REPORT

The District Attorneys respectfully request enforcement of the agreement between the parties, and the interim order of this Court, that notice be mailed to so-called Dookhan defendants. The petitioners entered into this agreement with full knowledge of the underlying facts, and their objections have been waived. As recognized in the agreement and interim order, the notice -- and the rebuttable presumptions it carries -- is the final step in the comprehensive series of remedies that has been crafted and implemented by this Court, the Full Court, the affected District Attorney's Offices, the public defenders, private bar counsel, and court personnel, among many others, since this misconduct came to light.

The District Attorneys specifically object to any further delay by the petitioners to the fast and effective means of notice already agreed upon by the parties. Accordingly, the District Attorneys emphatically oppose the petitioners' request for reservation and report seeking mass dismissal.

I. Factual background and the agreement to notice

For months, the District Attorneys have worked in good faith, with the petitioners, the intervenors, and the Court, to determine both the form and the content of the notice to be sent -- this notwithstanding the fact that should there be any obligation to send individualized notice, such a sending would be an executive function. The parties agreed, on the record and with the imprimatur of this Court, that (1) notice would be mailed to the last and usual address of each so-called Dookhan defendant, as identified by the District Attorneys, and that (2) certain rebuttable presumptions would be imposed with regard to the defendants included on the lists. This Court entered an interim order based on that agreement. The District Attorneys have complied with the conditions of the agreement, and seek its enforcement.

There is simply no new information before the Court that warrants the imposition of a mass dismissal of cases, an action that would be drastic, impracticable, and unjust. It is, moreover, a remedy that has been repeatedly rejected by the Full

Court.[1] Furthermore, any delay in the sending of notice may have immediately adverse consequences, because, as the petitioners have acknowledged, the turn of the fiscal year calendar will complicate the funding streams necessary to complete the project.

II. A comprehensive remedy is already in place, in the form of the massive collective institutional effort that has been undertaken to remediate Dookhan's presumed misconduct

The petitioners utterly disregard the fact that a "comprehensive remedy" has already been realized. It has unfolded over a period of years, the result of the massive collective effort to remediate the damage caused by Dookhan's presumed misconduct. Below is only a partial list of the steps in that effort:

- The initial State Police investigation into Annie Dookhan's misconduct, and the release of resulting information to public, prosecutors, and defense bar;
- The "war room" meetings among the stakeholders, attended by representatives from CPCS, the District Attorneys, the Executive Office of Public Safety, the Governor's Office, the Attorney General's Office, the US Attorneys, the Federal Public Defenders, and Special Counsel David Meier, among others. Out of these meetings, EOPSS facilitated the

[1] Commonwealth v. Scott, 467 Mass. 336, 354 (2014), Bridgeman v. Dist. Attorney for Suffolk Dist., 471 Mass. 465, 487 (2015).

provision of lists of defendants then incarcerated on 94C charges;

- The gathering of information by the Department of Corrections, the Houses of Correction, and the Parole and Probation Departments;
- The independent work undertaken by the private bar and bar counsel, as well as CPCS, to review their cases and notify clients;
- The creation and implementation of a response plan by every affected DAO;
- Prior to the creation of the special sessions, the collective effort by prosecutors to bring affected incarcerated defendants into court, based on the information they received from EOPSS and the DOC;
- The order, by the Executive Office of the Trial Court, creating dedicated special sessions to hear the motions of affected Dookhan defendants;
- The action, by retired Superior Court Justices, to come out of retirement and preside over the special sessions;
- The continuing work of active Superior Court judges, who have heard what Dookhan motions remain since the closure of the special sessions;

- The validation of the authority of the special sessions, by the Full Court, in its Charles & Milette decisions;[2]
- The holding by the Full Court, in its Scott decision, that a defendant convicted of an offense in part on the basis of a drug certificate on which Dookhan served as the primary or confirmatory chemist is entitled to a conclusive presumption of misconduct in their case;
- The ongoing investigations by the Office of the Inspector General, and the resulting reports;
- The list, created by Attorney David Meier at the request of the Governor, of potentially affected defendants;
- The Full Court's Bridgeman decision, capping the exposure of Dookhan defendants at what they received in their initial pleas;
- The voluntary creation and provision of lists of Dookhan defendants, by the two DAOs initially named as respondents in the Bridgeman lawsuit, provided to CPCS and the petitioners over twenty-two months ago;
- The voluntary creation, by all of the affected DAOs, of finalized notice lists containing defendants' names, docket numbers, dates of birth, and social security numbers.

[2] Commonwealth v. Charles, 466 Mass. 63 (2013).

