

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-11764

KEVIN BRIDGEMAN, YASIR CREACH AND MIGUEL CUEVAS

v.

DISTRICT ATTORNEY FOR SUFFOLK COUNTY AND DISTRICT
ATTORNEY FOR ESSEX COUNTY

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS AND THE MASSACHUSETTS ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS AS *AMICI CURIAE*

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Dated: December 18, 2014

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ISSUE PRESENTED

When, on behalf of the Commonwealth, one of its employees repeatedly, systematically, and in bad faith falsifies evidence against criminal defendants to induce plea agreements or guilty verdicts, is the Commonwealth required to timely disclose its misconduct to the affected defendants, or their counsel, if it wants to avoid having the convictions vacated and the underlying charges dismissed with prejudice?

STATEMENT OF INTEREST OF *AMICI CURIAE*¹

This brief is submitted on behalf of the National Association of Criminal Defense Lawyers ("NACDL") and the Massachusetts Association of Criminal Defense Lawyers ("MACDL") as *amici curiae* in support of petitioners. NACDL is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL, founded in 1958, has a nationwide membership of approximately 10,000 lawyers including private

¹ Undersigned counsel confirm that no counsel for a party authored any part of this brief, nor did any person or entity, other than *amici* or its counsel, provide financial support for the preparation or submission of this brief.

criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL files numerous *amicus* briefs each year in the United States Supreme Court and other courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

This case presents a question of great importance to NACDL because in courtrooms across the nation, whether by verdict or by guilty plea, accused persons are convicted without ever having seen information that was favorable to their defense. The fundamental due process right enshrined in *Brady v. Maryland* to have such favorable information disclosed has been violated in every one of the tens of thousands of cases handled by Annie Dookhan. Furthermore, the closely related duty to disclose favorable information to the defense imposed on prosecutors by Massachusetts Rule of Professional Conduct 3.8 ("Rule 3.8") has also been violated. Together, *Brady* and Rule 3.8 should work to ensure not only that defendants going to trial

are notified of all favorable information held by the prosecution, but also that defendants have that information before making the decision to plead guilty.

The frequency with which such information remains undisclosed, however, and the role such non-disclosure plays in wrongful convictions prompted NACDL and other partners to undertake a study of *Brady* claims litigated in federal courts over a five-year period and issue a report, *Material Indifference: How Courts Are Impeding Fair Disclosure in Criminal Cases*.

Kathleen "Cookie" Ridolfi, et al., Nat'l Assoc. of Criminal Defense Lawyers, 1 (2014), <http://www.nacdl.org/report/materialindifference/pdf/>.

This case presents an important opportunity for NACDL to share with this Court the product of its work both relating to its publication of *Material Indifference* and otherwise. NACDL's other work on disclosure of exculpatory information includes collaboration with the Department of Justice and the FBI on the Microscopic Hair Comparison Analysis Review Project, a joint effort of law enforcement and the criminal defense community to ensure meaningful notification to defendants nationwide whose

convictions have been tainted by scientifically erroneous and misleading testimony originating from the FBI's crime lab. NACDL's commitment to this DOJ/FBI Review underscores our mission to ensure every defendant the right to be convicted through a fair process and the right to appropriate remedies in the post-conviction setting when later-discovered evidence casts doubt on the process by which a conviction was obtained.

MACDL is an incorporated association representing more than 1,000 experienced trial and appellate lawyers who are members of the Massachusetts Bar and who devote a substantial part of their practices to criminal defense. MACDL devotes much of its energy to identifying, and attempting to avoid or correct, problems in the criminal justice system. It files *amicus curiae* briefs in cases raising questions of importance to the administration of justice. MACDL is the Massachusetts affiliate of NACDL.

INTRODUCTION AND

SUMMARY OF THE ARGUMENT OF AMICI CURIAE

Petitioners' Opening Brief demonstrated not only why this Court must fashion a remedy for tens of thousands of defendants whose convictions have been

tainted by the active malfeasance of former state employee Annie Dookhan, but also that the Constitution's due process guarantee requires that such a remedy be systematic, applicable on its face to all affected defendants.

But the delay and prejudice suffered by Petitioners, and explained at length in their Opening Brief, are not the only reasons why the Constitution and the law require that the onus for solving the problem it created must rest with the Commonwealth. The obligations imposed on the Commonwealth and its lawyers by the Constitution and by the Rules of Professional Conduct are further reasons why this Court should declare a systematic remedy which the Commonwealth must implement in order to avoid having the charges upon which Petitioners have been convicted dismissed with prejudice.

Specifically, the constitutional requirements articulated in *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and the ethical requirements set forth in Rule 3.8 demand that any remedy fashioned by this Court require the Commonwealth and its prosecutors to bear responsibility for rectifying the problem created by Dookhan's misconduct. This includes:

- Promptly notifying all defendants whose cases Dookhan worked on;
- Seeking to have all convictions of defendants whose cases could have been affected vacated; and
- Promptly re-examining the untainted evidence in each case to decide whether to re-prosecute.

