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

PETITION PURSUANT TO G.L. c. 211, § 3
AS RESERVED AND REPORTED BY JUSTICE BOTSFORD

REPLY BRIEF FOR PETITIONERS-APPELLANTS KEVIN BRIDGEMAN, YASIR CREACH AND MIGUEL CUEVAS

Matthew R. Segal,
BBO #654489
Carlton E. Williams,
BBO #600973
ACLU of Massachusetts
211 Congress St.
Boston, MA 02110
(617) 482-3170
msegal@aclum.org

Emma A. Andersson,
CA #260637
Ezekiel R. Edwards,
NY #4189304
ACLU Criminal Law
Reform Project
125 Broad St., 18th Fl.
New York, NY 10004
(212) 284-7365
eandersson@aclu.org

Daniel N. Marx,
BBO #674523
Christopher E. Hart,
BBO #625031
Daniel McFadden,
BBO #676612
Caroline S. Donovan,
BBO #683274
Shrutih Ramlochan-Tewarie,
BBO #685467
Foley Hoag LLP
155 Seaport Blvd.
Boston, MA 02210
(617) 832-1000
dmarx@foleyhoag.com

Dated: January 2, 2015

TABLE OF CONTENTS

INTRODUCTION.....1

ARGUMENT.....2

I. The District Attorneys ignore the undisputed evidence that prosecutors are actively discouraging challenges to tainted convictions.....2

A. Prosecutors are actively discouraging Petitioners and other Dookhan defendants from exercising their post-conviction rights.....3

B. Petitioners fear the “reasonable likelihood” of retaliation, whether or not prosecutors secretly harbor any vindictive intent.....6

C. This Court should rectify the harm caused by the egregious government misconduct.....9

II. The unconstitutional post-conviction delays are real and must be remedied.....12

A. Delays due to the magnitude of the drug lab scandal, but falling outside the Rule 30 process, cannot be ignored.....13

B. Uncounseled Dookhan defendants continue to suffer ongoing delays.....16

C. Petitioners do not seek “special rights”.....18

III. Petitioners’ proposed remedy is warranted.....19

CONCLUSION.....20

TABLE OF AUTHORITIES

CASES

Chaffin v. Stynchcombe,
412 U.S. 17 (1973) 5, 7

Colten v. Kentucky,
407 U.S. 104 (1972) 7

Commonwealth v. Charles,
466 Mass. 63 (2013) 8, 12, 18

Commonwealth v. Cronk,
396 Mass. 194 (1985) 9

Commonwealth v. DeJesus,
468 Mass. 174 (2014) 11

Commonwealth v. DeMarco,
387 Mass. 481 (1982) 11

Commonwealth v. Gonzalez,
86 Mass. App. Ct. 253 (2014) 15

Commonwealth v. Hyatt,
419 Mass. 815 (1995) 6

Commonwealth v. Libby,
411 Mass. 177 (1991) 15

Commonwealth v. Merry,
453 Mass. 653 (2009) 9

Commonwealth v. Ravenell,
415 Mass. 191 (1993) 7

Commonwealth v. Rollins,
354 Mass. 630 (1968) 11

Commonwealth v. Scott,
467 Mass. 336 (2014) 8, 9, 19

Commonwealth v. Therrein,
359 Mass. 500 (1971) 11

Commonwealth v. Tirrell,
382 Mass. 502 (1981) 6

Commonwealth v. Weichel,
403 Mass. 103 (1988) 15

Ferrara v. United States,
372 F. Supp. 2d 108 (D. Mass. 2005), aff'd ,
456 F.3d 278 (1st Cir. 2006) 2, 9

Ferrara v. United States,
384 F. Supp. 2d 384 (D. Mass. 2005) 9

Gaines v. Manson,
481 A.2d 1084, 1096 (Conn. 1984) 9

Lavallee v. Justices in Hampden Superior Court,
442 Mass. 228 (2004) ..... passim

