

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK, ss.

NO. SJC-12157

KEVIN BRIDGEMAN,
and others

Petitioners/Appellants

v.

DISTRICT ATTORNEY FOR THE SUFFOLK DISTRICT,
and others

Respondents/Appellees.

ON RESERVATION AND REPORT FROM THE SUPREME
JUDICIAL COURT FOR SUFFOLK COUNTY

BRIEF OF *AMICUS CURIAE*,
THE BOSTON BAR ASSOCIATION

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**CORPORATE DISCLOSURE STATEMENT OF
THE BOSTON BAR ASSOCIATION**

Pursuant to Supreme Judicial Court Rule 1:21(b)(i), the Boston Bar Association ("BBA"), is a non-profit corporation organized under the laws of the Commonwealth of Massachusetts. The BBA is a bar association established almost 250 years ago, and currently has more than 12,000 members. There is no parent corporation or publicly-held corporation that owns 10% or more of the BBA's stock.

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I. INTEREST OF AMICUS CURIAE

The Boston Bar Association ("BBA") was founded in 1761 by John Adams and other Boston lawyers and is the nation's oldest bar association. The BBA's mission is to facilitate access to justice, advance the highest standards of excellence for the legal profession, and serve the community at large. From its early beginnings, the BBA has served as a resource for the judicial, legislative, and executive branches of government.

The BBA respectfully submits this brief pursuant to Mass. R. App. P. 17 and the Court's solicitation of amicus briefs to address the following issue:

Whether the 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 as the analyst, who are collectively referred to as the "Dookhan defendants," are entitled to a comprehensive remedy, including, whether all cases involving misconduct by Dookhan should be dismissed or subjected to a court-imposed deadline.

Bridgeman v. District Attorney for the Suffolk District, No. SJ-2014-0005, Amicus Announcement (September 16, 2016).

The interest asserted by the BBA as amicus in this case is to facilitate access to justice for all

defendants in criminal cases and to ensure the timely, fair and efficient administration of justice. More specifically, this matter raises important access to justice issues concerning defendants' rights to address and remedy adverse criminal dispositions on drug-related offenses that were obtained through the use of tainted or falsified evidence. It also raises compelling issues regarding the administration of justice. The systemic misconduct of Annie Dookhan ("Dookhan") has affected a staggering number of criminal cases and, as has become more evident over the years, it is unlikely that the judicial system can process and address each of these cases on an individual basis to ensure the fair administration of justice.

The BBA first addressed the misconduct of Dookhan in 2012, when it created the Drug Lab Task Force (the "Task Force") to review the facts regarding Dookhan's misconduct and to make recommendations for change. In its subsequent report, the Task Force noted the extraordinary cost of Dookhan's misconduct, both in terms of monetary expense and, more importantly, in terms of the damage done to the public's confidence in the Massachusetts criminal justice system. See Report

of the Boston Bar Association Drug Lab Crisis Task Force (February 11, 2014), p. 1, available at <http://www.bostonbar.org/docs/default-document-library/bba-drug-lab-crisis-task-force-report.pdf>. The Task Force also recommended that prosecutors, defense counsel, judges and policy makers continue their "extraordinary joint efforts" to resolve promptly the open criminal cases related to Dookhan's misconduct. Id.

In the years since the Task Force issued its report, all stakeholders in the criminal justice system have worked diligently to address both open and closed cases affected by Dookhan's misconduct. Despite these efforts, however, an already overburdened criminal justice system is now confronted with the stark reality that there are more than 20,000 unresolved cases impacted by Dookhan's malfeasance. The BBA submits that this Court now should impose a global remedy that secures access to justice and the fair administration of justice for each of the defendants in these cases and, critically, takes a significant step toward bringing the Dookhan scandal to a final resolution.

II. STATEMENT OF THE CASE AND THE FACTS

The Dookhan misconduct at the Hinton Drug Lab in Jamaica Plain has been well documented and will not be repeated here in detail.¹ As this Court previously found, "[i]t is undisputed that the allegations of serious and far-reaching misconduct by Dookhan at the Hinton drug lab have raised significant concerns about the administration of justice in criminal cases where . . . the drugs at issue were analyzed at that facility." See Commonwealth v. Charles, 466 Mass. 63, 89 (2013). The Court noted that, although the full scope of Dookhan's misconduct was not yet known, thousands of cases had been compromised. Id.

In 2012, special "drug lab sessions" were created to deal with post-conviction matters arising from Dookhan's misconduct and specific judges in seven counties of the Commonwealth were appointed to preside

¹ The BBA adopts the Statement of the Case and Statement of Facts set forth in the brief filed by the Petitioners and Intervener Committee for Public Counsel Services (the "Bridgeman Brief"), to the limited extent they detail the factual background of Dookhan's misconduct and the cases affected by that misconduct and to the extent they detail the procedural history of this matter. See Bridgeman Brief, pp. 5-38. However, the BBA does not adopt and takes no position as to any other factual issues raised in the Bridgeman Brief, and, at this time, the BBA takes no position on the so-called "Farak scandal." See Bridgeman Brief, pp. 32-38.

over these sessions. See Charles, 466 Mass. at 65-66. In addition, five retired Superior Court judges also were appointed as "Special Judicial Magistrates" to assist with hearings and motions. Id. These judges and Special Judicial Magistrates worked diligently to address post-conviction issues arising from Dookhan's misconduct and they re-adjudicated a number of cases. Id.

As these drug lab sessions continued, this Court made significant rulings in other Dookhan related cases. Critically, in 2014, this Court held that, "[w]here Dookhan signed the certificate of drug analysis as either the primary or secondary chemist in the defendant's case, the defendant is entitled to a conclusive presumption that Dookhan's misconduct occurred in his case, that it was egregious, and that it is attributable to the Commonwealth." See Commonwealth v. Scott, 467 Mass. 336, 338 (2014). However, the Court also held that each individual defendant must demonstrate a reasonable probability that knowledge of Dookhan's misconduct would have materially influenced his decision to tender a guilty plea. Id. The Court further reminded 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." Id. at 358. As a result, the Court's ruling in Scott still required a case by case evaluation of adverse dispositions. At that time, the Court noted that, "[w]e cannot expect the defendants to bear the burden of a systemic collapse, but we also cannot allow the misconduct of one person to dictate an abrupt retreat from the fundamentals of our criminal justice system." Id. at 354, n.11.

In 2015, this Court ruled that any defendant granted a new trial based on Dookhan's misconduct could not be charged with a more serious offense, or given a more severe sentence than originally imposed. See Bridgeman v. District Attorney for the Suffolk Dist., 471 Mass. 465, 468 (2015). The Court, however, again declined to impose a global remedy at that time and found that "implementation of a 'one size fits all' approach is not presently a workable solution." Id. at 487 (declining to implement a global remedy "at this time.").

In May of 2016, lists of cases affected by Dookhan's misconduct were compiled by the various

District Attorneys' offices and submitted to the American Civil Liberties Union Foundation of Massachusetts ("ACLUM"). Based on these lists, a comprehensive single list of cases affected by Dookhan's misconduct has now been assembled. There are approximately 24,391 cases where Dookhan signed the drug lab certificate as either the primary or secondary chemist and where the defendant suffered an adverse disposition. See Record Appendix of Petitioners ("R. App.") at 1940; Bridgeman Brief, p. 17-18. Only 1,500 or so of these approximately 24,000 cases have been litigated or re-adjudicated since Dookhan's malfeasance first came to light in 2012. See R. App. at 1938-39; Bridgeman Brief at 42. The vast majority of these 24,391 cases, approximately ninety-one percent (91%), are District Court cases. See R. App. at 1944-45; Bridgeman Brief at 16.

III. SUMMARY OF THE ARGUMENT

The defendants in these cases should not bear the burden of coming forward to address adverse dispositions based on tainted or falsified evidence, particularly where Dookhan's "egregious" misconduct has resulted in a systemic problem affecting thousands of cases. Absent a global remedy, a significant

number of these adverse dispositions will remain unchallenged and intact. The defendants will continue to suffer the consequences of misconduct attributable to the government, and that misconduct will not be fully remedied or abated. See, infra, pp. 9-12.

Principles of access to justice and the fair administration of justice warrant vacating these adverse dispositions and putting the burden on the Commonwealth to come forward and re-prosecute specific cases as it deems appropriate. That approach will remedy and abate the Commonwealth's "egregious" misconduct in a comprehensive manner and will reduce the number of cases that will need to be resolved by the judicial system, appropriately focusing prosecutorial and defense resources on only those cases that the government decides to re-prosecute. See, infra, pp. 13-16.

IV. ARGUMENT

A. **The Commonwealth, and not the Dookhan Defendants, Should Bear the Burden of Addressing the Adverse Dispositions Affected by Dookhan's Misconduct, and Principles of Access to Justice and the Fair Administration of Justice Warrant the Imposition of a Global Remedy at This Time.**

The criminal justice system now finds itself at a crossroads with regard to Dookhan's malfeasance - after a tremendous expenditure of resources and four years litigating these matters, the vast majority of cases impacted by Dookhan's misconduct remain unresolved. For the first time, a comprehensive list of cases where Dookhan signed a drug lab certificate as either the primary or secondary chemist has been compiled. This list demonstrates that there are approximately 24,000 cases impacted by Dookhan's malfeasance and only about 1,500 of these cases have been re-adjudicated since her misconduct was exposed in 2012. See R. App. at 1938-39; Bridgeman Brief, p. 42. The sheer magnitude and systemic reach of Dookhan's misconduct is now manifest, and the process and procedures that may once have been deemed feasible and effective by this Court can no longer serve the interests of the fair, timely and efficient administration of justice. Accordingly, the BBA

submits it is time for this Court to impose a global remedy.²

In light of Dookhan's malfeasance and its widespread impact, the thousands of remaining defendants should not bear the burden of coming forward to address their adverse dispositions. See Lavallee v. Justices in the Hampden Superior Court, 442 Mass. 228, 246 (2004) (finding that "the burden of a systemic lapse is not to be borne by defendants."). Instead, drug related charges where Dookhan was the primary or secondary chemist should be vacated and the burden should be on the government to re-prosecute those cases it chooses to pursue. Id.; see also Scott, 467 Mass. at 352 ("[I]n 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.").³

The current process, including the notice recently sent to approximately 20,000 defendants last

² The vast majority of the defendants in these cases are no longer incarcerated on the drug related charges impacted by Dookhan's misconduct. See Bridgeman Brief, pp. 16-18, 20.

³ In these circumstances, the Commonwealth is in the best position to determine how to allocate its resources and identify those cases which merit re-prosecution, whether based on strength of admissible evidence or public safety concerns.

month, amply illustrates the need for a global remedy.⁴ It has been four years since the Dookhan scandal first came to light and even longer since these defendants received their adverse dispositions. It is likely that some number of defendants cannot be reached at the addresses where notice was sent and that these defendants will never receive the notice.⁵ Similarly, many of the defendants who do receive notice may not seek counsel and may not, without legal advice, understand their rights or what course of action they should take. Other defendants may simply discard the notice without regard to its content. In the end, many Dookhan defendants will not step forward to challenge their adverse dispositions.

⁴ There is intense disagreement between the various District Attorneys and the ACLU about the adequacy of the language used in the notice itself, a point which highlights the difficulty of simply putting defendants on fair notice of the Dookhan misconduct and their potential rights. See Bridgeman Brief, pp. 47-50. A global remedy renders this debate moot.

⁵ This likely will occur despite the best efforts of the District Attorneys' offices. The difficulty of providing notice is highlighted by a letter from the District Attorneys sent to Justice Botsford on August 25, 2016, indicating that notice will be sent to "best current addresses" and that a second round of mailings will have to be made for notices returned undeliverable using a "next best address." See No. SJC-12157, Dkt. Entry No.3, Emergency Motion for an Order Staying the Mailing of "Notice Letters" to Dookhan Defendants, Attachment A.

Indeed, the District Attorneys contend in part that no global remedy is needed here because only some of the defendants will challenge their adverse dispositions after receiving notice, and that the actual number of litigated cases will be entirely manageable. See R. App. at 611; Bridgeman Brief, p. 49. That contention presumes that a significant number of defendants will not challenge their adverse dispositions.

There are other reasons why many defendants may never challenge, or have the opportunity to challenge, their adverse dispositions, including the inability of the Committee for Public Counsel Services to provide attorneys for each of these cases. See Bridgeman Brief, pp. 24-32.

The net result of the current process will be that a certain and significant number of adverse dispositions that were obtained by "egregious" misconduct attributable to the Commonwealth will remain intact. Thus, by default, many Dookhan defendants will continue to suffer the consequences of "egregious" government misconduct and, absent a global

remedy, such misconduct will not be remedied or abated in any systemic or comprehensive way.⁶

Allowing these adverse criminal dispositions to stand in the face of tainted or falsified evidence is inconsistent with due process and undermines the integrity of the criminal justice system, particularly given the broad impact of Dookhan's malfeasance. The Court should exercise its powers of general superintendence to impose a global remedy vacating the adverse dispositions on drug related charges in all of the approximately 24,000 cases at issue, excluding only those cases that were re-adjudicated after Dookhan's misconduct came to light in 2012 and any cases adjudicated for the first time after her conduct was exposed. See M.G.L. c. 211, § 3; Lavallee, 442 Mass. at 246 (exercising discretionary powers under

⁶ The collateral consequences facing the Dookhan defendants include potential deportation, loss of drivers' licenses, loss of access to affordable housing and student loans, and lost job opportunities. See Bridgeman Brief, p. 18.

M.G.L. c. 211, § 3 to impose procedure to safeguard defendants' rights to counsel).⁷

The drug related charges that were not re-adjudicated should be dismissed without prejudice and the various District Attorneys should be given at least one (1) year, or a longer period as the Court deems appropriate, to re-prosecute those cases. Any cases not re-prosecuted within that one year period (or longer period), automatically should be dismissed with prejudice. This global remedy should apply only to the specific drug related charges affected by Dookhan's misconduct and should not apply to any other non-drug related charges brought as part of the same complaint or indictment.

The BBA acknowledges the Court's reluctance to date to use its extraordinary powers to impose a global remedy. The BBA respectfully submits that, with the scope of Dookhan's malfeasance now more fully clear and with so many cases left unresolved after

⁷ It appears that the approximately 24,000 cases include some cases that were re-adjudicated after the Dookhan misconduct came to light in 2012 and where an adverse disposition still remains. See Bridgeman Brief, p. 42, n.144. The BBA does not include those cases in its requested remedy and takes no position as to whether any remaining adverse dispositions in those re-adjudicated cases ultimately should be vacated or dismissed.

years of litigation, it is time to re-consider the current process. The impact of Dookhan's misconduct is so pervasive, and so incapable of being timely remedied on a case by case basis, that this is indeed one of those rare "most exceptional circumstances" where the Court should exercise its extraordinary powers to impose a global remedy. See Lavallee, 442 Mass. at 246.

Adopting a global remedy at this juncture will allow both prosecutors and defense counsel to focus their limited resources on the specific cases that are re-prosecuted. That, in turn, will assist the criminal justice system by significantly reducing the number of cases that will have to be re-adjudicated.

Without a global remedy, it is likely that many of these Dookhan cases will be litigated for years to come, with a concurrent expenditure of time and resources that an already strained criminal justice system can ill afford. At the end of that arduous and costly litigation and despite the best efforts of all the stakeholders here, a significant number of adverse dispositions obtained with tainted or falsified evidence will remain unchallenged and intact. By imposing a global remedy, this Court will mitigate the

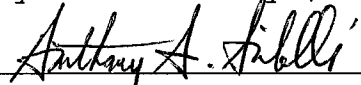
impact of the Commonwealth's "egregious" misconduct
and it will reaffirm the commitment of the judicial
system to due process and fairness.

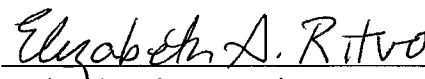
CONCLUSION

For any cases that have not been re-adjudicated since 2012 (or prosecuted for the first time since then), the Court should vacate the adverse dispositions on all drug related charges where Dookhan was the primary or secondary chemist, and those charges should be dismissed without prejudice. The District Attorneys should be given a period of at least one (1) year, or longer as the Court deems appropriate, to re-prosecute individual charges. Any charges not re-prosecuted within that one year period (or any longer period set by the Court) automatically should be dismissed with prejudice and further prosecution barred.

BOSTON BAR ASSOCIATION

By its attorneys,

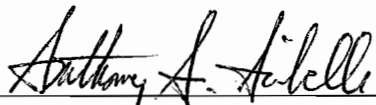

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October 24, 2016

Rule 16(k) Statement

I hereby certify that the foregoing Brief Of
Amicus Curiae, the Boston Bar Association, complies to
the best of my knowledge and belief, with the Rules of
Court pertaining to the filing of appellate briefs,
including those requirements specified in Mass. R.
App. P. 16(k).



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Certificate of Service

I hereby certify that on this 24th day of this October, 2016, I caused to be served two copies of the foregoing Brief Of Amicus Curiae, the Boston Bar Association, by first-class mail, on the following counsel of record:

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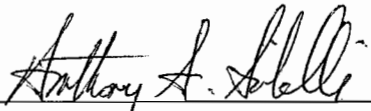
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