The Commonwealth must be ordered to take these steps without any further delay.

ARGUMENT

Due Process and the Rules of Professional Conduct Require the Prosecutors to Promptly Notify Individual Defendants of the Exculpatory Evidence in Each Affected Case.

The first, and most critical step, of any remedy is requiring the Commonwealth to immediately notify all defendants whose cases could have been affected by Dookhan's work. Although Dookhan's misconduct was first discovered in June 2011, the Commonwealth did not disclose her misconduct to the public for more than a year. Goldbach Aff., Att. C at R. 86-87. It then took another two years for the Commonwealth to complete an assessment of all defendants "whose drug cases potentially may have been affected by the alleged conduct of Ms. Dookhan." R. 249.

Although the Commonwealth now has a list of 40,323 names of potentially affected individuals, CPSC has only appointed counsel to approximately one-fifth of all of the potentially affected defendants. R. 271, ¶ 12 (counsel has been appointed in 8,700 of the 40,323 affected cases). There is no justifiable excuse for the delay in notifying and providing relief for the remaining four-fifths of affected defendants. The remedy fashioned by this Court should require such prompt, individual notification for all potentially affected defendants, not just the one-fifth that has been fortunate enough to have already been appointed counsel.

A. Because the Commonwealth Was Aware of This Exculpatory Evidence at the Time of Each Trial or Plea, *Brady v. Maryland* Requires Prompt Disclosure to Each Defendant.

The central evil against which the rule of *Brady v. Maryland* is designed to protect is present in each of the tens of thousands of cases that Dookhan touched. In every case, the Commonwealth suppressed material evidence in its possession which was favorable, even exculpatory, to the defense. As the Court in *Brady* explained, its affirmative requirement of disclosure of exculpatory evidence is based on the

principle that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Brady*, 373 U.S. at 87. The Supreme Court in *Brady* went on to explain that failing to disclose exculpatory evidence in possession of the state "casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice." *Id.* at 87-88; see also, U.S. Dep't of Justice, Office of Inspector Gen., *An Assessment of the 1996 Dep't of Justice Task Force Review of the FBI Laboratory*, 83 (July 2014), <http://www.justice.gov/oig/reports/2014/e1404.pdf> (concluding, among other things, that in cases tainted by unreliable or overstated testimony of FBI laboratory analysts, Justice Department prosecutors should "[p]rovide case-specific notice to currently and previously incarcerated defendants whose cases were reviewed by the Task Force" unless the issue has been previously litigated or deemed immaterial).

It is hard to imagine a set of circumstances that more directly illustrates the notion of state actors designing and building criminal proceedings in a manner inconsistent with standards of justice than the

set present here: Dookhan pre-determined that individuals charged with controlled substance offenses were guilty, completely abdicated her responsibility to reliably and objectively test the controlled substances, then ensured the convictions of these individuals by falsifying evidence. And the Commonwealth's own description of Dookhan's conduct highlights this very point: "[Dookhan] ensured that samples would test positive for controlled substances thus eviscerating both the integrity of the lab's internal testing processes, and the concomitant fact finding process that was a jury's to perform." R. 702. Meanwhile, the Commonwealth failed to disclose this information to Petitioners prior to their convictions *and the Commonwealth and its lawyers seemingly still have not notified individual Petitioners* of this information today.

The Commonwealth was both the "architect" and the builder responsible for the flaws that cracked the foundation of its cases against Petitioners and that have shaken the foundation of the criminal justice system in Massachusetts. *See, e.g., Commonwealth v. Charles*, 466 Mass. 63, 65, 992 N.E.2d 999, 1003-04 (2013) ("In October, 2012, the Chief Justice of the

Superior Court assigned specific judges in seven counties to preside over special 'drug lab sessions' From October 15 to November 28, the judges presiding over the drug lab sessions held 589 hearings, placing an enormous burden on the Superior Court."). And while this Court is empowered to design the solution for this problem, *Brady* requires that the Commonwealth and its lawyers – not the defendants or their lawyers – implement any such solution.

1. That a *Brady* violation occurred in each Dookhan defendant's case is clear.

To establish a *Brady* violation, a defendant must show that the prosecutors failed to disclose material evidence in their possession that was favorable to the defendants. See, e.g., *Drumgold v. Callahan*, 707 F.3d 28, 38 (1st Cir. 2013). All of the Dookhan-tainted convictions meet the following three requirements. First, there is no question that Dookhan's misconduct was not disclosed to the defendants on whose cases she worked; that has never been contested. Second, although the prosecutor may not have known about Dookhan's misconduct, Dookhan was part of the state law enforcement team and therefore her knowledge of her own misconduct is imputed onto the prosecutor for