COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK COUNTY NO. SJC-11764

KEVIN BRIDGEMAN, and others

V.

DISTRICT ATTORNEY FOR THE SUFFOLK DISTRICT,
and another

BRIEF FOR THE COMMITTEE FOR PUBLIC COUNSEL SERVICES ON RESERVATION AND REPORT FROM THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

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ISSUES PRESENTED

1. Whether the Court should allow the Committee for Public Counsel Services to intervene, where the questions reserved and reported affect the disposition of tens of thousands of criminal convictions found to have been spoiled by "egregious government misconduct," Commonwealth v. Scott, 467 Mass. 336, 352 (2014), and where the tens of thousands of indigent Dookhan defendants who pleaded guilty without knowledge of that misconduct require the assistance of counsel to secure relief from the violation of their due process rights.

2. Whether the Court, in the exercise of its supervisory and inherent authority, should adopt a comprehensive remedy for the egregious falsification of evidence committed by Annie Dookhan in potentially tens of thousands of cases, where the alternative approach adopted in Scott -- which requires hearing those cases one at a time -- will compound the disaster with ruinous expense and massive delay, while still failing to provide justice for many who have been harmed.

3. Whether, in the event the Court elects to retain the case-by-case framework established in Scott for the post-conviction litigation of tainted Dookhan convictions, the Court should rule:

(a) that Dookhan defendants who succeed in vacating their tainted convictions shall not be punished by terms harsher than those of their original guilty pleas, if re-convicted,

(b) that the "advocate-witness rule" does not disqualify attorneys who represented Dookhan defendants at the plea stage from handling post-Scott motions to vacate such pleas, or prohibit those attorneys from arguing that testimony which they were required to provide in support of the motion to vacate should be credited,

(c) that testimony of a Dookhan defendant at a motion to vacate is inadmissible on the issue of guilt in any future prosecution of the defendant, and;

(d) that a defendant who testifies at a motion to vacate his Dookhan-tainted guilty plea may not be made to incriminate himself on cross-examination regarding his culpability for the underlying offense, where the motion to vacate does not raise a claim of actual innocence.

STATEMENT OF THE CASE

This petition for relief pursuant to G.L. c.211, §3, is before the Court on reservation and report from

a single justice (Botsford, J.) (R.A. 8, 1129-1133),[1/] and raises issues affecting the ability of criminal defendants to receive justice following this Court's conclusion in Commonwealth v. Scott, 467 Mass. 336 (2014), that "egregious government misconduct," id. at 352, has infected a vast number of convictions obtained with falsified evidence processed by chemist Annie Dookhan at the Hinton drug lab in Jamaica Plain from 2003 until 2012.

The Committee for Public Counsel Services (CPCS) moved to intervene before the single justice "to assert and protect the interests" of the many "Dookhan defendants whom [the agency] will inevitably be called on to supply (or is already supplying) representation" (R.A. 1131). In addition to the issues raised by the petitioners, the single justice reserved and reported the question whether CPCS's motion to intervene should be allowed and a series of issues raised in that motion pertaining to the ground rules which, in CPCS's view, this Court must establish if the framework erected by Scott for the case-by-case litigation of motions to

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[1/]The petitioners' and CPCS's joint record appendix is cited by page number as "(R.A.)," and is reproduced in two volumes of material and on a CD-ROM.

vacate tainted Dookhan pleas is to have any hope of functioning (R.A. 822-831, 1007-1008, 1131-1132).

The single justice noted that

> [i]n the unique circumstances of this case -- where everyone agrees that there are tens of thousands of potentially tainted convictions, each one being a possible candidate for a motion for new trial -- I believe that the interests of justice require the court to attempt to resolve as many of the common issues as can properly be resolved at this juncture and on this record.
>
> (R.A. 1131) (emphasis added)

In addition, the reservation and report requests the full Court to "examine the possibility of a more systemic approach to addressing the impacts of the controversy than the individualized, case-specific remedy that the court envisioned in Scott; and if so, what the process for such an examination might be" (R.A. 1132).

STATEMENT OF FACTS

The facts pertinent to the legal issues in this case are set forth in the course of the Argument, post.

SUMMARY OF THE ARGUMENT

This Court held in Commonwealth v. Scott, 467 Mass. 336 (2014), that "egregious government misconduct" has tainted the 40,323 cases known to have been touched by chemist Annie Dookhan at the Hinton drug lab between 2003 and 2011. The case-by-case framework envisioned in Scott for resolving this constitutional disaster cannot work, and, as a practical matter, cannot be made to do so. Three years have elapsed since evidence of Dookhan's misconduct first surfaced and still most of the tens of thousands of defendants whose constitutional rights have been violated remain unidentified. The specter of harsher punishment has deterred many of those Dookhan defendants who have been identified from asserting their rights under Scott. And those who have been willing to assert their rights have been confronted with a tangle of new legal obstacles effectively precluding the possibility of justice in many cases.

CPCS's request to intervene at an earlier stage of this "burgeoning crisis," Commonwealth v. Charles, 466 Mass. 63, 89 (2013), was denied by the single justice without prejudice to renewal if events as they unfolded

demonstrated that a systemic rather than case-by-case approach was indeed necessary. As recognized by the reservation and report now before the Court, consideration of a comprehensive approach can no longer be rejected as premature. The Court should therefore permit CPCS to intervene so that it may advocate for a systemic remedy that will allow for the fair resolution of large numbers of tainted Dookhan convictions, while avoiding the ruinous costs of largely ineffective case-by-case litigation, which will damage the justice system for the foreseeable future (pp. 10-13).

Given the sheer number of cases involved, no workable solution can be found in our usual case-by-case approach to the resolution of post-conviction claims for relief. Indeed, with respect to a systemic problem involving potentially tens of thousands of cases, that approach is the main obstacle to an effective remedy, beginning with its prohibitive cost and inherent delay. The only viable way forward is for this Court to adopt a comprehensive remedy. CPCS offers a two-part solution: first, the Court should order that all identified Dookhan convictions be vacated; and second, the Court should order that the underlying charges in all such cases be resolved,

presumptively through dismissal, or via a framework under which the Commonwealth would have a limited opportunity to re-prosecute cases it can prove with untainted evidence. This remedy should be implemented by an administrator appointed by the Court, who would operate under its supervision, and whose first order of business would be to ensure that all individuals who have convictions which are constitutionally tainted under Scott have been identified. Indeed, the inadequacy of the individualized, case-specific approach envisioned in Scott is demonstrated by the fact that it is only recently, and only with the supervisory intervention of the single justice in the instant case, that meaningful progress has been made toward the threshold task of simply identifying all of those individuals appearing on the Meier list who in fact have been harmed.

Vacatur of all identified Dookhan convictions will be fair. This Court has already concluded in Scott that every such conviction is constitutionally tainted. The government is responsible for this unprecedented fiasco, and it is the government -- not the defendants who have been injured -- that should bear the burden of effectuating a systemic fix.

An appropriate comprehensive remedy must also include resolution of the underlying charges in all identified Dookhan cases. Those charges should be dismissed with prejudice. Such a remedy is proportionate because the egregiousness of the government misconduct here is unprecedented in both its gravity and scope, involving the intentional falsification of essential evidence in many cases over many years.

In the alternative, the Commonwealth could be given a limited opportunity to reprosecute particular Dookhan defendants, but only if it can make a preliminary showing that the evidence on which it intends to rely is (a) untainted beyond a reasonable doubt and (b) sufficient to withstand a motion for a required finding of not guilty. Vacated Dookhan convictions not reprosecuted within one year would be automatically dismissed with prejudice by operation of the speedy trial rule.

This Court has the supervisory and inherent authority to order a comprehensive remedy. Now is the time for the Court to exercise that authority. Dookhan has admitted her misconduct, the reports of David Meier and the Inspector General are complete, and the Scott

framework, although salutary in significant respects, nonetheless requires the individualized adjudication of potentially tens of thousands motions to vacate, which is incapable of providing the systemic relief that is needed immediately, and which has already given rise to a spate of new legal problems, each raising significant systemic concerns of its own. Finally, the single justice has concluded that "the interests of justice" require this Court to seek to resolve as many common issues as is possible "at this juncture and on this record," and has asked the Court to consider the possibility of adopting a comprehensive remedy (pp. 13-33).

If, however, a comprehensive remedy is not adopted, then, in order for the case-by-case approach envisioned in Scott to have any hope of functioning, the Court must make clear: (a) that Dookhan defendants who succeed in vacating their tainted guilty pleas shall not be punished by terms harsher than those of their original pleas, if re-convicted (pp. 33-34), (b) that lawyers who agree to represent former clients on post-Scott motions to vacate may, if necessary, testify on behalf of those clients and argue that any testimony that they are required to provide should be credited

without running afoul of the "advocate-witness rule" (pp. 34-41), and, (c) that the testimony of a Dookhan defendant at a motion to vacate is inadmissible at trial on the issue of guilt, and that a Dookhan defendant who takes the stand at such a motion solely to assert that he would not have agreed to the bargained-for punishment had he been told that the government's chemist was guilty of manufacturing evidence in a great many cases may not be gratuitously cross-examined about the details of his culpability for the offense to which, under Scott, he was involuntarily induced to plead guilty (pp. 41-50).

ARGUMENT

I.

