COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC-12157

Kevin Bridgeman et al.
Petitioners-Appellants

v.

District Attorney for Suffolk County et al.
Respondents-Appellees

ON A RESERVATION AND REPORT OF A SINGLE JUSTICE OF THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

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

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INTERESTS OF THE *AMICI CURIAE*

Founded in 1958, *the* National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. It has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL files numerous *amicus* briefs each year in the United States Supreme Court, the federal Circuit Courts of Appeal and in state appellate courts seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

The Massachusetts Association of Criminal Defense Lawyers ("MACDL") is an incorporated association representing more than 1,000 experienced trial and appellate lawyers who are members of the Massachusetts Bar and who devote a substantial part of their practices to criminal defense. MACDL devotes much of its energy to identifying, and attempting to preclude or correct, problems in the criminal justice system. MACDL routinely files *amicus curiae* briefs in cases raising questions of importance to the administration of justice.

NACDL and MACDL are particularly interested in this matter not only because the Hinton Drug Lab Scandal goes to the basic integrity and fairness of the criminal justice system, but also because the global remedy that Petitioners are seeking is the only plausible way to ensure redress for the thousands upon thousands of defendants, most of them likely indigent, whose convictions are the direct result of Annie Dookhan's jaw-dropping fraud.

SUMMARY OF THE ARGUMENT

Two years ago, in *Commonwealth v. Scott*, this Court took an essential first step toward a global remedy to the Hinton Drug Lab Scandal: the Court held that every "Dookhan Defendant" is entitled to an irrebuttable presumption that chemist Annie Dookhan, an agent of the prosecution team, willfully and fraudulently falsified the drug test and/or drug test certification that the Commonwealth used to secure a his or her guilty plea. *See* 467 Mass. 336, 348-52 (2014). The Court adopted that categorical approach because of the myriad practical impossibilities of a case-by-case approach that would require each Dookhan Defendant to prove that "egregious misconduct" occurred in his or her case.

The Court is now squarely confronted with the question that it previously had been able to avoid: whether each Dookhan Defendant is entitled also to an irrebuttable presumption in his or her favor at the second step of the *Ferrara* test, *i.e.*, an irrebuttable presumption that Dookhan's egregious misconduct had a material influence on his or her decision to plead guilty.

Last year, in *Bridgeman I*, the Court abstained from addressing the question because it was hopeful that an ordinary case-by-case approach, with the burden of persuasion placed on the defendant, might be sufficient to ensure that the gross injustices of Dookhan's egregious misconduct would be remedied. 471 Mass. 465, 487, 494 (2015). In the 18 months since *Bridgeman I*, the full magnitude of the Hinton Drug Lab Scandal has been revealed, and it is clear that an ordinary case-by-case approach with respect to the second step of the *Ferrara* test will either (1) sweep thousands upon thousands of wrongful convictions under the proverbial rug or (2) break the back of the judicial system, which simply does not have the capacity to adjudicate fairly even a fraction of the collateral challenges that remain to be brought.

Today, more than four years after Dookhan's fraud was first uncovered, there remain 24,000 Dookhan cases that this Court in *Bridgeman I* held were worthy of notice and an opportunity to be heard. To put it more bluntly, tens of thousands of men and women — many, if not most, of whom are among the members of society most vulnerable to the injustices of the legal system — may presently be burdened with criminal convictions

that the Commonwealth would not have secured but for Dookhan's fraud. These 24,000 convictions continue to cast their long shadow over the criminal justice system, and an ordinary case-by-case approach under *Ferrara* is inadequate to provide any meaningful cure.

In the four years since the Hinton Drug Lab Scandal was revealed, only 1,500 individuals — representing just over 5% of the Dookhan cases — have moved to vacate their convictions. The Commonwealth apparently believes that this is the result of some sort of intelligent natural selection process, *i.e.*, Dookhan Defendants who in fact would not have pled guilty but for Dookhan's misconduct have chosen to file collateral challenges and Dookhan Defendants whose decisions to plead guilty cannot fairly be attributed to Dookhan's misconduct have chosen not to file collateral challenges. This belief may make the Commonwealth feel good, but it has no basis in reality.

