COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK, ss. NO. SJC-12157

KEVIN BRIDGEMAN,
and others

V.

DISTRICT ATTORNEY FOR THE SUFFOLK DISTRICT,
and others

CORRECTED JOINT BRIEF OF THE PETITIONERS AND INTERVENER ON RESERVATION AND REPORT FROM THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

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INTRODUCTION

For over four years, the Commonwealth has labored to use case-by-case litigation to address drug convictions tainted by the misconduct of ex-chemist Annie Dookhan. Many stakeholders, most notably this Court, have tried to make this litigation timely and fair. But those efforts have not succeeded. Roughly 24,000 Dookhan cases remain. Another lab scandal looms large. And the resources to litigate all these cases do not exist. It is, therefore, beyond dispute that the Dookhan debacle has not been, and never will be, resolved through case-by-case litigation. There will be a comprehensive disposition — of some sort — because the system lacks the capacity to process these cases in any other way.

The question here is: what will that disposition be? Under the status quo, only a small fraction of those who have been harmed will get to court, and most convictions secured with Dookhan's help will never be challenged. This outcome is surely comprehensive, but it is not a remedy. In fact, it is the opposite.

In August 2012, the disclosure of Dookhan's misconduct arrived like a flood, with a sudden burst and then an expanse of standing water. Thousands of people had been convicted by fraud, and even those who had served their sentences faced harsh collateral

consequences. In their cases, little has happened.

"Dookhan defendants," we now know, are among the most vulnerable people in our society. Most are poor. Over 90 percent were prosecuted in district court. And in most cases — over 60 percent — the drug convictions were for possession. These people needed to be found. They needed lawyers. And they needed meaningful opportunities to challenge their convictions.

In response, the justice system has tested, exhaustively, the theory that these tasks could be accomplished through case-by-case litigation that requires defendants to initiate court proceedings. This effort has involved the Supreme Judicial Court for Suffolk County, the Trial Court, special judicial magistrates, the indigent defense bar, and at many times the respondent District Attorneys (DAs). And this Court has repeatedly reduced the burdens and risks of case-by-case litigation.

Citing this effort, as well as a belief that actionable lists of Dookhan's cases would soon be complete, the Court held in May 2015 that delays in resolving this crisis did not — at that time — require comprehensive relief as a matter of due process or as an exercise of the Court's superintendence power. Bridgeman v. District Attorney for the Suffolk Dist., 471 Mass. 465, 466-467 (2015) (Bridgeman I).

But the Dookhan floodwaters have not receded since May 2015. If anything, they have risen. And the case-by-case approach, it turns out, was an earnest but doomed attempt to bail water with a teaspoon.

Despite the Court's expectations in Bridgeman I, usable lists of Dookhan cases did not emerge until May 2016. According to these lists, there are 24,391 tainted cases.[1/] And although in September 2012 the DAs professed that their "primary concern" was to "ensur[e] that justice is done,"[2/] they have since made their strategy clear: in May 2016 the DAs explained that they are working to "protect[] these convictions," even when Dookhan-involved predicates are used to lengthen sentences in other cases in which people may be incarcerated right now.[3/]

That is not all. Since Bridgeman I, new crises have emerged due to an explosion of cases in CPCS's Children and Family Law division and misconduct involving ex-chemist Sonja Farak at the Amherst State Laboratory. The Amherst scandal itself might yield

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[1/]R.App. 1938 ¶2, 1940 ¶¶8-9 (Aff. of Paola Villarreal). "R.App." refers to the record appendix filed by petitioners and intervener the Committee for Public Counsel Services (CPCS). "SRA" refers to the supplemental appendix tendered with this brief.

[2/]Mass. Dist. Attys. Ass'n, Letter to Gov. Patrick Re: DPH Drug Lab (Sept. 6, 2012) (statehousenews.com/pr/20124612) (Add. 63-65).

[3/]R.App. 609, 615-16.

18,000 cases.

The Commonwealth's indigent defense system has no more capacity to litigate all these cases than it does to build a rocket ship and fly it to Jupiter. The DAs do not claim otherwise.

Instead, they argued to the single justice that most Dookhan defendants do not wish to challenge their convictions, and that litigating all of their cases is not necessary. Consistent with that assertion, the DAs recently sent a half-page "notice" to 20,000 Dookhan defendants. The "notice" fails to say who it is from or what this case is about, and its likely effect will be to deter requests for lawyers that an appropriate notice would have generated.

If this status quo prevails, the Dookhan crisis will come to a close by allowing thousands of tainted convictions to stand unaddressed. That is not justice. There is only one way to vindicate the due process rights of Dookhan defendants and to restore the integrity of the justice system. Their convictions should be vacated and dismissed.

QUESTION PRESENTED

As a matter of due process or as an exercise of this Court's superintendence authority, must all Dookhan-affected convictions be dismissed or subjected to a court-imposed deadline?

STATEMENT OF THE CASE

This is the latest case concerning the egregious misconduct of Annie Dookhan at the Hinton drug lab. The case was previously remanded to the county court for further proceedings in light of Bridgeman I, and is now back before the Court on a reservation and report by the single justice (Botsford, J).[4/]

I. Bridgeman I

Bridgeman I held that if a defendant succeeds in vacating a Dookhan-tainted guilty plea under the framework of Commonwealth v. Scott, 467 Mass. 336 (2015), and if the defendant is thereafter prosecuted and convicted a second time, any punishment must be "capped at what it was under the plea agreement." Bridgeman I, 471 Mass. at 477. This restriction was needed, the Court stated, to ensure that the post-conviction process did not become a "flawed option" that would wrongly impose upon the victims of this scandal "the burden of a systemic lapse that . . . is entirely attributable to the government." Id. at 475-76, citing Lavallee v. Justices in the Hampden Superior Court, 442 Mass. 228, 246 (2004).

In Bridgeman I, this Court also considered requests for comprehensive relief from the Petitioners and from CPCS, whose motion to intervene was granted by

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[4/]R.App. 250-54, 468-78, 1962-63.

the Court for the following reasons:

> CPCS is in the position of having to provide representation to Dookhan defendants in eight counties, and, as such, it has a compelling interest in advocating for uniform practices and solutions that will ensure consistent treatment for all of those defendants, irrespective of their individual jurisdictions.

Bridgeman I, 471 Mass. at 486-87.

The petitioners and CPCS identified due process and this Court's superintendence powers, respectively, as grounds for ordering relief that could "resolve, once and for all, the tens of thousands of cases affected by Dookhan's egregious misconduct." Id. at 487; see id. at 478-81. The Court declined to implement such a remedy in May 2015, based on its expectation that the exposure cap, see 471 Mass. at 477-78, together with the presumption of egregious misconduct in every Dookhan case, see Scott, 467 Mass. at 352, would "mov[e] these cases forward towards resolution." 471 Mass. at 487. The Court recognized that efforts to secure justice for "Dookhan defendants"[5/] had been "hampered by the inability of CPCS to ascertain which cases may have been tainted," id. at 480, and "encouraged" the District Attorneys who had used the Hinton lab to help in the process of identifying those

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[5/]The term refers "to those individuals who were convicted of drug offenses and in whose cases Dookhan signed the certificate of drug analysis. . . ." Bridgeman I, 471 Mass. at 467 n.4.

cases. Id. at 481.

II. Single Justice Proceedings

On remand, the single justice allowed the Petitioners' and CPCS's motion to join the District Attorneys for the counties of Barnstable, Dukes, Middlesex, Norfolk, and Plymouth as respondents on December 31, 2015.[6] Because the lists discussed in Bridgeman I were incomplete, see 471 Mass. at 478 n.20, the DAs proposed a new method for identifying cases based on Trial Court data, and the single justice directed them to compile "final lists" containing defendant names, case numbers, and other information for every "adverse disposition concerning every G.L. c.94C charge for which Annie Dookhan signed the drug certificate as analyst."[7]

The single justice also formed a working group to consider issues of notice to the Dookhan defendants, including what defendants should be told about their cases, who should send notice, and how. Before this case, prosecutors had notified only some defendants,[8]

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[6]R.App. 459-61. Joinder was ordered over the objection of the DAs for Norfolk County (R.App. 442-47), Middlesex County (R.App. 448-51), and Plymouth County (R.App. 457-58). The DA for Bristol County himself moved to intervene (R.App. 439-41), and that motion was allowed (R.App. 461).

[7]R.App. 463.

[8]R.App. 247-49; 255; 1899-900 (Aff. of Susanne M. O'Neil, ¶¶7-10).

and otherwise maintained that news coverage and CPCS's efforts would suffice.[9] In Bridgeman I, the Essex County DA also disclaimed any legal obligation to notify convicted defendants of Dookhan's fraudulent misconduct.[10] Nevertheless, the DAs worked on notice with counsel for the Petitioners and CPCS, and, in May 2016, the parties submitted draft notices to the single justice.[11] Their notices were similar in several respects: both were at least one page long in English; stated "You may have been wrongfully convicted"; explained the Scott presumption of misconduct; and described the Bridgeman I exposure cap ("you will not be penalized" for "exercising your rights").[12]

Meanwhile, in May 2016, the DAs finally filed and served their lists identifying 24,391 cases in which Dookhan defendants still had tainted drug convictions.[13]

Shortly thereafter, the Petitioners and CPCS asked

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[9]R.App. 248.

[10]Bridgeman I Oral Arg. at 45:20-46:10.

[11]SRA 45.

[12]SRA 43-44; 46.

[13]R.App. 19-21; 1938 (Aff. of Paola Villarreal, ¶2); 1940 (Aff. of Paola Villarreal, ¶¶8-9). This brief generally uses the term "conviction" to refer to any adverse disposition, including juvenile delinquency and youthful offender adjudications and continuances without a finding.

that this case be reserved and reported to the full Court.[14] They explained that a notice premised on case-by-case ligation could not work because such a notice "cannot truthfully tell Dookhan defendants . . . that lawyers are available to handle their cases."[15] Accordingly, and consistent with the original petition filed in January 2014, Petitioners and CPCS asked this Court to decide whether all Dookhan cases "should be dismissed or subjected to a court-imposed deadline."[16] The DAs opposed this request, arguing case-by-case litigation would not unduly burden CPCS because notices would likely yield few responses and could, therefore, be the "final step" in managing the Dookhan problem.[17]

The single justice issued a reservation and report on August 16, 2016.