THE COMMITTEE FOR PUBLIC COUNSEL SERVICES SHOULD BE ALLOWED TO INTERVENE TO ADVOCATE FOR APPROPRIATE REMEDIES FOR MANY THOUSANDS OF INDIGENT DOOKHAN DEFENDANTS WHOSE GUILTY PLEAS ARE CONSTITUTIONALLY TAINTED BY EGREGIOUS GOVERNMENT MISCONDUCT.

CPCS sought to intervene at an earlier stage of this "burgeoning crisis," Commonwealth v. Charles, 466 Mass. 63, 89 (2013), in order

> to preserve its clients' due process rights to the just and timely resolution of the many thousands of previously-adjudicated cases tainted by systemic malfeasance and incompetence at the Hinton Drug Lab, . . . [and] to advocate for a system that will allow for the

> fair resolution of large numbers of cases, while avoiding inefficient and costly case-by-case litigation in tens of thousands of cases.
>
> (R.A. 841, 850)

The single justice denied this earlier motion to intervene because she concluded that it was "premature" at that time (March 22, 2013) for the full Court to consider whether a systemic response to the Hinton drug lab debacle was necessary (R.A. 856-857). More specifically, the single justice noted that the work of Attorney David Meier and the Office of the Inspector General's investigation of the Hinton drug lab had yet to be completed, and that the information that these two sources were expected to provide "within a reasonable amount of time would give all concerned a more informed basis on which to consider what types of systemic remedies, if any, might be appropriate" (R.A. 856). Accordingly, the single justice denied CPCS's 2013 motion to intervene -- "without prejudice to renewal" -- retained jurisdiction, and invited CPCS to renew its motion "at an appropriate time" (R.A. 857).

"[N]ow is the appropriate time," (R.A. 352) (Affidavit of Chief Counsel Benedetti) (emphasis in original), for all the reasons set forth herein and in

the brief of the petitioners. It has been over three years since Dookhan's supervisors, on June 11, 2011, became aware of her misconduct (R.A. 38-39, 156-157, 166-167). Yet, thousands of defendants whose due process rights have been violated have yet to even be identified. Moreover, troubling legal obstacles have arisen which undermine the ability of the system to deliver justice for those identified Dookhan defendants who would seek to vindicate their due process rights under the case-by-case approach envisioned in Scott. See Arguments III, IV and V, post.

Most notably, the single justice -- who will have been dealing with this matter for almost two years by the time this case is argued -- has concluded that it is time for the full Court to grapple with "as many of the common issues as can properly be resolved at this juncture and on this record," and has asked the Court to consider the possibility of "a more systemic approach" to addressing the Dookhan problem "than the individualized, case-specific remedy that the [C]ourt envisioned in Scott" (R.A. 1132).

For these reasons, CPCS's request to be heard on this matter -- which is of legitimate concern to thousands of indigent Dookhan defendants who were

represented by CPCS-assigned counsel at the plea stage -- is ripe, and CPCS's renewed motion to intervene (R.A. 822-937, 1000-1002) should accordingly be granted. See Cruz Mgt. Co. v. Thomas, 417 Mass. 782, 785-786 (1994); Cosby v. Dept. of Social Services, 32 Mass. App. Ct. 392, 395-398 (1992).

II.

THE ONLY FAIR AND EFFECTIVE RESOLUTION TO THE DOOKHAN CRISIS IS FOR THE COURT TO ORDER A COMPREHENSIVE REMEDY THAT RESOLVES ALL DOOKHAN CASES.

This case presents the Court with a grave problem of unprecedented magnitude: A government chemist, Annie Dookhan, deliberately falsified evidence used to convict defendants of criminal charges in our courts. She did so in potentially tens of thousands of cases. And although there is no way of knowing which specific cases she intentionally mishandled, "[w]hat is reasonably certain . . . is that her misconduct touched a great number of cases." Scott, 467 Mass. at 352.

In Scott, this Court sought to address the problem by establishing a conclusive presumption of egregious government misconduct, to be applied in any motion to vacate in which the defendant can establish that Dookhan served as either the primary or secondary chemist, as such motions are litigated one by one. Id.

at 352-353. Any case-by-case approach is, however, 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. A comprehensive approach will solve this problem more fairly and more practically.[2/]

[2/]Identifying the 40,323 "individuals" on the Meier list (R.A. 330) and ascertaining whether those individuals' Dookhan cases resulted in convictions is obviously essential if any response, whether case-by-case or comprehensive, is to work. Until the intervention of the single justice below, CPCS was able to identify only about twenty-five percent of those individuals, for reasons which are detailed in the record (R.A. 320-326, 338-340, 345-348, 359-364, 382-386, 833-836, 859-879, 978-980). It suffices here to say that (a) the information needed to reliably link the names on the Meier list to docket numbers in the district and superior courts cannot readily be obtained without the active assistance of the District Attorneys whose offices relied on Dookhan's work product to obtain convictions, and (b) no such assistance was forthcoming until the problem was brought to the attention of the single justice by the instant motion to intervene. Since then, the single justice has facilitated the generating of needed data from the two District Attorneys whose offices are parties in this case. With the further anticipated assistance of the Trial Court, CPCS is hopeful that we will eventually have a comprehensive list of identifiable defendants with Dookhan-tainted convictions in Suffolk and Essex County cases. As this on-going process demonstrates, however, the critical threshold task of simply identifying those who have actually been harmed by the systemic constitutional violation found in Scott cannot

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A. The problem: Deliberate falsification of evidence in potentially tens of thousands of cases.

This Court is well aware of the general parameters of the Dookhan problem. To fully grasp the need for a comprehensive remedy, we need only recall the most extreme particulars of Dookhan's misconduct, which are outlined below.

1. The gravity of the problem.

It is established that Dookhan fabricated and falsified evidence. She did so by "dry labbing" -- reporting positive test results without conducting any tests (R.A. 132, 763-764). She did so by contaminating samples with known drugs so that they would test positive for the drug charged (R.A. 724, 780). And she did so by changing test results, i.e., "turn[ing] a negative sample into a positive" (R.A. 724). And she may have done so by reporting falsely inflated weights (R.A. 378-381).[3/]

[2/](CONTINUED FROM PREVIOUS PAGE)
be accomplished as a practical matter without the continuing exercise of this Court's supervisory authority.

[3/]The record contains descriptions of additional misconduct committed by Dookhan (R.A. 131-139), and demonstrates that she was motivated in part by a grossly improper purpose -- to "'get [drug defendants]
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Such misconduct defeats a core purpose of our elaborately designed justice system -- to arrive at the truth. It has now been more than two years since the Dookhan crisis became public but the criminal justice system is, practically speaking, little closer to resolving it. The taint of Dookhan's misconduct still lays thickly over thousands upon thousands of criminal convictions, and the problems created thereby lurk like a Leviathan in the shoals of our judicial system.

2. The magnitude of the problem.

Dookhan likely committed misconduct repeatedly throughout her tenure as a chemist at the Hinton lab. She has admitted to falsifying evidence for the two to three years immediately preceding her exposure, and there is compelling evidence to conclude that she had

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off the streets,' in her words." Scott, 467 Mass. at 350. Dookhan's running e-mail correspondence with various prosecutors (R.A. 229-270) reveals that she viewed herself as a member of the prosecution team ("I am trying to bump it to Federal court. . . . Trying to figure out the possible charges, other tha[n] SZ violation, possession and intent to distribute") (R.A. 238), who wanted to punish drug defendants ("def. will be making a lot of friends in the federal pen, named John. haha") (R.A. 237), and force them to plead guilty ("We are more than willing to provide discovery . . . as long as it will help in getting a plea or stipulation") (R.A. 246).

been falsifying results since 2004 (R.A. 171-172, 376): She had "an unusually high productivity level," and "reported test results on samples at rates consistently much higher than any other chemist in the lab, starting as early as 2004, during her first year of employment." Scott, 467 Mass. at 340.

From 2004 to 2011, Dookhan handled over 86,000 samples involving the cases of at least 40,323 individuals (R.A. 330, 340). CPCS does not know how many of these cases resulted in convictions. See n.2, ante, at 14. But a conviction rate of even seventy-five percent would mean more than 30,000 tainted convictions. Even if each of these cases were to be litigated one by one, such litigation still could not "resolve the question whether [Dookhan] engaged in misconduct in a particular case." Scott, 467 Mass. at 352.[4/] What has been resolved, however, is that the damaging effect of Dookhan's misconduct system has been "insidious" and of "systemic magnitude." Ibid.

[4/]Dookhan herself cannot provide any information as to the number or identify of the cases in which she falsified drug evidence (R.A. 724). Moreover, she has been convicted of this very misconduct (R.A. 733-734), so any information she might provide could not be viewed as reliable.

3. The *Scott* approach to the problem.

Scott creates "a conclusive presumption" that egregious government misconduct infects the case of any defendant whose motion to vacate is supported by a copy of a Hinton lab drug certificate (a) "from the defendant's case," and (b) "signed by Dookhan on the line labeled 'Assistant Analyst.'" Scott, 467 Mass. at 353. This approach has the significant virtue of relieving those Dookhan defendants who are able to obtain copies of their drug certificates of any requirement that they prove the unprovable -- that misconduct occurred in their individual cases. The Scott presumption also "relieve[s] the trial courts of the administrative burden of making duplicative and time-consuming findings in potentially thousands of new trial motions regarding the nature and extent of Dookhan's wrongdoing." Id. at 353, 355.

