COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC-11764

Kevin Bridgeman & others
Petitioners-Appellants

vs.

District Attorney for Suffolk County & another
Respondents-Appellees

ON A RESERVATION AND REPORT OF A SINGLE JUSTICE OF THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

BRIEF OF *AMICI CURIAE* FAMILIES AGAINST MANDATORY MINIMUMS & others

Aaron M. Katz
C. Thomas Brown
Mark Vaughn
ROPES & GRAY LLP
800 Boylston St.
Boston, MA 02199

Richard Marshall
ROPES & GRAY LLP
1211 Ave. of the Americas
New York, NY 10036

Barbara J. Dougan
Families Against Mandatory Minimums
P.O. Box 54
Arlington, MA 02476

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STATEMENT OF INTEREST OF *AMICI CURIAE*

This brief is being filed on behalf of 25 separate organizations whose interests include ensuring that the criminal justice system is fair to criminal defendants. Given the unprecedented scope of chemist Annie Dookhan's misconduct, many of these organizations have members who have been directly affected by the Hinton Lab scandal. *Amici* respectfully file this brief in order to address the so-called "exposure issue" (*i.e.*, the question of whether a "Dookhan defendant" who withdraws his prior plea pursuant to this Court's decision in *Commonwealth v. Scott* should, as a matter of law, be assured that, he will not face charges or punishment greater than that agreed to and imposed on his original, constitutionally defective plea if the Commonwealth chooses to re-prosecute).[1]

Lead *amicus* **Families Against Mandatory Minimums** ("FAMM") is a nonprofit, nonpartisan organization that advocates for sensible state and federal sentencing reform. FAMM's Massachusetts Project opposes mandatory minimums for drug offenses because they frequently force judges to impose lengthy prison

[1] *Amici*'s argument begins at page 10 of this brief.

sentences without consideration of a defendant's actual culpability. Incarcerated FAMM members often describe how the mere threat of a mandatory minimum sentence unfairly warps the plea bargaining process in the prosecution's favor. Many reluctantly choose to waive their right to a jury trial and instead plead guilty to a lesser charge because they would face incredibly harsh sentences if they were to be convicted at trial. FAMM respectfully files this brief because (1) it disagrees with the District Attorneys' position on the "exposure issue," and (2) the District Attorneys' arguments implicate mandatory minimum laws that FAMM opposes.

Amicus **Black and Pink** is an organization whose members include LGBTQ prisoners and that provides direct support and resources to lesbian, gay, bisexual, transgender, and queer people who are court-involved, incarcerated, and/or recently released from prison. Some of Black and Pink's members have been personally impacted by Annie Dookhan's misconduct and are entitled to relief under this Court's decision in *Commonwealth v. Scott*.

Amicus **Blackstonian** is newspaper and website created as a community service to the Black, Latino,

Cape Verdean and other peoples of color in Boston and the surrounding area. Reporting on issues of public importance to communities of color, Blackstonian has published extensively on the Hinton Lab crisis.

Amicus **Boston Workers Alliance** is a community organization led by unemployed and underemployed workers fighting for employment rights, including workers who continue to struggle because of prior convictions.

Amicus **The Center for Church and Prison, Inc.** is a resource and research center working towards community revitalization through sentencing and prison reform. Its work has focused in particular on the mass incarceration of nonviolent drug offenders and the War on Drugs' disproportionate impact on disadvantaged communities.

Amicus **Ex-Prisoners and Prisoners Organizing for Community Advancement** is a grassroots group of community organizers whose mission is to create resources and opportunities for those who have paid their debt to society. Its members include individuals whose prior convictions may be subject to vacatur under this Court's decision in *Scott*.

Amicus **Families for Justice as Healing** is an organization created by formerly incarcerated women. Its mission includes advocacy with respect to drug policies that lead to over-incarceration.

Amicus **Lawyers Committee for Civil Rights and Economic Justice** is a non-profit civil rights law office that specializes in law reform, litigation, and advocacy to redress race and national origin discrimination. The organization is concerned that Dookhan's misconduct caused a disproportionate impact on racial minorities and economically disadvantaged groups.