These efforts have required an enormous and incalculable expenditure of time and resources by professionals throughout our justice system. In seeking mass dismissal of cases, as demonstrated both in their filings and their statements in the press, the petitioners persistently distort and outright ignore these remedies. Instead, they make sweeping statements implying an irreparable injustice that is not borne out by the facts. For example, in an article published on May 12, 2016, counsel for the petitioners is quoted as saying, with regard to the Dookhan misconduct, that "[o]ver the last decade, Massachusetts has convicted thousands and thousands of people of drug crimes based on tainted evidence." Milton J. Valencia, *ACLU: Rogue Chemist Was Involved in 24,000-plus Convictions*, Boston Globe, May 12, 2016. In truth, no such finding has ever been made; on the contrary, in the most recent OIG investigation, widespread inaccuracies were not found:

> The OIG conducted a comprehensive review of over 15,000 drug samples originally tested between 2002 and 2012 at the Hinton Drug Lab. The OIG was focused on certain samples that the Hinton Drug Lab had repeatedly tested, with inconsistent results, but had typically only reported the final result to the parties in the corresponding criminal case. The OIG did not find any widespread testing inaccuracies.

Office of the Inspector General, *Supplemental Report Regarding the Hinton Drug Laboratory*, February 2, 2016.

Moreover, every conviction in which Annie Dookhan was involved was built on the work of many law enforcement professionals, including, invariably, a second chemist who was independently responsible for testing the drugs. This was a significant factor in the initial decision of the DAOs to protect these convictions, while simultaneously facilitating the ability of Dookhan defendants to challenge their convictions in court, if they chose to do so. Finally, Dookhan defendants are subject to no time limit in seeking relief.

III. In light of the existing comprehensive remedy, the petitioners do not offer sufficient reasons for the Court to abandon the process of notice and stage an "abrupt retreat from the fundamentals of our criminal justice system"

The reasons now cited by the petitioners to justify reneging on the notice agreement, and pushing for a mass dismissal, are **(1)** the potential number of Dookhan defendants who might come forward, and **(2)** speculative resource issues that will result from the misconduct of Sonja Farak at the Amherst State Laboratory.

As to the first offered reason, the petitioners entered into the notice agreement with the Court with the belief that the amount of Dookhan defendants was significantly *higher* than 20,000. At one single justice session, CPCS suggested the number would be well over 100,000. In January of 2105, the ACLU publicly estimated that the number was at least 40,000. Philip

Marcelo, *ACLU Argues for Drug-crime Defendants in Annie Dookhan Saga*, Boston Globe, January 9, 2015. The petitioners demonstrably did not, as they now suggest in the press and to the Court, learn anything new from the recent provision of the DA's final lists about the effect notice may have on their resources. In fact, they have known the approximate figure of 20,000 defendants since the oral argument in Bridgeman, and have had lists from Suffolk, Essex, and Bristol for over twenty-two months.[3]

Furthermore, the "millions" of dollars CPCS claims they will need is based on an entirely speculative projection of their staffing needs, and on the unjustified position that the thousands of bar advocates are "unqualified" to litigate a routine motion for new trial, in which they begin with a conclusive presumption of egregious governmental misconduct. That assertion, that bar advocates and staff attorneys are not qualified to handle a motion which requires the reading of a single case (Scott), should not be credited by the Court. The claim is a transparent attempt to artificially reduce the "supply" of attorneys because the petitioners are aware that the "demand" from clients, to litigate long dormant cases in which factually guilty defendants admitted their guilt in open court,

[3] Norfolk, Plymouth, and the Cape and Islands provided lists in April and May of 2015.

is not likely to come. In short, by their actions, the petitioners evince their knowledge that individual notice, in the vast majority of cases, will be repeating that which defendants have already learned -- from the intense, international media coverage and public scrutiny of the Dookhan case.

The District Attorneys acknowledge that it is impossible to predict with precision the response that notice will generate. However, all present signs indicate that additional mailed notice will not create the flood of responses the petitioners now predict. For example, the Dookhan sessions across all of the affected counties have seen a uniform drop in the number of Scott motions filed since the Bridgeman decision. The special sessions, once critically important due to the high volume of cases, have fulfilled their purpose, and the remaining cases can easily be handled in the District and Superior courts. This is true despite the fact that, for some affected counties, CPCS has possessed lists -- some that include docket numbers -- for over twenty-two months, yet has not generated any significant uptick in Scott motions. In short, throughout the proceedings, the petitioners have significantly overstated the apparent degree of interest on the part of the Dookhan defendants in revisiting settled cases.

Moreover, the petitioners misstate the amount of Dookhan defendants who will require CPCS services, based on the unsupportable premise that due process requires a CPCS attorney to individually counsel each defendant and convince that defendant to actively challenge the conviction. This is simply not so. Neither the federal nor the state constitution recognizes such a view of the due process clause.

In fact, "[t]he fundamental requirement of due process is notice and the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Matter of Angela, 445 Mass. 55, 62 (2005), quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965). The notice procedure, crafted by the Court with the agreement of the parties, is calibrated to fully provide this core due process to the Dookhan defendants.