III. The District Attorneys' September 2016 Notice

At a hearing on June 1, 2016, the DAs announced their intention to send "notices" regardless of whether the single justice reported this case to the full Court; the single justice asked for an opportunity to view any notice before it went out.[18]

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[14]R.App. 468-78.

[15]Id. at 469.

[16]Id. at 476.

[17]R.App. 603-17.

[18]SRA 7.

On August 29, 2016, the DAs filed a letter attaching a "notice" that they intended to send to thousands of Dookhan defendants "on or before" September 1, 2016 (the "Notice").[19] Unlike the notice they had previously proposed, this one was only a half-page long; it replaced the header about "wrongful[] convict[ions]" with one referencing "closed criminal case[s]"; it did not say who it was from but stated that defendants could call the office of the District Attorney "[f]or more information"; it no longer told defendants that they would not be penalized for exercising their rights; it ominously told defendants that vacating their convictions would cause their cases to be "returned to active status"; and although the rights of Dookhan defendants had been reserved and reported to this Court, the Notice omitted that fact.[20]

The bottom half of the Notice purported to be a Spanish translation, not including the heading and salutation, of the English text.[21] It contained numerous errors and was not readily understandable to someone who speaks Spanish but not English.[22] For example, its account of the Bridgeman I exposure cap began by explaining

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[19]SRA 1-2.

[20]SRA 2.

[21]SRA 2.

[22]SRA 56 (Aff. of Dr. Michael O'Laughlin ¶12).

that the DAs "can opt in proceed with criminal charges for the drug charges that could be freed."[23]

Petitioners and CPCS informed the DAs and the single justice that this Notice was misleading and poorly translated,[24] and the single justice invited the DAs to delay sending it.[25] Rejecting that suggestion, the DAs went forward,[26] announcing at a hearing on September 6, 2016, that the mailing had already begun. Each Notice was sent in an envelope marked "Important Legal Notice from the Commonwealth of Massachusetts," but with a return address of "RG/2 Claims Administration LLC" in Philadelphia.[27]

On September 7, 2016, CPCS filed an emergency motion seeking to halt further dissemination of the Notice.[28] The DAs opposed this motion, asserting that the Notice "contains language previously agreed upon by the parties."[29] This Court denied CPCS's motion on

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[23] Id. at 57 ¶14b (O'Laughlin Aff.).

[24] SRA 4.

[25] SRA 6.

[26] SRA 7

[27] SRA 80.

[28] SRA 11-18.

[29] SRA 30 (Aff. of Vincent J. DeMore, ¶8). Compare SRA 71 (Aff. of Adriana Lafaille, ¶8 (notice mailed by DAs in September 2016 and notice proposed by petitioners and CPCS in May 2016 "have 52 words in common"). See also SRA 73-76 (depicting these 52 words).

September 13, 2016, while at the same time ordering the DAs to preserve pertinent records.[30/]

STATEMENT OF FACTS

I. Dookhan's misconduct tainted one in six Massachusetts drug cases during her tenure.

This Court has described the facts of Dookhan's misconduct in some detail. Scott, 467 Mass. at 338-42.[31/] It is well known that Dookhan fabricated and falsified evidence. Less well known are the failures of state employees to disclose what they knew and the resulting consequences for the justice system.

A. Dookhan worked to help prosecutors.

Dookhan falsified evidence in several ways. She did so by "dry labbing" – reporting positive test results without conducting any tests. 467 Mass. at 339.[32/] She did so by contaminating samples with known drugs, thus "turning negative samples into positive samples." 467 Mass. at 339.[33/] And she may have done so

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[30/]SRA 50.

[31/]See also Bridgeman I, 471 Mass. at 476 (describing scandal as having "cast a shadow over the entire criminal justice system"); Commonwealth v. Charles, 466 Mass. 63, 89 (2013) (recognizing Dookhan's "serious and far-reaching misconduct").

[32/]See also R.App. 159; 1051 (Office of the Inspector General, Investigation of the Drug Laboratory at the William A. Hinton State Laboratory Institute, 2002-2012, Mar. 4, 2014) (OIG Report).

[33/]See also R.App. 1051 (OIG Report).

by reporting falsely inflated weights.[34]

Dookhan's emails reveal the crucial role that her work played in obtaining guilty pleas. As one prosecutor wrote to her: "If defense counsel know the chemists are available 9 out of 10 times it will be a plea."[35] Another stated: "My bet . . . you all show and the defense stipulates."[36] Yet another: "Defense attorneys get very concerned when the commonwealth has certs and lab packets."[37]

Dookhan appears to have been motivated in part by the grossly improper purpose of trying to "get [people] off the streets."[38] In her emails, Dookhan conferred with prosecutors about case strategy, inducing guilty pleas, having particular cases assigned to her, and a prosecutor's desired weight for a drug sample.[39] There

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[34]See Record Appendix at 378-81, Bridgeman I (Aff. of Thomas Workman).

[35]R.App. 75-76 (Aff. of Anne Goldbach ¶91).

[36]Id. at R.App. 76 ¶94 (Goldbach Aff.). Dookhan's reply: "Tell him it will be an[] extra 10 years, if I have to drive to Brockton and he stipulates. Haha." Id.

[37]Id. at R.App. 77 ¶95 (Goldbach Aff).

[38]Scott, 467 Mass. at 350.

[39]R.App. 70-73 (Aff. of Anne Goldbach, ¶¶74, 75, 79, 82, 83); see Andrea Estes & Scott Allen, Chemist's emails show ties to prosecutors, Boston Globe (Dec. 21, 2012) (discussing emails in which a prosecutor told Dookhan he "needed a marijuana sample to weigh at least 50 pounds so that he could charge the owners with drug trafficking. . . . Two hours later, Dookhan responded: 'OK . . . definitely Trafficking, over 80 lbs'").

is even a joke about prison rape.[40]

B. Dookhan's misconduct was allowed to continue for years.

The Inspector General found that Dookhan's misconduct was covered up, possibly because state officials "fear[ed] . . . losing [grant] money."[41]

From the start, Dookhan processed samples at more than twice the rate of her colleagues.[42] Dookhan's "suspiciously high productivity" had raised eyebrows by 2009.[43] But supervisors allowed her to keep working.[44] Supervisors also failed to disclose that Dookhan's colleagues complained, in 2010 and 2011, that she ignored lab protocols, forged their initials, and received high numbers of results inconsistent with those of the confirmatory chemist.[45] Dookhan was allowed to continue working, and prosecutors continued

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[40]R.App. 71 (Aff. of Anne Goldbach, ¶76). ("def. will be making a lot of friends in the federal pen, named John. Haha"). The OIG report "finds" that Dookhan's crimes were not motivated by "a zealous desire to convict criminal defendants." R.App. 1159-60. The basis for this finding is unclear.

[41]R.App. 1114 (OIG Report); see, e.g., R.App. 1111-16 (describing how whistle blowers were silenced by false claims that Dookhan's actions were being handled as a "personnel matter").

[42]R.App. 1109 (OIG Report).

[43]Id. at 1109-10, 1117.

[44]Id. at 1110.

[45]Id. at 1111-12, 1131.

using her work.[46]

In June 2011, Dookhan was finally removed from most of her testing duties after she was found to have taken and tested samples that had not been assigned to her.[47] She was nonetheless allowed to test samples into the fall of 2011, and to testify against defendants until February 2012, notwithstanding evidence known to her supervisors that she had been lying in court.[48]

In December 2011, after the Department of Public Health (DPH) began investigating the June incident, lab supervisors did not tell DPH about Dookhan's extra-ordinary "productivity" or her forgery of lab documents.[49] In January 2012, when the Norfolk District Attorney's office was informed of the June incident, DPH dismissed it as an isolated breach that did not affect the integrity of any test results.[50]

DPH permitted Dookhan to quietly resign in March 2012.[51] The public did not learn of her misconduct until August 30, 2012, when the Hinton lab was shut

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[46] Id. at 1111-12.

[47] Id. at 1112-13.

[48] Id. at 1115-18, 1123.

[49] Id. at 1117.

[50] R.App. 140 (Aff. of Joanna Sandman, ¶¶3-4); 1118, 1123 (OIG Report); 1899 (Aff. of Susanne O'Neil, ¶5).

[51] R.App. 1119 (OIG Report); see also R.App. 1116-23.

down.[52] The State Police had taken over the lab by legislative mandate on July 1, 2012, were approached by lab employees about Dookhan, and began an investigation.[53] Dookhan later pleaded guilty to the twenty-seven crimes for which she was indicted.[54]

C. Most Dookhan-tainted convictions involve poor people whose drug crimes were simple possession.

Dookhan's misconduct tainted more than 24,000 cases, i.e., one in six drug convictions in the Commonwealth during her eight-year employment.[55] Ninety-one percent of these cases were prosecuted in district court:[56]

Adverse Dookhan cases, by court type				
County	Superior Court	District Court	Other	Total
Barnstable	120 (10%)	1,124 (89%)	18 (1%)	1,262
Bristol	190 (8%)	1,980 (88%)	85 (4%)	2,255
Dukes	10 (16%)	51 (84%)	0 (0%)	61
Essex	305 (7%)	3,764 (89%)	139 (3%)	4,208
Middlesex	173 (5%)	3,290 (92%)	131 (4%)	3,594
Norfolk	115 (5%)	2,137 (92%)	64 (3%)	2,316
Plymouth	61 (3%)	1,943 (93%)	93 (4%)	2,097
Suffolk	716 (8%)	7,905 (91%)	69 (1%)	8,690
Total	1,690 (7%)	22,194 (91%)	599 (2%)	24,483

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[52] Michael Naughton, State police: Jamaica Plain crime lab shut down, potential for wrongful convictions, Metro-Boston (Aug. 30, 2012).

