COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, ss. NO. SJC-12157

KEVIN BRIDGEMAN,
and others

v.

DISTRICT ATTORNEY FOR SUFFOLK COUNTY AND DISTRICT,
and others

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

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INTRODUCTION

The District Attorneys' submission confirms that this crisis will end in a comprehensive disposition of one kind or another: either the comprehensive remedy that petitioners and intervener propose to vindicate the rights of all Dookhan defendants or the current DA-endorsed framework in which the vast majority of Dookhan-tainted cases will never be addressed.

Although the number appears nowhere in their 82-page brief, the DAs have identified **24,577** Dookhan-involved cases with adverse dispositions in which — as of September 2016 — no post-conviction motion had ever been filed. DA Br. 52; ComRA 437 ¶3.[1] The DAs further estimated that only about 1,500 motions to vacate Dookhan-tainted convictions were brought between August 2012 and August 2016, and that only 200 more cases were resolved following their recent notice letter. Op. Br. 19 & n.67; R.App. 1857-1939; ComRA 437-40.

The DAs see this trickle as proof that the case-by-case framework is a success. They ask the Court to dismiss this petition, end its attempts to solve this crisis, and "avoid" a flood by "[p]lacing the responsibility upon individual defendants to come forward."

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[1] "DA Br." refers to the DAs' brief; "Op. Br." refers to the petitioners' and CPCS's opening brief; "R.App." and "SRA" refer, respectively, to petitioners' and CPCS's appendix and supplemental appendix; and "ComRA" refers to the DAs' appendix.

DA Br. 66. The DAs thus seek their own version of a comprehensive resolution — one that would effectively eliminate case-by-case litigation because so few defendants would ever file motions. But it would also avoid justice, undermine due process, and fail to restore the integrity of the system.

The DAs also seek to pass off their plan as the defendants' choice. Requiring people to come forward, they argue, promotes "self-determination" and respects their alleged desire not to reopen "a closed chapter in their lives." DA Br. 35, 57, 69, 82. But the DAs cannot shift the "burden of a systemic lapse," Bridgeman v. District Attorney for the Suffolk Dist., 471 Mass. 465, 476 (2015) (Bridgeman I), by re-characterizing that burden as a chance for self-determination.

Each of the 20,000-plus people whom the DAs have identified is the victim of "egregious government misconduct." Commonwealth v. Scott, 467 Mass. 336, 354 (2014). Until this petition was filed, the DAs declined to identify them. Op. Br. 23-24. Now, contrary to Bridgeman I, the DAs issue a threat: if this Court vacates their convictions, Dookhan defendants might find themselves "arrested unexpectedly." DA Br. 63.

The time has come to vacate these tainted convictions and to dismiss the underlying charges with prejudice. If the Court chooses to dismiss Dookhan-tainted

charges without prejudice, it should limit permissible re-prosecution under a protocol that safeguards "the due process rights of defendants, the integrity of the criminal justice system, and the efficient administration of justice." Commonwealth v. Francis, 474 Mass. 816, 825 (2016).

ARGUMENT

I. Comprehensive relief is needed.

The DAs defend a status quo that, by requiring under-informed and uncounseled defendants to come forward one at a time, will deny relief to all but a few. But standing pat is not neutral, see New England Innocence Project (NEIP) Amicus Br. 9-10; it is a comprehensive response that aims to declare an end to this crisis and discourage litigation. Such a response would be acceptable only if this Court concludes, as the DAs argue, that justice has already been done and "the Dookhan cases have been remediated." DA Br. 37. The DAs' argument, however, is mistaken.

A. The crisis is ongoing.

The Dookhan debacle has not been "remediated." Only about 1,500 Dookhan cases were litigated by August 2016, and fewer than 200 have been resolved since the DAs' notice letter. Op. Br. 19 & n.67; R.App.

1857-1939; ComRA 437-40.[2] Meanwhile, roughly 24,000 cases still have a Dookhan-involved adverse disposition.