North Carolina v. Pearce,
395 U.S. 711 (1969) 6

United States ex rel. Williams v. McMann,
436 F.2d 103 (2d Cir. 1970) 11

United States v. Goodwin,
457 U.S. 368 (1982) 6, 7

United States v. LaDeau,
734 F.3d 561 (6th Cir. 2013) 3

In re Williams,
378 Mass. 623 (1979) 16

INTRODUCTION

The District Attorneys' brief amounts to a negotiating playbook. Each of its arguments, if accepted, would maximize prosecutorial power to discourage challenges to convictions tainted by the egregious government misconduct at the Hinton Lab.

On the exposure issue -- whether Petitioners can be exposed to greater punishments than resulted from their wrongful convictions -- the District Attorneys demand a do-over. It is too late, however, for Dookhan cases to proceed as if an unprecedented, criminal fraud had never happened, and as if Petitioners had not already served their sentences. The District Attorneys also fail to reckon with their own actions. Right now, prosecutors are impermissibly chilling the exercise of post-conviction rights by threatening to reinstate more serious charges, or withdraw plea offers, if defendants pursue Rule 30 motions.

On the delay issue –- whether there have been inordinate and prejudicial delays in notifying Petitioners, assigning counsel and providing meaningful post-conviction relief -- the District Attorneys blame the defendants. This argument posits, incorrectly, that there have been no relevant delays in disclosing the misconduct, that Petitioners and CPCS are wrong to complain that thousands of defendants still lack Rule 30 counsel, and that only 1,187 defendants have filed

Rule 30 motions because all of the other victims of the drug lab scandal have “elected” to stand pat with wrongful convictions.

On the remedy issue, the District Attorneys propose nothing. And in opposing the relief that Petitioners propose, they fail to distinguish Ferrara v. United States, 372 F. Supp. 2d 108 (D. Mass. 2005), and Lavallee v. Justices in Hampden Superior Court, 442 Mass. 228 (2004), which provided similar remedies.

The District Attorneys do not confront the reality facing Petitioners Kevin Bridgeman, Yasir Creach and Miguel Cuevas. Indeed, they scarcely mention the Commonwealth’s use of falsified evidence, the reasons why Petitioners are scared to pursue post-conviction relief, and the delays in finding Dookhan defendants. What they do, instead, is seek to blame the Petitioners, who are the victims of this scandal, and keep prosecutors firmly in control of the tools they need to preserve as many tainted convictions as possible.

ARGUMENT

I. The District Attorneys ignore the undisputed evidence that prosecutors are actively discouraging challenges to tainted convictions.

The District Attorneys argue that a presumption of vindictiveness is not applicable because Dookhan defendants who challenge convictions tainted by government misconduct should suffer the same consequences

as typical defendants who reject plea deals. DA Br. 28. This argument relies on several flawed premises.

First, the District Attorneys assert that reinstating previously dismissed charges, and the concomitant threat of more severe penalties, requires "no action by the prosecutor." DA Br. 25. That argument misunderstands the exposure problem, which is not due to defendants "repudiating" plea agreements, as the District Attorneys contend, but instead to prosecutors "elect[ing]" to up the ante against those who challenge wrongful convictions. Second, although the District Attorneys purport to analyze cases on prosecutorial vindictiveness, id. 26-43, they never wrestle with the gravity of the scandal here, or the need to deter future scandals. Third, and relatedly, they overlook that an appropriate remedy for the exposure issue cannot be found in run-of-the-mill guilty plea cases. Id. Rather, as in Ferrara, it must account for the government misconduct that has occurred.

A. Prosecutors are actively discouraging Petitioners and other Dookhan defendants from exercising their post-conviction rights.

The record establishes, and nowhere do the District Attorneys deny, that prosecutors are taking steps that effectively discourage Dookhan defendants from challenging their tainted convictions, whether or not that is the intended result. United States v. LaDeau, 734 F.3d 561, 566 (6th Cir. 2013).