[53] R.App. 1051 (OIG Report).

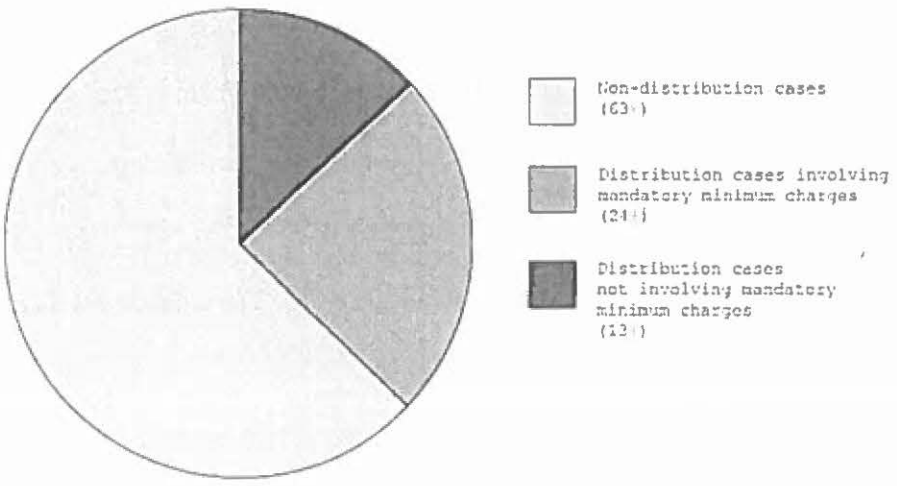
[54] R.App. 1052, 1057 (OIG Report); 172-73.

[55] R.App. 1818 (Aff. of Paola Villarreal, ¶5).

[56] R.App. at 1944-45 (Aff. of Paola Villarreal, ¶¶22-24). "Other" refers primarily to juvenile cases. Id. at 1945 ¶23.

Sixty-two percent of these cases involve only a charge of simple possession.[57] Among distribution cases, mandatory minimum charges figured prominently in securing convictions.[58]

Profile of Adverse Dookhan Cases



And if anything, these numbers undercount Dookhan's total cases because they exclude all but 92 of the unknown number of cases in which defendants cleared their convictions before the DAs submitted their lists in May 2016.[59] Thus, **the number of**

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[57]R.App. 1818 (Aff. of Paola Villarreal, ¶5).

[58]Id. at 1829-31 ¶¶34-38 (Villarreal Aff.).

[59]R.App. 1940 (Aff. of Paola Villarreal, ¶¶8-9).

unresolved Dookhan cases as of May 2016 appears to be 24,391.[60]

Many Dookhan defendants are facing grave colateral consequences; some have been deported based on Dookhan convictions.[61] For them, litigating a post-conviction motion from abroad presents daunting challenges, and returning to the United States is difficult even if a conviction is vacated and nearly impossible if the vacated charge is not also dismissed.[62] Other Dookhan defendants have lost drivers' licenses, housing, student loans, and job opportunities.[63] And it is likely that still others are currently imprisoned based on Dookhan predicates.[64]

Dookhan defendants also face many obstacles in seeking post-conviction relief, including poverty,

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[60] Id.

[61] R.App. 1710-11 (Aff. of Wendy Wayne, ¶¶4-5).

[62] Id. at 1712-14 ¶¶6-8 (Wayne Aff.).

[63] G.L. c.90, §22, 22½, amended by St. 2016, c.64, §1 (drivers' licenses); 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); 20 U.S.C. §1091(r) (federal student loans); see also Commonwealth v. Pon, 469 Mass. 296, 317 (2014) (collateral consequences include homelessness and unemployment).

[64] R.App. 609, 615-616.

addiction, mental illness, and, as one prosecutor aptly put it, the "struggle to survive in our society."[65/]

II. The vast majority of Dookhan-involved adverse dispositions have not been addressed.

About a year ago, the DA for the Cape and Islands publicly asserted that the case of "any defendant who has been affected" by Dookhan's misconduct "has been addressed."[66/] The record demonstrates otherwise. The DAs' submissions indicate that perhaps 1,500 motions to vacate were filed in the four years since news of the scandal broke.[67/] Meanwhile, on the DAs' own numbers, over 24,000 cases remain unaddressed.

A. Initial collaboration focused on incarcerated defendants.

State agencies pledged collaboration immediately after Dookhan's misconduct was disclosed, and DAs vowed

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[65/]R.App. 1935-36 (Aff. of Robert F. Kidd, ¶¶47, 49).

[66/]Michael O'Keefe, Letter to the Editor: DAs have worked to reach defendants affected by drug lab scandal, Boston Globe (Nov. 20, 2015).

[67/]R.App. 1938-39 (Aff. of Paola Villarreal, ¶3) (tabulating a total of 1,431 motions to vacate reported by the DAs for Suffolk, Plymouth, Middlesex, Norfolk, Essex, and Bristol counties); R.App. 1924-25 (Aff. of Brian S. Glenny, ¶¶20-21) (reporting 43 Dookhan cases in Barnstable Superior Court between October and December, 2012, and 53 post-conviction Dookhan matters and 32 pending Dookhan cases in that court since January 2013); see also 1857-58 (Aff. of Vincent J. DeMore, ¶¶4-5, 13); 1882 (Aff. of Richard F. Linehan, ¶¶4-5); 1889 (Aff. of Sara C. DeSimone, ¶¶27-29); 1902 (Aff. of Susanne M. O'Neil, ¶¶17-20); 1914-15 (Aff. of Susan Dolhun, ¶¶9-14); 1933 (Aff. of Robert P. Kidd, ¶20).

to "ensur[e] that justice is done."[68] Much of the early collaboration focused on incarcerated Dookhan defendants.[69]

The trial court, in turn, created "drug lab sessions" to hear Dookhan cases, beginning with motions by incarcerated Dookhan defendants to stay their sentences pending post-conviction motions. Charles, 466 Mass. at 65. In six weeks during the fall of 2012, judges held 589 hearings, which placed "an enormous burden on the Superior Court." Id. In the following three months, special judicial magistrates held over 900 hearings, many relating to motions to stay sentences. Id. at 66-67.

B. A return to business as usual created obstacles for Dookhan defendants.

Dookhan litigation became more adversarial by early 2013.[70] Defendants faced challenges in obtaining discovery and encountered vastly different procedures and outcomes from one county to the next.[71] These challenges put pressure on incarcerated defendants to

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[68]Mass. Dist. Attys. Ass'n, supra n.2 (Add. 63-65).

[69]R.App. 99, 136 (Aff. of Anthony J. Benedetti, ¶59).

[70]R.App. 128, 136-37 (Aff. of Anthony J. Benedetti, ¶¶5(g), 60, 64-65); 1743-45 (Aff. of Nancy T. Bennett, ¶¶30-32).

[71]R.App. 133-34 (Aff. of Anthony J. Benedetti, ¶¶43-49); 142-43 (Aff. of Joanna Sandman, ¶¶10-13); 148-52 (Aff. of Veronica White, ¶¶8-14); 1724-31 (Aff. of Nancy J. Caplan ¶¶24-44).

accept new pleas in order to leave custody.[72] And while prosecutors in some counties at times assented to motions to vacate and granted nolle prosequis — indeed, the Bristol DA's Office now reports that it has "little interest in tying up court time and lawyer time to oppose motions to vacate simple possession convictions"[73] — others at times have fought "tooth and nail in every single Annie Dookhan case."[74]

In this Court, some respondents have advanced legal positions that would make post-conviction challenges especially onerous. In Charles, the Essex County DA argued that judges were without authority to stay sentences of incarcerated Dookhan defendants who had moved to vacate their convictions. 466 Mass. at 72. In Scott, when Dookhan defendants' motions to vacate were being denied because they could not prove misconduct in their individual cases,[75] the District Attorney for Suffolk County contended that such proof was essential, 467 Mass. at 345. And in Bridgeman I,

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[72]R.App. 150.

[73]R.App. 1937 (Aff. of Robert F. Kidd, ¶59).

[74]R.App. 151 (Aff. of Veronica White, ¶¶12-13); see also R.App. 137-38 (Aff. of Anthony J. Benedetti, ¶¶64-67), 1730-31 (Aff. of Nancy J. Caplan ¶¶42-44); 1884 (Aff. of Richard F. Linehan, ¶¶12-13), 1886-87 (Aff. of Sara C. DeSimone, ¶¶11-12); 1901-02 (Aff. of Susanne O'Neil, ¶¶16, 21-22); 1925 (Aff. of Brian S. Glenny, ¶21); 1937 (Aff. of Robert P Kidd, ¶¶59-60).

[75]R.App. 151-52 (Aff. of Veronica White, ¶14).

these respondents both urged the Court to permit Dookhan defendants whose pleas were vacated to be prosecuted for previously dismissed charges and receive more punitive sentences than those originally imposed. 471 Mass. at 474-77. When CPCS addressed counsel shortages by assigning plea counsel to represent Dookhan defendants on motions to vacate,[76] these DAs contended that these assignments put plea counsel in the position of violating ethics rules regarding advocate-witnesses. Id. at 490.

This Court has consistently rejected these positions, recognizing in each instance the necessity of practical solutions to this "lapse of widespread magnitude." Bridgeman I, 471 Mass. at 474, 477, 489-90; Scott, 467 Mass. at 353-54; Charles, 466 Mass. at 74. At the same time, the Court declined to adopt broader comprehensive relief. Bridgeman I, 471 Mass. at 487.[77]

C. Identifying and notifying Dookhan defendants has taken years, and remains incomplete.

Since August 2012, CPCS has tried to identify Dookhan defendants and assign them counsel, but this task has proved to be a substantial challenge.[78] Due to

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[76]R.App. 1744-46 (Aff. of Nancy T. Bennett, ¶¶31-35).

[77]R.App. 471-72.