The reality is this: First, whether purposeful or inadvertent, the Commonwealth has failed to provide Dookhan Defendants with notice sufficient to inform them of their rights under *Scott* and *Bridgeman I*; indeed, the more likely impact of the information

letter that the Commonwealth sent to Dookhan Defendants has been to scare them out of filing collateral challenges. Second, even if a Dookhan Defendant understands his or her rights under *Scott* and *Bridgeman I*, the overwhelming likelihood is that he or she is unable to retain a lawyer who can represent him or her through the collateral review process, and there is no reason to believe that many Dookhan Defendants will proceed *pro se*. Third, even if every Dookhan Defendant understood his or her rights and was provided adequate legal representation, the judicial system simply does not have the capacity to conduct a case-by-case *Ferrara* assessment of all of the collateral challenges that would likely be filed. Accordingly, this Court should have no confidence that a case-by-case approach can identify and remedy the wrongful convictions and leave intact only those guilty pleas that the Commonwealth would have secured even absent Dookhan's misconduct.

This Court is now presented with a stark choice, and it can no longer abstain from making it: the Court can opt for a case-by-case approach where a Dookhan Defendant bears the burden of persuasion under the second step of the *Ferrara* test, which will virtually

guarantee that a substantial number (many thousands, at least) of wrongful convictions will go unchallenged; or the Court can opt for a categorical approach, holding that every Dookhan Defendant is entitled to an irrebuttable presumption under both steps of the *Ferrara* test, which is the only way to ensure that every wrongful conviction is corrected.

Amici NACDL and MACDL urge this Court to choose the latter course. The latter course is the only one consistent with the first principle of our criminal justice system, which is that wrongful convictions must be avoided, especially where the conviction might be wrongful because of intentional government misconduct.

This brief makes three arguments: First, it argues that every Dookhan Defendant is entitled to a presumption that he or she would not have pled guilty had he or she known of Dookhan's fraud. Second, it argues that this presumption should be made irrebuttable, such that the conviction of every Dookhan Defendant may be vacated *sua sponte* without the need for a formal legal filing by the defendant. Third, it argues that the same concerns that require an irrebuttable presumption of prejudice should bar

the Commonwealth from re-prosecuting any Dookhan Defendant. *Amici* respectfully submit that this *sui generis* three-pronged remedy is the only way to (1) meaningfully address the harm that Dookhan's fraud caused to defendants, (2) deter members of the prosecution team from engaging in similar frauds in the future, and (3) move past the Hinton Drug Lab Scandal.

ARGUMENT

I. EVERY DOOKHAN DEFENDANT SHOULD BE AFFORDED THE PRESUMPTION THAT DOOKHAN'S FRAUD WAS PREJUDICIAL.

Under the framework established by this Court in *Scott*, every Dookhan Defendant is entitled to a conclusive presumption at the first step of the *Ferrara* test, *i.e.*, that egregious governmental misconduct occurred in his or her case. *Scott*, 467 Mass. at 338. The Commonwealth's argument is that a Dookhan Defendant is not entitled to any presumption at the second step of the *Ferrara* test but rather should be forced to prove that Dookhan's fraud materially influenced his decision to plead guilty. In other words, the Commonwealth's position is that a court should start from the presumption that Dookhan's fraudulent conduct — and the defendant's lack of

contemporaneous knowledge of that fraudulent conduct — *did not* materially affect the defendant's decision to tender a plea.

As an initial matter, *amici* NACDL and MACDL consider it implausible that Dookhan's fraud was ever irrelevant to the outcome of a case. The evidence that Dookhan fraudulently manufactured was no ordinary evidence. It was *scientific* evidence, which tends to have an "aura of infallibility" when presented to a fact-finder. *Commonwealth v. Curnin*, 409 Mass. 218, 219 (1991); *see State v. Montoya*, 2016-NMCA-079, 2016 WL 3606176 at *8 (N.M. Ct. App. June 29, 2016) (scientific evidence such as breath alcohol test carries with it an "aura of infallibility"). In the mine run of drug prosecutions, the drug test and certification is such a central part of the factual inquiry – and consequently of the government's case - that the harm arising from the willful falsification of that evidence is akin to that of a structural error, where prejudice is presumed because "the error 'necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt

or innocence.'"[1] *Rivera v. Illinois*, 556 U.S. 148, 160 (2009) (alteration in original). The fact that the Commonwealth wielded the falsified evidence during the plea process, rather than at trial, should not matter — not when members of the prosecution team, including Dookhan, knew the power of the drug certification evidence and that a plea would be the most likely outcome where the drug test and certification have come back inculpatory.