In Suffolk County, where Petitioners Bridgeman and Creach were convicted based on Dookhan's drug certifications, the reasons why defendants fear retaliation are evident. Prosecutors threaten to reinstate and pursue more serious charges that they previously dismissed, if defendants seek post-conviction relief. See Supplemental Record Appendix (S.R.A.) 9-12 (Affidavit of Benjamin Selman). Prosecutors also, as matter of policy, withdraw time-served plea offers, if defendants litigate Rule 30 motions. See id.

A similar scenario confronts Petitioner Cuevas in Essex County: prosecutors have threatened to re-prosecute him on all counts of his original indictment, not just the lesser offenses to which he pled guilty. S.R.A. 14-15 (Letter, Commonwealth v. Cuevas, 2007-01535).[1] Prosecutors have made clear that seeking harsher punishments is their policy, which explains why Angel Rodriguez ended up with a longer sentence after successfully obtaining Rule 30 relief. See id. They have also admitted -- perhaps inadvertently -- that implementing this policy requires affirmative steps to "revive[] the original indictment." DA. A. 6 (Affidavit of ADA Susan Dolhun).

---

[1] Fearing that result, Petitioner Cuevas has asked that consideration of his Rule 30 Motion be deferred pending this Court's decision in this case. S.R.A. 14-15.

It is no surprise, therefore, that Petitioners fear vindictive prosecution for pursuing Rule 30 motions, see R.A. 85, 92, or that counsel for Dookhan defendants must advise their clients about the prospect of harsher punishments, see R.A. 318, 404; S.R.A. 11. The District Attorneys present no contrary evidence about what is transpiring the trial courts, and thus no basis to distinguish LaDeau.[2]

Regardless, the District Attorneys' "automatic revival" theory is legally dubious. As the Essex County Superior Court recently explained, there is substantial authority for the proposition that nolle prossed charges do not revive unless prosecutors file new indictments. S.R.A. 1-7 (Order staying execution of sentence, Commonwealth v. Rodriguez, ESCR2007-00875). And however this principle may operate in ordinary cases, those involving egregious government misconduct, like this one, can never be remedied by simply returning to the pre-plea status quo.

---

[2] The District Attorneys are wrong to argue that the exposure issue is unripe. DA Br. 23-24. Circumstances creating "a legitimate fear of retaliation," which cause defendants "not to exercise their rights," are themselves constitutional "wrong[s]." Chaffin v. Stynchcombe, 412 U.S. 17, 25 (1973). Petitioners suffer that "present harm" because prosecutors engage in conduct that chills their exercise of Rule 30 rights. As the Single Justice suggested, it is appropriate to consider this issue "at this junction." R.A. 1131.

B. Petitioners fear the "reasonable likelihood" of retaliation, whether or not prosecutors secretly harbor any vindictive intent.

The District Attorneys also dismiss the "exposure issue" by arguing that Petitioners have not proved any "vindictive motivation" by prosecutors. DA Br. 36. The critical issue, however, is not the prosecutors' intent, but rather Petitioners' fear of retaliation, which chills their exercise of post-conviction rights.

The Supreme Court and this Court have long held that defendants must "be freed of apprehension" regarding vindictiveness. North Carolina v. Pearce, 395 U.S. 711, 724 (1969) (emphasis added); Commonwealth v. Hyatt, 419 Mass. 815, 823 (1995) (safeguarding defendants "from any chilling effect" on post-conviction rights). That is why the presumption of vindictiveness turns not on "actual retaliatory motivation" or "bad faith," but the fear thereof. Commonwealth v. Tirrell, 382 Mass. 502, 508 n.8 (1981). The leading cases involved no such intent. Hyatt, 419 Mass. at 821 ("[T]he record does not support a claim that the judge was in fact vindictive"); United States v. Goodwin, 457 U.S. 368, 382 (1982) (noting, in Blackledge v. Perry, 417 U.S. 21 (1974), "it did not matter" that the prosecutor had not "acted in bad faith"). By arguing that Petitioners cannot prove vindictive intent, the District Attorneys attack a straw man.