[78]R.App. 128-30 (Aff. of Anthony J. Benedetti, ¶¶6-23); 140-42 (Aff. of Joanna Sandman, ¶¶5-8); 1742-45 (Aff. of Nancy T. Bennett, ¶¶25-33).

the Hinton lab's poor record keeping practices, a task force led by David Meier spent ten months and reviewed millions of documents to compile an initial list of evidence samples that Dookhan tested (the "Meier Report"). But the list was incomplete and could not readily be used to find actual cases or individuals because it did not contain docket numbers or key personal identifying information.[79/]

The Meier Report anticipated that DAs and police departments would fill these gaps. Specifically, it expected "the District Attorneys and/or the respective law enforcement agencies to locate" the information necessary to link Hinton lab data to identify Dookhan's criminal cases.[80/] But CPCS's requests for the DAs' assistance were declined or left unanswered.[81/]

Before this petition was filed, DAs had provided limited help in identifying Dookhan defendants and had notified very few of them.[82/] Only as a result of this petition, and at the urging of this Court, have the DAs assisted in generating a comprehensive list of Dookhan

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[79/]R.App. 91-94 (Aff. of Nancy J. Caplan ¶¶31-46); 101, 109-110, 1859-60 (Aff. of Vincent J. DeMore, ¶¶23-29); 1874 (Aff. of Gail M. McKenna, ¶14).

[80/]R.App. 109.

[81/]R.App. 185-87 (Aff. of Anthony J. Benedetti, ¶¶7-13); 198-219; 247-49.

[82/]R.App. 247-49; 255; 1899-900 (Aff. of Susanne M. O'Neil, ¶¶3-12); see Bridgeman I, 471 Mass. at 478 n.20, 480-481.

defendants, though thousands of names may still be missing.[83] CPCS has continued its efforts to reach Dookhan defendants, but has limited resources for this task.[84]

People contacted by CPCS almost invariably wish to have the advice of counsel, and those who consult with an attorney almost invariably opt to pursue relief.[85]

III. CPCS cannot provide counsel for 24,000 unresolved Dookhan cases.

Case-by-case litigation on behalf of Dookhan defendants is impossible as a practical matter. CPCS faces an access-to-counsel crisis unrelated to the Hinton lab scandal. It cannot ramp up any further; even if additional resources were available, CPCS could not address the needs of 24,000 victims of the Hinton lab scandal, especially as the Farak crisis looms on the horizon.

A. Even with a significant capacity increase, CPCS would need 48 years to assign post-conviction counsel to 24,000 Dookhan defendants.

Post-conviction motions by Dookhan defendants are currently assigned either to one of a small handful of staff attorneys in CPCS's Drug Lab Crisis Litigation

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[83] R.App. 452; 463; 468; 1696-97 (Aff. of David Colarusso, ¶¶14-17).

[84] R.App. 1723 (Aff. of Nancy J. Caplan, ¶20).

[85] Id. at 1723 ¶¶21-22 (Caplan Aff.).

Unit (DLCLU), or to the private attorneys (bar advocates) who are members of CPCS's post-conviction panel.[86/] Even with the DLCLU handling some Dookhan cases, CPCS struggles to assign counsel to its current caseload of post-conviction cases.[87/]

Each year, CPCS assigns counsel in about 1,500 post-conviction cases, including Rule 30 motions and direct appeals.[88/] The vast majority of these assignments are made to bar advocates on CPCS's post-conviction panel.[89/] This panel has about 300 lawyers, but far fewer than that are available to accept a new assignment at any given time. In part due to low compensation rates,[90/] it takes CPCS **between eight and sixteen weeks** to find a panel member to accept a new Rule 30 assignment, and CPCS's post-conviction

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[86/]Id. at 1737 ¶5 (Caplan Aff.); R.App. 1717-18 (Aff. of Nancy J. Caplan, ¶3).

[87/]R.App. 1739 (Aff. of Nancy T. Bennett, ¶14).

[88/]Id. at 1737 ¶4 (Bennett Aff.).

[89/]Id. at 1737 ¶5 (Bennett Aff.).

[90/]Id. at 1738 ¶11 (Bennett Aff.) ("[P]rivate attorneys have overwhelmingly testified that the existing rates are insufficient to support a private practice"). The compensation for post-conviction cases is the same as for pretrial assignments: $53/hour for District Court (but see Add. 72) and $60/hour for Superior Court. Id. at 1738 ¶10 (Bennett Aff.).

assignment coordinator "spends much of her time importuning attorneys to accept [such] assignments."[91/]

Even if CPCS could somehow expand its assignment capacity by one-third and make 500 additional post-conviction assignments each year, it would take 48 years, i.e., until 2064, to assign certified lawyers for the 24,000 cases tainted by Dookhan's misconduct.[92/]

B. Case-by-case litigation of Dookhan cases is time-consuming, difficult, and should be handled by attorneys certified to handle post-conviction matters.

Representing Dookhan defendant is challenging, and it requires competent counsel with adequate resources. Since Scott, Dookhan post-conviction counsel must focus their efforts on that decision's second prong, a "fact-intensive" inquiry under which a court must determine whether there is "a reasonable probability that [the defendant]' would not have pleaded guilty had he known of Dookhan's misconduct."' 467 Mass. at 355, 358. Addressing this question requires post-conviction counsel to review all evidence and documents in the case and work with the original plea attorney.[93/]

These tasks are time-consuming and challenging. Post-conviction counsel must work with plea attorneys

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[91/]Id. at 1739 ¶14 (Bennett Aff.).

[92/]Id. at 1739-40 ¶¶16-17, 19 (Bennett Aff.).

[93/]R.App. 1724-32 (Aff. of Nancy J. Caplan, ¶¶24-44).

and defendants to prepare affidavits and, where necessary, prepare them to testify.[94] Plea counsel, who may busy with other cases or no longer practicing law, must be located and asked to review documents and to report on the advice they would have given if they had known about Dookhan's fraud.[95] Moreover, the process of obtaining necessary documents is often "lengthy and extremely frustrating," requiring multiple attempts or even resort to public records requests.[96]

Even motions to vacate that turn out to be uncontested require substantial preparation because counsel cannot assume a prosecutor's assent. Indeed, only one county applies a policy of agreeing to relief in categories of cases, thereby allowing for minimal pleadings in cases within a "zone of agreement."[97] In some counties the approach is, "case by case" or "file your pleadings and we'll look at them," while in others, prosecutors contest nearly every Dookhan defendant's motion to vacate.[98]

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[94] Id. at 1729-30 ¶41; Scott, 467 Mass. at 343.

[95] Id. at 1729, ¶¶39-40.

[96] R.App. 1726-29 (Aff. of Nancy J. Caplan, ¶¶28-37).

[97] R.App. 1730-31 (Aff. of Nancy J. Caplan, ¶¶43-44). The "zone of agreement" excluded cases in which the Dookhan-affected conviction was a predicate in a pending case or figured in a federal prosecution.

[98] R.App. 1731 ¶44 (Caplan Aff.).

In an effort to respond quickly to the Dookhan scandal – and hopeful, based on the DAs' stated "overriding goal of ensuring that justice is done,"[99] that Dookhan cases would be vacated without significant litigation – CPCS originally departed from its usual practice and issued notices of appointments of counsel (NAC forms) to plea counsel, few of whom were certified to accept post-conviction assignments.[100] Using available DPH data, CPCS reopened about 7,000 "DPH-tagged" cases and issued NAC forms to prior counsel by December 2012.[101] The agency also made substantial efforts to provide training and assistance.[102]

But many of these appointments never resulted in any representation;[103] we know now that they could not have generated much more than 1,500 motions to vacate.[104] Where representation did occur, it provided CPCS with reason for concern. The "impact of trial attorneys' unfamiliarity with post-conviction

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[99]Mass. Dist. Attys. Ass'n, supra, n.2 (Add. 63).

[100]R.App. 1740-44 (Aff. of Nancy T. Bennett, ¶¶20-31).

[101]R.App. 1740-42, ¶¶21-25 (Bennett Aff.). This number represents almost ninety percent of all Dookhan-tagged appointments of counsel to date. Id. at 1742, ¶25.

[102]Id. at 1742-43, ¶¶26-28; see also R.App. 1719-20 (Aff. of Nancy J. Caplan, ¶¶8-12).

[103]R.App. 1743 (Aff. of Nancy T. Bennett, ¶29).

[104]See n.67, ante, at 19.

litigation" became clear when Scott and its accompanying cases were argued in October 2013, and when Scott was decided in March 2014.[105] The motions to vacate in those cases had been handled by bar advocates not certified to handle post-conviction matters, and, in Scott, the Court noted with disapproval that the motion lacked a supporting affidavit signed by the defendant.[106] In the current climate, in which defendants must be ready for adversarial litigation — whether or not their requests for relief are ultimately opposed — it is clear that "Dookhan defendants need lawyers who [have] not only the willingness but also the experience and relevant qualifications to properly handle contested post-conviction motions."[107]

C. Even if certified post-conviction counsel were not required, CPCS is unable to handle case-by-case litigation of Dookhan cases.

Even if CPCS could draw on all of its staff attorneys and bar advocates, it still could not come close to handling 24,000 Dookhan cases without abandoning existing clients and declining to represent future clients. CPCS struggles to meet the demands of its existing statutory responsibilities, and currently

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[105]R.App. 1745 (Aff. of Nancy T. Bennett, ¶34).

[106]Ibid; see also Scott, 467 Mass. at 343.

[107]R.App. 1745-46 (Aff. of Nancy T. Bennett, ¶35).

faces an access-to-counsel crisis in its Children's and Family Law Division (CAFL).