For defendants, these tainted convictions are not, as the DAs contend, "a closed chapter in their lives." DA Br. 57. Although the punishment they have endured is irreversible, the collateral consequences — from deportation to enhanced sentences in other cases — are constant and severe. Op. Br. 18.

Contrary to the DAs' brief, it is neither impossible to quantify the Dookhan scandal, nor too early to assess the Farak scandal, DA Br. 24, 35, 47. The DAs themselves identified 24,577 Dookhan cases that were still unaddressed as of September 2016. Id. at 52; ComRA 437 ¶3; see Op. Br. 17-18 (identifying 24,391 cases). It does little to mitigate the crisis to say that some Dookhan defendants may have died, as the DAs once argued, R.App. 474, or could lose motions for relief.

Moreover, CPCS estimates that as many as 18,000 cases may have been tainted due to Farak's misconduct, which the DAs' have conceded was both "egregious" and

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[2] While the DAs note that CPCS authorized billing in about 8,000 suspected Dookhan cases, DA Br. 31, they ignore the fact that many of those appointments yielded no representation, Op. Br. 28. The DAs' own numbers confirm that these efforts bore little fruit.

attributable to the government. R.App. 1777-78. Although a Superior Court judge is still considering allegations of misconduct against the Attorney General's Office, this Court may consider the strain that Farak-involved cases will place on the Commonwealth's indigent defense system.

The DAs assert that public defense resources will not necessarily be strained by thousands of wrongful convictions because there is no post-conviction right to counsel. DA Br. 61-62, 66. This argument is both beside the point and short-sighted. A systemic failure to provide access to post-conviction relief violates due process and imperils the systemic integrity that this Court safeguards with its superintendence powers. See Op. Br. 40, 52-58. Indeed, this Court has already stated that "the ability of CPCS" to assign post-conviction counsel "is crucial to the administration of justice in the Hinton drug lab cases." Bridgeman I, 471 Mass. at 480.

B. The status quo does not respect the "choices" of defendants.

The DAs make the peculiar argument that comprehensive relief would actually harm Dookhan defendants, by "nullif[ying]" their right to "self-determination." DA Br. 35, 82. But it is the current system, not the remedy proposed by petitioners and CPCS, that imperils

the agency of individual defendants. See NEIP Amicus Br. 10-13, 19-22.

The Commonwealth's agents created the predicament that now confronts Dookhan defendants. Some of these defendants have only recently learned about the possibility of challenging their tainted convictions because DAs neither identified nor notified Dookhan defendants until long after this litigation began.

Even at this late date, self-determination remains largely out of reach. The DAs report that they sought to mail 21,922 letters, but the number actually delivered was at most 16,113.[3] There is scant evidence that those letters were, in turn, received and "understood." DA Br. 23. Many may have arrived at homes where the defendant no longer lives; many may have been discarded by people wary of an envelope from RG/2 Claims Administration in Philadelphia; and many may not have been understood, because the letter is impenetrable and incompetently translated into Spanish.[4] And

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[3] For 1,006 defendants an address could not be found, and for an additional 4,803 defendants a letter was returned undelivered and no secondary address was found. ComRA 437.

[4] If the DAs receive Department of Justice funding, their reliance on a Spanish translation from a "bilingual" colleague may have been unlawful. Compare SRA 31, 55-58, with 42 U.S.C. 2000d; Lau v. Nichols, 414 U.S. 563 (1974); Dept. of Justice, Guidance to Federal Financial Assistance Recipients regarding Title VI Prohibition Against National Origin Discrimination Af-

many of the letters may have yielded no response because they menacingly promise to return cases to "active status." SRA 2.[5]

The DAs offer no explanation for replacing a prior draft of the notice with one that was so deeply flawed. See Op. Br. 8, 10. Nor do they provide any reason to doubt that properly informed defendants almost invariably pursue relief, Op. Br. 24 — they cite no cases, for example, in which an offer to vacate and file a nolle prosequi was refused or a referral to counsel was declined, ComRA 440. Rather than defendants exercising their right of "self-determination," it is the choices made by the DAs and the scope of the fiasco itself that have denied most Dookhan defendants

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fecting Limited English Proficient Persons, 67 Fed. Reg. 41455, 41459-61, 41463-64 (2002) (legal obligation of DOJ grantees to provide translation increases with size of affected population; "quality and accuracy" is especially important for legal documents); id. at 41462 ("Competency requires more than self-identification as bilingual").

[5] The DAs state that CPCS "requested that the letter recipients not be provided with a telephone number for CPCS." DA Br. 23 n.15. This is misleading. In fact, CPCS stated that it could not in good conscience sign on to a notice process that promised a free lawyer to 24,000 Dookhan defendants, because CPCS lacks the resources to fulfill such a promise. R.App. 23 (docket sheet in SJ-2014-0005, paper no. 126; audio-recording of June 1, 2016, hearing at 14:00-15:00).

the opportunity to seek a remedy for convictions tainted by egregious government misconduct.[6]

C. The current system does not promote individualized, merits-based review.

The DAs contend that comprehensive relief is inappropriate because "each case" is getting, and warrants, individual attention. DA Br. 36, 45-56, 64-70. Both aspects of this contention are incorrect.

First, at present, most cases do not get individual attention, and random chance determines which ones do. Requiring defendants to come forward — individually, uncounseled, and four years after Dookhan's fraud was disclosed — avoids case-by-case adjudication only by placing the burdens of a systemic lapse on its victims. Multiple factors determine how defendants fare in this system, but the merits of their cases are not high on the list. The key factors appear to be whether they learn about their options — including whether they received, opened, understood, and failed to be deterred by the DAs' recent notice — and whether they were prosecuted in Suffolk County, where dismissals are being offered, or instead another county, where

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[6] The DAs' concern about foisting unwanted relief on defendants could be addressed by giving defendants the option to decline any relief that is ordered in this case. If the DAs are correct that wrongfully convicted Dookhan defendants have no wish to reopen this "closed chapter" of their lives, the opt-outs will pour in.

such relief is rarer. Op. Br. 20, 27; ComRA 437-40. This system is not a fair, fact-based "triage." DA Br. 66, 68. Nor does it restore integrity to the Commonwealth's justice system. See National Association of Criminal Defense Lawyers Amicus Br. 17-19; Boston Bar Association (BBA) Amicus Br. 13.

Second, though some cases do receive individual attention under the current system, the limited value of that attention cannot justify a remedy that effectively denies most defendants meaningful access to post-conviction relief. More than 90% of these cases were prosecuted in district court, and, thus, have been identified by prosecutors as relatively less serious. Op. Br. 16; DA Br. 68 (district court cases "do not resemble those resolved after indictment").

D. A comprehensive remedy would be consistent with decisions from this Court and others.

Focusing largely on cases that do not involve government misconduct, the DAs contend that there is no precedent for the solution proposed here. DA Br. 75-82. In the long history of American law, however, no state has ever used fraudulent and falsified evidence to convict 24,000 people, taken four years to identify them, sent them a notice that is misleading, incomplete, threatening, and incompetently translated, and then described the resulting quagmire as an exer-

cise in "self-determination." These circumstances, unique to Massachusetts, demand an appropriate remedy.

Recognizing that this scandal is “sui generis,” Scott, 467 Mass. at 353, this Court has already adopted rules that apply to all Dookhan defendants. Bridgeman I, 471 Mass. at 477 (exposure cap); Scott, 467 Mass. at 354 (presumption of misconduct). Although the Court has required defendants to demonstrate prejudice, other courts have recognized that it can be appropriate to dispense with that requirement. Tempest v. State, 141 A.3d 677, 683 (R.I. 2016) (“When the failure to disclose [exculpatory evidence] is deliberate, this [C]ourt will not concern itself with the degree of harm caused to the defendant by the prosecution's misconduct; we shall simply grant the defendant a new trial”) (citation omitted); State v. Patterson, 662 P.2d 291, 293 (Mont. 1983) (“intentional or deliberate suppression of evidence is a per se violation of due process sufficient to reverse or nullify a conviction”) (citation omitted).

Even when there has not been government misconduct, this Court and others have recognized that it may be appropriate to vacate convictions or dismiss charges if the justice system has reached a breaking

point.[7] Systemic remedies are especially appropriate where, as here, alternative remedies have been tried and have not "been found to be sufficient." Brown v. Plata, 563 U.S. 493, 501-02 (2011) (affirming order that could lead to release of 46,000 inmates).

II. The remedies proposed by petitioners and CPCS are workable and consonant with justice.

If the Court concludes that comprehensive relief is warranted, it will have to decide what form that relief should take. As a matter of due process and as an exercise of its superintendence power, the Court should dismiss tainted convictions with prejudice. Op. Br. 39-61. If the Court instead dismisses cases without prejudice, it should strictly limit reprosecutions. Id. at 51-52, 61. If many cases are renewed — as might happen if the Commonwealth is given abundant

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[7] See Lavallee v. Justices in the Hampden Superior Court, 442 Mass. 228, 246 (2004) (ordering the dismissal of charges if counsel is not provided within designated time); Public Defender v. State, 115 So. 3d 261, 274 (Fla. 2013) (approving "aggregate/systemic motions to withdraw" by public defenders); State v. Randolph, 800 N.W.2d 150, 161-62 (Minn. 2011) (authorizing a conviction to be vacated "[i]f the State determines not to provide compensation" for indigent defense); Hurrell-Harring v. State of N.Y., 15 N.Y.3d 8, 26-27 (2010) (approving class claim for denial of counsel in five New York counties); Kuren v. Luzerne Cnty., 2016 WL 5466302 (Sept. 28, 2016) (approving class action seeking injunction forcing county to adequately fund public defender's office); see also National Association for Public Defense Amicus Br. 4-13.

time and few constraints — there will be a new flood. To resolve rather than prolong this crisis, there must be a mechanism to significantly reduce the volume of cases. Cf. BBA Amicus Br. 14.

A. The DAs' arguments confirm that dismissals with prejudice are warranted.

In 2012, if the DAs had made good on their pledges to ensure "that justice is done" and to "assure the ongoing integrity" of the justice system, Op. Br. 63-64 (Addendum), it might reasonably have been argued that they should be permitted to reprosecute Dookhan cases. But those pledges were not fulfilled; remediation did not happen. Now, in 2016, dismissing cases with prejudice is more appropriate than ever. Giving the Commonwealth a do-over is not.

The DAs' latest arguments confirm that this remedy is appropriate, because they do not recognize the damage this debacle has done to our justice system. They assert that sorting Dookhan cases is too much for the justice system to bear, as though the burden should more appropriately be borne by the defendants who have been harmed (DA Br. 71-72); that convictions obtained with falsified evidence pose no problem because defendants pleaded guilty, as though due process does not matter (id. at 65); that their September 2016 notice should end this case, even though the vast majority of tainted convictions remain unaddressed (id.

at 37); and that it is still impossible to quantify Dookhan and Farak cases, as though failing to have an accounting of these scandals in 2016 demonstrates anything besides the Commonwealth's inability to reckon with its own misconduct (id. at 26-29, 33-35).[8]

The Commonwealth's handling of these wrongful conviction scandals does not inspire optimism that the justice system's integrity will be preserved without swift and decisive action by this Court. Any further delay, including an opportunity for a significant number of reprosecutions, will continue to shift the burden of egregious misconduct to defendants.

B. In the alternative, dismissals without prejudice would be workable and fair, and the DAs' complaints provide no grounds for rejecting such systemic relief.

Dismissals without prejudice would, if adequately supervised and curtailed, neither harm defendants nor unduly burden the justice system. To the contrary, such a solution would be efficient and just. For example, the DAs argue that Dookhan defendants "would face arrest" if their convictions are dismissed without prejudice, because summonses would go unanswered, and DAs would request (and judges would issue) arrest war-

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[8] As discussed infra, at Part II.B, the DAs also argue that defendants "would face arrest" if their convictions are dismissed without prejudice. DA Br. 63. This concern can be addressed by dismissing cases outright.

rants for unwitting defendants. DA Br. 63. This threat is based on the assumption that prosecutors will have the same unfettered discretion to reprosecute Dookhan cases as they have in any other case that is dismissed without prejudice. But that is not the remedy that petitioners and CPCS have proposed, see Op. Br. 51-52, 61, nor is it one this Court should adopt.

Likewise, the DAs complain that permitting them to reprosecute dismissed Dookhan cases would require too much work. DA Br. 71-72. But this complaint could be accurate only if the DAs mean to reprosecute far more cases than could be justified by the interests of justice. By now, virtually all Dookhan defendants have completed their sentences, cf. DA Br. 70, and the number of cases that prosecutors might reasonably renew is miniscule. The DAs concede, after all, that "[t]he most serious cases . . . have already been addressed." Id. at 74. The limited timeframe proposed for reprosecution and the requirement that reprosecution be based on untainted evidence will appropriately cabin reprosecutions.

Accordingly, if the Court does not vacate all Dookhan convictions with prejudice, it should implement a remedy containing the following elements:

1. A notation prohibiting the issuance of an arrest or default warrant should be added to the war-

rant management system for each Dookhan case that has been vacated.

2. Defined sub-categories of vacated Dookhan convictions should be dismissed with prejudice (e.g., cases that do not involve trafficking convictions).[9]

3. Charges not dismissed with prejudice may be reprosecuted only upon allowance of a motion to reprosecute in which the Commonwealth has the burden of establishing sufficient untainted evidence to prove the drug charges beyond a reasonable doubt and that reprosecution is in the interests of justice.

4. A motion to reprosecute would trigger notice to the defendant and the assignment of counsel.

5. Only upon allowance of such a motion would a Dookhan case revert to “active” status.

6. A Dookhan defendant whose case has been returned to active status may be issued a notice to appear; but a default or arrest warrant may issue, if at all, only if there has been a failure to appear after a showing of in-hand service.

7. Any vacated Dookhan conviction as to which a motion to reprosecute has not been allowed by a date certain from the issuance of this Court’s rescript

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[9] Where a drug offense was part of a case involving non-drug charges, DA Br. 28, the non-drug convictions would be left intact.

should be automatically dismissed with prejudice in accord with the speedy trial rule.

The past four years have made clear that a comprehensive remedy is necessary. The above-described approach is practical, has the significant virtue of resting wherever possible on well-settled legal principles, and would represent a significant step toward restoring the justice system's integrity.

CONCLUSION

For the foregoing reasons and those stated in the opening brief, the Court should order that all cases involving misconduct by Annie Dookhan be vacated and dismissed with prejudice or, in the alternative, dismissed under a protocol permitting limited reprosecution only under particularized circumstances.

Respectfully submitted,

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November 2, 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. 20 (form of briefs, appendices, and other papers).

/s/ Matthew R. Segal
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I, Matthew R. Segal, counsel for petitioners-appellants Kevin Bridgeman, Yasir Creach, and Miguel Cuevas, do hereby certify that on this 2nd day of November, 2016, I caused a true copy of the foregoing document to be served by electronic mail on the counsel listed below for the other parties. I further certify that two copies of the foregoing document will be mailed by First Class Mail to the counsel listed below on November 3, 2016.

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