They also mistakenly dismiss the unique circumstances here that trigger a "reasonable likelihood" of retaliation, thereby justifying a presumption of prosecutorial vindictiveness. Commonwealth v. Ravenell, 415 Mass. 191, 194 (1993). The District Attorneys will be forced to "do over" what they thought had "been done correctly" because they will have to re-prosecute tens of thousands of cases in which they already obtained convictions, whether by guilty pleas or trials. Colten v. Kentucky, 407 U.S. 104, 116-117 (1972). That repetition runs headlong into the powerful "institutional bias" to let such convictions stand. Chaffin v. Stynchcombe, 412 U.S. 17, 27 (1973). And prosecutors cannot credibly deny that, collectively, they have a strong interest in "self-vindication" following the drug lab scandal, because Dookhan was, for nearly a decade, a critical member of their team. Id. at 27; see FAMM Amicus Br. 16-20.

In addition, re-prosecuting tens of thousands of wrongful convictions, dating back more than a decade, will undoubtedly entail the "duplicative expenditures of prosecutorial resources." Goodwin, 457 U.S. at 383. The District Attorneys cleverly parse that language, arguing that giving defendants fair trials will not "duplicat[e]" prior efforts to obtain guilty pleas. DA Br. 37. That nuance aside, there is no question the drug lab crisis has, and will continue,

to put a tremendous strain on prosecutors, who have sought to minimize that burden at nearly every turn.

Prosecutors have resisted even the most basic tasks, such as linking names from the Meier List to docket numbers with the Trial Court (which still has not been completed), and they have avoided the truly difficult and time-consuming work of notifying all Dookhan defendants and, then, negotiating new pleas or trying cases against them, without the benefit of evidence compromised by Dookhan. The District Attorneys boast that they have processed about 1,100 cases, id. at 45, but more than ten times as many Dookhan defendants have not been advised of their wrongful convictions, appointed counsel or had a fair day in court.

Finally, the District Attorneys identify "no changed circumstances" that warrant, across the board, harsher punishments for Petitioners and other Dookhan defendants. Instead, they dispute whether Dookhan's misconduct materially weakened the Commonwealth's cases against her victims. This effort to minimize the exceptional circumstances of the drug lab scandal, see Commonwealth v. Scott, 467 Mass. 336, 338-42 (2014); Commonwealth v. Charles, 466 Mass. 63, 65 (2013), based on "anecdotal" evidence, DA Br. 39, betrays a lack of perspective on the magnitude of this crisis and its effect on the criminal justice system.

C. This Court should rectify the harm caused by the egregious government misconduct.

Where, as here, the government has engaged in egregious misconduct, this Court has applied the standards of United States v. Ferrara. See Scott, 467 Mass. at 346. As the presiding judge explained in Ferrara, the remedy for such misconduct must be tailored to make the victim whole:

> [T]he goal is to fashion a remedy that will, as much as possible, place [the defendant] in the position that he would have been in if the government had not violated his constitutional right to due process.

Ferrara v. United States, 372 F. Supp. 2d 108, 111 (D. Mass. 2005), aff'd 456 F.3d 278 (1st Cir. 2006). Thus, Ferrara tailored a remedy to include resentencing without consideration of certain charges, because those charges were infected by government misconduct. See Ferrara v. United States, 384 F. Supp. 2d 384, 436-440 (D. Mass. 2005). As a result, the court reduced the defendant's sentence from 22 years to time served. See Ferrara, 372 F. Supp. 2d at 133.