IV. The Farak matter should not be considered in the context of the Dookhan matter

In their request for Reservation and Report, the petitioners and intervenors assert that the misconduct by former-chemist Sonja Farak at the Department of Public Health Amherst Laboratory is a factor that should be considered for universal vacatur of Dookhan cases. 'Petitioners and Intervenors Request for Reservation and Report Regarding Comprehensive Remedy for Dookhan Defendants' at 2, 6, 7. The timing, scope, and impact of Farak's misconduct is the subject

of active litigation in Hampden County. See Commonwealth v. Cotto, 471 Mass. 97, 112 (2015) (0779CR00770). The respondents are not parties to those cases.

Appropriately, the petitioners and intervenors have not made specific claims based on the Farak investigation. The Farak matter remains under consideration by Judge Richard J. Carey. While it is foreseeable that defendants will seek postconviction review based on the information revealed to-date, it remains to be seen how Commonwealth v. Scott, 464 Mass. 336 (2014), will ultimately be applied to Farak cases. In part, this is because it is readily apparent that the nature of her misconduct, e.g., skimming narcotics from high quality samples that she tested, is different in kind from the presumed misconduct attributed to Dookhan, e.g., dry-labbing to increase her productivity numbers and aid prosecution.

In the most recent filing, the petitioners and intervenors reference the Farak cases as an additional burden on the limited resources of the Committee for Public Counsel Services, suggesting that the May 2016 report from the Attorney General now reveals the scope of her misconduct. This argument is disingenuous at best. The intervenors have been challenging Farak's work during the entirety of her tenure at the Department of Public Health, at both the Amherst Lab and the Hinton Lab. From information provided to them in February 2014 in Dookhan

related discovery, the intervenors have had access to the total number of samples tested by Farak in at least the Respondent counties for all but a few months in 2005.

V. The petitioners have failed to demonstrate that the cost of mass dismissal would be less than the resources that would hypothetically be spent following notice

Not only is mass dismissal a retreat from the fundamentals of our justice system, but it also carries its own massive costs, both societal and financial. As a basic matter, the suggestion of mass dismissal of any particular class of convictions is offensive to fundamental justice, where there has been no finding that the convictions were, in fact, wrongful.

More practically speaking, mass dismissal is a costly, not a cost-saving, measure. To effectuate notice of dismissal, letters must be sent out to the Dookhan defendants. Court personnel and others will have to be trained and available to answer inquiries about the letters as well as to correct dockets. The Clerk's Offices will be tasked with changing all the individual dockets, digital and paper. The question of return of fees, including probation fees paid to the court on mass-dismissed cases must also be resolved. The Attorney General will need to assess the viability of their mandate to deal with payments to those now claiming to be innocent, which is based on an administrative entry on a docket sheet, not a court finding.

The protocols for dealing with the Dookhan defendants are squarely in place, and have been refined over a period of years. Mass dismissal unleashes a host of unknowns, all of them expensive, and, more to the point, wholly unwarranted.

Finally, for this Court to order mass dismissal of cases, it would need to vacate Scott on its own, completely doing away with the approach to this matter set forth by the Full Court. Mass dismissal of cases interferes with the prerogative of the executive branch by the judiciary, and there is no mechanism by which this Court can reverse the Full Court's holdings in Scott and Bridgeman.

VI. The suggested alternative remedy of selecting certain defendants to re-prosecute is unjust and effectively impossible

The suggested alternative remedy of allowing the DAOs to "pick and choose" a selection of cases to re-prosecute, to ease the work-load on the defense bar, is not viable. Such a plan would only invite further litigation, as well as a perception of unfairness, because, as shown below, such a triage would necessarily be arbitrary and incomplete:

- Many possessory offenses, implicitly considered to be minor by the very suggestion of this plan, in fact serve as predicates for other serious convictions, including armed career criminal offenses, habitual offender offenses, and second and subsequent narcotics offenses. It is not

possible, using the DAO databases, to determine whether an otherwise seemingly "minor" possessory offense is, in fact, such a predicate. Given this limitation, the DAOs would be unable to identify which possessory convictions they need to defend;

- In older serious cases, the evidence may have been destroyed long ago;
- The possessory offense may have been a plea concession, endangering any remaining convictions on serious or violent offenses;
- As a practical matter, the proposed plan would inundate the trial court with new trials and pleas that would require extensive resources in a short period of time, whereas the alternative -- dealing with motions for new trial as they arise -- gives defense counsel, the District Attorneys and the Court time to consider each case, to address a standard motion with individualized facts and circumstances, and to reach a fair, just, and expedient disposition without undue strain on the courts.

VII. Conclusion

A comprehensive remedy for Dookhan defendants is already in place. Mass dismissal would be unjust and costly, and would represent an abrupt retreat from the fundamentals of our criminal justice system. The District Attorneys respectfully

request enforcement of the agreement that all parties entered into, and that forms the basis of this court's interim order. For the foregoing reasons, and because there is no procedural mechanism to support it, the petitioner's motion for a reservation and report should be denied or dismissed.

Respectfully Submitted,
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June 2016

CERTIFICATE OF SERVICE

I, Quentin R. Weld, counsel for the respondents, do hereby certify under the penalties of perjury that on this 1st day of June, 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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Dated: June 1, 2016