COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK SS. 2016 SITTING

No. 12157

KEVIN BRIDGEMAN, et al.,
PETITIONERS,

V.

DISTRICT ATTORNEY for SUFFOLK, et al.,
RESPONDENTS.

ON RESERVATION AND REPORT

BRIEF FOR THE RESPONDENTS

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INTRODUCTION

In Bridgeman v. District Attorney for Suffolk District, 471 Mass. 465, 468 (2015) (Bridgeman I), the Court rejected the request by the petitioners and the Committee for Public Counsel Services (CPCS) as interveners for a "global remedy" that would entail the Supreme Judicial Court's ordering either dismissal of all affected convictions with prejudice, or the vacatur of all G.L. c. 94C convictions in all cases in which Annie Dookhan signed the certificate of drug analysis as assistant analyst followed by limited re-prosecution in selected cases and an order of dismissal of all other complaints and indictments. In the Court's view "implementation of a 'one-size fits all' approach [was] not [then] a workable solution." Id. at 487. The question before the Court on this Reservation and Report is reconsideration of Bridgeman I, whether the petitioners' and CPCS's "one-size fits all" approach is either workable or warranted at this or any time.

ISSUE PRESENTED

SHOULD THIS COURT ABANDON ITS CAREFUL AND COMPREHENSIVE JURISPRUDENCE, WHICH CREATED A WORKABLE SOLUTION EFFECTIVELY REMEDIATING THE HARM CAUSED BY DOOKHAN'S MALFEASANCE, IN FAVOR OF "MASS DISMISSAL" OF CASES, WHERE THERE IS NO PRECEDENT SUPPORTING SUCH DRASTIC ACTION BECAUSE IT WOULD ABROGATE ESTABLISHED PRINCIPLES UNDERLYING OUR SYSTEM OF JUSTICE?

STATEMENT OF THE CASE

This matter originated as a petition pursuant to G.L. c. 211, § 3 on January 9, 2014, by the three named defendants against the District Attorneys for the Suffolk and Essex Districts requesting the Court exercise its original superintendence power to place limits on the prosecution of "Dookhan defendants" after a motion for new trial is granted.[1] The petitioners asked in the alternative for an order requiring the District Attorneys to notify all "Dookhan defendants"[2] whether the Commonwealth intended to re-prosecute them; vacating the convictions and dismissing the complaints with prejudice of all defendants not so notified of the intent to re-prosecute; and requiring the Commonwealth to conclude any re-prosecution within a limited time. Bridgeman I, at 467. On May 27, 2014, the Committee for Public Counsel Services (CPCS) moved to intervene seeking a global remedy of mass vacatur followed by mass dismissal and, in the alternative, rulings

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[1] Two of the three named petitioners did not have pending motions before the trial court. Bridgeman I, at 470, 471.

[2] The Court used this term "to generally refer to those individuals who were convicted of a drug offense and in whose cases Dookhan signed the certificate of drug analysis" as an assistant analyst. Bridgeman I, at 467 n. 4. Cf. Commonwealth v. Ruffin, 475 Mass. 1003, 1004 (2016) (distinguishing cases where defendant tendered plea before Dookhan analyzed drugs and signed certificate of analysis and those where plea took place after analysis).

specific to motion for new trial hearings. Bridgeman I, at 467-468. The two named District Attorneys filed a verified opposition to the petition and to the motion to intervene on June 3, 2014. SJ-2014-0005, #10.[3]

Before the October 21, 2014 reservation and report the Single Justice held four hearings without finding facts. SJ-2014-0005. After argument on January 5, 2015, this Court issued its first Bridgeman decision on May 18, 2015. The Court denied the petitioners' and CPCS's request for a "global remedy," while granting the petitioners' request for an "exposure cap" in event of re-trial; CPCS's motion to intervene; and CPCS's request for certain procedural rulings on motions for new trial. Bridgeman I, at 468. The Court remanded the

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[3] References to the Commonwealth's Record Appendix and Addendum are ComRA and ComAdd. References to the Petitioners' Brief and Record Appendix are Pet.Br. and PRA. Reference to the proceedings before the Single Justice are to docket SJ-2014-0005, paper no. A copy of this docket is at ComRA 1.

The Commonwealth's Record Appendix includes the relevant dockets; correspondence; and substantive motions on the issue of reservation and report, as well as the petitioners' and CPCS's motions and affidavits referenced in this Brief; the relevant reports from David Meier and the Inspector General; and an affidavit (subject to the motion to supplement the record) of ADA Vincent DeMore (ComRA 437-441).

The petitioners and CPCS filed a Supplemental Record appendix that includes materials and filings related to the District Attorneys' notification mailing and the petitioners' objection thereto. See SJ-2014-0005, #166-171; SJC-12157, #3; SJ-2016-M012, #1-5,7.

matter to the Single Justice "consistent with this opinion, as appropriate." Bridgeman I, at 494.

While the matter was under advisement, the District Attorneys for Bristol, Cape and Islands, Middlesex, Norfolk, and Plymouth appeared voluntarily to assist in the effort to identify and send notice to "Dookhan defendants." See SJ-2014-0005; Memorandum and Order (dated Dec. 31, 2015) on Motion to Join District Attorneys for the Counties of Barnstable, Bristol, Dukes, Middlesex, Norfolk, and Plymouth as Respondents (ComAdd 11-12; PRA 459-461); Bridgeman I, at 478 n. 20, 480-481. On December 31, 2015 the Single Justice formally ordered these District Attorneys joined as respondents. SJ-2014-0005, #79 (ComAdd 10).[4]

On May 9, 2016, the respondent District Attorneys produced lists with defendant names, docket numbers and personal identifying information for the purpose of providing notification to those defendants of their status as "Dookhan defendants." SJ-2014-0005, #106-111, 113. On May 11, 2016, at a hearing before the Single Justice, CPCS informed the Court that CPCS did not have adequate resources to provide counsel to all identified defendants and objected to the sending of notification

[4] References to the petitioners includes both the named petitioners and intervener CPCS unless otherwise noted. References to the District Attorneys or the Commonwealth refer to all of the respondent District Attorneys unless otherwise noted.

at that time. SJ-2014-0005, # 117 (ComRA 105; PRA 466). On May 20, 2016, the petitioners and CPCS asked the Single Justice to reserve and report the matter to the full Court on the question whether this development warranted implementation of the previously denied comprehensive or global remedy. SJ-2014-0005, #120 (ComRA 146; PRA 468). On June 1, 2016, the Commonwealth filed an opposition and requested the Single Justice implement the notice plan described in the May 11, 2016 Interim Order. SJ-2014-0005, #124 (ComRA 33; PRA 603).

The Single Justice held a non-evidentiary hearing on June 1, 2016 regarding the question of a Report. SJ-2014-0005, #122. In her order following the hearing, the Single Justice permitted the parties to file affidavits to supplement the record, to consist of all the documents before the Single Justice to date. Second Interim Order, June 3, 2016, SJ-2014-0005, #129 (ComAdd 7; PRA 618). The Single Justice reserved and reported the entire matter to the Court on August 16, 2016. Subsequent to the reservation and report, the District Attorneys sent the letters to "Dookhan defendants" as previously planned. See SJ-2016-M012. This Court ordered the District Attorneys to preserve records of the individual mailings and responses. SJC-12157, #6.

STATEMENT OF FACTS

The Single Justice did not hold an evidentiary hearing on the issue presented by the petitioners and CPCS nor did the parties agree to a statement of facts in lieu of findings.[5] The Commonwealth submits that

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[5] The petitioners and CPCS have submitted a four volume record appendix comprising 1963 pages. Their supplemental record appendix comprises 80 pages.

Record appendix volume I contains motions, memoranda, and affidavits filed in this action; pages 482-603 pertain to misconduct by former-chemist Sonja Farak at the Department of Public Health Amherst Laboratory and the on-going litigation after remand in Commonwealth v. Cotto, 471 Mass. 97 (2015) and Commonwealth v. Ware, 471 Mass. 85 (2015) and companion cases.

Record appendix volume II consists in its entirety of materials compiled by Attorney Luke Ryan, counsel for the defendant in Commonwealth v. Jermaine Watt, Hampden Superior Court docket 0979CR01069 (and others), related to the Attorney General's investigation into the timing and scope of misconduct by former-chemist Sonja Farak and the on-going litigation after remand in Cotto and Ware and companion cases.

Record appendix volume III contains copies of two letters from the ACLU to the Attorney General in October 2012 as well as the Office of the Inspector General Investigation of the Drug Laboratory at the William A. Hinton State Laboratory Institute, 2002-2012, March 4, 2014 and the Office of the Inspector General Supplemental Report Regarding the Hinton Drug Laboratory, February 2, 2016. The remaining materials [pages 1200-1692] pertain to the investigation and litigation in Cotto and Ware and companion cases.

Record appendix volume IV consists of the supplemental affidavits filed by the parties pursuant to the Single Justice's Second Interim Order. Certain of the affidavits and attachments [pages 1767-1817, 1827] pertain Sonja Farak.

The Commonwealth has filed a Motion to Strike the materials contained in the record appendix that pertain

this Court's decisions in Commonwealth v. Scott, 467 Mass. 336 (2014), Commonwealth v. Resende, 475 Mass. 1 (2016), and Commonwealth v. Charles, 466 Mass. 63 (2013); the reports from the Office of Inspector General, Investigation of the Drug Laboratory at the William A. Hinton State Laboratory Institute 2002 - 2012, March 4, 2014 ("OIG report" - ComRA 277) and Supplemental Report Regarding the Hinton Drug Laboratory, February 2, 2016 ("OIG Supplemental Report" - ComRA 406); and the Report of David Meier to the Governor, August 2013 (ComRA 263), constitute the relevant facts of Dookhan's misconduct and the response by the Commonwealth, courts, and defense bar. These facts are supplemented with reference to the filings in SJ-2014-0005.

The Commonwealth does not concede that the allegations in the affidavits filed by CPCS and ACLU in course of proceedings before the Single Justice are correct or warranted. These allegations form the basis for their putative Statement of Facts at Pet. Br. at 12-37 and underlie their arguments at Pet. Br. at 40-50.

A. Discovery of Dookhan's Misconduct

The Hinton Lab was overseen by the Department of Public Health until July 1, 2012, when it was

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to the investigation of Sonja Farak and the litigation in Cotto and Ware and companion cases.

transferred to the State Police as part of the state budget bill. At that time, the State Police became aware of a 2011 breach of protocol by former-chemist Annie Dookhan. Scott, 467 Mass. at 338. OIG report (ComRA 289).

The breach occurred when Dookhan removed ninety samples from the evidence locker and assigned them to herself for testing. Dookhan attempted to hide her breach of internal protocols by forging the initials of the lab evidence officer in the evidence log book. When lab supervisors discovered what Dookhan had done, they relieved her of her duties in the lab effective June 21, 2011 and assigned her other, non-testing tasks. Scott, at 338-339. OIG report (ComRA 289).

When the Commissioner of Public Health learned of the June breach of protocol, he initiated a formal internal inquiry in the breach. As a result of that inquiry, Dookhan resigned in lieu of termination in March 2012. The State, on learning of the breach after taking over the lab in July, initiated a broader investigation which was conducted by the State police detective unit of the office of the Attorney General. Scott, at 339. OIG report (ComRA 289, 355-356).

Hinton drug lab protocols required two chemists to test substances. Based on Dookhan's admissions and the manner in which testing was done, this Court concluded that "Dookhan's admitted wrongdoing in the form of 'dry

labbing' and converting 'negatives to positives' likely took place while Dookhan was serving as the primary chemist responsible for those samples. Her failure to verify the proper functioning of the GC-MS machine, and her forgery of those reports to hide her wrongdoing, likely took place while Dookhan was serving as a secondary chemist." Scott, at 341.

There was no suggestion or support for finding Dookhan's misconduct extended beyond cases in which she served as either the primary or the confirmatory chemist. Scott, at 352 n. 8. Nor was there any suggestion in the record that Dookhan engaged in any wrongdoing in cases where she merely served as a notary public. Scott, at 341. OIG report (ComRA 397-398).

It appeared that Dookhan was motivated "in large part [by] a desire to increase her apparent productivity." The other chemists were not aware of or involved in her deliberate misconduct. Scott, at 341. Insofar as there were other improprieties with Dookhan's conduct, i.e., accessing the lab data base to look up cases for prosecutors and her "apparently close relationship with some prosecutors" there was no additional wrongdoing and her misconduct was "limited to cases in which she served as either the primary or secondary chemist." Scott, at 341-342. OIG report (ComRA 293).

As noted by this Court, the OIG report found that although Dookhan reportedly forged another chemist's initials on one run on a batch sheet in March 2011, there was no evidence that she tampered with the actual operation of the GC-MS machine. Resende, 475 Mass. at 14-15. OIG report (ComRA 327). Likewise, while she reportedly falsified reports on the quality control standard mix on four days in March 2011, there was no evidence that she did so on other occasions. The IGO reviewed 3,930 quality control standard mix results from 2005 to 2012 and found no falsified reports or other evidence of wrongdoing. Resende, at 15. OIG report (ComRA 330). And because Dookhan forged the initials of another chemist on a "tune report" in June 2011, the OIG reviewed tune reports from 2009 to 2012. The OIG found no indication that the GC-MS machines were operating outside acceptable parameters. Resende, at 15. OIG report (ComRA 330).[6]

[6] Dookhan was indicted and pleaded guilty in Suffolk Superior Court on SUCR2012-11155 to one count of perjury under G.L. c. 268, § 1; five counts of misleading a witness under G. L. c. 268, § 13B; eight counts of tampering with a record, document or other object for official use in proceedings under G.L. c. 268, § 13E; and one count of false claim to hold a degree under G.L. c. 266, § 89.

B. Global Response to Dookhan's Misconduct: Investigations and Judicial Remedies

On January 31, 2012, the Department of Public Health notified several District Attorneys of Dookhan's June 2011 breach of protocol. OIG report (ComRA 356). The District Attorneys, the Governor's Office, the Executive Office of Public Safety and Security initiated a response plan providing information to other District Attorneys, stakeholders, the Legislature and the media. OIG report (ComRA 356).[7] On August 28, 2012, Dookhan admitted her misconduct in the lab to State police investigators; two days later, then-Governor Deval Patrick closed the lab. OIG report (ComRA 289).

On September 20, 2012, the governor established a task force headed by Attorney David Meier ("Meier Task Force") to identify potentially impacted defendants. OIG report (ComRA 290). The Meier Task Force prioritized identifying individuals who were incarcerated or in custody on a drug case in which Dookhan had performed testing. Report of David E. Meier, Special Counsel to the Governor, August 2013, at 3 ("Meier report") (ComRA 264, 265; PRA 96). Within 45 days, the Task Force identified approximately 2,000 priority individuals. Meier report (ComRA 265).

[7] CPCS learned of the breach at that time and began advising the defense bar. (ComRA 106; PRA 1912).

In October 2012, the Chief Justice of the Superior Court created "drug lab sessions" with specially assigned judges to hear motions arising out of the Dookhan misconduct revelations. Commonwealth v. Charles, 466 Mass. 63, 64 (2013). In the Superior Court alone, 589 hearings took place from October 15 to November 28, 2012. Charles, at 64. To expeditiously manage the volume of motions, on November 9, 2012, this Court issued an order permitting assignment of post-conviction motions to any judge of the trial court, waiving the usual rule that post-conviction motions be heard by the original trial or plea judge. Charles, at 66. On November 26, 2012, this Court issued an additional order appointing retired justices of the Superior Court as special judicial magistrates to preside over the special sessions. Charles, at 66.

Meanwhile, on November 5, 2012, Governor Patrick announced that Inspector General Glenn A. Cunha would conduct an independent review of Annie Dookhan and the Hinton Lab alongside the criminal investigation of Dookhan by the Attorney General's Office and the identification effort undertaken by David Meier (ComRA 277, 285).

By December 2012, the Meier Task Force had provided relevant information to prosecutors and defense attorneys about approximately 10,000 potentially impacted individuals. Meier report (ComRA

269-270). And, "in conjunction with the Committee for Public Counsel Services, the Superior Court, and the Probation Department, as of December, 2012, most, if not all, of the identified 10,000 individuals who so qualified had been assigned counsel for purposes of reviewing their case and seeking some form of court hearing." Meier report (ComRA 270). According to CPCS, the agency had identified clients and appointed counsel in 7,000 cases by the end of 2012. Bennett Aff. ¶25 (ComRA 217; PRA 1742). By that time, most, if not all, of the priority individuals, i.e., those in custody, had been brought before a court or afforded some form of review. Meier report (ComRA 270).

Appointment of counsel continued apace. CPCS reported to this Court that it had identified 5,600 clients and assigned counsel in approximately 8,000 cases by March 2013. Benedetti aff. ¶¶ 15, 17 (ComRA 177; PRA 129). By January 2014, CPCS reported counsel had been assigned in 8,700 cases. Benedetti Aff. ¶ 12 (ComRA 200; PRA 121).

While David Meier continued his work and the Inspector General reviewed the operations at the Hinton Lab, the special sessions continued to operate for defendants bringing post-conviction motions for discovery and new trial. See Bridgeman, at 480-481 &

n. 23.[8] These motion hearings raised procedural questions pertaining to the authority of the trial court to stay sentences pending a motion for new trial and the authority of the special judicial magistrates. This Court answered these questions in Commonwealth v. Charles, 466 Mass. 63 (2013). The Court concluded that a judge of the Superior Court does have the inherent authority to stay a sentence pending a motion for new trial and the special judicial magistrates had the authority to conduct plea colloquies and report their findings on voluntariness and the factual basis for such pleas to the presiding justice for endorsement. Charles, at 79, 85-87, 89-91. See also Bridgeman, at 479 n. 22.

By August 2013, when David Meier issued his report, 2,600 court hearings had been held statewide in Superior Court on Dookhan-related cases or Dookhan-

[8] In the affidavits submitted by CPCS in support of the original petition and motion to intervene, CPCS expressed frustration at the pace and availability of discovery. The Court addressed this point in Bridgeman, noting that the conclusive presumption in Scott was intended to address this concern. 471 Mass. at 479-480. Prior to the decision in Scott, where the Commonwealth did not assent to a motion to vacate, defendants pressed their claims for post-conviction relief under Ferrara v. United States, 456 F.3d 278, 290 (1st Cir. 2006), common law newly discovered evidence, or a violation of Brady v. Maryland, 373 U.S. 83 (1963). See Scott, at 346, 358-359. As recognized by the Court, motions resolved at a steadier pace after Scott. Bridgeman, at 480.

related issues. Meier report (ComRA 266). Meier provided a detailed summary of the response of the courts, prosecutors, and defense bar to that date. His "report" was a "master list" of individuals with potential Dookhan-related claims. The list contained entries for each certificate associated with Dookhan containing a name, corresponding town and law enforcement agency, the date the sample was submitted to the lab, the Hinton lab number (certificate number), the testing results, and the drug evidence submission form. Meier report (ComRA 274-275). The master list ("Meier list") contained 40,323 names with the associated available information. Meier report (ComRA 275). It does not purport to represent that there are 40,323 separate cases or convictions.

In October 2013, this Court heard argument on Scott and four companion cases, each challenging a trial court ruling on a motion for new trial based on Dookhan. While those cases were under advisement, the petitioners filed the original petition in Bridgeman. SJ-2014-0005.

Before any action was taken on the petition, on March 4, 2014, the Inspector General issued his report on the Hinton Lab investigation. OIG report (ComRA 277). The OIG's primary finding was that "Dookhan was the sole bad actor at the Drug Lab. Though many of the chemists worked alongside Dookhan for years, the OIG

found no evidence that any other chemist at the Drug Lab committed malfeasance with respect to testing evidence or knowingly aided Dookhan in committing her malfeasance. The OIG found no evidence that Dookhan tampered with any drug samples assigned to another chemist even when she played a role in confirming another chemist's results." OIG report (ComRA 285).[9] [10]

On March 5, 2014, this Court issued its ruling in Scott. The Court created a "special evidentiary rule" to relieve a defendant who produced a certificate of analysis signed by Dookhan from the defendant's case of the burden of proving misconduct by Dookhan. "[I]n cases in which a defendant seeks to vacate a guilty

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[9] The OIG's findings were based on a review of over 200,000 documents, including emails, memoranda, policies, personnel records, discovery responses, budget materials, chain of custody records, lab notes and analysis documentation as well as interviews including twenty-four conducted under oath, and materials produced in response to summons to eleven entities. The OIG "found no evidence to support treating cases in which Dookhan confirmed another chemist's results with any increased suspicion about Dookhan's involvement." OIG report (ComRA 285-286).

[10] On February 2, 2016, the OIG issued its supplemental report on the Hinton Lab (ComRA 406). The OIG reported that the office had completed a comprehensive review of over 15,000 drug samples originally tested between 2002 and 2012, including samples tested by Dookhan, focusing on samples that the lab had repeatedly tested, with inconsistent results. OIG Supplemental report (ComRA 410). At the conclusion of its investigation, the OIG "did not find any widespread testing inaccuracies." OIG Supplemental report (ComRA 410).

plea under Mass. R. Crim. P. 30(b) as a result of the revelation of Dookhan's misconduct, and where the defendant proffers a drug certificate from the defendant's case signed by Dookhan on the line labeled 'Assistant Analyst,' the defendant is entitled to a conclusive presumption that egregious government misconduct occurred in the defendant's case." Scott, at 353.[11] It remained the defendant's burden, however, to show a "reasonable probability that he would not have pleaded guilty had he known of Dookhan's misconduct." Id. at 355. The Court struck this balance of presumption and burden because it could "not allow the misconduct of one person to dictate an abrupt retreat from the fundamentals of our criminal justice system." Id. at 354, n. 11.

C. Identification and Notification

Approximately six months later, on October 21, 2014, the Single Justice reserved and reported the Bridgeman petition and motion to intervene. SJ-2014-0005, #25 (PRA 250). The full Court heard argument on

[11] The Court held that the presumption attaches whether Dookhan served as primary or confirmatory chemist because her misconduct "likely occurred both while conducting primary tests and while conducting confirmatory tests using the [GC-MS] machine." The record on review in Scott consisted of 400 printed pages from the Department of Public Health and Attorney General's investigation along with a compact disc containing several hundred additional pages of exhibits. Scott, at 353 n. 9 & 10.

January 5, 2015. While the case was under advisement, the Single Justice asked the non-party District Attorneys for Bristol, Cape and Islands, Middlesex, Norfolk, and Plymouth to create and provide lists with docket numbers and identifying information consistent with the effort undertaken by Suffolk and Essex; Bristol and Norfolk provided lists at that time. Cape and Islands provided a list shortly after the rescript; Plymouth and Middlesex began the process of producing lists. SJ-2014-0005, #18, 38, 42, 47 and 51. See Bridgeman, at 478 n. 20, 480-481.

The rescript in Bridgeman issued in May 2015 with a remand to the Single Justice. The focus of the remand was to determine the best methods to identify potential "Dookhan defendants" and provide notification to those individuals of their status viz-a-viz Scott and Bridgeman. See Memorandum and Order on Motion to Join District Attorneys, SJ-2014-0005, #79 (ComAdd 10).

On remand, the non-party District Attorneys continued to voluntarily participate in the process overseen by the Single Justice to identify "Dookhan defendants" to determine the best method of providing notice to those persons of their status as such.[12] See

[12] Prior to ordering joinder, the Single Justice held conferences or hearings on February 18, 2015; March 20, 2015; November 13, 2015 and December 1, 2015. See Docket SJ-2014-0005.

Memorandum and Order on Motion to Join District Attorneys, SJ-2014-0005, #79 (ComAdd 10-13). On November 10, 2015, while this process was continuing, the petitioners and CPCS filed a "Request for Briefing and Hearing Concerning Identification and Notification" seeking judicial guidance on who bore the legal responsibility to identify and notify Dookhan defendants and how identification and notification would be implemented and funded. SJ-2014-0005, # 55; (ComRA 130; PRA 269). CPCS wrote that it lacked the resources to identify, notify, and advise Dookhan defendants of their rights. (PRA 281-283).[13] [14]

In response to the Single Justice's request at a conference on December 1, 2015, the two named-respondent District Attorneys proposed a plan to complete identification (taking into consideration concerns expressed by CPCS) and notification. SJ-2014-0005, #77. By order dated December 31, 2015, the Single

[13] As noted above, Essex and Suffolk had provided CPCS with identification lists in August, 2014, and three other counties had produced identification lists between six and eight months before the request. SJ-2014-0005, #18, 38, 42, 47 and 51.

[14] In the filing, CPCS asserted that the lists were incomplete because CPCS was not able to cross-reference all identified the docket numbers with data provided by the trial court from MassCourts; CPCS did not address its ability to identify clients or cross-reference the 8,700 previously-made assignments of counsel from its own records among the names and docket numbers provided.

Justice determined that "formal joinder" was necessary and added the District Attorneys for Bristol, Cape and Islands, Middlesex, Norfolk, and Plymouth as party-respondents. Memorandum and Order on Motion to Join District Attorneys. SJ-2014-0005, #79 (ComAdd 10).

On February 3, 2016, the Administrative Office of the Trial Court provided county-specific MassCourts data to each of the seven District Attorneys and state-wide MassCourts data to CPCS for all cases with a G.L. c. 94C offense from 2003 to June 2011 to aid in refining the list of cases associated with testing by Dookhan. SJ-2014-0005, #84. Simultaneously, the Single Justice sought to move the parties forward on the form of notification. See SJ-2014-0005, #88-93. On April 6, 2016, the Single Justice convened a status conference to discuss notification. See SJ-2014-0005, #94. On May 9, 2016, the District Attorney filed the identification lists with the Single Justice and provided copies to CPCS as requested. SJ-2014-0005, #105-111; Interim Order of May 11, 2016 (ComAdd 3; PRA 462).

The Single Justice summarized the progress of the proceedings through conferences and substantive work by the District Attorneys as of May 11, 2016 in the Interim Order issued that date: "[t]he Court is informed that the parties have conferred with one another and generally agree to the process and framework for the identification and notification of

Dookhan defendants . . ." SJ-2014-0005, #114 (ComAdd 4). Regarding notification, "[t]he parties shall work together to file a joint draft notification to be sent to the Dookhan defendants for the Court's review and approval . . . The draft notification shall include but not be limited to advising the persons identified in the lists . . . of their status as Dookhan defendants and associated rights." SJ-2014-0005, #114 (ComAdd4).

After a conference on May 11, 2016, the Single Justice scheduled a further conference for May 23, 2016 for a "working group" of two attorneys for the petitioners and CPCS and two attorneys for the District Attorneys to meet to "continue to work on a draft notice letter." SJ-2014-0005, # 114, entries 05/16/2016 and 05/23/2016.

Prior to that May 23 conference, the petitioners and CPCS informed the District Attorneys that their position now was that no notice of rights letter should be sent. SJ-2014-0005, #121 (ComRA 30; PRA 279). Despite this position, the parties conferred on a draft notification letter, which was provided to the Single Justice by letter date May 20, 2016. SJ-2014-0005, #121 (ComRA 30). That same day, the petitioners and CPCS filed their "Request for Reservation and Report Regarding Comprehensive Remedy for Dookhan Defendants." SJ-2014-0005, #120 (ComRA 146; PRA 468).

The Single Justice held the working group status conference on May 23, 2016, as scheduled. Docket SJ-2014-0005. She then gave notice for a status conference to all counsel and parties to be held June 1, 2016. SJ-2014-0005 #122. The District Attorneys filed a motion to proceed with the identification and notification plan that the parties had agreed upon and which the Single Justice had endorsed in the Interim Order. SJ-2014-0005, #124 (ComRA 33; PRA 603). Although the petitioners and CPCS "withdrew" from the Single Justice's notification plan, the District Attorneys stated that they intended to complete the process and move forward with notification (SuppRA 52).

In a Second Interim Order, issued June 3, 2016, the Single Justice provided a schedule for the parties to file supplemental affidavits in advance of an order of reservation and report of the entire matter. SJ-2014-0005, #129 (ComAdd 7).

D. Notification and Response

By August 29, 2016, the District Attorneys had funding and a contract for the mailing in place and provided a copy of the notification letter and anticipated date of mailing to the Single Justice and petitioners and CPCS. Docket SJ-2014-0005, #165 (SuppRA 1). Copies of the notice letter can be found in the

Commonwealth's Record Appendix at 442-456 (subject to the Commonwealth's motion to expand the record).[15]

On September 2, 2016, the Single Justice scheduled a status conference for the parties on September 6, 2016 to address the anticipated mailing. No motions were filed and no orders issued from that hearing. On September 7, 2016, the petitioners and CPCS filed an emergency motion to stay the mailing with the full Court. SJC-12157; SJ-2016-M012, #2 (SuppRA 11). The motion was referred to the Single Justice. SJ-2016-M012, #2. The full Court entered an order denying the motion on September 13, 2016, with an order that the District Attorneys retain copies of all communications with recipients of the notification letter. SJC-12157, #6 (SuppRA 50).

The District Attorneys have moved to supplement the record with an affidavit describing the progress of the notification mailing, response from defendants, and status of motions filed since the mailing. The Affidavit is included in the Commonwealth's Record Appendix at 437-441. The response indicates that the recipients understood the letter and called the listed

[15] Because CPCS requested that the letter recipients not be provided with a telephone number for CPCS, each District Attorney provided a county-specific dedicated telephone contact number for recipients to contact for more information about the original court and original plea counsel.

number for more information. Some recipients filed motions shortly after receipt; many have not yet chosen to do so. Nor need they - there are not time limits under either Rule 30 or Scott.

E. Response to Petitioners' and CPCS's "Statement of the Facts"

As noted above, this matter was reserved and reported without findings of fact and without an evidentiary hearing. For the reasons below, the Commonwealth submits that the petitioners' and CPCS's "Statement of Facts" is not supported by decisions of this Court and the reports of the Inspector General; relies on data analysis that is unreliable and unverified; and relies on materials from on-going litigation before the trial court and therefore is not properly before this Court.

1. Claim that Dookhan's misconduct tainted one in six Massachusetts drug cases during her tenure.

To support the claim that Dookhan's misconduct tainted one in six Massachusetts drug cases, the petitioners and CPCS make three arguments that are not supported by the record and do not support their claim.

First, the petitioners and CPCS cite to a selection of Dookhan's emails for the proposition that she "worked to help prosecutors." Pet. Br. 12. This Court examined Dookhan's conduct in depth in Scott and found that "it appears her misconduct was the result of

a misguided effort to test as many samples as possible (whether properly or not) and to further what she perceived to be the mission of the Commonwealth: to 'get [criminals] off the streets,' in her words." Scott, at 350. The Court took care to note that it was applying the Ferrara analysis of egregious government misconduct "in light of Dookhan's own misconduct, not the conduct of any other government agent." Scott, at 347 n. 6.

Second, the petitioners' and CPCS suggest that the Inspector General found that Dookhan's misconduct was "covered up" to avoid loss of grant money. Pet. Br. 14. The suggestion that this "cover up" of her misconduct lasted for years both misrepresents the Inspector General's report and fails to support the claim that she tainted so many cases. The Inspector General found that the need for grant funds "may have played into" the lab supervisors' decision not to report Dookhan's misconduct on the Coverdell annual report in January 2012. OIG report (ComRA 363-364). The Inspector General was referring to misconduct that occurred in the spring of 2011;[16] Dookhan was removed from testing in June

[16] The Inspector General identified the misconduct known to supervisors as the May and June 2011 breaches of protocol in the evidence room and Dookhan's forgeries and falsified quality control standardized mixes and her curriculum vitae. OIG report (ComRA 364). The forgeries and falsified reports occurred in March, May, and June 2011. OIG report (ComRA 349-350). Super-

2011. OIG report (ComRA 363-364). The record does not support an inference that once supervisors learned of these issues her misconduct was allowed to continue for years.

Third, the petitioners and CPCS claim that Dookhan "tainted more than 24,000 cases" or "one in six drug convictions" during her time at the Lab. This claim is based on data analysis by Paola Villarreal at the direction of the ALCUM (ComRA 237; PRA 1817). The Court should give no weight to this claim because it used the data provided in a manner not intended by either the Single Justice or the District Attorneys; it is based on a false premises; and it is unverified by peer-review or an evidentiary hearing.

a. First, the Single Justice stated in the Order impounding the MassCourts data, the data "was compiled at the direction of [the] Court for the express and limited purpose of assisting the parties' counsel in the identification of so-called Dookhan defendants." Amended Impoundment Order, April 22, 2016; SJ-2014-0005, #100 (ComAdd 13). Thus, the data was intended to be used only for the express and limited purpose of identification. Id. Ms. Villarreal states in her affidavit that the "goal of her analysis" was to provide information about the cases identified by the

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visors learned in January 2012 that she misrepresented her credentials on her CV. OIG report (ComRA 309).

District Attorneys. Villarreal Aff. ¶¶ 8, 9 and 10 (PRA 1817-1833). Her explanation of the complexity of the data itself, and her need to manipulate the data to perform the analysis sought by the petitioners, demonstrates that the unconfronted analysis should not be considered by this Court.

b. Next, as stated by the Single Justice in the impoundment order, the data was compiled and provided to the District Attorneys for the purpose of providing docket numbers and personal identifying information to CPCS and the Court about "Dookhan defendants." See Bridgeman, at 468 n. 4. As this Court recently clarified, the Scott presumption of misconduct applies in cases in which a defendant tender a plea after Dookhan signed the certificate of analysis. Commonwealth v. Ruffin, 475 Mass. 1003, 1004 (2016). The District Attorneys identified all cases in which Dookhan signed a certificate of analysis, irrespective of the date of the plea because there was no preliminary agreement by CPCS not to include cases where the certificate was signed after the plea. The District Attorneys did not exclude all cases where no conviction for a drug offense had entered. Although Ruffin was decided on August 9, 2016, before the date of Ms. Villarreal's second affidavit, August 15, 2016, Ms. Villarreal did not adjust her analysis (ComRA 262; PRA 1946).

c. Lastly, the petitioners' and CPCS's claim that most of these cases involve poor people convicted of simple possession, is simply unsupported and false.[17] As explained above, the data does not support the conclusion because it does not take into account the purpose of the data or the qualification that only defendants who tendered pleas in reliance on a certificate signed by Dookhan should be considered. Ms. Villarreal did not include non-94C charges in her analysis, so it is false to say that the cases involve only convictions for drug possession. Villarreal Aff. ¶ 32d. (ComRA 248; PRA 1828). The data analysis does not account for cases in which a charge was reduced from trafficking to distribution or distribution to possession. And, by relying only on information about only 94C offenses that a defendant ultimately pleaded to without the context of the original charged offense and non-94C offenses charged or pleaded to, (see Villarreal Aff. ¶32d (ComRA 248), the data analysis does not account for the facts and circumstances of a case which would figure most prominently in securing convictions. Cf. Pet. Br. 17.

Indisputably, as the petitioners and CPCS correctly point out, there are collateral consequences

[17] There is no demographic data or analysis in the record; nor would it be appropriate.

that stem from admitting to possession, distribution or trafficking controlled substances. In the circumstances here, however, the assertion is overstated. The most telling reason is the absence of data analysis to account for defendants whose cases were continued without a finding. Such a disposition can have immigration consequences under federal law for immigrant defendants, but it is not the equivalent of a conviction under Massachusetts law. Commonwealth v. Doe, 473 Mass. 76, 81-82 (2014). Commonwealth v. Villalobos, 437 Mass. 797, 802 (2002).

2. The claim that the vast majority of Dookhan-involved cases have not been addressed

The petitioners and CPCS assert that the majority of Dookhan-involved cases have not been addressed. Pet. Br. 19-24. They frame this with three points: first, the initial collaboration focused on incarcerated defendants; second, the adversarial nature of our system hindered defendants; and third, not all "Dookhan defendants" have been identified. This supposition comes from a tally of motions reported by the District Attorneys in affidavits to the Court compared to the total number of Dookhan defendants as determined by the petitioners and CPCS. Pet. Br. 24.

First, the District Attorneys agree with the petitioners and CPCS that Charles recounts the number

of motions hearings held in Superior Court in the wake of the Dookhan revelations. And, as reported by David Meier, and detailed above at 11-16, the initial focus of the courts, District Attorneys, and David Meier's Task Force was on those defendants incarcerated and in custody. Meier report (ComRA 265-266). Meier's Task Force quickly identified 2,000 potentially impacted individuals and provided the information to CPCS and the defense bar, as well as the District Attorneys. Id.

Second, whether in fact motion sessions became more adversarial after 2013 cannot be answered, and need not be answered, on this record. See Pet. Br. 20. It is, however, helpful to look at examples of the breadth of issues raised in motions at that time: Commonwealth v. Gardner, 467 Mass. 363, 369 (2014) (motion for pre-trial dismissal where Dookhan was notary in co-defendant's case); Commonwealth v. Torres, 470 Mass. 1020 (2015) (motion for new trial where Dookhan was notary in defendant's case); Commonwealth v. Gaston, 86 Mass. App. Ct. 568 (2014) (motion for new trial on both drug and gun convictions where Dookhan tested drug evidence).

The change in motion practice demonstrates that the courts, District Attorneys, and defense bar triaged the cases, see Charles, and then considered the cases individually. This was an appropriate exercise of the Commonwealth's duty to the public to evaluate whether

misconduct occurred or likely occurred in a case before taking the extraordinary step of agreeing to vacate a guilty plea. The Court addressed squarely these concerns with the conclusive presumption articulated in Scott.

Third, the District Attorneys submit that the record reflects that all reasonable and possible measures have been taken to identify Dookhan defendants. The District Attorneys have provided the Court with detailed affidavits of the steps taken to create the identification lists. (ComRA 48-129).

By the numbers. Since 2012, CPCS has been provided with lists from the Department of Public Health, the Department of Corrections, David Meier, the District Attorneys, and the Trial Court. By the end of 2012, CPCS had identified 7,000 clients on the Dookhan lists and re-opened assignments. Bennett Aff. ¶25 (ComRA 217; PRA 1742). By March 2013, CPCS had identified 5,600 clients; it had established a hotline; and assigned counsel in approximately 8,000 cases. Benedetti Aff. ¶¶ 11, 14, 17. (ComRA 177; PR.App 129). By January 2014, counsel had been appointed in approximately 700 more cases. Benedetti Aff. ¶ 12 (ComRA 200; PRA 121). According to David Meier, as of August 2013, 2,600 hearings had been held (ComRA 266). According to Ms. Villarreal's analysis, approximately 1,500 motions have been heard or adjudicated. According to the District

Attorneys, as of the filings this summer, there were 2 Scott motions pending in Plymouth County (Linehan Aff. ¶¶ 7-8) and 10 Scott motions pending Middlesex (DeSimone Aff. ¶¶ 20-21) (ComRA 89, 126-127). Yet no figures for the number of motions filed or defendants counselled have been provided by CPCS. Cf. Caplan affidavit detailing development of training materials and litigation strategy. (ComRA 224-227; PRA 1719-1721)

3. Claim that CPCS cannot provide counsel for 24,000 unresolved Dookhan cases.

According to CPCS, the agency cannot provide counsel in 24,000 cases.[18] As set forth previously, and discussed below, the 24,000 figure is dubious at best (pp. 13,26-28, 49, 52-53, 72-74); it appears that CPCS has provided counsel to an undisclosed number of these defendants already (pp. 12-14, 19, 29-32); and the Legislature has not authorized nor has this Court called upon CPCS to represent every defendant with a potential Scott motion (pp. 56-57, 60-62).[19]

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[18] In allowing CPCS's motion to intervene in the original petition, the Court noted "[w]e focus here on CPCS, but recognize that not all Dookhan defendants were represented by CPCS attorneys." Bridgeman I, 471 Mass. at 480 n. 24. And, "[p]lainly, not all Dookhan defendants will be represented by CPCS in the event they seek postconviction relief." Bridgeman I, 471 Mass. at 486 n. 31.

[19] It cannot be gainsaid that CPCS's position does not account for defendants who were, and presently may be, by private, non-bar advocate, counsel.

4. Claim that potential "Farak defendants" exacerbates CPCS's challenge in handling "Dookhan defendants"

One of the reasons put forth by CPCS for its inability to provide counsel to Dookhan defendants is the possibility that it may need to assign counsel to "Farak defendants." This claim is both improperly raised in this matter and substantively without merit.

Of the 1963 pages in the petitioners' and CPCS' record appendix more than half (1071 pages)[20] pertain to Sonja Farak and the on-going litigation in Hampden County related to the Attorney General's investigation into the timing and scope of her misconduct. See Commonwealth v. Cotto, Hampden Superior Court, Docket 0779CR00770.[21] Because those matters are still pending, the Commonwealth submits that the materials proffered by the petitioners and CPCS are not properly before

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[20] Vol. I, R.App. pp. 482-603 (Motion to Modify Impoundment Order) (125 pages);

Vol. II, pp. 621-1019 (in its entirety) (Affidavit of Luke Ryan) (398 pages);

Vol. III, R.App. 1020-1692 (Affidavit of Matthew Segal, submitted on behalf of ACLUM, not as counsel for party) (Exhibits 1, 2, 3, and 4 pertain to Dookhan and Hinton Lab matters; Exhibits 5, 6, and 7 pertain to Sonja Farak and Amherst Lab matters, pp. 1200-1692, 492 pages);

Vol. IV, R.App. pp. 1767-1816 (Transcript in Commonwealth v. Cotto); and pp. 1849-1856 (Affidavit of Christopher Post) (56 pages).

[21] This Court may take judicial notice of the Hampden Superior Court docket. Jarosz v. Palmer, 436 Mass. 526, 530 (2002).

this Court in this matter. See Commonwealth's Motion to Strike Portions of Petitioners' and Intervener's Record Appendix.[22]

To briefly address the claim, Farak took for personal use drug evidence that had been submitted to the lab for testing. Commonwealth v. Cotto, 471 Mass. 97, 101-102, 108-110 (2015). Commonwealth v. Ware, 471 Mass. 85 (2015). Because this Court recognized that where the "systemic nature of Dookhan's misconduct only came to light following a thorough investigation by the State police detective unit of the Attorney General's office," it remanded Cotto's case pending a full investigation of the nature and scope of potential misconduct by Farak at the Amherst Lab by the Commonwealth. Cotto, at 111-112.

Accordingly, the Attorney General's office undertook a broad-based investigation. The investigation report and grand jury testimony have been submitted to the trial court judge presiding over the motions for new trial, Hon. Richard J. Carey. See Cotto, Docket 0779CR00770. Judge Carey has scheduled an

[22] Although a court may take judicial notice of the docket entries and papers filed in a separate case, the court does not take judicial notice of facts or evidence brought out in another case. Cannonball Fund, Ltd. v. Dutchess Capital Management, LLC, 84 Mass. App. Ct. 75, 92, review denied, 466 Mass. 1106 (2013), quoting Home Depot v. Kardas, 81 Mass. App. Ct. 27, 28 (2011).

evidentiary hearing on December 12, 2016. Id. The petitioners cite no rule, statute or case law for this court to make findings of fact on a separate case actively being litigated before a judge in the trial court.

To the extent the petitioners seek to establish for this court that there are thousands of additional "drug lab" defendants who will need counsel and that CPCS is not able to provide it on the scale required, the District Attorneys point out that the litigation involving Farak is not complete, and the petitioners have been questioning testing by Farak since 2013. Commonwealth v. Cotto, 471 Mass. 97, 98-99 (2015). This is not new information, only newly raised by the petitioners in this matter.

SUMMARY OF THE ARGUMENT

The Court's thoughtful, workable solutions have proven fair and effective in remediating Dookhan's misconduct. Pp. 37-40. The remedies provided by the Court since 2012 are quite substantial. The Court both dispensed with the need for a "Dookhan defendant" to prove the first prong of Ferrara, an otherwise onerous burden, and capped sentencing at the point of the plea. Pp. 40-45. The rights of competent defendants to self-determination - to decide for themselves whether to

move to withdraw a guilty plea or seek a new trial should not be nullified. The legal remedies have proven successful in lending appropriate consideration to each case and defendant individually, based on distinctive facts and circumstances. Pp 45-46, 56-58, 64-70.

The petitioners' request for a global solution, a mass dismissal and reinstatement of cases by the District Attorneys is impractical. Their allegations about the Dookhan defendants' socio-economic make-up are not supported by record facts or confrontation and fact-finding and are not directly material to the issue before the Court, the impact of Dookhan certificates on pleas. The District Attorneys have identified Dookhan defendants using the best available means, and sent them written notice. Pp. 47-56, 62-63, 72-75.

Because defendants are not entitled to post-conviction counsel unless appointed by a judge after a finding of indigency by the Department of Probation, the alleged burden of representing those that choose to have their cases revisited will not fall on CPCS as predicted. A defendant has a right to self-representation, and to hire a private attorney. The five year history of the Dookhan matter has shown that the grim predictions about the strain on the system have not come to fruition. Pp. 59-62.

Just as is the situation with other matters challenging our justice system, the Dookhan cases have been remediated. Our system is resilient and manageable. The concerted efforts brought to bear here, and in cases arising from those such as Melendez-Diaz and Padilla are proof. Pp. 75-81.

Thus the matters driving the remand in Bridgeman have been resolved, and the petition should now be dismissed. Pp. 81-82.

ARGUMENT

I. MEASURES INSTITUTED BY THIS COURT OVER A NUMBER OF YEARS CREATED A "WORKABLE SOLUTION" - BOTH EFFECTIVE AND JUST. THIS COURT SHOULD NOT VACATE PLEAS ENTERED BY ANY DEFENDANT WHO HAS NOT FILED A MOTION TO WITHDRAW A PLEA SUPPORTED BY AN AFFIDAVIT OF THE DEFENDANT SHOWING A CREDIBLE BASIS FOR RELIEF AS REQUIRED IN COMMONWEALTH v. SCOTT.

The Court is now called upon to address continuation of its requirement that a defendant take the affirmative step of requesting relief by filing a motion to withdraw a plea supported by the relevant certificate of analysis signed by Dookhan as an analyst with a showing of prejudice to the decision to plead. The Commonwealth opposes mass vacating of cases. The Court's workable solutions, developed since 2012, have proven effective in addressing Annie Dookhan's misconduct.

This Court has acted under its superintendence powers to assure that our system of justice has responded effectively to this challenge. Any potential due process concerns are addressed by this Commonwealth's established post-trial procedures which assure that individuals can file a new trial motion at the time of their choosing. Mass.R.Crim.P. 30.

The petitioners have not, as they must, presented persuasive, evidence-based reasons to depart from this Court's carefully crafted remedies, or to support their implicit contention that the holdings in Scott, and the cases that followed, were unwise or improper. Commonwealth v. Scott, 467 Mass. 336 (2014). Further remedial action is not justified in the circumstances, and punitive dismissal is not warranted.

A hallmark of our system of justice is its flexibility to accommodate even large numbers of court filings without retreating from the essential worth -- deeply embedded in our societal consciousness, and reflected in the constitution -- granted with deep respect to individual rights and related responsibilities.

A. The Court's Careful Jurisprudence Creating a Just and Workable Solution.

In Commonwealth v. Scott the justices of this Court declared that "it is incumbent upon us to exercise our superintendence power to fashion a

workable approach to motions to withdraw a guilty plea brought by defendants affected by this misconduct. We must account for the due process rights of defendants, the integrity of the criminal justice system, the efficient administration of justice in responding to such potentially broad-ranging misconduct, and the myriad public interests at stake." Scott, 467 Mass. 336, 352 (2014). The Court did not limn a "workable approach" by review of constitutional parameters: "[w]e fashioned this remedy out of concern for the due process rights of defendants, the integrity of the criminal justice system, and the efficient administration of justice, [Scott, at 352], but we did not declare that this remedy was constitutionally required." Commonwealth v. Francis, 474 Mass. 816, 825 (2016).

To balance these interests, this Court held in Scott "that in cases in which a defendant seeks to vacate a guilty plea under Mass. R. Crim. P. 30(b) as a result of the revelation of [Annie] Dookhan's misconduct, and where the defendant proffers a drug certificate from the defendant's case signed by Dookhan on the line labeled 'Assistant Analyst,' the defendant is entitled to a conclusive presumption that egregious government misconduct occurred in the defendant's case." Scott, at 352. The Court otherwise maintained the traditional approach followed by the First Circuit

in Ferrara v. United States, 456 F.3d 278 (1st Cir. 2006). Scott, at 346. See Commonwealth v. Resende, 475 Mass. 1, 3 (2016).

The Court has outlined its "workable solution." It falls to the defendant to make a claim for relief under Mass. R. Crim. P. 30. "A motion for a new trial pursuant to Mass. R. Crim. P. 30(b) is the proper vehicle by which to seek to vacate a guilty plea." Scott, at 344, citing Commonwealth v. Fernandes, 390 Mass. 714, 715 (1984). "[W]hen a defendant seeks to vacate a guilty plea as a result of underlying government misconduct, rather than a defect in the plea procedures, the defendant must show both [prong one] that 'egregiously impermissible conduct . . . by government agents . . . antedated the entry of his plea' and [prong two] that 'the misconduct influenced his decision to plead guilty or, put another way, that it was material to that choice.'" Scott, at 346, quoting Ferrara, 456 F.3d at 290. See Resende, 475 Mass. at 3-4, 16.

1. As Part of its Workable Solution the Court Modified the First Prong of the Ferrara Procedure.

This Court modified the first prong of the Ferrara procedure by adopting a "conclusive presumption" that Dookhan's conduct was "egregiously impermissible." This was no small measure. The burden in the first

prong of Ferrara is a stringent one, but the Court has relieved every "Dookhan defendant" of having to prove that the conduct was egregious and occurred in the individual defendant's case.

As it had stood, "[u]nder the Ferrara analysis, the defendant [first had to] show that egregious government misconduct preceded the entry of his guilty plea and that it is the sort of conduct that implicates the defendant's due process rights. Ferrara, 456 F.3d at 290, 291. It is not enough for a defendant to show that he misjudged the prosecution's case or was unaware of a possible defense." Scott, at 347. See Resende, 475 Mass. at 16. In other words, "under the first prong of the [Ferrara] analysis, the defendant must demonstrate that the misconduct occurred in his case." Scott, at 350 ([in Ferrara] the nexus between the prosecutor's wrongdoing and the defendant's case was not in dispute"). This Court recognized that in the traditional procedure, "the defendant is required to show a nexus between the government misconduct and the defendant's own case." Scott, at 351. See Commonwealth v. Cotto, 471 Mass. 97, 110 (2015).

The Court held that "Dookhan's misconduct [in the Scott prosecution] was not an 'individual unlawful scheme,' [Commonwealth v.] Waters, [410 Mass. 224,] 230 [1991], and is attributable to the government for the limited purposes of the Ferrara analysis." Id. at 350.

The Scott Court concluded, that "defendants seeking to vacate a guilty plea who produce a drug certificate related to the charges underlying their plea that is signed by Dookhan on the line labeled 'Assistant Analyst'[23] are entitled to a conclusive presumption that" there is the requisite nexus to the defendant's challenged conviction. Scott, at 354. See Commonwealth v. Ruffin, 475 Mass. 1003, 1004 (2016) (where defendant pleads guilty before Dookhan tested the substance at issue, it cannot be concluded that her action influenced the defendant's decision).

The Court reasoned that "Dookhan made a number of affirmative misrepresentations by signing drug certificates and testifying to the identity of substances in cases in which she had not in fact properly tested the substances in question." Scott, at 348.[24] Scott faced

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[23] This Court noted that Dookhan was assigned to work as an analyst at the Hinton lab from 2003 to June 21, 2011. Scott, at 337, 339. The Court stated that "there is no suggestion in the investigative reports that Dookhan's misconduct extended beyond cases in which she served as either the primary or the confirmatory chemist." Scott, at 341, 350.

[24] This Court concluded, on the basis of its review of the Massachusetts State Police investigations in the Dookhan's conduct at the Hinton Laboratory (operated in Jamaica Plain by the Department of Public Health), Scott, at 338-341, 350, that "we treat the allegations set forth in the extensive investigative reports and grand jury testimony contained in the Hinton Drug Laboratory Record Appendix' as the facts of her misconduct for the purposes of this appeal." Scott, at 337 n.3, emphasis added (the OIG report was adopted in

only drug possession and no other crimes so "the drug certificate was central to the Commonwealth's case, and an affirmative misrepresentation on the drug certificate may have undermined the very foundation of Scott's prosecution." Id.[25] Dookhan's affirmative misrepresentations by signing drug certificates "constitutes the sort of egregious misconduct that satisfies the first element of the first prong of the Ferrara analysis." Scott, at 348.

Moreover, "even if Dookhan herself were to testify in each of the thousands of cases in which she served as primary or secondary chemist, it is unlikely that her testimony, even if truthful, could resolve the question whether she engaged in misconduct in a particular case." Scott, at 352 (Dookhan's misconduct "belies reconstruction"). This defendant "is entitled to a conclusive presumption that egregious government misconduct occurred in [his] case." Scott, at 352.

The Court stepped away from the Ferrara requirement that the defendant who moves to withdraw a

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subsequent decisions). See also Commonwealth v. Cotto, 471 Mass. At 111 ("the systemic nature of Dookhan's misconduct only came to light following a thorough investigation of the Hinton drug lab by the State police detective unit of the Attorney General's Office").

[25] By contrast, see Resende, at 17-19, where the Court agreed that Dookhan misconduct was not the overriding factor in a rational decision to enter a plea where other offense are involved.

plea produce credible evidence beyond the Dookhan certificate itself, not only because no one, including Dookhan herself, could establish how she conducted the documented analysis in any particular case, but because "the efficient administration of justice" warranted relief from "the administrative burden of making duplicative and time-consuming findings in potentially thousands of new trial motions regarding the nature and extent of Dookhan's wrongdoing." Scott, at 352-353.

In this instance, the Court's "remedy [was] dictated by the particular circumstances surrounding Dookhan's misconduct." Scott, at 353-354. "[T]he solution we fashion today relieves defendants of the costly administrative burden of proving the nature and extent of the investigation into Dookhan and the Hinton drug lab in order to establish that Dookhan's misconduct was egregious and that she may be considered a government agent." Scott, at 353.

Thus, in this particular circumstance, the Court acted under its superintendence power to excuse defendants of certain burdens usual to those who seek post-conviction relief. Scott, at 354 n.11, quoting Commonwealth v. Chatman, 466 Mass. 327, 333 (2013) ("The defendant has the burden of proving facts upon which he relies in support of his motion for a new trial"). This Court established this "sui generis" "conclusive presumption" where Dookhan was certifying

analyst as a "workable solution." Scott at 353. This was a substantial remedy, expressly directed at solving problems created by Dookhan's misconduct.

2. The Second Prong of Ferrara Focuses on an Individualized Remedy, Recognizing that All Cases Involve Different Circumstances.

This Court left intact the second prong of Ferrara.[26] "Ultimately, a defendant's decision to tender a guilty plea is a unique, individualized decision, and the relevant factors and their relative weight will differ from one case to the next." Scott, at 356. See Bridgeman v. District Attorney, 471 Mass. 465, 491 (2015) (quoting Scott). "[E]vidence of the circumstances surrounding [a] defendant's decision to tender a guilty plea should be well within the defendant's reach." Commonwealth v. Cotto, 471 Mass. at 116-117, quoting Scott, at 354 n.11 ("Unlike evidence of the particular scope of Dookhan's

[26] The Court's ruling: "Although our holding under the first Ferrara prong enables the defendant to establish that egregious government misconduct occurred in his case using only the drug certificate signed by Dookhan, we do not relieve the defendant of his burden under the second Ferrara prong to particularize Dookhan's misconduct to his decision to tender a guilty plea." Scott, at 354. When a defendant seeks to vacate a guilty plea due to Dookhan's misconduct, rather than a defect in the plea procedures, "[u]nder the second prong of the Ferrara analysis, the defendant must demonstrate a reasonable probability that he would not have pleaded guilty had he known of Dookhan's misconduct. Scott, at 354-355. See Resende, at 16.

misconduct, evidence of the circumstances surrounding the defendant's decision to tender a guilty plea should be well within the defendant's reach").

"[T]he reasonable probability test [is] a totality of the circumstances test . . . ." Scott, at 355. "[T]he reasonable probability standard mirrors our formulation of the test for prejudice in cases in which a defendant claims that counsel's ineffective assistance induced the defendant to plead guilty." Scott, at 356, citing Commonwealth v. Clarke, 460 Mass. 30, 46-47 (2011) (addressing "Padilla" motions to withdraw pleas, motions alleging ineffective advice concerning expected immigration consequences). "[W]e draw on our ineffective assistance of counsel cases to identify additional factors [beyond those in Ferrara] that may be relevant to show a reasonable probability that had the defendant known of the government misconduct at the time of his plea, he would not have tendered a guilty plea." Scott, at 356.

The Court noted "[m]oreover, a particular case may give rise to consideration of additional relevant factors not identified by either Clarke or Ferrara, such as whether the defendant was indicted on additional charges and whether the drug-related charges were a minor component of an over-all plea agreement." Scott, at 357. See Resende, at 16, 18.

3. This Court Recognized that the Farak Litigation is in a Different Posture; Where Fact-Finding is Ongoing at The Trial Court.

The Court in Cotto made it clear that the Sonja Farak circumstances arising at the Department of Public Health lab in Amherst have not yet been investigated with the "breadth" of the Dookhan investigation available to the Court in Scott. See Cotto, 471 Mass. at 111, 114. Thus, the Court declined "to extend" a conclusive presumption as in Scott to relieve individual defendants from establishing that Farak engaged in egregious misconduct as a government agent in cases other than the handful detailed in the Commonwealth's initial investigation. Cotto, at 108, 110, 111.

In the companion case, Commonwealth v. Ware, 471 Mass. 85, 95 (2015), the Court made clear that "the Commonwealth had a duty to conduct a thorough investigation to determine the nature and extent of her misconduct, and its effect both on pending cases and on cases in which defendants already had been convicted of crimes involving controlled substances that Farak had analyzed." See Cotto, at 112.[27]

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[27] "E]ven if the prosecutor in [a defendant's] case had a duty to disclose evidence of Dookhan's wrongdoing as a result of the Commonwealth's constructive knowledge of her actions, the failure to disclose this information is in no way as egregious as the prosecutor's conduct in Ferrara, nor is it as egregious as the misconduct of Dookhan herself." Scott, at 347 n.6.

4. May 2015, the Court in Bridgeman Affirms its Reasoning in Scott; The Remand.

In Bridgeman v. District Attorney, this Court endorsed the March 2014 Scott framework and, in May 2015, added an additional remedy capping sentencing where a defendant withdraws a plea. The Court reaffirmed its decision in Scott, "we articulated a workable approach by which judges should evaluate and decide individual motions to withdraw guilty pleas brought by defendants affected by Dookhan's misconduct." Bridgeman, at 474.

In Bridgeman, this Court recognized that to date there had been no "deliberate blocking of appellate rights or inordinate and prejudicial delay without a defendant's consent." Bridgeman, at 479. The Court recognized the "substantial efforts that are being made to deal with the impact of Dookhan's misconduct on affected defendants." Bridgeman, at 479.[28] The Court

[28] The Court did address the claim of the petitioners that "a defendant who files a motion to withdraw a guilty plea as a consequence of Dookhan's misconduct is not doing so in the context of an ordinary criminal case in which the original charges brought by the Commonwealth, and their attendant sentences, simply can be reinstated as if the plea bargain had never occurred." Bridgeman, at 475. The Court blocked the usual consequence of a successfully withdrawn plea (see Bridgeman, at 475, citing Commonwealth v. DeJesus, 468 Mass. 174, 178 (2014), and Commonwealth v. DeMarco, 387 Mass. 481, 486 (1982)), and announced that in this context "a defendant's sentence is capped at what it was under the plea agreement." Bridgeman, at 477, 494.

remanded "the case" to the Single Justice "for further proceedings, consistent with this opinion, as appropriate." Bridgeman, at 494.

Left on the table as part of the remand was the petitioners' complaint that "there is no comprehensive list of docket numbers identifying all of the cases in which Dookhan served as either the primary or secondary chemist, and that lawyers have not yet been appointed for approximately 30,000 individuals." Bridgeman, at 478.[29] The Court commented in its opinion that "[d]uring earlier proceedings in this case in the county court, the Commonwealth commendably provided the

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The Court also addressed issues expected to arise in connection with proceedings on motions to withdraw a plea. The Court ruled that (a) "a lawyer who represented a Dookhan defendant at the plea stage of criminal proceedings is not barred by the advocate-witness rule from subsequently representing that defendant and testifying at an evidentiary hearing on the defendant's motion to withdraw a guilty plea;" (b) "the scope of cross-examination of a Dookhan defendant at a hearing on a motion to withdraw a guilty plea is left to the broad discretion of the motion judge;" and (c) "the testimony of a Dookhan defendant at a hearing on a motion to withdraw a guilty plea is only admissible at a subsequent trial for impeachment purposes if the defendant chooses to testify." Bridgeman, at 494.

[29] The Commonwealth has not adopted this estimate of 30,000 individuals. This Court used the term "Dookhan defendant" in Bridgeman "to refer generally to those individuals who were convicted of drug offenses and in whose cases Dookhan signed the certificate of drug analysis (drug certificate) on the line labeled 'Assistant Analyst.'" 471 Mass. at 467 n.4. See Scott, at 352, 354 (addressing defendants who present a motion to withdraw plea and such certificate).

Single Justice and CPCS with the docket numbers (and other relevant identifying information) of the Suffolk County and Essex County cases in which Dookhan analyzed the drug samples as either the primary or secondary chemist." Bridgeman, at 480-481.

The Single Justice ordered five other District Attorneys be joined and set an initial April 2016 deadline for filing seven lists, office by office, of defendants and docket numbers of those who may yet seek relief as outlined in Scott, based on Dookhan's signing a certificate as analyst in a case resolved "adversely."

In sessions with the Single Justice, CPCS generally questioned the completeness of the seven lists of "Dookhan defendants" and declined to agree to a form of notice. To ameliorate any concerns over using years old addresses, the District Attorneys retained a private service to locate addresses based on name, date-of-birth, and social security data.

If an additional effort at notice is warranted, the Commonwealth respectfully suggests the possibility that the Board of Probation insert a note on the records (BOPs) of those individuals listed by the District Attorneys on the seven lists filed with this Court. Should a defendant appear in any court in the Commonwealth, the trial courts, the several assistant district attorneys, and defense counsel and defendants

will be alerted that a "Scott motion" may be appropriate. Creation of this alert on the "BOPs" should serve the interests of justice and provide another level of notice that a conviction may warrant further review. This is a one-step procedure that could be implemented over a matter of weeks without adding more work than the routine ebbs and flows in statewide daily maintenance of Probation Records that already occurs. This is an additional notice provision assisting those who are not easily located.

B. As Was Discussed at the May 2016 Hearing Before the Single Justice, The District Attorneys Did Mail Notice to Dookhan Defendants.

By May 2016, the District Attorneys completed the identification piece of the remand, and provided lists of "Dookhan defendants" to the Single Justice and petitioners. The Interim Order had entered May 11; it memorialized the agreement brokered by the Single Justice that the District Attorneys would complete the seven Dookhan defendant lists so that the mailing could commence. Petitioners moved to reserve and report the case to this Court once again. The District Attorneys objected and asked for enforcement of the Interim Order. On August 16, 2016 the case was reported on the full record, including affidavits filed after the May hearing.

At the hearings in May and June, and reiterated in their affidavits filed with the Court, the District Attorneys advised that they would send notice to the Dookhan defendants as contemplated in the remand (ComRA 54, 67, 77, 123). The District Attorneys did send notice in September, 2016 addressed to each defendant who had not yet sought a new trial or moved to withdraw a plea or admission to sufficient facts on a complaint or indictment for a violation of a provision of G.L. c. 94C. See DeMore Affidavit (ComRA 437-441).

This mailing thus included defendants who fell within the scope of the Court's term "Dookhan defendant" because the Commonwealth believed that Dookhan had signed the relevant certificate as an analyst and (a) the defendant had entered a plea or admission, and (b) as a consequence the defendant was convicted of a "drug offense." The Commonwealth also sent notice to defendants, whose "drug offense" was continued without a finding, thus including in the lists defendants who were not "Dookhan defendants" because they were not convicted of a "drug offense." The district attorneys lists include those who pleaded guilty before receiving a drug certification because the Ruffin case had not yet been decided. Commonwealth v. Ruffin, 475 Mass at 1004.

The Commonwealth sent notices to these added defendants because some may experience adverse

collateral consequences if non-citizens. The Commonwealth also sent notices to those found guilty after trial. See Commonwealth v. Francis, 474 Mass. 816, 823-824 (2016). However, the Commonwealth did not send notice to most defendants (a) who were in default, and thus were not yet convicted, or (b) who had previously sought relief based on allegations of Dookhan misconduct, whether as shown on the relevant drug certificate or on any other claim. Thus, some defendants were omitted though they may fall within the term "Dookhan defendant" as used by the Court; others were sent notice though not within the scope of the term. This special form of notice was in addition to the notice provided to CPCS, members of the bar, and the constructive notice provided through the intense media saturation (a national and international story) covering Dookhan's misconduct (ComRA 98).

The petitioners sought to enjoin the Commonwealth's mailing this September after arguing before this Court in the original Bridgeman briefs that the Commonwealth was obliged to notify "Dookhan defendants" or their counsel (or CPCS) that Dookhan did sign the relevant certificate as analyst in each case that

resulted in conviction for a "drug offense." Bridgeman, at 478.[30] (SuppRA 1-49).

The petitioners asserted that "the inability of CPCS to ascertain which cases may have been tainted by Dookhan's misconduct" had "hampered" the allocation of attorney-resources to those with an avenue for relief under the Scott framework. Bridgeman, at 480. This notice issue was the subject of further proceedings on remand. Until May, 2016 the Single Justice pressed for agreement on the form of the notice letter to be sent to the adversely affected "Dookhan defendants" named on the list prepared by the seven District Attorneys. Now that CPCS and the Court have received the lists that include the "Dookhan defendants" as delineated in Bridgeman, there should not be undue difficulty in determining who may file a Scott motion. Entry of a notation on records of the Board of Probation should avoid the need to cross-check the several lists, and alert pro se defendants or counsel not appearing by CPCS appointment.

Here the additional remedy sought by the petitioners would dismiss these cases where no relief is warranted based on the argument that the Commonwealth did not provide notice of the misconduct to the

[30] CPCS also argued that such notice indicate whether the Commonwealth intended to "re-prosecute" such convictions. Bridgeman, at 478.

individual defendants at issue. That request presumes that notice from the Commonwealth is a substitute for each defendant's seeking relief.

This Court found that the District Attorneys had not engaged in "deliberate blocking" of any defendant who sought individual relief. The petitioners offer nothing new against a record that demonstrates that the District Attorneys produced comprehensive lists of moving parties, and over the objection of the petitioners, pressed to send notice.

Indeed, the Single Justice was unable in the self-allotted time to secure agreement with the petitioners on pertinent details such as how the Commonwealth should reestablish addresses for the many defendants whose last contact with the courts was years ago. The petitioners objected even to the details of the notice, showing a willingness to block any notice at all, while seemingly demanding it be made. Justice for none is not a workable program, and denies justice for almost all.

II. THERE IS NO CONVINCING REASON TO RETREAT FROM THE THOUGHTFUL REMEDIES-BASED, WORKABLE SOLUTION DESIGNED BY THE COURT.

What the petitioners now seek is that the Court address its statement in Bridgeman that "at this time" the Court would not consider mass dismissal of cases. In other words, the impact of its continued requirement

that an individual defendant take the affirmative first step of requesting relief by filing a motion to withdraw a plea supported by the relevant certificate of analysis signed by Dookhan as an analyst. Accepting the petitioner's request would abrogate the defendant's burden to establish the second prong too.

The Commonwealth opposes such added relief not only because of its unnecessary and unwarranted prejudice to "the integrity of the criminal justice system" and to "the myriad public interests at stake," Scott, at 352, but because this Court squarely and fairly recognized that no defendants, even those who show that they are entitled to the conclusive presumption adopted in Scott, may be allowed to withdraw the pleas challenged without satisfying the other "prong" of the Ferrara analysis. See Resende, at 16.

The Court's workable solution, a product of its superintendence powers, provides every defendant with an opportunity to be heard, when that defendant chooses to be heard. The District Attorneys have addressed the two matters that appeared to have given the Court pause in Bridgeman I by their creation of a list of Dookhan defendants, and by mailing notice to those on the list.

A. The Petitioners Have Miscalculated The Burden Brought By the Dookhan Litigation.

On this second (present) report, the petitioners expand on prior assertions, arguing that attorney

resources will be required for every single case, all at the same time. Experience casts doubt not only on the prediction of thousands of trials in lieu of resolution without trial,[31] but on the prediction that every defendant will choose to seek relief, even though the disposition on reconsideration is capped.

Experience shows that not every "Dookhan defendant" comes forward immediately upon notice. Not every Dookhan defendant faces the same, substantial "adverse impact" from their pleas. Indeed, a defendant may conclude that they face no adverse impact at all from a closed chapter in their lives. A realistic projection of the costs of providing counsel must not treat each defendant as a potential worst case.

Many defendants may feel no urgency in reopening a closed chapter in their lives before an adverse impact actually occurs. Unlike many other jurisdictions, the Commonwealth permits a defendant to bring a motion for a new trial or to withdraw a guilty plea at any time. Mass.R.Crim.P. 30. The availability of this procedure recognizes that post-trial proceedings do not generally invoke speedy trial concerns, and provides a Dookhan

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[31] The Commonwealth has noted that the CPCS estimate of "per-motion" costs appears to include assumptions that that counsel must be appointed in every single case, and that every case will proceed to trial, an overly aggressive forecast of future outlays (ComRA 196; PRA 1766).

defendant with the opportunity to be heard at a meaningful time and manner, as contemplated by due process. Individualized hearings are yet another assurance of due process. See, e.g., Roe v. Attorney General, 434 Mass. 418, 427 (2001).

B. The Lavallee Case Supports the Court's Workable Case-by-Case Approach.

The petitioners rely heavily on Lavallee v. Justices, 442 Mass. 228 (2004), in support of their position that mass dismissal of cases is warranted. The case is readily distinguishable if only because the Court addressed arraignment and pretrial right to counsel, and did not order a mass dismissal of cases despite the liberty interests at stake. What Lavellee details is a workable case-by-case approach, a balance of the rights of defendants with the legislative branch's obligations and challenges in making laws and appropriating funds; the district attorney's discretion to prosecute cases; and the public safety.

In Lavallee, CPCS had represented that no attorneys were available to appear on behalf of any individual defendant at arraignment in the District Court, because no attorney was willing to accept new cases at the current rate of compensation authorized in the annual budget. Lavallee, at 230-231, 246. The remedy that this Court chose was to direct a weekly review of the unrepresented, defendant by defendant, to

ensure none was detained, unable to post bail, beyond one week, nor otherwise unrepresented for more than forty-five days. Lavallee, at 248. The goal of the review was to allocate available attorneys to those presently detained or unrepresented and nearing the deadline for representation;[32] the Court's remedy did not seek to create a reservoir of attorneys available for similar defendants not presently detained or currently being prosecuted.

This Court rejected the requested global remedy of dismissal with prejudice, because the funding of counsel shortfall was not deemed "wilful interference with defendant's right to counsel." Lavallee, at 246, citing Commonwealth v. Manning, 373 Mass. 438, 439 (1977). The Lavallee decision lends further support to this Court's upholding the "workable solution" it established for the Dookhan cases in Scott.

The Lavallee case rejects a potential harm to the justice system based on the notion that cases ought to be dismissed based on counsel's unwillingness to represent a given defendant or group of defendants. The Court rejected the idea that all cases brought in a particular District Court must be dismissed with

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[32] "The resources that are available on any given day in a particular court must be prioritized and deployed in a manner that provides optimal protection to the public." Lavallee, at 247.

prejudice because defense attorneys refused to represent the defendants, no matter the reason for the refusal. Presumably the Court would reject any similar attempt to dismiss, with prejudice, any other class of cases (for example, all murder cases) if no one was willing to accept representation of those cases. The Court would do exactly as it did in Lavallee, find a workable solution.

The Court implicitly acknowledged in deciding Lavallee that control over which criminal cases to bring is a purely executive function. "In the context of criminal prosecutions, the executive power [under art. 30 of the Massachusetts Declaration of Rights [33]] affords prosecutors wide discretion in deciding whether to prosecute a particular defendant, and that discretion is exclusive to them." Commonwealth v. Cheney, 440 Mass. 568, 574 (2003). See Commonwealth v. Gordon, 410 Mass. 498, 500 (1991). Mass dismissal, over the Commonwealth's objection, without an evidentiary hearing on the facts and circumstances of a case and the legal basis for dismissal usurps the

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[33] Under article 30 of the Massachusetts Declaration of Rights, "the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."

executive power. See Commonwealth v. Pellegrini, 414 Mass. 402, 404 (1993). Gordon, 410 Mass. at 500.

The petitioners' argument for mass relief is largely premised on the mistaken assumption that CPCS represents all Dookhan defendants. This is not so; indeed, the predicted strain on defense resources is overdrawn and misleading. The argument fails to address how CPCS resources become available to represent the defendants who do face re-prosecution.

In post-conviction proceedings, unlike at the pre-trial proceedings in Lavallee, there is no right to counsel. Even if determined by a court to be indigent, a defendant is not entitled to post-conviction counsel. If a judge declines to appoint counsel, a defendant is free to represent himself, as is his constitutional right. A defendant who is not indigent must either represent himself or hire an attorney.

In Commonwealth v. Conceicao, 388 Mass. 255, 261 (1983), this Court concluded, after reviewing both the United States Constitution and decisions of other courts, "that an indigent defendant does not have an absolute right under any provision of the United States Constitution or the Massachusetts Declaration of Rights to appointed counsel in preparing or presenting his motion for a new trial." "Rather, the State need only ensure that indigent defendants have meaningful access

to this postconviction proceeding." Id., citing Ross v. Moffitt, 417 U.S. 600, 616 (1974).

The Court declined to hold that it was necessary to appoint counsel to ensure "meaningful access;" instead, concluding that "the decision whether to appoint counsel remains discretionary with the judge and the determination whether a refusal to appoint counsel deprives an indigent defendant of meaningful access, Ross v. Moffitt, supra at 616, or results in fundamental unfairness, Lassiter v. Department of Social Servs., 452 U.S. 18, 24-25 (1981), would be resolved on a case-by-case basis." Commonwealth v. Conceicao, 388 Mass. at 262. See Mass. R. Crim. P. 30 (c)(5) ("The judge in the exercise of discretion may assign or appoint counsel in accordance with the provisions of these rules to represent a defendant in the preparation and presentation of motions filed under subdivisions (a) and (b) of this rule").

C. The Petitioner's Suggestion that the District Attorneys Bear the Burden of Reopening Cases Without Individual Motions is Not a Workable Solution.

A blanket order vacating pleas entered after 2002 and before Dookhan was removed from her duties in 2011 would treat defendants as though they personally approved or requested a motion for relief be filed on their behalf, although they did not. It also presumes that each and every motion is meritorious, and should

be allowed. The "motions" would be addressed with essentially no notice to individual defendants, without the watchful eye of the public. Moreover, mass vacatur would constitute a complete abandonment of the careful weighing of the interests of defendants, the public, and the criminal justice system that this Court set out in Scott, and affirmed in Bridgeman and the cases that followed.

The petitioners suggest further that the Commonwealth be permitted to choose which cases to "reopen." This suggestion implicitly acknowledges that each case deserves individual attention, "initiated" post-plea by the District Attorneys. Closing and reopening cases in the absence of a defendant's affirmative request to do so would create unworkable, unpredictable situations as well as continued litigation. The Commonwealth would compel such a defendant to appear and face "re-prosecution." Some defendants would face arrest for failing to appear, should the Commonwealth be unable to secure their appearance upon mailing a summons. They may find themselves arrested unexpectedly in this state or in any jurisdiction of this country to face charges they did not know were reopened. The sudden and unanticipated burden of warrants would fall unevenly upon those who had the least contact over the intervening years with the criminal justice system. The Court should "do no harm" and decline to refashion Scott.

D. Individual Attention to Defendants and their Cases Remains Workable and Is Just and Fair.

This Court has determined that a defendant should be permitted to move to withdraw a plea where it is shown that Dookhan signed the drug certificate as analyst, and the defendant did not know at the time of the plea that the Court would presume that she did not identify the drug at issue. This Court should not presume that the defendant who admitted guilt or facts sufficient to warrant a finding of guilt did not voluntarily and justly admit knowing possession of a controlled substance. See Resende, at 17-19 (pleas to the offenses as charged suggest defendant's recognition that a sentence after conviction at trial may be more severe; commentary on the Office of the Inspector General's Report about the overall accuracy of Hinton Laboratory results).

"We conclude that to support a conviction under G.L. c. 94C, § 32E, the Commonwealth must prove that the defendant trafficked in one of the three categories of controlled substances, that a certain quantity of the controlled substance was involved, and that the defendant knew it was a controlled substance. Proof that the defendant knew the exact nature of the controlled substance is not an element of the crime." Commonwealth v. Rodriguez, 415 Mass. 447, 454 (1993).

See Commonwealth v. Hernandez, 439 Mass. 688, 694 (2003).

By entering a guilty plea or admission the defendant disclosed to the judge that based on personal information, his own knowledge, he possessed a controlled substance. What Dookhan did or did not do, and what she certified that she did, was not evidence of the defendant's personal knowledge of the nature of the substance at issue. The very basis of making a plea is that defendants take responsibility for their actions by pleading guilty on the basis of actual guilt - that they are pleading guilty because they are guilty, and for no other reason. A defendant swears that this is a truthful statement. Only by placing and maintaining the burden on the defendant to come forward and make the showing imposed by the "second prong" of Scott and Ferrara can a judge rule on the credibility and sufficiency of evidence how Dookhan's tacit misrepresentation weighed on the defendant's decision to waive confrontation and trial. See Scott, at 358 ("we remind judges of the importance of their findings and rulings for purposes of appellate review, especially in the case of a fact-intensive analysis taking account of the range of circumstances surrounding the defendant's decision to enter a plea agreement").

It is not in the interests of justice, nor necessary to a "workable solution," to excuse the

defendant's admission of knowing possession of a controlled substance. It is in the interests of the public that every defendant who chooses to contest the voluntariness of a guilty plea made before Dookhan's misconduct was discovered make a credible claim in open court.[34] Placing the responsibility upon individual defendants to come forward respects their having taken responsibility for their actions in the first place, and serves to channel the flow of motions and to avoid the speculative "flood" that CPCS has conjured. As in Lavallee, the trial court, District Attorney, and defense counsel can immediately triage each case as it is brought forward, and commit precious court and attorney resources as warranted.

District Attorneys and defense counsel have much experience in triage, the recognition that not every case can be tried or should be tried, where agreements on recommended disposition can be reached. Indeed, the administration of justice has long accepted plea discussions as a pragmatic and proper means of reaching resolution without trial.

In this context art. 30 requires that the Court allow the Commonwealth to exercise its exclusive

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[34] See, e.g., Waller v. Georgia, 467 U.S. 39, 46 (1984). Commonwealth v. Lavoie, 464 Mass. 83, 86, cert. denied, 133 S.Ct. 2356 (2013) ("open court permits members of the public to observe trial proceedings and promotes fairness in the judicial system").

authority: "[t]he district attorney is the people's elected advocate for a broad spectrum of societal interests -- from ensuring that criminals are punished for wrongdoing, to allocating limited resources to maximize public protection. . . . Without any legal basis for his ruling, the judge . . . effectively usurped the decision-making authority constitutionally allocated to the executive branch." Commonwealth v. Gordon, 410 Mass. at 500-501. See Commonwealth v. Cheney, 440 Mass. at 574. See also Commonwealth v. Tirrell, 382 Mass. 502, 510 (1981) ("In any plea bargaining situation the defendant is necessarily put to a difficult choice -- the risk of a more serious sentence after trial and conviction against the probabilities of the trial judge's accepting the prosecutor's recommended leniency. The defendant's fond hopes for acquittal must be tempered by his understanding of the strength of the case against him, his prior record, and the completely unknowable reaction of the trier of fact").

It is not in the interests of the administration of justice, public confidence in the courts and prosecutors, or the public interest in prosecution of the guilty for this Court to disregard a defendant's acceptance of the direct consequences of the original plea or admission. The Court can accept that defendants attach different weights to a mandatory

period of incarceration, or a lesser sentence, or a period of probation, or a continuance without a finding, or a nolle prosequi in consideration of pleas to other offenses arising in the same prosecution.

In proceedings after Dookhan's suspension in 2011, the overwhelming majority of pleas reviewed have been resolved by a modified disposition and not a trial where the identification of the substance possessed can be confronted. This experience warrants the conclusion that the nature of the original disposition plays the most substantial role in the triage now required for those who seek review. The cases originally resolved in the District Court do not resemble those resolved after indictment. In addition, given the passage of time, and the decision to "cap" resentencing, defendants are ready to accept reduced charges or nolle prosequi of others because a return to incarceration is "off the table."

There is a significant exception to the routine triage where the reviewed plea became the basis of a prosecution as a subsequent offender, or was the basis for a revocation of probation or parole in a prior case. Though the subsequent consequence arose after the plea, and should not have weighed on the defendant's calculus at the time of the plea, reaching an agreement on review may be challenging. See Ruffin, at 1004. The Commonwealth acknowledges that certain

defendants may be motivated now because of collateral consequences, particularly immigration consequences.

These defendants, much as those indicted, represent a small part of those reflected in the lists of "Dookhan defendants" provided to the Court. It behooves this Court not to grasp for the inelastic remedy now sought by the petitioners and CPCS because the variety of individual factors affect not only the defendant's interest but those of the public in substantive justice for those who admit their guilt. The practical solution recognizes that those defendants who answer a complaint in District Court face lesser direct consequences than those who appear in Superior Court, where the stakes are higher; the collateral consequences faced by citizens are different than those who are not, and those who reoffend test the public interest in more significant ways. These differences must weigh against the unitary solution sought by the petitioners.

In the end, justice does not require that each defendant be compelled to reopen their convictions; the factors that may affect a defendant's decision to decline review or to delay it until adverse consequences "ripen" are as individual as those in the decision whether to plead guilty to a drug offense, or to another offense in consideration of dismissal of a drug offense. A defendant is permitted to bring a

motion to withdraw a plea at any time; it is just and practical to allow the defendant to determine when to come forward, or whether to come forward at all. The reasons a defendant pleads guilty are individual, as is the weight that might be attached to Dookhan's misconduct in a particular case.

Those motions and "re-prosecutions" that can be readily resolved will be. Those that can be resolved upon retesting will be. Those where retesting cannot occur because untainted samples no longer are available will be quickly identified, and also readily resolved. See Cotto, at 114-115. Resentencing consistent with the "cap" fashioned by this Court in the original Bridgeman opinion should not be difficult, particularly where any sentence previously imposed has been served. The Court noted in its original opinion that from the outset those "Dookhan defendants" still incarcerated in 2012 were the target of the first rehearings. Such defendants were the most readily produced in court. It appears that those convicted on indictments have come forward in the last four years at a high rate, in contrast to those whose cases were disposed in District Court; it would be reasonable to address those few hundreds remaining from Superior Court as soon as counsel can be assigned, a burden no greater than that were met without a concerted effort.

E. Shifting Burdens to the Clerks of the Trial Courts via Global Action is No Relief to the Courts.

The Court also should consider the uncommon burden upon the clerks of the trial courts who will be called upon to docket on a case by case basis an order to vacate the plea to a drug offense, though guided by the lists prepared by the District Attorneys to identify by docket number the defendants linked to a drug certificate signed by Dookhan as analyst. First, the petitioners claim (and the press of the report has precluded any fact-finding on this claim) that the lists are significantly flawed. This Court can discount this claim which serves only to deny relief to the large majority who are properly listed because it is possible that some small number has not yet been identified. Case-by-case fact finding to determine whether a particular defendant falls within the scope of the global remedy adds a hearing that will require the same resources as individual Scott hearings, without the benefit of a defendant's involvement in his own case, via a request for relief.

Second, the proposed remedy demands that the clerks act in a very short time, and treat each defendant the same, without a procedure to distinguish the defendant who sought relief already, or the defendant who did not enter a plea until after Dookhan's misconduct was disclosed. Those who allege misconduct

other than "Dookhan as analyst" must be identified for individual treatment. A clerk also must be able to distinguish between those particular counts of a complaint or indictment that involve Dookhan, and those that do not, a distinction that does not appear on the docket or charging instrument.

The lists prepared by the District Attorneys were prepared for identification leading to case-by-case review, never to mass vacatur. The lists do not identify which count of a complaint might be associated with the Dookhan analysis where there are multiple drug counts. In order to vacate the correct counts of a complaint, the clerks will be required to conduct a file-by-file review.

F. Unsupported Allegations Should Not Inform The Decision Of This Court.

Finally, this Court should treat with great caution the claims that the weight of Dookhan's misconduct has fallen upon minorities or the economically disadvantaged and that relief from Dookhan's misconduct is warranted. These claims were not pressed in hearings before the Single Justice, and are not supported by the record before the Court. The District Attorneys dispute the reliability of these claims, including the claim that Dookhan tested one in six drug cases in the state that resulted in adverse disposition, or that the number is even greater, one in

four, when Farak's testing is factored in. Data supplied to the petitioners from the District Attorneys was tailored to the sole purpose of providing notice per the Court's Interim Order.

The District Attorneys worked closely with the Court and the petitioners in defining the scope of the data on their list. There is a significant lack of "fit" between that data and the analysis performed by the petitioners, which led to their conclusions.

The list prepared by David Meier ("Meier List") includes every substance submitted by police agencies to the DPH laboratory for which Dookhan signed a certificate as analyst. The Meier List was not limited to cases that ended up in prosecution. Many items were not narcotics, were not linked to any specific individual, or did not result in criminal charges for myriad reasons. It is misleading to rely on the numbers from the Meier list and draw any conclusions about prosecutions or "cases" from it.

Similarly, codefendants cannot be presumed to face identical charges. One defendant may be charged with narcotics violations, another with entirely different, non-narcotic charges. See, e.g., Commonwealth v. Gardner, 467 Mass. 363 (2014). The absence of multiple codefendants names on the Meier list is not a reliable basis from which to conclude that a "Dookhan defendant" has been omitted.

The petitioners' claim that sixty percent of adverse Dookhan dispositions occurred in what they term "mere possession" cases is an unfair and unsupported characterization. Pet. Br. 16. Again, this is not supported by normative and principled fact-finding (none was sought by the petitioners before the Single Justice) and ignores the overall context of all charges faced by a particular individual. For example, an individual may be charged with several crimes of violence and possession of some cocaine as well.[35] This is not a "mere possession" case. Or, in a plea setting, a defendant may have conceded his guilt in exchange for a reduction in charges from possession with intent to distribute to possession.

Properly viewed, the petitioners' term "mere possession" covers multiple circumstances; each case should be viewed individually because no two cases, as with no two individuals, are alike. The same analysis flows to the claim that "[a]mong distribution cases, mandatory minimum charges figured prominently in securing convictions." Pet.Br.17. The most serious cases proceeded by indictment and have already been addressed. See Commonwealth v. Charles, 466 Mass. at 64.

[35] The petitioners do not account for cases in which a non-94C offense was charged as well (ComRA 248).

Among other things, the notice that the District Attorneys mailed to Dookhan defendants said "if you are tried and convicted again, you will not face any punishment greater than what you already received. In other words, you cannot be additionally punished for choosing to challenge your convictions." This settles the petitioners claim that the notice letter failed to inform "defendants that they would not be penalized for exercising their rights." See Pet.Br. 10.

III. A HALLMARK OF OUR SYSTEM OF JUSTICE IS OUR ABILITY TO ADDRESS ARISING AND ONGOING CHALLENGES WITHOUT ABANDONING INDIVIDUAL RIGHTS AND RESPONSIBILITIES.

Our system of justice has repeatedly proven it can quite competently address large numbers of post-conviction motions, filed over a period of time. Similar challenges brought in the Melendez-Diaz, Padilla, and CPSL (Community Parole Supervision for Life) lines of cases have been duly addressed, just as those in the Scott line of cases have been. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 324 (2009). Padilla v. Kentucky, 559 U.S. 356, 366-367 (2010). See Commonwealth v. Cummings, 466 Mass. 467, 468-469 (2013), and Commonwealth v. Cole, 468 Mass. 294, 304 (2014).

This Court proceeded undeterred when it restored the right of thousands tried after this Court's decision in Commonwealth v. Verde, 444 Mass. 279, 282

[May 19, 2005], not to extend Crawford to "drug certificates" and before the Supreme Court's Melendez-Diaz decision. Commonwealth v. Vasquez, 456 Mass. 350, 352, 358-359 (March 26, 2010) (the Court deemed it futile for a defendant to make a "Crawford" objection after its Verde decision).[36] In Vasquez, the Court excused the failure to raise the objection for trials after Verde, but did not require the Commonwealth to notify defendants of the constitutional error announced in Crawford. "The defendant always has the burden of raising his Confrontation Clause objection." Melendez-Diaz, 57 U.S. at 327. The Court ruled secure in the

[36] Melendez-Diaz v. Massachusetts, 557 U.S. 305, 324 (2009), was announced on June 25, 2009 ("the analysts' statements here - prepared specifically for use at petitioner's trial - were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment"). Crawford v. Washington, 541 U.S. 36, 59 (2004), was announced on March 8, 2004 ("Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine"). See Commonwealth v. Francis, 474 Mass. 816, 826 (2016). As this court explained in 2010, defendants in cases adjudicated before June 25, 2009, the date of the Supreme Court's ruling in Melendez-Diaz, would understand that the Commonwealth could introduce a drug certificate to prove the truth of the substance analyzed without presenting the declarant for cross-examination. Vasquez, 456 Mass. 350, (2010). Confrontation is a right waived by plea. That the certificate was testimonial was of no consequence in the review of the plea in Scott.

knowledge that our justice system would accommodate those who chose to come forward.

This Court opened the door to untold numbers who were allowed to move to withdraw pleas made as early as April 1996, on the basis of individualized showings that counsel may have failed to provide sufficient advice about the likely immigration consequences sparked by a tightening of federal policies. Commonwealth v. Clarke, 460 Mass. 30, 44-45 (2011); Commonwealth v. Sylvain, 466 Mass. 422, 424, 432-434 (2013). See Commonwealth v. Mercado, 474 Mass. 80, 81-82 (2016).

Paralleling its decision in Scott, this Court kept intact the individual need to assert his rights, ruling that where the defendant may not have been advised properly about the immigration consequences of an admission of guilt, "the defendant bears the substantial burden of showing that (1) he [or she] had an 'available, substantial ground of defence,' . . . that would have been pursued if he [or she] had been correctly advised of the dire immigration consequences attendant to accepting the plea bargain; (2) there is a reasonable probability that a different plea bargain (absent such consequences) could have been negotiated at the time; or (3) the presence of 'special circumstances' that support the conclusion that he placed, or would have placed, particular emphasis on immigration

consequences in deciding whether to plead guilty." Commonwealth v. Lavrinenko, 473 Mass. 42, 55-56 (2015), quoting Clarke, at 47-48.

Thus, our system of justice contemplates individual defendants seeking relief, where they so choose, case by case, for a wide-spread pattern of defense counsel neglect of immigration consequences vis-à-vis pleas occurring years before the Supreme Court brought focus to the issue in March, 2010 in Padilla v. Kentucky, 559 U.S. 356, 366-367 (2010).

This Court's "workable solution" for Padilla rightly assumes that our system is flexible enough and inherently geared to meeting challenges as they arise. The Court did not concern itself with whether there were defense counsel resources available to provide competent representation at Padilla motions of the nearly fourteen years of cases involving defendants who may face immigration consequences. Again, the Court did not deem it necessary that any individual notice be provided to defendants who may be warranted in seeking relief.

This Court should consider too the "workable solutions" it formulated to address its decisions that struck down CPSL (Community Parole Supervision for Life). See Commonwealth v. Cummings, 466 Mass. 467, 468-469 (2013). See also Commonwealth v. Cole, 468 Mass. 294, 304 (2014) (grant of judicial authority to

parole board to find violations and increase sentence "plainly violates art. 30"); Commonwealth v. Pagan, 445 Mass. 161, 162, 173-174 (2005) (CPSL may not be imposed on first offender or without notice by indictment or complaint). In Cole this Court assessed the "burden on our courts" in resentencing an anticipated 300 defendants whose sentences included CPSL, and dismissed the potential burden on the prosecutors on the ground that "resentencing need only occur where the Commonwealth moves for resentencing." Cole, at 311. This Court did uphold the traditional procedure of requiring defendants to move individually to vacate the CPSL portion of their sentences. Cole, at 311.

Signaling again that individual consideration of cases, and not blanket orders are a guarantee of our system of justice, although the defendant need show no more than that CPSL was imposed by the sentencing judge, this Court did not consider entry of a blanket order to vacate any CPSL provision imposed after the adoption of the disposition in 1999. See St. 1999, c. 74. Nor did the Court direct that notice be provided indicating that the CPSL portion of these sentences was invalid. This Court implicitly understood that defense attorneys in Massachusetts would be able to file post-conviction motions more than adequate to meet the needs of their clients.

More recently this Court ordered a change to the degree of certainty required in classification hearings before SORB (Sex Offender Registry Board). See Doe No. 380316 v. SORB, 473 Mass. 297, 298, 299, 314, 315 (2015) (remand this defendant's classification hearing for proceedings applying a "clear and convincing" standard, not preponderance). This Court made it clear that this change was required by due process, and thus would apply not only to those defendants who were awaiting hearings before SORB, but to those who had not yet exhausted direct judicial review or appellate review. Doe, at 314 n.26.

The Court did not impose upon SORB responsibility for bringing review of affected defendants forward; silence is no indication that the Court abandoned the traditional procedure that placed the burden of seeking rehearing on the defendant. The Court did not address the burden on the adjudicative body to conduct an unstated number of classification hearings in addition to those already scheduled, nor the burden to attempt an agreed lower classification. A cap on how long defendants may wait before classification is completed was not considered.

Although the petitioners point to several other states in which crime lab misconduct placed criminal convictions in doubt, they have failed to cite a single instance -- and the Commonwealth knows of none -- in

which the Court of last resort has ordered mass dismissal of cases. Contrast, e.g., Aricidiacono v. State, 125 A.3d 677, 681 (Delaware 2015) (affirming denial of forty-five motions to withdraw plea); State v. Hill, 871 N.W.2d 900, 909-910 (Minnesota 2015) (declining to adopt presumption of misconduct where crime lab found to have problems with quality control); Matter of Investigation of West Virginia State Police Crime Laboratory, 190 W.Va. 321, 327-328 (1993) (adopting case-by-case approach to convictions possibly tainted by disgraced chemist); Ex Parte Coty, 418 S.W.3d 597, 606 (Tex. App. 2014) (applying presumption of misconduct but not global remedy).

Here the Commonwealth has established special sessions to hear every defendant who has come forward, and to bring forward every defendant who remained in custody. The Court has adopted a "conclusive presumption" to remove the evidentiary burden for defendants under the first prong of Ferrara, and has capped dispositions. A leap to the "one-size-fits-all" outcome is a denial of the meaningful effort to identify the "Dookhan defendants," to link Dookhan's misconduct to specific dockets in the Commonwealth's courts, and the determination of this Court to fashion a procedure for seeking a just rehearing for each defendant who should seek one. Matthews v. Eldridge, 424 U.S. 319, 334-335 (1976) (test of due process

balances private interests, risk of erroneous deprivation of those interests; value of any additional procedural safeguards; and government interest involved).

CONCLUSION

A comprehensive and workable remedy for Dookhan's misconduct has been developed through the Court's several careful decisions, and actual and constructive notice in several forms has been provided to members of the bar and individuals. The rights of competent defendants to self-determination -- to decide for themselves whether to move to withdraw a guilty plea or seek a new trial should not be abrogated. Issues arising within the parameters of the remand in Bridgeman have been resolved, and the petition should now be dismissed.

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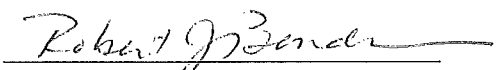
As required by Mass.R.App.P. 16(k) I certify that this brief complies with the rules relating to briefs.

October 25, 2016



ROBERT J. BENDER
ASSISTANT DISTRICT ATTORNEY

ADDENDUM

Orders

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. SJ-2014-0005

Suffolk Superior Court
No. SUCR2005-10537;

Essex Superior Court;
No. ESCR2007-1535

Boston Municipal Court
No. 0501-CR-0142

KEVIN BRIDGEMAN, YASIR CREACH and MIGUEL CUEVAS, PETITIONERS

vs.

DISTRICT ATTORNEY FOR SUFFOLK COUNTY, DISTRICT ATTORNEY FOR ESSEX COUNTY, DISTRICT ATTORNEY FOR BRISTOL COUNTY, DISTRICT ATTORNEY FOR THE CAPE AND ISLANDS, DISTRICT ATTORNEY FOR MIDDLESEX COUNTY, DISTRICT ATTORNEY FOR NORFOLK COUNTY, DISTRICT ATTORNEY FOR PLYMOUTH COUNTY, RESPONDENTS

and

COMMITTEE for PUBLIC COUNSEL SERVICES, INTERVENER

RESERVATION AND REPORT

This matter came before the Court, Botsford, J., presiding, on the petitioners' petition pursuant to G.L. c. 211, § 3.

Upon consideration thereof, the petition be, and the same hereby is, reserved and reported without decision to the Full Court for determination on the record before the Single Justice in SJ-2014-005. The record is comprised of the following:

1. All of the documents that were before the Single Justice in matter No. SJ-2014-005, Bridgeman, et al. v. District Attorney for Suffolk County, et al.;

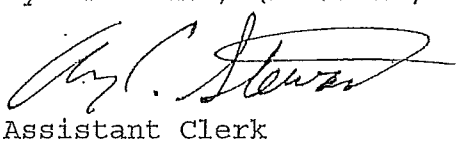
2. The docket sheet in SJ-2014-005; and

3. This reservation and report.

The petitioners and intervener CPCS collectively shall be deemed the appellant, and the respondents collectively shall be deemed the appellee. This reservation and report shall proceed in all respects with the Massachusetts Rules of Appellate Procedure.

This matter shall be scheduled for oral argument in November, 2016. The appellant's brief, which shall be filed jointly by the petitioners and intervener CPCS, shall be due on September 16, 2016. The appellee's brief, which shall be filed jointly by the respondents, shall be due on October 17, 2016. The appellant's reply brief, which shall be filed jointly by the petitioners and intervener CPCS, shall be due on October 28, 2016. Filing shall be made via hand delivery or electronically to the Office of the Supreme Judicial Court for the Commonwealth by close of business on the above-mentioned dates.

By the Court, (Botsford, J.)



Assistant Clerk

ENTERED: August 16, 2016

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. SJ-2014-0005

Suffolk Superior Court
No. SUCR2005-10537;

Boston Municipal Court
NO. 0501-CR-0142;

Essex Superior Court
No. ESCR2007-1535

KEVIN BRIDGEMAN, YASIR CREACH and MIGUEL CUEVAS

vs.

DISTRICT ATTORNEY FOR SUFFOLK COUNTY, DISTRICT ATTORNEY FOR ESSEX COUNTY, DISTRICT ATTORNEY FOR BRISTOL COUNTY, DISTRICT ATTORNEY FOR THE CAPE AND ISLANDS, DISTRICT ATTORNEY FOR MIDDLESEX COUNTY, DISTRICT ATTORNEY FOR NORFOLK COUNTY, DISTRICT ATTORNEY FOR PLYMOUTH COUNTY and DISTRICT ATTORNEY FOR BARNSTABLE COUNTY

INTERIM ORDER

This matter came before the Court, Botsford, J., presiding, on the petitioners' petition pursuant to G.L. c. 211, § 3, concerning the rights of persons who were convicted of drug-related charges and in whose cases former Hinton Drug Lab Assistant Analyst Annie Dookhan signed the certificate of drug analysis ("drug certificate") as analyst; such persons are hereafter collectively referred to as the

"Dookhan defendants." See Bridgeman v. District Attorney for the Suffolk District, 471 Mass. 465, 467 n. 4 (2015).

The Court is informed that the parties have conferred with one another and generally agree to the process and framework for the identification and notification of Dookhan defendants set forth below. Upon consideration thereof, the Court hereby ORDERS that:

1. By today, the respondents shall have filed with the Court and served on the petitioners and intervener CPCS their respective final lists, in digital format such as CD-Rs, identifying Dookhan defendants. Identification shall include but not be limited to the defendant's name, date of birth, Social Security number, relevant Trial Court docket number,[1] and adverse disposition concerning every G.L. c. 94C charge for which Annie Dookhan signed the drug certificate as analyst. To the extent possible, the respondents are to include all available, relevant information concerning the adverse disposition of each c. 94C charge included on the lists.[2] The Court expects that the respondents will coordinate with one another to the extent possible to make the format of their respective lists uniform. Because of the personal identifying information to be included in these lists, the lists are to be marked as IMPOUNDED. The respondents are requested to serve and file a joint motion to impound the lists

[1]Based on representations made at the April 6, 2016, status conference in this matter, the Court understands that the respondents will make inquiries as needed to confirm and include any relevant Juvenile Court Department docket numbers in the lists.

[2]Relevant information concerning adverse dispositions includes information identifying the type of disposition, e.g., nolle prosequi, dismissal, guilty finding, and/or continuance without a finding.

at the time the lists themselves are served and filed, to which the petitioners and intervener CPCS may respond.

2. The Court anticipates that the Court and the parties will coordinate efforts to secure adequate funding for purposes of researching appropriate mailing addresses for the identified Dookhan defendants, including any presently incarcerated Dookhan defendants, providing them with notification of their status as Dookhan defendants, and staffing for CPCS for purposes of responding to inquiries by Dookhan defendants generated by the notification. Once funding is secured, the Court anticipates that intervener CPCS will be responsible for managing the mailing address research effort and selecting the appropriate mailing addresses associated with the Dookhan defendants to which notification will be sent.

3. The parties shall work together to file a joint draft notification to be sent to the Dookhan defendants for the Court's review and approval by today. The draft notification shall include but not be limited to advising the persons identified in the lists referenced in paragraph 1 above of their status as Dookhan defendants and associated rights. If, notwithstanding their diligent efforts, the parties are unable to agree upon a joint draft notification, the parties instead shall file their respective draft notifications for the Court's consideration by today. The notification is to be mailed to the Dookhan defendants as soon as possible once the adequate funding referenced in paragraph two is secured.

4. The Dookhan defendants identified pursuant to the above-referenced process and who file motions to vacate their drug-related convictions in the appropriate trial court shall be entitled to a presumption that Annie Dookhan signed as analyst a drug certificate in every G.L. c. 94C case that is identified on the lists for notification, and shall not be required to produce a copy of the certificate. See Commonwealth v. Scott, 467 Mass. 336 (2014). The Commonwealth may rebut this presumption under compelling circumstances.

5. Any defendant not identified pursuant to this process who is charged with a G.L. c. 94C offense and establishes that Annie Dookhan signed as analyst the defendant's drug certificate pertaining to that c. 94C charge, may file a motion in the appropriate court to vacate the conviction or other adverse disposition entered against them in that case. Such a defendant will be entitled to a presumption of vacatur and dismissal of that c. 94C offense, which may be rebutted by the Commonwealth under compelling circumstances.

By the Court, (Botsford, J.) MS

Assistant Clerk

ENTERED: 5/11/16

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. SJ-2014-0005

Suffolk Superior Court
No. SUCR2005-10537;

Boston Municipal Court
NO. 0501-CR-0142;

Essex Superior Court
No. ESCR2007-1535

KEVIN BRIDGEMAN, YASIR CREACH and MIGUEL CUEVAS

vs.

DISTRICT ATTORNEY FOR SUFFOLK COUNTY, DISTRICT ATTORNEY FOR ESSEX COUNTY, DISTRICT ATTORNEY FOR BRISTOL COUNTY, DISTRICT ATTORNEY FOR THE CAPE AND ISLANDS, DISTRICT ATTORNEY FOR MIDDLESEX COUNTY, DISTRICT ATTORNEY FOR NORFOLK COUNTY, DISTRICT ATTORNEY FOR PLYMOUTH COUNTY and DISTRICT ATTORNEY FOR BARNSTABLE COUNTY

SECOND INTERIM ORDER

This matter came before the Court, Botsford, J., presiding, on the petitioners' petition pursuant to G.L. c. 211, § 3, concerning the rights of persons who were convicted of drug-related charges and in whose cases former Hinton Drug Lab Assistant Analyst Annie Dookhan signed the certificate of drug analysis ("drug certificate") as analyst; such persons are hereafter collectively referred to as the

"Dookhan defendants." See Bridgeman v. District Attorney for the Suffolk District, 471 Mass. 465, 467 n. 4 (2015).

Most recently, the parties have filed the following pleadings:

1. "Motion to Impound on Behalf of the District Attorneys" concerning compilations of data by the Respondents District Attorneys (Paper No. 112);

2. "Motion to Impound on Behalf of the Petitioners and CPCS" concerning compilations of data by the Respondents District Attorneys (Paper No. 118);

3. "Petitioners' and Intervenor's Request for Reservation and Report Regarding Comprehensive Remedy for Dookhan Defendants" (Paper No. 120);

4. Intervenor's "Motion to Modify Impoundment Order" (Paper No. 123) concerning Amended Impoundment Order (Paper No. 100) impounding Excel file "caseparty" of the compilation of c. 94C data from the Trial Court's MassCourts system;[1] and

5. "District Attorneys' Motion to Enforce In-Court Agreement and Interim Order Regarding Additional Notice to Dookhan Defendants and Opposition to Reservation and Report" (Paper No. 124).

These pleadings were the subject of argument by counsel for the parties and upon consideration thereof, it is ORDERED as follows:

A. The parties' cross-Motions to Impound the compilations of data identifying Dookhan defendants prepared by the Respondents District Attorneys (Paper Nos. 112 and 118) are allowed in part such that the data be, and hereby is, IMPOUNDED and only counsel for the parties, including their staff as needed, and the Court may access and view the data. The motions are otherwise denied.

B. Paragraphs 2-5 of the Court's Interim Order (Paper No. 114) entered on May 11, 2016, are hereby STAYED until further order of the Single Justice or the Full Court.

C. The Petitioners and Intervenor shall have until June 22, 2016 to file any supplemental affidavits, in support of

[1] This motion is not resolved in the present order.

their Request for Reservation and Report Regarding Comprehensive Remedy for Dookhan Defendants (Paper No. 120).

D. The Respondents District Attorneys shall have until July 6, 2016 to file any responses to any supplemental affidavits filed by the Petitioners and Intervenors.

By the Court, (Botsford, J.) MB

Assistant Clerk

ENTERED: June 3, 2016

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
SJ-2014-0005

KEVIN BRIDGEMAN and others[1]
Petitioners

Vs.

DISTRICT ATTORNEY FOR SUFFOLK COUNTY and another[2]
Respondents

MEMORANDUM AND ORDER ON MOTION TO JOIN DISTRICT ATTORNEYS FOR THE COUNTIES OF BARNSTABLE, BRISTOL, DUKES, MIDDLESEX, NORFOLK, AND PLYMOUTH AS RESPONDENTS

The petitioners have moved pursuant to Mass. R. Civ. P. 19 and 20 to join the District Attorneys of the above-listed counties as respondents in this case. The case, which began in the county court, thereafter was before the full court, see Bridgeman v. District Attorney for the Suffolk Dist., 471 Mass. 465 (2015), and has been remanded to the county court. On remand, the parties and the court are engaged in a continuing effort to (1) identify to the extent possible every person who was a so-called "Dookhan defendant" -- meaning a person who was charged with a criminal drug offense between 2003 and including 2012 in connection with which Annie Dookhan was the chemist at the William A. Hinton State drug laboratory who signed the drug certificate as analyst; and (2) evaluate appropriate methods of notifying those persons of their status as Dookhan defendants.

[1] Yasir Creach and Miguel Cuevas.
[2] District Attorney for Essex County.

Thereafter, it likely will be necessary for the court, with the assistance of the parties, to determine which notification method or methods are to be used, and how and by whom the notification should be accomplished.

In response to the petitioners' motion, the District Attorney for the Bristol District has himself moved to intervene pursuant to Mass. R. Civ. P. 24; the District Attorneys for Norfolk County, Middlesex County, and Plymouth County have opposed the motion for joinder; and the District Attorney for the Cape & Islands has not responded to the motion.

In the present posture of this case, I conclude that the motion to intervene filed by the Bristol District Attorney should be allowed, and the petitioners' motion to join the other District Attorneys listed in the preceding paragraph also should be allowed. The Suffolk and Essex County District Attorneys, who have been named as respondent parties from the inception of this case, and from the inception, have participated constructively in all the proceedings before me as single justice and have voluntarily provided enormous assistance to the court and to the petitioners in the complex and time-consuming task of identifying Dookhan defendants in their respective counties. The District Attorneys of Bristol, Norfolk, Plymouth, and Middlesex Counties have sent representatives to the hearings

before me as single justice for close to a year, and the Bristol and Norfolk District Attorneys, in particular, have provided detailed information to the court and the petitioners in an ongoing effort to identify Dookhan defendants in those counties. I appreciate greatly the willingness of all these District Attorneys, who have not been parties, to attend and provide assistance in this voluntary fashion. However, their formal joinder as parties at this juncture is necessary, because Dookhan defendants are located in each of these counties and it is unlikely that an appropriate remedial notification plan can be developed or implemented without them. See Richardson v. Sheriff of Middlesex Cty., 407 Mass. 455, 469-71, 553 N.E.2d 1286, 1294-95 (1990).

For the foregoing reasons, it is ordered that the petitioners' motion for joinder is allowed with respect to the District Attorneys for the Barnstable, Dukes, Middlesex, Norfolk and Plymouth Counties. The motion of the District Attorney for the Bristol District to intervene also is allowed. The District Attorneys who are joined will be joined as respondents in this case, as will the intervenor District Attorney for the Bristol District.

(Margot Botsford)
Margot Botsford
Associate Justice

Dated: December 31, 2015

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. SJ-2014-0005

Suffolk Superior Court
No. SUCR2005-10537;

BOSTON MUNICIPAL COURT
NO. 0501-CR-0142;

ESSEX SUPERIOR COURT NO:
No. ESCR2007-1535

KEVIN BRIDGEMAN, YASIR CREACH and MIGUEL CUEVAS

vs.

DISTRICT ATTORNEY FOR SUFFOLK COUNTY, DISTRICT ATTORNEY FOR ESSEX COUNTY, DISTRICT ATTORNEY FOR BRISTOL COUNTY, DISTRICT ATTORNEY FOR THE CAPE AND ISLANDS, DISTRICT ATTORNEY FOR MIDDLESEX COUNTY, DISTRICT ATTORNEY FOR NORFOLK COUNTY, DISTRICT ATTORNEY FOR PLYMOUTH COUNTY and DISTRICT ATTORNEY FOR BARNSTABLE COUNTY

IMPOUNDMENT ORDER

It is hereby ORDERED that that the compilation of data from the Trial Court's MassCourts system identifying all the defendants convicted of an offense under G.L. c. 94C from 2003 to 2012 in the Commonwealth of Massachusetts be, and hereby is, IMPOUNDED and only counsel for the parties, including their staff as needed, and the Court may access and view the data.

The data was compiled at the direction of this Court and for the express and the limited purpose of assisting parties' counsel in the identification of so-called Dookhan defendants. The compilation of data contains personal identifying information of the defendants, including but not limited to their social security numbers. Redaction of the statewide data, consisting of over 46,000 pages and 154 Megabytes of data, would be unduly burdensome and is unwarranted given the limited purpose for which the data was compiled.

MG

By the Court, (Botsford, J.)

Assistant Clerk

ENTERED: February 3, 2016

No. 12157

Kevin Bridgeman, et al.

v.

District Attorney for Suffolk, et al.

ON RESERVATION AND REPORT

BRIEF FOR THE RESPONDENTS

Suffolk ss.
2016 Sitting