The court's remedy in Ferrara was entirely consistent with this Court's view that remedies for government misconduct "should be tailored to the injuries suffered and should not unnecessarily infringe on competing interests." Commonwealth v. Cronk, 396 Mass. 194, 199 (1985); cf. Commonwealth v. Merry, 453 Mass. 653, 664-666 (2009) (explaining the flexible standard

for post-trial relief due to government misconduct, and noting that deliberate misconduct may be "grounds for dismissal").

Here, as in Ferrara, Petitioners and other Dookhan defendants cannot be returned to the pre-plea status quo. But they should be returned, as much as possible, to the position that they would have been in without any government misconduct. And in no such "misconduct-free" world would defendants have faced worse punishments than what they actually received.[3]

This Court has not hesitated to exercise its superintendence powers to fashion appropriate remedies for Dookhan defendants. Charles adopted procedural rules to expedite post-conviction relief and relieve burdens on Dookhan defendants who challenge their tainted convictions. Then, Scott adopted an evidentiary rule, based on Ferrara, that every Dookhan defendant is entitled to a conclusive presumption that egregious government misconduct occurred in his or her case. This Court should use its expansive authority,

---

[3] If a Dookhan sample had been tested by an honest chemist, one of two things would have happened: (1) the sample would have tested negative (or for a lesser weight), and there would be no conviction (or a conviction for a lesser charge); or (2) the sample would have tested positive, and the parties would have reached the same plea. Accordingly, restoring Dookhan defendants to a "misconduct-free" position could not possibly involve harsher charges or penalties.

again, to ensure that Petitioners are "freed from any apprehension" that, if they exercise their post-conviction rights, they will not be subjected to even worse penalties than those that they would have received had the drug lab scandal not occurred.

In rejecting this approach, the District Attorneys refuse to acknowledge that Dookhan defendants are, in fact, victims of egregious misconduct who should be made whole. Advocating a business-as-usual approach, the District Attorneys erroneously rely on precedents that fail to address the twin problems of government misconduct and prosecutorial vindictiveness. They point to Commonwealth v. Therrein, 359 Mass. 500 (1971), and Commonwealth v. Rollins, 354 Mass. 630 (1968), both of which pre-dated Perry, involved no government misconduct, and addressed violations of double jeopardy, not the fear of prosecutorial vindictiveness. They also rely on Commonwealth v. DeJesus, 468 Mass. 174 (2014), and Commonwealth v. DeMarco, 387 Mass. 481 (1982), which merely mention in passing that, upon withdrawal of guilty pleas in ordinary cases, original charges may be reinstated.

The protracted string citations are equally unhelpful, because the District Attorneys do not identify a single case involving comparable prosecutorial misconduct. They cite, for example, the discussion of judicial vindictiveness in United States ex rel. Wil-

liams v. McMann, 436 F.2d 103 (2d Cir. 1970). See DA Br. 28. But they ignore the section on prosecutorial vindictiveness, where the Second Circuit emphasized the "faultless conduct" of the prosecutor, 436 F.2d at 106, a stark contrast to this case of egregious misconduct by a prosecution team member.

Here, the fundamental fact is that a member of the prosecution team fraudulently induced thousands of guilty pleas by manufacturing powerful, and often dispositive, inculpatory evidence. The Commonwealth must bear the burden of this "systemic lapse," rather than proceed as if it never happened. Charles, 466 Mass. at 75; Lavallee, 442 Mass. at 246.

II. The unconstitutional post-conviction delays are real and must be remedied.

The District Attorneys largely concede the facts underlying Petitioners' claim of undue post-conviction delays. They admit that Dookhan's misconduct was not disclosed for 13 months. They do not deny that, due partly to the lab's shortcomings, there is still no list of all affected cases. And aside from the lists they provided in September 2014, as a result of this petition and at the urging of the Single Justice, they do not claim to have helped find or notify defendants.