Moreover, in assessing whether Dookhan's fraud had a material impact on the defendant's decision to plead guilty, *amici* respectfully submits that the right question to ask is not whether the defendant would have pled had there been no drug certification at all, but rather whether the defendant would have pled had he or she known that the drug test and

[1] The United States Supreme Court has found willful government misconduct to be structural error even in circumstances where the misconduct did not taint the actual evidence against the defendant. *See, e.g. Batson v. Kentucky*, 476 U.S. 79 (1986) (racial discrimination in *venire* process); *Tumey v. Ohio*, 273 U.S. 510 (1927) (biased trial judge); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (racial discrimination in selection of grand jury). *Amici* respectfully submit that this Court should treat Dookhan's fraud as a form of structural error, where prejudice is irrebuttably presumed, because of its pernicious impact on the public's trust in the integrity of the criminal justice system.

certification had been *falsified*. There are at least three reasons why a defendant might not have pled guilty had he or she known of Dookhan's fraud. First, the defendant would have been aware that the drug test and drug certification had been falsified, effectively leaving the Commonwealth without what is usually the prosecution's best evidence in a drug case. Second, the defendant would have known that he or she could introduce to the jury at trial the fraudulent behavior of the government agent who handled the prosecution's drug evidence, which would taint the credibility of the prosecution's case as a whole. Third, the prosecution might have dropped the case (or offered an even lesser plea) in order to avoid having Dookhan's fraud revealed to the world in open court.

But even setting aside that most Dookhan Defendants would be able to satisfy the second step of the *Ferrara* test, placing the burden of proof and persuasion on the defendant at the second step of the *Ferrara* analysis is impractical where so many cases — most of which "resolved" years ago — bear the stain of Dookhan's fraud. A necessary consequence of placing the burden on the defendant at the second step of the *Ferrara* analysis is that the defendant must initiate

the collateral challenge. *Amici* NACDL and MACDL believe that most Dookhan Defendants will lack the knowledge and legal representation practically necessary to initiate a collateral challenge.

For starters, consider the letter notice that the Commonwealth sent to the Dookhan Defendants (likely around 20,000 in all) who have yet to file collateral challenges to their convictions. Even if the letter notice happens to make it to the defendant, its likely effect is to deter him or her from exercising his or rights, because it implies that the consequence of exercising those rights is the "re-opening" of "a closed criminal case," which an average person would understand to mean the potential for re-prosecution and re-imprisonment. Next, if the defendant is non-English speaking, the letter notice will be essentially incomprehensible to him or her. Moreover, there is good reason to believe that a significant percentage of the letter notices will never reach the intended recipient. Furthermore, even if the defendant receives the letter notice and understands that under *Bridgeman I* initiating a collateral challenge will not expose him or her to the risk of re-imprisonment, the likelihood is that the defendant

will not be able to retain a lawyer to represent him or her in the collateral proceedings, and *amici* NACDL and MACDL believe it is extraordinarily unlikely that many Dookhan Defendants would choose to proceed *pro se*.

In sum, placing the burden of proof and persuasion on the defendant would almost certainly prevent the vast majority of Dookhan Defendants from exercising their rights to a collateral challenge — and for reasons that have absolutely nothing to do with the merits of the challenge that the defendant has the right to bring. This would not be justice; it would be sweeping Dookhan's misconduct under the rug.

As this Court recognized in *Scott*, it "must account for the due process rights of defendants" when fashioning a remedy for the Dookhan crisis. *Scott,* 467 Mass. at 352. At its most basic, the right of due process is a right to notice and a right to be heard. *See e.g., Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314–15 (1950). As the United States Supreme Court held in *Mullane*, the right to be heard "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."

Id. And, in a criminal case, due process means being represented by adequate legal counsel. *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963).

