COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

ESSEX COUNTY

NO. SJC-11408 &
SJC-11409

COMMONWEALTH

V.

SHUBAR CHARLES

COMMONWEALTH

V.

HECTOR MILETTE

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# BRIEF AND ADDENDUM FOR DEFENDANTS CHARLES AND MILETTE ON QUESTIONS RESERVED AND REPORTED BY THE SINGLE JUSTICE TO THE FULL COURT

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Beth L. Eisenberg
BBO #554630
Chris Norris
BBO #669624
COMMITTEE FOR PUBLIC COUNSEL SERVICES
Special Litigation Unit
21 McGrath Highway
Somerville, MA 02143
(617) 623-0591
beisenberg@publiccounsel.net

Matthew R. Segal
BBO #654489
AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS
211 Congress Street
Boston, MA 02110
(617) 482-3170
msegal@aclum.org

Ezekiel R. Edwards
NY 4189304 (pro hac vice pending)
Emma A. Anderson
CA 260537 (pro hac vice pending)
Criminal Law Reform Project
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street, 18th Floor
New York, New York 10004
(212) 284-7365
Eanderson@aclu.org


April, 2013.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provision



Statutes

Other Authorities

## Issues Presented

1. Does a special judicial magistrate appointed by the Chief Justice of the Superior Court pursuant to Mass. R. Crim. P. 47, or a judge of the Superior Court, have the authority to allow a defendant's motion to stay execution of his sentence, then being served, pending disposition of the defendant's motion for a new trial?

2. Does a special judicial magistrate have the authority to reconsider and allow a motion to stay execution of a criminal defendant's sentence where a judge of the Superior Court has previously denied a motion to stay execution filed by the same defendant?

3. Should this Court order the release from custody of defendants Hector Milette and Shubar Charles?

## Statement of the Cases

These cases arise from a Reservation and Report of issues by a single justice (Botsford, J.) dated March 22, 2013, concerning the Commonwealth's petitions, brought under G.L. c. 211, § 3. In these petitions, the Commonwealth challenges the scope of the Superior Court's authority to decide certain post-conviction motions filed by these defendants following revelations of misconduct at the William A. Hinton State Laboratory Institute in Jamaica Plain ("Hinton Lab").

Hector Milette and Shubar Charles are two defendants affected by the Hinton Lab controversy. In 2011, Milette pled guilty to four drug crimes and was sentenced to five years to five years and one day of imprisonment. SRA 88-89.[1/] In 2010, Charles pled guilty

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[1/] Citations in this brief take the following form: "SRA" refers to the Supplemental Record Appendix jointly filed by the defendants; "Milette RA" and

(continued...)

to possession of a class B substance with intent to distribute, and two ammunition charges. SRA 5. The Commonwealth's petitions dispute the authority of judges and special judicial magistrates of the Superior Court to stay their sentences.

On October 22, 2012, based on evidence of misconduct at the Hinton Lab, Milette moved in the Superior Court for a new trial and for a stay of his sentence. SRA 90, 94-86. Superior Court Judge David Lowy initially denied the stay request on November 13, 2012. SRA 110. Later, on November 26, 2012, the Chief Justice of the Superior Court assigned retired Superior Court Judge John C. Cratsley as one of the Special Judicial Magistrates ("S.J.M.") in the Hinton Lab cases. SRA 112-13. On February 6, 2013, Milette filed a motion for reconsideration of the denial of his stay request, and S.J.M. Cratsley granted it on February 12, 2013. SRA 119, 145. Judge John T. Lu further modified the stay on February 13. SRA 162.

Meanwhile, on December 13 and 17, 2012, Charles filed motions in the Superior Court for a new trial and for a stay of his sentence, based on evidence of malfeasance at the Hinton Lab. SRA 9-10, 255-56. On

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[1/](...continued)
"Charles RA" refer to the Commonwealth's Record Appendices in Milette and Charles; and "Comm. Milette Br." and "Comm. Charles Br." refer to the Commonwealth's briefs in Milette and Charles.

January 31, 2013, S.J.M. Cratsley granted the stay. SRA 255. On appeal from the stay by the Commonwealth, the stay itself was stayed by Judge Lu on February 4, 2013. SRA 6, 259. On February 8, 2013, Judge Lu restored the stay of Charles's sentence, but he modified it to impose additional conditions. SRA 258.

Following those Superior Court proceedings, the Commonwealth initiated proceedings in the Supreme Judicial Court for Suffolk County by filing an emergency petition against Charles, under G.L. c. 211, § 3, on February 14, 2013. The petition challenged the authority of S.J.M. Cratsley and Judge Lu to stay the execution of Charles's sentence while his new trial motion remained pending. The petition also requested a stay of the stay of execution of Charles's sentence. On February 15, 2013, Justice Margot Botsford, sitting as Single Justice, granted the stay of the stay of Charles's sentence.

