COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK COUNTY NO. SJC-11764

KEVIN BRIDGEMAN, and others

V.

DISTRICT ATTORNEY FOR THE SUFFOLK DISTRICT,
and another

REPLY BRIEF FOR THE COMMITTEE FOR PUBLIC COUNSEL SERVICES

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I.

CPCS SHOULD BE PERMITTED TO INTERVENE BECAUSE THE DISTRICT ATTORNEYS HAVE DEMONSTRATED BEYOND ANY DOUBT THAT THEY WILL NOT VOLUNTARILY ASSIST IN RESOLVING THE DOOKHAN CRISIS, AND BECAUSE THERE IS NO STATEWIDE AGENCY IN THE COMMONWEALTH OTHER THAN CPCS WITH A LEGITIMATE INTEREST IN DOING SO.

One might reasonably imagine a justice system in which prosecutors who learned they had obtained fraudulent convictions would wish to identify those whom they had unwittingly harmed and affirmatively seek to notify them of the injustice. See generally NACDL and MACDL Amicus Br. 7-25. We do not have such a system, as demonstrated by the Commonwealth's brief in this case, which proceeds from the remarkable premise that the District Attorneys' legal and ethical responsibility for the Hinton lab fiasco begins and ends with their in-court responses to those Dookhan defendants who have filed motions to vacate.

As to the many thousands of Dookhan defendants who remain unidentified, the District Attorneys alternately (1) pretend that they have "elected" to sit on their rights, (2) boast of having "voluntarily expended time and resources [in September, 2014, in the course of the instant litigation] to identify . . . potentially affected defendants," DA Br. 58, and (3) suggest that CPCS is itself to blame for those Dookhan defendants who remain unidentified, as evidenced by CPCS's

supposed failure to "[]ever provide[] an affidavit [averring] that the [identifying] information [provided by the Commonwealth to the single justice in September, 2014] did not exist within [CPCS's] own databases and case tracking systems." DA Br. 59.

With respect to the District Attorneys' proposition that thousands of unidentified and unrepresented Dookhan defendants have "elected" to stand pat, CPCS rests upon the petitioners' reply brief, which refutes that proposition completely. See Argument III, post. As to the latter suggestion -- i.e., that CPCS possesses the data points needed to effectively identify the whole population of Dookhan defendants, and that this is somehow evidenced by CPCS's failure to provide an affidavit to the contrary -- the Commonwealth's contention is simply untrue.

Since March 12, 2013, when CPCS first sought to intervene in the Charles and Milette cases then pending before the single justice, CPCS has been informing this Court, with great specificity, of its efforts to "identify[] affected clients," and of the "[d]ifficulties" that it has encountered in doing so (R.A. 359-361 [Affidavit of Chief Counsel Benedetti, ¶¶6-23]. On January 6, 2014, i.e., about five months after the Meier list was released, CPCS informed the Court of the "information" which the Meier list "lack[ed]" but which was "highly significant to the process CPCS must

undertake" to connect Dookhan-tainted evidence to docket numbers (R.A. 322 [Affidavit of Nancy J. Caplan, ¶36]). See also R.A. 320-326 (Affidavit of Attorney Caplan, ¶¶28-47) (describing in exhaustive detail what information CPCS needed, but lacked, in order to reliably link the names on the Meier list to docket numbers in the district and superior court).

> In an effort to fill the gaps in the Meier list, [Chief Counsel Benedetti] wrote to the District Attorneys of each of the seven affected counties on February 11, 2014, requesting information in their custody or control necessary in order for CPCS to identify, locate, and counsel defendants convicted in Dookhan-involved cases. . . . Specifically, [he] asked the District Attorneys to provide CPCS with the police report, booking sheet, docket number, and drug analysis certificate(s) associated with the Meier list entries for their county. . . . As of April 11, 2014 -- i.e., two months after [Chief Counsel Benedetti's] initial request for information and more than five weeks after Scott[1/] was decided -- none of the District Attorneys whose offices have relied on Dookhan's work product to obtain criminal convictions had responded to [his] letter. Accordingly, [Chief Counsel Benedetti] sent a follow-up letter to the District Attorneys, referencing Scott and reiterating the need for information in their custody or control that would allow CPCS to identify in a reasonably timely manner the individuals whose names appear on the Meier list. [As of May 27, 2014, when CPCS filed the instant motion to intervene], only the Middlesex County District Attorney's office ha[d] responded (R.A. 833-834 [Affidavit of Chief Counsel Benedetti, ¶¶7-13]).

Chief Counsel Benedetti's letters to the District

1/Commonwealth v. Scott, 467 Mass. 336 (2014).

Attorneys of February 11, 2014 (copies of which are appended to his affidavit in support of the instant motion to intervene) again described in detail the information that CPCS is "missing" but believes is readily "accessible" to the District Attorneys in order to connect the names on the Meier list to docket numbers (R.A. 860-861, 863-864, 866-867, 869-870, 872-873, 875-876, 878-879). The only response that CPCS has received from the respondent District Attorneys to its multiple requests for assistance in obtaining identifying information in the Commonwealth's control or custody has been their letter, dated June 2, 2014, in which they describe in fulsome detail why they believe that identifying Dookhan defendants is not their problem (R.A. 978-980).[2/]

For these reasons, the Commonwealth's contention that CPCS is to blame for the failure of the system to identify the bulk of Dookhan defendants is entirely specious and cannot prevail.[3/]

[2/]As to its belated production of necessary identifying information during the course of this litigation before the single justice, the respondent District Attorneys misleadingly characterizes as "voluntary" that which is its duty. See Mass. R. Prof. C. 3.8(j), as appearing in 428 Mass. 1305 (1999) ("The prosecutor in a criminal case shall . . . not avoid the pursuit of evidence because the prosecutor believes it will damage the prosecutor's case or aid the accused").

[3/]The data point that most definitively links a Dookhan-tainted drug sample to a docket number and,

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Finally, the Commonwealth objects to CPCS's intervention by pressing hyper-technical readings of Mass. R. Civ. P. 24(a), and ripeness doctrine. These objections ignore the import of the single justice's conclusion that the time has come for the full Court to deal with as much of the impact of the Dookhan disaster as is possible "at this juncture" (R.A. 1132). See Diatchenko v. District Attorney for the Suffolk Dist., 466 Mass. 655, 658 n.5 (2013) ("[w]here the single justice has, in [her] discretion, reserved and reported the case to the full court, we grant full appellate review of the issues reported") (citations omitted).

CPCS should be permitted to intervene because the many thousands of indigent Dookhan defendants who remain unidentified have a right to be heard, and because there is no statewide entity other than CPCS which has a legitimate interest in giving them a voice.

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hence, to an individual Dookhan defendant is the police department case number (referred to by the Boston police department as the "cc number"), which typically is entered on the drug receipt by the police officer who delivered the alleged drug evidence to the Hinton lab. The police department case number is, by definition, prosecution information. It does not figure into CPCS's case management system, as the District Attorneys know or should know. It does, however, figure into the District Attorneys' case management systems. Indeed, in response to the single justice's concerns, the Suffolk County District Attorney's office was able to generate docket numbers for most of Suffolk County's Meier list entries simply by, in effect, clicking on its Boston police department cc numbers to access a docket number. See also CPCS Br. 14 n.2.

The Commonwealth's objections to such intervention should therefore be rejected.

II.

THE ONLY FAIR AND EFFECTIVE SOLUTION TO THE DOOKHAN CRISIS IS TO ADOPT A COMPREHENSIVE REMEDY THAT RESOLVES ALL DOOKHAN CASES.

A. The Commonwealth's new affidavits address only a small sliver of all the Dookhan cases.

The District Attorneys have attached six new affidavits to their brief in a supplemental appendix (DA S.A. 1-16). These affidavits fail to show that the Scott approach can resolve the Dookhan cases, or that a comprehensive remedy is unnecessary. This is so for two reasons.

First, most of the affidavits do not specify the number of cases resolved during the time since the Scott decision. The affidavits thus fail to support the Commonwealth's claim that the Scott case-by-case approach is a "provably efficient and fair" means of resolving the problem (DA Br. 44).

Second, on the Commonwealth's own tally, the affidavits show that only about 1,100 Dookhan cases have been resolved in total (DA Br. 45). This is only a tiny fraction of the Dookhan cases resulting in convictions -- which undoubtedly number in the tens of thousands (see CPCS Br. 17). In fact, then, the affidavits strongly support the petitioner's claim

that, despite the decision in Scott, "little progress has been made toward remedying this [problem]." P. Br. 3. See CPCS Br. 19 (stating that problem "remains unresolved and, indeed, almost completely unchanged").[4/]

The affidavits thus fail to show that the Scott approach is capable of resolving the problem, or that there is no need for a comprehensive remedy.

B. A comprehensive remedy is necessary and justified by bedrock principles.

The District Attorneys suggest that the adoption of a comprehensive remedy would represent an "abrupt retreat from the fundamentals of our criminal justice system." DA Br. 18, 48, quoting Commonwealth v. Scott, 467 Mass. at 354-355 n.11. That is far from the case, and CPCS addresses that suggestion head-on.

The unique situation presented here boils down to this: Egregious government misconduct has led defendants to be convicted on deliberately falsified evidence. The scope of the misconduct was vast, extending back over a period of eight years. And there is now no

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[4/]Throughout their argument, the District Attorneys myopically ignore the remaining thousands of defendants, even asserting at one point that there is "no evidence of an unseen mass of such defendants" who wish to obtain relief (DA Br. 59). Most of those defendants, however, still have not even been identified -- a task in which all District Attorneys originally refused to assist (R.A. 978-980). Nor have those defendants been located and assigned counsel, unlike the few defendants whose cases have been resolved.

way to determine in which cases the falsification occurred. It is for that reason that the only effective remedy is to vacate the convictions in all cases.

Moreover, that remedy is wholly supported by a bedrock principle inherent in our law for centuries: "[I]t is better that ten guilty persons escape than one innocent suffer." 4 Blackstone, Commentaries 358 (1765), quoted in 1 LaFave, Criminal Procedure §1.5(e), at 195 & n.213 (3d ed. 2007) (noting that this principle represents "a fundamental value determination of our system").

Thus, the request for a comprehensive remedy, far from representing a "retreat," is founded on one of the most venerable "fundamentals of our criminal justice system." That remedy is both necessary and appropriate to resolve the Dookhan cases.[5/]

C. A comprehensive remedy is workable in cases involving pleas to multiple charges.

The District Attorneys assert that CPCS ignores "all the practical considerations that would be

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[5/]CPCS recognizes that in requesting this remedy, it asks a lot of this Court. The Court should note, however, that this remedy would not allow defendants who are actually guilty to evade all punishment. To the contrary, it appears that most Dookhan defendants, have, by now, served their entire committed sentences (see R.A. 318). See also Commonwealth v. Charles, 466 Mass. 63, 65 (2013) (showing that in the aftermath of the Dookhan revelations, only 589 defendants brought motions to stay execution of their sentences).

involved" in effecting a comprehensive remedy, and suggest that such a remedy is not "possible" (DA Br. 63). CPCS disagrees and, as to these general claims, relies on its prior description of the practical operation of that remedy.[6/]

In particular, the District Attorneys point to the situation where a defendant pled guilty both to a Dookhan charge and other charges at the same time (DA Br. 63 n.23). That situation, however, can be dealt with by a very simple rule: The plea to the Dookhan charge should be vacated, and the pleas to the other charges should be left intact.

An exception to this rule should exist, however, for cases where the Dookhan charge was the lead charge -- the "driving force" on the plea -- meaning that it carried the longest allowable sentence. See Commonwealth v. Velazquez-Ortiz (SJC No. 11795), Brief for Appellant, at 13-17, and cases cited. In such cases, the pleas to the other charges should not be vacated automatically, but the defendant should be permitted to bring a motion to vacate them.[7/]

[6/]The principal logistics of the remedy are outlined in CPCS' brief, at 25-33. Additional details of the same proposed remedy were addressed in the amicus brief filed by CPCS in the Scott case, at 26-47.

[7/]As to resentencing in such cases (where a Dookhan plea is vacated and the other pleas left intact), the

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III.

THE COURT SHOULD ESTABLISH A BRIGHT LINE RULE THAT PROTECTS DOOKHAN DEFENDANTS WHO SUCCEED IN VACATING THEIR PLEAS FROM RECEIVING A HARSHER SENTENCE THAN THE TERMS OF THE PLEA IN THE EVENT OF RE-CONVICTION.

Pursuant to Mass. R.A.P. 16(j), 365 Mass. 860 (1974), CPCS adopts the petitioners' arguments in their reply brief with respect to the District Attorneys' various theories for why it is supposedly "not necessary" (DA Br. 42) that defendants victimized by Dookhan's egregious misconduct be protected against harsher punishment in the event of re-conviction. P.R. Br., Argument I.

Furthermore, while the District Attorneys plainly believe that they are legally justified in seeking such harsher punishment, their continuing contention that tens of thousands of unidentified and unrepresented Dookhan defendants have freely "elected" to leave their tainted convictions intact (DA Br. 44, 53-54, 60) is not only unfounded in fact, but a logical and legal impossibility.

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rule should be equally simple: The sentences on the other pleas should also be left intact, with no automatic resentencing. Either party should be permitted to bring a motion seeking resentencing on the remaining charges, but any new sentence should not be permitted to exceed the original aggregate sentence. See P. Br., Argument I.

IV.

THE COMMONWEALTH'S CLAIM THAT DUAL-ROLE REPRESENTATION IN SCOTT HEARINGS GIVES RISE TO A DISABLING CONFLICT OF INTEREST IS WITHOUT MERIT, AND ITS ASSERTION THAT DUAL-ROLE REPRESENTATION IS A "PROBLEM OF CPCS' OWN MAKING" IS BOTH INACCURATE AND GROSSLY UNFAIR.

Acknowledging it has "always insisted" that plea counsel take the stand at Scott hearings (even before Scott was decided), the Suffolk County District Attorney's office asserts that a "clear conflict of interest" arises whenever an attorney who represented a Dookhan defendant at the plea stage undertakes to represent that defendant at a Scott hearing. DA Br. 72-74. To cure the putative "conflict" created by this scenario -- characterized by the District Attorneys as a problem "entirely of CPCS' own making," DA Br. 73 -- the District Attorneys suggest that plea counsel be ordered to simply "step[]-to-the-left," and that CPCS be ordered to "simply . . . re-assign[]" all Dookhan cases now being handled by plea counsel to "conflict-free counsel." DA Br. 73, 76. Such a process, in the District Attorneys' view, would permit this Court to "enforce the advocate-witness rule" set forth in Mass. R. Prof. C. 3.7(a), 426 Mass. 1396 (1998), while obviating any need for it to scrutinize the Suffolk County District Attorney's stratagem of invoking that rule to impede indigent defendants from vacating their Dookhan-tainted convictions with the assistance of former plea counsel. This argument should be rejected,

for the following reasons.[8/]

First, as a factual matter, the District Attorneys do not dispute Chief Counsel Benedetti's averment that "[a]bout ninety-five percent of the post-conviction assignments made by CPCS each year -- including all direct appeals and rule 30 motions -- are to private attorneys certified by the Private Counsel Division to accept such assignments," and that "[t]here are no more than 300 attorneys willing to accept such assignments" (R.A. 836).[9/] Perhaps, had CPCS anticipated the Suffolk

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[8/]The only substantive claim that the Commonwealth makes as to the applicability of rule 3.7 in these circumstances is its assertion that, because Scott hearings are open to the public, "the appearance of impropriety is still a concern." DA Br. 75. For the reasons stated in CPCS's principal brief, CPCS Br. 38-41, that concern does not outweigh the right of Dookhan defendants to the assistance of plea counsel to seek to remedy the egregious government misconduct at issue.

[9/]The District Attorneys assert that "only six defendants are represented by plea counsel in Suffolk County." DA Br. 73 n.27. This assertion is not correct. The portion of the record cited for it (R.A. 34-41) is a piece of the petition for relief pursuant to G.L. c.211, §3, which says nothing about how many Dookhan defendants are represented by plea counsel in Suffolk County (or anywhere else, for that matter). Contrary to the District Attorneys' baseless assertion, CPCS reiterates, through the affidavit of its Chief Counsel, that the "vast majority" of Dookhan assignments have been to plea counsel -- who are unlikely to be certified to handle post-conviction matters -- and that CPCS views such assignments as a "necessity" under the exceptional circumstances created by the Hinton lab fiasco. See R.A. 354-355, 359-361 (affidavits of Chief Counsel Benedetti describing practical problems of assigning qualified counsel to Dookhan defendants in light of the number of such assignments to be made and

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County District Attorney's litigation strategy with respect to rule 3.7(a), the agency would have been well-advised to seek to assign Dookhan cases (or at least Suffolk County Dookhan cases) to counsel who had no previous involvement in the case. But over ninety percent of the assignments of counsel that CPCS has made to defendants with potential Dookhan claims were made prior to March 12, 2013, when CPCS sought to intervene in the Charles and Milette cases then pending before the single justice (R.A. 368, 835). This was all well before CPCS had any inkling that the Suffolk County District Attorney's office would seek to use the fact that those assignments were made to plea counsel to its tactical advantage.

Having raised the rule 3.7(a) objection in the first place, it is cynical in the extreme for the Suffolk County District Attorney's office now to propose a "solution" that would require Dookhan defendants, who have been waiting for justice for years, to start over with new counsel who know nothing about the case, who likely are not certified to handle post-conviction matters, and whom the DAs wrongly presume to be chomping at the bit to take on these cases "either on a pro bono basis or" for the princely sum of fifty

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[9/](CONTINUED FROM PREVIOUS PAGE)
the limited pool of attorneys certified to handle post-conviction matters).

dollars an hour. DA Br. 73. Ultimately, the Commonwealth's proposed "step to the left" solution would amount to a massive, costly, and chaotic game of "musical chairs" in which there are not enough "seats" (i.e., lawyers) to go around.

Second, the Suffolk County District Attorney's claim that rule 3.7(a) forbids dual-role representation in Scott hearings because such representation gives rise to a "conflict of interest" is specious. Although "combining the roles of advocate and witness may create a conflict of interest, . . . such situations are governed by Mass. R. Prof. C. 1.7, 426 Mass. 1373 (1998) (conflict of interest), or Mass. R. Prof. C. 1.9, 426 Mass. 1342 (1998) (prior representation), not rule 3.7." Smaland Beach Ass'n v. Genova, 461 Mass. 214, 227 n.20 (2012) (emphases supplied). Conflicts under rule 1.7 or rule 1.9 "may be waived by the client either expressly or implicitly." Commonwealth v. Woodberry, 26 Mass. App. Ct. 636, 637 (1988). But the Suffolk County District Attorney's office is uninterested in such waivers, which do nothing to advance its litigation agenda (R.A. 885-886) (noting Suffolk County District Attorney's objection to dual-role representation notwithstanding Dookhan defendant's "informed consent" to such representation).

Moreover, it is well established that a witness may testify to certain events or communications without

effectuating a general waiver of the proponent's privilege. Commonwealth v. Goldman, 395 Mass. 495, 499-501 (1985). Thus, a judge hearing a Scott motion to vacate would be acting "well within her discretion" by sustaining objections to questions, asked of the defendant's attorney, which would elicit the content of irrelevant or privileged communications. Commonwealth v. Birks, 435 Mass. 782, 789 (2002).

When plea counsel testifies at a Scott hearing, the area of legitimate inquiry -- whether plea counsel's advice that the defendant accept the punishment imposed pursuant to the plea bargain would likely have been influenced by the evidence of Annie Dookhan's fraudulent misconduct -- is narrowly defined in the fourth and fifth factors of the Ferrara analysis adopted in Scott.[10/] Moreover, the substance of that testimony will already have been spelled out in an affidavit of counsel -- which prosecutors in affected counties other than Suffolk County have generally accepted as admissible (R.A. 315, 882-883). Accordingly, the Suffolk County District Attorney's contention that it should be permitted to "strip[] [Dookhan defendants] of [their] chosen counsel"

[10/]See Commonwealth v. Scott, 467 Mass. at 356 ("(4) whether the evidence would have influenced counsel's recommendation as to whether to accept a particular plea offer, and (5) whether the value of the evidence was outweighed by the benefits of entering into the plea agreement").

(R.A. 925) to effectuate some prosecutorial right to cross-examine plea counsel at Scott hearings is entirely spurious.

Third, "[a] genuine conflict of interest arises whenever trial counsel is called upon to give testimony adverse to his client." Commonwealth v. Shraiar, 397 Mass. 16, 21 (1986) (emphasis supplied). There is no legitimate reason to presume that the testimony of plea counsel at a Scott hearing will harm the Dookhan defendant. Any concern that a prosecutor's cross-examination of plea counsel will be so effective as to elicit some unknown devastating evidence does not rise to the level of a genuine conflict of interest.

Finally, even assuming for the sake of argument that plea counsel was presented with an ethical difficulty in that her testimony would somehow be adverse to the Dookhan defendant, such a problem would not be remedied by disqualifying plea counsel from the Scott hearing. Were the case to be reassigned to an entirely new attorney, the problem would remain the same: plea counsel would be in a position of having to provide testimony which was adverse to her former client, thus violating her duty of loyalty. If questioned about such imagined adverse matters, plea counsel would likely invoke the attorney-client privilege, regardless of whether she would then go on to function as motion counsel.

For these reasons, the District Attorneys' argument concerning the advocate witness rule are without merit and should be rejected.

V.

THE COURT SHOULD RULE THAT: (A) THE TESTIMONY OF A DOOKHAN DEFENDANT AT A MOTION TO VACATE IS INADMISSIBLE AT A SUBSEQUENT TRIAL ON THE ISSUE OF GUILT, AND (B) THE PERMISSIBLE SCOPE OF CROSS-EXAMINATION OF A DEFENDANT WHO TESTIFIES IN SUPPORT OF A MOTION TO VACATE A DOOKHAN-TAINTED GUILTY PLEA MAY NOT SEEK TO DELVE INTO THE DETAILS OF THE DEFENDANT'S FACTUAL GUILT, UNLESS A CLAIM OF ACTUAL INNOCENCE HAS BEEN RAISED.

A. The Scope of Cross-examination.

The District Attorneys misapprehend CPCS's proposed evidentiary rule regarding the scope of cross-examination of a defendant (DA Br. 76-77). CPCS does not seek a rule precluding questioning regarding the alleged facts of a given case. Instead, it seeks a rule that the Commonwealth be restrained from questioning a defendant regarding his actual guilt or innocence. That rule would still leave the Commonwealth free to question the defendant regarding the nature and "strength of the evidence against him." Scott, 467 Mass. at 356-357.[11/]

CPCS does not seek to curtail a motion judge's ability to hear evidence regarding "such relevant facts as the circumstances of the defendant's arrest and

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[11/]The Commonwealth could also question the defendant about guilt or innocence where he "opens the door" in his pleadings or testimony by asserting factual innocence (see CPCS Br. 41).

whether the Commonwealth possessed other circumstantial evidence tending to support the charge of drug possession." Scott, 467 Mass. at 357. CPCS simply seeks a rule which would prevent the Commonwealth from reducing a defendant's claim for relief into a game of "gotcha" -- where the Commonwealth's strategy is to ask the defendant whether he is factually guilty, and then argue that he is a liar because his motion testimony contradicts his plea colloquy testimony. See, e.g., R.A. 1111-1120.

In weighing the injustice of the Commonwealth's techniques, this Court should keep in mind that the majority of Dookhan defendants' pleas were extracted through threats of mandatory minimum periods of incarceration.[12/] There is great unfairness when we bludgeon defendants into pleading guilty with mandatory minimums -- which call for utterly proportion sentences -- and later allow the Commonwealth to cross-examine them about their factual guilt.

Mandatory minimums routinely coerce innocent and

[12/]As the Court is aware, the Chief Justice has recently stated pointed criticism of mandatory minimum sentences. See http://www.mass.gov/courts/docs/sjc/docs/speeches/sjc-chief-justice-gants-state-of-judiciary-speech-2014.pdf. See also Rakoff, Why Innocent People Plead Guilty, N.Y. Review of Books (Nov. 20, 2014) (concluding that "the prosecutor-dictated plea bargain system, by creating such inordinate pressures to enter into plea bargains, appears to have led a significant number of individuals to plead guilty to crimes they never actually committed").

partially innocent defendants who would otherwise go to trial to plead guilty. The system knows this and tacitly accepts it. Absent a limitation on the scope of cross-examination at a Scott hearing, prosecutors will readily be able to argue that "you can[not] believe a word" the Dookhan defendant says because he necessarily "lied" (R.A. 1081-1082), either at the plea colloquy or at the hearing, and is thus unworthy of rule 30 relief. Because this set-up is fundamentally unfair, the Court should limit cross-examination to the defendant's knowledge of the strength of the Commonwealth's evidence at the time of the plea.

B. The Simmons Solution.

The unfairness of the Commonwealth's "gotcha" cross is aggravated by the absence of a common-sense rule of the sort adopted in Simmons v. United States, 390 U.S. 377, 392-394 (1968). Such a rule would allow a defendant to litigate his post-conviction claim without proceeding at peril of generating testimony that could be used against him if he is granted a new trial. The Commonwealth's reliance on a ripeness challenge (DA Br. 78) belies the basis of its position: the Commonwealth would have no reason to object to a Simmons-style rule if it did not seek to keep available the very tool -- the admission of a defendant's motion testimony at a subsequent trial -- whose use it claims

is merely speculative.

A defendant who has been cowed into pleading guilty by the threat of a mandatory minimum, without benefit of the knowledge that the government's evidence was infected by fraud, should not then be made to play the Commonwealth's game of "Catch-22." In that game, the defendant must choose between (1) testifying in support of his new trial motion and generating evidence against himself at a hoped-for retrial; and (2) maintaining his privilege against self-incrimination by declining to testify, knowing that the absence of his testimony will cut against the allowance of his motion.

CPCS's proposal of a Simmons-style rule is ripe, reasonable, and necessary. This Court should adopt that proposal.

Respectfully submitted,

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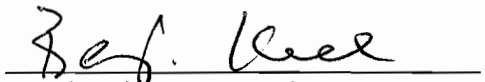
CERTIFICATE OF COMPLIANCE

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



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