Since *Bridgeman I*, the Commonwealth has been operating under the assumption that Dookhan Defendants bear the burden of proof and persuasion under the second step of the *Ferrara* analysis. As a consequence, the Commonwealth has done little to nothing to apprise the thousands of remaining Dookhan Defendants of their rights. The Commonwealth sent the Dookhan Defendants a confusing letter notice that is likely to deter the exercise of those rights.[2] It is

[2] The notice the District Attorneys sent to affected defendants is plainly not written to effectively inform defendants of their rights. Prior drafts of the notice done in consultation with counsel for the Petitioners and CPCS contained a heading stating "You may have been wrongfully convicted," explained the presumption of misconduct established in *Scott*, and informed affected defendants that they "will not be penalized" for "exercising [their] rights." These did not make it into the version of the notice that the Commonwealth sent. Instead, the Commonwealth's version was styled as an "Important Notice Regarding a Closed Criminal Case." The letter itself did not state who had sent it, and while the envelope it was sent in stated that it was an "Important Legal Notice from the Commonwealth of Massachusetts," the return address listed was "RG/2 Claims Administration LLC" in Philadelphia. If this did not cause the recipient to treat the letter as junk mail, the recipient would have read the ominous message that bringing a collateral challenge to his or her conviction would return his or her case "to active status." Just as a

therefore not surprising that relatively few collateral challenges have been brought.

The District Attorneys blithely claim that the quiet "trickle" of collateral challenges is evidence that Dookhan's fraud, while egregious, did not meaningfully impact very many cases.[3] This is just plain hogwash. The trickle is more likely proof that Dookhan Defendants (1) have not been given adequate notice of their rights, (2) have been deterred from exercising their rights, and (3) lack the legal resources necessary to exercise their rights.[4]

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point of comparison, adequate notice in the context of civil class actions under the Federal Rules of Civil Procedure (where individual plaintiff interests are typically lower and must be aggregated to make pursuit of a lawsuit feasible) requires "the best notice that is practicable" and that both the nature of the action and the class' claims, issues, and defenses be "clearly and concisely state[d] in plain, easily understood language." Fed. R. Civ. P. 23(c)(2).

[3] Tom Jackman, *When a state's drug chemist lies for years, should all her cases be thrown out?*, True Crime Blog, Washington Post, Sept. 29, 2016, available at https://www.washingtonpost.com/news/true-crime/wp/2016/09/29/when-a-states-drug-chemist-lies-for-years-should-all-her-cases-be-thrown-out (quoting spokesman for Suffolk County District Attorney: "a handful of state prosecutors has handled the drug lab crisis since day one" and that "the small number that now trickle in are resolved in the ordinary course of business").

[4] *Amici* anticipate that the overwhelming majority of Dookhan Defendants are indigent, and it is clear that CPCS does not have the resources to represent any

II. THE PRESUMPTION OF PREJUDICE SHOULD BE IRREBUTTABLE.

This Court recognized in *Scott* that Dookhan's "insidious form of misconduct . . . [was] a lapse of systemic magnitude . . . that has cast a shadow over the entire criminal justice system," and that any remedy it fashioned must be "workable" and account for (among other things) "the integrity of the criminal justice system, [and] the efficient administration of justice." *Scott*, 467 Mass. at 352. In the two years since *Scott*, it has become abundantly clear that only a *sui generis* conclusive presumption can appropriately address both the compelling public policy need to re-establish citizens' trust in the criminal justice system and the compelling practical need to fashion an efficient remedy that does not place undue stress on an already resource-strapped judicial system.[5]

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significant portion of them. CPCS is facing a 59% spike in care and protection petitions filed by the Department of Children and Families and potentially an additional 18,000 cases arising from eight years of drug lab misconduct on the part of Sonja Farak. All of this in in addition to the typically back-breaking caseload public defense counsel carry as they attempt to provide constitutionally guaranteed services to the indigent despite chronic underfunding.