The Commonwealth filed a petition against Milette, under G.L. c. 211, § 3, on February 20, 2013. In addition to raising the legal issue presented in the petition against Charles, the petition against Milette also argued that, in granting Milette's stay, S.J.M. Cratsley had impermissibly reconsidered a ruling made by a judge of the Superior Court. On February 27, 2013, after the petition was filed, Judge Lu vacated the stay of Milette's sentence and ordered his return to prison.

On February 28, 2013, Judge Lu entered a written order reflecting that decision. SRA 198-99.

Following a conference with the Single Justice by the Commonwealth and counsel for defendant Charles on February 19, 2013, the Commonwealth filed a petition against the Superior Court, also under G.L. c. 211, § 3, on March 1, 2013. That petition, in what is now before this Court as District Attorney of Essex County v. Superior Court Department, No. SJC-11410, challenged the authority of special judicial magistrates to conduct plea colloquies.

The defendants filed timely written oppositions to the Commonwealth's petitions in the County Court. SRA 394, 397. The defendants also urged the Single Justice to report broader questions of law to this Court, concerning the exercise of the Court's equitable powers to "direct and endorse a range of judicial remedies" to properly safeguard the rights of defendants embroiled in the Hinton Lab crisis. The defendants also asked the Single Justice to restore them to the stays of their sentences. SRA 392.

On March 12, 2013, the Committee for Public Counsel Services ("CPCS") moved to intervene as a party. SRA 394, 398. It, too, urged the Single Justice to report to the full court the questions suggested by the defendants. SRA 286-98, 327.

After a hearing attended by all parties before the

Single Justice on March 13, 2013, Justice Botsford issued a Reservation and Report on March 22. SRA 324-28. The Single Justice reported the questions posed by the Commonwealth and declined to report the separate questions advanced by the defendants or CPCS. Justice Botsford also retained jurisdiction over the cases. Id.

The cases were docketed in this Court on March 27, 2013. On April 9, 2013, Justice Botsford denied the defendants' joint request to be released pending the outcome of these cases. SRA 392. However, the requests were denied "without prejudice to the renewal of the joint request before the full court." Id.

## Statement of Facts

### I. The Hinton Lab Crisis

These cases, like thousands of others, concern allegations of misconduct at the Hinton Lab. That misconduct is not discussed in the Commonwealth's briefs. Nor is it discussed in the amicus brief filed by the District Attorney for the Bristol District. But it is largely undisputed. The Commonwealth has itself charged Annie Dookhan, the chemist at the heart of this controversy, with crimes in six different counties. See Comm. Milette Br. 27-28; SRA 225-41.

Those charges center on allegations that Dookhan repeatedly and deliberately falsified results, tampered with evidence, and forged signatures. SRA 225-41. Dookhan was hired in November 2003 by the Hinton Lab as

a Chemist 1 in the Forensic Drug Lab. SRA 209. In 2005, she was re-classified to Chemist 2 "based on her successful performance." Id. Her "workload and tests" then "involved increasingly complex drug cases." Id. Between 2004 and 2011, Dookhan was consistently assigned, and was presumed to have tested, more samples at the Hinton Lab than any other chemist, "exceeding her peers by as much as 50% more than the second highest chemist." Id.; see SRA 215 (chart).

In June 2011, Hinton Lab supervisors learned of a potentially serious breach in documentation protocols for processing 90 drug samples for Norfolk County. SRA 204. After review, managers suspected that Dookhan "both violated proper protocol for release of samples and retroactively falsified log entries."[2/] SRA 210. On June 21, 2011, Dookhan was removed from testing duties and re-assigned to desk duties. Id. However, her access to the lab was not immediately revoked. Id.

Several months later, in December 2011, the Deputy Commissioner of the Department of Public Health ("DPH") was notified of Dookhan's breaches of protocol. Recognizing their "potentially significant impacts," DPH launched a formal investigation. SRA 211. DPH later concluded that "Dookhan failed to follow Lab protocols

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[2/]The Commonwealth also concedes that Dookhan falsely claimed – during sworn in-court testimony – that she held a master's degree in chemistry. SRA 228.

for the transfer and documentation of samples for testing, and subsequently created a false record of said transfers." Id.

Beginning on January 31, 2012, the Governor's Legal Counsel notified State and federal prosecutorial authorities, but not authorities for any defendants. SRA 211. Effective February 21, 2012, DPH placed Dookhan on paid administrative leave. SRA 212. Dookhan resigned in March 2012. Id.