Amicus **New Start Project** is an organization that advocates for and supports individuals who are returning from incarceration and re-integrating themselves into the community. The individuals on behalf of whom the organization advocates include those who have been personally impacted by Dookhan's misconduct.

Amicus **The Real Cost of Prisons Project** brings together justice activists, artists, researchers and people directly experiencing the impact of mass criminalization to end mandatory minimum sentences and other excessively punitive sentences.

Amicus **Union of Minority Neighborhoods** works across Massachusetts to ensure that communities of color can effectively organize around the issues facing them, including the mass incarceration that has resulted from the War on Drugs.

Amicus **UU Mass Action** is the statewide advocacy network for the 20,000 Unitarian Universalists in Massachusetts. One of the organization's top priorities is to end unnecessary mass incarceration, and it opposes practices that compromise defendants' rights to due process.

Amicus **Arise for Social Justice** is a low-income, anti-oppression people's political organization in Springfield. It works to educate, organize and unite working poor people and people on entitlement programs to learn about and fight for social justice. The organization is a community leader in criminal justice issues, including the War on Drugs that has had a devastating impact upon the communities the organization serves.

Amicus **Charles Hamilton Houston Institute for Race and Justice** at Harvard Law School honors and continues the unfinished work of Charles Hamilton Houston, one of the 20th century's most important

legal scholars and litigators. Its long-term goal is to ensure that every member of our society enjoys equal access to the opportunities, responsibilities and privileges of membership in the United States. The organization is particularly concerned that the failure to fully address and remedy Dookhan's misconduct will exacerbate already existing racial disparities in the Commonwealth.

Amicus **Span** assists people who are or have been in prison to achieve healthy, productive and meaningful lives. The organization helps plan for former offenders' reintegration by preparing release plans with them, organizing resources, offering case management, employment training and procurement, and broad based services addressing reintegration from incarceration, recovery from substance abuse, and providing guidance to successfully negotiate the complex challenges of reintegration from incarceration.

Amicus **Tufts Center for the Study of Race and Democracy** promotes engaged research, scholarship, and discussion with a focus on racial justice and public policy. One of its research areas is in Race, Democracy, and Mass Incarceration.

Amicus **Brookline PAX** is a liberal and progressive advocacy group that was founded in 1962 and originally focused on banning nuclear tests.

Amicus **STRIVE/Boston Employment Service Inc.** helps chronically unemployed men and women find and keep jobs that promise sustainable livelihoods and personal growth. STRIVE believes that providing alternatives to incarceration, such as substance treatment, support, training, and employment, will help offenders make positive changes in their lives.

Amicus **National Lawyers Guild (Massachusetts Chapter**) is a progressive bar association of lawyers, legal workers, and law students dedicated to overcoming political, social, and economic injustices.

Amicus the **NAACP (New England Area Conference)** supports democracy, dignity and freedom and stands against all forms of injustice. The NAACP is particularly interested in the judicial response to the Hinton Lab scandal because the massive fraud committed by Dookhan likely caused disproportionate harm to persons of color.

Amicus **Partakers** is a faith-based non-sectarian organization that provides mentoring to incarcerated women and men who are enrolled in the Boston

University Prison Education Program. The organization typically does not involve itself in litigation but has added its name to this brief due to the extraordinary impact that the drug lab crisis has had on Massachusetts' criminal justice system.

Amicus **Prisoners' Legal Services of Massachusetts** is a non-profit organization established to protect and promote the civil and constitutional rights of Massachusetts prisoners and their families. The organization is concerned that the District Attorneys' position on the "exposure issue," if accepted, would breed further cynicism and disrespect for the criminal justice system.

Amicus **Survivor's, Inc.** is a group of low-income women and their allies who organize and educate around poverty, welfare and low-income survival issues. It offers training in writing, speaking, advocacy, computer skills, desktop publishing, organizing, membership and leadership. The organization is concerned that the Hinton Lab scandal has caused disproportionate harm low-income communities.