But Scott does "not relieve the [Dookhan] defendant of his burden . . . to particularize Dookhan's misconduct to his decision to tender a guilty plea." Id. at 354. To the contrary, in order to actually vacate his tainted conviction, the Dookhan defendant must "demonstrate a reasonable probability that he would not have pleaded guilty had he known of Dookhan's

misconduct." Id. at 355. Scott makes clear that this "materiality" inquiry is a fact-intensive, "individualized" determination to be based on the "totality of the circumstances" in every Dookhan motion to vacate that is litigated. Id. at 356, 358. Thus, despite its virtues, the Scott approach still requires that the system seek to handle the tens of thousands of previously-litigated cases tainted by Dookhan, one by one.

As a practical matter, the problem after Scott remains essentially unresolved and, indeed, almost completely unchanged. The overwhelming majority of identified Dookhan cases remain untouched. See n.2, ante, at 14. Moreover, the Scott approach has resulted in a spate of entirely new legal issues, see Arguments III, IV, and V, post, which will themselves require time and money in order to resolve.

B. The obstacle to a solution: The usual case-by-case approach to relief.

One of the great virtues of our criminal justice system is that it seeks to provide justice in each case individually, one case at a time. As a result, however, the system is ill-equipped to deal with "exceptional circumstances" of the sort presented here,

where a remedy is needed for literally tens of thousands of compromised cases. In these circumstances, the case-by-case approach is actually the main obstacle to a solution. Consequently, the Scott approach should not be the last word on this issue, because the individualized remedy that it envisions entails delay and expense which will cripple the system for years while still failing to deliver justice for many affected defendants.

1. The time and expense of the individualized approach.

In the usual case, a defendant who claims his plea of guilty was invalid must seek relief by way of a motion for a new trial. Such a motion typically proceeds through numerous steps: factual investigation, drafting and filing of pleadings and affidavits, drafting and filing of opposition papers, followed eventually by a hearing before and decision by a judge, and, in some cases, an appeal by the losing party.

The time and expense required to litigate tens of thousands of Dookhan motions to vacate under the usual "one-at-a-time" approach will be staggering. This Court has already recognized that the 589 hearings

conducted in these cases on motions to stay sentences "plac[ed] an enormous burden on the Superior Court." Charles, 466 Mass. at 65. That, however, is nothing compared to the burden of preparing and conducting full-blown Scott hearings in potentially tens of thousands of cases, followed by appeals in some unknowable percentage of those cases.

The Legislature has passed an initial appropriation of $30 million to fund expenses arising from the Hinton lab failure generally. St. 2013, c.3, §2A. The Massachusetts District Attorneys Association correctly predicted that this sum would be grossly inadequate to "fix this mess."[5/] And the Attorney General has estimated that the costs may ultimately total "hundreds of millions of dollars" (R.A. 784).

The Attorney General's estimate is certain to become reality if the case-by-case approach continues. As of May 2014, CPCS had assigned counsel in approximately 8,700 cases for possible post-conviction litigation relating to the Hinton lab failure (R.A. 835). About ninety-five percent of the post-conviction assignments made by CPCS each year -- including all

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[5/]John Ellement, Prosecutors Say $30M Not Enough, Boston Globe, Nov. 3, 2012, at B2.

direct appeals and rule 30 motions -- are to private attorneys certified by the Private Counsel Division to accept such assignments (R.A. 836). There are no more than 300 attorneys who are willing to accept such assignments (R.A. 836). "By necessity, therefore, the vast majority of the Dookhan assignments made by CPCS thus far have been to plea counsel, few of whom are certified to accept post-conviction assignments" (R.A. 836). Accordingly, if Dookhan cases continue to be litigated one at a time, it will be necessary for CPCS to "recruit, train, and provide support to a small army of newly-qualified post-conviction attorneys" (R.A. 355).

The cost of such an undertaking is difficult to estimate, even without attempting to guess the costs that will be incurred by prosecutors, judges, and court personnel. In short, the time and expense of pursuing the case-by-case approach is impossible to accurately estimate but, in any event, is astronomical.

2. The delay inherent in the individualized approach.

Handling Dookhan motions to vacate one at a time will take literally years to resolve the problem, and will result in delay impacting the system as a whole.

For CPCS, time spent on post-conviction Dookhan cases "is time that is diverted from other cases," and constitutes an "unquantifiable impediment to [CPCS's] ability to carry out [its] core mission" (R.A. 354). For Dookhan defendants, the delays inherent in the case-by-case approach are profound, with each case winding its way through the post-conviction litigation labyrinth. During the course of such delay, Dookhan defendants will continue to suffer serious consequences from their tainted convictions, which could be used as prior convictions at sentencing on other matters, or as new offenses triggering the revocation of probation. Dookhan-tainted convictions may also result in a defendant's deportation,[6/] ineligibility for public housing and subsidized housing,[7/] and ineligibility for federal student loans.[8/]

[6/]See 8 U.S.C. §§1101(a)(43)(B), 1227(a)(2)(B)(i). CPCS is aware of at least one case in which a Dookhan defendant has now in fact been deported as a result of (and during the course of a protracted attempt to vacate) his tainted guilty pleas. Commonwealth v. Perez, 86 Mass. App. Ct. 1106, further app. rev. denied, 469 Mass. 1109 (2014) (unpublished).

[7/]See 24 C.F.R. 960.203(c)(3), 760 Code Mass. Regs. §5.08(1)(d) (public housing); 24 C.F.R. 982.553 (subsidized housing).

[8/]See 20 U.S.C. §1091(r). Other serious consequences of drug convictions include mandatory suspension of

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3. The under-inclusiveness of the individual approach.

The case-by-case approach envisioned in Scott requires that any post-conviction challenge to a Dookhan conviction be initiated by the defendant. In many cases, however, that will not occur. Most defendants convicted of a drug offense during the Dookhan era have any idea whether Dookhan was one of the chemists in their case. Most Dookhan defendants -- who are likely to be indigent, poorly educated, or afflicted with substance abuse or mental health issues -- will not have heard of the Dookhan problem, or have any idea how to go about fixing it, or believe that they could afford to do so. And many other Dookhan defendants, viewing the case as over and done with, and lacking an understanding of its potential future consequences, will make no attempt to vacate their tainted convictions -- until, perhaps, they are used against them by a prospective employer, an immigration official, or in a habitual offender prosecution.

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driver's license, G.L. c.90, §22(f), availability of criminal record to current and prospective employers, G.L. c.6, §172(a)(3)(i), and ineligibility for military service, 10 U.S.C. §504(a).

In sum, the time, expense, and delay inherent in the case-by-case approach will turn the Dookhan matter into the "Big Dig" of our judicial system. CPCS urges the Court to ensure that does not occur.

C. The solution: This court should adopt a comprehensive remedy for all Dookhan cases.

CPCS proposes a two-part solution: first, the Court should vacate all Dookhan convictions; second, the Court should dismiss all Dookhan cases with prejudice, or, in the alternative, provide the Commonwealth with a limited opportunity to seek to reprosecute and then dismiss all remaining cases after one year. Such a solution will seem bold, and it is; it is unprecedented. But the crisis facing our justice system is also unprecedented.

1. The Court has the authority to adopt a comprehensive remedy.

This Court has the supervisory and inherent authority to order a comprehensive solution, and, indeed has already twice invoked that authority in response to the Hinton lab failure. See Charles, 466 Mass. at 89-90; Scott, 467 Mass. at 352. Because "egregious government misconduct" tainting the consti-

tutional validity of tens of thousands of cases plainly presents a "lapse of systemic magnitude," it is incumbent upon the Court to exercise this authority "to fashion a workable approach" which restores the integrity of the system. Scott, 467 Mass. at 352.

The comprehensive approach proposed here requires a more expansive application of the Court's supervisory authority than was exercised in Charles or Scott. But the exercise of such powers is reserved for the "most exceptional circumstances," Planned Parenthood League of Mass., Inc. v. Operation Rescue, 406 Mass. 701, 706 (1990), and, without hyperbole, the Dookhan scandal presents as exceptional a set of circumstances as our justice system has ever faced.

2. The first step: Convictions in all Dookhan cases should be vacated.

The first step toward a practical systemic remedy is for the Court to order that all identified convictions resulting from these cases, be vacated.[9/]

[9/]Some Dookhan defendants, viewing their cases as long since resolved, may not wish to have their convictions vacated. Such defendants should be allowed to opt-out of the remedy upon request, such as happens in civil class action litigation. Managing these "opt-out" requests could appropriately be assigned to the administrator appointed by the Court. There will

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The Dookhan crisis requires a more comprehensive remedy than those described in out-of-state decisions pertaining to similar misconduct, because the number of affected defendants in those cases is dwarfed by the number of defendants whose due process rights have been violated here. See In re Investigation of W. Va. State Police Crime Lab., Serology Div., 190 W. Va. 321, 330-331 (1993) (involving 134 defendants identified at the time of the investigation); State v. Gookins, 135 N.J. 42, 50 (1994) (three defendants on appeal, with unquantified references to "widespread misconduct" and pending "class action"); State v. Roche, 114 Wash. App. 424, 438 (2002) (two defendants on appeal, with reference to "dozens" of cases dismissed).[10/]

In short, the sheer number of cases touched by Dookhan, with each case "being a possible candidate for a motion for new trial" (R.A. 1131), is reason enough

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likely also be some Dookhan defendants who cannot be identified. Individuals later identified must be afforded the same remedy at that time as those now identified.