Nevertheless, the District Attorneys argue that there is no unconstitutional delay here. They reason that such delay must be measured only by calculating

the time between the filing of a Rule 30 motion and the end of the "modified Rule 30 procedure." DA Br. 46. Outside that narrow purview, according to the District Attorneys, all other delays are irrelevant.

Specifically, the District Attorneys argue that delays due to the scandal's scope, rather than the Rule 30 process, do not count or were addressed in Scott. DA Br. 55-59. They ignore the ongoing delays affecting defendants who lack Rule 30 counsel, claiming that those defendants have elected to keep their convictions. Id. at 53. And they argue that Petitioners and CPCS have caused delay by seeking "special rules." Id. at 60. These arguments lack merit.

A. Delays due to the magnitude of the drug lab scandal, but falling outside the Rule 30 process, cannot be ignored.

The District Attorneys fail to confront the delays that have plagued all Dookhan defendants. They claim, for example, that Petitioners have merely complained about the facts of "the IG's report itself" and "the respondent District Attorneys' September 2014 provisions to CPCS." DA Br. 58. These arguments miss the point, which is that delays have been caused by the very misconduct that necessitated the IG's report, and by the noncooperation that preceded the District Attorneys' recent provisions.

For starters, the District Attorneys argue that any delays preceding Rule 30 motions are irrelevant or "implicitly" addressed by Scott. DA Br. 57. That is not so. Every moment spent investigating Dookhan, or identifying defendants, counts against the Commonwealth. It is irrelevant whether Attorney Meier and the Inspector General worked expeditiously. Their work would not have been so vital if Dookhan had behaved honestly, or if the Hinton Lab had provided proper supervision and kept decent records. Cf. Lavallee, 442 Mass. at 240 ("The petitioners cannot be required to wait on their right to counsel while the State solves its administrative problems.").

It is relevant that these delays could have been ameliorated if, as amici explain, prosecutors had promptly met their obligations to find and notify defendants. See NACDL and MACDL Br. 7-25. Rather than work to resolve this crisis, the District Attorneys have exacerbated delays by telling defendants, including Cuevas, that those who pursue Rule 30 relief will be penalized with the prosecution of previously-dismissed counts -- and in Suffolk County, with the withdrawal of previously-offered pleas. S.R.A. 9-14. The District Attorneys do not mention these sharp tactics, while accusing Petitioners of stalling.

These delays were not before the Court in Scott. Nor was the IG's report, which is devastating. The IG

found that concerns were raised about Dookhan by December 2009; that a would-be whistleblower was admonished "not to tell anyone about the June [2011] Breach and the forgery"; that Dookhan was permitted to testify 32 times from June 2011 to February 2012; that DPH officials "withheld" facts about Dookhan's misconduct from a DPH attorney; that DPH officials also withheld facts in connection with a federal grant report; and that such concealment may have arisen from DPH concerns about "the threat to the criminal justice system resulting from its failure to properly manage its forensic drug lab," or from "fear[s] of losing" federal grants. IG Report at 63-64, 68, 72, 77-78, 81.

So, to be clear: Petitioners' post-conviction rights have been "'deliberately block[ed],'" by both individual misconduct and a departmental cover-up. DA Br. 50, quoting Commonwealth v. Gonzalez, 86 Mass. App. Ct. 253, 257 (2014). It is hard to imagine delay resulting from a more clear-cut case of "intentional or deliberate misconduct on the part of State agents." Commonwealth v. Libby, 411 Mass. 177, 180 (1991); see Commonwealth v. Weichel, 403 Mass. 103, 109 (1988). And these delays that result from government misconduct, and cause collateral consequences for wrongfully convicted defendants, cannot be swept aside by citing other sources of delay. DA Br. 54, 57.

B. Uncounseled Dookhan defendants continue to suffer ongoing delays.

Beyond the irrevocable delays described above, thousands of Dookhan defendants also face delays due to not being assigned post-conviction counsel. R.A. 352. The District Attorneys, however, deny that any such defendant exists. They argue that few people identified by Attorney Meier have filed Rule 30 motions -- just 1,187 -- because all of the others have knowingly forgone any available post-conviction relief. DA Br. 1, 45. On this view, anyone who has not filed a motion, like Petitioners Bridgeman and Creach, cannot show a delay "'without [their own] consent.'" DA Br. 49, quoting In re Williams, 378 Mass. 623, 625 (1979). This view is mistaken.

In fact, tens of thousands of people have not "elected," "deci[ded]," or "chosen" to forgo relief. DA Br. 1, 54, 60, 64. As Petitioners and CPCS have shown, most people on the Meier List have not had any meaningful opportunity to make that choice, because they have not been counseled regarding their post-conviction rights and options. Pet. Op. Br. 19, 41-43; CPCS Op. Br. 21-24; see Lavallee, 442 Mass. at 234 (right to be heard requires effective counsel).

The District Attorneys insist otherwise, DA Br. 59, but it is unclear why. After all, they do not deny that CPCS has been able to recruit counsel for

about 8,700 people, rather than all Dookhan defendants whose samples resulted in convictions. And they know that the Trial Court is currently checking on thousands of potential Dookhan cases in Essex and Suffolk Counties, which the District Attorneys identified in September 2014. So it is beyond dispute that the rights of thousands of people have been jeopardized.

Petitioners Bridgeman and Creach are two such people. The District Attorneys claim not to know of any defendant -- not one -- "who wishes to seek post-conviction relief, but is unable to do so due to lack of counsel or any other reason." DA Br. 59 (emphasis removed). Yet Bridgeman and Creach were not found by CPCS or the ACLU; it was the other way around. R.A. 502-503 (Bridgeman's pro se motion); Pet. Op. Br. 42-43. Thus, just as this Court addressed the rights of both named and unknown petitioners in Lavallee, 442 Mass. at 228 n.1, it should address the delays that have harmed Bridgeman, Creach, and countless uncounseled defendants.[4]

---

[4] The District Attorneys divide Dookhan defendants into five groups, but Petitioners fall into just two: those who have not filed Rule 30 motions (Bridgeman and Creach), and those whose motions have not been decided (Cuevas). DA Br. 52. The largest group, which the District Attorneys ignore, comprises the tens of thousands of defendants who lack post-conviction counsel.

Of course, by coming forward, Bridgeman and Creach made it possible for CPCS to assign them counsel. But it is unclear what CPCS would do if 5,000 or 20,000 other Dookhan defendants also raised their hands. It would strain logic to hold, as the District Attorneys imply, that any uncounseled defendant suddenly becomes ineligible to complain about delay once he or she becomes known to CPCS, the ACLU or pro bono counsel. That approach would insulate a serious constitutional problem from the justice system's remedial reach.

C. Petitioners do not seek "special rights."

The District Attorneys accuse Petitioners of causing delay by seeking "special rights." DA Br. 60-61. But Petitioners seek only due process: fair trials without tainted evidence or fear of vindictive prosecution, and within reasonable time limits.

More broadly, the notion that defendants have chosen to stay on the sidelines would be easier to accept if the District Attorneys had not tried to sideline them. When the courts stayed sentences, Essex County prosecutors challenged their authority to do so. See Charles, 466 Mass. at 71; R.A. 527 (opposing Cuevas's stay motion). When the Meier Report cited information possessed by "the District Attorneys and/or ... law enforcement agencies," the District At-

torneys did not volunteer it. R.A. 339-40. When this Court considered a rule presuming misconduct in Dookhan's cases, the District Attorneys opposed it. See Scott, 467 Mass. at 345. When Scott hearings began, prosecutors invoked the advocate-witness rule. CPCS Op. Br. 34, 37. And when CPCS asked for help, the District Attorneys declined, until the Single Justice prompted a change of heart. Pet. Op. Br. 18-19.[5]

III. Petitioners' proposed remedy is warranted.

The District Attorneys do not say what remedy, in their view, would be warranted if Petitioners' legal claims have merit. Instead, they insist that Petitioners' proposal -- shielding defendants from harsher punishments, requiring prosecutors to identify cases, and setting time limits -- would undermine Scott and lacks support in other precedent.

Scott poses no legal hurdle because it did not address the issues presented here. Moreover, due to the exposure and delay problems, the trickle of Scott hearings has nearly run dry. DA Br. 45; DA A. 1-16.

Ferrara and Lavallee, meanwhile, remain on point. The court's remedy in Ferrara accounted for the gov-

---

[5] To answer the District Attorneys' question, these are all things that could have been handled "differently." DA Br. 54 n.21. But the main thing that should have been done differently is that government misconduct should not have been committed in the first place.

ernment's misconduct and resembles Petitioners' proposal on the exposure issue, and this Court's remedy in Lavallee resembles Petitioners' proposal on the delay issue. The District Attorneys mistakenly argue that the Lavallee petitioners were "limited in number, identified by name ..., and were procedurally similarly situated." DA Br. 62-63. In fact, they were named pretrial detainees plus "other unknown indigent criminal defendants, and [CPCS] on behalf of future defendants." 442 Mass. at 228 n.1. While the Attorney General argued those petitioners made "no specific showing of harm," as the District Attorneys argue, this Court held their lack of counsel "may likely result in irremediable harm if not corrected." Id. at 237-238.

Crafting a remedy will require careful "practical considerations," DA Br. 63 & n.23, but it can be done. Certainly, no practical hurdle justifies allowing thousands of people to suffer ongoing violations of their due process and common law rights. "[T]he decisive factor" in fashioning a remedy "must be the vindication of the petitioner[s'] constitutional rights." Gaines v. Manson, 481 A.2d 1084, 1096 (Conn. 1984).

CONCLUSION

Petitioners respectfully request that this Court allow this petition and provide the requested relief.

Respectfully submitted,

KEVIN BRIDGEMAN,
YASIR CREACH, and
MIGUEL CUEVAS,

by their Attorneys

Matthew R. Segal, BBO #654489
Carlton E. Williams, BBO #600973
American Civil Liberties Union
of Massachusetts
211 Congress Street
Boston, MA 02110
(617) 482-3170
msegal@aclum.org

Emma A. Andersson, CA #260637
Ezekiel R. Edwards, NY #4189304
Criminal Law Reform Project
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004
212) 284-7365
eandersson@aclu.org

Daniel N. Marx, BBO #674523
Christopher E. Hart, BBO #625031
Daniel McFadden, BBO #676612
Caroline S. Donovan, BBO #683274
Shrutih Ramlochan-Tewarie, BBO #685467
Foley Hoag LLP
155 Seaport Boulevard
Boston, MA 02210
(617) 832-1000
dmarx@foleyhoag.com

Dated: January 2, 2015

MASS. R. APP. P. 16(K)

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

Daniel L. McFadden

AFFIDAVIT OF SERVICE

I, Daniel McFadden, counsel for petitioners-appellants Kevin Bridgeman, Yasir Creach, and Miguel Cuevas, do hereby certify under the penalties of perjury that on this 2nd day of January, 2015, I caused a true copy of the foregoing document to be served by Federal Express and electronic mail on the following counsel for the other parties:

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

Quentin R. Weld
District Attorney for Essex County
10 Federal Street
Salem, Massachusetts 01970

Benjamin H. Keehn
Committee for Public Counsel Services
Public Defender Division
44 Bromfield St.
Boston, MA 02108

Aaron Katz
Ropes & Gray LLP
Prudential Tower
800 Boylston St.
Boston, MA 02199

Jean Jacques Cabou
Perkins Coie
2901 N. Central Ave., Suite 2000
Phoenix, AZ 85012

Daniel L. McFadden

Dated: January 2, 2015