The lion's share of CPCS's annual appropriation pays bar advocates, who work at the hourly rates that the Legislature has authorized and who represent most CPCS clients.[108] Even though CPCS reliably forecasts how much funding will be needed to pay bar advocates and requests an appropriation in accord with that forecast, its appropriation is "invariably deficient by tens of millions of dollars."[109] This recurring "structural deficiency" – which has averaged about $36 million per year for the last five years – "forces the agency to continually request additional funding necessary to pay the bills throughout the fiscal year," and leaves it in an untenable position when unexpected

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[108]R.App. 1749 (Aff. of Anthony J. Benedetti, ¶6). "Massachusetts' hourly rates for assigned counsel remain 'among the lowest in the nation,' . . . even though it been sixteen years since this Court identified the problem in Lavallee." Id. at 1749-50, ¶9, quoting Lavallee, 442 Mass. at 230. The superior court rate of sixty dollars per hour has remained static for eleven years; the district court rate, which had been stuck at fifty dollars per hour, was increased by three dollars in 2015, effective July 1, 2016 (R.App. 1738 [Aff. of Nancy T. Bennett, ¶10]), but even that minimal increase is now in question. See 2016 House Doc. No. 4506, §6 (proposing that supplemental appropriation for CPCS to pay bar advocates for FY2016 bills be conditioned on repealing 2015 rate increase for District Court and CAFL cases) (Add. 72).

[109]R.App. 1749 (Aff. of Anthony J. Benedetti, ¶7).

circumstances like the Dookhan and Farak fiascos arise.[110/]

At the moment, shortages are particularly acute in CPCS's CAFL Division. The Dookhan crisis has coincided with a fifty-nine percent spike in the number of care and protection petitions filed by the Department of Children and Families.[111/] This increase often makes it impossible for CAFL to assign counsel in a timely manner, because there are not enough attorneys to take the cases.[112/] As a result, it "often takes weeks to assign the lawyers" for hearings that, by law, are supposed to occur within 72 hours. G.L. c.119, §24.[113/]

CPCS recently transferred four Public Defender Division staff attorneys to CAFL offices in western Massachusetts, where the access-to-counsel emergency is most acute. But, of course, the cases "that would

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[110/]Id. at 1749, ¶8. See also John R. Ellement and Evan Allen, Baker signs budget to pay lawyers for indigent, Boston Globe, July 22, 2016 (reporting bar advocates' descriptions of going unpaid at the end of every fiscal year "while a supplemental budget for [CPCS] to cover expenses from the last fiscal year ma[kes] its way through Beacon Hill").

[111/]R.App. 1732 (Aff. of Michael Dsida, ¶3).

[112/]R.App. 1732 ¶4 (Dsida Aff.). Since 2005, CPCS has been authorized to pay CAFL attorneys fifty per hour. Although the rate was scheduled to go up by five hours per hour on July 1, 2016, that increase, like the three dollar per hour increase for District Court cases, see Add. 72, is on the chopping block.

[113/]R.App. 1733 ¶6 (Dsida Aff.).

have been handled by those public defenders do not disappear; they are added to the existing caseloads of other attorneys."[114/]

IV. The Farak scandal exacerbates the Dookhan crisis.

The Farak scandal will increase systemic burdens, particularly with respect to indigent drug defendants.[115/] The same sources of ongoing delay with respect to the Dookhan debacle have emerged in the Farak context. There has also been an additional source of delay: the Office of the Attorney General (OAG), which prosecuted Farak, improperly withheld evidence and provided incorrect information to attorneys and courts about its decision to do so. As a result of the OAG's conduct, thousands of cases that should have been addressed, starting in 2013, are only now coming back to the courts.

A. Farak may have tainted 18,000 cases.

Farak worked at the Hinton lab in 2003 before moving to the Amherst lab in 2004.[116/] By late 2004 or early 2005, she was regularly consuming drugs there, including "standards" used by the whole lab to test

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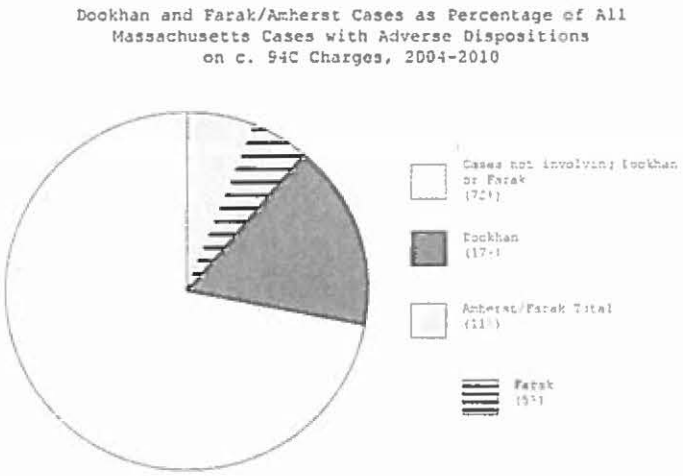
[114/]R.App. 1734 ¶11 (Dsida Aff.).

[115/]R.App. 1854-56 (Affidavit of Christopher K. Post, ¶¶16-24).

[116/]R.App. 1643-44 (Office of the Attorney General, Investigate Report Pursuant to Commonwealth v. Cotto, 471 Mass. 92 (2015), Apr. 1, 2016 (OAG Report)).

drug samples.[117] She also manufactured crack cocaine at the lab and smoked crack "throughout the entire day."[118] Farak was arrested in January 2013 after an evidence officer noticed that two drug samples were missing.[119] She was charged with, and pleaded guilty to, crimes discovered on the day of her arrest.[120]

Farak's misconduct may have affected 18,000 cases in which defendants were convicted on drug charges.[121] From 2004 to 2010, when both Farak and Dookhan were employed as chemists, their misconduct tainted one in four Massachusetts drug convictions:[122]



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[117]R.App. 1646.

[118]R.App. 1654-55.

[119]R.App. 1658-60.

[120]R.App. 1660.

[121]R.App. 1854-56 (Aff. of Christopher K. Post, ¶¶16-24).

[122]R.App. 1827 (Aff. of Paola Villarreal, ¶30).

B. The OAG prevented defendants, their counsel, and the judiciary from learning the true scope of Farak's misconduct.

The Attorney General's Office repeatedly told courts and defense attorneys that Farak's misconduct was extremely limited in duration, even though it had evidence that this was not true. In court, the OAG insisted that Farak's misconduct was limited to the "four months" before her January 2013 arrest.[123] But the OAG and the State Police possessed worksheets that documented Farak's prior drug use over a much longer time period. The OAG suppressed these worksheets until July 2014, when a court ordered the OAG to disclose them to defense attorneys representing Farak defendants seeking to vacate their guilty pleas. The worksheets showed that Farak's drug use at the lab dated back at least to December 2011, and they led defense attorneys to additional documents proving that Farak's misconduct stretched back to 2004 or 2005.[124]

The State Police seized these worksheets from Farak's car on January 2013 and quickly informed the OAG that they were significant. On February 14, 2013, under the subject heading "FARAK admissions," a State

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[123]R.App. 622-23, 635 (Aff. of Luke Ryan, ¶¶5-12, 77).

[124]R.App. 622-28 (Ryan Aff.).

Police Sergeant included them among four documents he attached to an email to the Assistant Attorney General prosecuting Farak, along with this message: "Here are those forms with the admissions of drug use I was talking about."[125] In March 2013, the OAG acknowledged in a "prosecution memo" that it possessed unprivileged evidence of Farak's "use[] [of] illegal substances and the temptation of working with 'urge-ful samples.'"[126]

The OAG repeatedly blocked efforts by defense attorneys to obtain these worksheets, and it provided false information to courts and defense lawyers along the way.[127] These actions affected cases in which people's liberty was at stake.

For example, the worksheets reflected drug use by Farak on December 22, 2011, the very day she tested an alleged drug sample in Commonwealth v. Rolando Penate.[128] But the OAG withheld this evidence from Penate's attorney. In a court filing, it claimed that Farak's apparent drug addiction had begun "roughly four months" before her January 2013 arrest; it argued that Attorney Luke Ryan's evidence request was a "fishing

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[125]R.App. 626-27 ¶¶ 28-31 (Ryan Aff.); R.App. 679. The attachments also included news items from 2011 about people caught using drugs at work. R.App. 680-82.

[126]R.App. 629-30 ¶¶45-47 (Ryan Aff.); R.App. 718 & n.7.

[127]R.App. 635-47 (Ryan Aff.).

[128]R.App. 633 ¶¶65-68 (Ryan Aff.).

expedition" because there was no indication that Farak's drug use "date[d] back" to December 2011.[129] Without this evidence, Penate lost his motion to dismiss, was convicted, and is now incarcerated.[130]

In another case, when the OAG indicated that the evidence sought by a defendant included mental health records, Judge C. Jeffrey Kinder ordered the office to turn over withheld evidence for in camera review.[131] On September 10, 2013, the Assistant Attorney General prosecuting Farak explained to other prosecutors that this withheld evidence included the "worksheets" that the State Police Sergeant had flagged in February.[132] Six days later, the OAG told Judge Kinder – incorrectly – that "every document in [the Sergeant's] possession has already been disclosed."[133]

Consequently, defense attorneys were denied access to exculpatory evidence until nearly a year later, when Judge Kinder granted attorney Ryan's motion to inspect

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[129]R.App. 635-36 ¶¶74-81 (Ryan Aff.); R.App. 764 (emphasis added); see also R.App. 644 ¶ 116 (Ryan Aff.); R.App. 906 (OAG attorney's claim that the sought-after evidence was "just irrelevant").

[130]R.App. 646 ¶126 (Ryan Aff.); R.App. 1002.

[131]R.App. 638-39 ¶¶91-96, 643 ¶113 (Ryan Aff.).

[132]R.App. 882

[133]R.App. 642-44 ¶¶110-17 (Ryan Aff.); R.App. 890 (emphasis added).

evidence from Farak's car.[134] That inspection revealed the worksheets, which in turn led Judge Kinder to order the production of Farak's treatment records revealing drug use going back to 2004 or 2005.[135]

C. The OAG prosecuted Farak without actually investigating her.

In addition to blocking others from learning about Farak, the OAG blinded itself to the scope and consequences of her misconduct. Despite prosecuting Farak, the OAG did not investigate her until instructed to do so by this Court. Commonwealth v. Cotto, 471 Mass. 97 (2015). For example, it apparently never pursued an offer by Farak's attorney to make a proffer as to the scope of Farak's drug use; nor did it charge any conduct not already known to the OAG on the day of Farak's arrest.[136] Its lead Farak prosecutor also urged the Inspector General's Office to "say no" to investigating the Amherst lab, even though that same prosecutor had told a colleague about the lab's "embarrassing" lack of quality control.[137]

As a consequence of the OAG's actions, the Superior Court denied relief to Farak defendants based

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[134]R.App. 647 ¶¶131-32 (Ryan Aff.).

