COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

NO. SJC-12157

---

KEVIN BRIDGEMAN,
AND OTHERS

v.

DISTRICT ATTORNEY FOR THE SUFFOLK DISTRICT,
AND OTHERS

---

# BRIEF OF AMICUS CURIAE,

# THE NATIONAL ASSOCIATION FOR PUBLIC DEFENSE (NAPD),

# IN SUPPORT OF PETITIONERS

Submitted by:
National Association for Public Defense,
By and through counsel,

Patricia A. DeJuneas
Sibbison & DeJuneas
1 McKinley Square
Boston, MA 02109
dejuneas@sdappeals.com
(617) 529-8300

Janet Moore, *Co-Chair, Amicus Committee*
For Identification Purposes Only:
Associate Professor
University of Cincinnati College of Law
Post Office Box 210040
Cincinnati, Ohio 45221-0040
(513) 600-4757

Dated: October 24, 2016

**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES**

**CASES**

**CONSTITUTIONAL PROVISIONS**



**OTHER AUTHORITIES**

## STATEMENT OF INTEREST

The National Association for Public Defense ("NAPD") is an association of more than 14,000 attorneys, investigators, social workers, administrators and others professionals who fulfill constitutional mandates to deliver public defense representation throughout all U.S. states and territories. NAPD members advocate for clients in jails, courtrooms, and communities, and are experts in the theory and practice of evidence-based quality service to people who are charged with crimes but who cannot afford to hire counsel. They serve in state, county, and local systems through full-time, contract, and assigned counsel who litigate juvenile, capital and appellate cases through a diversity of traditional and holistic practice models.

Moreover, NAPD's membership includes all staff providing legal representation through the Commonwealth's Committee for Public Counsel Services (CPCS) as well as over 100 assigned counsel in Massachusetts. CPCS leaders are active in NAPD leadership through committee work and as faculty for the annual NAPD Leadership Institute. CPCS also has shared thousands of pages of crucial defender trial resources with public defenders across that nation through MyGideon, NAPD's secure public defense library.

This partnership gives NAPD a strong interest in maintaining access to the courts and fair, reliable case outcomes through the provision of quality public defense service for the people of Massachusetts. In addition, NAPD's insight into the real-world effects of criminal convictions on individuals and their families anchors our strong interest in preventing the systemic overload and breakdown of public defense in the Commonwealth. Based on the foregoing factors, we hope the Court will find our perspective helpful.

## STATEMENT OF THE CASE AND RELEVANT FACTS

NAPD hereby accepts and adopts the Statements of the Case and Facts as set forth in the Corrected Joint Brief of Petitioners and the Intervener.

## SUMMARY OF ARGUMENT

As the highest courts in Florida, Missouri, Michigan, New York, and Pennsylvania have demonstrated, systemic relief is necessary and appropriate to cure systemic failures that deny access to courts by imposing overwhelming demands on struggling public defense systems. Government misconduct created exactly that type of constitutional crisis by flooding the Commonwealth's criminal legal system with 24,000 Dookhan cases. New revelations of even more corruption in the Commonwealth's forensic sciences system are now anticipated to

exacerbate that crisis by adding another 18,000 Farak wrongful-conviction cases. At the same time, the District Attorneys have undermined progress on fair, reliable case-by-case resolution of the Dookhan convictions by issuing misleading and ineffective communications regarding *who* is eligible to cure the government's misconduct, *how* they should obtain relief, and *when* they must do so.

These developments underscore the unworkability of the current case-by-case approach to remedying the government misconduct at issue here. They demonstrate the compelling and immediate need for this Court to grant Petitioners' requested relief by ordering these convictions vacated with prejudice, or with a severely limited opportunity for district attorneys to justify refiling charges in specific cases that are supported by untainted evidence and for the defense of which the Commonwealth's public defense attorneys have sufficient resources to provide timely, quality representation. Any other resolution only exacerbates the ongoing harm to thousands of people from egregious government misconduct.

## ARGUMENT

### I. SYSTEMIC RELIEF IS REQUIRED TO CURE A SYSTEMIC TAINT TO CRIMINAL CONVICTIONS THAT HAS OVERLOADED THE COMMONWEALTH'S PUBLIC DEFENSE SYSTEM.

#### A. Systemic Taint is Causing Systemic Harm

State courts across the country have approved systemic relief as the necessary and appropriate response to constitutional crises created by systemic overload of public defense systems, such as the crisis created by government misconduct in the Dookhan cases. The Florida Supreme Court succinctly captured why such systemic failings require a systemic remedy, when swamped public defenders urged that case-by-case resolution of the crisis was unworkable:

> In extreme circumstances where a problem is system-wide, the courts should not address the problem on a piecemeal case-by-case basis. This approach wastes judicial resources on redundant inquiries.

Public Defender, Eleventh Judicial Circuit of Fla. v. State, 115 So. 3d 261, 274 (Fla. 2013). The Court further reasoned that "systemic aggregate relief" prevented courts from being "clogged with hundreds of individual motions" that would be "tantamount to applying a band aid to an open head wound." Id.

As demonstrated below, systemic relief is equally necessary with respect to the convictions tainted by what this Court has determined to be egregious misconduct attributable to the Commonwealth. This Court pre-

viously ruled that, where Commonwealth prosecutors relied on the tainted evidence at issue here, each defendant "is entitled to a conclusive presumption that … misconduct occurred[,] that it was egregious, and that it is attributable to the Commonwealth." Commonwealth v. Scott, 467 Mass. 336, 338 (2014). Yet despite the "conclusive presumption" of "egregious" wrongdoing, the current case-by-case approach to curing that wrong has left the vast majority of the Dookhan convictions in full effect today. Indeed, only about six percent (6%) of defendants entitled to that presumption have even had motions to vacate filed on their behalf under the current case-by-case approach, much less had them resolved. See R.App. 1938-40, ¶¶ 3, 8-9.

These facts show that the case-by-case, "conclusive presumption" approach is not just unworkable, but that this approach has created exactly the type of backlog decried by the Florida Supreme Court. Moreover, the Massachusetts backlog is causing even more immediate, serious, and tangible harm to these individuals and their families. These tainted convictions are inflicting myriad state and federal collateral consequences that block access to jobs, housing, support for education, and other resources that promote productive participation in society. See R.App. 1710-14, ¶¶ 4-8; American Bar Association, National Inventory of Collateral

Consequences of Conviction (Federal), http://www.aba-collateralconsequences.org/search/ ?jurisdiction=1000; id. (Massachusetts) http://www. abacollateralconsequences.org/search/?jurisdiction=25; see also Margaret Colgate Love, Jenny Roberts, & Cecilia Klingele, Collateral Consequences of Criminal Convictions: Law, Policy, and Practice (2016).

Imposition of these immediate, tangible harms is all the more unjust because the majority of the tainted convictions involve lower-level drug possession charges that prosecutors chose to pursue in District Court. R. App. 1818 (62% of cases are possession-only); id. at 1940 (90% of cases were prosecuted in District Court). Jurisdictions across the country are decriminalizing, dismissing, and diverting these types of low-level drug charges in order to refocus scarce resources on more serious crimes. *See* Human Rights Watch & American Civil Liberties Union, Every 25 Seconds: The Human Toll of Criminalizing Drug Use in the United States 184 (2016); National Research Council, The Growth of Incarceration in the United States: Exploring Causes and Consequences 352-353(2014); Alexandra Natapoff, Misdemeanor Decriminalization, 68 Vanderbilt L. Rev. 155 (2015). Indeed, reducing the flood of low-level cases in criminal legal systems is one way to reduce the risk of tainted pleas and wrongful con-

victions such as those at issue here. See Robert Boruchowitz, et al., Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts 20-27 (2009).

**B. Systemic Harm Requires Systemic Relief**

In light of these facts, it is unsurprising that other courts have joined Florida's in ordering systemic relief to address systemic overload of public defense providers, and in doing so through the exercise of their inherent judicial authority and responsibility to supervise the fair administration of justice. Significantly, courts in these cases are acknowledging that systemic overload of the public defense function requires critical analysis of system priorities in order to focus resources on the most serious cases.

Indeed, Florida courts have invoked systemic relief not just once but repeatedly. In the case discussed above, Public Defender v. Florida, the state Supreme Court confronted a statute that forbade trial judges from granting motions to withdraw by public defenders who claimed that excessive caseloads created conflicts of interest. The Court invoked its inherent supervisory authority to hold the statute unconstitutional as applied and to order class-based relief. 115 So. 3d 261, 276-277. More specifically, the Court affirmed a trial

court order allowing defenders categorically to refuse appointments in low-level felony cases. *Id.* at 271-272.

In so ruling, the Florida Court expressly held that case-by-case, *ex post facto* analysis was "inappropriate" for addressing system-wide failure in the provision of public defense. *Id.* at 276-277. Observing "how the excessive caseload ha[d] impacted the Public Defender's representation of indigent defendants," based on the "systematic inability" to perform basic attorney functions, the Court authorized "aggregate/systematic motions to withdraw . . . in circumstances where there is an office-wide or wide-spread problem as to effective representation." Id. at 273-74 & n.8.

The Court further stressed that "[i]n extreme circumstances where a problem is system-wide, the courts should not address the problem on a piecemeal case-by-case basis." Id. The Court also identified past instances where it had invoked its inherent authority to "approve[] aggregate or systemic relief . . . where public defenders were experiencing excessive caseloads or where the offices were underfunded." Id. at 272-73.

Significantly, the Florida Supreme Court also acknowledged that unmanageable caseloads trigger ethical rules governing conflicts of interest. The Court concluded that systemic relief was necessary to address the "substantial risk that the representation of [one] or

more clients will be materially limited by the lawyer's responsibilities to another client." *Id.* at 279; see also American Bar Association Standing Committee on Ethics and Professional Responsibility, Formal Ethics Opinion 06-441 (requiring public defenders to decline new cases if excessive workloads prevent make "competent and diligent representation" impossible).

Missouri's highest Court applied comparable reasoning in ordering systemic relief to address systemic overloads of that state's public defense systems. Missouri Public Defender Commission v. Waters, 370 S.W.3d 592, 599–601, 612 (Mo. 2012). The Court ordered systemic relief by enforcing a state administrative rule allowing defender agencies to decline appointment in specific classes of cases. The Missouri Court, like the Florida Court, expressly cited ethical rules proscribing conflicts of interest, which "inevitably" result from excessive caseloads. *Id.* at 607. Also like the Florida Court, the Missouri Court invoked judges' inherent "authority and . . . responsibility to manage their dockets in a way that . . . respects" constitutional and ethical requirements. *Id.* at 610-611. It is equally clear that a case-by-case cure for the ongoing constitutional harms in these tainted cases is wholly unworkable and must be replaced with Petitioners' requested system-wide solution.

Yet another case in which state courts applied a systemic solution to systemic public defense overload is Hurrell-Harring v. State of New York, 81 A.D.3d 69, 914 N.Y.S.2d 367 (App. Div. 2011). In Hurrell-Harring, as in the instant case, people who needed public defense lawyers suffered the effective denial of counsel because the system was too overloaded for existing counsel to handle their cases. The New York courts reasoned that such systemic breakdowns required a systemic response to address the risks posed to "potentially tens of thousands of individuals" by inadequate public defense resources instead of forcing plaintiffs to pursue case-by-case relief. 81 A.D.3d at 71-73. See also Nicholson v. Williams, 203 F. Supp. 2d 153, 240 (E.D. N.Y. 2002) ("systemic barriers to effective representation" require systemic remedies "without individualized proof of injury"; Kenny A. ex rel. Winn v. Perdue, 356 F. Supp. 2d 1353 (N.D. Ga. 2005) ("systemic problems" with case overloads make case-by-case remedies "totally inadequate").

Similarly, in Duncan v. Michigan, the Court approved a systemic approach instead of forcing plaintiffs to pursue case-by-case relief from "widespread and systemic instances of actual or constructive denial of counsel" caused by case overloads and inadequate resources. 774 N.W.2d 89, 124 (Mich. Ct. App. 2009) Most

recently, the Supreme Court of Pennsylvania also approved a systemic remedy to address systemic inadequacies in public defense resources. Kuren v. Luzerne County, 2016 Pa. LEXIS 2191 (September 28, 2016). There, too, the state's highest Court was called upon to address the systemic denial of access to counsel due to case overloads and insufficient staffing. Id. at **16-24. Like other courts considering the issue, Pennsylvania's highest court recognized that systemic problems require a systemic response instead of individualized, case-by-case litigation, and allowed plaintiffs to proceed in their quest for prospective equitable relief. Id. at *97.

These cases demonstrate that comprehensive, system-wide remedies are necessary and appropriate to correct the system-wide wrong caused by misconduct of prosecution witnesses in Massachusetts. This Court should follow the lead of these sister courts, lest the current and demonstrably inadequate case-by-case approach devolve as did Louisiana's following that state's Supreme Court ruling in State v. Peart, 621 So. 2d 780 (La. 1993).

Peart also involved systemic overload of public defense systems. In a grim parallel to Petitioners' cases, the Louisiana Supreme Court agreed that these systems were so swamped that people who needed public defense lawyers "were entitled to a rebuttable presumption" that

their constitutional rights were being violated. Id. at 790, 791. Despite that indictment of the system, the Court declined to order systemic relief and instead required case-by-case adjudication with the burden on indigent defendants to vindicate their rights. Id. at 791.

In the two decades since that ruling, the harm from the Court's failure to order systemic relief from systemic flaws in the provision of public defense has only compounded. Louisiana currently faces an internationally reported collapse of its public defense system. See, e.g., Justice Denied: The Human Toll of America's Public Defender Crisis, The Guardian, September 7, 2016, available at: https://www. theguardian.com/us-news/2016/sep/07/public-defender-us-criminal -justice-system (last visited October 24, 2016).

The contrast could not be clearer between individualized, case-by-case attempts to cure systemic flaws and the approaches of courts in Florida, Missouri, New York, Michigan, and Pennsylvania. The case-by-case approach is "an ineffective mechanism for criminal defendants to obtain relief" for system-wide failure. Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems, 118 Harv. L. Rev. 1731, 1737 (2005). In contrast, courts, justice systems, and the public benefit when systemic flaws are addressed

systemically. Examples of productive results from system-relief approaches include provision of resources necessary to cure denials of access to counsel caused by prior system overload. See, e.g., Martha Ellen, St. Lawrence County Is Awarded Indigent Defense Grant, Watertown (New York) Daily Times, August 10, 2013 (discussing new resources provided pursuant to Hurrell-Harring settlement). As discussed below, the need for systemic relief in the Dookhan cases is underscored by the vitally important nature of the constitutional violations and rights at issue here.

## II. TIMELY SYSTEMIC RELIEF IS NECESSARY TO CORRECT SYSTEMIC VIOLATIONS OF FUNDAMENTAL CONSTITUTIONAL RIGHTS.

The need for systemic relief in the Dookhan cases is further warranted by the significance of the systemic constitutional violations at issue here. First, the Commonwealth violated basic due process guarantees by tainting criminal prosecutions with fraudulent testimony by state witnesses. See Napue v. Illinois, 360 U.S. 264, 269 (1959). Indeed, "[w]rongful conviction [is] the ultimate sign of a criminal justice system's breakdown and failure[.]" Hurrell-Harring v. State, 930 N.E.2d 217, 227 (N.Y. Ct. App. 2010).

Sadly, the initial constitutional wrong inflicted on thousands of people in the Commonwealth is exacerbated

by an independent constitutional violation: inability to access the courts, which is necessary to challenge their tainted convictions. *See* Bounds v. Smith, 430 U.S. 817, 828 (1977) (describing right of access to courts as "fundamental"); Wolff v. McDonnell, 418 U.S. 539, 579 (1974) (same). This double due process denial is extraordinary. Petitioners cannot cure their wrongful convictions despite the benefit of this Court's "conclusive presumption" supporting a motion to vacate. For that presumption to have any meaning, the defendants must be able to file and pursue a motion to vacate their convictions in the courts. Petitioners have shown that this is not feasible due to systemic overload of the public defense system. It is therefore necessary and appropriate for this Court to order a systemic remedy.

It is equally important to emphasize that the fundamental nature of the constitutional rights at issue supersede considerations of cost and convenience. See Tennessee v. Lane, 541 U.S. 509, 512 (2004). "Our jurisprudence does not ration constitutional rights based on the financial cost of preserving and enforcing those rights." Commonwealth v. Musser, 82 Va. Cir. 265, *5 (Va. Cir. 2011) (citing Griffin v. Illinois, 351 U.S. 12 (1956)).

Yet the case-by-case approach to remedying the Dookhan crisis puts the burden on the people most directly affected by government misconduct to vindicate their

rights. Unfortunately, the District Attorneys have made that burden unbearable by issuing ineffective, obscure, and confusing papers that fail to inform people of their rights and how to vindicate them. SRA 79. Those papers are so deficient as to make effective case-by-case adjudication impossible, even if the Commonwealth's public defense system were fully equipped for the task. It is particularly shocking that those papers actually encourage recipients to contact the very prosecutors whose interests demonstrably conflict with people who have tainted convictions. That encouragement may be an acknowledgment that the Commonwealth's defense system cannot respond effectively to the systemic overload created by government misconduct. Regardless of the intended meaning of these papers, their substantive deficiencies are compounded by questions whether all eligible defendants received them as well as the unrealistic expectation that recipients can decipher the papers and respond appropriately to correct government misconduct. All of these factors contribute to an ongoing effective denial of the right to be heard on a matter of vital importance.

Compounding this matter are the additional 18,000 Farak cases tainted by still more corruption in the Commonwealth's forensic system. These thousands of cases will only further strain an already overburdened criminal legal system. That new burden will exacerbate harms already caused to the Dookhan defendants. All of these

harms are attributable to the Commonwealth. They double down on the systemic constitutional violations that tainted these convictions in the first place, and further highlight the constitutional crisis created by the inability of the Commonwealth's public defense system to assist the thousands of people whose plight Petitioners have presented so clearly and comprehensively to this Court.

This Court should not countenance any further delay in ordering a systemic remedy for the "egregious" misconduct in these cases. Just as it has long been recognized that courts have an "essential obligation to provide a remedy for violation of a fundamental constitutional right, Hurrell-Harring, 930 N.E.2d at 227 (citing Marbury v. Madison, 5 U.S. 137, 147 (1803)), it is equally well established that "[j]ustice delayed is justice denied." U.S. v. Hastings, 847 F.2d 920, 923 (1st Cir. 1988). Justice is being denied by the current case-by-case approach to remedying the Commonwealth's misconduct. The scope of the requested remedy is "proportional to the scope of the violation." Brown v. Plata, 563 U.S. 493, 531 (2011). Immediate systemic relief is the necessary cure.

It remains only to emphasize that, beyond being unconstitutional, it is patently inequitable to demand that defendants, particularly the low-income defendants

who dominate the Dookhan cases, bear the burden of correcting the Commonwealth's systemic failures. Where the State obtains convictions based on false evidence, "[t]he State must bear the responsibility for the false evidence. The law forbids the State from obtaining a conviction based on false evidence." Matter of Investigation of West Virginia State Police Crime Lab., 438 S.E.2d 501, 505 (W. Va. 1993). Despite efforts to resolve these injustices on a case-by-case basis, experience shows that approach to be unworkable and constitutionally insufficient. The responsibility to right these wrongs must be borne by the Commonwealth, to whom this Court has conclusively attributed them. Faced not with hundreds of individual motions, but instead with tens of thousands of them, this Court should order system-wide relief now.

## CONCLUSION

In Scott, this Court described the misconduct that tainted the Dookhan cases as "particularly insidious … form of government misconduct that has cast a shadow over the entire criminal justice system," and acknowledged the due process interests at stake in curing that harm. 467 N.E.3d at 352. The time has come to rectify that misconduct and fully vindicate those due process interests. Experience has demonstrated that Petitioners' request for system-wide relief is tailored to ongoing and serious harm. This Court should order the Dookhan convictions vacated with prejudice or with a severely limited opportunity for district attorneys to justify refiling charges in specific cases that are supported by untainted evidence, and for the defense of which the Commonwealth's public defense attorneys have sufficient resources to provide timely, quality representation. Only such comprehensive relief can cure the serious constitutional

violations in these cases and begin to restore integrity to the Commonwealth's criminal justice system.

Respectfully submitted,
National Association of Public Defenders,
By and through counsel,

*Patricia A. DeJuneas*
Patricia A. DeJuneas
Sibbison & DeJuneas
1 McKinley Square
Boston, MA 02109
dejuneas@sdappeals.com
(617) 529-8300

Janet Moore, *Co-Chair, Amicus Committee*
For Identification Purposes Only:
Associate Professor
University of Cincinnati College of Law
Post Office Box 210040
Cincinnati, Ohio 45221-0040
(513) 600-4757

Dated: October 24, 2016

**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. P. 20 (form of briefs, appendices, and other papers).

*Patricia A. DeJuneas*

**AFFIDAVIT OF SERVICE**

I, Patricia A. DeJuneas, local counsel for the National Association for Public Defense, do hereby certify under the penalties of perjury that on this 24th day of October, 2016, I caused a true copy of the foregoing document to be served by U.S. Mail and electronic mail on the following counsel:

Matthew R. Segal
American Civil Liberties Union of Massachusetts
211 Congress Street
Boston, MA 02110
MSegal@aclum.org

Benjamin H. Keehn
Committee for Public Counsel Services
44 Bromfield Street
Boston, MA 02108
bkeehn@publiccounsel.net

Jean-Jacques Cabou
Perkins Coie
2901 N. Central Avenue, Suite 2000
Phoenix, AZ 85012
JCabou@perkinscoie.com

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

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

Gail McKenna
Assistant District Attorney for Plymouth County
32 Belmont Street
Brockton, MA 02301

Robert J. Bender
Assistant District Attorney for Middlesex County
15 Commonwealth Avenue
Woburn, MA 01801

Susan M. O'Neil
Assistant District Attorney for Norfolk County
45 Shawmut Road
Canton, MA 02021

Robert Kidd
Assistant District Attorney for Bristol County
P.O. Box 973
888 Purchase Street
New Bedford, MA 02741

Brian S. Glenny
Assistant District Attorney for Cape and Islands
3231 Main Street
P.O. Box 455
Barnstable, MA 02630

_____
ATTORNEY NAME