[10/]For a case involving potentially larger numbers, see Ex Parte Coty, 418 S.W.3d 597, 598-599 & nn.1-2 (Tex. Crim. App. 2014) (involving government chemist who handled 4,944 cases and was found to have dry-labbed in "one case" and possibly a second).

for the Court to adopt a comprehensive approach.

3. The second step: The underlying charges in all Dookhan cases should be resolved.

Once all identified Dookhan convictions have been vacated, the next step requires that the underlying criminal charges be resolved. This could be accomplished either by (1) dismissing the cases with prejudice, or (2) allowing the Commonwealth a limited opportunity to reprosecute those cases in which it can show that there is sufficient untainted evidence to prove the charges beyond a reasonable doubt.

Neither proposed remedy places any new burden on the backs of the Dookhan defendants whose rights have been violated. Instead, where there is a burden to be met, it is placed on the Commonwealth, where it properly belongs. Either proposed solution will restore the integrity of the system both by righting the wrongs and by allowing the system to work prospectively rather than remaining mired indefinitely in previously-adjudicated cases.

a. The charges should be dismissed with prejudice.

Ordering that all vacated Dookhan convictions be

dismissed with prejudice is both proportionate and practical. It is proportionate because the egregiousness of the government misconduct at hand "shocks the conscience," Rochin v. California, 342 U.S. 165, 172 (1952), and is comparable to misconduct that has resulted in dismissal with prejudice in other contexts. See Commonwealth v. Manning, 373 Mass. 438, 443-445 (1977) (ordering dismissal with prejudice due to intentional police interference with defendant's right to counsel); Commonwealth v. Washington W., 462 Mass. 204, 213-216 (2012) (upholding dismissal with prejudice where Commonwealth's refusal to comply with discovery orders was "deliberate, willful and repetitive" and thus "egregious").[11]

Dismissal with prejudice would also have the benefit of systemically resolving this "lapse of systemic magnitude," Scott, 467 Mass. at 352, as simply and decisively as possible, and with the least possible expense or delay to the Commonwealth of Massachusetts.

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[11]See also Commonwealth v. Cronk, 396 Mass. 194, 199 (1985) (dismissal with prejudice may be appropriate where government misconduct is "egregious, deliberate, and intentional"); Commonwealth v. Monteagudo, 427 Mass. 484, 485 (1998) ("The principle that egregious government misconduct may violate due process and bar prosecution is well-established in Federal law").

b. In the alternative, re-prosecution could be permitted in particular cases and under narrowly limited circumstances.

The Court could also fashion a remedy that allows the Commonwealth a limited opportunity to reprosecute individual cases.

i. Re-prosecution should only be permitted if the Commonwealth can make a preliminary showing that its evidence is both untainted beyond a reasonable doubt and sufficient to withstand a motion for a required finding of not guilty.

Re-prosecution of a vacated Dookhan conviction should only be permitted if the Commonwealth files a motion to re-prosecute, putting the Dookhan defendant on notice and triggering the assignment of counsel for those who are indigent.[12/] The Commonwealth should be required to file such a motion within a fixed time period. Dookhan defendants are entitled to swift resolutions of their cases, and a deadline will provide the Commonwealth with an incentive to make timely decisions about which cases to seek to re-prosecute.

[12/]Continuing indigency should be presumed for Dookhan defendants who were represented by assigned counsel at their original pleas, and can be revisited as warranted by any changed financial circumstances for particular defendants.

In its motion to re-prosecute, the Commonwealth should be required to specify the evidence upon which re-prosecution would be based and show that such evidence is untainted beyond a reasonable doubt. See State v. Gookins, 135 N.J. at 51 (vacating convictions in falsification cases and instructing 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"). The motion should also be required to demonstrate that the evidence claimed to be untainted would be sufficient to permit a finding of guilt beyond a reasonable doubt. Such a burden is appropriate in order to "screen out . . . those cases that should not go to trial, thereby sparing individuals . . . from being unjustifiably prosecuted [again]." Commonwealth v. Perkins, 464 Mass. 92, 101 (2013), quoting Myers v. Commonwealth, 363 Mass. 843, 847 (1973).

ii. Any vacated Dookhan conviction not reprosecuted within a year should be automatically dismissed with prejudice pursuant to the speedy trial rule.

Once a tainted Dookhan conviction has been vacated, no new device would be required to dispose of

the charges in the vast majority of cases, which would be dismissed after one year by operation of the speedy trial rule. Mass. R. Crim. P. 36(b)(1)(D), as amended, 422 Mass. 1503 (1996). Such dismissal would be with prejudice. Commonwealth v. Balliro, 385 Mass. 618, 624 (1982).[13/]

4. This remedy can be implemented in a practical and timely way.

The details of this proposed remedy should be implemented by an administrator appointed and supervised by this Court, whose first task should be to coordinate the identification by docket number of all Dookhan cases which resulted in a conviction, see n.2, ante, at 14, so that a comprehensive remedy can be implemented.

A systemic remedy of the sort proposed here could be implemented in little more than one year. Such a time frame is just: "The burden of a systemic lapse is not to be borne by defendants." Charles, 466 Mass. at

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[13/]Although the speedy trial rule provides for dismissal "upon motion" by the defendant, Mass. R. Crim. P. 36(b)(1)(D), requiring Dookhan defendants to file individual motions to dismiss would defeat a critical purpose of a comprehensive solution. That provision of Rule 36 would therefore need to be supplanted for these purposes by a mechanism for automatic dismissal, which the Court has the authority to formulate.

74-75, quoting Lavallee v. Justices in the Hampden Superior Court, 442 Mass. 228, 246 (2004). For the thousands who have already waited too long for relief, an additional year of delay is all that can fairly be asked.

III.

THE COURT SHOULD ESTABLISH A BRIGHT LINE RULE THAT PROTECTS DOOKHAN DEFENDANTS WHO SUCCEED IN VACATING THEIR PLEAS FROM BEING PUNISHED BY TERMS HARSHER THAN THOSE OF THEIR ORIGINAL PLEAS, IN THE EVENT OF RE-CONVICTION.

Assuming that the framework established in Scott for the case-by-case litigation of motions to vacate tainted Dookhan convictions continues to govern how these matters are to be resolved, it is essential that Dookhan defendants who succeed in vacating their tainted guilty pleas be protected against the possibility of receiving a harsher punishment than the terms of the plea, should they be re-convicted.

As to the reasons that the Court should establish such a rule, CPCS adopts by reference the petitioners' arguments in support of their first claim for relief. Brief of petitioners-appellants, Arguments I and III(A). Mass. R.A.P. 16(j), 365 Mass. 860 (1974). As to the necessity for such a rule, CPCS emphasizes the chilling effect that the Angel Rodriguez case has had

on the willingness of Dookhan defendants to assert otherwise viable motions to vacate (R.A. 319-320, 800-813, 893-894). Accordingly, if the Court adheres to the Scott approach and does not limit the potential exposure of Dookhan defendants whose motions to vacate are granted, then it is safe to say that the justice system's efforts to remedy the harms perpetrated by Annie Dookhan effectively will have reached an end.

IV.

THIS COURT SHOULD DECLARE THAT THE ADVOCATE-WITNESS RULE DOES NOT DISQUALIFY AN ATTORNEY FROM LITIGATING OR TESTIFYING AT A DOOKHAN MOTION TO VACATE, AND FROM ARGUING THAT HIS OR HER TESTIMONY SHOULD BE CREDITED, WHERE SUCH ATTORNEY REPRESENTED THE DEFENDANT AT THE ORIGINAL PLEA.

A. Summary.

CPCS's practical ability to assign counsel for Dookhan defendants has been put in question by the position taken by some prosecutors, particularly in Suffolk County (R.A. 922-927), that an attorney who represented a Dookhan defendant at the plea stage may not thereafter represent the defendant at a Scott hearing without violating the "advocate-witness rule." Accordingly, if the case-by-case approach laid out in Scott is to continue, the Court should declare that the advocate-witness rule -- whether as expressed through

the Rules of Professional Conduct,[14] the Rules of the Superior Court,[15] or the common law,[16] -- does not disqualify an attorney from litigating a Dookhan motion to vacate where such attorney was plea counsel, and where the attorney is called upon to testify at an evidentiary hearing on the motion. Such a declaration would: (a) be consistent with this Court's previous reading of the advocate-witness rule, (b) constitute an appropriate exercise of the Court's authority "to

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[14]Mass. R. Prof. C. 3.7(a), 426 Mass. 1396 (1998), provides as follows:

> A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
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> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) disqualification of the lawyer would work substantial hardship on the client.

[15]Rule 12 of the Rules of the Superior Court states:

> No attorney shall be permitted to take part in the conduct of a trial in which he has been or intends to be a witness for his client, except by special leave of the court.