[135]R.App. 648 ¶139 (Ryan Aff.).

[136]R.App. 630; see Cotto, 471 Mass. at 222 n.14.

[137]R.App. 629 ¶44; R.App. 711.

on the misapprehension that their cases predated her misconduct.[138] This Court, in turn, was led to believe that Farak's misconduct "[did] not appear to be . . . comparable to the enormity of Dookhan's misconduct." Cotto, 471 Mass. at 111. A year later, and only because this Court held that the Commonwealth was obliged to investigate, it is clear that Farak compromised the integrity of thousands of cases.[139]

SUMMARY OF THE ARGUMENT

1. Case-by-case litigation of Dookhan cases is not compatible with due process because it is not possible. This Court recognized in Bridgeman I that due process requires meaningful access to post-conviction relief. There is not such access here because there are 24,000 cases, other scandals, and resources to deal with only a fraction of the cases needing attention. The cases must therefore be dismissed. Pp. 39-50.

2. Even if case-by-case litigation were compatible with due process, it should be rejected as an exercise of this Court's broad superintendence authority. The integrity of the Commonwealth's justice system has been deeply damaged by the Dookhan debacle. Continuing to pursue case-by-case litigation would exacerbate that damage by denying access to justice for the victims of

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[138] R.App. 646, 650.

[139] R.App. 1638-39, 1646-60, 1850.

this systemic lapse, and by failing to meaningfully deter future scandals. In accord with the approach taken by this Court in Lavallee v. Justices in the Hampden Superior Court, 442 Mass. 228 (2004), a workable two-step solution previously submitted to this Court can now be implemented to vacate and dismiss Dookhan-tainted cases, either with prejudice or by providing the DAs with a strictly limited opportunity to reprosecute certain cases. Pp. 50-61.

ARGUMENT

I. Case-by-case assignment and litigation of Dookhan matters is not consistent with due process because it is not reasonably possible.

The permissible time for resolving Dookhan cases is not infinite. In Bridgeman I, the Court expressed a view that Dookhan defendants were on the cusp of accessing meaningful opportunities to seek relief. But that view cannot survive 2016. It is now clear that Dookhan defendnats are trapped in a years-long game of musical chairs; justice can be offered to any of them, but only if it is denied to others.

This dynamic is especially dismaying when measured against the benchmarks of 2012. When Dookhan's fraud was disclosed, prosecutors pledged an "overriding goal" of "ensuring that justice is done."[140] It would have been surpassingly odd if, amid those pledges, they had

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[140]Mass. Dist. Attys. Ass'n, supra n.2. (Add. 63-65).

announced that in 2016 roughly 24,000 Dookhan cases would remain; prosecutors would be pursuing a strategy of "protecting" these convictions; two new crises would have emerged; and the Dookhan crisis would be "solved" by sending her victims an inscrutable notice. Yet that is the situation today.

A. Due process is violated when access to justice is impossible for most defendants.

Bridgeman I held that barriers to providing justice to the Dookhan defendants had not at that juncture "rise[n] to the level" of constitutional error. 471 Mass. at 479. But the Court recognized that due process would be denied if meaningful access to post-conviction relief were blocked. Id. Moreover, it stated that "[t]he ability of CPCS to identify clients and to assign them attorneys . . . is crucial to the administration of justice in the Hinton drug lab cases." Id. at 480.[141]

The Court anticipated that two interventions would soon remove barriers to relief. First, it pointed to its own decisions, which have made post-conviction motions less risky and less burdensome. Id. at 476-80; see Scott, 467 Mass. at 338. Second, the Court noted

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[141]See Commonwealth v. Weichel, 403 Mass. 103, 109 (1988); In re Williams, 378 Mass. 623, 625 (1979); Harris v. Champion, 15 F.3d 1538, 1557 (10th Cir. 1994).

its belief that, in response to this litigation, complete lists of Dookhan cases in every affected county would soon be supplied by the DAs. Bridgeman I, 471 Mass. at 480-81. Thus, while recognizing that many defendants had been given no meaningful opportunity to take advantage of this Court's case law, the Court believed that this bottleneck had been removed.

The first intervention has performed as expected, but its impact has been negated by the unmitigated failure of the second. Due to Bridgeman I, it is now true that defendants who learn of their post-conviction rights almost always choose to exercise them.[142/] But the number of these people is vanishingly small. This is because the case lists mentioned in Bridgeman I required work (which, to their credit, the DAs performed); new lists were not ready until May 2016; and now that these new lists exist, it has become apparent that there is no way to provide lawyers to all the people who appear on them. This litigation simply cannot proceed, on any timetable, one case at a time.

B. Case-by-case litigation is impossible in 24,000 Dookhan cases.

It is no longer conceivable that the Dookhan debacle can be resolved through case-by-case

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[142/]R.App. 1723 (Aff. of Nancy J. Caplan, ¶¶21-22).

litigation. In fact, no party before this Court submits that all Dookhan-involved convictions can be litigated one by one. And for good reason.

1. After four years, the number of unresolved Dookhan cases is still enormous. The DAs have identified 24,391 cases in which a Dookhan-involved conviction was still on the books in May 2016,[143] and only some 1,500 Dookhan cases that may have already been litigated.[144] Many Dookhan cases may still be unidentified.[145]

By the same token, the task of addressing collateral consequences facing Dookhan defendants is harder than ever. In June 2016, the DAs filed a document announcing their strategy to "protect" Dookhan-involved convictions – even when those convictions are used as predicates for a mandatory minimum sentence in some other case, and even when the

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[143] R.App. 1938, 1940 (Aff. of Paola Villarreal, ¶¶2, 8-9).

[144] See supra, n.67. The 24,391 cases include at most 555 cases in which a post-conviction motion has been filed and resolved through a new adverse disposition, such as a "re-plea" to a lesser included offense. But the defendants had the benefit of this Court's decisions in Charles, Scott, and Bridgeman in at most 32 of these 555 cases. R.App. 1940-41, 1943-44 (Aff. of Paola Villarreal, ¶¶11-12, 18-20).

[145] R.App. 1696 (Aff. of David Colarusso, ¶¶14-17).

Dookhan predicate is drug possession.[146] Thus, contrary to the hope that defendants incarcerated due to Dookhan's misconduct were all addressed in the early days of this litigation, see Charles, 466 Mass. at 77, people may be incarcerated right now because of Dookhan-involved predicates.[147]

2. Even if this were CPCS's only crisis, 24,391 cases would present an intractable problem. If CPCS could increase its post-conviction capacity by one-third - which, in point of fact, it cannot - it would still take 48 years to assign counsel to the Dookhan defendants.[148] And during those 48 years, CPCS would have to make daily, unacceptable, and constitutionally infirm choices among its various clients. This outcome would "wrongly . . . [place] the burden of a systemic lapse that . . . is entirely attributable to the government" on those who are its victims. Id. at 476, citing Lavallee, 442 Mass. at 246.

3. This crisis is not the only one facing CPCS. In April 2016, the Attorney General conceded that

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[146]R.App. 609, 615-16.

[147]Deported Dookhan defendants have met an equally tragic fate. They cannot easily litigate from abroad and, if a conviction is vacated and charges reinstated, pending charges effectively bar them from readmission to the U.S. R.App. 1712-14 ¶¶6-8 (Aff. of Wendy Wayne).

[148]R.App. 1739-40 (Aff. of Nancy T. Bennett, ¶17).

Farak's misconduct lasted roughly eight years.[149] Together with lab mismanagement, it may have tainted some 18,000 cases.[150] Meanwhile, in CPCS's Children and Family Law Division, there are weeks-long delays in securing counsel for hearings that are required by law to be held within 72 hours of a child's removal from their home.[151] Either crisis, without more, would be too much for CPCS to bear.

Litigating the Farak scandal might be particularly time-consuming. For starters, it is unclear if or when systemic notice will occur. In September 2015, defense groups wrote the Attorney General's Office to endorse its offer to broker a discussion with DAs about notifying Farak defendants.[152] The OAG did not report back.[153]

Farak litigation might also require defense lawyers to raise issues that have not emerged in the Dookhan context. These issues will inevitably include prosecutorial misconduct by the Office of the Attorney General. Whatever its explanation might be, the OAG

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[149]R.App. 1638-60 (OAG Report).

[150]R.App. 1660-83 (OAG Report); R.App. 1855-56 (Aff. of Christopher K. Post, ¶24).

[151]R.App. 1750 (Aff. of Anthony J. Benedetti, ¶10); R.App. 1732-35 (Aff. of Michael Dsida, ¶¶3-12).

[152]R.App. 1200-04.

[153]R.App. 1022 (Aff. of Matthew R. Segal, ¶¶12-14).

made false statements about the scope of Farak's misconduct, and about the evidence in its possession. When the OAG told attorney Ryan that he was engaged in a "fishing expedition," this was not true. When the OAG claimed that Farak's drug crimes spanned only "four months," this was not true. And when the OAG told Judge Kinder that it had "already" disclosed documents it was still withholding, this was not true either.[154] Accordingly, in many cases it might be impossible to responsibly represent a Farak defendant without asserting prosecutorial misconduct.[155]

4. Case-by-case litigation would be impossible if this were Day One of the Dookhan crisis. But it is not Day One. There have been years of "inordinate and prejudicial delay" attributable to the Commonwealth. Bridgeman I, 471 Mass. at 479.

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[154]Compare R.App. 634, 642, and R.App. 890, with Mass. R. Prof. C. 3.3 & cmt. [2], [2a], as appearing in 471 Mass. 1416 (2015) (candor toward the tribunal), 3.4, as appearing in 471 Mass. 1425 (2015) (fairness to opposing party and counsel), and 3.8, as amended, 428 Mass. 1305 (1999) (special responsibilities of a prosecutor).