Amicus **Trinity Chapel** is an Episcopal church located in Shirley, Massachusetts that is committed to social justice and has sponsored many educational

forums on issues that affect the community, including criminal justice issues such as mandatory minimum sentencing laws and restorative justice. The church's rector, vestry, and parishioners wish to express their concern about the injustices that have been inflicted on many drug defendants by the fraudulent actions of Annie Dookhan.

Amicus **Criminal Justice Policy Coalition** (CJPC) is a non-profit organization dedicated to the advancement of effective, just, and humane criminal justice policy in Massachusetts. CJPC cares deeply about the outcome of this case because the Hinton Lab scandal should not continue to compromise the livelihoods of people who have already paid such a high price.

SUMMARY OF THE ARGUMENT

In *Commonwealth v. Scott*, this Court recognized that former Hinton Lab chemist Annie Dookhan had engaged in an "insidious," "egregious," and years-long misconduct that on behalf of the Commonwealth's prosecution team.[2] Acknowledging the stain that Dookhan's misconduct placed on the Commonwealth's criminal justice system, this Court crafted a rule that gave real meaning to the constitutional requirement that a defendant's guilty plea be knowing and intelligent. Specifically, this Court held that a defendant whose drug sample was tested by Dookhan is entitled to a "special evidentiary rule" that the prosecution team committed "egregious misconduct" in his case. Following well-established federal and state precedent, this Court then held that, if a defendant can show a "reasonable possibility" that he would not have entered into his plea had he known about this "egregious misconduct," the defendant is constitutionally entitled to withdraw his plea an unknowing and involuntary.

[2] The sordid history of Dookhan's misconduct, and the Commonwealth's failure to detect and correct that misconduct for nearly a decade, is well-documented. *Amici* will not retread that ground in this brief.

Scott does not provide restitution to defendants who pled guilty only after prosecutors confronted them with damning drug test results that Dookhan had manipulated; after all, those individuals lost years of freedom that they can never get back. Nor does *Scott* impose any sort of "penalty" on the Commonwealth's prosecution team; instead, where a defendant is allowed to withdraw his plea under *Scott*, the Commonwealth's prosecution team merely loses a constitutionally defective plea to which it was never entitled in the first place. *Scott*, therefore, was just an initial, not final, judicial response to Dookhan's "egregious misconduct."

This case now presents this Court an opportunity to address a critical question that *Scott* did not involve: what is the appropriate judicial penalty to impose on the Commonwealth so that misconduct similar to Dookhan's does not occur in the future?

Like the Petitioners, *amici* agree that the District Attorneys' arguments on the "exposure issue" — *i.e.*, the question of whether a "Dookhan defendant" who withdraws his prior plea pursuant to *Scott* should, as a matter of law, be assured that, he will not face charges or punishment greater than that agreed to and

imposed on his original, constitutionally defective plea if the Commonwealth chooses to re-prosecute — can be rejected on the basis of this Court's and the United States Supreme Court's precedents regarding "vindictive prosecution." But even those constitutional precedents aside, *amici* respectfully submit that this Court can and should, pursuant to its supervisory powers, adopt a categorical rule providing that, where a defendant withdraws his prior plea under *Scott*, the defendant's potential exposure if the Commonwealth re-prosecutes is *capped* at (1) the charges to which the defendant originally pled guilty and (2) the sentence that the trial court originally imposed. As *amici* explain further below, this Court's prior case law establish this Court's power to impose such a categorical rule under its supervisory power. Moreover, such a categorical rule is both consistent with *Scott* and necessary due to the *sui generis* circumstances of the Hinton Lab scandal.

The breadth and brazenness of Dookhan's misconduct is unprecedented, as this Court already recognized in *Scott*. If a defendant withdraws his plea under *Scott*, it is therefore not enough for the prosecution team to be "disgorged" of the conviction

it obtained unconstitutionally. Contrary to the District Attorneys' argument, the parties should not merely be returned to the *status quo ante*, with the Commonwealth free to begin its prosecution anew as though nothing happened and to pursue charges and punishment greater than those it agreed to in the prior defective plea. The reason for this is simple: in addition to disgorgement, the prosecution team as a whole must be subject to an meaningful litigation penalty so that it is (1) deterred from allowing misconduct on Dookhan's scale from occurring in the future and (2) incented to recognize and respond to the various red flags that existed, but were for too long ignored, with respect to Dookhan.