In a wider investigation conducted thereafter by DPH management, practices within the Hinton Lab were identified as root causes vulnerable to fraud. DPH found that there were insufficient safeguards for access to the Evidence Room and Evidence Safe; that the Hinton Lab lacked close supervision and oversight; that the Hinton Lab lacked adequate quality control; and that personnel demonstrated poor judgment in responding to the violation of mandated protocols. SRA 212-16. Subsequent review by the State Attorney General and the Massachusetts State Police of the Hinton Lab's functioning has revealed system-wide, gravely serious departures from proper protocols and accepted practice in the field. SRA 336-90; see also SRA 304-22.

## II. The Hinton Lab Litigation

### A. The Volume of Cases

Dookhan's work might be associated with 34,000 cases, and the true number of tainted cases might reach

190,000. SRA 248. The latter figure represents an estimate, advanced by CPCS's Chief Counsel, of all drug cases processed by the Hinton Lab during Dookhan's tenure. Id. Those cases might all be implicated by this malfeasance because of allegations of rampant problems with oversight, evidence storage, laboratory protocols, and with distinguishing the samples Dookhan may have handled from those she did not. SRA 329-90.

As of this writing, it is unclear when a more complete list of involved cases will emerge. On September 20, 2012, the Governor appointed attorney David Meier to review the affected cases. SRA 295. Mr. Meier has not yet produced a list of such cases; given the evidence of inferior recordkeeping at the Hinton Lab, SRA 329-90, it is unclear that such a list is possible. See SRA 294-97.

**B. The Court System's Response**

Massachusetts courts have sought to manage the influx of post-conviction cases involving the Hinton Lab. Initially, based on "unanimity that an injustice appeared to have been done," the Chief Justice of the Superior Court established special "Drug Lab Sessions" in seven different counties. SRA 267-68. In October 2012, these Sessions began holding hearings, including on motions to stay the execution of sentences pending the resolution of new trial motions. SRA 267-70.

In Essex County, where the present cases

originated, then-Regional Administrative Justice Lowy set rules for appearing in the Sessions, which required the filing of "a motion for new trial and a motion to stay execution of sentence." SRA 200. Judge Lowy conducted stay hearings on nine different days between October 24 and November 16, 2012. Milette RA 109.

On November 9, as these stay hearings proceeded, this Court issued an Order intended to facilitate the Drug Lab litigation. It provides:

> This Order is issued to facilitate the handling of matters related to allegations of misconduct at the William A. Hinton State Laboratory Institute. To further the expeditious handling of such matters, and notwithstanding any provisions to the contrary in any Rule of Court or Standing Order, it is hereby ORDERED that a Chief Justice of a Trial Court Department may assign for all purposes, including disposition, any post conviction motion in which a party seeks relief based on alleged misconduct at the Hinton State Laboratory to any judge of that Trial Court Department. The assigned judge may reassign the motion to the original trial judge where the interests of justice require.
>
> This Order is effective immediately and shall remain in effect until further Order of this Court.

SRA 265.

Shortly thereafter, on November 26, 2012, Superior Court Chief Justice Barbara J. Rouse issued Orders of Assignment for five counties – including Essex – which appointed "Special Judicial Magistrate[s] of the Superior Court, to preside over criminal proceedings in connection with cases relating to [the Hinton Lab]." SRA 276-85. The Orders stated that they were "[i]n

accordance with the provisions of Mass. R. Crim. P. 47," which governs "special magistrates." Id.

Several aspects of the Orders of Assignment are significant here. First, they specifically appointed "Special *Judicial* Magistrates," not "Special Magistrates." This nomenclature is not superfluous; it reflects Chief Justice Rouse's intent that the magistrates were imbued with powers and discretion more comparable to judges than to ordinary clerk-magistrates. SRA 276-85. Second, in addition to describing functions listed in Rule 47 — e.g., setting bail and marking up pretrial motions — the Orders gave special judicial magistrates "the power and authority to conduct hearings on post conviction motions, to issue orders regarding discovery, and other matters, and to make proposed findings and rulings to the Regional Administrative Justice." Third, the Orders provided that any findings and rulings by special judicial magistrates, unless contested within 48 hours, "shall be acted upon by the Regional Administrative Justice without further hearing." Finally, they provided that special judicial magistrates "shall perform such other duties as may be authorized by order of the Superior Court." Id.

Beyond conferring powers that were judicial in nature, the Orders assigned people with formidable judicial experience. SRA 271-72. Each special judicial

magistrate, including retired Associate Justice John C. Cratsley in Essex County, is a retired Superior Court judge who previously served as Regional Administrative Justice. Id. Chief Justice Rouse also asked that retired assistant clerks be recalled on a per diem basis to assist the special judicial magistrates, and she authorized the hiring of seven law clerks to assist in the Sessions. SRA 273.