[16]See, e.g., Borman v. Borman, 378 Mass. 775, 786 (1979) ("The ultimate concern about the testifying advocate is, in Professor Wigmore's view, that the public might think that the lawyer is distorting the truth for his client"), citing 6 J. Wigmore, Evidence §1911 (Chadbourn rev. 1976).

fashion a workable approach," Scott, 467 Mass. at 352, to the litigation of motions to vacate brought by Dookhan defendants, (c) promote the efficient administration of justice, especially with respect to the appointment of counsel for indigent Dookhan defendants, and (d) appropriately "inure to [the benefit of] defendants" whose due process rights have been violated by virtue of the Hinton lab failure, ibid., in that it will stop prosecutors from strategically seeking to disqualify dual-role counsel by refusing to stipulate to the admissibility of such counsel's averments in affidavit form.

B. The problem.

Of necessity, the vast majority of CPCS's assignment of counsel to date for possible post-conviction litigation relating to the Hinton lab failure have been to the attorney who handled the plead (R.A. 835-836). See ante, at 21-22. In some of the eight affected counties, prosecutors have generally stipulated to the admissibility of dual-role counsel's affidavit, thus obviating any problem with respect to the advocate-witness rule (R.A. 882). Such a stipulation is a "common and appropriate" solution to the problems presented by the "advocate-witness situation." Commonwealth v. Shraiar, 397 Mass. 16, 22 (1986).

In other counties, however, most notably Suffolk County, prosecutors have generally refused to stipulate to affidavits of counsel, and objected to defendants' employment of dual-role representation on grounds that it is prohibited by Mass. R. Prof. C. 3.7(a) (R.A. 922-926, 1039). In response to such objections, Attorney Michael Roitman, who represents several Dookhan defendants seeking to vacate tainted Suffolk County guilty pleas, sought guidance from the Massachusetts Bar Association's Committee on Professional Ethics (R.A. 895-902). The widely-circulated opinion that he received in response from the vice-chair of that committee, which states that "a court might well conclude" that rule 3.7(a) prohibits dual-role representation at post-Scott motions to vacate, has further served to discourage such representation (R.A. 883-885).

Some Dookhan defendants have nonetheless elected to proceed with dual-role representation, including testimony of plea counsel at evidentiary hearings on motions to vacate (R.A. 1041-1042, 1070-1079). In some of these cases, however, the court has barred defense counsel from commenting on or arguing her own credibility, concluding that such argument "would be highly inappropriate" (R.A. 1042) and would "place the Commonwealth in an unfair position" (R.A. 886, 930).

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 Dookhan defendants have already endured. 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 prosecutors continue to use rule 3.7(a) to impede the ability of plea counsel to represent Dookhan defendants on their motions to vacate.

C. The solution.

Contrary to the position taken by the Suffolk County District Attorney's office, dual-role representation in Hinton Laboratory litigation is consistent with existing interpretations of the applicability of the advocate-witness rule. Although CPCS has found no case addressing whether the advocate-witness rule applies to a post-conviction evidentiary hearing, in Smaland Beach Ass'n v. Genova, 461 Mass. 214 (2012), this Court conducted a detailed analysis of the rule and its rationales, and concluded that it does not apply to a pretrial evidentiary hearing in a civil case: "By its plain language," and in contrast to the rules requiring disqualification of an attorney due to

a conflict of interest, rule 3.7(a) is limited to prohibiting a lawyer from acting "as an advocate at trial in which the lawyer is likely to be a necessary witness." Id. at 225 (2012) (quoting rule) (emphasis added by the Court). Accordingly, the Court concluded in Smaland Beach that rule 3.7(a) is not implicated when an attorney is found to be a necessary witness at a pretrial proceeding. Ibid.

> This reading of rule 3.7(a) adheres to its text and fulfils its underlying purposes. . . . . That is, because the rule strives to mitigate potential jury confusion, to avoid the difficulties of cross-examining an adversary[,] and to diminish the appearance of impropriety where an attorney "leave[s] counsel table for the witness chair," . . . judges need only divorce the two functions -- that of advocate and witness -- at the trial itself.

Id. at 226 (citations omitted).[17/]

Like the pretrial hearing addressed in Smaland Beach, an evidentiary hearing on a Dookhan defendant's motion to vacate does not present any risk of "jury confusion" or the "appearance of impropriety" which may arise when a lawyer, at a jury trial, leaves counsel table for the witness chair. The only remaining

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[17/]Rule 12 of the Rules of the Superior Court contains nearly identical language of limitation: "No attorney shall be permitted to take part in the conduct of a trial in which he has been or intends to be a witness for his client, except by special leave of the court" (emphasis added).

consideration -- avoiding "the difficulties of cross-examining an adversary" -- should be discounted in light of the unique circumstances of post-conviction Dookhan litigation, which has been necessitated by egregious government misconduct that has "cast a shadow over the entire criminal justice system." Scott, 467 Mass. at 352. Furthermore, where the Commonwealth has been invited to stipulate to defense counsel's affidavit, but declines to do so, any difficulties occasioned by the cross-examination of an adversary are of the Commonwealth's own creation.

Enunciation of a rule that excepts Hinton lab litigation from the ambit of the advocate-witness rule will also have the salutary effect of preventing the Commonwealth from strategically forcing defendants to choose between maintaining an attorney-client relationship with extant counsel at the cost of foregoing argument as to that attorney's credibility (or at the cost of foregoing that attorney's testimony altogether), or requesting the appointment of new counsel and incurring the delay which inevitably results from such transfer.

Although a Dookhan defendant may elect to avoid dual-role representation, it is important that the decision remain in the hands of the individual seeking to vindicate his right to due process. "Where the need for an attorney to testify on behalf of his client

arises, judges should defer to the best judgment of counsel and his client." Smaland Beach Ass'n, 461 Mass. at 221, citing Borman v. Borman, 378 Mass. at 790. Such deference is particularly important in the context of a Dookhan defendant's motion to vacate, which seeks to remedy egregious government misconduct of historic proportions. See also Scott, 467 Mass. at 352 (Court's superintendence power encompasses "the authority to regulate the presentation of evidence in court proceedings"), citing Commonwealth v. DiGiambattista, 442 Mass. 423, 444-445 (2004).

D. Conclusion.

For these reasons, the Court should affirm the validity of dual-role representation in post-Scott motions to vacate, and make clear that a dual-role attorney who is required to testify on such a motion is not required to refrain from comment or argument concerning the credibility of her testimony.

V.

THE COURT SHOULD RULE THAT: (A) THE TESTIMONY OF A DOOKHAN DEFENDANT AT A MOTION TO VACATE IS INADMISSIBLE AT A SUBSEQUENT TRIAL ON THE ISSUE OF GUILT, AND (B) THE PERMISSIBLE SCOPE OF CROSS-EXAMINATION OF A DEFENDANT WHO TESTIFIES IN SUPPORT OF A MOTION TO VACATE A DOOKHAN-TAINTED GUILTY PLEA MAY NOT SEEK TO DELVE INTO THE DETAILS OF THE DEFENDANT'S FACTUAL GUILT, UNLESS A CLAIM OF ACTUAL INNOCENCE HAS BEEN RAISED.

A. Commonwealth v. Cruz.

Hipolito Cruz is a Dookhan defendant (R.A. 1021-

1126). On June 14, 2010, he pleaded guilty in Suffolk Superior Court to trafficking in 14 or more grams cocaine (count one), and possession of cocaine with intent to distribute (count two) (R.A. 1102, 1121). In exchange for his change of plea, the prosecution agreed to a three-year prison sentence on count one, and to drop the "second and subsequent" portion of count two, which would have subjected Cruz to a five-year minimum mandatory sentence (R.A. 1095-1106, 1121).

On November 7, 2012, Cruz moved to vacate his convictions on grounds that his guilty plea was constitutionally tainted in light of Dookhan's egregious misconduct, which Cruz had been unaware of when he agreed to the terms of the plea and was sentenced to prison (R.A. 1114). An evidentiary hearing on the motion was held on May 6, 2014 (Special Magistrate Donovan, presiding) (R.A. 1021, 1105). Prior to the hearing, Cruz moved in limine to either admit his affidavit in support of the motion to vacate, or, in the alternative, to limit his testimony at the hearing "to avoid the disclosure of potentially incriminatory evidence" (R.A. 1036-1039, 1107). The motion in limine was denied (R.A. 1041).

Accordingly, Cruz took the stand, and testified on direct examination that he would not have accepted a plea bargain which required him to serve so much time

in prison if he had been made aware that the Commonwealth's chemist was guilty of manufacturing drug evidence in a vast number of cases just like his (R.A. 1051). On cross-examination, the prosecutor asked Cruz no questions at all about that subject, focusing instead entirely -- and over defense counsel's repeated and largely futile objections -- on an exhaustive exploration of the details of Cruz's culpability for the offenses to which he had pleaded guilty (R.A. 1053-1069),[18] and concluding with the following flourish:

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[18] For example:

[THE PROSECUTOR]: Prior . . . to going to get yourself some lunch, did you receive a call on your cell phone?

. . .

[DEFENSE COUNSEL]: Objection.

[THE COURT]: Objection's overruled.

[THE DEFENDANT]: I received a few phone calls, yes.

[THE PROSECUTOR]: . . . And did any of those phone calls request to purchase narcotics from you?

[THE DEFENDANT]: No -

[DEFENSE COUNSEL]: Objection, your Honor.

[THE COURT]: Objection's overruled.

[THE DEFENDANT]: I don't really remember that.

. . .

[THE PROSECUTOR]: But you remember going to Gallivan

(CONTINUED ON NEXT PAGE)

[THE PROSECUTOR]: Sir, why did you plead guilty to this case?