Under the categorical rule that *amici* propose, the litigation penalty imposed on the prosecution team would be far short of the most severe penalty available, which is dismissal without prejudice. Instead, where a defendant withdraws his plea under *Scott*, the prosecution team would be free to re-prosecute and would simply lose one of the weapons in its plea bargaining arsenal: the ability to threaten the defendant with greater punishment, including a

harsh mandatory minimum sentence, if he chooses to go to trial.

Whether grounded in the constitutional "vindictive prosecution" doctrine (as Petitioners propose) or this Court's supervisory powers (as *amici* propose), imposing such a litigation penalty on the prosecution team strikes an appropriate balance between the competing interests at stake. On the one hand, the Commonwealth will retain the right to re-prosecute where it deems appropriate. On the other hand, the public's substantial interest in ensuring the integrity of the criminal justice system will be given equal priority.

Moreover, because "Dookhan defendants" will be freed from the fear of greater punishment if they are re-prosecuted, and therefore will be far more likely to invoke their rights under *Scott*, the citizens of the Commonwealth will be able to obtain some meaningful idea about just how many guilty pleas were unconstitutionally obtained as a result of Annie Dookhan's misconduct. By contrast, the District Attorneys' arguments, if accepted, would keep "Dookhan defendants" — and thus the full impact of Annie Dookhan's misconduct itself — in the shadows.

ARGUMENT

With respect to the "exposure issue," the District Attorneys' argument is that, if a defendant withdraws his prior plea under *Scott*, the Commonwealth should be completely unconstrained in any further prosecution of the defendant.[3] Essentially, the District Attorneys' position is that Dookhan's misconduct is simply a run-of-the-mill *Brady* violation (*i.e.*, though acting in complete good faith, the prosecution team overlooks and thus fails to disclose material exculpatory evidence), for which vacatur of the tainted conviction is ordinarily a sufficient remedy.

For the reasons set forth in Petitioners' brief, this Court should reject the District Attorneys' position on the basis of the "vindictive prosecution" precedents that Petitioners cite. But, as *amici* urge below, it should also reject the District Attorneys'

[3] As Petitioners point out in their brief, most "Dookhan defendants" have already served out their prison terms and begun to reintegrate themselves into society. With respect to those defendants, the District Attorneys' position offers the following Hobson's choice: either live with their unconstitutional "Dookhan-tainted" pleas, or enforce their rights under *Scott* at the risk of returning to prison, possibly for many extra years, if re-prosecuted.

argument pursuant to the Court's supervisory powers. As this Court recognized in *Commonwealth v. Scott*, 476 Mass. 336 (2014), Dookhan's misconduct was *extraordinary* and necessitates an extraordinary judicial response.

I. Under this Court's Precedents, the Prosecution Team as Whole, and Not Just Dookhan Herself, Must Be Deemed Culpable for Dookhan's Misconduct.

Dookhan is the individual who committed intentional, criminal fraud. Nevertheless, under these unique circumstances, the prosecution team as a whole is culpable for Dookhan's misconduct and therefore must be subject to a meaningful litigation penalty, rather than simple disgorgement of constitutionally defective pleas.

This Court previously has held that, where the prosecution team taints or destroys evidence, "'[c]ulpability and 'bad faith' are not interchangeable terms. Negligence or inadvertence are less culpable than bad faith, but they are nevertheless culpable and must be accounted for . . . ." *Commonwealth v. Olszewski*, 401 Mass. 749, 757 n.7 (1988). Thus, regardless of whether Dookhan was the only intentionally bad actor, the prosecution team as a whole is culpable under the law. At a bare

minimum, the prosecution team as a whole — including the prosecutors who during the plea bargaining process unwittingly used drug tests that Dookhan performed — inadvertently made use of Dookhan's misconduct to the detriment of defendants.