[155]See Commonwealth v. Cronk, 396 Mass. 194, 198-99 (1985) ("Prosecutorial misconduct that is egregious, deliberate, and intentional, or that results in a violation of constitutional rights may give rise to presumptive prejudice"); Commonwealth v. Lam Hue To, 391 Mass. 301, 314 (1984) (dismissal of the indictment "would be appropriate where failure to comply with discovery procedures results in irremediable harm to a defendant that prevents the possibility of a fair trial").

In Bridgeman I, this Court noted the "substantial efforts" that had been made to deal with Dookhan's misconduct. 471 Mass. at 479. And it is true that many stakeholders, including the DAs, deserve credit for this effort. At the same time, Annie Dookhan is not the reason why victims are still being identified in 2016. If she had worked in a properly-functioning DPH, with ethically-minded supervisors, then her actions would have been halted, disclosed, and addressed years ago.

But that is not what happened. When Dookhan reported humanly impossible productivity in 2004, no one stopped her.[156/] When whistleblowers complained, they were silenced.[157/] When Dookhan was caught red-handed, her misconduct was covered up by officials who reportedly might have "desire[d] to conceal any problems" due to "their fear of losing [grant] money."[158/] And when Dookhan's fraud finally was disclosed, woeful recordkeeping prevented the Commonwealth from generating case lists the way other states do it: by typing search terms into a computer.

* * *

The "fundamental requirement" of the due process guaranteed by the 14th Amendment to the United States

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[156/]R.App. 1109-10, 1117 (OIG Report).

[157/]R.App. 1111-16 (OIG Report).

[158/]R.App. 1114 (OIG Report).

Constitution and art. 12 of the Massachusetts Declaration of Rights "is the opportunity to be heard at a meaningful time and in a meaningful manner." Mathews v. Eldridge, 424 U.S. 319, 333 (1976); see Doe, SORB No. 380316 v. Sex Offender Registry Board, 473 Mass. 297, 301 (2015). These requirements cannot be met so long as Dookhan defendants are made to bring and litigate individual cases. Because this Court has given case-by-case litigation every chance to succeed, its impossibility is all the more clear. The Dookhan convictions should now be vacated and the underlying drug charges should be dismissed.

C. The DAs' notice was the "final step" in a "global remedy" that violates due process.

The DAs have reached for a disposition that is every bit as "global" as anything proposed by petitioners and CPCS. But the DAs' disposition, if allowed to stand, would violate rather than uphold due process. Four years after Dookhan's fraud was disclosed, but just two months before this case was to be argued in this Court, the DAs sent 20,000 defendants a Notice that was apparently designed as a "final step" that would "complete the process" of working with the single justice, petitioners, and CPCS to address this crisis.[159] And a "final step" is precisely what this

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[159] R.App. 603-17; SRA 7.

Notice portends; it is so poorly drafted that it will have the predictable consequence of limiting individual cases to a bare minimum.

The Notice, see SRA 79-80, has these peculiarities:

- it takes up only half a page of English text;
- it does not mention that the rights of Dookhan defendants are at issue in this case;
- it does not mention Scott's presumption of egregious government misconduct;
- it alludes to Bridgeman I's exposure cap, but it is unclear about whether defendants might have to re-serve their original sentences;
- it ominously pledges that any defendant whose conviction is vacated will have an "active" criminal case (as though prosecutors had already decided not to dismiss any cases);
- it is silent as to who sent it, apart from an envelope purporting to be from both the "Commonwealth of Massachusetts" and "RG/2 Systems Inc.";[160]
- it instructs defendants to call the DAs "[f]or more information," even though the DAs of course represent a party that is or has been adverse to each defendant;[161] and
- it cannot be understood by people who speak only Spanish.

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[160]SRA 80.

[161]It is unclear what steps the DAs have taken to ensure that any discussions with Dookhan defendants are appropriate. See Mass. R. Prof. C. 4.2, as appearing in 471 Mass. 1440 (2015) (communications with person represented by counsel); id. at 4.3 (dealing with unrepresented person).

This Notice is not a serious effort to ensure that wrongful convictions will be addressed through case-by-case litigation. It is a poison pill. Anyone who receives it could be misled, confused, or both.

The Notice's tendency to suppress demand for lawyers also appears to be part of a self-fulfilling prophecy. Rather than attempt to prove that comprehensive case-by-case litigation is possible — which it is not — the DAs have argued that it will not be necessary because Dookhan defendants have a low "degree of interest" in challenging "settled" cases where fraud may have been used to convict them.[162/] One prosecutor has even argued that this Court can safely ignore all 15,000 cases in which none of the drug charges involve distribution. The defendants in these possession-only cases, he writes, are "unlikely . . . [to] be interested in challenging their convictions" because they are preoccupied by the struggles of being "poor," of dealing with "addiction and mental illness," and of just trying "to survive in our society."[163/]

This proposal abandons case-by-case litigation, but it does not do so fairly. Precisely because Dookhan defendants are some of the most vulnerable people in our society, they should not have been sent a Notice

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[162/]R.App. 611.

[163/]R.App. 1935-37.

that was so misleading and incomplete. Moreover, unless these defendants are relieved of the burdens of case-by-case litigation, the harm of this Notice cannot be undone because the Notice cannot be un-seen. How could a corrective letter persuade recipients that it, and not the prior one, is the real notice? How could such a letter both reach the very same people and erase all the misconceptions that will have arisen?[164] Because so many people affected by this scandal are poor, without stable housing, and suffering from addiction and other mental health issues, the DAs' mistake cannot readily be fixed by measures that fall short of vacating convictions.

II. The Court should exercise its broad supervisory powers to vacate and dismiss Dookhan-involved convictions, either with prejudice or subject to a limited opportunity to reprosecute.

It was proposed in Bridgeman I that the Court use its broad superintendence powers under G.L. c.211, §3, to order and implement a comprehensive response that would "resolve, once and for all, the tens of thousands of cases affected by Dookhan's egregious misconduct at the Hinton drug lab." Bridgeman I, 471 Mass. at 487. The "two-part solution" presented in Bridgeman I was aptly summarized by Justice Spina, as follows:

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[164] Commonwealth v. Seng, 436 Mass. 537, 538 (2002) ("a faulty recitation to the defendant of his Miranda rights in the Khmer language prevented the defendant from executing a valid waiver of these rights").

> First, . . . this [C]ourt should vacate the convictions of all Dookhan defendants. Second, . . . this [C]ourt should dismiss all such cases with prejudice or, in the alternative, give the Commonwealth a limited opportunity to reprosecute individual cases in which there is sufficient untainted evidence to prove the drug charges beyond a reasonable doubt. Those cases that are not reprosecuted within one year . . . should be dismissed with prejudice in accordance with the speedy trial rule, Mass. R. Crim. P. 36(b)(1)(D), as amended, 422 Mass. 1503 (1996).

Id.

Petitioners and CPCS resubmit the remedy considered in Bridgeman I. Even assuming that proceeding on a case-by-case basis could be said to satisfy due process, it nevertheless is "untenable." Id. The status quo – in which about 94 percent of the convictions tainted by Dookhan's misconduct have not been addressed pursuant to Rule 30 – impairs the integrity of the justice system as a whole. Vindicating the rights of Dookhan defendants, who for so long have not had access to justice, will both restore that integrity and encourage such systemic reforms as are necessary to ensure that lapses of such magnitude will not occur again.

The proposal summarized in Bridgeman I is eminently "workable," 472 Mass. at 487, and can now be implemented in light of the DAs' production of lists of Dookhan defendants. A blueprint for such implementation may be found in CPCS's brief as amicus curiae in Scott,

at 31-48, and CPCS's brief in Bridgeman I, at 25-33.[165] The particulars of that proposal have the significant virtue of resting, in large measure, on well-settled legal principles and mechanisms. We refer the Court to these briefs and stand ready to submit supplemental briefing upon request of this Court or if this case is remanded to a single justice. See Lavallee, 442 Mass. at 247 ("outlin[ing]" systemic remedy calling for "dismissal" of defined category cases but referring matter to a single justice so that the remedy could be refined or modified as necessary).

A. Vacatur followed by dismissal of convictions tainted by Dookhan's misconduct is a necessary and appropriate exercise of this Court's supervisory authority.

Even though the Court declined to implement the above-summarized remedy in May 2015, the broad superintendence powers set out in G.L. c.211, §3, unquestionably confer the statutory authority to do so. See Charles, 466 Mass. at 88-89 (exercising Court's superintendence authority where Hinton lab failure raised systemic problems and where "no other remedy [was] expressly provided" by law), quoting G.L. c.211, §3.[166]

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[165]CPCS's amicus brief can be found in the Court's file for Commonwealth v. Geordano Rodriguez, No. SJC-11462, one of five cases decided with Scott.

[166]In addition to its superintendence authority under

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This Court has already held in the extraordinary series of cases generated by the Hinton lab debacle — Charles (2013), Scott (2014), and Bridgeman I (2015) — that the "widespread magnitude" of Dookhan's misconduct, Bridgeman I, 471 Mass. at 474, has given rise to unprecedented systemic challenges which, realistically, cannot be managed without supervisory intervention by this Court. Furthermore, a comprehensive remedy like the one proposed here — which anticipates the dismissal of a defined category of cases — is entirely consistent with this Court's exercise of its supervisory authority in Lavallee, which also involved a governmental lapse of systemic magnitude. There, as a result "chronic underfunding" of the Commonwealth's indigent defense system, id. at 231, and "the low rate of attorney compensation authorized by the [Legislature's] annual budget appropriation," no attorneys were available to represent indigent

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[166]/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE) G.L. c.211, §3, this Court has addressed Hinton lab-related exigencies using its "inherent power 'to do whatever may be done under the general principles of jurisprudence to insure to the citizen a fair [hearing], whenever his life, liberty, property or character is at stake.'" Charles, 466 Mass. at 73 (citation omitted). See also Matter of Troy, 364 Mass. 15, 21 (1973) (relying on Court's "inherent common law and constitutional powers . . . to protect and preserve the integrity of the judicial system and to supervise the administration of justice").

defendants facing criminal charges in the courts of Hampden County. Id. at 229-30.