[5]43 Mass. Prac., Trial Practice § 15.3 (2d ed.)(noting that conclusive presumptions are warranted where there

A. A CONCLUSIVE PRESUMPTION PRESERVES THE INTEGRITY OF THE JUDICIAL SYSTEM.

A conclusive presumption that Dookhan's misconduct materially informed defendants' decision to plead guilty ensures that no fraudulently-obtained conviction will be allowed to stand in the face of Dookhan's egregious misconduct. If the Court were to allow the Commonwealth to rebut the presumption, it risks validating and putting its imprimatur on a process that is "fundamentally unfair [and] an unreliable vehicle for determining guilt or innocence." *See Rivera*, 556 U.S. at 160 (explaining standard for structural errors that warrant automatic reversal). Such an outcome would only make indelible the very black mark that this Court set out to remove in *Scott.*

A conclusive presumption also ensures that the defendants do not "bear the burden of a systemic lapse that . . . is entirely attributable to the government." *Bridgeman I*, 471 Mass. at 476. If the Commonwealth were allowed the opportunity to rebut the presumption, defendants would be forced to try to engage legal resources to which they simply do not

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are compelling public policy and practicality justifications)

have access. As explained in Petitioners' and Intervener's joint brief, Dookhan Defendants are among the most vulnerable people in our society and it would be difficult, if not impossible, for them to engage legal counsel to represent their interests in post-conviction proceedings where the Commonwealth chose to attempt a rebuttal.

Lest the Court think that this risk is overstated and assume that the Commonwealth would be selective about the cases in which they attempt to rebut the presumption, *amici* reminds the Court that several District Attorneys chose to indiscriminately preserve every Dookhan-tainted case in their jurisdiction after *Scott.*[6] The District Attorneys' approach was emboldened in large part by their knowledge that most Dookhan Defendants remained unaware of their right to raise a post-conviction challenge and that, within the small subset of defendants who were aware, only a select few would have the wherewithal to access and utilize the

[6] 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).

scarce legal resources available to challenge their conviction as contemplated in *Scott.*

Unless the presumption is made irrebuttable, further strategic behavior by District Attorneys could substantially eliminate any benefit of reversing the presumption. By moving to retain over 24,000 Dookhan convictions *en masse*, prosecutors would then shift the burden of noticing defendants to the Commonwealth's courts. Even if defendants receive proper notice, they would be unlikely to have access to counsel. Accordingly, prosecutors are likely to retain a large portion of any Dookhan convictions whose *vacatur* they contest merely by virtue of default judgments. For the Court's remedy to be meaningful, the prosecution team cannot be permitted to retain the tainted convictions without carrying a more substantial burden than opposing *vacatur*.

B. A CONCLUSIVE PRESUMPTION WOULD ALLOW FOR MORE EFFICIENT ADMINISTRATION OF JUSTICE.

Practical concerns also point the Court towards establishing a conclusive presumption. Providing the Commonwealth with an opportunity for rebuttal unnecessarily ties up scarce judicial resources and prolongs the Dookhan scandal at the same time that the

judicial system is facing an indigent defense crisis and confronted with a new drug lab scandal involving Sonja Farak.

C. A CONCLUSIVE PRESUMPTION WOULD MORE EFFECTIVELY DETER FUTURE COMMONWEALTH MISCONDUCT.

A conclusive presumption resulting in the *vacatur* of all Dookhan cases is also necessary to provide an incentive for the Commonwealth to be more vigilant in its oversight of the drug labs that play such a pivotal role in the criminal justice system, and to respond to future crises more appropriately than it did in the wake of Dookhan and Farak. Both the Dookhan and Farak investigations have revealed that the Commonwealth overlooked obvious red flags in each case, allowing the underlying misconduct to continue over the course of almost a decade. When each scandal did finally come to light, the Commonwealth was lethargic in its response. Regardless of whether this reluctance to investigate is intentional or merely subconscious, it is clear that Commonwealth officials are not adequately incentivized to deter or uncover drug lab misconduct because doing so risks jeopardizing convictions they are tasked with obtaining. To properly realign prosecutorial

incentives, the benefit of their inattention to these issues must be removed. They cannot be allowed to keep the convictions procured with the help of Dookhan's fraud.

The Dookhan and Farak scandals each resulted from Commonwealth officials' gross mismanagement of the crime labs that play a pivotal role in the administration of criminal justice. Over the course of Dookhan's decade-long tenure at the Hinton lab, Commonwealth officials ignored obvious red flags and missed numerous opportunities to catch and prevent her from engaging in the misconduct precipitating this crisis. Similarly, Commonwealth officials remained blissfully unaware as Sonja Farak routinely stole and used methamphetamine and crack cocaine during her nearly eight year tenure as a drug chemist in the Amherst lab.[7] Both failures make clear that there are currently insufficient incentives for Commonwealth officials overseeing the labs to appropriately monitor lab activity and to investigate potential misconduct.