In actuality, however, there are numerous indicators that it was the negligence (and perhaps even recklessness) of numerous other members of the prosecution team that allowed Dookhan's misconduct to grow to the scale and to continue for as many years as it did.

For many years, numerous red flags suggested that something was amiss with Dookhan's testing results. These red flags were missed and/or ignored because members of the prosecution team were not paying proper attention and, in some instances, were deliberately ignorant. For example, during her tenure at the Hinton Lab, Dookhan was purportedly testing over 500 samples per month when her fellow Hinton Lab chemists were testing between 50 and 150 samples per month. *See* Massachusetts State Police Report of Interview of Michael Lawler 2 (Aug. 7, 2012). With this claimed level of productivity, one might have expected Dookhan to be hunched over her microscope twenty-four hours a

day, seven days a week. On the contrary, however, Dookhan's supervisor *never* saw her in front of a microscope. *See* Massachusetts State Police Memorandum of Interview of Peter Piro 1 (Aug. 27, 2012). Yet, rather than leading the supervisor to investigate, the Hinton Lab deemed Dookhan a "super woman." *See* Massachusetts State Police Memorandum of Interview of Nicole Medina 1 (Aug. 28, 2012).

Moreover, as Petitioners point out, drug test results delivered by Dookhan were, on average, extreme outliers. This was particularly true with respect to drug weight, typically the critical element to a putative defendant's potential prison sentence and therefore a crucial weapon in prosecutors' plea bargaining arsenal. On average, samples tested by Dookhan came back at three times the weight as samples tested by her Hinton Lab colleagues, as noted in the affidavit of Thomas Workman filed with Petitioners' petition. At the very least, this should have led prosecutors to conduct some sort of internal investigation. Unfortunately, the red flags were ignored.

Perhaps most perplexing, when a Hinton Lab colleague learned that Dookhan did not, as she claimed,

have a master's degree in chemistry, Dookhan's supervisors simply allowed her to correct her curriculum vitae without any additional repercussions. *See* Massachusetts State Police Memorandum of Interview of Elizabeth O'Brien 3 (Aug. 7, 2012).[4]

It was only after Dookhan was caught red-handed in June 2011, removing samples from the Hinton Lab's evidence room and forging the initials of an evidence officer in her log book, that anyone on the prosecution team did any sort of investigation of Dookhan's testing track record. *See* Commonwealth's Statement of the Case, Commonwealth vs. Annie Dookhan, No. SUCR 2012-1115, at 1 (Dec. 20, 2012). Though suspended from performing additional lab tests, the prosecution team still allowed Dookhan to testify as an expert witness through February 2012. Katharine Q. Seelye and Jess Bidgood, *Prison for a State Chemist Who Faked Drug Evidence*, N.Y. Times, Nov. 22, 2013, at A9.

The Petitioners' brief provides this court with a more detailed accounting of all of the red flags that

[4] Astonishingly, after some time passed, Dookhan returned the phantom master's degree to her resume, and although the same coworker was aware of this fact, Dookhan continued unpunished and uninvestigated. *Id.*

should have led — but inexplicably did not lead — prosecution team members to investigate and terminate Dookhan many years before Dookhan's misconduct was finally publicly disclosed and prosecuted. Rather than repeat this litany of red flags here, *amici* respectfully refer this Court back to Petitioners' brief. The important point is that Dookhan's misconduct is not something that occurred in spite of the vigilance of the prosecution team. Instead, as the Commonwealth's Inspector General found, the myriad failures of Dookhan's superiors "contributed to Dookhan's ability to commit her acts of malfeasance." Office of the Inspector General of the Commonwealth of Massachusetts, *Investigation of the Drug Laboratory at the William A. Hinton State Laboratory Institute 2002–2012*, at 1 (March 4, 2014).

II. Because the Prosecution Team as Whole Was Legally Culpable for Dookhan's Misconduct, the Prosecution Team Should Be Subject to a Meaningful Litigation Penalty.

In *Scott*, this Court recognized that Dookhan's misconduct compromised "the integrity of the criminal justice system, the efficient administration of justice in responding to such potentially broad-ranging misconduct, and . . . myriad [other] public

interests . . . ." *Scott*, 467 Mass. at 544–45. The District Attorneys' position on the "exposure issue" — namely, that the only consequence the prosecution team should suffer is losing pleas that were unconstitutionally obtained — fails to account for the breadth and severity of Dookhan's misconduct.

This Court's precedents establish that, when a party has committed severe litigation misconduct, merely restoring the *status quo ante* is inadequate. This is because restoration of the *status quo ante* alone does not punish the party that is in the wrong and therefore does nothing to deter similar misconduct in the future. For example, this Court has held that, where a party in a civil case destroys, alters, or conceals evidence, "various sanctions, including dismissal or judgment by default, may be imposed for that violation." *Fletcher v. Dorchester Mut. Ins. Co.*, 437 Mass. 544, 551 (2002). As another example, this Court has held that a criminal defendant "forfeits" his right to object to the admission of hearsay if the defendant's own wrongdoing is what rendered the hearsay declarant unavailable to testify at trial. *Commonwealth v. Edwards*, 444 Mass. 526, 534-535 (2005). This Court in *Edwards* explained that this rule is

"based on a public policy protecting the integrity of the adversary process by deterring litigants from acting on strong incentives to prevent the testimony of an adverse witness" and "discouraging untoward behavior toward witnesses by defendants." *Id.* at 535-536 (internal quotation marks and citation omitted).

In addition, this Court has recognized that the need for a judicial remedy that deters, and therefore punishes, the entire prosecution team exists even where, as here, there is no suggestion that the lead prosecutors themselves were knowingly involved in the intentional misconduct of their agent. This Court's decision in *Commonwealth v. Manning*, 373 Mass. 438 (1977), is particularly instructive. In *Manning*, the defendant was arrested and charged with selling cocaine. After the defendant retained counsel, two special investigative agents, working as part of the prosecution team, contacted the defendant "'without the knowledge or permission'" of his counsel. *Id.* at 440. Although the lead prosecutor neither endorsed nor knew about the agents' misconduct, this Court held that the agents' misconduct was so severe that the indictment against the defendant should be dismissed with prejudice. *Id.* at 443. This Court explained

that, although dismissal with prejudice was an unusual remedy, a "stronger deterrent against the type of conduct demonstrated here is necessary." *Id.* at 444. This Court explained further that "[p]rophylactic considerations assume paramount importance in fashioning a remedy for deliberate and intentional violations of constitutional rights" and that "such deliberate undermining of constitutional rights must not be countenanced." *Id.*

Manning, which involved litigation misconduct no more egregious and certainly less extensive than Dookhan's, should guide the Court's resolution of the "exposure issue." As *Manning* demonstrates, stronger-than-usual medicine is required as a judicial response to Dookhan's more-extreme-than-usual misconduct, regardless of whether Dookhan herself was the only *intentional* wrongdoer and regardless of whether individual prosecutors were also unwitting victims of Dookhan's fraud. Accordingly, with respect to "Dookhan defendants," such as the Petitioners, the prosecution team should, as a matter of judicial prudence and fairness, be subject to a meaningful litigation penalty.

Absent a meaningful litigation penalty, a drug lab scandal like this will be more likely to re-occur in the future. As the United States Supreme Court has recognized, there are significant institutional pressures for drug labs to alter or shade evidence in favor of the prosecution.[5] *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318 (2009); *see also* Craig M. Cooley, *Nurturing Forensic Science: How Appropriate Funding and Government Oversight Can Further Strengthen the Forensic Science Community*, 17 Tex. Wesleyan L. Rev. 441, 464-466, 479 (2011) (demonstrating that forensic scientists are subject to a general risk of bias in favor of the law enforcement agencies and prosecutors' offices they serve). At the same time, prosecutors are naturally (even if only subconsciously) reluctant to initiate thorough investigations into drug labs or individual chemists whose work, like Dookhan's, is consistently pro-prosecution. Meaningful judicial penalties are thus

[5] In North Carolina, for example, investigators learned that the State Bureau of Investigation's crime lab had made it a practice to withhold exculpatory evidence from defendants. According to one lab technician, this practice was something that his supervisor had ordered. *See* North Carolina Dep't of Justice, An Independent Review of the SBI Forensic Laboratory 7 (2010).

required to ensure that all members of the prosecution team to remain alert to, and to follow up on, the types of red flags that existed for years with respect to Dookhan.

III. Precluding the Prosecution Team From Seeking Greater Penalties Against Defendants Who Withdraw Their Pleas Under *Scott* Is an Appropriate Litigation Penalty.

The most significant litigation penalty would be a penalty equivalent to the one that this Court imposed in *Manning*: reversing the convictions the defendants whose pleas were unknowing and involuntary under *Scott* and barring the Commonwealth from re-prosecuting them. By comparison, the outcome that Petitioners and *amici* propose is modest, though still meaningful enough to serve as a proper punishment and deterrent, because it goes significantly further than just "disgorging" the Commonwealth of an improperly obtained conviction and placing the parties back in the *status quo ante*.

The litigation penalty that *amici* propose is also consistent with justice and fairness. As a practical matter, *amici*'s proposed litigation penalty does little more than remove from the District Attorneys' plea-bargaining arsenal a weapon that is routinely

criticized for its tendency to warp the plea bargaining process in drug cases: the prosecutor's ability to threaten the defendant with more severe charges that carry harsh mandatory minimums if the defendant does not agree to waive his trial rights and plead guilty to a lesser offense.

Mandatory minimum sentences have been a feature of the Massachusetts Controlled Substance Act since its inception. *See* 1971 Mass. Acts 1044. Because of their arbitrary, one-size-fits-all nature, mandatory minimums routinely force trial judges to impose prison sentences that far exceed what the defendant deserves. Mandatory minimums, however, do not just adversely impact defendants who refuse to waive their trial rights. Mandatory minimums also provide prosecutors a tool with which they may "bludgeon defendants into effectively coerced plea bargains," including even defendants who believe that they are innocent of all wrongdoing. Jed S. Rakoff, "Why Innocent People Plead Guilty," N.Y. Rev. of Books, Nov. 20, 2014. As Chief Justice Gants stated earlier this year:

> Prosecutors often will dismiss a drug charge that carries a mandatory minimum sentence in return for a plea to a non-mandatory offense with an agreed-upon sentence recommendation, and defendants

> often have little choice but to accept a sentencing recommendation higher than they think appropriate because the alternative is an even higher and even less appropriate mandatory minimum sentence.

Ralph D. Gants, Chief Justice of the Supreme Judicial Court, *Annual Address: State of the Judiciary* 3 (Oct. 16, 2014).

The District Attorneys clearly understand that, if this Court were to accept their position on the "exposure issue," it would mean that prosecutors will possess an unfettered ability to threaten "Dookhan defendants" who avail themselves of their rights under *Scott* with the full panoply of mandatory minimums. The end result to this would not merely be the warping of the plea bargaining process. Rather, the knowledge that withdrawing his plea under *Scott* might be a Pyrrhic victory would warp a defendant's decision whether to enforce his rights under *Scott* at all. Indeed, even defendants who steadfastly maintain their innocence would likely forego their *Scott* rights due to fear that they may be found guilty at trial and

sentenced to a mandatory minimum far greater than the sentence originally imposed on them.[6]

This Court should not countenance that result. The victims of Dookhan's misconduct should not be deterred from effectively challenging that misconduct, even in cases in which a particular prosecutor was not culpable for Dookhan's misconduct. The prosecution team, therefore, should not simply be returned to the *status quo ante*, equipped with a weapon — the threat of greater charges and punishment, including harsh mandatory minimums — that will clearly deter "Dookhan defendants" from enforcing the rights that this Court provided to them in *Scott*. If the prosecution team retains that weapon, it will turn this Court's decision in *Scott* into a hollow response to Dookhan's misconduct.

[6] The District Attorneys suggest that this Court should treat defendants whose convictions were based on a trial differently from those whose convictions were based on a guilty plea. (*See* Opp. to Pet. 19.) This argument misses the mark. Whether the result of a plea or a jury finding, a conviction obtained as a result of Dookhan's misconduct is a conviction obtained as a result of litigation misconduct.

IV. The Result That Petitioners and *Amici* Propose Is the Only Result That Will Ensure That the Extent of Dookhan's Misconduct Is Exposed to the Full Sunshine That the Public Deserves.

The District Attorneys surely understand that, if it were adopted, their position on the "exposure issue" would substantially reduce the number of pleas withdrawn under *Scott* (and potentially eliminate them altogether). This is because most "Dookhan defendants," particularly the ones who already have completed their prison terms and begun reintegrating themselves into society, would be too fearful of increased punishment to assert their rights under *Scott*.

The unavoidable flip side to this is that the result that Petitioners and *amici* propose will result in many "Dookhan defendants" moving to withdraw their pleas under *Scott* (though not all will be able to satisfy the second prong of *Scott*'s two-pronged test).[7] Thus, as Petitioners acknowledge in their brief, adopting the result that Petitioners and *amici* propose on the "exposure issue" will lead to the expenditure of judicial resources that could be saved if "Dookhan

[7] For "Dookhan defendants" who already have served out their prison terms, withdrawing their pleas under *Scott* essentially amounts to an effort to clear their record of the prior conviction.

defendants" simply remained in the shadows. (*See* Pet. Br. 17.)

But the expenditure of judicial resources here is a good thing, not a bad thing. If a defendant's guilty plea was the result of Dookhan's misconduct, the public deserves to know that. The public's interest in knowing the full extent of Dookhan's misconduct — and the full extent of the damage she caused to individual defendants — means that such a defendant should feel free to come to court and tell his story, not compelled to remain in the shadows for fear that withdrawing his plea under *Scott* could be the first step toward a greater punishment. Anything that deters "Dookhan defendants" from asserting their rights under *Scott* deprives the public of the full sunshine that it deserves. Only full sunshine can disinfect the stain that Dookhan's conduct left on the Commonwealth's criminal justice system.

CONCLUSION

For the reasons stated in Petitioner's brief, and the reasons stated in *amici curiae*'s brief, the Court should find in favor of the Petitioners on the "exposure issue."

Respectfully Submitted,

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Aaron M. Katz (BBO No. 662457)
C. Thomas Brown (BBO No. 667558)
Mark D. Vaughn (BBO No. 673002)
ROPES & GRAY LLP
Prudential Tower
800 Boylston Street
Boston, MA 02199-3600
Tel: 617-951-7000
Fax: 617-951-7050
Aaron.Katz@ropesgray.com
Thomas.Brown@ropesgray.com
Mark.Vaughn@ropesgray.com

Richard C. Marshall
ROPES & GRAY LLP
1211 Avenue of the Americas
New York, NY 10019

Barbara J. Dougan (BBO No. 558932)
Families Against Mandatory Minimums
P.O. Box 54
Arlington, MA 02476

Counsel for Amici Curiae

Dated: December 23, 2014

Certification of Compliance

Pursuant to Mass. R.A.P. 16(k), I hereby certify that this brief complies in all material respects with the Massachusetts Rules of Appellate Procedure pertaining to the filing of briefs.

_____

Aaron M. Katz (BBO No. 662457)

Certificate of Service

I, Aaron M. Katz, certify that on this day I caused to be served by hand an original and seventeen copies of the foregoing brief with the clerk of this Court, along with an electronic copy on compact disc. I further certify that I caused to be served two copies of the foregoing brief on counsel for each party separately represented in this matter by sending such copies via e-mail to:

Matthew R. Segal
American Civil Liberties Union
of Massachusetts
211 Congress Street
Boston, Massachusetts 02110

Daniel N. Marx
Foley Hoag LLP
115 Seaport Boulevard
Boston, Massachusetts 02210

Attn: Vincent J. DeMore
District Attorney for Suffolk County
One Bulfinch Place
Boston, Massachusetts 02114

Attn: Quentin Weld
District Attorney for Essex County
10 Federal Street
Salem, Massachusetts 01970

Signed this 23rd day of December, 2014.

Aaron M. Katz (BBO No. 662457)