In addressing that access-to-counsel crisis, the Court set out the twin principles which have since guided its supervisory intervention with respect to systemic lapses. First, the "duty" of implementing and maintaining a system that adequately safeguards the fundamental rights of criminal defendants "falls squarely on government." Id. at 246. Second, "the burden of a systemic lapse is not to be borne by defendants." Id. Applying these principles, the Court ordered the dismissal without prejudice of all cases brought against indigent defendants in Hampden County for whom, despite good faith efforts, a notice of appearance by assigned counsel could not be secured within 45 days of arraignment. Id. at 246-47.

Here, the systemic lapse arising from the Hinton lab scandal is the responsibility of the Commonwealth, specifically the various agencies and officers, including the respondents, entrusted with ensuring the integrity of evidence essential to the fair prosecution of the thousands of individuals brought up on drug charges every year.

Put differently, it would be unfair to place the significant burdens of rectifying a systemic lapse on the backs of the defendants most directly affected by it. It is especially important to avoid such a mistake

here because the 24,000 Dookhan defendants are the same poor people of color disproportionately targeted by our War on Drugs. See, e.g., Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness, 97-139 (2012).

The "remedy" that the DAs have proposed - maintaining the status quo - unfairly puts the burden on Dookhan defendants to initiate post-conviction proceedings and, thus, contravenes the principles of supervisory intervention set out in Lavallee, and endorsed in Charles, Scott, and Bridgeman I. That "remedy" is also doomed to fail, because the "time and expense" that would be required to implement a case-by-case approach actually capable of reaching an acceptable percentage of 24,000 Dookhan-affected cases is "untenable." Bridgeman I, 471 Mass. at 487.

Although the criminal justice system seeks to provide justice for each defendant, one case at a time, the sheer number of Dookhan defendants makes that model infeasible.[167] Indeed, in a scandal of this magnitude,

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[167]In fact, the magnitude of this debacle diminishes the relevance of other states' responses to drug lab failures, because the numbers at issue in those cases is dwarfed by the number of adverse dispositions generated by Dookhan's misconduct. 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

(FOOTNOTE CONTINUED ON NEXT PAGE)

the normal case-by-case approach has itself become the main obstacle to a fair solution, because it necessarily entails both additional delay, which due process does not permit, and additional resources, which the Commonwealth does not have.

The cost of actually relitigating 24,391 Dookhan cases — however many tens or hundreds of millions of dollars that would be — is patently unaffordable. CPCS is one of "more than twenty" agencies that have incurred costs related to the Hinton lab scandal.[168] Continuation of burdensome, piecemeal litigation will require these agencies to compete for whatever scant resources are made available for the foreseeable future. CPCS itself is underfunded at the beginning of every fiscal year by about $36 million, "forc[ing] the agency to continually request additional funding necessary to pay the bills throughout the fiscal year."[169] The hourly rates which CPCS is authorized to

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[167](FOOTNOTE CONTINUED FROM PREVIOUS PAGE) 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). The out-of-state case with the greatest number of affected defendants still contends with but a fraction of the cases affected by Dookhan.

[168]R.App. 304 (Aff. of Anthony J. Benedetti, ¶17).

[169]R.App. 1749 ¶8 (Benedetti Aff.).

pay to bar advocates "remain 'among the lowest in the nation,' . . . even though it [has] been [twelve] years since this Court identified the problem in Lavallee."[170] As a result, CPCS must often decide which hole in the dyke to plug, and it simply "do[es] not have the . . . resources necessary to provide counsel for anywhere near the number of individuals who have been harmed" by the Hinton lab fiasco:[171]

> Every second and every dollar that CPCS spends dealing with the previously-litigated cases which Dookhan . . . intentionally mishandled is time and money that is unavailable for other compelling issues that cannot responsibly be deferred, including providing counsel to, for example, children and parents in emergency care and protection cases, mentally ill persons in involuntary commitment cases, and juvenile and adult defendants facing the loss of liberty and a plethora of "collateral" consequences in the event of a delinquency adjudication or criminal conviction.[172]

As time passes and new systemic stressors inevitably arise, continuing with the case-by-case response to the Hinton lab scandal compounds the problem by squandering scarce resources in previously litigated cases and causing additional undue delay in the resolution of all cases, for Dookhan defendants and non-Dookhan defendants alike. The "responsibility for

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[170]R.App. 1749-50 ¶9 (Benedetti Aff.).

[171]R.App. 1754 ¶24 (Benedetti Aff.).

[172]Id. at 1748 ¶4 (Benedetti Aff.).

providing representation to thousands of indigent Dookhan defendants" cannot be shunted onto CPCS without precipitating a significant state-wide crisis in its ability to carry out its primary statutory duty, to "'plan, oversee, and coordinate the delivery of criminal and certain noncriminal legal services' to indigent defendants." Bridgeman I, 471 Mass. at 485-486, quoting G.L. c.211D, §1. This problem must be resolved "once and for all," Bridgeman I, 471 Mass. at 487, to prevent the systemic damage that will ensue in the absence of swift and comprehensive relief for all Dookhan defendants. See and compare Lavallee, 442 Mass. at 247 (acknowledging the interests of the petitioners and "future indigent defendants in Hampden County"), with Public Defender v. State, 115 So. 3d 261, 265, 270, 276 (Fla. 2013) (judiciary should devise systemic remedy to ensure against "prospective inability" of indigent defense system to adequately effectuate the right to counsel in large numbers of cases), citing Hurrell-Harring v. State of New York, 15 N.Y.3d 8 (2010).[173/]

[173/]See also American Council of Chief Defenders, Nat'l Legal Aid and Defender Ass'n, Ethics Opinion 03-01 (Apr. 2003) ("When confronted with a prospective overloading of cases . . . which will cause the agency's attorneys to exceed . . . capacity, the chief executive of a public defender agency is ethically required to refuse appointment to any and all such cases"); Mass. R. Prof. C. 1.16 & cmt. [1], as

(FOOTNOTE CONTINUED ON NEXT PAGE)

B. The proposed two-part solution is workable and will restore integrity to the justice system.

Vacatur followed by dismissal of identified and reasonably identifiable Dookhan-tainted convictions is needed to safeguard each of the general superintendence concerns identified by this Court in the context of systemic lapses: "[1] the due process rights of defendants, [2] the integrity of the criminal justice system, [3] the efficient administration of justice . . ., and [4] the myriad public interests at stake." Scott, 467 Mass. at 352.

Dismissal here can justifiably be ordered with prejudice. While Dookhan is responsible for her personal "misconduct," see Scott, 467 Mass. at 355 n.11, it cannot be ignored that it was a systemic lapse, of epic proportions, which permitted her to fabricate and falsify evidence, certified under oath, see G.L. c.111, §§12-13, for so many years and in so many cases. It is not Dookhan alone who failed. Notwithstanding the risk of "Dookhan fatigue," the unprecedented number of human beings who have been directly hurt remains shocking. Dismissal with prejudice is, thus, proportionate under the

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[173] (FOOTNOTE CONTINUED FROM PREVIOUS PAGE) appearing in 471 Mass. 1395 (2015) ("A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion").

circumstances and in accord with the governing case law. See, e.g., Commonwealth v. Manning, 373 Mass. 438, 443-445 (1977); Commonwealth v. Washington W., 462 Mass. 204, 213-216 (2012).

Dismissal with prejudice also would bring relief to Dookhan defendants as decisively as possible, encourage the political branches to undertake the reforms necessary to prevent lapses like this from occurring, and remind prosecutors that, when government misconduct taints the integrity of a conviction, the Commonwealth's interest "is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935).

Finally, dismissals with prejudice would not substantially prejudice the Commonwealth. Most "Dookhan defendants have completed service of their sentences." Bridgeman I, 471 Mass. at 477 n.19. With respect to these cases, the Commonwealth has already "obtained the full benefit of its plea agreements." Id. The DAs tell us that Dookhan defendants who do get into court typically prevail, often because the prosecutor files a nolle prosequi.[174] It is not unreasonable under these

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[174]R.App. 137-38 (Aff. of Anthony J. Benedetti, ¶¶64-67), 1730-31 (Aff. of Nancy J. Caplan ¶¶42-44); 1884 (Aff. of Richard F. Linehan, ¶¶12-13), 1886-87 (Aff. of Sara C. DeSimone, ¶¶11-12); 1901-02 (Aff. of Susanne O'Neil, ¶¶16, 21-22); 1925 (Aff. of Brian S. Glenny, ¶21).

circumstances for the Commonwealth to bear the risk of being unable to reprosecute some relatively small percentage of Dookhan-affected cases that it might otherwise wish to.

In the alternative, the vacatur of all Dookhan defendants' conviction could be followed by dismissal without prejudice, for the sole purpose of giving the DAs a limited opportunity to reprosecute individual cases in which they can demonstrate that there exists sufficient untainted evidence to prove the drug charges 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"); Commonwealth v. Perkins, 464 Mass. 92, 101 (2013) (involving process of "screen[ing] out . . . those cases that should not go to trial, thereby sparing individuals . . . from being unjustifiably prosecuted") (citation omitted). Any case not reprosecuted within one year would be automatically dismissed in accordance with the speedy trial rule, Mass. R. Crim. P. 36(b)(1)(D), as amended, 422 Mass. 1503 (1996), i.e., such that further prosecution "is barred." Commonwealth v. Balliro, 385 Mass. 618, 624 (1982), citing Commonwealth v. Ludwig, 370 Mass. 31, 34 (1976).

CONCLUSION

For the above stated reasons, the Court should order that all cases involving misconduct by Annie Dookhan be vacated and dismissed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, the undersigned counsel for the petitioner herein, 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) (see also motion filed with this brief for leave to file brief in excess of fifty pages), 18 (appendix to the briefs), and 20 (form of briefs, appendices, and other papers).

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