[7]Office of the Attorney General of the Commonwealth of Massachusetts, *Investigative Report Pursuant to Commonwealth v. Cotto, 471 Mass. 97 (2015)* ("OAG Report") at 1, 8-9, 16-17 (Apr. 1, 2016).

This Court can, and should, provide the necessary incentive.

Commonwealth officials had many opportunities to catch Dookhan, but failed to do so. During her time at the Hinton Lab, Dookhan was purportedly testing 500 samples per month while her colleagues were only testing between 50 and 150.[8] Dookhan's remarkable "productivity" was even more suspicious in light of the fact that her direct supervisor never saw her in front of a microscope.[9] When it came to light that Dookhan had overstated her credentials and qualifications – fraudulently claiming she had a master's degree in chemistry – her superiors at the Hinton Lab astonishingly allowed her to simply correct her curriculum vitae without any further repercussions.[10] Commonwealth prosecutors were even warned directly of Dookhan's propensity for dishonesty by her ex-husband, who wrote in one series of text messages to an assistant district attorney nearly two years before Dookhan's misconduct was uncovered that

[8] *See* Massachusetts State Police Memorandum of Interview of Michael Lawler 2 (Aug. 7, 2012).

[9] *See* Massachusetts State Police Memorandum of Interview of Peter Piro 1 (Aug. 27, 2012).

[10] *See* Massachusetts State Police Memorandum of Interview of Elizabeth O'Brien 3-4 (Aug. 7 2012).

Dookhan was "a liar" and she was "always lying."[11] As the Office of the Inspector General found in its subsequent investigation and report on the scandal, the lack of inquiry into Dookhan's conduct in spite of these red flags "contributed to Dookhan's ability to commit her acts of malfeasance."[12]

For any monitoring scheme to be effective, prosecutors will almost certainly need to play a role, as other institutions are either unavailable or poorly situated to engage in such monitoring. At present there are no federal or state agencies aimed at ensuring that crime laboratories are producing accurate and verifiable results. The defense bar, although it has every incentive to identify crime lab misconduct, is poorly situated to do so as its access to information about the workings of any given lab is limited. The challenge for the defense bar in identifying misconduct is perhaps most starkly illustrated by the fact that Dookhan testified in court more than 150 times in the three years prior to

[11] Brian Ballon, *Ex-chemist's Husband Warned Prosecutor She Was a Liar*, Boston Globe, Jan. 9, 2013, at A1.

[12] Office of the Inspector General of the Commonwealth of Massachusetts, *Investigation of the Drug Laboratory at the William A. Hinton State Laboratory Institute 2002-2012*, at 1 (Mar. 4, 2014) ("OIG Report").

her arrest, and yet cross-examination failed to uncover Dookhan's fraud.[13] Further, as the Dookhan and Farak scandals demonstrate, crime labs are poorly situated to police themselves. The United States Supreme Court itself has noted that there are significant institutional pressures for drug labs to alter or shade evidence in favor of the prosecution. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318 (2009).

As the governmental actors that ultimately receive and employ the results produced by crime labs, prosecutors' offices are well-situated to monitor drug lab conduct. However the response of the Commonwealth's prosecutors to recent drug lab scandals demonstrates that a significant shift in prosecutorial incentives is necessary to ensure misconduct is properly investigated and remedied. The most glaring example of the need for such a shift is the Commonwealth's response to the Sonja Farak scandal.

Misconduct by former state drug lab chemist Sonja Farak may have tainted an additional 18,000 cases.[14]

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[13]Andrea Estes & Brian Ballou, *Drug Lab Chemist Accused of Lying*, BOSTON GLOBE, Sept. 26, 2012 at A1.

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

Farak was a habitual drug user that from at least 2005 to 2013 regularly used her lab's supply of methamphetamine and crack cocaine, performing her duties as a lab chemist while high "nearly every day." [15] Despite the fact that Farak eventually exhausted the supplies of methamphetamine, amphetamine and ketamine that her lab used as comparison standards,[16] Farak's use of these drugs went unnoticed and uninvestigated for almost nine years. Perhaps even more astonishingly, the Office of the Attorney General did not conduct an investigation into the timing and scope of Farak's misconduct when her drug use was uncovered, nor did it initiate one after the completion of its prosecution of Farak for her criminal misconduct. The Attorney General's Office only initiated an investigation *after it was instructed to do so by this Court*.[17] This underscores the indispensable role that this Court's exercise of superintendence powers in this case will have in deterring future massive failures of government

[15]OAG Report at 1, 8-9.

[16]*Id.* at 12-13. Farak also "substantially diminished" the lab's cocaine standard, despite the lab's more frequent use of this standard. *Id.* at 11-13.

[17]*Commonwealth v. Cotto*, 471 Mass. 97, 98, 115 (2015); OAG Report at 1.

integrity, such as the Hinton Drug Lab Scandal and the Farak scandal.

The District Attorneys' response to the ongoing Dookhan crisis indicates that incentives for prosecutors must also be shifted to resolve scandals of this magnitude. Though this Court has recognized that the Dookhan scandal is the product of "egregious misconduct" that is attributable to the government, attempts to remedy the crisis have been anything but swift. *Scott*, 467 Mass. at 354. If the Commonwealth is allowed to hang on to the guilty pleas that it wrenched from Dookhan Defendants, it will demonstrate to prosecutors that they have little incentive to monitor the drug labs for misconduct and blow the whistle and remediate the misconduct when it is detected. This is precisely the opposite of the message that this Court needs to send to the Commonwealth's prosecutors, who are the first line of defense to future drug lab scandals.

III. THIS COURT SHOULD BAR RE-PROSECUTION OF DISMISSED DOOKHAN CASES.

At this late date, the overwhelming majority of Dookhan Defendants have already served their sentences. This Court observed in *Bridgeman I* that in

such cases, "the Commonwealth has obtained the full benefit of its plea agreements." *Bridgeman I*, 471 Mass. at 477 n. 19. Accordingly, the value to the Commonwealth or the system as a whole of re-prosecuting the vast majority of Dookhan Defendants is negligible.

To a Dookhan Defendant, however, the harm caused by a retrial is substantial. Even if acquitted, the pre-trial and trial process itself is stressful and onerous; in some cases, the stress and time spent dealing with the proceeding could jeopardize the defendant's health or job. In some instances the desire to avoid the stress and time of re-trial may be so substantial that the defendant will plead guilty for reasons that have nothing to do with his or her actual guilt. Furthermore, the defendant and the public could have no confidence that a re-trial would be completely free of the stain of Dookhan's misconduct. Would, for example, the prosecution be allowed to use drug evidence previously handled by Dookhan at the Hinton Drug Lab?

In addition to the benefit of finality, the dismissal of the Dookhan cases with prejudice would also send the appropriate message to state actors that

prosecutorial malfeasance needs to be seriously and swiftly addressed. Two years ago, *amici* may not have taken the position that dismissal with prejudice is necessary to punish and deter the Commonwealth's egregious misconduct. But the Commonwealth's response to drug lab misconduct, both in the Dookhan in Farak cases, has been to sweep the scandal under the rug. To change this behavior a drastic remedy is not only appropriate, it is necessary.

A. Dismissal with Prejudice is an Appropriate Corrective to the Lax Response by the Commonwealth to the Dookhan and Farak Scandals

After over four years of investigations and proceedings before this and other courts, the defendants in over 24,000 of Dookhan's cases have received no relief from the harm they suffered from Dookhan's misconduct and the government's failure to stop it. The District Attorneys appear largely unbothered by the current state of the crisis. They have asserted that formal notice to these defendants has never been necessary[18] and have characterized the

[18] Jackman, *supra* n. 3 (quoting Suffolk D.A. spokesperson: "The notion that there was a convicted drug defendant that didn't know about Dookhan, it strains credulity.").

mailing of their plainly inadequate notice as the "final step" in their efforts to resolve the crisis.[19] The 18,000 potential cases generated by the Farak scandal are unlikely to be resolved any faster, as the Commonwealth waited two years to even begin an investigation into the scope of her conduct, and only did so at the direction of this Court.[20]

Thankfully, the Commonwealth's prosecutors have shown they can be responsive to this Court's correctives. Admonishment by this Court resulted in both a list of Dookhan Defendants being generated and the eventual investigation into the scope of Farak's misconduct. After four years it is clear that this crisis is unlikely to ever be satisfactorily resolved without serious intervention by this Court. To resolve this crisis and ensure serious responses to any future crises of prosecutorial misconduct in the future, this Court must dismiss the cases against the Dookhan Defendants with prejudice.

[19]SRA 7.

[20]*Cotto*, 471 Mass. at 98, 115; OAG Report at 1.

B. A Bar on Re-prosecution Will Obviate a Need for Courts to Address the Question of Whether Dookhan Not Only Falsified Drug Certifications, But Also Irrevocably Corrupted the Underlying Drug Sample.

Prosecutors have suggested that a simple retesting of the evidence in Dookhan's cases should be sufficient to determine the guilt or innocence of any given defendant. Even setting aside the harms to wrongly-convicted defendants and to public perception of the integrity of the criminal justice system this casual approach would entail, this Court can have no confidence in the continuing underlying integrity of drug samples that Dookhan handled at the Hinton lab. Dookhan has admitted to "turning negative samples into positive samples," and she may have falsely inflated the weights of the evidence she handled. But the actual scope of Dookhan's misconduct, including whether she physically manipulated the drug samples that she handled, in addition to falsifying drug certifications, will likely never be known.

As this Court observed in Scott, Dookhan was the only witness to her misconduct and cannot herself identify the cases in which she tampered with evidence. As Dookhan's "particularly insidious form

of misconduct" is one which "belies reconstruction" (Scott, 471 Mass. at 352), any evidence she handled is inherently suspect. Indeed, *amici* expect that, in the event a Dookhan Defendant were to face re-prosecution, the first step that the defendant's attorney likely would take would be to move to preclude the admission of the results of any retesting of a drug sample that Dookhan may have touched. Given that prosecutors likely would challenge such motions, allowing re-prosecution of Dookhan Defendants would virtually guarantee that the Commonwealth's courts will continue to be bogged down litigating unresolved factual questions about the scope of Dookhan's fraud.

A categorical bar on re-prosecution, however, would obviate the need for courts to adjudicate such motions. More pointedly, a bar on re-prosecution would provide the benefit of finality: like ripping off a bandage on a healed wound, the Commonwealth could finally, once and for all, move on from the Hinton Drug Lab Scandal and focus its efforts on ensuring that nothing remotely like it ever happens again in the future.

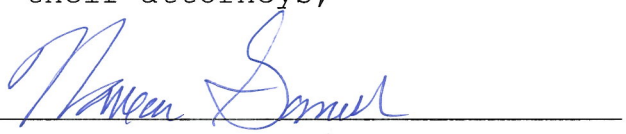
CONCLUSION

For the reasons stated in Petitioner's brief, and the reasons stated in amici curiae's brief, the Court should dismiss all cases against Dookhan defendants with prejudice.

Respectfully Submitted,

For *Amici* National Association of Criminal Defense Attorneys and Massachusetts Association of Criminal Defense Lawyers

By their attorneys,



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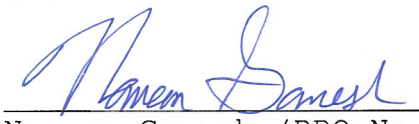
Certification of Compliance

Pursuant to Mass. R.A.P. 16(k), I hereby certify that this brief complies in all material respects with the Massachusetts Rules of Appellate Procedure pertaining to the filing of briefs.



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Certificate of Service

I, Naveen Ganesh, certify that on this day I caused to be served by hand an original and seventeen copies of the foregoing brief with the clerk of this Court, along with an electronic copy on compact disc. I further certify that I caused to be served two copies of the foregoing brief on counsel for each party separately represented in this matter by sending such copies by Federal Express overnight mail or U.S. First Class mail to:

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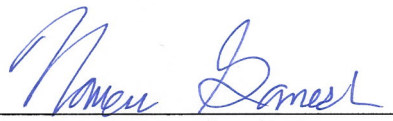

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