COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK COUNTY

NOS. SJC-11462-
SJC-11466

COMMONWEALTH

V.

GEORDANO RODRIGUEZ
ADAM DAVILA
COREY BJORK
RAKIM D. SCOTT
RENE TORRES

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# BRIEF FOR THE COMMITTEE FOR PUBLIC COUNSEL SERVICES AND OTHERS AS AMICI CURIAE

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## ISSUE PRESENTED

Whether this Court, in the exercise of its supervisory and inherent powers, should adopt a comprehensive remedy for the falsification of evidence committed by chemist Annie Dookhan, which occurred in potentially tens of thousands of cases, where the alternative -- hearing these cases one at a time -- is not only unnecessary for proper analysis, but would compound the problem with prohibitive expense and massive delay, and would still fail to provide relief for all affected defendants.

## STATEMENT OF INTEREST OF AMICI CURIAE

The Committee for Public Counsel Services (CPCS), the Massachusetts public defender agency, is mandated by statute to provide counsel to indigent defendants in criminal proceedings. The present appeals arise from the fact that evidence has been falsified in criminal prosecutions for drug offenses, potentially in tens of thousands of cases. Since its clients are defendants in many such cases, CPCS has an immediate interest in

this problem and in fashioning a workable solution.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The Criminal Law Reform Project of the ACLU seeks an end to excessively harsh policies that result in mass incarceration and stand in the way of a just and equal society. The ACLU of Massachusetts (ACLUM) is one of the ACLU's statewide affiliates. Both the ACLU, through the Criminal Law Reform Project, and ACLUM work to reduce the number of people entering jails and prisons by focusing on reform at the front end of the criminal justice system. These organizations have appeared before many courts in matters involving criminal justice, and they have appeared before this Court with respect to the Commonwealth's drug lab crisis. See Commonwealth v. Charles, 466 Mass. 63 (2013).

The Massachusetts Association of Criminal Defense Lawyers (MACDL) is an incorporated association representing more than 1,000 experienced trial and appellate

lawyers who are members of the Massachusetts Bar and who devote a substantial part of their practices to criminal defense. MACDL is dedicated to protecting the rights of the citizens of the Commonwealth guaranteed by the Massachusetts Declaration of Rights and the United States Constitution. MACDL seeks to improve the criminal justice system by supporting policies and procedures to ensure fairness and justice in criminal matters. MACDL devotes much of its energy to identifying, and attempting to avoid or correct, problems in the criminal justice system. It files amicus curiae briefs in cases raising questions of importance to the administration of justice.

## STATEMENT OF THE CASE

Amici adopt the statements of the case set forth in the defendants' briefs.

## STATEMENT OF FACTS

Amici adopt the statements of facts set forth in the defendants' briefs.

Additional facts are stated in the course of the argument post.[1/]

## SUMMARY OF THE ARGUMENT

I. The problem underlying the cases before this Court is that a government chemist, Annie Dookhan, has falsified evidence in potentially 40,000 cases over a period of eight years. She has admitted to doing so during the last two to three years of that period. And her asserted production numbers during the first five years -- which were sometimes double those of the next most productive chemist -- all but compel the conclusion that she was doing so during that period as well (pp. 8-11).

In addition, defendants in Dookhan cases, in deciding whether to plead guilty or go to trial, were entirely unaware that Dookhan was falsifying evidence of an essential element. That lack of knowledge rendered their decisions to plead guilty defective

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[1/]The Hinton Laboratory record appendix filed by Rodriguez, and jointly used by three other defendants, is cited as "(HRA)." The supplemental record appendix filed by Davila is cited as "(D.SRA)." The briefs filed by the defendants are cited by their initials, e.g., Rodriguez's brief as "(R.B.)." The Commonwealth's brief in the Rodriguez case is cited as "(C.B.R.)."

under any of the three theories argued by the defendants in these cases (pp. 11-13).

II. Given the magnitude of the problem, no proper solution can be found in our usual case-by-case approach to providing relief, which, in this situation, is actually the obstacle to a solution. That approach would place a massive burden on our courts, beginning with its prohibitive cost. It would result in years of delay, not only for these defendants, who are suffering ongoing consequences due to the tainted convictions, but for other criminal and civil cases as well. And because some defendants would never challenge their convictions, if only for lack of knowledge of the problem, this approach would still fail to provide relief for all affected defendants (pp. 14-20).

Furthermore, the case-by-case approach is unnecessary to a proper analysis of the several factors considered in these cases below (e.g., whether Dookhan was the primary or secondary chemist). Whichever way these factors may cut in a particular case, the case could have been affected by the misconduct or its nondisclosure (pp. 20-26).

III. The only proper and viable approach to this problem is to treat all convictions in Dookhan cases as presumptively tainted, and to adopt a comprehensive remedy. Amici offer a two-part solution: first, this Court should vacate all of the Dookhan convictions; and second, this Court should resolve all the underlying charges in the Dookhan cases (pp. 26-27). The proposed comprehensive remedy should be implemented by an administrator appointed by this Court who would operate under its supervision (pp. 44-47).

First, vacating the convictions is necessary because the case-by-case approach would be disastrously unworkable, and because there is no way to ascertain which, or how many, cases were actually affected by the misconduct. This remedy is also fair. It was a government chemist who created this unprecedented problem and it is therefore government, and not defendants and taxpayers, that should suffer the consequences of needing to provide a comprehensive remedy (pp. 31-34).

Second, a proper remedy should include a resolution of the underlying charges in these cases (pp. 34-35). The charges in all Dookhan cases should be dismissed with

prejudice. That remedy is appropriate because it is proportionate -- the misconduct was egregious in the extreme, involving deliberate falsifications committed repeatedly over a period of years (pp. 36-38).

In the alternative, the Commonwealth could be allowed a limited opportunity to reprosecute particular cases, but only if it can do so with untainted evidence. To reprosecute, the Commonwealth should be required to make a preliminary showing that the evidence it will rely on is untainted beyond a reasonable doubt, and that the evidence would be sufficient to permit a finding of guilt. Any Dookhan case not reprosecuted within a period of one year would be dismissed by operation of the speedy trial rule (pp. 38-43).

This Court has ample authority to adopt this proposed remedy pursuant to its supervisory powers under G.L. c.211, §3, and its inherent powers under the Constitution of the Commonwealth of Massachusetts (pp. 27-29). Now is the time for this Court to exercise those powers. Dookhan has admitted her misconduct and the Commonwealth does not dispute the basic facts of the crisis. There is, therefore, no need to wait any longer

for further fact-finding or investigation. Indeed, because this disgraceful problem has undermined the very integrity of our judicial system, there is a need for decisive action, not least to show the will to fix it (pp. 30-31).

## ARGUMENT

### I.

### THE PROBLEM: DELIBERATE FALSIFICATION OF EVIDENCE IN POTENTIALLY TENS OF THOUSAND OF CASES.

These appeals cases present this Court with a problem that is extremely grave and of unprecedented magnitude. Unless the problem is resolved by decisive action, these cases are but a harbinger of many more to come.

#### A. The Gravity of the Problem

A government chemist, Annie Dookhan, has deliberately falsified evidence used to convict defendants of criminal charges in our courts.

Dookhan has admitted to "dry-labbing" -- reporting positive test results without conducting any tests. She has admitted to contaminating samples with known drugs -- so that they would then test positive for the drug

charged. And she has admitted to changing test results -- "turn[ing] a negative into a positive" (HRA 45-46, 50, 120; D.SRA 20a-21a).[2/]

"The law forbids the State from obtaining a conviction based on false evidence." In re Investigation of W. Va. State Police Crime Lab., Serology Div., 190 W. Va. 321, 325 (1993) (hereinafter "In re Investigation"). Falsification of evidence defeats the entire purpose of our elaborately designed system of criminal justice -- to arrive at the truth. Short of blowing up the courthouse, it perpetrates perhaps the most grievous wound that can be inflicted on our ability to deliver justice.

Dookhan's falsifications were egregious and their effect was pernicious.

B. The Magnitude of the Problem

The scope of Dookhan's misconduct is vast and the number of cases affected is indeterminable.

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[2/]This list includes only the most shocking elements of Dookhan's misconduct. She has also admitted to numerous other improprieties, most of which were apparently designed to cover up her misconduct -- notably, forging the initials of other chemists in the evidence log (HRA 45), which compromised the chain of custody, and committing perjury in testimony given in court (R.B. 18-19; D.SRA 22a-23a). For a fuller list of Dookhan's improprieties, see R.B. 10-22.

The Hinton Laboratory's own records show that Dookhan was a chemist in the testing of 63,876 samples.[3] A recent investigation shows that she worked on a total of 40,323 cases. Meier Report,[4] at 3 (see post, at 54).

Dookhan has acknowledged committing deliberate misconduct over a period of two to three years (HRA 46, 50). That, however, is just the misconduct to which she has admitted. There is compelling reason to believe that she was falsifying evidence much earlier -- throughout the preceding five years and, indeed, beginning in her very first full year at the Lab (see post, at 23-24). And there is now no way to ascertain how long her misconduct actually occurred, or in which cases it occurred, which even Dookhan herself is unable to determine (HRA 53, 120-121). What is clear is that

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[3]This figure is derived from a graph and a set of charts prepared by the Lab, both showing the number of samples tested by Dookhan each year from 2004 to 2011 (HRA 83, 108-112, 119). The record includes a second set of similar looking charts (HRA 97-101), but its numbers do not correspond to those in the graph, and its purpose is unexplained. The first set of charts also contains the more conservative numbers.

[4]David E. Meier, The Identification of Individuals Potentially Affected by the Alleged Conduct of Chemist Annie Dookhan at the Hinton Drug Laboratory: Final Report to Governor Deval Patrick (Aug. 2013).

Dookhan's falsifications were pervasive and persistent, and that they potentially affected some 40,000 cases over a period of eight years (2004-2011).[5/]

The magnitude of the problem is catastrophic and daunting.[6/]

C. The Nondisclosure of the Problem

Moreover, the problem is not only the misconduct itself, but its nondisclosure -- the fact that it was unknown to defendants in deciding whether to plead guilty or go to trial.

Ninety-five percent of defendants in our system decide to enter pleas of guilty. Commonwealth v.

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[5/]Amici have seen no estimate of how many of these cases resulted in convictions. One might conservatively guess that convictions were obtained in at least 75% of these cases, which would be 30,000. In any event, the number is undoubtedly in the range of multiple tens of thousands.

[6/]Amici address only cases in which Dookhan was one of the chemists (hereinafter "Dookhan cases"), and take no position on other cases arising out of the Hinton Lab (including the Gardner case now before this Court). The Inspector General is investigating the apparent disarray at the lab generally, and his report will shed further light on the specifics of that problem. But there is no reason to think that it will contradict the specific facts already admitted by Dookhan herself concerning her falsifications.

Marinho, 464 Mass. 115, 127 (2013). But in Dookhan cases, none of the defendants making that decision had any idea that she was deliberately falsifying evidence that would be used to prove the first essential element of any drug offense -- that the substance was the drug charged. Commonwealth v. Vasquez, 456 Mass. 350, 361 (2010).[7/]

The defendants' lack of knowledge of the falsifications thus rendered their decisions to plead guilty defective under any of the three theories argued in most of the litigation below:

> (1) Newly discovered evidence. Commonwealth v. Grace, 397 Mass. 303, 305-306 (1986). Commonwealth v. Buck, 64 Mass. App. Ct. 760, 762-765 (2005).
>
> (2) Nondisclosure of exculpatory evidence. Brady v. Maryland, 373 U.S. 83, 87 (1963). Commonwealth v. Ellison, 376 Mass. 1, 22 & n.9 (1978). (See also R.B. 48-50).
>
> (3) Involuntariness of the plea. Brady v. United States, 397 U.S. 742, 755 (1970).

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[7/]While amici focus on defendants who pled guilty, the same is true, of course, of defendants who decided to go to trial. Those defendants, had they known of Dookhan's practice of falsification, certainly would have used it to impeach her test results in their cases.

Ferrara v. United States, 456 F.3d 278, 290 (1st Cir. 2006).[8/]

For Superior Court decisions accepting multiple theories as grounds for vacating pleas, see Commonwealth v. Baez-Franco, No. ESCR2009-1151 (April 25, 2013) (Cratsley, S.J.M.); Commonwealth v. Rodriguez, No. ESCR2007-875 (March 28, 2013) (Cratsley, S.J.M.), followed in part (May 29, 2013) (Lu, J.). Copies of the latter two decisions are reproduced in the addendum post, at 73-95.

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[8/]There is no question here that Dookhan was a member of the "prosecution team." She was a chemist in a government lab. Commonwealth v. Martin, 427 Mass. 816, 824 (1998) (state police chemist). See Commonwealth v. Woodward, 427 Mass. 659, 679 (1998) (medical examiner). And that lab was required by statute to test drugs submitted by the Commonwealth for prosecution. G.L. c.111, §12, subsequently repealed, St. 2012, c.139, §107. Moreover, Dookhan's email exchanges with prosecutors certainly make clear that she acted, and was regarded, as a member of the prosecution team. See R.B. 20-22; S.B. 40 n.13; B.B. 17 n.2. This is shown most graphically by her statement to one prosecutor: "I have the same attitude ... get them off the streets" (HRA 171a). Her knowledge of the falsifications is therefore attributable to the Commonwealth, even though prosecutors lacked actual knowledge of them. "[I]t matters not whether a prosecutor ... ever knew that [Dookhan] was falsifying the State's evidence. The State must bear responsibility for the false evidence." In re Investigation, 190 W. Va. at 325. See Commonwealth v. St. Germain, 381 Mass. 256, 261-262 n.8 (1980), and cases cited.

## II.

## THE OBSTACLE TO A SOLUTION: THE USUAL CASE-BY-CASE APPROACH TO RELIEF.

One of the great virtues of our criminal justice system is that it seeks to provide justice in each case individually, one case at a time. Lawyers and judges are thus trained to think about legal problems, and seek ways to solve them, by examining all the circumstances presented by individual cases. The defect of this virtue, however, is that the traditional system is ill-equipped to deal with "exceptional circumstances" of the sort presented here, where a remedy is needed for literally "thousands of cases that may have been compromised." Commonwealth v. Charles, 466 Mass. 63, 89 (2013).

In these circumstances, the case-by-case approach is actually the biggest obstacle to a solution. Resolving the problem by that approach is a practical impossibility.

As discussed below, any attempt to deal with the Dookhan cases one at a time would only compound the problem -- entailing a level of time, expense and delay that would cripple our system for years. And it would

do so to no good purpose because no individual analysis of these cases is necessary.

A. The Time and Expense of the Individual Approach

On the usual approach, a remedy in these cases would have to be sought by each defendant individually, by way of a motion for a new trial seeking to vacate the plea. This would result in a tidal wave of such motions. And most of those motions would typically proceed through numerous steps: factual investigation, hearings, decision, and appeal.

The time and expense required to process these cases one at a time would be staggering. This Court has said that the 589 hearings previously conducted in these cases on motions to stay sentences "plac[ed] an enormous burden on the Superior Court." Commonwealth v. Charles, 466 Mass. at 65. That, however, is nothing compared with the burden of conducting full-blown hearings on the merits of potentially tens of thousands of motions for a new trial in individual Dookhan cases.

The legislature has passed an initial appropriation of $30 million to fund expenses arising from the problems at the Hinton Laboratory generally. St. 2013, c.3, §2A. The Massachusetts District Attorneys Association predicted, correctly, that this sum would be grossly inadequate to "fix this mess." John Ellement, Prosecutors Say $30M Not Enough, Boston Globe, Nov. 3, 2012, at B2. The expenses thus far have already totaled $10.4 million. John Ellement & David Abel, Tally Climbs in Lab Scandal, Boston Globe, Aug. 21, 2013, at A1. And none but a handful of these cases have yet been dealt with in the courts.

CPCS estimates that the cost for assigned private counsel could be $30 million for Dookhan cases alone, at the trial court level alone.[9/] This figure does not

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[9/]This figure is derived by assuming 20 hours/case x $50/hour x 30,000 Dookhan cases resulting in convictions -- which, again, is a conservative guess (see ante, at 11 n.5).

For fiscal year 2014, CPCS has estimated that its expenses for Dookhan cases could be $10.4 million. That estimate, however, was submitted before the release of the Meier Report, which more than doubled the number of Dookhan cases that CPCS had been able to identify at the time of the estimate (see post, at 44-45).

include any representation on appeal, or representation at any level by staff public defenders. Nor, of course, does it include the time and expense incurred by prosecutors, judges and court personnel.

The time and expense of pursuing the case-by-case approach is impossible to estimate with any accuracy but, in any event, would be astronomical.

B. The Delay in the Individual Approach

Handling these cases one at a time would also take literally years to resolve the problem. This would place a massive burden on our courts, as well as defendants, and would result in massive delay for all other cases, both criminal and civil.

Even the assignment of counsel for individual Dookhan cases would suffer from massive delay. This is because the CPCS Private Counsel Division only has enough certified postconviction attorneys to handle about 1,500 cases per year. At current staffing levels, then, the assignment of certified counsel in all these cases could take twenty years, even if those attorneys did nothing else.

Also, while these cases were pending, these defendants would continue to suffer serious consequences resulting from the tainted Dookhan convictions -- for example, their consideration as prior convictions at sentencing on other matters, or their consideration as new offenses permitting revocation of probation. Defendants would also continue to suffer serious collateral consequences in numerous areas -- immigration (including deportation), 8 U.S.C. §§1101(a)(43)(B), 1227(a)(2)(B)(i); ineligibility for public housing, 24 C.F.R. 960.203(c)(3), 760 C.M.R. 5.08(1)(d), and subsidized housing, 24 C.F.R. 982.553; and ineligibility for student loans, 20 U.S.C. §1091(r).[10/]

These defendants need a remedy now.

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[10/]Additional serious consequences of drug convictions include mandatory suspension of driver's license, G.L. c.90, §22(f), availability of criminal record to current and prospective employers, G.L. c.6, §172(a)(3)(i), and ineligibility for military service, 10 U.S.C. §504(a). All provisions cited are reproduced in the addendum post.

C. The Underinclusiveness of the Individual Approach

On a case-by-case approach, any challenge to a Dookhan conviction would have to be initiated by the defendant. But in a large number of cases, that would never occur.

Most defendants would have no idea whether Dookhan was one of the chemists in their case or not. A large number of defendants (many of whom are undereducated or impoverished) would never learn of the Dookhan problem, or know how to go about fixing it, or believe that they could afford to fix it. And many defendants, viewing the case as over and done with, and lacking knowledge of its potential future consequences, would make no attempt to fix it. Also, while any comprehensive remedy would begin by attempting to identify all affected defendants, some defendants will not be identified, and some of those identified will not be located.

As a result, the case-by-case approach, for all the time and expense it would require, still would not succeed in providing a remedy for all affected defen-

dants.[11/] A comprehensive remedy is therefore critical to deal with this problem effectively.

Overall, then, the time, expense and delay required by the case-by-case approach would turn the Dookhan matter into the "Big Dig" of our court system. Amici urge this Court not to allow that to occur, particularly since the individual approach is not necessary to resolve the problem.

D. The Lack of Necessity for the Individual Approach

The parties have looked to several factors to determine whether Dookhan's falsifications likely had an effect on the individual case. No such analysis is necessary, however, at least in any case where the alleged testing was done prior to the plea. Whichever way these factors cut, the case could have been affected by the misconduct or its nondisclosure.

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[11/]The same would be true under the comprehensive remedy proposed herein. Under that remedy, however, all defendants identified (even if not located) would obtain relief now, automatically. And that would be accomplished without placing the burden on defendants to seek relief, and without the massive cost and delay of litigating these cases one case at a time.

1. Primary versus Secondary Chemist

All should agree that Dookhan could have falsified test results in any case where she was the primary chemist. As the primary, she could have done so and, indeed, has admitted doing so, in a number of ways: (1) by "drylabbing," (2) by adding known drugs to the sample, and (3) by changing negative results to positive (see ante, at 8-9). She also could have done so (4) by simply substituting known drugs for the sample submitted.[12/]

Dookhan also had the opportunity, however, to falsify results in cases where she was the secondary chemist. Although sometimes called the "confirmatory" chemist, that term is somewhat misleading, since it is

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[12/]With two of these methods (#2 & 4), Dookhan could make sure that her results would not conflict with those of the secondary chemist, since the primary is the one who prepares the vial subsequently tested by the secondary (HRA 75-76). With the other two methods (#1 & 3), if the secondary obtained conflicting results, Dookhan could simply "clean the [discrepancy] up" by adding, or substituting, known drugs when the case was returned to her, which she also admitted doing (HRA 46, 50, 120; D.SRA 21a).

actually the secondary who does the only dispositive scientific testing in the process.[13/]

As the secondary, Dookhan could have falsified results in two of the same ways noted above. If her test results were initially negative, she could have added known drugs to the vial or she could have substituted known drugs for the sample -- both of which would have changed the initial results to positive.

Since Dookhan thus had the opportunity to falsify results both as the primary and the secondary, it is unnecessary to examine all Dookhan cases one at a time in order to distinguish them on this basis.

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[13/]The primary does only "preliminary" screening tests --mainly "spot tests" with reagents to see if a sample changes color (HRA 216, 226, 294-295, 330-332, 390) -- which are apparently no different from mere "field tests." Commonwealth v. Vasquez, 456 Mass. at 364 n.15. The secondary, however, performs a test known as GC-MS (gas chromatography-mass spectrometry), which produces a spectroscopic "fingerprint" that differs for each drug, and can therefore identify a substance "unequivocally" as a particular drug (HRA 229-230, 296-297, 304-305, 314, 398). See generally HRA 75-76; Commonwealth v. Charles, 466 Mass. at 65 n.1.

2. Period When Testing Occurred

Dookhan has admitted falsifying testing during the two to three year period before she left the Lab (HRA 46, 50). So all should agree that she could have done so in any case where the testing occurred during that period (2009-2011).

But there is compelling reason to believe that this misconduct was also occurring during the earlier period of five years (2004-2008). Four facts stand out as particularly telling:

> (1) Dookhan's asserted production numbers during that period were consistently much higher, and sometimes double, those of the second most productive chemist (HRA 83, 108-112).
>
> (2) This was so even in her first full year at the Lab (2004) (HRA 83, 108), when she was presumably far less experienced than the other chemists.
>
> (3) Her numbers were triple the Lab average during the first three years (2004-2006) and double the Lab average during the next two years (2007-2008) (HRA 83).
>
> (4) Her numbers during one of those years (2005) were actually higher than in any of the two to three years as to which she admitted her misconduct (2009-2011) (HRA 83, 109, 111-112).

These outlandish numbers alone make it next to impossible that Dookhan was conducting all the asserted testing, or doing so properly, during the earlier five year period either.

There is thus every reason to believe that Dookhan was falsifying test results throughout the entire time she worked at the lab -- both during the period admitted and during the earlier period of five years -- and that her admission was merely designed to minimize the extent of her misconduct. Consequently, it is unnecessary to examine all Dookhan cases one at a time in order to distinguish them based on the period when the testing occurred.

3. Reliance on Test Results

In any case where the defendant received the certificate of analysis prior to the plea, he would have relied on the results asserted therein in deciding to plead guilty. So all should agree that the defendant's lack of knowledge of Dookhan's falsifications easily could have affected the defendant's decision in those cases.

There are undoubtedly a few cases where the defendant was not given the certificate, or otherwise informed of the test results, prior to the plea. Although that is a factor that one decision has viewed as significant, see In re Investigation, 190 W. Va. at 327,[14/] it is of little importance here for two reasons.

First, in every case where the testing was done by Dookhan prior to the plea, the results were relied upon by the prosecutor, either explicitly or implicitly, in asserting at the plea hearing that the substance was the drug charged. The defendant was therefore entitled to know of Dookhan's falsifications, which placed that assertion in question, because that easily could have affected his decision whether to plead.

Second, cases of this sort are only a small sliver of the total. They cannot be identified without examining all Dookhan cases individually. And such an examination, on the issue of the defendant's knowledge, would shed no light on the larger question -- whether,

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[14/] "[W]here a defendant made his guilty plea without any knowledge of the [asserted test results], it cannot be said to have influenced the plea." Id.

in fact, the test results were falsified in a particular case. Since that question cannot now be answered, it is unnecessary to insist on a case-by-case examination of the defendant's knowledge.

In sum, there is nothing in the legal analysis of the three factors above to make it necessary that these cases be dealt with one at a time. That approach would only serve to place an additional obstacle between the Dookhan problem and its solution.

As discussed next, however, there is every reason to adopt a comprehensive solution to this massive problem.

## III.

## THE SOLUTION: THIS COURT SHOULD ADOPT A COMPREHENSIVE REMEDY FOR ALL DOOKHAN CASES.

In the aftermath of this crisis, there can be no justice without a comprehensive solution; the magnitude of the problem created by Dookhan's deliberate misconduct demands it. Such a solution will seem bold, and it is; it is unprecedented. But the crisis facing the Massachusetts judicial system is also unprecedented.

Amici propose a two-part solution: first, this Court should vacate all of the Dookhan convictions, post at 31-34; second, this Court should either dismiss all Dookhan cases with prejudice or provide the Commonwealth with a limited opportunity for reprosecution and then dismiss all remaining cases after one year. Post at 34-43.

### A. This Court Has Authority to Adopt a Comprehensive Remedy.

This Court has the authority to order a comprehensive solution in its supervisory powers pursuant to G.L. c.211, §3, and in its inherent powers pursuant to the Constitution of the Commonwealth of Massachusetts. O'Coin's, Inc. v. Treasurer of the County of Worcester, 362 Mass. 507, 514 (1972).

This Court's supervisory powers exist "to correct ... errors and abuses" where "no other remedy is expressly provided." G.L. c.211, §3, quoted in Commonwealth v. Charles, 466 Mass. at 88. The exercise of supervisory powers is reserved for the "most exceptional circumstances," Planned Parenthood League

of Mass., Inc. v. Operation Rescue, 406 Mass. 701, 706 (1990), and without hyperbole, the Dookhan scandal likely presents the most exceptional circumstances that Massachusetts's criminal justice system has ever seen. The sheer number of cases affected by Dookhan's misdeeds has created "a systemic issue affecting the proper administration of the judiciary." G.L. c.211, §3. A comprehensive remedy crafted by this Court would, therefore, sit squarely within this Court's supervisory powers. See Lavallee v. Justices in the Hampden Superior Court, 442 Mass. 228 (2004) (exercising powers to remedy prior crisis).

This Court also has the inherent power to "protect and preserve the integrity of the judicial system." Matter of Troy, 364 Mass. 15, 21 (1973). There can be no clearer moment to exercise these powers than now, when the validity of tens of thousands of convictions is compromised by deliberate misconduct. It is "necessary to secure the full and effective administration of justice" because traditional remedies are inadequate here. O'Coin's, Inc. v. Treasurer of

the County of Worcester, 362 Mass. at 514, 516, quoted in Commonwealth v. Charles, 466 Mass. at 72-73. The exercise of these powers now is "essential to the function of the judicial department, the maintenance of its authority, [and] to its capacity to decide cases." Brach v. Chief Justice of Dist. Court Dep't., 386 Mass. 528, 535 (1982).

This Court has already invoked its inherent powers and supervisory powers in the Dookhan crisis. In Commonwealth v. Charles, this Court recognized that the Dookhan misconduct presents "exceptional circumstances" and is a "burgeoning crisis." 466 Mass. at 89. It concluded that "the magnitude of the allegations of serious and far-reaching misconduct ... cannot be overstated," and therefore the "anticipated avalanche of cases" requires an extraordinary remedy. Id. at 90. Employing those powers now to craft an extraordinary solution is certainly within this Court's authority.[15/]

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[15/]The adoption of such a solution is further supported by Article 12 of the Massachusetts Declaration of Rights. That the Commonwealth may obtain a conviction based on falsified evidence cannot be due process or the "law of the land." Commonwealth v. Lyons, 397 Mass. 644, 646 (1986), and cases cited.

B. The Time for a Comprehensive Remedy is Now.

This Court should not and need not wait to order a comprehensive remedy. This Court need not engage in further fact-finding or investigation to do so.[16/] Waiting will not change the inescapable conclusion that the circumstances demand a comprehensive solution.[17/] Instead, waiting will cause more harm to the integrity of the criminal justice system and to affected defendants.

Dookhan has admitted to grave, deliberate misconduct. Ante at 8-9. See State v. Roche, 114 Wash. App.

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[16/]This is not the kind of information that might become more complete with more time. Now that Dookhan has been indicted on charges arising out of her misconduct, any effort to obtain more information from her would surely be thwarted by the exercise of her Fifth Amendment right. Additionally, Dookhan is an admitted liar, so any additional information gained from her could not be presumed reliable. Lastly, so many cases are potentially affected that even with the most credible human source no human could accurately distinguish the tainted from any untainted.

[17/]The Commonwealth argues that this Court's adoption of a comprehensive solution would amount to "rule by judicial fiat" (C.B.R. 11). That characterization is myopic and wrong. In adopting such a solution, the Court would only be fashioning a remedy sufficient to extricate all stakeholders -- defendants, the courts, District Attorneys' offices, and taxpayers -- from a massive crisis of the government's own making.

424, 438 (2002) (stating that chemist's admissions "remove the allegations against [him] from the realm of conjecture"). Dookhan's admissions have been corroborated by the Department of Public Health investigation and an investigation by Massachusetts State Police (see R.B. 7-15). The Commonwealth has not contested the facts of Dookhan's misconduct. To the contrary, as a result of these investigations, the Commonwealth has obtained thirty-nine indictments charging Dookhan with evidence tampering, obstruction of justice, and perjury.[18/] The key facts of this crisis stand undisputed.

Providing relief now is also possible. The Meier Report greatly assists in the thorny task of identifying Dookhan defendants, and it provides a basis to implement swift, meaningful relief. Post at 44-47. There is no need to further delay a comprehensive remedy.

### C. The First Step: The Convictions Should be Vacated in All Dookhan Cases.

The taint of Dookhan's misconduct lays thickly over her 40,232 cases. Her misconduct was deliberate

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[18/]These include twenty-seven indictments in Suffolk County (HRA 124-153) and twelve additional indictments in five other counties.

and unprecedented in scale. The only reasonable first step towards a remedy is for this Court to vacate all of the Dookhan convictions.

Any alternative falling short of vacating all of the Dookhan convictions would create the untenable requirement that each case be litigated individually. Requiring defendants to challenge their convictions one-by-one would improperly rest the burden on them and would result in a stagnating, underinclusive resolution. Since this massive problem was created by the Commonwealth's agent, ante at 13 n.8, it is appropriate that the consequences be suffered by the government and not the taxpayers or the defendants. All of the Dookhan convictions are presumptively tainted and, quite simply, the system cannot handle the massive burden, astronomical expense, and interminable delay resulting from any solution that would require each of the cases to be individually assigned counsel, litigated, reviewed, and appealed. Ante at 14-20.

The crisis here requires a more comprehensive remedy than those described in the out-of-state

decisions cited by several defendants. The number of defendants potentially affected by falsified evidence in those out-of-state cases pales in comparison to the number of cases affected here. See In re Investigation, 190 W. Va. at 330-331 (involving 134 defendants identified at the time of the investigation); State v. Gookins, 135 N.J. 42, 50 (1994) (three defendants on appeal, with unquantified references to "widespread misconduct" and pending "class action"); State v. Roche, 114 Wash. App. at 438 (two defendants on appeal, with reference to "dozens" of cases previously dismissed by the prosecutor).[19/] The number of cases in need of the solution proposed here is reason to implement it, not reason to balk at it.

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[19/]Ongoing litigation in Texas involves a government chemist who did testing in 4,944 cases, Report of Texas Forensic Comm'n, 9 (April 15, 2013), and was found to have drylabbed in a single case. Id. at 6-7. He also had a relatively high correction rate, but "[m]ost of the corrections were administrative in nature, [although] some technical corrections were noted." Id. at 18. That situation has resulted in decisions vacating convictions in eighteen cases, only a few of which are published, see, e.g., Ex Parte Hobbs, 393 S.W.3d 780 (Tex. Crim. App. 2013), and the analysis applied in those cases is now awaiting reconsideration. See Ex Parte Coty, No. WR-79,318-02 (Tex. Crim. App. June 26, 2013) (unpublished), reproduced post, at 96. Whatever the outcome in Texas, however, the problem there is dwarfed by the one here by a factor of ten.

The Commonwealth stresses that there has been no showing that the misconduct affected any particular case (C.B.R. 11, 23-25). That however, is no answer. To the contrary, it is precisely because there is no telling which, or how many, cases were actually compromised that the only solution is a comprehensive remedy starting with vacating the convictions in all Dookhan cases.[20/]

D. The Second Step: The Underlying Charges Should be Resolved in All Dookhan Cases.

Any comprehensive solution must go further than vacating the Dookhan convictions. Ending the remedy there would still require making individualized determinations in all of the tens of

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[20/]Some Dookhan defendants may view their cases as long-since resolved. They may not wish to have their convictions vacated, potentially exposing them to reprosecution. Such defendants should be allowed to opt-out of the remedy upon request, such as happens in civil class action litigation. No defendant should be exposed to reprosecution against his will (nor could he properly be exposed to a harsher sentence) merely because the magnitude of the government misconduct demands a comprehensive remedy. Managing these "opt-out" requests could be appropriately assigned to the administrator. See post at 44-47.

Relatedly, inevitably there will also be some Dookhan defendants who cannot be identified right now. Individuals later identified must be afforded the same remedy at that time as those now identified.

thousands of vacated cases, determinations that would include pleas, pretrial motions, trials, and appeals. That so-called solution would create precisely the insurmountable problem necessitating a comprehensive remedy. Ante at 14-20. Vacating the convictions is the first step, not the last for the Dookhan cases.

The next step in the comprehensive remedy must be to resolve the underlying charges in these cases. That could be done either by (1) dismissing the cases with prejudice, or (2) allowing the Commonwealth an opportunity to reprosecute in cases where it can meet its burden without evidence tainted by Dookhan's misconduct.

Neither of the proposed remedies places the burden on the backs of defendants to challenge the validity of the Dookhan cases against them. Instead, the proposed solutions provide an equitable and practical remedy for all cases, and where there is a burden to be met, it is properly placed on the Commonwealth. These remedies restore the integrity of the system by righting the wrongs and allowing the system to work prospectively rather than being mired in tainted cases.

1. The Charges Should be Dismissed With Prejudice.

Dismissing all the Dookhan cases would be proportionate and practical. It is proportionate because the Dookhan cases do not present garden-variety errors, committed out of mere negligence. To the contrary, this was grave deliberate misconduct on an unprecedented scale, and it has wreaked havoc on the criminal justice system. It was a pattern of misconduct that spanned over eight years and it was so egregious that it raised legitimate questions about the operations of the entire Lab.

The misconduct was egregious in the extreme; it "shocks the conscience." Rochin v. California, 342 U.S. 165, 172 (1952). It was, therefore, just the sort of misconduct which, in various other contexts, qualifies for the drastic remedy of dismissal with prejudice. See, e.g., Commonwealth v. Manning, 373 Mass. 438, 443-445 (1977) (ordering dismissal due to intentional police interference with defendant's right to counsel); Commonwealth v. Washington W., 462 Mass. 204, 213-216 (2012) (upholding dismissal with prejudice for

misconduct that was "deliberate, willful and repetitive" and thus "egregious"). See generally Commonwealth v. Cronk, 396 Mass. 194, 199 (1985) (dismissal may be proper for misconduct that is "egregious, deliberate, and intentional"); Commonwealth v. Monteagudo, 427 Mass. 484, 485 (1998) ("The principle that egregious government misconduct may violate due process and bar prosecution is well-established in Federal law"). Dismissing all of the Dookhan cases is a sweeping remedy, but it is proportionate to Dookhan's sweeping misconduct.

Dismissing all of the Dookhan cases with prejudice would also have practical virtue. It would resolve the mess created by Dookhan's falsifications as simply and decisively as possible, and with the least possible expense or delay for anyone, including the courts, District Attorneys' offices, CPCS, and defendants. This solution would also swiftly remove the burden of this scandal from already burdened and budget-strapped agencies. This is no small matter given the magnitude of the problem and the overwhelming

effects that this scandal could have on the administration of justice in Massachusetts.

2. In the Alternative, the Charges Could be Reprosecuted in Particular Cases under Narrowly Limited Circumstances.

This Court could also order a remedy that allows the Commonwealth a limited opportunity to reprosecute if it can meet the burden to do so without tainted evidence.

While this remedy does allow the Commonwealth a second bite at the apple, it is difficult to imagine what evidence the Commonwealth could now offer to prosecute and prove these cases beyond a reasonable doubt. The results of Dookhan's alleged testing are hopelessly tainted and now, any sample that might be retested is similarly presumed tainted. There may be cases, however, where the sample is not tainted and the Commonwealth can prove as much. There also may be cases where there is other, unrelated, evidence sufficient to prove the identity of the substance. See e.g., Commonwealth v. DeMatos, 77 Mass. App. Ct. 722, 731 (2010) (defendant's admissions). Contrast, e.g., Commownealth v. Montoya, 464 Mass. 566, 572-573 & n.4

(2013). In recognition of these possibilities, this Court could permit reprosecution in the following limited way.

a. Reprosecution Should Only be Permitted Where the Commonwealth Can Make a Preliminary Showing that its Evidence is Both Untainted and Sufficient Beyond a Reasonable Doubt.

First, in the cases that the Commonwealth seeks to reprosecute it must file a motion to reprosecute, putting the defendant on notice and triggering assignment of counsel to the defendant.[21/] The Commonwealth would be required to file these motions within a fixed period of time. Defendants and the public are entitled to swift resolution of this scandal and a fixed period provides the Commonwealth with an incentive to make timely decisions about which cases to reprosecute.

In the motion to reprosecute, the Commonwealth should be required to specify the evidence upon which

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[21/]To avoid needless expense, counsel, if not already assigned, would not be assigned unless and until such a motion was filed.

the reprosecution would be based and show that it is untainted beyond a reasonable doubt. See State v. Gookins, 135 N.J. at 51 (vacating convictions in falsification cases and instructing on remand that "[t]he prosecution shall certify to the [trial] court all the evidence that it considers to be untainted that would sustain the prosecution"). The motion would also have to show that the evidence is sufficient to permit a finding of guilt beyond a reasonable doubt. See Matter of Grand Jury Investigation, 427 Mass. 221, 224 (1998) (Commonwealth is required to present "sufficient evidence to warrant a conviction"). This is an appropriate burden for the Commonwealth because the standard can "screen out at this ... critical stage of the criminal process those cases that should not go to trial, thereby sparing individuals ... from being unjustifiably prosecuted [again]." Myers v. Commonwealth, 363 Mass. 843, 847 (1973), discussed in Commonwealth v. Perkins, 464 Mass. 92, 106 & n.2 (2013) (Gants, J., concurring) (requiring proof beyond a

reasonable doubt for bind-over at probable cause hearings).[22/]

Retested Evidence

If reprosecution is to be based on retesting, the Commonwealth must be required to prove that the sample is, in fact, untainted by misconduct, and to do so overwhelmingly -- beyond reasonable doubt.[23/] Since the evidence is presumptively tainted, a showing by that standard is both necessary and reasonable. See State v. Roche, 114 Wash. App. at 447 ("[W]e will not tolerate criminal convictions based on tainted evidence"); State v. Gookins, 135 N.J. at 49 ("[A] prosecutor may not strike a foul blow by offering tainted evidence").

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[22/]The use of this standard at a preliminary stage is not unprecedented; it has long been used for the same screening purpose that it would serve here. See, e.g., Myers v. Commonwealth, 363 Mass. at 847 (probable cause hearings); Commonwealth v. Ortiz, 393 Mass. 523, 534 n.13 (1984) (bind-over hearing); Commonwealth v. Black, 403 Mass. 675, 678 (1989) (pretrial motion to dismiss); Commonwealth v. Gallant, 453 Mass. 535, 541 n.6 (2009) (bind-over hearing).

[23/]Reprosecution could not be based on mere field tests because field tests involve no dispositive scientific analysis. Commonwealth v. Vasquez, 456 Mass. at 364 nn.15, 17. Commonwealth v. Fernandez, 458 Mass. 137, 150 n.20 (2010).

Non-Scientific Evidence

If reprosecution is to be based on non-scientific evidence, the Commonwealth should also be required to show that it would be sufficient to permit a finding of guilt beyond a reasonable doubt. This is reasonable because, while possible, it is "rare" that non-scientific evidence will be sufficient to prove the identity of a substance. See e.g., Commonwealth v. Dawson, 399 Mass. 465, 467 (1987) ("experienced user" of "particular drug" may be qualified to make such identification). Compare Commonwealth v. MacDonald, 459 Mass. 148, 156-157 (2011) (involving identification of marijuana, rather than rock or powder).

b. All Cases Not Reprosecuted After One Year Would Be Dismissed under the Speedy Trial Rule.

After the convictions are vacated, no new device would be required to dispose of the charges in the vast majority of Dookhan cases. Realistically, due to sheer numbers, the Commonwealth will not reprosecute most cases, and it will not be able to meet its burden to prosecute many others.

In all such vacated cases, the charges would be dismissed after one year by operation of the speedy trial rule.[24/] Mass. R. Crim. P. 36(b)(1)(D), 378 Mass. 910 (1979), amended, 422 Mass. 1503 (1996). The dismissal would be with prejudice. Commonwealth v. Balliro, 385 Mass. 618, 624 (1982).

This is far preferable to a remedy which, after vacating the convictions, would dismiss the charges without prejudice. With that disposition, the Commonwealth could simply obtain new charges based on the original facts anytime within the six-year statute of limitations period. G.L. c.277, §63. Dismissing these cases without prejudice, therefore, would provide neither a timely solution nor a fair solution for the Dookhan problem.

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[24/]Although the rule provides for dismissal "upon motion" by the defendant (see post, at 103), requiring Dookhan defendants to file individual motions to dismiss would defeat a critical purpose of a comprehensive solution. That requirement, therefore, would have to be supplanted here by a mechanism for automatic dismissal, which this Court has the authority to formulate under its supervisory powers. Ante at 27-29. See also Mass. R. Crim. P. 2(a), 378 Mass. 844 (1979), quoted in Lavallee v. Justices in the Hampden Superior Court, 442 Mass. at 236.

E. This Remedy Can Be Implemented in a Practical Way.

The details of the remedy should be implemented by an administrator appointed and supervised by this Court. The administrator's first task would be to identify all Dookhan cases with certainty -- i.e., by docket number -- so that the comprehensive remedy could be implemented.

That task would begin with the Lab's list of all cases in which Dookhan was one of the chemists. The Lab's original list of these cases was fraught with problems, particularly in identifying the defendants, who were sometimes named with an alias or a nickname or simply as "unknown." The Meier investigation expanded the known data to include the first and last names of all defendants, the name of the "submitting" officer and police department, and the date when the sample was submitted.

This list, however, is still missing the information ultimately needed to match cases with defendants -- the docket numbers -- and also other useful identifiers such as the defendants' dates of

birth and social security numbers. Admittedly incomplete, the Meier list was meant to "enable the District Attorneys, law enforcement agencies, the Committee for Public Counsel Services, the private bar and any other appropriate agencies to most accurately identify these individuals." Post at 63.

CPCS has run the information in the Meier list against its list of assignments of counsel in all drug cases. That run produced a total of 21,178 matches. These are identifications where there is a single unique match between the Meier list and CPCS's records when all available data points are compared.[25/] These identifications, however, are merely provisional because they still lack the information necessary to match the identified individuals with cases. Frustrating the identification process further, the Meier list and CPCS's records include many entries of multiple identical names for which more information is needed to identify which are the Dookhan defendants.

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[25/]The data points compared were: last name, first name, court, county, and date of assignment of counsel within one year before or after the lab sample was tested.

Additional information is needed to confirm these identifications. It is also needed to identify the remaining 19,145 defendants on the Meier list for whom CPCS found no match. Both of those tasks, however, could be accomplished with the defendants' dates of birth, social security numbers, or docket numbers. That data should be easily obtained by the police departments and District Attorneys' offices. The police departments in the "submitting" towns should have a date of birth or social security number for any defendant arrested. Likewise, the District Attorneys' office for that county should have this information, as well as a docket number, for any defendant actually prosecuted. This Court should order the District Attorneys' offices and police departments to use the Meier list as intended and identify the Dookhan defendants within a fixed period of time.

The administrator would obtain this information from those sources and, if it includes only a date of

birth or social security number, have it run against the CORI database to obtain the docket number. In this way, the administrator should be able to identify nearly all Dookhan cases. The administrator could compile the lists of defendants and the comprehensive remedy could then be executed in cases that resulted in convictions.

F. This Remedy is Efficient and Just.

The comprehensive solution proposed here could be implemented in little more than one year and that is just. "The burden of a systemic lapse is not to be borne by defendants." Lavallee v. Justices in the Hampden Superior Court, 442 Mass. at 246, quoted in Commonwealth v. Charles, 466 Mass. at 74-75. For the defendants who have already waited over a year for a remedy, one additional year is all that the justice system can ask of them. While neither proposed solution will tie all of this crisis's loose ends -- there will undoubtedly be surprises for years to come

-- it will bring the crisis into the realm of the manageable and it will restore the integrity of a battered system.

The solution is bold and sweeping for good reason -- it must be. This crisis is sui generis. Other states have been faced with scandals involving state forensic labs and misdeeds by police officers, but none of those scandals approaches the magnitude of this crisis. Ante at 33. If this Court fails to act comprehensively and decisively, the wheels of justice will slow to a creep for both the Dookhan cases and the regular business of the courts. The system cannot afford to continue to be hamstrung by this crisis and defendants must wait no longer for justice.

## CONCLUSION

For the reasons stated herein, this Court should adopt a comprehensive solution to the problem created by the Dookhan falsifications.

In the cases now before the court, the orders below in the Davila, Bjork, Scott, and Torres cases should be affirmed. The order in the Rodriguez case should be reversed.

Respectfully submitted,

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ADDENDUM

Table of Contents

# THE IDENTIFICATION OF INDIVIDUALS POTENTIALLY AFFECTED BY THE ALLEGED CONDUCT OF CHEMIST ANNIE DOOKHAN AT THE HINTON DRUG LABORATORY

## FINAL REPORT TO GOVERNOR DEVAL PATRICK

**David E. Meier**
**Special Counsel to the Governor's Office**
**August 2013**

**Overview**

In September, 2012, Governor Deval Patrick established a Task Force whose goal was to identify all of the individuals who potentially could have been affected by the alleged conduct of Chemist Annie Dookhan at the Hinton Drug Laboratory in Jamaica Plain, MA, from 2003 to the present. The primary purpose of the Task Force was to ensure that prosecutors, defense attorneys, and judges were provided with as much information as possible about the identity of those individuals potentially affected, so as to enable them to respond appropriately to the alleged misconduct from their respective positions within the criminal justice system. The objective was to make all reasonable efforts to identify each and every one of the individuals who, depending upon the facts of his or her case and the applicable law, could seek their day in court; the objective was not to pass judgment or make factual or legal determinations about any particular defendant or any particular case. In short, the goal was to ensure that the criminal justice system and all potentially impacted defendants were afforded the opportunity to achieve fundamental fairness or, simply stated, to get it right.

In September, 2012, based upon the database then maintained at the Hinton Laboratory, we generated a list of approximately 37,500 individuals whose drug samples had been tested in some manner by Ms. Dookhan during her work as a chemist at the laboratory from 2003 to 2012. The list included the names of individuals whose drug samples had been tested by Ms. Doohkan as a "primary" chemist or a "secondary" (confirmatory) chemist. The list was based upon the database then maintained at the laboratory and contained entries for every drug sample tested by Ms. Dookhan from 2003, when she was first employed, to the present. Based upon the total number of drug samples contained in the laboratory data base that were associated with testing

performed by Ms. Dookhan (close to 70,000 samples), laboratory officials estimated that the total number of individuals whose cases were associated with Ms. Dookhan was approximately 34,000-35,000. Based upon our subsequent review and analysis of the list and the laboratory database, we determined that the actual number of names of individuals contained on the list generated in September, 2012, was 37,554.

At the outset of our work, the overriding priority was to identify as expeditiously as possible those individuals who at the time were potentially most adversely affected by the alleged conduct of Ms. Dookhan: individuals who were then incarcerated (or in custody) on a drug case in which Ms. Dookhan had performed drug testing. These individuals may have been incarcerated while serving a prison or jail sentence in a state or federal correctional facility, held on bail while awaiting trial on a pending case, or in custody for other reasons (e.g., parole detainers, probation violations, immigration matters, or juveniles committed to the Department of Youth Services). Within 45 days, we had identified a total of approximately 2,000 individuals who were then incarcerated on a drug case or a drug-related case in which Ms. Dookhan had performed drug testing from 2003 to the present.

From late last year through mid-2013, we worked through three (3) basic phases to attempt to identify every individual who potentially may have been impacted by the alleged conduct of Ms. Dookhan. As of August, 2013, upon the completion of Phase I, Phase II, and Phase III of our review, we have identified a total of 40,323 individuals whose drug cases potentially may have been affected by the alleged conduct of Ms. Dookhan. Law enforcement officers recovered drug samples from these 40,323 individuals in eight counties: Barnstable, Bristol, Dukes, Essex, Middlesex, Norfolk, Plymouth, and Suffolk (as well as a one-time instance in Worcester). As outlined below,

most, if not all, of the additional 2,769 individuals who have been identified since September, 2012 are associated with individuals who or cases which were previously identified and contained on the original list generated in September, 2012.

Our review, analysis, and identification of potentially impacted individuals is now essentially complete. Thus far, over 2,600 court hearings have been held statewide in the Superior Court on Dookhan-related cases or Dookhan-related issues. The prosecution of Ms. Dookhan by the Attorney General's Office for certain alleged crimes is ongoing. Likewise, the wider investigation into the practices, procedures, and overall reliability of drug testing at the Hinton Laboratory by the Inspector General's Office is also ongoing.

## Summary of Our Three-Phase Review and Analysis

### Phase I

From September - December, 2012, we focused our efforts on coordinating with the District Attorneys, the Committee for Public Counsel Services, the private defense bar, the United States Attorney's Office, the Federal Defender's Office, the Superior Court, the District Court, the Boston Municipal Court, the Juvenile Court, and various other agencies within the criminal justice system to exchange information and data regarding those individuals who potentially may have been impacted by the alleged conduct of Ms. Dookhan. A list of the agencies and offices with which we consulted and coordinated is attached as Exhibit A. Throughout our work, each of these agencies and offices shared information and resources with us on an ongoing basis and were fully supportive of our efforts in every way.

The foundation for the sharing of information was a master list (or spreadsheet) of approximately 37,500 names of individuals upon whose drug samples Ms. Dookhan allegedly had worked as a "primary" chemist or a "secondary" (confirmatory) chemist from 2003 to the present. The original master list was generated by the Department of Public Health's Information Technology Department in late August and early September, 2012, and was based upon the available personal identifying information and other data contained within the Hinton Laboratory data base.

The master list was provided (or made available electronically with CORI-protected safeguards) to the District Attorneys, the Committee for Public Counsel Services, the private defense bar, and other appropriate agencies during the first week of September, 2012. Due to various shortcomings in the manner in which the information and data were recorded and maintained at the Hinton Laboratory, throughout September, October, and November, 2012, information technology specialists, law enforcement investigators, and others from the Massachusetts State Police and the Executive Office of Public Safety and Security undertook a wide range of investigative and technological efforts to refine or revise the personal identifying information and other data within the master list so as to enhance our ability to accurately identify by true full name as many of the individuals on the list as possible. The cooperation of the various agencies and offices set forth in Exhibit A were extraordinary during this effort.

In order to most effectively coordinate the response of the criminal justice system to the alleged conduct of Ms. Dookhan, starting immediately upon the creation of the Task Force in September, 2012, we held joint meetings with the District Attorneys, the Committee for Public Counsel, the private defense bar, the United States

Attorney's Office, and the Federal Defender's Office, as well as representatives of numerous other criminal justice agencies and offices. On an ongoing basis, we distributed specific, individualized "priority lists" reflecting the names and personal identifying information of those individuals on the master list of approximately 37,500 names who at the time were in the most severely-impacted categories: individuals in state or federal custody while serving a prison or jail sentence, individuals in state or federal custody while being held on bail awaiting trial, individuals within the custody or authority of the Department of Youth Services, individuals on parole, individuals on probation, and individuals who had a prior or predicate Superior Court drug conviction.

During the same time period, we met and communicated regularly with the Chief Justice of the Superior Court, the Chief Justice of the District Court, the Chief Justice of the Boston Municipal Court, and the Chief Justice of the Juvenile Court, as well as those judges overseeing the special "drug lab sessions" in each of the affected counties. Our purpose in doing so was to ensure that we were coordinating our efforts with those of the Trial Court, in order to most effectively and expeditiously identify all of the individuals in the priority categories, determine their corresponding criminal cases, indictments, and docket numbers, and afford them (and their counsel) an opportunity to request a court hearing wherever appropriate.

At the joint criminal justice meetings, in addition to the review and distribution of the priority category lists, prosecutors, defense counsel, and representatives of the various other agencies discussed certain Dookhan-related legal, practical, and ethical issues that were then arising within the court system on a frequent basis: requests for the discovery of potentially exculpatory information relating to the Hinton Laboratory in general (e.g., evidence logs, internal procedures, protocols, quality assurance materials,

training materials, and internal investigation reports that were within the possession of the Department of Public Health, the Attorney General's Office, or the Inspector General's Office); requests for the discovery of potentially exculpatory information relating in particular to the investigation and prosecution of Ms. Dookhan herself (e.g., Massachusetts State Police investigative reports, witness statements, and transcripts of grand jury testimony that were within the possession of the Attorney General's Office); requests for the discovery of potentially exculpatory information relating to specific individual cases and specific individual drug samples on which Ms. Dookhan had performed tests (e.g., handwritten laboratory notes (or "powder sheets"), evidence control cards, chain of custody records, mass spectrometry data, and other materials relating to specific individual cases that were within the possession of the Department of Public Health, the Attorney General's Office, or the Inspector General's Office); requests to generate and distribute a master list of the names of all of the individuals whose drug samples had been tested at the Hinton Laboratory, whether by Ms. Dookhan or any other chemist; and various legal, practical, and ethical concerns surrounding the assignment of counsel, adequate and sufficient access to inmates and clients, the transportation of defendants to and from correctional facilities, courthouse and courtroom security, audio-video conferencing of court hearings, and other real life, practical considerations related to the ongoing response by the criminal justice system. For all of the criminal justice agencies at the meetings, however, the overriding focus was on continuing our joint efforts to enhance the accuracy of the information related to each of the names on the master list.

As of December, 2012, we had specifically identified, designated, and provided relevant information to prosecutors and defense attorneys about approximately 10,000

potentially impacted individuals who fell within the various "priority categories": individuals in state or federal custody while serving a prison or jail sentence, individuals in state or federal custody while being held on bail awaiting trial, individuals within the custody or authority of the Department of Youth Services, individuals on parole, individuals on probation, and individuals who had a prior or predicate Superior Court drug conviction or a prior Juvenile Court delinquency finding.

The majority of the remaining 27,500 names were (and remain) those of individuals who from 2003 to the present have been charged with lesser drug offenses (e.g., first offense possession offenses) that have been prosecuted and resolved in the District Court or the Boston Municipal Court. We fully recognize and appreciate the potential impact that a prior guilty finding, "continuance without a finding", period of probation, fine, or other routine disposition on a first-offense District Court drug case might have on an individual's criminal history, future employment, educational opportunities, public housing qualifications, or other daily pursuits.

Working in conjunction with the Committee for Public Counsel Services, the Superior Court, and the Probation Department, as of December, 2012, most, if not all, of the identified 10,000 individuals who so qualified had been assigned counsel for purposes of reviewing their case and potentially seeking some form of court hearing. Working in conjunction with prosecutors, defense attorneys, judges, and court personnel, as of December, 2012, most, if not all, of the 2,000 individuals incarcerated in prisons or county jails (those in the highest priority category) on Dookhan-related cases had been brought before a court or otherwise afforded some form of Dookhan-related factual and legal review.

**Phase II**

Beginning in January of this year, we focused our efforts on improving and enhancing the accuracy and personal identifying information of the approximately 37,500 names on the master list by reviewing actual laboratory files, evidence submission forms, drug receipts, evidence control cards, and other laboratory documents then in the possession of the Hinton Laboratory, the Massachusetts State Police, the Attorney General's Office, and/or the Inspector General's Office. As a supplement to the information technology or computer-based review and analysis undertaken in Phase I of the names and information contained in the Hinton Laboratory data base itself, the Phase II review involved a by-hand, file-by-file review of individual laboratory documents.

The goal of the file-by-file review was to improve the accuracy of the master list by (i) manually updating, revising, or verifying the personal identifying information associated with the existing names (by including, wherever appropriate, additional data such as dates of birth, first names, middle names, last names, properly-spelled names, and police departments), as well as by (ii) creating new entries for the names and personal identifying information of (a) those individuals whose drug samples were associated with Ms. Dookhan but whose names were not previously contained in the laboratory data base (and therefore were not previously on the master list), (b) those individuals whose names were previously contained in the data base but within a single entry that contained multiple names or defendants and lacked sufficient personal identifying information, and (c) those individuals who were previously described generically within the laboratory data base (and therefore generically on the master list) as "multiple suspects", "multiple defendants", "co-defendants", "et al", or "etc.".

As of April, 2013, we had reviewed by hand certain laboratory documents and records from the years 2012, 2011, and 2010. For 2012, the review generated no "new" or additional individuals whose drug samples were associated with Ms. Dookhan as the primary or secondary chemist. For 2011, the review generated 673 new or additional entries of individuals whose drug samples were associated with Ms. Dookhan as the primary chemist and 192 new or additional entries of individuals whose drug samples were associated with Ms. Dookhan as the secondary chemist. The majority of these new or additional entries were for individuals whose names were previously contained in the laboratory data base but within a single entry that contained multiple names or defendants and lacked sufficient personal identifying information. For 2011, the file by file review also enabled us to update, revise, or verify the names and personal identifying information of 2,068 previously-identified individuals whose drug samples were associated with Ms. Dookhan as the primary or secondary chemist.

For 2010, the review generated 1,369 new or additional entries of individuals whose drug samples were associated with Ms. Dookhan as the primary chemist and 1,066 new or additional entries of individuals whose drug samples were associated with Ms. Dookhan as the secondary chemist. Again, the majority of these new entries were for individuals whose names were previously contained in the laboratory data base but within a single entry that contained multiple names or defendants and lacked sufficient personal identifying information. For 2011, the file by file review enabled us to update, revise, or verify the names and personal identifying information of 6,411 previously-identified individuals whose drug samples were associated with Ms. Dookhan as the primary or secondary chemist.

Independent of our efforts during Phase II of our review, in early 2013, Navigant -- the outside document storage vendor contracted by the Inspector General's Office in connection with that Office's ongoing overall review of the Hinton Laboratory -- began the electronic collection, scanning, and storage of all documents and records generated at the laboratory from as far back as 1998, including those from 2012, 2011, and 2010 that we were then reviewing by hand. Given the nature, extent, and volume of the documents and records (as well as the various locations where they were then maintained, stored, or archived), the electronic collection, scanning, and storage process continued for several months. So too did our file-by-file review.

As of May of this year, as a result of the ongoing document collection and storage, we not only had the capability of accessing, reviewing, and analyzing electronically all of the data and information that the law enforcement investigators and information technology specialists from the State Police and the Executive Office of Public Safety and Security had researched and refined during Phase I of our efforts, but also all of the substantial additional data and information that were contained in the evidence submission forms, drug receipts, evidence control cards, chain of custody records, and other actual laboratory documents that formed the basis of our file-by-file review during Phase II of our review.

**Phase III**

Accordingly, in order to provide the criminal justice system with the most accurate information available to us regarding the identity of each and every individual who potentially could have been affected by the alleged conduct of Ms. Dookhan, throughout June and July we researched and analyzed all of the data, laboratory

records, and related information that to date had been electronically collected and stored. In all, during Phase II and Phase III of the review, some 1.5 million hardcopy laboratory documents, comprising more than 3.5 million hardcopy pages, as well as another 3.5 million documents from electronic sources, were collected, stored, researched, and analyzed.

Based on the research and analysis conducted in Phase II and Phase III of our review, we have now generated a revised, updated, and comprehensive list of 40,323 names of individuals upon whose drug samples Ms. Dookhan performed testing as a primary chemist or a secondary (confirmatory) chemist from 2003 to the present. This new master list reflects our best efforts to identify each and every individual who potentially may have been impacted by the alleged conduct of Ms. Dookhan. A sample, illustrative version of the revised and updated master list (the original of which is CORI-protected) is attached as Exhibit B. Again, our primary purpose in creating the new master list is to ensure that prosecutors, defense attorneys, and judges (as well as all others within the system) are provided with as much information as possible about the identity of those individuals potentially affected, so as to enable each of the agencies and offices to respond appropriately to the alleged misconduct from their respective positions within the criminal justice system.

The new master list is in a format designed to be user-friendly. It contains the basic, necessary information that will enable the District Attorneys, law enforcement agencies, the Committee for Public Counsel Services, the private defense bar, and any other appropriate agencies to most accurately identify those individuals who potentially may have been impacted by Ms. Dookhan. The list is organized by county, and for most of the 40,323 names, includes individual entries reflecting the corresponding town, the

corresponding law enforcement agency, the name of the police officer who submitted the drug sample to the laboratory, the date the drug sample was submitted, the internal Hinton Laboratory sample number, the results of the drug testing, and the drug submission (or drug receipt) form. The drug submission form contains additional confidential law enforcement data and information which should enable the District Attorneys and/or the respective law enforcement agencies to locate the applicable police reports, arrest/booking records, and any other related materials.

In addition, by utilizing the specific internal Hinton Laboratory sample (or case) number that corresponds to each individual on the list, prosecutors and defense attorneys will soon be able to request access to copies of all of the relevant discovery material from the laboratory that relates to any specific individual defendant, individual case, or individual drug test.

As noted above, the new list contains 40,323 names. It is based, in part, upon a systematic review and analysis -- initially by hand and then electronically -- of some 3.5 million actual laboratory documents, including those related to over 86,000 drug samples associated with Ms. Dookhan. The original list, generated in September, 2012, contained 37,554 names. It was based upon the available personal identifying information and other data contained within the Hinton Laboratory database. The 2,769 additional names that we have identified are the result of our research and analysis during Phase II and Phase III of our review. As outlined above, most, if not all, of these additional names are the result of our research and analysis of previous multiple defendant (or "et al") drug samples and drug tests; most, if not all, of these additional names are associated with a name or an individual or a case that was contained on the original list generated in September, 2012.

**Endnote**

In the coming days, we intend to meet with the District Attorneys, the Committee for Public Counsel Services, the Chief Justices of the respective courts, the Massachusetts Bar Association, the Boston Bar Association, and any other appropriate agencies and offices to discuss and distribute the new master list.

One final note: This Report is meant to summarize for the Governor in a general way the nature, extent, and course of the research and analysis that was performed by the Task Force during the three phases of our review. It is neither intended nor designed to describe in detail our work over the past 10 months. Indeed, in the end, it is the revised and updated master list of names and related information that is our true report to the Governor and, perhaps more importantly, to the criminal justice system.

# Exhibit A

**Agencies and Organizations Within the Criminal Justice System with Which the Task Force Consulted and Coordinated**

1. Department of Public Health Hinton Drug Laboratory
2. District Attorneys' Offices
3. United States Attorney's Office
4. Attorney General's Office
5. Committee for Public Counsel Services
6. Federal Defender's Office
7. Federal Criminal Justice Act Panel
8. Private Defense Bar
9. Bar Advocate Programs
10. Massachusetts Bar Association
11. Boston Bar Association
12. Chief Justice of the Superior Court + Superior Court Judges
13. Chief Justice of the District Court + District Court Judges
14. Chief Justice of the Boston Municipal Court + Boston Municipal Court Judges
15. Chief Justice of the Juvenile Court + Juvenile Court Judges
16. Massachusetts State Police
17. Local Police Departments
18. Executive Office of Public Safety and Security
19. Department of Corrections
20. Sheriffs' Departments/County Houses of Corrections/County Jails

21. Department of Youth Services
22. Massachusetts Parole Board
23. Massachusetts Probation Department
24. United States Marshal's Office
25. Federal Bureau of Prisons
26. Department of Homeland Security/Immigration and Customs Enforcement
27. United States Probation Office
28. United States Pretrial Services Office
29. Superior Court Clerk's Offices
30. District Court and Boston Municipal Court Clerk's Offices

# Exhibit B

# HINTON DRUG LAB REVIEW

****ILLUSTRATIVE AID: ALL NAMES ARE FABRICATED FOR SAMPLE PURPOSES ONLY****

| Submitting Agency (Normalized) | Submitting Agency (As Entered at Lab) | Town (Normalized) | County (Normalized) |
|---|---|---|---|
| BREWSTER PD | Brewster Police Dept | | |
| BREWSTER PD | Brewster Police Dept | | |
| BREWSTER PD | Brewster Police Dept | | |
| BREWSTER PD | Brewster Police Dept | | |
| BREWSTER PD | Brewster Police Dept | | |
| HYANNIS PD | Hyannis Police Dept | | |
| HYANNIS PD | Hyannis Drug Police | | |
| HYANNIS PD | Hyannis Police Dept | | |
| HYANNIS PD | Hyannis Police Dept | | |
| HYANNIS PD | Hyannis Police Dept | | |
| SALEM PD | Salem Police Dept | | |
| SALEM PD | Salem Police Dept | | |
| SALEM PD | Salem Police Dept | | |
| SALEM PD | Salem Police | | |
| SALEM PD | Salem Police Dept | | |
| SALEM PD | Salem Police Dept | | |
| SALEM PD | Salem Police Dept | | |
| SALEM PD | Salem Police | | |
| SALEM PD | Salem Police | | |
| SALEM PD | Salem Police Dept | | |
| QUINCY PD | Quincy Police Dept | | |
| QUINCY PD | Quincy Police | | |
| QUINCY PD | Quincy Police Dept | | |
| QUINCY PD | Quincy Police Dept | | |
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| QUINCY PD | Quincy Police Dept | | |
| QUINCY PD | Quincy Police Dept | | |
| QUINCY PD | Quincy Police Dept | | |

HINTON DRUG LAB REVIEW

****ILLUSTRATIVE AID: ALL NAMES ARE FABRICATED FOR SAMPLE PURPOSES ONLY****

| Defendant(s) (As Entered at Lab) | Submitting Officer (As Entered at Lab) | Date Submitted to Lab | Lab Sample # | Results (As Entered at Lab) | Individual Defendant (As Entered at Lab) |
|---|---|---|---|---|---|
| SMITH, RICHARD | Sergeant JOHN JONES | 1/25/2011 | A00-12345 | HEROIN | SMITH, RICHARD |
| JOHNSON, JAMES | Sergeant JOHN JONES | 1/25/2011 | A12-67890 | COCAINE | JOHNSON, JAMES |
| WILLIAMS, ROBERT | Sergeant JOHN JONES | 1/25/2011 | A34-98765 | MARIJUANA | WILLIAMS, ROBERT |
| BROWN, WILLIAM | Sgt JOHN JONES | 1/25/2011 | A56-43456 | COCAINE | BROWN, WILLIAM |
| DAVIS, MARY | Sergeant JOHN JONES | 1/25/2011 | A78-23156 | OXYCODONE | DAVIS, MARY |
| ADAMS, PHIL | Detective MICHAEL HALL | 6/18/2007 | A90-68754 | OXYCODONE | ADAMS, PHIL |
| WILSON, CHARLES | Det MICHAEL HALL | 6/18/2007 | A11-89765 | COCAINE | WILSON, CHARLES |
| WHITE, JOSEPH | Detective MICHAEL HALL | 6/18/2007 | A23-13232 | ALPRAZOLAM | WHITE, JOSEPH |
| HARRIS, PAUL | Detective MICHAEL HALL | 6/18/2007 | A46-76954 | HYDROMORPHONE | HARRIS, PAUL |
| HARRIS, PAUL | Det MICHAEL HALL | 6/18/2007 | A90-14231 | HYDROMORPHONE | HARRIS, PAUL |
| THOMAS, JASON | Sergeant SARA SMITH | 2/11/2005 | A31-00876 | COCAINE | THOMAS, JASON |
| ROBINSON, ANTHONY | Sergeant SARA SMITH | 2/11/2005 | A54-13987 | MARIJUANA | ROBINSON, ANTHONY |
| ALLEN, MARY | Sergeant SARA SMITH | 2/11/2005 | A64-10098 | MARIJUANA | ALLEN, MARY |
| GREEN, PATRICIA | Sergeant SARA SMITH | 2/11/2005 | A79-36532 | COCAINE | GREEN, PATRICIA |
| KING, MARIA | Sergeant SARA SMITH | 2/11/2005 | A23-76981 | OXYCODONE | KING, MARIA |
| SCOTT, PAUL | Sgt SARA SMITH | 2/11/2005 | A97-22164 | AMPHETAMINE | SCOTT, PAUL |
| HALL, STEVEN | Sergeant SARA SMITH | 2/11/2005 | A98-80198 | COCAINE | HALL, STEVEN |
| YOUNG, KEVIN | Sergeant JAMES MILLER | 4/19/2004 | A87-35211 | HYDROCODONE-C | YOUNG, KEVIN |
| CLARK, PAUL | Sergeant JAMES MILLER | 4/19/2004 | A67-99543 | COCAINE | CLARK, PAUL |
| ADAMS, SUSAN | Sergeant JAMES MILLER | 4/19/2004 | A54-42390 | MARIJUANA | ADAMS, SUSAN |
| ADAMS, SUSAN | Sergeant JAMES MILLER | 4/19/2004 | A32-13654 | MARIJUANA | ADAMS, SUSAN |
| LEWIS ET AL | Detective BRIAN ADAMS | 11/17/2010 | A21-24407 | MARIJUANA | LEWIS, DONALD |
| LEWIS ET AL | Detective BRIAN ADAMS | 11/17/2010 | A21-24407 | MARIJUANA | LEE, LINDA |
| LEWIS ET AL | Det BRIAN ADAMS | 11/17/2010 | A21-24407 | MARIJUANA | HILL, CHARLES |
| BAKER, DANIEL | Detective BRIAN ADAMS | 11/17/2010 | A42-21345 | MARIJUANA | BAKER, DANIEL |
| ROBERTS, SANDRA | Detective BRIAN ADAMS | 11/17/2010 | A31-22202 | MARIJUANA | ROBERTS, SANDRA |
| NELSON, ELIZABETH | Detective BRIAN ADAMS | 11/17/2010 | A45-22209 | COCAINE | NELSON, ELIZABETH |
| TURNER, RICHARD | Detective BRIAN ADAMS | 11/17/2010 | A35-24610 | COCAINE | TURNER, RICHARD |
| PARKER, LAURA | Sgt THOMAS RAY | 6/5/2010 | A57-02472 | COCAINE | PARKER, LAURA |
| CAMPBELL, CHARLES | Sergeant THOMAS RAY | 6/5/2010 | A43-24611 | OXYCODONE | CAMPBELL, CHARLES |
| EVANS, MICHELLE | Sergeant THOMAS RAY | 6/5/2010 | A02-10985 | OXYCODONE | EVANS, MICHELLE |
| GEORGE, ETHEL | Sergeant THOMAS RAY | 6/5/2010 | A56-02458 | OXYCODONE | GEORGE, ETHEL |

## HINTON DRUG LAB REVIEW

****ILLUSTRATIVE AID: ALL NAMES ARE FABRICATED FOR SAMPLE PURPOSES ONLY****

| Drug Submission Form (Click for Drug Receipt) |
|---|
| MSPON00062917.pdf |
| MSPON00062918.pdf |
| MSPON00062918.pdf |
| MSPON00062918.pdf |
| MSPON00062919.pdf |
| MSPON00062919.pdf |
| MSPON00062920.pdf |
| MSPON00067921.pdf |
| MSPON00062922.pdf |
| MSPON00062922.pdf |
| MSPON00062924.pdf |
| MSPON00062925.pdf |
| MSPON00062926.pdf |
| MSPON00062927.pdf |
| MSPON00062928.pdf |
| MSPON00062929.pdf |
| MSPON00062930.pdf |
| MSPON00062931.pdf |
| MSPON00062942.pdf |
| MSPON00062956.pdf |
| MSPON00062956.pdf |
| MSPON00014703.pdf |
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| MSPON00014703.pdf |

32

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss

SUPERIOR COURT
CRIMINAL ACTION
NO. ESCR 2007-875

COMMONWEALTH

vs.

ANGEL D. RODRIGUEZ

PROPOSED FINDINGS AND ORDER ON
DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEA

## INTRODUCTION

By motion filed on October 31, 2012, the defendant, Angel D. Rodriguez ("the defendant" or "Rodriguez"), moves to withdraw his guilty plea and seeks a new trial on one count of trafficking cocaine in an amount of twenty-eight grams or greater.[1] Rodriguez challenges his guilty plea based on newly discovered evidence of Annie Dookhan's ("Dookhan") misconduct at the Hinton Drug Laboratory in Jamaica Plain ("the Drug Lab"). The Commonwealth opposes the motion. After receiving stipulated exhibits and conducting a hearing on February 14, 2013, I make the following Proposed Findings and Order allowing the defendant's motion.

## BACKGROUND

The docket reflects that on June 13, 2007, a Grand Jury returned an indictment against Rodriguez for one count of trafficking in cocaine in an amount of one hundred grams or more. Dookhan was the primary chemist who analyzed the alleged controlled substance and certified

[1] The court treats Rodriguez's motion to withdraw his guilty plea as a motion for a new trial pursuant to Rule 30(b). See Commonwealth v. Pingaro, 44 Mass. App. Ct. 41, 47-48 (1997) (treating defendant's post-conviction motion to withdraw guilty pleas as motion for new trial pursuant to Mass. R. Crim. P. 30(b)).

that it was cocaine on drug certificate number 817051. Ex. 18. Since December 2012, Dookhan has been indicted in multiple counties for tampering with evidence and obstruction of justice. See, e.g., Ex. 10.

Pursuant to a negotiated plea bargain with the Commonwealth, Rodriguez pled guilty to the lesser offense of trafficking in cocaine in an amount of twenty-eight grams or more on January 28, 2008. Ex. 30 at 14. During the plea colloquy, the Commonwealth proffered the following facts on the record: On the evening of April 18, 2007, the Lawrence police executed a search warrant for 35 Cedar Street in Lawrence, where Rodriguez and a co-defendant, Nora Pereyra ("Pereyra"), resided at the time. Ex. 30 at 15. One to two minutes after the officers knocked at the rear door, Pereyra answered the door. Ex. 30 at 15. At the same time, Rodriguez ran out through the front door holding a scale with residue on it, a plate containing a large amount of a substance believed to be cocaine, a plastic bag containing residue and a softball-sized rock that appeared to be a partially cooked substance, which weighed out to over 129 grams. Ex. 30 at 15-16. Officers arrested Rodriguez and found $375 on his person. Ex. 30 at 16. Following his guilty plea, Rodriguez received a sentence of five to seven years, with 286 days of jail credit for time served. Ex. 30 at 30.

The current motion came before this Court (Lowy, J.) on November 9, 2012 for a hearing on Rodriguez's motion for a stay of execution of his sentence, which was denied. Pursuant to the "power and authority to conduct hearings on post conviction motions . . . [,]" this Special Magistrate held a hearing on Rodriguez's motion for a new trial on February 14, 2013. See Mass. R. Crim. P. 47; Order of Assignment, (Mass. Super. November 26, 2012) (Rouse, C.J.).

Rodriguez was present, stipulated exhibits were presented, and I heard both counsels' oral argument on the merits of the motion.

## DISCUSSION

### I. Motion for a New Trial Pursuant to Rule 30(b)

"A postconviction motion to withdraw a plea is treated as a motion for a new trial." Commonwealth v. Correa, 43 Mass. App. Ct. 714, 716 (1997) (citations omitted). A judge may grant such a motion if "'it appears that justice may not have been done.'" Commonwealth v. DeRosier, 56 Mass. App. Ct. 348, 353-354 (2002), quoting Mass. R. Crim. P 30(b), 378 Mass. 900 (1979). Moreover, "the judge's disposition of the motion will not be reversed for abuse of discretion unless it is manifestly unjust . . . . " Correa, 43 Mass. App. Ct. at 716 (citations omitted).

### II. Special Magistrate's Authority

Pursuant to Rule 47 of the Massachusetts Rules of Criminal Procedure, "the Justices of the Superior Court may appoint special magistrates to preside over criminal proceedings in the Superior Court. Such special magistrates . . . have the powers to . . . make findings and report those findings and other issues to the presiding justice or Administrative Justice, and to perform such other duties as may be authorized by order of the Superior Court." Mass. R. Crim. P. 47. Pursuant to the rule, Chief Justice Barbara J. Rouse issued an Order of Assignment appointing me as a Special Judicial Magistrate to preside over criminal proceedings in connection with so-called Dookhan cases. Order of Assignment, (Mass. Super. November 26, 2012) (Rouse, C.J.). As a Special Magistrate, I have "the power and authority to conduct hearings on post conviction motions, to issue orders regarding discovery, and other matters . . . , to make proposed findings

and rulings to the Regional Administrative Justice . . . [and to] perform such other duties as may be authorized by order of the Superior Court." Id. This current motion for a new trial constitutes a postconviction motion within the language of the Order of Assignment. Accordingly, I have the authority to make these proposed findings and rulings.

**III. Voluntariness of Plea**

Rodriguez first argues that he should be allowed to withdraw his guilty plea because it was not intelligently and voluntarily made. Rodriguez does not contend, nor does the plea colloquy indicate, that he was pressured or coerced into pleading guilty, or lacked an understanding of either the elements of the crime charged or the consequences of pleading guilty. See generally, Commonwealth v. Robbins, 431 Mass. 442, 449 (2000). Rather, Rodriguez argues that had he known about Dookhan's misconduct at the time, he would not have pled guilty.

Where, as here, the defendant was "warned of the usual consequences of pleading guilty and the range of potential punishment for the offense before entering a guilty plea . . . ," Ferrara v. United States, 456 F.3d 278, 290 (1st Cir. 2006), the First Circuit has instructed that a defendant seeking to set aside a guilty plea as involuntary must show that (1) the government or its agents committed some egregiously impermissible conduct that antedated the entry of the plea; and (2) the misconduct was material to the defendant's choice to plead guilty. Id.[2] In analyzing these elements, the Court considers "the totality of the circumstances surrounding the plea." Id. (citations omitted).

In applying the Ferrara analysis, I must first determine whether Dookhan is a government agent. All of the evidence submitted by stipulation in this hearing establishes that Dookhan's

[2] The court adopts the test in Ferrara, as it best addresses the defendant's argument.

role at the Drug Lab was to provide evidentiary support for the government's prosecution of alleged drug offenses. That support included expert scientific opinions about the composition and weight of substances seized from defendants. Ex. 13 at 1; Ex. 15 at 6. Certainly, she and her scientific findings were essential to the Commonwealth's proof of criminal behavior. As such, it cannot be denied that in June of 2007, Dookhan was an agent of the government.

Next, I must determine whether Dookhan's misconduct antedated the defendant's guilty plea and whether, once known, information about that misconduct would be material to any attorney advising the defendant about accepting a guilty plea versus going to trial. Essential to this analysis are my conclusions with respect to Dookhan's activities at the Drug Lab in June of 2007, when she reported her findings as the primary chemist named on drug certificate number 817051.

Much is known, admissible, and went unrebutted at this hearing about Dookhan's misconduct in 2009 to 2011. There is evidence that Dookhan lied about her credentials and provided false testimony in court cases dating back to May of 2009. Ex. 20 at 32-33; Ex. 21 at 4-11; Ex. 24 at 6-14, 18; Ex. 26 at 9. Dookhan admitted in her interview with the State Police and in her written statement that she took and tested samples from the evidence safe against proper procedure, see Ex. 5 at 71-72, 77; Ex. 20 at 19; forged dates, initials, and entries on documents, Ex. 5 at 72, 77; Ex. 20 at 11, 19-20; "dry labbed" drug test results, Ex. 5 at 73, 77; recorded false data on Quality Control GC/MS Daily Injector Reports, Ex. 5 at 72; Ex. 20 at 20; and intentionally contaminated samples that had previously tested negative for drugs in order to make them test positive. See Ex. 5 at 72-74; 77; Ex. 20 at 22-26. Using that information to infer

her misconduct of the same or similar proportions in June of 2007, however, is a more challenging task.

First, there are Dookhan's admissions to Detectives Captain Joseph Mason and Lieutenant Robert Irwin and in her signed statement that she was "dry labbing" drug tests for two to three years prior to her removal from lab duties in June 2011. Ex. 5 at 73, 77; Ex. 20 at 24. This constitutes an admission of improper drug testing practices and procedures dating back to 2008—six months to one year after Dookhan tested the substance seized from Rodriguez. Second, there are the preliminary findings of the Hinton Laboratory Internal Inquiry and interviews conducted by the State Police, which indicate that the number of drug samples that Dookhan tested was far in excess of the number of samples tested by any other chemist in the Drug Lab, as far back as 2007. Ex. 15 at 11-12; Ex. 5 at 21. In fact, in his State Police interview, Peter Piro stated that he became suspicious of her high volume of work in 2007 to 2008. Ex. 5 at 21. Third, we have the statement of Julie Nasif to the State Police in December 2012 that Dookhan experienced a crisis in her personal life, "about six years back," thus likely in 2006, which antedated the drug test she conducted in this matter. Ex. 16 at 13.

In my opinion, all of this information submitted in the record for this hearing, particularly the details outlined in the previous paragraph, allows me to make a finding inferring that Dookhan's misconduct likely, more probably than not, was occurring in June of 2007, including on June 7, 2007, when she was the primary chemist signing the drug certificate for the prosecution of the defendant. I say this with particular respect to "dry labbing" because of the extensive time period for which she admitted conducting this improper practice.[3]

[3] While the other forms of Dookhan's misconduct during 2009 – 2011, described supra p. 5, arguably relate to that specific timeframe, the impact of these misdeeds on her overall credibility, including the accuracy of her work, is apparent.

Furthermore, the Commonwealth's argument that the defendant failed to produce certain control cards and control sheets, like the ones critical to the findings of Dookhan's wrongdoing in the Commonwealth v. Reeves and Commonwealth v. Banks cases, misses the point of her admission to extensive "dry labbing." By her own admission, she was "dry labbing" back to 2008, prior to the Melendez-Diaz v. Massachusetts decision in 2009. This admission weakens the Commonwealth's argument that the Melendez-Diaz decision is an important event in determining the date for the beginning of Dookhan's misconduct.

It is clear that a defendant is not entitled to change his guilty plea simply because he miscalculated the strength of the case against him. See Brady v. United States, 397 U.S. 742, 757 (1970). However, when that miscalculation is the result of "some particularly pernicious form of impermissible conduct[,] . . . due process concerns are implicated." Ferrara, 456 F.3d at 291. I find that Dookhan's malfeasance at the Drug Lab, while different from the malfeasance that occurred in Ferrara,[4] constitutes precisely this sort of "egregiously impermissible misconduct" sufficient to implicate due process concerns and satisfy the requirements in Ferrara.

In analyzing whether this information about Dookhan's misconduct is material to the defendant's choice to plead guilty, a court "considers whether a reasonable defendant standing in the [defendant's] shoes would likely have altered his decision to plead guilty . . . " had he known about the misconduct. See Ferrara, 456 F.3d at 293. Here, one of the many relevant factors in making such a determination is whether the information about Dookhan's misconduct "would have influenced counsel's recommendation as to the desirability of accepting a plea bargain." Ferrara, 456 F.3d at 294 (citation omitted). I make the finding that the information about

[4] In Ferrara, the Government knew, but failed to disclose to the defendant that a witness had recanted his grand jury testimony that inculpated the defendant. See Ferrara, 456 F.3d at 285-286.

Dookhan's misconduct, including the reasonable inference that it occurred on June 7, 2007, is material and relevant to any attorney advising Rodriguez as to how to proceed.

Likewise, I find that this information would have been material and relevant to Rodriguez's attorney before and on January 28, 2008, when she counseled the defendant about whether to plead guilty. In fact, according to Rodriguez's plea counsel, Lynette M. Leos ("Attorney Leos"), she advised Rodriguez to plead guilty, "in significant part," based on the drug certificates, noting particularly that at the time of the plea, drug certificates were considered prima facie evidence of the content and weight of suspected drugs because Melendez-Diaz v. Massachusetts had not yet been decided.[5] Ex. 28 at 1-2, pars. 9-10. Attorney Leos further states that had she known of Dookhan's malfeasance at the time of the plea, she "would have advised . . . a trial on the merits, rather than a plea of guilty . . . [e]specially since there was no other testing or weighing of the suspected narcotics before they were sent to the [Drug Lab] . . . ." Ex. 28 at 3, par. 23.

In my opinion, and I so find, this information about Dookhan's misconduct would have been essential to Rodriguez's decision, made in consultation with Attorney Leos, whether to accept a plea bargain and, if so, for which crime. Information indicating that Dookhan was likely dry labbing or otherwise improperly performing drug tests when she was the primary chemist named on the drug certificate would have called into doubt the composition and weight of the substance at issue, which, according to Attorney Leos, formed the basis for the offense to which the defendant pled guilty. As such, that information certainly would have been material to

[5] In Melendez-Diaz, 557 U.S. 305, 325-326 (2009), the United States Supreme Court held that drug certificates prepared for use in a criminal prosecution are subject to the protections of the confrontation clause of the sixth amendment of the United States Constitution, and that defendants are entitled to cross-examine the chemists who analyzed and reported the weight and content of the substances in those certificates.

Rodriguez's choice to accept a guilty plea, as the information would have "detracted from the factual basis . . . support[ing] his plea." Ferrara, 456 F.3d at 293.

At oral argument, the Commonwealth contended that the Court should deny the defendant's motion outright based on the strength of the Commonwealth's evidence independent of the drug certificate. The Commonwealth appears to argue that this information about Dookhan's misconduct would not have been material to the defendant's decision to plead guilty because the evidence independent of the drug certificate was strong enough to form the basis of the defendant's guilty plea. This argument is unpersuasive.

It is true that "[p]roof that a substance is a particular drug . . . may be made by circumstantial evidence." Commonwealth v. Dawson, 399 Mass. 465, 467 (1987) (citations omitted). However, the circumstantial evidence that exists here is not this type of proof. Evidence that the defendant fled from the police, while probative of some wrongdoing or consciousness of guilt, reveals nothing about the composition of the substance in question. See Commonwealth v. Charles, 456 Mass. 378, 382 (2010). The scale, cash in an amount consistent with drug proceeds, and the plastic bag with residue arguably tie the defendant to drug dealing, but do not establish the chemical composition of the substance seized from the defendant. See Commonwealth v. Vasquez, 456 Mass. 350, 366-367 (2010) (paraphernalia associated with drug distribution did not establish substance was cocaine). Nor do the appearance, size, and shape of a substance establish its chemical composition. See Dawson, 399 Mass. at 467.

Moreover, in the defendant's case, no field tests were conducted, and the defendant did not admit prior to his plea that the substance seized from him was cocaine. Indeed, in some circumstances, even field test results and admissions might be insufficient to establish the

chemical composition of a substance. See Commonwealth v. Fernandez, 458 Mass. 137, 151 n.20 (2010) (noting that no Massachusetts case has accepted as reliable field test results, regardless of purpose for which they are offered); Commonwealth v. Burrell, 82 Mass. App. Ct. 1106 (2012); 2012 LEXIS 882 at *5 (Mass. App. Ct. 2012) (unpublished opinion pursuant to Rule 1:28), rev. denied by Commonwealth v. Burrell, 463 Mass. 1110 (2012) (defendant's in-court admission that he had previously used cocaine and that substance found on his person was cocaine intended for personal use failed to establish identity of substance). Accordingly, the Commonwealth's evidence independent of the drug certificate does not alter my finding that the information about Dookhan's misconduct would have been material to the defendant's decision to plead guilty.

Another relevant factor in determining whether the information about Dookhan's misconduct would have been material to the defendant's choice to plead guilty is whether the value of that information was outweighed by the benefit of pleading guilty. See Ferrara, 456 F.3d at 294. There is no doubt that Rodriguez received some benefit by pleading guilty. Before entering his plea, he faced a state prison sentence of ten to twenty years. See G. L. c. 94C, § 32E(b)(3), as in effect in 2008; Ex. 30 at 6. After pleading guilty, he received a reduced sentence of five to seven years. See G. L. c. 94C, § 32E(b)(2); Ex. 30 at 30. I find that given the significant disparity among the various "staircased" mandatory penalties for trafficking in cocaine, the defendant and his counsel should have had the information about Dookhan's misconduct to inform them as to what kind of plea bargain to seek and/or accept or whether to reject a plea bargain and go to trial. Where that information may well have cast significant doubt on the Commonwealth's ability to meet its burden of proving the composition and weight of the

substance, it can hardly be said that the value of such information was outweighed by the reduced sentence that the defendant received in exchange for his guilty plea.

Finally, this information about Dookhan's misconduct remains critical, following this decision, to the defendant and his counsel in making an informed decision as to whether to proceed to trial and challenge Dookhan's overall credibility, as well as her analysis on the drug certificate by confronting her on the witness stand pursuant to Melendez-Diaz. Alternatively, should Dookhan be found unavailable at any future new trial, the new information concerning her misconduct and how it implicated the workings at the Drug Lab remains equally important for the defendant's counsel in deciding whether to challenge the Commonwealth's "non-Dookhan" evidence regarding the composition and weight of the alleged drugs.

For all these reasons and resting upon the analysis found herein, I find that this defendant did not make a knowing and voluntary guilty plea on January 28, 2008.

**IV. Newly Discovered Evidence**

Rodriguez also argues that Dookhan's misconduct at the Drug Lab is newly discovered exculpatory evidence and urges this court to vacate his guilty plea on that basis. "A defendant seeking a new trial on the ground of newly discovered evidence must establish . . . that the evidence is newly discovered and that it casts real doubt on the justice of the conviction." Commonwealth v. Grace, 397 Mass. 303, 305 (1986) (citation omitted). Evidence is "newly discovered" if it was "unknown to the defendant or his counsel and not reasonably discoverable by them at the time of [the defendant's plea]." Id. at 306.

The Commonwealth briefly argues that the evidence of Dookhan's misconduct is not "new for purposes of [Rodriguez's] plea . . . ." However, there is no evidence that either the

defendant or his attorney was aware of Dookhan's misconduct or its extent at the time of the defendant's plea, or that the defendant or his attorney could have discovered that evidence. As such, evidence of Dookhan's misconduct qualifies as "newly discovered."

The only issue for this analysis that remains is whether this newly discovered evidence casts doubt on the justice of Rodriguez's conviction. To constitute an appropriate basis for a new trial, newly discovered evidence "not only must be material and credible . . . but also must carry a measure of strength in support of the defendant's position." Grace, 397 Mass. at 305 (citations omitted). Newly discovered evidence is material if it is "weighty and of such nature as to its credibility, potency, and pertinency to fundamental issues in the case as to be worthy of careful consideration." Commonwealth v. Brown, 378 Mass. 165, 171 (1979) (citation omitted).

As previously indicated, I find that this newly discovered evidence, had it come to light at the time, would have had a significant impact on the defendant's decision to plead guilty. Although evidence of Dookhan's misconduct could certainly be used to impeach her credibility, it can hardly be said that the evidence is "merely impeaching," as the Commonwealth contends. My finding that Dookhan likely dry labbed drug test results as far back as June of 2007, along with her many years of excessive productivity in issuing testing results, raises serious doubts about the accuracy of the defendant's drug certificate which Dookhan signed as the primary chemist.

A drug certificate "assure[s] the fact finder, to a degree that virtually no amount of circumstantial evidence can, that the charged substance is in fact a particular illegal drug." Vasquez, 456 Mass. at 363-364. Here, the record submitted at this hearing shows that no other weighing or testing of the substance seized from the defendant occurred. Thus, evidence of

Dookhan's misconduct and the related deficiencies at the Drug Lab have seriously undermined what is traditionally considered the Commonwealth's strongest evidence as to the composition and weight of the substance. I find that knowing about this newly discovered evidence would have enabled the defendant and his counsel to make an informed decision whether or not to call Dookhan or other Drug Lab staff to testify at trial. I also find that at the very least, it would have allowed the defendant to seek a better plea bargain. Accordingly, my ultimate finding is that this newly discovered evidence casts doubt on the justice of the defendant's conviction.

Therefore, I recommend that the defendant's motion for a new trial be allowed.

V. **Due Process Under Brady**

The defendant has also challenged his conviction on due process grounds under Brady v. Maryland, 373 U.S. 83 (1963). The Court has decided the motion on other grounds and thus, declines to reach this issue.[6]

**PROPOSED ORDER**

For the foregoing reasons, my proposed Findings and Order are that the defendant's motion for a new trial be **ALLOWED**.[7]

John C. Cratsley
Special Judicial Magistrate

Date: March 28, 2013

[6] The Court also notes that the few other judges who have granted motions for new trials have either declined to reach this issue or have found it unpersuasive.

[7] Pursuant to the Order of Assignment from Chief Justice Rouse, dated November 26, 2012, "If any party objects to the findings or rulings of the Special Judicial Magistrate, it must notify the Special Judicial Magistrate, opposing counsel and the Regional Administrative Justice in writing within 48 hours after receipt of the proposed findings and rulings stating the grounds for the objection."

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COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

ESSEX, ss.

INDICTMENT
NO. 07- 875

COMMONWEALTH

vs.

ANGEL RODRIGUEZ

**MEMORANDUM OF DECISION AND ORDER ON COMMONWEALTH'S OBJECTION TO SPECIAL MAGISTRATE'S RULING ALLOWING THE DEFENDANT'S MOTION FOR A NEW TRIAL**

**INTRODUCTION**

On January 29, 2008, the defendant, Angel Rodriguez (Mr. Rodriguez) pled guilty to one count of trafficking in cocaine over twenty-eight grams (G.L. c. 94C, § 32E(b)(2) (2007)). This court (Whitehead, J.) sentenced him to five-to-seven years in the Massachusetts Correctional Institution at Cedar Junction. At the plea hearing, the Commonwealth recited the following facts the government would have relied on if the case had gone to trial:

> "The Lawrence police report that at 6 p.m. on April 18th, 2007, . . . they were conducting surveillance of 35 Cedar Street, the second floor which is where [Mr. Rodriguez and his co-defendant] lived at the time. They did see Mr. Rodriguez drive away, at one point, in a Honda that was registered to [his co-defendant].

> "On that evening, they executed a search warrant for that address. After knocking several times on the rear door, they waited about one to two minutes before [the co-defendant] answered the door.
>
> "While she answered the rear door, at that same time, Mr. Rodriguez ran out the front door with a scale with residue in his hands. Officers were waiting at that front door for him. He had a large amount of cocaine on a plate. Also on the plate was a plastic bag with residue and a softball-sized piece of cocaine that was in the process of being cooked and drying into crack cocaine.
>
> ". . . [W]hen the officers were able to retrieve it, the defendant actually dropped it onto the foot of one of the detectives. It weighed out to over 129 grams of cocaine.
>
> ". . . [T]hey note that Mr. Rodriguez also, when he was arrested, had $375 on his person.
>
> . . . .
>
> "Those are essentially the facts."

Exhibit 30, at 15-16. The court then asked Mr. Rodriguez if the facts were true and if he understood that, by pleading guilty, he "admit[ted] those facts and all other facts which are necessary to make out [his] guilt." Exhibit 30, at 17. Mr. Rodriguez answered affirmatively to the court's questions. Id.

Annie Dookhan (Ms. Dookhan) served as the primary chemist in this case, signing the drug certificate that identified the substance recovered from Mr. Rodriguez as cocaine. After learning of Ms. Dookhan's misconduct between 2008 and 2011 at the William A. Hinton State Laboratory Institute in Jamaica Plain where the testing of this substance occurred, Mr. Rodriguez filed a motion to vacate his guilty plea. After a

February 2013 non-evidentiary hearing[1] on Mr. Rodriguez' motion, the Special Judicial Magistrate (Cratsley, M.J.), on March 28, 2013, issued Proposed Findings and Order (proposal) allowing Mr. Rodriguez' motion.

The Commonwealth's objects to the proposal pursuant to the Order of Assignment.[2] This court held a hearing on this objection on April 19, 2013, and informed Mr. Rodriguez and the Commonwealth of its intention to view the matter de novo, with the proposal serving as persuasive authority only.[3]

## BACKGROUND

Based on oral arguments and a review of the parties' papers and stipulated exhibits, the court accepts the Special Judicial Magistrate's factual findings concerning Ms. Dookhan's misconduct for purposes of this decision.

## DISCUSSION

"A motion to withdraw a guilty plea is treated as a motion for a new trial under Mass. R. Crim. P. 30(b), . . . . [and] [a] judge may grant the defendant's motion 'only if it appears that justice may not have been done.'" Commonwealth v. Furr, 454 Mass. 101, 106 (2009) (internal citation and quotations omitted); see Commonwealth v. Berrios,

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[1]The Commonwealth and Mr. Rodriguez stipulated to the admission of certain documents which they presented to the court at this hearing.

[2]The Order of Assignment, issued November 26, 2012 (Rouse, C.J.), provides: "If any party objects to the findings or rulings of the Special Judicial Magistrate, it must notify the Special Judicial Magistrate, opposing counsel and the Regional Administrative Justice in writing within 48 hours after the receipt of the proposed findings and rulings stating the grounds for the objection."

[3]At the April 2013 hearing, the court marked the proposal Exhibit A for identification.

447 Mass. 701, 708 (2006) (noting that even though "the disposition of such a motion is within the discretion of the judge," the standard of review is "rigorous"). "Due process requires that 'a guilty plea should not be accepted, and if accepted must be later set aside,' unless the contemporaneous record contains an affirmative showing that the defendant's plea was intelligently and voluntarily made." Furr, 454 Mass. at 106; see Commonwealth v. Desrosier, 56 Mass. App. Ct. 348, 354 (2002) ("As a matter of constitutional due process, a guilty plea may be nullified if it does not appear affirmatively that the defendant entered the plea freely and voluntarily.").

Mr. Rodriguez argues that Ms. Dookhan's misconduct constitutes newly discovered evidence, renders the drug certificate in this case unreliable, and serves as powerful impeachment material; as a result, Mr. Rodriguez was unable to make a voluntary and intelligent plea. While the Commonwealth disputes that Mr. Rodriguez' plea was involuntary and unintelligent, and that Ms. Dookhan's misconduct qualifies as newly discovered evidence, its primary argument in favor of denying Mr. Rodriguez' motion is the lack of connection between Ms. Dookhan's misconduct and Mr. Rodriguez' case. The actual dispute, then, centers on the legal implications of the facts in this case, i.e., what is the effect of Ms. Dookhan's misconduct on the validity of Mr. Rodriguez' plea where Ms. Dookhan was the primary chemist but there is no evidence that Ms. Dookhan mishandled the substance recovered from Mr. Rodriguez? Stated another way within the context of Mass. R. Crim. P. 30(b), has justice been done if a defendant pleads guilty without knowing that Ms. Dookhan has been accused of mishandling evidence in other cases during the time period that she was the primary chemist in his case?

"A plea is voluntary if entered without coercion, duress, or improper inducements." Berrios, 447 Mass. at 708. The United States District Court for the District of Massachusetts recently addressed the matter of voluntariness of a plea under similar circumstances in United States v. Wilkins, --- F. Supp. 2d ---, 2013 WL 1899614 (D. Mass. May 8, 2013) (Steams, J.). Although Wilkins does not serve as controlling precedent in this case, a close reading provides a useful framework and assists in the resolution of the issues before this court.

In Wilkins, the defendants moved to vacate their guilty pleas on the basis that, as a result of Ms. Dookhan's misconduct, "their guilty pleas were obtained in violation of their right to due process and without the effective assistance of counsel." Id. at *4. They asserted that information regarding "the full range of Ms. Dookhan's malfeasance[,] . . . . if provided, would have cast a shadow over the evidentiary value of Ms. Dookhan's certifications of the nature and weight of the drugs they were accused of possessing. . . . [and] their attorneys' imperfect knowledge of this potential weakness in the government's case tainted the advice to plead guilty . . . ." Id. Under federal law, "a defendant's guilty plea [must] be voluntary in order to satisfy the Fifth Amendment's Due Process Clause." Id. at *5, citing Brady v. United States, 397 U.S. 742 (1970). Compare Furr, 454 Mass. at 106.

To demonstrate that his guilty plea is involuntary, "a defendant must show that (1) 'some egregiously impermissible conduct (say, threats, blatant misrepresentations, or untoward blandishments by government agents) antedated the entry of his plea' and (2) that 'the misconduct influenced his decision to plead guilty, or, put another way, that it was material to that choice." Wilkins, 2013 WL 1899614, at *6, quoting Ferrara v.

United States, 456 F.3d 278, 290 (1st Cir. 2006). With respect to the first prong, the district court compared the situation before it with the facts in Ferrara. Id. There, "the prosecution suppressed a key murder witness's recantation and coerced the witness . . . into reverting to testimony falsely implicating the defendant in a murder." Id.; see Ferrara, 456 F.3d at 282-284. The First Circuit held that the recantation evidence "'was of enormous significance for impeachment purposes'" as the jury might have "'hinged'" their verdict on an evaluation of that witness's credibility; and that "'the evidence tended to negate the petitioner's guilt . . . . Since these admissions, if accepted as true, would have precluded a jury from holding the petitioner liable for the [charged] murder, the suppressed evidence was suggestive of the petitioner's factual innocence.'" Wilkins, 2013 WL 1899614, at *6 (alteration and ellipses in original) (emphasis omitted), quoting Ferrara, 456 F.3d at 292.

Conversely, in Wilkins, the district court held that "the government's 'suppression' of impeachment evidence concerning Ms. Dookhan . . . falls miles short of the 'rare instance' of sufficiently egregious misconduct inducing involuntariness of the kind that figured in Ferrara." Id. This court respectfully disagrees with the district court's minimization of the significance of the Ms. Dookhan evidence[4] and concludes that this

[4]The facts before it likely influenced that court in reaching that decision: unlike in Ferrara, the facts before the Wilkins court, discussed more fully below, indicated that "there was overwhelming evidence (including defendants' own admissions in the course of the drug deal [and retesting of the evidence after the defendants moved to vacate their pleas]) that the contraband carried and dealt by [the defendants] was in fact crack cocaine and indeed, defendants do not claim otherwise." Id. The underlying facts in this case are more like those in Ferrara than in Wilkins, even though Mr. Rodriguez' "factual innocence" is not as clear as the defendant's was in Ferrara. Similar to the evidence of the witness's recantation in Ferrara, the evidence regarding Ms. Dookhan's misconduct is "'of enormous significance for impeachment purposes[,]'" see id., and may preclude a jury from finding that the Commonwealth has met its burden beyond a reasonable doubt. See, e.g., Commonwealth v. MacDonald, 459 Mass. 148, 153 (2011) ("In a case involving a narcotics offense, the Commonwealth must prove beyond a reasonable doubt that the substance at issue "'is a particular drug" because such proof is an element of the crime

evidence is sufficiently egregious to satisfy the first prong of the two-part Ferrara test.[5]

"[T]o satisfy the second prong of Ferrara. . . . a petitioner must show 'a reasonable probability that, but for [the misconduct], he would not have pleaded guilty and would have insisted on going to trial.'" Id. at *7 (alteration in original), quoting Ferrara, 456 F.3d at 294. The First Circuit defined "'reasonable probability'" as "'a probability sufficient to undermine confidence in a belief that the petitioner would have entered a plea.'" Id., quoting Ferrara, 456 Mass. at 294. In considering "'whether a reasonable defendant standing in the petitioner's shoes would likely have altered his decision to plead guilty had the prosecution made a clean breast of the evidence in its possession[,]'" the court can consider such factors as "'whether the . . . evidence would have detracted from the factual basis used to support the plea; . . . whether the . . . evidence could have been used to impeach a witness whose credibility may have been outcome-determinative; . . . [and] whether the . . . evidence would have influenced counsel's recommendation as to the desirability of accepting a particular plea bargain . . . .'" Id., quoting Ferrara, 456 F.3d at 294.

The Wilkins court accepted the representations of defendants' counsel "who state[d] that they would not have advised their clients to plead guilty . . . had they known the extent of Ms. Dookhan's misconduct[,]" but the court did not believe that there was

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charged.'" (citation omitted)); cf. Commonwealth v. Bly, 448 Mass. 473, 485 (2007) (defining "exculpatory evidence" as favorable evidence "that is of significant aid to [the defendant's] case, 'whether it furnishes corroboration of the defendant's story, calls into question a material, although not indispensable, *element of the prosecution's version of the events*, or challenges *the credibility of a key prosecution witness*'" (emphases added)).

[5]Ms. Dookhan was an agent of the Commonwealth. See Exhibit 17, at 1-2 (explaining that laboratory where Ms. Dookhan worked was part of Massachusetts Department of Public Health which, in turn, is statutorily required, "upon request from law enforcement authorities, to perform chemical analyses of drugs").

"a reasonable probability that either defendant would have foregone a guilty plea (whatever counsel's advice) and taken his chances before a jury in light of the strength of the government's evidence." Id. "In addition to the independent retesting of samples of the drugs seized from [the defendants], there was overwhelming circumstantial evidence, . . . including defendants' own admissions, that they knowingly possessed and sold crack cocaine." Id. (footnote omitted). The court concluded that, "in light of the sheer weight of the untainted incriminating evidence and the appreciable benefit that defendants received in terms of the ultimate sentences for which their pleas made them eligible, both [defendants] had strong incentives to plead guilty. . . . [and] these incentives had nothing to do with the (then unknown) impact that information about Ms. Dookhan might have had on the jury . . . ." Id.

Here, the evidence of Ms. Dookhan's misconduct calls into question not only Ms. Dookhan's credibility as a witness, but also the reliability of the drug certificate itself, thereby potentially jeopardizing the Commonwealth's ability to meet its burden at trial of proving "beyond a reasonable doubt that the substance at issue "'is a particular drug" . . . .'" Commonwealth v. MacDonald, 459 Mass. 148, 153 (2011) (citation omitted). It is reasonably probable, then, that Mr. Rodriguez would not have entered a guilty plea if he had known of Ms. Dookhan's misconduct. Mr. Rodriguez has accordingly satisfied the second prong as well.

Strengthening this conclusion are the affidavits of Mr. Rodriguez and his plea counsel. Mr. Rodriguez' plea counsel attests that "[t]he entire landscape of [her] discussions and advice to Mr. Mr. Rodriguez would have been dramatically altered had [she] known any of the information that [she] currently know[s] about the Department of

Public Health Laboratory and the malfeasance happening within the laboratory." Exhibit 28, par. 20. Given the absence of "other testing or weighing of the suspected narcotics before they were sent to the Department of Public Health laboratory, [she] likely would have advised Mr. Rodriguez to put the Commonwealth to their burden of proof. [She] would have advised a trial on the merits rather than a plea of guilty." Exhibit 28, par. 23. The Court credits defense counsel's position.

Mr. Rodriguez himself attests that he pled guilty because he believed that the drug certificates demonstrated "that the Commonwealth had shown that they would meet their burden of proof[,]" and he "did not believe that [he] had any realistic means of challenging" the drug certificates. Exhibit 27, pars. 9-10. If he had "known that the chemist involved in [his] case was untrustworthy, [he] would not have changed [his] plea to guilty" but "would have fought this case all the way to trial." Exhibit 27, pars. 15-16.[6]

As Mr. Rodriguez has demonstrated that his guilty plea was involuntary,[7] it appears that justice may not have been done, and his plea must be vacated.

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[6]Mr. Rodriguez adds that, after he filed his motion for a new trial, "the Commonwealth offered [him] a reduced sentence of 'time served'" which he refused "because [he] believe[s] that [his] rights were violated and [he] want[s] to have a trial." Exhibit 27, pars. 17-18.

[7]A plea is intelligent if "'(1) . . . the judge explain[ed] to the defendant the elements of the crime; (2) . . . counsel[] . . . has explained to the defendant the elements he admits by his plea; or (3) . . . the defendant[] . . . [admitted] to facts recited during the colloquy which constitute the unexplained elements.'" Furr, 454 Mass. at 107; see Desrosier, 56 Mass. App. Ct. at 354. The record appears to indicate that these procedural requirements for an intelligent plea were satisfied. See Exhibit 30, at 14-16, 17, 25. This court need not consider whether the potential unreliability of certain facts supporting the elements of the crime calls this indication into question given that this court vacates Mr. Rodriguez' plea because it was involuntary.

This court also need not consider whether the Ms. Dookhan evidence is newly discovered evidence that "'casts real doubt on the justice of the [plea].'" Commonwealth v. Rosario, 460 Mass. 181, 195 (2011), quoting Commonwealth v. Grace, 397 Mass. 303, 307 (1986); see, e.g., Commonwealth v. Buck, 64 Mass. App. Ct. 760, 765 (2005) (rejecting Commonwealth's argument that newly discovered evidence was inconsistent with its case, and affirming allowance of defendant's motion for new trial because "[t]he point is . . . that defense counsel never had the opportunity to argue the various possibilities to the jury, nor did the jury have an opportunity to evaluate such an argument").

**ORDER**

Angel Rodriguez' Motion to Withdraw his Guilty Plea (Paper #25) is **ALLOWED**.

John T. Lu
Justice of the Superior Court

Date: May 29, 2013

*2013 Tex. Crim. App. Unpub. LEXIS 778, **

EX PARTE **LEROY EDWARD COTY,** Applicant

NO. WR-79,318-02

COURT OF CRIMINAL APPEALS OF TEXAS

2013 Tex. Crim. App. Unpub. LEXIS 778

June 26, 2013, Filed

**NOTICE:** DO NOT PUBLISH.

PLEASE CONSULT THE TEXAS RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

**PRIOR HISTORY: [*1]**
ON APPLICATION FOR A WRIT OF HABEAS CORPUS. CAUSE NO. 1264113 IN THE 180TH DISTRICT COURT FROM HARRIS COUNTY.
Ex parte Coty, 2013 Tex. Crim. App. Unpub. LEXIS 648 (Tex. Crim. App., June 5, 2013)

**OPINION**

**Per curiam.**

**ORDER**

This is a post-conviction application for a writ of habeas corpus forwarded to this Court pursuant to TEX. CODE CRIM. PROC. art. 11.07, § 3, *et seq.* Applicant was convicted of possession of cocaine and sentenced to ten years' imprisonment. He did not appeal his conviction. On June 5, 2013, this Court granted relief in a written opinion. After reconsideration on its own motion, the Court withdraws the previous opinion entered in this application and substitutes this order.

Applicant contends that his due-process rights were violated because a forensic scientist did not follow accepted standards when analyzing evidence and therefore the results of his analyses are unreliable. We order that this application be filed and set for submission to determine under what circumstances, if any, we should presume a due-process violation in a case handled by a forensic scientist who has been found to have committed misconduct in another case. The parties shall brief this issue. Oral argument is permitted.

It appears that Applicant is represented by counsel. If Applicant is no **[*2]** longer represented by counsel, counsel shall be appointed by the trial court. Both Applicant's brief and the State's brief shall be filed with this Court within 30 days of the date of this order.

Applicant's writ application is filed and set for the Court's consideration.

DO NOT PUBLISH
FILED: June 26, 2013

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Massachusetts Declaration of Rights

Article Twelve

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 defence by himself, or his counsel, 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.

Massachusetts General Laws

Chapter 6, Section 172(a)(3)

(a) The department shall maintain criminal offender record information in a database, which shall exist in an electronic format and be accessible via the world wide web. Except as provided otherwise in this chapter, access to the database shall be limited as follows:

* * *

(3) A requestor or the requestor's legally designated representative may obtain criminal offender record information for any of the following purposes: (i) to evaluate current and prospective employees including full-time, part-time, contract, internship employees or volunteers; (ii) to evaluate applicants for rental or lease of housing; (iii) to evaluate volunteers for services; and (iv) to evaluate applicants for a professional or occupational license issued by a state or municipal entity. Criminal offender record information made available under this section shall be limited to the following: (i) felony convictions for 10 years following the disposition thereof, including termination of any period of incarceration or custody, (ii) misdemeanor convictions for 5 years following the disposition thereof, including termination of any period of incarceration or custody, and (iii) pending criminal charges, which shall include cases that have been continued without a finding until such time as the case is dismissed pursuant to section

18 of chapter 278; provided, however, that prior misdemeanor and felony conviction records shall be available for the entire period that the subject's last available conviction record is available under this section; and provided further, that a violation of section 7 of chapter 209A and a violation of section 9 of chapter 258E shall be treated as a felony for purposes of this section.

Chapter 90, Section 22(f)

The registrar shall suspend, without hearing, the license or right to operate of a person who is convicted of a violation of any provision of chapter ninety-four C or adjudged a delinquent child by reason of having violated any provision of chapter ninety-four C; provided, however, that the period of such suspension shall not exceed five years; provided further, that any person so convicted who is under the age of eighteen years or who is adjudged a delinquent child by reason of having violated any provision of chapter ninety-four C, and is not licensed to operate a motor vehicle shall, at the discretion of the presiding judge, not be so licensed for a period no later than when such person reaches the age of twenty-one years.

Chapter 111, Section 12

The department shall make, free of charge, a chemical analysis of any narcotic drug, or any synthetic substitute for the same, or any preparation containing the same, or any salt or compound thereof, and of any poison, drug, medicine or chemical, when submitted to it by police authorities or by such incorporated charitable organizations in the commonwealth, as the department shall approve for this purpose; provided, that it is satisfied that the analysis is to be used for the enforcement of law.

Chapter 211, Section 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 necessary 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.

Chapter 277, Section 63

An indictment for murder may be found at any time after the death of the person alleged to have been murdered. An indictment or complaint for an offense set forth in section 13B, 13B1/2, 13B3/4, 13F, 13L, 22A, 22B, 22C, 23, 23A, 23B, 24B or subsection (b) of section 50 of chapter 265, for conspiracy to commit any of these offenses, as an accessory thereto, or any 1 or more of them may be found and filed at any time after the date of the commission of such offense; but any indictment or complaint found and filed more than 27 years after the date of commission of such offense shall be supported by independent evidence that corroborates the victim's allegation. Such independent evidence shall be admissible during trial and shall not consist exclusively of the opinions of mental health professionals. An indictment for an offense set forth in sections 22, 24 or subsection (a) of section 50 of chapter 265, or for conspiracy to commit either of these offenses or as an accessory thereto or any 1 or more of them may be found and filed within 15 years of the date of commission of such offense. An indictment for an offense set forth in sections 17, 18, 19 and 21 of said chapter 265 or section 17 of chapter 272, for conspiracy to commit any such crime, as an accessory thereto, or any 1 or more of them may be found and filed within 10 years after the date of commission of such offense. An indictment for any other crime shall be found and filed within 6 years after such crime has been committed. Any period during which the defendant is not usually and publicly a resident within the commonwealth shall be excluded in determining the time limited.

Notwithstanding the first paragraph, if a victim of a crime set forth in section 13B, 13F, 13H, 22, 22A, 23, 24B, 26A or 50 of chapter 265, or section 1, 2, 3, 4, 4A, 4B, 5, 6, 7, 8, 12, 13, 17, 26, 28, 29A, 29B, 33, 34, 35 or 35A of chapter 272 is under the age of 16 at the time the crime is committed, the period of limitation for prosecution shall not commence until the victim has reached the age of 16 or the violation is reported to a law enforcement agency, whichever occurs earlier.

St. 2012, c.139, §107

Sections 11 to 13, inclusive, of chapter 111 of the General Laws are hereby repealed.

St. 2013, c.3, §2A

To provide for certain unanticipated obligations of the commonwealth, to provide for alterations of purpose for current appropriations and to meet certain requirements of law, the sums set forth in this section are hereby appropriated from the General Fund unless specifically designated otherwise in this section, for the several purposes and subject to the conditions specified in this section and subject to the laws regulating the disbursement of public funds for the fiscal year ending June 30, 2013. These sums shall be in addition to any amounts previously appropriated and made available for the purposes of those items.

EXECUTIVE OFFICE FOR ADMINISTRATION AND FINANCE
Reserves.

1599-0054. For a reserve for costs of the investigation and response related to the breach at the Dr. William A. Hinton Laboratory at the State Laboratory Institute; provided, that the secretary of administration and finance may transfer funds from this item to state agencies, as defined in section 1 of chapter 29 of the General Laws, and to municipalities for this purpose; provided further, that these transfers shall occur on a monthly basis in incremental amounts based on costs to investigate or respond to the Hinton laboratory breach unless the secretary determines that funds are required to be transferred more or less frequently in order to meet necessary funding needs of state agencies and municipalities; provided further, that transfers shall be made in accordance with an executed memorandum of agreement between the secretary and each entity receiving funding, documenting the types of costs eligible for funding under this item and other terms of funding that the secretary considers appropriate, a copy of which shall be filed with the chairs of the house and senate committees on ways and means within 10 days after the agreement's execution; provided further, that requests for funding of eligible costs pursuant to any such memorandum of agreement shall include documentation evidencing these eligible costs that the secretary, in the secretary's sole discretion, determines to be sufficient; provided further, that no transfers shall be made from this item before the filing of the applicable memorandum of agreement with the house and senate committees on ways and means; and provided further, that the secretary shall file a quarterly report with the chairs of the house and senate committees on ways and means which identifies, by funding recipient: (i) all

funding requests and transfers made for the quarter that has most recently ended; (ii) the total funding requested and transfers by fiscal year; and (iii) projected funding required for the forthcoming quarter ..... $30,000,000

* * *

CODE OF MASSACHUSETTS REGULATIONS

760 C.M.R. 508(1)(d)

(1) In making its final determination the LHA shall determine if applicant and household members are qualified for public housing. An applicant and the applicant household shall be disqualified for public housing for any of the following reasons:

* * *

(d) The applicant or a household member in the past has engaged in criminal activity, or activity in violation of M.G.L. c. 151B §4, which if repeated by a tenant in public housing, would interfere with or threaten the rights of other tenants or LHA employees to be secure in their persons or in their property or with the rights of other tenants to the peaceful enjoyment of their units and the common areas of the housing development.

Massachusetts Rules of Criminal Procedure

Rule 2(a)

(a) Purpose; Construction. These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of expense and delay.

Rule 36(b)(1)

(b) Standards of a Speedy Trial. The time limitations in this subdivision shall apply to all defendants as to whom the return day is on or after the effective date of these rules. Defendants arraigned prior to the effective date of these rules shall be tried within twenty-four months after such effective date.

(1) Time Limits. A defendant, except as provided by subdivision (d)(3) of this rule, shall be brought to trial within the following time periods, as extended by subdivision (b)(2) of this rule:

* * *

(D) If a retrial of the defendant is ordered, the trial shall commence within one year after the date the action occasioning the retrial becomes final, as extended by subdivision (b)(2) of this rule. The order of an appellate court requiring a retrial is final upon the issuance by the appellate court of the rescript. In the event that the clerk of the appellate court fails to issue the rescript within the time provided for in Massachusetts Rule of Appellate Procedure 23, retrial shall commence within one year after the date when the rescript should have issued.

If a defendant is not brought to trial within the time limits of this subdivision, as extended by subdivision (b)(2), he shall be entitled upon motion to a dismissal of the charges.

UNITED STATES CODE

8 U.S.C. §1101(a)(43)(B)

(a) As used in this Act--

* * *

(43) The term "aggravated felony" means--

* * *

(B) illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act [21 USCS § 802]), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code).

8 U.S.C. §1227(a)(2)(B)(i)

(a) Classes of deportable aliens. Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

* * *

(2) Criminal Offenses

* * *

(B) Controlled substances.

(i) Conviction. Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

10 U.S.C. §504(a)

(a) Insanity, desertion, felons, etc. No person who is insane, intoxicated, or a deserter from an armed force, or who has been convicted of a felony, may be enlisted in any armed force. However, the Secretary concerned may authorize exceptions, in meritorious cases, for the enlistment of deserters and persons convicted of felonies.

20 U.S.C. §1091(r)

(r) Suspension of eligibility for drug-related offenses.

(1) In general. A student who is convicted of any offense under any Federal or State law involving the possession or sale of a controlled substance for conduct that occurred during a period of enrollment for which the student was receiving any grant, loan, or work assistance under this title shall not be eligible to receive any grant, loan, or work assistance under this title from the date of that conviction for the period of time specified in the following table:

| If convicted of an offense involving: | The possession of a controlled substance: |
|---|---|
| First offense | 1 year |
| Second offense | 2 years |
| Third offense | Indefinite. |

| The sale of a controlled substance: | Ineligibility period is: |
|---|---|
| First offense | 2 years |
| Second offense | Indefinite |

CODE OF FEDERAL REGULATIONS

24 C.F.R. 960.203(c)(3)

(c) In selection of families for admission to its public housing program, or to occupy a public housing development or unit, the PHA is responsible for screening family behavior and suitability for tenancy. The PHA may consider all relevant information, which may include, but is not limited to:

* * *

(3) A history of criminal activity involving crimes of physical violence to persons or property and other criminal acts which would adversely affect the health, safety or welfare of other tenants. (See § 960.204.)

24 C.F.R. 982.553

(a) Denial of admission. (1) Prohibiting admission of drug criminals.

(i) The PHA must prohibit admission to the program of an applicant for three years from the date of eviction if a household member has been evicted from federally assisted housing for drug-related criminal activity. However, the PHA may admit the household if the PHA determines:

(A) That the evicted household member who engaged in drug-related criminal activity has successfully completed a supervised drug rehabilitation program approved by the PHA; or

(B) That the circumstances leading to eviction no longer exist (for example, the criminal household member has died or is imprisoned).

(ii) The PHA must establish standards that prohibit admission if:

(A) The PHA determines that any household member is currently engaging in illegal use of a drug;

(B) The PHA determines that it has reasonable cause to believe that a

household member's illegal drug use or a pattern of illegal drug use may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents; or

(C) Any household member has ever been convicted of drug-related criminal activity for manufacture or production of methamphetamine on the premises of federally assisted housing.

(2) Prohibiting admission of other criminals -- (i) Mandatory prohibition. The PHA must establish standards that prohibit admission to the program if any member of the household is subject to a lifetime registration requirement under a State sex offender registration program. In this screening of applicants, the PHA must perform criminal history background checks necessary to determine whether any household member is subject to a lifetime sex offender registration requirement in the State where the housing is located and in other States where the household members are known to have resided.

(ii) Permissive prohibitions. (A) The PHA may prohibit admission of a household to the program if the PHA determines that any household member is currently engaged in, or has engaged in during a reasonable time before the admission:

(1) Drug-related criminal activity;

(2) Violent criminal activity;

(3) Other criminal activity which may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents or persons residing in the immediate vicinity; or

(4) Other criminal activity which may threaten the health or safety of the owner, property management staff, or persons performing a contract administration function or responsibility on behalf of the PHA (including a PHA employee or a PHA contractor, subcontractor or agent).

(B) The PHA may establish a period before the admission decision during which an applicant must not to have engaged in the activities specified in paragraph (a)(2)(i) of this section ("reasonable time").

(C) If the PHA previously denied admission to an applicant because a member of the household engaged in criminal activity, the PHA may reconsider the applicant if the PHA has sufficient evidence that the members of the household are not currently engaged in, and have not engaged in, such criminal activity during a

reasonable period, as determined by the PHA, before the admission decision.

(1) The PHA would have "sufficient evidence" if the household member submitted a certification that she or he is not currently engaged in and has not engaged in such criminal activity during the specified period and provided supporting information from such sources as a probation officer, a landlord, neighbors, social service agency workers and criminal records, which the PHA verified.

(2) For purposes of this section, a household member is "currently engaged in" criminal activity if the person has engaged in the behavior recently enough to justify a reasonable belief that the behavior is current.

(3) Prohibiting admission of alcohol abusers. The PHA must establish standards that prohibit admission to the program if the PHA determines that it has reasonable cause to believe that a household member's abuse or pattern of abuse of alcohol may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents.

(b) Terminating assistance -- (1) Terminating assistance for drug criminals. (i) The PHA must establish standards that allow the PHA to terminate assistance for a family under the program if the PHA determines that:

(A) Any household member is currently engaged in any illegal use of a drug; or

(B) A pattern of illegal use of a drug by any household member interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents.

(ii) The PHA must immediately terminate assistance for a family under the program if the PHA determines that any member of the household has ever been convicted of drug-related criminal activity for manufacture or production of methamphetamine on the premises of federally assisted housing.

(iii) The PHA must establish standards that allow the PHA to terminate assistance under the program for a family if the PHA determines that any family member has violated the family's obligation under § 982.551 not to engage in any drug-related criminal activity.

(2) Terminating assistance for other criminals. The PHA must establish standards that allow the PHA to terminate assistance under the program for a family if the PHA determines that any household member has violated the family's

obligation under § 982.551 not to engage in violent criminal activity.

(3) Terminating assistance for alcohol abusers. The PHA must establish standards that allow termination of assistance for a family if the PHA determines that a household member's abuse or pattern of abuse of alcohol may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents.

(c) Evidence of criminal activity. The PHA may terminate assistance for criminal activity by a household member as authorized in this section if the PHA determines, based on a preponderance of the evidence, that the household member has engaged in the activity, regardless of whether the household member has been arrested or convicted for such activity.

(d) Use of criminal record. -- (1) Denial. If a PHA proposes to deny admission for criminal activity as shown by a criminal record, the PHA must provide the subject of the record and the applicant with a copy of the criminal record. The PHA must give the family an opportunity to dispute the accuracy and relevance of that record, in the informal review process in accordance with § 982.554. (See part 5, subpart J for provision concerning access to criminal records.)

(2) Termination of assistance. If a PHA proposes to terminate assistance for criminal activity as shown by a criminal record, the PHA must notify the household of the proposed action to be based on the information and must provide the subject of the record and the tenant with a copy of the criminal record. The PHA must give the family an opportunity to dispute the accuracy and relevance of that record in accordance with § 982.555.

(3) Cost of obtaining criminal record. The PHA may not pass along to the tenant the costs of a criminal records check.

(e) In cases of criminal activity related to domestic violence, dating violence, or stalking, the victim protections of 24 CFR part 5, subpart L, apply.

CERTIFICATE OF COMPLIANCE

We certify that this brief complies with the rules of court that pertain to the filing of briefs, including those specified in Rule 16(k) of the Massachusetts Rules of Appellate Procedure.

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SJC-11466

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COMMONWEALTH

V.

GEORDANO RODRIGUEZ
ADAM DAVILA
COREY BJORK
RAKIM D. SCOTT
RENE TORRES

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# BRIEF FOR THE COMMITTEE FOR PUBLIC COUNSEL SERVICES AND OTHERS AS AMICI CURIAE