[THE DEFENDANT]: Well, I'm not really want to plead guilty because I know the -- I really believe the -- the Commonwealth have to have search warrant to search the car. They never have that. They know the facts. But my lawyer kind of talked to me, explained to me, and that's my -- that's girlfriend pregnant at that point, and I just don't want to -- you can be -- you know, you can never tell. So I tendered on the offers. You know, at that point, it's -- I can handle it, and that's why I pled guilty.

[THE PROSECUTOR]: Did you plead guilty because you

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[18]/(CONTINUED FROM PREVIOUS PAGE)
Boulevard?

[THE DEFENDANT]: Yes.

[THE PROSECUTOR]: And driving a Mazda Protégé?

[THE DEFENDANT]: Yes.

[THE PROSECUTOR]: You don't remember receiving a phone call from someone requesting to make a hundred dollar purchase from you?

[THE DEFENDANT]: No.

[THE PROSECUTOR: Do you remember going to Gallivan Boulevard and meeting with somebody?

[THE DEFENDANT]: No.

[THE PROSECUTOR]: Do you remember selling cocaine to somebody at Gallivan Boulevard?

[THE DEFENDANT]: No.

(R.A. 1057-1059)

were guilty?

[THE DEFENDANT]: No.

[THE PROSECUTOR]: You were not guilty?

[THE DEFENDANT]: No.

(R.A. 1069)

In closing, the prosecutor successfully urged the special magistrate to recommend that Cruz's motion to vacate be denied (R.A. 1111-1120), as follows:

[THE PROSECUTOR]: [T]he real question is what would he have done had he known [about Dookhan's misconduct], and what I take away from the cross examination is . . . I don't think you can believe a word he said. Whether or not he would have or wouldn't have, his credibility was at issue from the get go denying where he went, what time he went, whether or not he was in trouble for having gone, whether or not he actually sold the substance to an undercover police officer. And in fact, it's borderline perjurious what he did in this Court today.

He doesn't have the right to come in and testify under oath and lie to the Court . . . which is tantamount to what he did.

Some five, six years ago, he pled guilty under oath and stood up and raised his hand and pled guilty and said those are the facts. And today, he came before the court, raised his hand and said none of that's true. I lied on that date. I lied when I pled guilty. How can the Court take any credence from any of his testimony as to what he would have done?

> . . . It's the Commonwealth's position that he hasn't provided satisfactory evidence, credible evidence, as to what he would have done because there wasn't quite frankly a whole lot coming out of his mouth that didn't contradict the prior plea.
>
> (R.A. 1081-1082)

B. The Hobson's choice.

Scott's materiality prong requires that a Dookhan defendant demonstrate a "reasonable probability that he would not have pleaded guilty had he known of Dookhan's misconduct." Scott, 467 Mass. at 355. To satisfy this burden, a defendant must aver in his pleadings that he would not have pleaded guilty if he had known of Dookhan's misconduct, and then, if his affidavit is not admitted in evidence, he must testify. But if a defendant's hearing testimony, given to meet the Scott materiality requirement, is admissible against him at a subsequent trial on the question of guilt, the defendant is forced to surrender his privilege against self-incrimination in order to seek to vacate a guilty plea that, as a matter of law, is tainted by egregious government misconduct.

What happened in Hipolito Cruz's hearing serves as a blunt warning to any Dookhan defendant brave (or foolish) enough to press his rights under Scott. Dookhan defendants should not have to surrender their

Fifth Amendment privileges in order to vindicate their rights to due process.

C. The *Simmons* solution.

In Simmons v. United States, 390 U.S. 377 (1968), the Supreme Court eliminated such a Hobson's choice for defendants in the context of a motion to suppress evidence allegedly seized in violation of the Fourth Amendment, finding it "intolerable that one constitutional right should have to be surrendered in order to assert another," and holding that "when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt. . . ." Id. at 394.

The Simmons rationale applies here:

> [I]t seems obvious that a [Dookhan] defendant who knows that his testimony [in support of a motion to vacate] may be admissible against him at trial will sometimes be deterred from presenting the testimonial proof . . . necessary to assert [a due process claim under Scott].

Simmons, 390 U.S. at 392-393.

In the face of Dookhan's egregious misconduct, fairness requires that harmed defendants not be deterred from seeking relief. Accordingly, the Court should rule that testimony of the sort that Hipolito

Cruz was required to provide "may not be admitted against [the Dookhan defendant] at trial on the issue of guilt." Commonwealth v. Rivera, 425 Mass. 633, 640 (1997), citing Simmons.[19]

D. The cross-examination of Hipolito Cruz.

> [T]he use of prosecutorial power to invoke or threaten to invoke a mandatory sentencing provision that would result in a sentence that exceeds fair punishment for the case in order to procure a plea of guilty . . . makes the risk of going to trial so great that rational defendants frequently have no choice but to voluntarily plead guilty.

United States v. Kupa, 976 F. Supp. 2d 417, 419 n.9 (E.D.N.Y. 2013).

> Never before in our history . . . have such an extraordinary number of people felt compelled to plead guilty, even if they are innocent, simply because the punishment for the minor, non violent offense with which they are charged is so unbelievably severe. When prosecutors offer "only" three years in prison when the penalties defendants could receive if they took their case to trial would be five, ten or twenty years . . . only extremely courageous (or foolish) defendants turn the offer down.

Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 87 (2012) (The New

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[19]Indeed, Dookhan defendants are especially deserving of Simmons-style protection where the conclusive presumption of Scott permits them to begin their litigation with a wrong already established. In contrast, defendants seeking to suppress evidence may freely testify in support of their motions even though a wrong has not been, and may never be, established.

Press) (paperback edition).

The ultimate issue under Scott is whether the Dookhan defendant has demonstrated "a reasonable probability that he would not have pleaded guilty had he known of Dookhan's misconduct." Scott, 467 Mass at 352. Although that question is to be answered on the basis of the "totality of the circumstances," id. at 358, Dookhan defendants, by definition, have "valid reasons for withdrawing [their] plea[s] that have nothing to do with innocence." United States v. Fisher, 711 F.3d 460, 467 (4th Cir. 2013) (internal citation omitted). Under these circumstances, permitting the Commonwealth -- under the guise of "exploring questions of credibility" -- to seek to compel a Dookhan defendant to confess on the stand is fundamentally unfair and vastly more prejudicial than probative.

The transcript of Hipolito Cruz's hearing on his motion to vacate (R.A. 1021-1094), and especially the prosecutor's cross-examination of Cruz (R.A. 1053-1070) provides this Court with a glimpse of what life under Scott will look like for the many thousands of Dookhan defendants who, like Cruz, rationally concluded that, in order to avoid a mandatory minimum, they "had no choice but to voluntarily plead guilty," United States v. Kupa, supra, and who have the audacity to seek

relief through the courts after being informed only years later that the government chemist who processed the evidence which put them in prison was permitted to function for years as an ends-justifies-the-means foot soldier in the war on drugs.

CONCLUSION

For the above-stated reasons, the Court should grant the requested relief.

Respectfully submitted,

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ADDENDUM

Table of Contents

MASSACHUSETTS PROVISIONS

Massachusetts Declaration of Rights

Article Twelve

No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

Massachusetts General Laws

Chapter 6, Section 172(a)(3)

(a) The department shall maintain criminal offender record information in a database, which shall exist in an electronic format and be accessible via the world wide web. Except as provided otherwise in this chapter, access to the database shall be limited as follows:

* * *

(3) A requestor or the requestor's legally designated representative may obtain criminal offender record information for any of the following purposes: (i) to evaluate current and prospective employees including full-time, part-time, contract, internship employees or volunteers; (ii) to evaluate applicants for rental or lease of housing; (iii) to evaluate volunteers for services; and (iv) to evaluate applicants for a professional or occupational license issued by a state or municipal entity. Criminal offender record information made available under this section shall be limited to the following: (i) felony convictions for 10 years following the disposition thereof, including termination

of any period of incarceration or custody, (ii) misdemeanor convictions for 5 years following the disposition thereof, including termination of any period of incarceration or custody, and (iii) pending criminal charges, which shall include cases that have been continued without a finding until such time as the case is dismissed pursuant to section 18 of chapter 278; provided, however, that prior misdemeanor and felony conviction records shall be available for the entire period that the subject's last available conviction record is available under this section; and provided further, that a violation of section 7 of chapter 209A and a violation of section 9 of chapter 258E shall be treated as a felony for purposes of this section.

Chapter 90, Section 22(f)

The registrar shall suspend, without hearing, the license or right to operate of a person who is convicted of a violation of any provision of chapter ninety-four C or adjudged a delinquent child by reason of having violated any provision of chapter ninety-four C; provided, however, that the period of such suspension shall not exceed five years; provided further, that any person so convicted who is under the age of eighteen years or who is adjudged a delinquent child by reason of having violated any provision of chapter ninety-four C, and is not licensed to operate a motor vehicle shall, at the discretion of the presiding judge, not be so licensed for a period no later than when such person reaches the age of twenty-one years.

Chapter 111, Section 12

The department shall make, free of charge, a chemical analysis of any narcotic drug, or any synthetic substitute for the same, or any preparation containing the same, or any salt or compound thereof, and of any poison, drug, medicine or chemical, when submitted to it by police authorities or by such incorporated charitable organizations in the commonwealth, as the department shall approve for this purpose; provided, that it is satisfied that the analysis is to be used for the enforcement of law.

Chapter 211, Section 3

The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue all writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws.

In addition to the foregoing, the justices of the supreme judicial court shall also have general superintendence of the administration of all courts of inferior jurisdiction, including, without limitation, the prompt hearing and disposition of

matters pending therein, and the functions set forth in section 3C; and it may issue such writs, summonses and other processes and such orders, directions and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration; provided, however, that general superintendence shall not include the authority to supersede any general or special law unless the supreme judicial court, acting under its original or appellate jurisdiction finds such law to be unconstitutional in any case or controversy. Nothing herein contained shall affect existing law governing the selection of officers of the courts, or limit the existing authority of the officers thereof to appoint administrative personnel.

St. 2013, c.3, §2A

To provide for certain unanticipated obligations of the commonwealth, to provide for alterations of purpose for current appropriations and to meet certain requirements of law, the sums set forth in this section are hereby appropriated from the General Fund unless specifically designated otherwise in this section, for the several purposes and subject to the conditions specified in this section and subject to the laws regulating the disbursement of public funds for the fiscal year ending June 30, 2013. These sums shall be in addition to any amounts previously appropriated and made available for the purposes of those items.

EXECUTIVE OFFICE FOR ADMINISTRATION AND FINANCE
Reserves.

1599-0054. For a reserve for costs of the investigation and response related to the breach at the Dr. William A. Hinton Laboratory at the State Laboratory Institute; provided, that the secretary of administration and finance may transfer funds from this item to state agencies, as defined in section 1 of chapter 29 of the General Laws, and to municipalities for this purpose; provided further, that these transfers shall occur on a monthly basis in incremental amounts based on costs to investigate or respond to the Hinton laboratory breach unless the secretary determines that funds are required to be transferred more or less frequently in order to meet necessary funding needs of state agencies and municipalities; provided further, that transfers shall be made in accordance with an executed memorandum of agreement between the secretary and each entity receiving funding, documenting the types of costs eligible for funding under this item and other terms of funding that the secretary considers appropriate, a copy of which shall be filed with the chairs of

the house and senate committees on ways and means within 10 days after the agreement's execution; provided further, that requests for funding of eligible costs pursuant to any such memorandum of agreement shall include documentation evidencing these eligible costs that the secretary, in the secretary's sole discretion, determines to be sufficient; provided further, that no transfers shall be made from this item before the filing of the applicable memorandum of agreement with the house and senate committees on ways and means; and provided further, that the secretary shall file a quarterly report with the chairs of the house and senate committees on ways and means which identifies, by funding recipient: (i) all funding requests and transfers made for the quarter that has most recently ended; (ii) the total funding requested and transfers by fiscal year; and (iii) projected funding required for the forthcoming quarter $30,000,000

* * *

CODE OF MASSACHUSETTS REGULATIONS

760 Code Mass Regs. §508(1)(d)

(1) In making its final determination the LHA shall determine if applicant and household members are qualified for public housing. An applicant and the applicant household shall be disqualified for public housing for any of the following reasons:

* * *

(d) The applicant or a household member in the past has engaged in criminal activity, or activity in violation of M.G.L. c. 151B §4, which if repeated by a tenant in public housing, would interfere with or threaten the rights of other tenants or LHA employees to be secure in their persons or in their property or with the rights of other tenants to the peaceful enjoyment of their units and the common areas of the housing development.

Massachusetts Rules of Criminal Procedure

Rule 36(b)

(b) Standards of a Speedy Trial. The time limitations in this subdivision shall apply to all defendants as to whom the return day is on or after the effective date of these rules. Defendants arraigned prior to the effective date of these rules shall be tried within twenty-four months after such effective date.

(1) Time Limits. A defendant, except as provided by subdivision (d)(3) of this rule, shall be brought to trial within the following time periods, as extended by subdivision (b)(2) of this rule:

* * *

(D) If a retrial of the defendant is ordered, the trial shall commence within one year after the date the action occasioning the retrial becomes final, as extended by subdivision (b)(2) of this rule. The order of an appellate court requiring a retrial is final upon the issuance by the appellate court of the rescript. In the event that the clerk of the appellate court fails to issue the rescript within the time provided for in Massachusetts Rule of Appellate Procedure 23, retrial shall commence within one year after the date when the rescript should have issued.

If a defendant is not brought to trial within the time limits of this subdivision, as extended by subdivision (b)(2), he shall be entitled upon motion to a dismissal of the charges.

UNITED STATES CODE

8 U.S.C. §1101(a)(43)(B)

(a) As used in this Act--

* * *

(43) The term "aggravated felony" means--

* * *

(B) illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act [21 USCS § 802]), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code).

8 U.S.C. §1227(a)(2)(B)(i)

(a) Classes of deportable aliens. Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

* * *

(2) Criminal Offenses

* * *

(B) Controlled substances.

(i) Conviction. Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

10 U.S.C. §504(a)

(a) Insanity, desertion, felons, etc. No person who is insane, intoxicated, or a deserter from an armed force, or who has been convicted of a felony, may be enlisted in any armed force. However, the Secretary concerned may authorize exceptions, in meritorious cases, for the enlistment of deserters and persons convicted of felonies.

20 U.S.C. §1091(r)

(r) Suspension of eligibility for drug-related offenses.

(1) In general. A student who is convicted of any offense under any Federal or State law involving the possession or sale of a controlled substance for conduct that occurred during a period of enrollment for which the student was receiving any grant, loan, or work assistance under this title shall not be eligible to receive any grant, loan, or work assistance under this title from the date of that conviction for the period of time specified in the following table:

If convicted of an offense involving:	The possession of a controlled substance:
First offense	1 year
Second offense	2 years
Third offense	Indefinite.

The sale of a controlled substance:	Ineligibility period is:
First offense	2 years

Second offense..... Indefinite

CODE OF FEDERAL REGULATIONS

24 C.F.R. 960.203(c)(3)

(c) In selection of families for admission to its public housing program, or to occupy a public housing development or unit, the PHA is responsible for screening family behavior and suitability for tenancy. The PHA may consider all relevant information, which may include, but is not limited to:

* * *

(3) A history of criminal activity involving crimes of physical violence to persons or property and other criminal acts which would adversely affect the health, safety or welfare of other tenants. (See § 960.204.)

24 C.F.R. 982.553

(a) Denial of admission. (1) Prohibiting admission of drug criminals.

(i) The PHA must prohibit admission to the program of an applicant for three years from the date of eviction if a household member has been evicted from federally assisted housing for drug-related criminal activity. However, the PHA may admit the household if the PHA determines:

(A) That the evicted household member who engaged in drug-related criminal activity has successfully completed a supervised drug rehabilitation program approved by the PHA; or

(B) That the circumstances leading to eviction no longer exist (for example, the criminal household member has died or is imprisoned).

(ii) The PHA must establish standards that prohibit admission if:

(A) The PHA determines that any household member is currently engaging in illegal use of a drug;

(B) The PHA determines that it has reasonable cause to believe that a household member's illegal drug use or a pattern of illegal drug use may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents; or

(C) Any household member has ever been convicted of drug-related criminal activity for manufacture or production of methamphetamine on the premises of federally assisted housing.

(2) Prohibiting admission of other criminals -- (i) Mandatory prohibition. The PHA must establish standards that prohibit admission to the program if any member of the household is subject to a lifetime registration requirement under a State sex offender registration program. In this screening of applicants, the PHA must perform criminal history background checks necessary to determine whether any household member is subject to a lifetime sex offender registration requirement in the State where the housing is located and in other States where the household members are known to have resided.

(ii) Permissive prohibitions. (A) The PHA may prohibit admission of a household to the program if the PHA determines that any household member is currently engaged in, or has engaged in during a reasonable time before the admission:

(1) Drug-related criminal activity;

(2) Violent criminal activity;

(3) Other criminal activity which may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents or persons residing in the immediate vicinity; or

(4) Other criminal activity which may threaten the health or safety of the owner, property management staff, or persons performing a contract administration function or responsibility on behalf of the PHA (including a PHA employee or a PHA contractor, subcontractor or agent).

(B) The PHA may establish a period before the admission decision during which an applicant must not to have engaged in the activities specified in paragraph (a)(2)(i) of this section ("reasonable time").

(C) If the PHA previously denied admission to an applicant because a member of the household engaged in criminal activity, the PHA may reconsider the applicant if the PHA has sufficient evidence that the members of the household are not currently engaged in, and have not engaged in, such criminal activity during a reasonable period, as determined by the PHA, before the admission decision.

(1) The PHA would have "sufficient evidence" if the household member submitted a certification that she or he is not currently engaged in and has not engaged in such criminal activity during the specified period and provided

supporting information from such sources as a probation officer, a landlord, neighbors, social service agency workers and criminal records, which the PHA verified.

(2) For purposes of this section, a household member is "currently engaged in" criminal activity if the person has engaged in the behavior recently enough to justify a reasonable belief that the behavior is current.

(3) Prohibiting admission of alcohol abusers. The PHA must establish standards that prohibit admission to the program if the PHA determines that it has reasonable cause to believe that a household member's abuse or pattern of abuse of alcohol may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents.

(b) Terminating assistance -- (1) Terminating assistance for drug criminals. (i) The PHA must establish standards that allow the PHA to terminate assistance for a family under the program if the PHA determines that:

(A) Any household member is currently engaged in any illegal use of a drug; or

(B) A pattern of illegal use of a drug by any household member interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents.

(ii) The PHA must immediately terminate assistance for a family under the program if the PHA determines that any member of the household has ever been convicted of drug-related criminal activity for manufacture or production of methamphetamine on the premises of federally assisted housing.

(iii) The PHA must establish standards that allow the PHA to terminate assistance under the program for a family if the PHA determines that any family member has violated the family's obligation under § 982.551 not to engage in any drug-related criminal activity.

(2) Terminating assistance for other criminals. The PHA must establish standards that allow the PHA to terminate assistance under the program for a family if the PHA determines that any household member has violated the family's obligation under § 982.551 not to engage in violent criminal activity.

(3) Terminating assistance for alcohol abusers. The PHA must establish standards that allow termination of assistance for a family if the PHA determines that a household member's abuse or pattern of abuse of alcohol may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents.

(c) Evidence of criminal activity. The PHA may terminate assistance for criminal activity by a household member as authorized in this section if the PHA determines, based on a preponderance of the evidence, that the household member has engaged in the activity, regardless of whether the household member has been arrested or convicted for such activity.

(d) Use of criminal record. -- (1) Denial. If a PHA proposes to deny admission for criminal activity as shown by a criminal record, the PHA must provide the subject of the record and the applicant with a copy of the criminal record. The PHA must give the family an opportunity to dispute the accuracy and relevance of that record, in the informal review process in accordance with § 982.554. (See part 5, subpart J for provision concerning access to criminal records.)

(2) Termination of assistance. If a PHA proposes to terminate assistance for criminal activity as shown by a criminal record, the PHA must notify the household of the proposed action to be based on the information and must provide the subject of the record and the tenant with a copy of the criminal record. The PHA must give the family an opportunity to dispute the accuracy and relevance of that record in accordance with § 982.555.

(3) Cost of obtaining criminal record. The PHA may not pass along to the tenant the costs of a criminal records check.

(e) In cases of criminal activity related to domestic violence, dating violence, or stalking, the victim protections of 24 CFR part 5, subpart L, apply.

Commonwealth v. Perez

Appeals Court of Massachusetts

July 31, 2014, Entered

13-P-1410

Reporter
2014 Mass. App. Unpub. LEXIS 898; 86 Mass. App. Ct. 1106; 12 N.E.3d 1052; 2014 WL 3746439

COMMONWEALTH *vs.* ROBERTO E. PEREZ.

Subsequent History: Appeal denied by Commonwealth v. Perez, 2014 Mass. LEXIS 817 (Mass., Oct. 1, 2014)

Judges: [*1] Kafker, Katzmann & Hines, JJ.

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, Roberto Perez, appeals from the denial of his motions to withdraw his guilty pleas on two counts of distributing a class A substance and one count of distributing a class B substance. He argues that the motions should have been granted because these charges were part of a nonseverable plea agreement that included five other charges for which he was allowed to withdraw his pleas;[1] and because his counsel was ineffective for failing to provide sufficient advice about the consequences of pleading guilty to criminal offenses for which deportation is presumptively mandatory. We reject the defendant's first argument and affirm the order denying his motion to withdraw his guilty pleas on that basis, but we reverse the order denying his motion for a new trial based on ineffective assistance, and remand for further proceedings on that claim.

[1] The motion to withdraw was granted for those five charges because Annie Dookhan, the crime laboratory employee who admitted to intentionally falsifying drug-related evidence in hundreds of criminal cases, had tested those drug samples. The Commonwealth filed a nolle prosequi [*2] in each of these matters after the motion was granted. The drug analyses relevant to the three charges at issue here, however, were conducted at a laboratory with no connection to Dookhan.

Standard of review. "A postsentence motion to withdraw a plea is treated as a motion for a new trial." Commonwealth v. Conaghan, 433 Mass. 105, 106, 740 N.E.2d 956 (2000). We review a judge's decision denying a motion for a new trial pursuant to Mass.R.Crim.P. 30(b), as appearing in 435 Mass. 1501 (2001), "only to determine whether there has been a significant error of law or other abuse of discretion." Commonwealth v. Grace, 397 Mass. 303, 307, 491 N.E.2d 246 (1986).

Severability of plea agreement. We are unpersuaded by the defendant's argument that the three charges at issue here were part of a nonseverable plea agreement with the Commonwealth requiring that the motion to withdraw be granted on all eight charges together, when he was allowed to withdraw five pleas and the Commonwealth filed a nolle prosequi on those five charges. Although "plea bargaining is often analogized to a contractual negotiation," Commonwealth v. Tirrell, 382 Mass. 502, 512, 416 N.E.2d 1357 (1981), the defendant has not shown that the parties intended for all of his guilty [*3] pleas to rise or fall together. See Commonwealth v. Smith, 384 Mass. 519, 523, 427 N.E.2d 739 (1981), quoting from Blaikie v. District Attorney for the Suffolk Dist., 375 Mass. 613, 618, 378 N.E.2d 1368 (1978) (defendant must have "reasonable grounds for assuming his interpretation of the bargain"). During the plea colloquy, the facts were read separately as to each charge, and the charges all related to different incidents that occurred over a period of weeks. Further, the defendant has cited no authority suggesting that pleas offered together are presumptively an indivisible package, in the sense that a postconviction event warranting relief on one or more charges requires relief on all charges. Cf. Commonwealth v. Tavernier, 76 Mass. App. Ct. 351, 352, 354-363, 922 N.E.2d 166 (2010) (vacating more than one dozen pleas because of inadequate plea colloquy while affirming convictions on two pleas where colloquy was adequate).[2] There was no abuse of discretion in denying the motion as to the three charges based on drug samples that had not been tampered with or tainted.

Ineffective assistance of counsel. We review the ineffective assistance claim under the two-prong standard set forth in Commonwealth v. Saferian, 366 Mass. 89, 96, 315 N.E.2d 878 (1974). In light of the recent decision in Commonwealth v. DeJesus, 468 Mass. 174, 9 N.E.3d 789 (2014), and based on the evidence in the record before us, the first prong is satisfied by defense counsel's failure to convey that the guilty pleas under consideration made the defendant, a noncitizen, subject to "presumptively mandatory" deportation. Id. at 175, quoting from Padilla v. Kentucky, 559 U.S. 356, 369, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010). See Commonwealth v. Chleikh, 82 Mass. App. Ct. 718, 724-725, 978 N.E.2d 96 (2012). After *DeJesus*, it was not enough for defense counsel to discuss "potential" immigration consequences, as she did here.

The second prong requires the defendant to show that he was prejudiced by counsel's ineffective assistance — that, but for counsel's error, it would have been rational for him to reject the plea deal and insist on going to trial. See Commonwealth v. Clarke, 460 Mass. 30, 46-47, 949 N.E.2d 892 (2011). The defendant has asserted through affidavits that special circumstances informed his desire to stay in the United States — the length of time [*5] he had been living in the country, a child and a fiancée who are United States citizens, as well as ties to his community — and that he would not have pleaded guilty if he knew the near-certain deportation consequences. See id. at 48. The motion judge, without the benefit of *DeJesus*, and without an evidentiary hearing, emphasized that the defendant "decided to accept the suspended sentence instead of going to trial and risking almost certain incarceration for a

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[2] Like the motion judge, we are not persuaded that the plea judge's reference to a "global resolution" meant that postconviction relief for some charges required relief [*4] for all charges.

significant period of time." *DeJesus* makes clear, however, that "[i]f an assessment of the apparent benefits of a plea offer is made, it must be conducted in light of the recognition that a noncitizen defendant confronts a very different calculus than that confronting a United States citizen. For a noncitizen defendant, preserving his 'right to remain in the United States may be more important to [him] than any jail sentence.'" *DeJesus, supra* at 184, quoting from *Padilla v. Kentucky, supra* at 368. We cannot, based on this record and these findings, discern if the motion judge took "into account the particular circumstances informing the defendant's desire to remain in the United States," or simply decided that he was not prejudiced [*6] because he was aware of "potential" immigration consequences and "got a very good deal" in avoiding prison time. *DeJesus, supra* (internal citation omitted). We therefore reverse the February 27, 2013, order denying the defendant's motion for a new trial based on ineffective assistance, and the case is remanded to the District Court for further proceedings and findings addressing the requirements of *DeJesus*. As discussed *supra*, we affirm the December 12, 2012, order denying the defendant's motion to withdraw guilty pleas.

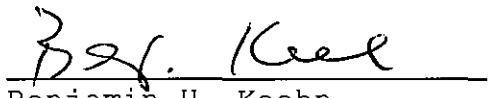
So ordered.

By the Court (Kafker, Katzmann & Hines, JJ.),

Entered: July 31, 2014.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to, Mass. R.A.P. 16(a)(6) (pertinent findings or memorandum of decision), 16(e) (references to the record), 16(f) (reproduction of statutes, rules, regulations), 16(h) (length of briefs), 18 (appendix to the briefs), and 20 (form of briefs, appendices, and other papers).



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NO. SJC-11764

KEVIN BRIDGEMAN

V.

DISTRICT ATTORNEY FOR THE SUFFOLK DISTRICT,
and others

BRIEF FOR THE COMMITTEE FOR PUBLIC COUNSEL SERVICES ON RESERVATION AND REPORT FROM THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY