Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

NO. SJC-12157

SUFFOLK COUNTY

KEVIN BRIDGEMAN, AND OTHERS,
PETITIONERS-APPELLANTS,

v.

DISTRICT ATTORNEY FOR THE SUFFOLK DISTRICT, AND OTHERS,
RESPONDENTS-APPELLEES.

AMICUS CURIAE BRIEF OF THE NEW ENGLAND INNOCENCE PROJECT AND THE NORTH CAROLINA CENTER ON ACTUAL INNOCENCE IN SUPPORT OF PLAINTIFFS

Joseph S. Dowdy
N.C. State Bar. No 31941
Pro Hac Vice motion forthcoming
KILPATRICK, TOWNSEND & STOCKTON LLP
Suite 1400, 4208 Six Forks Rd.
Raleigh, NC 27609
(919) 420-1718
jdowdy@kilpatricktownsend.com

Counsel For Amici Curiae The New England Innocence Project And The North Carolina Center On Actual Innocence

John Roddy
BBO #424240
BAILEY & GLASSER LLP
99 High Street, Suite 304
Boston, MA 02110
(617) 439-6730
jroddy@baileyglasser.com

Counsel For Amici Curiae The New England Innocence Project And The North Carolina Center On Actual Innocence

Christine C. Mumma
N.C. State Bar No. 26103
P.O. Box 52446
Durham, North Carolina 27717
(919) 489-3268
cmumma@nccai.org

Of Counsel, Executive Director, North Carolina Center on Actual Innocence

Denise McWilliams
BBO#340600
120 Tremont Street, Ste 735
Boston, MA. 02108
Dmcwilliams@newenglandinnocence.org
(617) 830.7677

Of Counsel, Executive Director, New England Innocence Project

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STATEMENT OF THE INTEREST OF THE *AMICI CURIAE*[1]

I. The New England Innocence Project

The New England Innocence Project ("NEIP"), founded in 2000, is an independent 501(c)(3) non-profit located in Boston, Massachusetts with the mission of identifying and exonerating wrongly convicted individuals. NEIP initially focused on cases involving DNA evidence, but now NEIP will consider any case where an innocent person has been convicted.

NEIP has a small staff of attorneys, paralegals, administrative professionals, and volunteer law students from throughout New England, the United States, and several foreign countries, who work with a dedicated network of criminal defense attorneys, experts, scholars and exonorees to address the conviction of innocent people. As a result of the efforts of NEIP, thirty-nine individuals throughout New England have been exonerated.

[1] No counsel for a party authored any part of this brief, nor did any person or entity, other than amici or its counsel, provide financial support for the preparation or submission of this brief.

II. The North Carolina Center on Actual Innocence

The North Carolina Center on Actual Innocence (the "Center"), founded in 2000, is an independent 501(c) non-profit headquartered in Durham, North Carolina, with the primary mission of identifying, investigating and advancing credible claims of innocence, obtaining justice for people imprisoned for crimes they did not commit, for the victims of those crimes, and for the actual perpetrators. The Center's secondary mission is to educate policymakers, the public, and legal and law enforcement communities about the factors that contribute to wrongful conviction, as well as emerging solutions which can increase the reliability of convictions. Promoting such systematic changes to our criminal justice system helps prevent the true perpetrators from evading capture and victimizing others, increase public confidence in the system, decrease cost to taxpayers, and save people from years of suffering due to wrongful convictions or imprisonment.

III. The Interests of the Amici Curiae in this Matter

The NIEP and the Center (collectively the "Amici") respectfully submit this brief in the knowledge that many people, both within Massachusetts

and in other states, are looking to this Court in this case to provide meaningful and fair guidance concerning how the criminal justice system will respond to a far-reaching problem concerning crime lab testing. In the modern era, scientific evidence is more important than ever, as is the integrity of that evidence:

> If evidence and laboratory tests are mishandled or improperly analyzed; if the scientific evidence carries a false sense of significance; or if there is bias, incompetence, or a lack of adequate internal controls for the evidence introduced by the forensic scientist and their laboratories, the jury or cord can be misled, and this could lead to wrongful conviction . . . . If juries lose confidence in the reliability of forensic testimony, valid evidence might be discounted, and some innocent persons might be convicted or guilty individuals acquitted.

National Research Council of the National Academies, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 37 (National Academies Press 2009). The Amici submit this brief to highlight that the Dookhan scandal implicates both sets of concerns: it creates risks that the innocent were convicted, and it creates risks that the public will have less confidence in forensic evidence.

Forensic evidence has been vital to exonerating 347 people in thirty-seven states during the previous three decades – with thirty six of those exonerations involving guilty pleas and twenty-nine percent of them involving false confessions. Innocence Project, *DNA Exonerations in the United States: Fast Facts*, http://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited Oct. 23, 2016. These statistics demonstrate that guilty pleas and convictions sometimes occur even when the accused are innocent, and that, as a society, we must have public faith in forensic testing to address those situations in which wrongful convictions occur.

While DNA testing was developed through extensive scientific research, many other forensic techniques — such as ballistics, bloodstain patterns, hair microscopy, or bite mark comparisons — have not been subjected to the same level of scientific evaluation. Flawed forensics are a leading cause of wrongful convictions: in roughly half of DNA exonerations, unvalidated or improper forensic science contributed to the conviction. Despite some positive developments in forensic science in recent years, wrongful convictions continue to show that forensic analysts

sometimes testify without an appropriate scientific foundation for their findings. Testimonies regarding less than reliable forensic disciplines (such as efforts to match a defendant's teeth to marks on a victim's body) masquerade as science, but do not meet even the most basic scientific standards. Juries are then left with the impression that the evidence is more exact than it is, and the potential for wrongful convictions increases. Further, even within forensic disciplines that are more firmly grounded in science, evidence is often made to sound more precise or pertinent than it is. In many cases, the science – rather than the scientist – is inadequate. In other cases, forensic analysts make errors resulting from insufficient training, poor support and oversight, or lack of resources to meet a rapidly expanding demand. In some cases, forensic analysts have engaged in intentional misconduct, which can taint thousands of cases through the acts of just one analyst alone.

Dookhan's falsification of evidence in approximately 24,000 cases raises system-wide questions concerning whether there were wrongful convictions of innocent people and whether the public should place its faith in scientific evidence. As is

explained below, the Amici respectfully submit that this Court should address these problems by taking action to uphold the presumption of innocence. This involves granting relief from the tainted convictions unless prosecutors, based on a case-by-case assessment of the available and uncompromised evidence of guilt, choose to proceed against a particular Dookhan defendant.

STATEMENT OF THE ISSUE

Annie Dookhan falsified forensic evidence in some 24,000 criminal cases. These admitted falsifications give rise to a conclusive presumption of egregious misconduct attributable to the Commonwealth. Given this presumption, should the Dookhan defendants' convictions be overturned unless, in a specific case, a prosecutor opts out of such a system, or should those convictions stand unless an individual defendant affirmatively chooses to seek relief?

SUMMARY OF THE ARGUMENT

The present proceedings will determine whether there will be barriers to obtaining relief from convictions tainted by Annie Dookhan's habitual falsification of material evidence. The fundamental question is this: If no one takes further action in a

particular case, what will be the consequences? As a matter of behavioral science, the answer to that question will decide whether a substantial majority of the Dookhan defendants receive justice because ***almost all people almost always choose the default option presented to them, even if it is not in their best interests to do so***. *See, e.g.,* Cass R. Sunstein & Richard H. Thaler, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH AND HAPPINESS 1-14 (Penguin Books, revised and expanded ed. 2009) (hereinafter "NUDGE"). The purpose of this brief is to try to convince the Court to set the fairest and most appropriate default choice.

There are only two potential default positions: ***presumptive relief*** or ***presumptive non-relief***. Presumptive relief means that the tainted convictions will be set aside unless a prosecutor "opts out" of such relief in an appropriate way. On the other hand, presumptive non-relief means that the tainted convictions will be treated as valid, notwithstanding their procurement in connection with fraudulent evidence, unless a Dookhan defendant "opts in" to such relief. Here, the Plaintiffs ask for presumptive relief, and the District Attorneys ask for presumptive non-relief.

Presumptive relief is the far superior alternative. It best reflects the obvious, logical choice of the Dookhan defendants, is uncomplicated, achieves justice, and promotes the integrity of the criminal justice system. By contrast, presumptive non-relief practically guarantees that a substantial majority of the Dookhan convictions, which rest uneasily upon falsified evidence, will go unaddressed primarily because people are burdened with understanding and affirmatively seeking relief when they are unlikely to do so. Accordingly, consistent with the arguments and authorities set out herein, the Amici respectfully request that this Court grant presumptive relief to the Dookhan defendants.

ARGUMENT

I. Social and Behavioral Science Should Guide This Court in Fashioning a Remedy for Dookhan's Widespread Falsification of Evidence.

The District Attorneys seek to cast presumptive relief as an extreme remedy. But it is not. It is just one of two alternative starting points to address an admitted wrong. The Amici respectfully request that this Court determine the appropriate remedy for Dookhan's falsification of evidence in approximately 24,000 cases based on social and behavioral science,

and not based on an erroneous characterization of a particular remedy as drastic. This Court is charged with correcting a systemic wrong; science supports presumptive relief as a systemic remedy.

As is explained in NUDGE, this Court's selection of the default position involves an aspect of behavioral science known as "choice architecture," which is the method by which people present choices and set default options. *Id.* at 3, 74. Choice architects are those who design the systems of choice, as this Court is being asked to do in deciding whether the Dookhan defendants must "opt in" to relief or whether the prosecutors must "opt out" of it. *Id.* The obligations of choice architects are informed by at least two important background principles.

First, "there is no such thing as a neutral design." *Id.* at 3. Every system invariably encourages decision makers to choose or to not choose something because of the way the system is set up. *Id.* To use a simple example, the placement of certain items at eye level on a store shelf increases the likelihood of their selection when compared to items placed elsewhere. William Hageman, *Supermarket Science: Stores use many strategies to sell you their*

products, CHICAGO TRIBUNE, Oct. 13, 2010, http://articles.chicagotribune.com/2010-10-13/features/sc-food-1008-supermarket-20101013_1_supermarket-science-dairy-case-bakery.

The second principle is that, if all other items are held constant, it is best to design a system that promotes true choice and makes it easy for decision makers to select the option that will do the most good and the least harm. NUDGE, at 3, 74. An example of good choice architecture involves setting a default that people will be organ donors, affording them sufficient notice that this is the case, and providing them with an easy mechanism for opting out – in such a system, choice is preserved and more people donate organs that save lives. Eric J. Johnson & Daniel Goldstein, *Do Defaults Save Lives?,* 302 SCIENCE 1338-1339 (Nov. 2003).

Consideration of these principles in the case *sub judice* counsels in favor of presumptive relief. If the Court chooses presumptive non-relief, it is adopting a non-neutral design that makes it more likely that the Dookhan defendants will choose not to seek relief, even if they want it and even if they are entitled to it. As is explained below, there are many

reasons why the Dookhan defendants would avoid seeking relief that are unrelated to their ultimate guilt or innocence. *See also* Keith Findley, *Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for Truth*, 38 SETON HALL L. REV. 893 (2008) (explaining how process and issues with scientific evidence create a disadvantage for criminal defendants). Further, there is no indication that, given Dookhan's falsification of evidence, true prosecutorial discretion was exercised in charging the Dookhan defendants, proceeding with those charges, or negotiating any plea arrangements. *See, e.g.*, Peter Krug, *Prosecutorial Discretion and Its Limits*, 50 AM. J. COMP. L. SUPP. 643 (2002) (discussing prosecutorial discretion in charging); Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259 (2001) (discussing prosecutorial discretion to charge and to negotiate and accept plea bargains); Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471 (1993) (discussing prosecutorial discretion in plea bargaining). The remedy that best addresses these issues is presumptive relief.

II. As A Matter of Social and Behavioral Science, the Dookhan Defendants Are Unlikely to "Choose" Relief if Presumptive Non-relief Is Set as the Default.

Among the fundamental teachings of behavioral science are the notions that "people have a more general tendency to stick with their current situation," and if an option is designated as the default, that alone is likely to result in people choosing that option. NUDGE at 35; *see also* John Beshears and Francesca Gino, *Leaders as Decision Architects*, HARV. BUS. REV. 10 (May 2015), available at https://hbr.org/2015/05/leaders-as-decision-architects. Put differently, default rules shape our behavior. For example, as a population, we save for retirement and invest in necessary insurance products more often when systems are established that require us to opt out of them rather than opt into them. Bridgitte C. Madrian and Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 QUARTERLY J. ECON. 1149-1225 (2001); Eric J. Johnson, et al., *Framing, Probability Distortions, and Insurance Decisions*, 7 J. RISK & UNCERTAINTY 35-51 (1993). It is precisely because default rules shape our behavior that the primary

dispute in this case involves what the default option will be.

A. In Arguing for a Presumptive Non-relief Default, The District Attorneys Misunderstand How People Make Decisions.

In advocating for a presumptive non-relief default, the District Attorneys make arguments and observations that are based upon misunderstandings of human nature and human behavior. For example, the District Attorneys posit that those Dookhan defendants who are out of prison and who are not facing collateral consequences do not want to reopen their drug cases. *See, e.g.,* Aff. R. Kidd at ¶¶ 46 -53.[2] Life is too busy, according to the District Attorneys, in part because the Dookhan defendants are busy "struggling" to survive in society. *Id.* at ¶ 49. Accordingly, it is rare, they claim, for a defendant to seek a new trial for the sole reason of removing a Dookhan-related case from his record. *Id.* at ¶¶ 53 – 56. The District Attorneys appear to believe that the infrequent filing of new trial motions to date proves that most of the defendants simply are not interested

[2] The referenced collateral consequences are deportation, enhanced sentencing, denial of subsidized housing, or license loss.

in relief. *See, e.g.*, Aff. of S. Dolhun at ¶¶ 10 – 11; Aff. Q. R. Weld at ¶¶ 6-9.

In behavioral science terms, the District Attorneys are asking this court to apply the theory of "the economic person" or "the notion that each of us thinks and chooses unfailingly well." NUDGE, at 6. Professors Sunstein and Thaler note that this theory is "obviously false." *Id.* at 9. If people unfailingly acted in their best interests, then there would be fewer societal problems with obesity, smoking, alcohol and drug consumption, and other risk-related behavior. *Id.* at 7. Consistent with these examples, the "emerging science of choice . . . has raised serious questions about the rationality of many judgments and decisions that people make." *Id.*

The same science suggests that human thinking is designed so that we can very easily make bad decisions that are not in our best interest. *Id.* at 17-39. As the District Attorneys apparently concede, life is busy, complicated, and confusing. *Id.* at 19; *see* Kidd Aff. at ¶ 49. What the District Attorneys fail to appreciate is that human beings cope with this complexity by shifting much of their decision making from a slow, deliberate, and thoughtful "Reflexive

System" to a fast, unconscious, and uncontrolled "Automatic System" that uses rules of thumb to make decisions. NUDGE, at 19-21. The Reflexive System may provide us with better, more rational answers, but we usually go with the quick answer provided by the Automatic System without pausing to think. *Id*. at 22.

The rules of thumb that predominate our Automatic System are essentially a series of heuristics and biases that we use to make judgments. *Id*. at 22-23. Some of the most common biases include: (1) a tendency to rely on personal experience instead of overall probability; (2) unrealistic optimism that bad things will not happen to the chooser personally, even when the stakes are high; (3) a preference for avoiding loss rather than seeking gain; and (4) a very strong bias for maintaining the status quo. *Id*. at 32-36. If a decision is framed to play into one or more of these biases, it is likely to influence a choice consistent with the bias. *Id*. at 37.

B. The District Attorneys' Recent Behavior, and Their Proposal to Perpetuate It with a System of Presumptive Non-relief, Will Reinforce Natural Human Biases against Choosing Relief.

Unfavorable framing by the District Attorneys already risks reinforcing these natural human biases

against choosing relief. The District Attorneys have already framed the issue as one involving presumptive non-relief default by sending notices that include: (1) no reference to a pending case that might vacate the convictions; (2) no meaningful explanation of the law; (3) a description of finding legal counsel that is cast as a chore; and (4) a deficient Spanish language translation. If they are provided such insufficient information about the relief available to them, it is unrealistic to expect the Dookhan defendants to overcome the natural tendency we all have to simply accept the status quo. Further, the District Attorneys' dissemination of notices assumes that all of the notices will be received – there will be no relief available to the Dookhan defendants who do not receive the notice, a problem that seems especially likely to occur given the District Attorneys' filings indicating that the Dookhan defendants are "struggling to make it" in society.

The District Attorneys proposal of a presumptive non-relief default further plays into the biases that tend to lead us all astray. Given the improbability that the Dookhan defendants will be personally knowledgeable of someone obtaining post-conviction

relief, they likely will be disinclined to seek it. Unrealistic optimism might prevent the Dookhan defendants from considering that there could be future negative collateral consequences associated with their convictions remaining unaddressed. For good reason, the Dookhan defendants may fear that they have something to lose from further interaction with the criminal justice system or by upsetting a prosecutor. Status quo bias will influence the Dookhan defendants not to change the circumstances as they presently exist.

Strong choice architecture is needed to overcome the inertia of simply leaving things as they are and thereby maintaining convictions procured in connection with improper evidence. A presumptive non-relief default is insufficient because science teaches us that the Dookhan defendants will "choose" not to seek relief for no other reason than it being the path of least resistance. *Id.* at 35. For relief to be a legitimate choice under the circumstances, relief should be the status quo. *Id.* Only presumptive relief accomplishes this.

III. As a Matter of Choice Architecture, Presumptive Relief Is A Better Default Than Presumptive Non-relief.

Professors Sunstein and Thaler conclude, based on scientific evidence, that the best choice architecture involves: (1) incentives and information concerning a chosen course of action; (2) help comparing choices; (3) good and fair defaults; (4) feedback that addresses mistakes; (5) safeguards against human error; and (5) simple choices among few, well-understood alternatives. *Id*. at 96-97. Here, consideration of these features leads ineluctably to the conclusion that the proposed presumptive relief involves superior choice architecture.

A. Presumptive relief Is Good Choice Architecture.

Presumptive relief is simple and user-friendly in its presentation. The relief is understandable, can be chosen without assistance from others, and leads to the Dookhan defendants making the logical choice of not keeping a conviction procured in connection with bad evidence on their record. With presumptive relief, if a prosecutor is permitted to and decides to proceed with a new trial following vacatur of a conviction, then the affected Dookhan defendant would

be afforded the full panoply of due process rights, which would help ensure that the particular defendant understands the costs and benefits inherent in the defense of his or her matter.

B. A Presumptive Non-relief Default Is Bad Choice Architecture.

By contrast, the District Attorneys' proposed system of presumptive non-relief and cursory notice to the Dookhan defendants is exceedingly poor choice architecture. For the "choice" of no relief to be meaningful, the Dookhan defendants must understand the costs of foregoing relief, and such understanding seems unlikely unless they speak with an attorney, and seems even less unlikely if they rely on a short notice to apprise them of their rights. The presumptive non-relief proposal also is deficient in that it fails to account for human error, such as simple oversight in failing to schedule an appointment to speak with counsel or overlooking the need to respond to a notice. It further fails the NUDGE test in that it creates a complex set of choices. *Id.* at 96-99 (noting that people experience great difficult making good choices when they are presented with complexity); Cass R. Sunstein, REPUBLIC.COM 2.0

(Princeton Univ. Press 2007) (exploring in further detail). The defendants not only have to choose whether they want relief, but with a presumptive non-relief default, they also are required to consider whether they need help deciding whether to seek relief, whether they need the assistance of counsel and if so how to select counsel, whether there are financial, social, and economic consequences to the defendant or his or her family if he or she chooses to seek relief, and whether there are actual or potential criminal justice repercussions for seeking or not seeking relief.

Perhaps most importantly, a non-relief presumption is poor choice architecture because it sets a bad and unfair default. A presumptive non-relief default is problematically counterintuitive because it assumes that people prefer to remain convicted of a crime based on faulty evidence, and inaccurate representations and assumptions concerning the validity and strength of that evidence. And a presumptive non-relief default unfairly shifts the burden of overcoming this assumption to defendants who are poor and do not have ready access to counsel, even

for important matters[3] and who suffer from drug addiction, which the District Attorneys concede can create a "struggle." Moreover, many of the defendants are people of color, and it is deeply unjust to impose a procedural default that fails to address wrongful convictions that are also racially disparate.[4]

The system has already failed these defendants, as this Court recognized in ruling that there is a

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[3] Even then, there could be the problem of providing significant access to attorneys for those who could not afford them. Campbell Robertson, NY Times, In Louisiana, the Poor Lack Legal Defense (March 19, 2016) available at http://www.nytimes.com/2016/03/20/us/in-louisiana-the-poor-lack-legal-defense.html ("Noting that in Louisiana, 8 out of 10 criminals are represented by public defenders and budgets have slashed numbers of public defenders leading to waitlist and longer prison times for those jailed on all manner of charges."). Without counsel, a Dookhan defendant will experience trouble researching relevant information concerning his case. Todd Wallack, Boston Globe, Courts cut online access to criminal cases (July 14, 2016), available at https://www.bostonglobe.com/metro/2016/07/13/massachusetts-courts-limit-online-access-criminal-case-information-for-lawyers-journalists/wnlY18EmPS9KbHvZ8nqjNO/story.html (noting that Massachusetts courts halted online access to basic data in superior court cases, meaning that journalists, attorneys, prosecutors, and inmates will have a harder time "keep[ing] tabs on ongoing court cases or to verify the outcome of old ones").

[4] As this Court's Chief Justice has observed, the mandatory minimum sentencing laws in Massachusetts have a disparate, unfavorable impact on people of color. Testimony of Massachusetts Supreme Judicial Court Chief Justice Ralph D. Gants before the Joint Committee on the Judiciary (June 9, 2015).

conclusive presumption of egregious misconduct attributable to the Commonwealth. *Commonwealth v. Scott*, 467 Mass. 336, 338, 5 N.E.3d 530, 535 (2014). The District Attorneys' request that this Court adopt an inconsistent presumption that the egregious misconduct will go unaddressed unless the Dookhan defendants, who like all people are unlikely to resist the status quo, navigate a confusing and unsure system in pursuit of the possibility of relief. The District Attorneys' proffered presumptive non-relief default is unscientific and unfair. It is an inferior alternative to presumptive relief, which better reflects human behavior, justice, and the best interests of the Dookhan defendants.

CONCLUSION

In choice architecture, "there must be [a] . . . rule that determines what happens to the decision maker if she does nothing." *Id.* at 85. The present question is whether we will assume, contrary to social and behavior scientific evidence, that the Dookhan defendants will choose the path of most resistance and complexity. The Amici respectfully requests that this Court instead adopt the position that social and behavioral science provides, namely, that the Dookhan

defendants, like all people, will "choose" – generally automatically – the default that is presented to them. Given that they will, it is especially important that this Court set a good and fair default, one that helps preserve the rights of the innocent. That default is presumptive relief. Accordingly, the Amici respectfully requests that this Court grant presumptive relief to the Dookhan defendants.

Respectfully submitted,

/s/ John Roddy

John Roddy
BBO #424240
BAILEY & GLASSER LLP
99 High Street, Suite 304
Boston, MA 02110
(617) 439-6730
JRoddy@baileyglasser.com

Joseph S. Dowdy
N.C. State Bar. No 31941
Pro Hac Vice motion forthcoming
Kilpatrick, Townsend & Stockton LLP
Suite 1400, 4208 Six Forks Road
Raleigh, NC 27609
(919) 420-1718
jdowdy@kilpatricktownsend.com

Dated: October 24, 2016

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), 18 (appendix to the briefs), and 20 (form of briefs, appendices, and other papers).

/s/ John Roddy

John Roddy

CERTIFICATE OF SERVICE

The undersigned certifies that two (2) copies of the foregoing Amicus Curiae Brief were served on the following persons by United States Mail, postage prepaid addressed as follows:

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

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

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

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

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

This the 24th day of October, 2016.

/s/ John Roddy
John Roddy

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS