COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

NO. SJC-11764

KEVIN BRIDGEMAN, YASIR CREACH AND MIGUEL CUEVAS

v.

DISTRICT ATTORNEY FOR SUFFOLK COUNTY
AND DISTRICT ATTORNEY FOR ESSEX COUNTY

PETITION PURSUANT TO G.L. c. 211, § 3
AS RESERVED AND REPORTED BY JUSTICE BOTSFORD

BRIEF FOR PETITIONERS-APPELLANTS KEVIN BRIDGEMAN, YASIR CREACH AND MIGUEL CUEVAS

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Due to the unprecedented crisis at the William A. Hinton Laboratory Institute ("Hinton Lab"), including the outrageous misconduct and gross mismanagement that has affected tens of thousands of defendants ("Dookhan defendants"), this Court should exercise its power, under G.L. c. 211, § 3, to address:

1. Whether the prospect of harsher punishments for Petitioners and other Dookhan defendants following successful challenges to their tainted convictions violates due process and common law protections against the apprehension of vindictive prosecution, given the egregious government misconduct and the limited bargaining power of Dookhan defendants, especially those who have already served their sentences?

2. Whether inordinate and prejudicial delays in providing post-conviction relief to Petitioners and other Dookhan defendants violate due process, where more than three years have passed since supervisors discovered Dookhan's misconduct, yet the vast majority of Dookhan defendants have not even been assigned counsel, much less had their convictions reviewed?

3. Whether, as a remedy for these violations of due process and common law rights, this Court should adopt prophylactic rules (a) limiting the exposure of Petitioners and other Dookhan defendants and (b) setting time limits for re-prosecuting them?

INTRODUCTION

Annie Dookhan, a Hinton Lab chemist, perpetrated an extensive fraud for almost a decade. Her egregious misconduct, which was exacerbated by chronic mismanagement of the lab, potentially affected tens of thousands of defendants convicted of state drug offenses.

Now, long after lab managers discovered misconduct by Dookhan in June 2011, many Dookhan defendants fear that challenging their tainted convictions, by moving to withdraw their guilty pleas or for new trials, could result in even harsher punishments than those that they initially received. Worse yet, their challenges have been inordinately and prejudicially delayed by factors well beyond their control.

The combination of fear, which chills the exercise of post-conviction rights, and delay, which frustrates the ability to obtain post-conviction relief, has deprived Petitioners Kevin Bridgeman, Yasir Creach and Miguel Cuevas -- as well as many other Dookhan defendants -- of their due process and common law rights to meaningful post-conviction proceedings and relief. Through this case, Petitioners seek to vindicate their rights and restore the integrity of the criminal justice system.

The scandal at the Hinton Lab is, by now, well-known. As a Commonwealth employee and member of the prosecution team, Dookhan failed adequately to test an

untold number of alleged drug samples. In many cases, Dookhan falsely certified that she had performed the required tests and also that samples, in fact, tested positive for illegal drugs. For that reason, the convictions of tens of thousands of defendants appear to have been obtained by fraud.

"In light of Dookhan's guilty pleas and the information gathered in the course of the investigation into her misconduct," this Court held, in Commonwealth v. Scott, 467 Mass. 336 (2014), that in cases where Dookhan signed drug certificates, defendants who challenge their convictions are "entitled to a conclusive presumption that Dookhan's misconduct occurred in [their] case[s], that it was egregious, and that it is attributable to the Commonwealth." Id. at 338.

It is less well-known that, despite this Court's decisions in Scott and Commonwealth v. Charles, 466 Mass. 63 (2013), little progress has been made toward remedying this injustice.

The Committee for Public Counsel Services ("CPCS") has been able to assign counsel to about 8,700 Dookhan defendants, a small fraction of the roughly 40,000 people identified to date. See Affidavit of Anthony Benedetti ("Benedetti Aff.") at R.A. 352, ¶ 12; R.A. 353, ¶ 16.[1] This effort has been ex-

[1] "R.A. __" refers to a citation in the Joint Record Appendix.

ceedingly difficult in part because, even as of January 2015, there will still be no list of docket numbers for all of the tainted convictions. See Affidavit of Nancy Caplan ("Caplan Aff.") at R.A. 322, ¶ 36.

Meanwhile, many defendants are afraid to seek post-conviction relief. Despite having colorable claims, they fear that challenging their convictions might trigger vindictive prosecutions; for example, prosecutors might reinstate previously dismissed charges that carry mandatory minimum sentences. See Affidavit of Veronica White ("White Aff.") at R.A. 404, ¶ 15; Caplan Aff. at R.A. 317-319, ¶¶ 18-22.

In addition, undue delays have stymied those defendants who, despite the risks and uncertainty, are willing to proceed in court. See Affidavit of Miguel Cuevas ("Cuevas Aff.") at R.A. 92, ¶ 13; White Aff. at R.A. 400-402, ¶¶ 8-11. Thus, many defendants do not know how to challenge their tainted convictions, how long post-conviction proceedings may take, and if those proceedings will ultimately help or hurt them.

Adding further insult to the injuries suffered by Dookhan defendants is the simple fact that the Commonwealth is entirely at fault and, accordingly, bears the burden of remedying this "systemic lapse" in the criminal justice system. Charles, 466 Mass. at 75, quoting Lavallee v. Justices in the Hamden Super. Ct., 442 Mass. 228, 246 (2004).

Petitioners seek recognition of these problems -- which violate their due process and common law rights -- as well as a remedy. Because "[t]he continuation of what is now an unconstitutional state of affairs cannot be tolerated," Lavallee, 442 Mass. at 245, Petitioners seek two rulings in particular.

First, because the fear of harsher punishments chills the exercise of post-conviction rights, this Court should rule that Dookhan defendants who challenge their tainted convictions cannot be penalized with new outcomes that are more severe -- in terms of the offenses charged or the sentences imposed -- than the original outcomes of their cases.

Second, because justice has already been unduly delayed, with no end in sight, this Court should vacate all other tainted convictions and set deadlines that give prosecutors reasonable, but limited, opportunities to re-prosecute select Dookhan defendants.

Shielding Petitioners and other Dookhan defendants from more severe punishments will allow them to exercise their post-conviction rights without any fear of vindictive prosecution, and providing clear deadlines by which prosecutors must re-litigate any of these cases will ensure that the burden falls squarely where it belongs: on the Commonwealth.

STATEMENT OF THE CASE

Petitioners Bridgeman, Creach and Cuevas pleaded guilty based on drug certificates signed by Dookhan. Although this Court held in Scott that every Dookhan defendant is "entitled to a conclusive presumption that Dookhan's misconduct was egregious, is attributable to the government, and occurred in his [or her] case," 467 Mass. at 362, Petitioners have not yet obtained any relief, and none will until this Court decides that (1) Dookhan defendants may not be subjected to harsher punishments for challenging their tainted convictions, and (2) inordinate and prejudicial delays in providing post-conviction relief for Dookhan defendants violate due process.

A. The Petitioners.

Petitioner Bridgeman pleaded guilty to possession with intent to distribute cocaine, distribution of cocaine, and non-drug offenses in 2005 and, also, to possession with intent to distribute cocaine and distribution of cocaine in 2008. Affidavit of Kevin Bridgeman ("Bridgeman Aff.") at R.A. 83, 84, ¶¶ 8, 12. In both cases, the grand jury reviewed drug certificates that Dookhan signed. See R.A. 439, 466-467. Based on those certificates, and in exchange for the dismissal of charges carrying mandatory minimum sentences, Bridgeman twice waived his jury trial right, pleaded guilty and was sentenced to prison terms,

which he served. Bridgeman Aff. at R.A. 85, ¶¶ 15-16. Bridgeman, who is disabled, now volunteers for a non-profit organization that supports the formerly incarcerated. See id. at R.A. 82, ¶¶ 2, 5.

In April 2005, Petitioner Creach pleaded guilty to cocaine possession and was sentenced to one year in prison, which he served. See Affidavit of Yasir Creach ("Creach Aff.") at R.A. 88, ¶ 4. Creach waived his right to a jury trial partly because the Commonwealth produced a drug certificate, signed by Dookhan, claiming the samples in his case were, in fact, cocaine. See id. at R.A. 88, ¶ 5; R.A. 515-516.

In January 2009, Petitioner Cuevas pleaded guilty to distribution of cocaine and heroin and was sentenced to four-and-a-half to five years in prison. See Affidavit of Miguel Cuevas ("Cuevas Aff.") at R.A. 91, ¶¶ 6-7; R.A. 526. Since serving his sentence, Cuevas has worked full-time, and he is active in community and charitable events. See id. at R.A. 90, ¶¶ 2-3.

When Petitioners entered their guilty pleas, they did not know about the egregious government misconduct in the Hinton Lab. The lawyers who represented them on those pleas were similarly unaware, despite their demands for all exculpatory discovery (including impeachment materials) from the Commonwealth.

If Petitioners had known the facts about Dookhan and the Hinton Lab, they would have made different decisions, see Bridgeman Aff. at R.A. 85, ¶¶ 15-16; Creach Aff. at R.A. 88, ¶¶ 7-8; Cuevas Aff. at R.A. 92, ¶¶ 10-11, and they would have received different legal advice, see Affidavit of Joseph Griffin ("Griffin Aff.") at R.A. 95-96, ¶¶ 3-5, R.A. 98, ¶ 12; Affidavit of Paul Carrigan ("Carrigan Aff.") at R.A. 100-101, ¶¶ 5-6, R.A. 102, ¶¶ 13-15; Affidavit of Amy Jo Freedman ("Freedman Aff.") at R.A. 105, ¶¶ 5-6, 8; Affidavit of Lawrence McGuire ("McGuire Aff.") at R.A. 108, ¶¶ 5-6, R.A. 110, 15-18.

Bridgeman and Creach have suffered tainted convictions since 2005, and Cuevas since 2009. Although misconduct by Dookhan was initially discovered by lab managers in June 2011, and publicly disclosed in August 2012, Petitioners are still waiting for post-conviction relief. They are represented pro bono for the limited purpose of this petition, but Bridgeman and Creach have not been assigned post-conviction counsel.

Even with counsel, relief has proven unacceptably slow. Cuevas, whom CPCS represents in post-conviction proceedings, moved for a new trial and discovery about the Hinton Lab in October 2012. After this Court's decision in Scott, in March 2014, Cuevas was finally able to move ahead without more discovery. Now, Cue-

vas and his counsel are unsure whether to litigate his Rule 30 motion because, if he is "successful," Cuevas may face a new trial on the more serious charges that prosecutors previously dismissed.

Bridgeman has expressed the same concern about the prospect of harsher punishments:

> I am concerned that if I seek to withdraw my guilty plea or otherwise vacate my conviction on the basis of Dookhan's misconduct, I could be prosecuted for the serious charges which the Commonwealth moved to dismiss and be sentenced to a longer prison term.

Bridgeman Aff. at R.A. 85, ¶ 17. As a result, he has yet to seek any post-conviction relief.

B. Their Petition.

On January 9, 2014, Petitioners filed this case under G.L. c. 211, § 3, alleging violations of their due process and common law rights -- which guard against the fear of prosecutorial vindictiveness and undue post-conviction delay -- and requesting the relief at issue here. On May 27, 2014, CPCS moved to intervene and raised two issues closely related to the relief sought by Petitioners: first, whether a Dookhan defendant's plea counsel, if reappointed as post-conviction counsel, can testify at a Rule 30 hearing despite the advocate-witness rule, see Mass. R. Prof. C. 3.7(a); and second, whether a Dookhan defendant's testimony at such a hearing may later be admitted against that defendant at trial on the issue of guilt.

On June 3, 2014, the District Attorneys for Suffolk County and Essex County ("District Attorneys") opposed the petition, and on July 10, 2014, they also opposed CPCS's intervention motion. On July 15, 2014, Petitioners filed their reply, and on the next day, CPCS filed its reply.

Shortly thereafter, the Single Justice (Botsford, J.) held a series of hearings, focusing primarily on the threshold problem of how to obtain docket numbers for the tens of thousands of Dookhan defendants so that CPCS can identify and locate these individuals. Then, on October 21, 2014, Justice Botsford reserved and reported this entire matter, including the questions that Petitioners have raised, the additional questions that CPCS has presented, and the procedural question whether CPCS should be permitted to intervene in this case.

Further, recognizing that this petition was "the latest in a series of cases" concerning the Hinton Lab, Reservation & Rep. at 1, Justice Botsford stated that "the interests of justice require the court to attempt to resolve as many of the common issues as can properly be resolved at this juncture and on this record." Id. at 3. In addition to these "common issues," Justice Botsford also suggested that this Court seize this opportunity to consider whether a comprehensive remedy for Dookhan defendants is appropriate.

> [G]iven the unique circumstances of the controversy created by Dookhan's work at the Hinton laboratory and its far-reaching impacts on Dookhan defendants, their attorneys, prosecutors, the Trial Court, and the administration of the criminal justice system in the Commonwealth, I ask the full court, when deciding the case, to consider whether it might be fruitful for the court to undertake to examine the possibility of a more systemic approach to addressing the controversy than the individualized, case-specific remedy that the court envisioned in Scott; and if so, what the process for such an examination might be.

Id. at 4.

C. The Prior Drug Lab Litigation.

As this Court knows, litigation about the Hinton Lab crisis has been extensive. In these proceedings, Dookhan defendants, CPCS and amici curiae have suggested comprehensive remedies, but those proposals were deemed premature. As a result, this Court has not yet answered the core question: How to vindicate the due process and common law rights of Dookhan defendants and, at the same time, restore the integrity of the criminal justice system?

1. The Commonwealth's Initial Emergency Petitions.

In early 2013, the Commonwealth filed three emergency petitions against defendants Shubar Charles, Hector Milette and the Superior Court concerning procedural issues in the drug lab sessions. Both Charles and Milette urged the Single Justice to ask the full Court to consider whether to adopt a comprehensive

remedy for the Hinton Lab crisis. Opp. to Commonwealth's Pet. by Charles at 35, Commonwealth v. Charles, SJ-2013-0066; Opp. to Commonwealth's Pet. by Milette at 5, Commonwealth v. Milette, SJ-2013-0083. So too did CPCS, which moved to intervene.

In reporting those petitions to this Court, however, the Single Justice did not, at that time, report any broader questions. Justice Botsford commented that, while it might be "appropriate ... at some point" to address the "systemic impact of the alleged misconduct[,]" it was then "premature." Reservation & Rep. at 4, Commonwealth v. Charles, 466 Mass. 63 (2013). Justice Botsford also denied CPCS's motion to intervene, without prejudice to its renewal. See id.

Consequently, in Charles, this Court resolved only three narrow procedural issues: (1) could Superior Court and Special Magistrate judges stay sentences for Dookhan defendants who moved for new trials, (2) could Special Magistrates reconsider stay orders by Superior Court judges, and (3) could Special Magistrates accept guilty pleas. But this Court recognized the vast impact of Dookhan's misconduct, noting "[a]lthough the full scope of the misconduct is not yet known, thousands of cases may have been compromised." Id. at 89.

> The allegations of misconduct at the Hinton drug lab, and the implications of such misconduct on defendants who have been convicted of drug offenses, present exceptional

> circumstances warranting this court's exercise of its superintendence powers.

Id. It also made clear that the "burden of [a] 'systemic lapse' in [the] administration of justice 'is not to be borne by defendants.'" Id. at 74-75, quoting Lavallee, 442 Mass. at 246.

2. The Commonwealth's Appeals from Orders Granting New Trials to Dookhan Defendants.

In March 2014, this Court decided Scott and its companion cases. Dookhan defendants in those appeals urged this Court to use its superintendence powers to provide a comprehensive remedy to the Hinton Lab crisis. See, e.g., Scott Br. at 45-47, Scott, SJC-2014-11465 (asking this Court to order the trial courts to "allow Rule 30 motions" for all Dookhan defendants).

CPCS again proposed a "comprehensive remedy," asking that this Court "either dismiss all Dookhan cases with prejudice or provide the Commonwealth with a limited opportunity for re-prosecution and then dismiss all remaining cases after one year." CPCS Br. at 27, Scott, SJC-2014-11465. As in Charles, CPCS emphasized "the magnitude of the problem," arguing "no proper solution can be found in our usual case-by-case approach to providing relief." Id. at 5, 26.

In Scott, this Court re-affirmed the extraordinary circumstances of the Hinton Lab crisis:

> 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. Moreover, in the wake of government misconduct that has cast a shadow over the entire criminal justice system, it is most appropriate that the benefit of our remedy inure to defendants.

Id. at 352. Noting that "[t]his particularly insidious form of misconduct, which belies reconstruction, is a lapse of systemic magnitude in the criminal justice system," this Court determined that extraordinary relief was warranted. Id. Specifically, it adopted a new rule that all Dookhan defendants are "entitled to a conclusive presumption" that egregious government misconduct occurred in their case. Id.

STATEMENT OF RELEVANT FACTS

A. Dookhan's Egregious Misconduct.

Dookhan's unprecedented fraud has been extensively catalogued and conclusively established. This Court considered substantial evidence concerning the Hinton Lab scandal in Charles and Milette; Inspector General Glenn Cuhna completed an official investigation and published his final report; and Dookhan has been prosecuted, convicted and sentenced to prison. Thus, this petition only briefly summarizes the egregious government misconduct that occurred.

From her hiring in November 2003 through June 2011, when she was caught violating protocols and forging records in the Hinton Lab, Dookhan, a Common-

wealth employee and prosecution team member, engaged in a massive fraud. During this period, Dookhan was prolific, "testing" vastly more samples than the next most productive analyst. See Affidavit of Thomas Workman ("Workman Aff.") at R.A. 376, ¶¶ 30-33; Affidavit of Anne Goldbach ("Goldbach Aff.") at R.A. 133, ¶ 45; id., R.A. 166, Att. C. To maintain her artificially elevated levels of productivity, Dookhan engaged in the following misconduct:

- Dookhan falsified test results, tampered with evidence, and forged signatures of her colleagues, including an evidence officer. See Goldbach Aff. at R.A. 136, ¶ 59; id. R.A. 170, Att. C.

- Dookhan postdated entries in the log book, including her own initials and the forged initials of an evidence officer. See id. at R.A. 130-131, ¶ 39.

- Dookhan improperly loaded and ran samples on the Gas Chromotograph/Mass Spectrometer, misusing the machine critical to accurate testing and deviating from the two-chemist system. See id. at R.A. 133, ¶¶ 43-44.

- In violation of lab protocols, Dookhan left samples on her bench top work space, and she submitted multiple racks of sample vials to the confirmatory chemists. See id. at R.A. 133, ¶ 44.

- Dookhan improperly expedited the tests of specific samples at the request of prosecutors. See id. at R.A. 134, ¶ 49.

- As her emails demonstrate, Dookhan acted as a partisan member of the prosecu-

tion team. See id. at R.A. 140, ¶ 73; see also, e.g., id., R.A. 246, Att. I ("We are more than willing to provide discovery packets to the ADAs as long as it will help in getting a plea or stipulation"), R.A. 237 ("[Defendant] needs to be locked up and throw away the key"), R.A. 243 ("Defaulted [Defendant] ... must be in the Dominican republic on the beach with my other default defendants").

- Dookhan reported sample weights that were, on average, three times higher than those reported by other chemists suggesting further fraud or incompetence. See Workman Aff. at R.A. 380, ¶ 49; Goldbach Aff. at R.A. 133, ¶ 45.

Supervisors initially discovered Dookhan's misconduct in June 2011, and Dookhan resigned in March 2012. An investigation by the Department of Public Health ("DPH") revealed far more fraud and mismanagement in the Hinton Lab. Ultimately, after its transfer to the State Police, the lab closed in August 2012. Only then, the scandal was publicly disclosed.

Dookhan pleaded guilty to several crimes on November 2013, and she was sentenced to three to five years' imprisonment. In connection with her plea, the Commonwealth acknowledged some, but not all, of Dookhan's misconduct. It stated that the DPH investigation found that Dookhan "regularly failed to follow proper protocols for signing out drug samples from the evidence room, and in fact tampered with evidence by forging the initials of an evidence officer to cover-

up her misconduct." R.A. 780. It also stated that according to the State Police investigation, Dookhan had "dry labbed" samples, "the practice of merely visually identifying samples instead of performing the required chemical test on them to determine if the sample was in fact a controlled substance." Id.

In recommending a significantly longer sentence for Dookhan, the Commonwealth stated:

> [Dookhan] ensured that samples would test positive for controlled substances thus eviscerating both the integrity of the lab's internal testing processes, and the concomitant fact finding process that was a jury's to perform.

Id. at 783. While noting that the scandal had already cost "hundreds of millions of dollars," the Commonwealth explained that the true damage done by Dookhan cannot be counted in dollars alone:

> The gravity of the present case cannot be overstated. [Dookhan]'s actions not only affected the particular individuals named in the indictments but also the entire criminal justice system in Massachusetts. Her malfeasance has not only potentially affected every drug sample that she is believed to have handled at the Hinton Lab, but her misconduct has helped to engender public mistrust in the criminal justice system by impugning the role of the government witness in a criminal trial and undermining the integrity of evidence admitted at those trials.

Id. at 783-84.

The judge who sentenced Dookhan noted the "catastrophic" results of her fraud: "innocent persons were

incarcerated," and "the integrity of the justice system has been shaken to the core." R.A. 788.

B. Inordinate and Prejudicial Delays.

Justice for Petitioners and other Dookhan defendants has been unduly delayed, first because the misconduct and mismanagement in the Hinton Lab was not publicly disclosed until August 2012, and now by other factors that continue to frustrate relief.

For example, poor recordkeeping at the Hinton Lab has obscured vital information. More than two years ago, in September 2012, Governor Deval Patrick created a Task Force to identify defendants with drug certificates that Dookhan signed. The Task Force conducted a file-by-file review and, in August 2013, issued its final report ("Meier Report"), identifying 40,323 people "whose drug cases potentially may have been affected." Caplan Aff. at R.A. 330, Att. A.

Even then, however, the Task Force had no social security numbers, birthdates or docket numbers. See id. at R.A. 322, ¶ 36. Due in part to this lack of identifying information, lawyers have been appointed for only 8,700 Dookhan defendants, not all 40,323 of them. See Benedetti Aff. at R.A. 352, ¶ 12.

Only as a result of this petition, and efforts by the Single Justice, the District Attorneys for Suffolk and Essex Counties -- Respondents, here -- provided critical information in September 2014. The Trial

Court is now creating a list of docket numbers based on that information. Meanwhile, the District Attorneys from other affected counties have not provided any information to date, despite repeated requests by CPCS. See R.A. 866-880.

In addition, the criminal defense system cannot handle the outsized demands of this extraordinary crisis. At least 40,323 people may need counsel, but no more than 300 qualified defense attorneys are willing to handle post-conviction cases at the low hourly rates that CPCS is authorized to pay. See Benedetti Aff. at R.A. 355, ¶¶ 22-23. The strain on the judicial resources has been, and will continue to be, no less significant. See Scott, 467 Mass. at 341-342 ("[T]he investigation into her wrongdoing has had an enormous impact on the criminal justice system in Massachusetts."), citing Charles, 466 Mass. at 65.

Given the ongoing difficulty in identifying potentially affected individuals and the limited ability to assign them counsel, the vast majority of Dookhan defendants are still unable to assess whether, or how, to challenge their tainted convictions. These uncertain conditions will continue into the foreseeable future, as many more individuals discover, belatedly, that they are "Dookhan defendants," for example when they are confronted with the collateral consequences of their convictions.

C. Fear of Vindictive Prosecution.

Petitioners and other Dookhan defendants are well aware that, given the position of the District Attorneys, and without relief from this Court, they risk facing the more serious charges (which prosecutors previously dismissed) and suffering even harsher punishments if they challenge their tainted convictions.

In this regard, the case of Angel Rodriguez is a cautionary tale. Indicted for trafficking cocaine over 100 grams, Rodriguez pleaded guilty to a reduced charge and was sentenced to five to seven years. R.A. 803-04. After the revelations about the Hinton Lab, he successfully moved to vacate his guilty plea. R.A. 805. In response, the prosecution reinstated the 100-gram charge, a jury convicted Rodriguez, and the court sentenced him to eight years and one day, more time than it had originally imposed. R.A. 806-808.

Petitioners and other Dookhan defendants are well-aware of Rodriguez's fate, which received media attention. R.A. 810, 812-813; Cuevas Aff. at R.A. 92, ¶ 13; Caplan Aff. at R.A. 319-320, ¶¶ 23-27. Indeed, as discussed supra, Petitioner Bridgeman has not filed a Rule 30 motion because he fears vindictive prosecution. See Bridgeman Aff. at R.A. 85, ¶ 17; Caplan Aff. at R.A. 318, ¶ 21.

SUMMARY OF ARGUMENT

Exposure Issue: Due process and common law principles protect Dookhan defendants who challenge their tainted convictions from harsher punishments. In order to protect post-conviction rights, defendants must be freed of any apprehension of vindictiveness. A reasonable likelihood of vindictiveness is all that is required, and many factors relevant to that finding are present here: a strong institutional bias against retrials for Dookhan defendants, substantial burdens on prosecutorial resources, and a signification motivation for prosecutors to engage in self-vindication. Additionally, the egregious government misconduct in the prosecution of every Dookhan defendant is a changed circumstance that warrants less, not more, severe punishments. Thus, any insistence on harsher sanctions, despite this new fact, supports a presumption of vindictiveness. Further, plea bargaining cases are inapposite because they do not address the fear of vindictiveness in the post-conviction context. (pp. 22-37).

Delay Issue: Undue delays in providing post-conviction relief to Dookhan defendants violate due process. Here, the reasons for such delays are all attributable to the government, including delays in publicly disclosing Dookhan's misconduct and in identifying Dookhan defendants (which has still not been

accomplished). The repercussions of these delays, however, are felt by Dookhan defendants who are prejudiced as they contend with ongoing uncertainties and the collateral consequences of their tainted convictions. (pp. 37-44).

Proposed Remedy: Given these due process and common law violations, this Court should adopt rules limiting the exposure of Dookhan defendants, vacating their tainted convictions and setting time limits for re-prosecuting them. This relief should be managed by the Single Justice or a Special Master on remand. (pp. 45-48).

ARGUMENT

I. Due process and common law principles do not permit Petitioners and other Dookhan defendants who challenge their tainted convictions to be subjected to more severe punishments.

Dookhan defendants reasonably fear prosecutorial vindictiveness if they successfully challenge their convictions. That situation, which chills the exercise of their post-conviction rights, violates due process and common law principles.

A. Petitioners must be freed from any apprehension that exercising their post-conviction rights will result in harsher punishments.

"Penalizing" defendants for challenging their convictions is "patently unconstitutional." North Carolina v. Pearce, 395 U.S. 711, 724 (1969); see

United States v. Goodwin, 457 U.S. 368, 372 (1982). Moreover, because "the very threat" of such retaliation "'chill[s] the exercise'" of post-conviction rights, Pearce, 395 U.S. at 724, quoting United States v. Jackson, 390 U.S. 570, 582 (1968), due process requires defendants "be freed of apprehension" that they might be punished for challenging their convictions, id. at 725. Accordingly, both the Supreme Court and this Court have categorically prohibited outcomes that cause any fear of vindictiveness.

In North Carolina v. Pearce, 395 U.S. 711 (1969), the Supreme Court held that, following a retrial, a judge may not impose a longer sentence on a defendant, because doing so might discourage any appeal. 395 U.S. at 724-25. And in Blackledge v. Perry, 417 U.S. 21 (1974), the Court extended its rule to prosecutors, holding that a defendant must be permitted to challenge his or her conviction "without apprehension that the State will retaliate by substituting a more serious charge for the original one." Id. at 27. Prosecutors, even more than judges, have "a considerable stake in discouraging" appeals, because they want to conserve "resources" and prevent defendants from "going free." Id. By "upping the ante" with more serious charges, prosecutors "can ensure that only the most hardy defendants will brave the hazards" of seeking post-conviction relief. Id. at 27-28.

This Court, in Commonwealth v. Hyatt, 419 Mass. 815 (1995), adopted a similar rule as "a common law principle." Id. at 823. "Though the Massachusetts rule is somewhat broader in its application, the basis for the two rules is essentially the same: to avoid the appearance of vindictiveness." Commonwealth v. Henriquez, 65 Mass. App. Ct. 912, 913 n.3 (2006). The rule "effectively safeguards" a defendant "from the possibility, however slight, of retaliatory vindictiveness," and in doing so, "protects a convicted defendant's right" to seek post-conviction relief "from any chilling effect emanating from the possibility" of harsher punishment. Hyatt, 419 Mass. at 823, quoting State v. Violette, 576 A.2d 1359, 1361 (Me. 1990).

To be clear, "vindictiveness" under Pearce, Perry and Hyatt does "not require actual retaliatory motivation," "bad faith" or "malice." Commonwealth v. Tirrell, 382 Mass. 502, 508 n.8 (1981). Instead, it requires "only a reasonable appearance" of vindictiveness. Id.; see Hyatt, 419 Mass. at 821 (adopting the common law rule in the absence of any evidence that "the judge was in fact vindictive"); Goodwin, 457 U.S. 382 (noting that, in Perry, "it did not matter" that there was no evidence that "the prosecutor had acted in bad faith or with malice").

Rather, when there is "a realistic likelihood of 'vindictiveness,'" Perry, 417 U.S. at 27, a prophylac-

tic rule is needed to "free defendants of apprehension," Goodwin, 457 U.S. at 372; see Commonwealth v. Ravenell, 415 Mass. 191, 194 (1993) (discussing the "reasonable likelihood" standard).

No hard and fast rule establishes when retaliation is reasonably likely and justifies a presumption of vindictiveness. Instead, courts consider whether prosecutors face systemic pressures to discourage defendants from exercising their post-conviction rights. These systemic pressures arise for several reasons.

For starters, there is an "institutional bias inherent in the judicial system against the retrial of issues that have already been decided." Goodwin, 457 U.S. at 376-377. This bias can "subconsciously motivate" retaliation against "a defendant's exercise of his right to obtain a retrial of a decided question," id., if the prosecutor is "[a]sked to do over" what he or she believes was "already done correctly," Colten v. Kentucky, 407 U.S. 104, 117 (1972).

Further, "the likelihood that a defendant's exercise of his rights will spur a vindictive prosecutorial response is indexed to the burden that the defendant's conduct has placed on the prosecution." United States v. LaDeau, 734 F.3d 561, 569 (6th Cir. 2013). Thus, the risk of retaliation is greater when "duplicative expenditures of prosecutorial resources" are required. Goodwin, 457 U.S. at 383. In addition, the

likelihood that prosecutors will try to discourage post-conviction challenges is enhanced when they have a "stake in the prior conviction[s]" and "motivation to engage in self-vindication." Chaffin v. Stynchcombe, 412 U.S. 17, 27 (1973).

Courts also consider whether changed circumstances that are unfavorable to the defendant (but unrelated to the exercise of any post-conviction rights) adequately explain why the defendant may face harsher punishment, after successfully attacking his or her conviction. In Alabama v. Smith, 490 U.S. 794 (1989), for example, a judge imposed a longer sentence after the defendant vacated his guilty plea and went to trial, during which the judge learned extensive aggravating details about the rape. A presumption of judicial vindictiveness was not warranted on those facts, the Supreme Court held, because the longer sentence likely reflected new information that the judge acquired about "the nature and extent of the crimes charged" and the defendant's "moral character and suitability for rehabilitation." Id. at 801-802.

In contrast, when a prosecutor "operate[s] in the context of roughly the same [charging and] sentencing considerations," a presumption of vindictiveness emerges from "any unexplained change" in their position. Id. at 802. That was the case in United States v. LaDeau, 734 F.3d 561 (6th Cir. 2013), where the

prosecution superseded the indictment to add more serious charges after the defendant successfully moved to suppress key evidence. The appeals court affirmed the dismissal of the harsher indictment, concluding that it was unlikely that the prosecutor's view of the case had "changed significantly," and therefore, that the more serious charges were presumptively vindictive. Id. at 568.

B. Petitioners face a reasonable likelihood of vindictive prosecution.

In the context of the Hinton Lab crisis, Petitioners and other Dookhan defendants face a reasonable likelihood of vindictiveness, due to the systemic pressures on prosecutors and the absence of any changed circumstances warranting harsher punishments.

1. Prosecutors face systemic pressures to discourage Dookhan defendants from challenging tainted convictions.

The gravity and scope of the Hinton Lab scandal creates extraordinary incentives for prosecutors to limit post-conviction litigation. Indeed, each source of systemic pressure noted supra -- the institutional bias against retrials, the substantial burden on prosecutorial resources, and the motivation to engage in self-vindication -- exists in abundance.

First, the institutional bias against retrials for Dookhan defendants is profound. As this Court has stated, when it first addressed "this burgeoning cri-

sis," Charles, 466 Mass. at 89, "[t]he magnitude of the allegations of serious and far-reaching misconduct by Dookhan at the Hinton drug lab cannot be overstated," id. at 74. Given the prospect of re-prosecuting tens of thousands of cases, many of which are more than 10-years old, the institutional bias against challenges to these tainted convictions is, like the scope of the scandal, of unprecedented magnitude.

Second, and relatedly, the potential burden on prosecutorial resources is enormous. Indeed, the District Attorneys previously told CPCS that their offices are "not funded or staffed" to identify all of the Dookhan defendants, much less re-prosecute their cases, because "the resources required ... are immense." R.A. 978-980, June 3, 2014 Letter at 1; see id. at 2 ("As we made clear when this crisis began, the District Attorneys lack the resources to pull tens of thousands of case files in order to compile the information that [CPCS is] requesting.").

From the outset, the desire to conserve resources has influenced, if not dictated, the prosecution's approach to the scandal. That approach is to treat "the extraordinary circumstances presented here," Charles, 466 Mass. at 90, like business-as-usual and to oppose any comprehensive remedy.

Third, prosecutors have a clear stake in vindicating convictions obtained, even inadvertently, based

on outrageous fraud by "a government agent," who was a key member of the prosecution team for many years. Scott, 467 Mass. at 353. For example, the District Attorneys have argued that tainted convictions should stand, despite the egregious misconduct that this Court has recognized, unless the defendants are actually innocent. See Opp. to Pet. at 6-7 n.7, 20.

That argument falls flat where "the drug certificate was central to the Commonwealth's case," and "an affirmative representation on the drug certificate may have undermined the very foundation of the prosecution." Scott, 467 Mass. at 348. More importantly, it ignores due process; a prosecutor's belief that he or she could convict someone in a fair trial does not justify clinging to a conviction obtained by fraud. Defending such a conviction -- particularly where so many Dookhan defendants have already served their time in prison -- reflects a powerful "motivation to engage in self-vindication." Chaffin, 412 U.S. at 27.

These systemic pressures may explain why prosecutors have often resisted efforts by Dookhan defendants to challenge their tainted convictions. In Scott, for example, the Commonwealth argued that "the defendant failed to establish that Dookhan engaged in wrongdoing in her testing of the substances at issue in his case." 467 Mass. at 345. This Court rejected that contention, holding all Dookhan defendants are "enti-

tled to a conclusive presumption that egregious government misconduct occurred" in their cases. Id. at 352. In contrast, prosecutors elsewhere have sometimes dismissed cases wholesale when confronted by milder scandals involving fewer defendants. See, e.g., Peter Hermann, "Judge order prosecutors to detail investigation of FBI agent," Wash. Post (Nov. 18, 2014) at B3 (noting that prosecutors "notified 150 defendants that [an FBI agent accused of misconduct] was involved in their cases" and "dismissed indictments against two dozen defendants").

2. No changed circumstance arising from the Hinton Lab scandal justifies harsher punishment for Dookhan defendants.

The revelation that egregious government misconduct occurred in the prosecution of every Dookhan defendant undoubtedly constitutes a changed circumstance. See Scott, 467 Mass. at 353-354, 362. But, far from justifying harsher punishments, it suggests that increased penalties can be attributed to prosecutorial vindictiveness. Put another way, this new fact does not explain why Dookhan defendants should be forced to accept tainted convictions or withdraw guilty pleas at the peril of even more serious charges or longer prison sentences. Just the opposite: any "remedy" for the drug lab crisis must "inure to the

defendants." Id. at 352, quoting Lavallee, 442 Mass. at 246.

Prosecutors now know that the evidence on which they relied was tainted by Dookhan's fraud and, therefore, that their cases against Petitioners and other Dookhan defendants are far weaker than previously believed. Nevertheless, prosecutors threaten to reinstate previously-dismissed charges -- and possibly recommend longer sentences -- against defendants, like Angel Rodriguez, who successfully challenge their tainted convictions. See Opp. to Pet. at 18 (arguing that more serious charges "not only may but should" be lodged against defendants [emphasis in original]).

In opposing this petition, the District Attorneys have presumed that at least some Dookhan defendants will be convicted of more serious charges and sentenced to more time in prison. Id. at 14 (arguing that the "exposures issue" will not be ripe until "the petitioner is convicted" and "a greater sentence is imposed"). Accordingly, defense attorneys must advise their clients that seeking post-conviction relief based on Dookhan's misconduct risks increased punishments, including the possibility of reincarceration for defendants who have already completed their sentences. See Caplan Aff. at R.A. 318, ¶ 21.

It is easy to see why both prosecutors and defense attorneys predict that more severe sanctions

will, in fact, be imposed. Because most Dookhan defendants have already served their sentences, and because many of the previously-dismissed charges carry mandatory minimum sentences, prosecutors can force defendants to choose between accepting pleas that replicate the outcomes of their tainted convictions or going to trial on more serious charges. See id. at ¶¶ 19-21. For example, Bridgeman fears that, if he challenges his convictions, he will be forced to plead guilty again to the same charges (for which he already served his time) or face trial on charges that carry longer, mandatory minimum sentences. See Bridgeman Aff. at R.A. 85, ¶ 17.

In effect, Bridgeman and his fellow Petitioners face the prospect of harsher plea offers than those that they received before Dookhan's misconduct was revealed. Whereas they initially accepted plea deals (and forwent trials) based on the assumption that the drug certificates in their cases were legitimate, they are now being asked to accept those same deals -- or instead go to trial and face harsher punishments -- even though this Court has found that the government engaged in fraud. This insistence on identical or greater punishments in patently weaker cases justifies the presumption of vindictiveness.

For the same reason, post-conviction challenges by Dookhan defendants are unlike the appeal in Alabama

v. Smith, 490 U.S. 794 (1989). There, the defendant successfully vacated a guilty plea well before serving his entire sentence, chose to go to trial, and received a harsher sentence because "the evidence presented at trial ... convinced [the trial court] that the original sentence had been too lenient," not because the prosecutor reinstated a mandatory minimum charge. Id. at 797. Smith is procedurally distinguishable because it dealt with judicial vindictiveness, not prosecutorial vindictiveness. See Turner v. Tennessee, 940 F.2d 1000, 1002 (6th Cir. 1991). It is also factually distinguishable because, unlike the judge in that case, a prosecutor who re-tries a Dookhan defendant is unlikely to gain "any new insight as to the moral character" of the Petitioners, "the nature and extent" of their drug offenses, or "[their] suitability for rehabilitation." Id. at 801; see also Turner, 940 F.2d at 1002. And Smith is statutorily distinguishable because it did not involve the reinstatement of mandatory minimum charges after the discovery of prosecutorial malfeasance.

C. Plea bargaining cases, on which the District Attorneys rely, do not address the fear of prosecutorial vindictiveness.

Citing cases that concern plea bargaining, including Commonwealth v. Tirrell, 382 Mass. 502 (1981), the District Attorneys argued to the Single Justice that prosecutors must be permitted to threaten harsher

punishments for Dookhan defendants who successfully challenge their tainted convictions and go to trial. See Opp. to Pet. at 15-19. They are mistaken.

The issues presented here do not involve plea bargaining, and the cases addressing coercion in that particular context are, therefore, inapplicable.

The Supreme Court first sanctioned plea bargaining in Bordenkircher v. Hayes, 434 U.S. 357 (1978). Accepting "the 'give-and-take' of plea bargaining," the Court ruled that "there is no ... element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." Id. at 363. But this rule -- permitting trial penalties for defendants who decline plea bargains -- is limited to fair, honest and equitable pre-trial negotiations. See Goodwin, 457 U.S. at 308 ("This case, like Bordenkircher, arises from a pretrial decision to modify the charges against the defendant.").

In contrast, as both the Supreme Court and this Court have acknowledged, Pearce, Perry and the subsequent cases concerning "vindictiveness" confronted an altogether different problem:

> In those cases, the Court was dealing with the State's unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction -- a situation "very different from the give-and-take negotiation common in plea

> bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power."

Bordenkircher, 434 U.S. at 362-363, quoting Parker v. North Carolina, 397 U.S. 790, 809 (1970); see Tirrell, 382 Mass. at 508-509 ("We view [Pearce and Perry] ... neither as plea bargaining cases, nor as cases which essentially deal with the problem of the voluntariness of pleas."); Commonwealth v. Damiano, 14 Mass. App. Ct. 615, 623 n.14 (1982) ("Vindictiveness and coercion are essentially different concepts.").

Thus, nothing in plea bargaining cases, like Tirrell and Bordenkircher, forecloses the relief that Petitioners seek. Indeed, the District Attorneys did not cite any case to the Single Justice that involved convictions obtained by fraud. Because that is the circumstance here, the central question is not whether guilty pleas were voluntary in the first place (this Court already decided that the "egregious misconduct" by Dookhan rendered them "involuntary," Scott, 467 Mass. at 354), but whether prosecutors are, going forward, reasonably likely to retaliate against defendants who withdraw their pleas. The answer is clear: the fear that prosecutors will seek harsher punishments against Dookhan defendants, thereby discouraging post-conviction litigation, is well-grounded.

Even if Tirrell and Bordenkircher were relevant -- on the theory that Dookhan defendants who secure

post-conviction relief must decide whether to plea bargain or go to trial -- those cases remain distinguishable. As the District Attorneys have conceded, their reliance on cases like Tirrell rests on a claim that permitting Dookhan defendants to withdraw their guilty pleas and vacate their tainted convictions will restore the "status quo ante." Opp. to Pet. at 18, quoting People v. Scheller, 136 Cal. App. 4th 1143, 1149 (2006). That claim is incorrect.

For most Dookhan defendants, including Petitioners, the "status quo ante" is out of reach. They have already served their prison sentences and cannot get their lost time and liberty back through plea bargain. See Charles, 466 Mass. at 77, quoting Commonwealth v. Levin, 7 Mass. App. Ct. 501, 513 (1979) ("The conviction may be reversible, but the time spent in prison is not.").

Absent relief from this Court, Dookhan defendants can achieve more favorable outcomes only by contesting their tainted convictions, even if that means going to trial on charges carrying additional mandatory minimum sentences. That stark choice -- accept tainted convictions or, instead, go to trial on aggravated charges -- is not what Dookhan defendants faced at the "status quo ante." It is a far worse situation and a far cry from the acceptable "give and take" that Tirrell and Bordenkircher contemplate.

The insistence by the District Attorneys that run-of-the-mill plea bargaining precedents govern this extraordinary situation also ignores the reality that, due to the lab scandal, this Court is "sailing into uncharted waters with regard to the appellate procedure," Charles, 466 Mass. at 77 n.16, and that the interests of justice require rules that are "sui generis," Scott, 467 Mass. at 353. It also contradicts the well-established principle that, "in the wake of egregious government misconduct that has cast a shadow over the entire criminal justice system, it is most appropriate that the benefit of our remedy inure to the defendants." Scott, 467 Mass. at 352; Lavallee, 422 Mass. at 246. Returning to "square one," and pretending as if Dookhan had not committed years of fraud, fails to put the burden where it belongs: on the Commonwealth.

II. Undue delays in providing post-conviction relief to Petitioners and other Dookhan defendants violate due process.

Although Dookhan's misconduct was discovered in June 2011, there will not be a complete list docket numbers for all of the tainted convictions, let alone a comprehensive assignment of counsel for the affected defendants, when this case is argued in January 2015. This ongoing delay is a violation of due process, not merely an administrative inconvenience.

A. Undue delay in post-conviction proceedings violates due process.

"[I]nordinate and prejudicial delay" in the appellate process "may rise to the level of constitutional error," because it violates the right of due process guaranteed by the Fifth Amendment and Article 12. In re Williams, 378 Mass. 623, 625 (1979), quoting Commonwealth v. Swenson, 368 Mass. 268, 279-80 (1975); see Commonwealth v. Weichel, 403 Mass. 103, 109 (1988); see also State v. Bianco, 511 A.2d 600, 607-608 (N.J. 1986) (recognizing a due process right against undue appellate delay because "justice is denied if it is delayed").

Fundamental fairness requires an expedient process for reviewing convictions and providing post-conviction relief, because "an appeal that is inordinately delayed is as much a 'meaningless ritual' as an appeal that is adjudicated without the benefit of effective counsel or a transcript of the trial court proceedings." Harris v. Champion, 15 F.3d 1538, 1558 (10th Cir. 1994), quoting Douglas v. California, 372 U.S. 353, 358 (1963); see Mathews v. Eldridge, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." [internal quotations omitted]). This is particularly true when, during the delay, defendants are incarcerated or suf-

fer collateral consequences of their convictions. See White Aff. at R.A. 405, ¶ 17.

The same due process analysis applies to undue delays concerning new trial motions:

> [T]he interests protected by preventing unreasonable delay from arrest through sentencing and throughout the appellate process are also endangered by delay in deciding a motion for a new trial based on newly discovered evidence. Faded memories or misplaced evidence may impair a defendant's ability to adequately defend himself if he is granted a new trial. Delay may also produce anxiety or drain a defendant's financial resources.

United States v. Yehling, 456 F.3d 1236, 1243 (10th Cir. 2006) (internal citations omitted). Thus, there is "no reason to exempt a motion for a new trial based on newly discovered evidence from protection against unreasonable delay." Id.

Consistent with those principles, this Court held, in Charles, that "the extraordinary circumstances" of the Hinton Lab crisis warrant special procedures "to expedite the processing of the anticipated avalanche of cases." 466 Mass. at 90. Although that case concerned only stays of sentences, the need to avoid undue delay applies with equal or greater force in this case, which directly addresses challenges to the tainted convictions themselves.

B. Delays for Dookhan defendants have been inordinate and, without this Court's intervention, will continue.

The egregious government misconduct in the Hinton Lab has been known to public officials for more than three years, yet Dookhan defendants still face substantial uncertainty about how to obtain meaningful post-conviction relief and how long proceedings may take. The causes of this inordinate, ongoing delay include the following:

- From 2003 until 2011, Dookhan committed extensive fraud by "dry labbing," tampering with samples, and forging records. She operated without meaningful oversight and claimed to have tested an impossibly high volume of samples. Although Dookhan's misconduct was discovered in June 2011, it was not disclosed to the public until August 2012, after a limited, internal investigation by DPH.

- Due to the massive problems in the Hinton Lab, a list of potential Dookhan defendants was not disclosed until the Meier Report of August 2013. But even then, the list did not contain docket numbers.

- The IG's March 2014 report found "management failures of DPH lab directors contributed to Dookhan's ability to commit her acts of malfeasance." It also found, among other shocking deficiencies, the unaccredited Hinton Lab lacked "formal and uniform protocols," provided "wholly inadequate" training, had "ineffective" quality control, and "no mechanisms" to document "inconsistent testing results."

- In September 2014, and only after Petitioners filed this case, two District Attorneys -- Respondents, here -- finally

provided information needed to identify docket numbers for Dookhan defendants. The Trial Court is now using that information to create a list of docket numbers. Meanwhile, despite requests by CPCS, other District Attorneys have not turned over identifying information.

- Lawyers have not yet been appointed for roughly 30,000 Dookhan defendants, who continue to suffer collateral consequences of their tainted convictions.

These problems are attributable solely to the government. See Scott, 476 Mass. at 353. As the Superior Court Justices have observed, "the delays in resolving defendants' new trial motions are largely beyond defendants' control." Br. of Justices of Super. Ct. at 28-29 n.18, Dist. Att'y v. Super. Ct., SJC-2013-11410. And due process does not permit Dookhan defendants, who are not responsible for the massive fraud perpetrated against them or the delays in addressing it, to be forced to wait for many years while the justice system stumbles toward a solution.

Unfortunately, no end is in sight. There is no efficient and reliable process, nor any deadlines, in place for identifying all Dookhan defendants, assigning them counsel, and ruling on their new trial motions, let alone affording them new and fair trials. As a result, "[t]he pace of relief [has been] incredibly slow." White Aff. at R.A. 402, ¶ 11.

In Scott, this Court took an important first step toward a comprehensive remedy, ruling that Dookhan's

fraud was "the sort of egregious misconduct that could render a defendant's guilty plea involuntary" and that "it may be attributed to the government." 467 Mass. at 354. That decision obviated the need for "duplicative and time-consuming findings in potentially thousands of new trial motions regarding the nature and extent of Dookhan's wrongdoing." Id. at 353. But it left unresolved additional issues that Petitioners have presented, including whether the undue delays in resolving these cases violate due process.

As this Court noted in Charles, it "plac[ed] an enormous burden on the Superior Court" merely to decide about 600 motions to stay sentences. 466 Mass. at 65. The remaining work will be much harder. Relitigating tens of thousands of cases against Dookhan defendants -- who have served their time, but whose docket numbers may still be unknown -- would take many years, even if there were enough attorneys willing and able to represent them. It is not just the length of time that makes these delays intolerable but also the uncertainty surrounding the wait, which is indefinite.

The notion that Rule 30 motions are being quickly resolved, which the District Attorneys advanced to the Single Justice, is wishful thinking. Most Dookhan defendants, including Petitioners Bridgeman and Creach, still have not been assigned counsel. Like the petitioners in Lavallee, Bridgeman and Creach are repre-

sented pro bono in this case for the limited purpose of addressing systemic deficiencies with providing meaningful post-conviction relief to victims of the Hinton Lab scandal. See 442 Mass. at 230. And many defendants represented by Rule 30 counsel, such as Petitioner Cuevas, have declined to file or seek rulings on Rule 30 motions due to their fear of prosecutorial vindictiveness. See Cuevas Aff. at R.A. 92, ¶ 13; see, e.g., Phillips v. Dist. Att'y, SJC-11764 (filed Nov. 13, 2014) (seeking to join this action); Huffman v. Dist. Att'y, SJC-00325 (filed Aug. 7, 2014) (same). Even the hearty few defendants who have moved for new trials have confronted substantial obstacles and disparate approaches by courts and prosecutors.

C. Delays for Dookhan defendants are also prejudicial.

For defendants who are currently serving sentences based on tainted convictions, delays "work an irremediable unjust loss of liberty." Williams, 378 Mass. at 626. That is because, as noted supra, "[t]he conviction may be reversible, but the time spent in prison is not." Charles, 466 Mass. at 77, quoting Levin, 7 Mass. App. Ct. at 513.

Petitioners are no longer in custody; like most Dookhan defendants, they have already completed their full terms of imprisonment and cannot get back any of that lost time. For them, indefinite delays in the

post-conviction process "entail anxiety, forfeiture of opportunity, and damage to reputation, among other conceivable injuries." Williams, 378 Mass. at 626. Delays prolong the collateral consequences of their tainted convictions and, also, squander limited resources and court time with protracted litigation.

For all defendants, whether incarcerated or not, delays risk prejudice through the disappearance of witnesses, the fading of memories, and the loss of other evidence, in the event that retrials prove necessary. See id. at 626. This risk is pronounced for Dookhan defendants because the physical evidence in their cases may be missing or contaminated and re-prosecutions may depend on witness testimony.

Beyond the defendants, "the legal system" and "society at large" share a compelling interest "in the expedition of ... criminal appeals." Id. This Court has held that, in certain cases, "very lengthy unjustified delay" in the appellate process can warrant "dismissal of the charges on that basis itself." Id. at 628 n.8. Thus, as Justice Botsford concluded, "the interests of justice require the court to attempt to resolve as many of the common issues [for Dookhan defendants] as can properly be resolved at this time and on this record." Reservation & Rep., at 3.

III. This Court should fashion an appropriate remedy for these serious violations of due process and common law rights.

This Court should order remedies designed to eliminate the fear of prosecutorial vindictiveness and end the undue post-conviction delays. While no remedy will be simple, the proceedings before the Single Justice prove that progress is possible; in less than two months, those efforts produced thousands of docket numbers that had not been disclosed for more than three years since the revelation of Dookhan's misconduct. Petitioners urge this Court to outline appropriate remedies and, then, remand to the Single Justice or a Special Master for further proceedings. The following principles should guide this Court's remand.

A. This Court should eliminate the fear of vindictiveness by limiting charging and sentencing exposure.

In the context of the Hinton Lab crisis -- a potent mix of convictions obtained by egregious government misconduct, tainted sentences that have already been served, and the possible reinstatement of charges carrying mandatory minimum sentences -- "any increase [in punishment] would penalize the defendant for exercising his right of appeal." Hyatt, 419 Mass at 823. This Court should, therefore, establish a prophylactic rule preventing exposure to harsher punishments.

In particular, the Court should rule that, if Petitioners obtain post-conviction relief, they cannot

be charged with or convicted of more serious offenses or sentenced to longer prison terms in any subsequent proceedings occasioned by that post-conviction relief. Petitioners respectfully submit that the same relief is warranted for all Dookhan defendants.

B. This Court should end the undue delays by setting deadlines and shifting burdens to the prosecution.

Unless this Court squarely remedies the problem of post-conviction delays, the burden of this "'systemic lapse'" will continue "'to be borne by defendants.'" Charles, 466 Mass. at 74-75, citing Lavallee, 442 Mass. at 246. Fortunately, Lavallee can be used as a remedial framework for this case.

In Lavallee, indigent criminal defendants lacked counsel due to a shortage of attorneys in the Hampden County bar advocates program. See id. at 229. Faced with various proposed remedies, from funding CPCS to conscripting private counsel, this Court emphasized that defendants "cannot be required to wait on their right to counsel while the State solves its administrative problems." Id. at 240.

In the end, this Court set two "clear deadlines": if counsel was not promptly assigned, defendants had to be released (if held) after 7 days, and their criminal cases had to be dismissed without prejudice after 45 days. See id. at 246. This Court explained that a "deadline provides certainty to the defendants who are

suffering a violation of their rights, and also provides all concerned with an opportunity of known duration to make all reasonable efforts to cure this violation in the most direct and effective way, i.e., to secure counsel for the defendant." Id. at 249.

Those same reasons to impose deadlines -- giving defendants "certainty" and encouraging public officials to "make all reasonable efforts" to fix the problem -- are more acutely present here. The violation of rights is more serious because it was caused by government misconduct, not scarce resources. And unlike in Lavallee, it has dragged on for years, and most Dookhan defendants have served their sentences.

It is true that scarce resources limit the speed with which Dookhan defendants can be identified, assigned counsel and provided court hearings. But "[i]nadequate resources can never be an adequate justification for the state's depriving any person of his [or her] constitutional rights." Hamilton v. Love, 328 F. Supp. 1182, 1194 (E.D. Ark. 1971); see Harris, 15 F.3d at 1562-1563 (holding "lack of funding" was not an "acceptable excuse" for undue appellate delay).

This Court should "not tolerate ... unnecessary infractions of citizens' liberty where the sole justification amounts to little more than the State's inability" to provide post-conviction relief in "an efficient an expeditious fashion." McCarthy v. Manson,

554 F. Supp. 1275, 1300 (D. Conn. 1982), aff'd 714 F.2d 234 (2d Cir. 1983). Rather, in the extraordinary circumstances of the Hinton Lab crisis, "the decisive factor must be the vindication of the petitioner[s'] constitutional rights." Gaines v. Manson, 481 A.2d 1084, 1096 (Conn. 1984).

Accordingly, this Court should order Lavallee-style relief here. Petitioners propose:

1. Prosecutors should be given 90 days to notify individual defendants, or their counsel, whether they intend to re-prosecute them.
    a. Any defendant who does not receive this notice within 90 days will be entitled to have the underlying conviction(s) vacated with prejudice.
    b. If timely notice of re-prosecution is provided, prosecutors will have six months to bring such cases to trial or to conclude them with guilty pleas.
2. Defendants who are entitled to relief under this procedure should be permitted to seek relief at any time and, once identified, entitled to the appointment of counsel for the purpose of seeking that relief.

IV. CPCS's motion to intervene should be allowed, and its requested relief should be provided.

Petitioners support CPCS's motion to intervene and agree with its arguments on the two questions presented therein: first, that plea counsel, if appointed as post-conviction counsel, can testify at a Rule 30 hearing without violating the advocate-witness rule, and second, that a Dookhan defendant's testimony at such a hearing may not thereafter be admitted against him or her at trial on the issue of guilt.

Given the practical difficulties in providing counsel to the massive number of Dookhan defendants, Petitioners agree that plea counsel who serve as post-conviction counsel should be allowed to testify at a Rule 30 hearing and argue that their testimony should be credited. Petitioners support the requested ruling that Massachusetts Rule of Professional Conduct 3.7(a) allows counsel to act in this manner.

Additionally, in part due to fears about prosecutorial vindictiveness, Petitioners agree that because a defendant moving to vacate a conviction may be subjected to cross-examination concerning the underlying charges, a defendant's testimony at such a hearing should be inadmissible against him or her at a later trial on the issue of guilt.

CONCLUSION

For the foregoing reasons, Petitioners Kevin Bridgeman, Yasir Creach and Miguel Cuevas respectfully request that this Court allow this petition and provide the requested relief.

Respectfully submitted,
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ADDENDUM

CONSTITUTIONAL AUTHORITIES

Massachusetts Declaration of Rights

Article XII. No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or his council at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

United States Constitution

Fifth Amendment. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY AUTHORITIES

Massachusetts General Laws

c. 211, § 3. The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue all writs and processes to such courts and to corporations and individuals which may be nec-

essary to the furtherance of justice and to the regular execution of the laws.

In addition to the foregoing, the justices of the supreme judicial court shall also have general superintendence of the administration of all courts of inferior jurisdiction, including, without limitation, the prompt hearing and disposition of matters pending therein, and the functions set forth in section 3C; and it may issue such writs, summonses and other processes and such orders, directions and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration; provided, however, that general superintendence shall not include the authority to supersede any general or special law unless the supreme judicial court, acting under its original or appellate jurisdiction finds such law to be unconstitutional in any case or controversy. Nothing herein contained shall affect existing law governing the selection of officers of the courts, or limit the existing authority of the officers thereof to appoint administrative personnel.

RULES AND REGULATIONS

Massachusetts Rules of Criminal Procedure

Rule 30.

(a) Unlawful Restraint. Any person who is imprisoned or whose liberty is restrained pursuant to a criminal conviction may at any time, as of right, file a written motion requesting the trial judge to release him or her or to correct the sentence then being served upon the ground that the confinement or restraint was imposed in violation of the Constitution or laws of the United States or of the Commonwealth of Massachusetts.

(b) New Trial. The trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done. Upon the motion the trial judge shall make such findings of fact as are necessary to resolve the defendant's allegations of error of law.

(c) Post Conviction Procedure.

(1) Service and Notice. The moving party shall serve the office of the prosecutor who represented the

Commonwealth in the trial court with a copy of any motion filed under this rule.

(2) Waiver. All grounds for relief claimed by a defendant under subdivisions (a) and (b) of this rule shall be raised by the defendant in the original or amended motion. Any grounds not so raised are waived unless the judge in the exercise of discretion permits them to be raised in a subsequent motion, or unless such grounds could not reasonably have been raised in the original or amended motion.

(3) Affidavits. Moving parties shall file and serve and parties opposing a motion may file and serve affidavits where appropriate in support of their respective positions. The judge may on rule on the issue or issues presented by such motion on the basis of the facts alleged in the affidavits without further hearing if no substantial issue is raised by the motion or affidavits.

(4) Discovery. Where affidavits filed by the moving party under subdivision (c)(3) establish a prima facie case for relief, the judge on motion of any party, after notice to the opposing party and an opportunity to be heard, may authorize such discovery as is deemed appropriate, subject to appropriate protective order.

(5) Counsel. 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. The court, after notice to the Commonwealth and an opportunity to be heard, may also exercise discretion to allow the defendant costs associated with the preparation and presentation of a motion under this rule.

(6) Presence of Moving Party. A judge may entertain and determine a motion under subdivisions (a) and (b) of this rule without requiring the presence of the moving party at the hearing.

(7) Place and Time of Hearing. All motions under subdivisions (a) and (b) of this rule may be heard by the trial judge wherever the judge is then sitting. The parties shall have at least 30 days notice of any hearing unless the judge determines that good cause exists to order the hearing held sooner.

(8) Appeal. An appeal from a final order under this rule may be taken to the Appeals Court, or to the

Supreme Judicial Court in an appropriate case, by either party.

(A) If an appeal is taken, the defendant shall not be discharged from custody pending final decision upon the appeal; provided, however, that the defendant may, in the discretion of the judge, be admitted to bail pending decision of the appeal.

(B) If an appeal or application therefor is taken by the Commonwealth, upon written motion supported by affidavit, the Appeals Court or the Supreme Judicial Court may determine and approve payment to the defendant of the costs of appeal together with reasonable attorney's fees, if any, to be paid on the order of the trial court after entry of the rescript or the denial of the application. If the final order grants relief other than a discharge from custody, the trial court or the court in which the appeal is pending may, upon application by the Commonwealth, in its discretion, and upon such conditions as it deems just, stay the execution of the order pending final determination of the matter.

(9) Appeal Under G. L. c. 278, § 33E. If an appeal or application for leave to appeal is taken by the Commonwealth under the provisions of Chapter 278, Section 33E, upon written notice supported by affidavit, the Supreme Judicial Court may determine and approve payment to the defendant of the costs of appeal together with reasonable attorney's fees to be paid on order of the trial court after entry of the rescript or the denial of the application.

Massachusetts Rules of Professional Conduct

Rule 3.7(a). A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

MASS. R. APP. P. 16(K)

I hereby certify that this brief complies with the rules of court pertaining to the filing of briefs, including, but not limited to: Mass. R. App. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. App. P. 16(e) (references to the record); Mass. R. App. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. App. P. 16(h) (length of briefs); Mass. R. App. P. 18 (appendix to the briefs); and Mass. R. App. P. 20 (form of briefs, appendices, and other papers).

Caroline S. Donovan

AFFIDAVIT OF SERVICE

I, Caroline Donovan, counsel for Petitioners-Appellants Kevin Bridgeman, Yasir Creach, and Miguel Cuevas, do hereby certify under the penalties of perjury that on this 25th day of November, 2014, I caused a true copy of the foregoing document to be served by Federal Express and electronic mail on the following counsel for the other parties:

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Dated: November 25, 2014