By March 6, 2013, special judicial magistrates had conducted more than 900 out of a then-total of 1,500 drug lab hearings. SRA 273. Many of these hearings have concerned motions to stay sentences. Id. In its pleadings before the Single Justice, the Superior Court noted that the Commonwealth's approach to those motions has varied from county to county. In Suffolk County, prosecutors "agreed to virtually all Motions to Stay Sentence where Dookhan was the first or confirmatory chemist." SRA 274. In Essex County, however, "the Commonwealth opposed all 52" such motions. Id.

Hearings on motions for new trials, meanwhile, have been rare. The Superior Court has stated that these hearings have been delayed by many factors, including "discovery issues." SRA 273. There are "hundreds of outstanding discovery requests, including requests directed to the Office of the Inspector General." Id.; see SRA 293-94. Moreover, because Annie Dookhan has been indicted, it is unclear how defendants

will obtain live witness testimony. See SRA 304.

**III. The Defendants**

Both Hector Milette and Shubar Charles were accused of drug charges, and pled guilty, after Annie Dookhan signed drug certifications against them.

**A. Hector Milette**

1. Milette's Convictions and Sentence

Milette pled guilty in 2011 to four crimes: three counts of trafficking in cocaine and one count of cocaine possession. SRA 88-89. The trafficking convictions arose from allegations that Milette sold cocaine to an informant on August 5, 18, and 27, 2009. SRA 100. The possession conviction arose from allegations that officers found cocaine during a search, on October 20, 2009, of an apartment shared by Milette and Eric Gonzalez. SRA 114-16.

Annie Dookhan was the primary chemist[3/] for the samples associated with the three trafficking charges. SRA 117. In two certifications dated November 13, 2009, and a third certification dated December 7, 2009, Dookhan swore that the samples were cocaine. SRA 125-28. The sample for the possession charge was separately analyzed at the Hinton Lab. SRA 116.

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[3/]The "primary" chemist is assigned a suspected drug specimen for testing. SRA 206. Analytical protocols include "color tests," "microcrystalline analyses," "ultraviolet visualization," "Mass Spectrometry," "Infrared Spectroscopy," and "Gas Chromatography." Id.

On December 16, 2009, one week after Dookhan's final certification, Milette was indicted. SRA 88. He was initially charged with three counts of trafficking in 100 grams or more of cocaine, under G.L. c. 94C, § 32E(b)(3), and one count of trafficking 14 grams or more of cocaine, under G.L. c. 94C, § 32E(b)(2). But he pled guilty on May 9, 2011, to lesser charges: three counts of trafficking at least 28 grams of cocaine, and one count of possession with intent to distribute a class B substance. SRA 88-89.

On the trafficking convictions, for which Dookhan was the primary chemist, Milette was sentenced to concurrent prison terms of five years to five years and one day. SRA 89. On the possession conviction, he received a consecutive three-year term of probation. Id.

2. Post-Conviction Proceedings

On September 12, 2012, Milette moved to vacate his guilty plea. SRA 93. He then filed, on October 22, motions for a new trial and to stay the execution of his sentence. SRA 90, 94-96. Essex County prosecutors opposed the stay motion. SRA 97-110.

Judge Lowy denied Milette's stay motion on November 13, 2012. SRA 110. Although Milette argued that he had "pled guilty based upon those drug analyses," Judge Lowy ruled that a stay was not warranted because drug samples associated with another

defendant in the case had been "tested by a chemist completely unrelated to the lab and Annie Dookhan." Id.

On November 26, the Superior Court assigned S.J.M. Cratsley to the Drug Lab cases. SRA 112-13. On February 6, 2013, Milette filed a motion for reconsideration of his motion to stay his sentence. SRA 119.

S.J.M. Cratsley granted the motion for reconsideration at a hearing on February 12, 2013. SRA 119, 145, 162. He set a bail of $2,000 with additional conditions, including GPS monitoring, curfew, and random drug and alcohol tests. Id. He reasoned that: (1) Milette had served approximately 40 months of his 60-month sentence; (2) Milette was then housed in a minimum security bunkhouse at MCI-Shirley; (3) Dookhan was the primary chemist for three of Milette's drug charges; (4) Milette was a "middleman"; and (5) Milette would have a place to live if he posted bail. Id. S.J.M. Cratsley also noted that Essex County was "out of line with all the other counties . . . on taking guilty pleas, on stays, on bails, [and] on nolle prosequis." SRA 151.

The prosecutor did *not* argue that Milette's motion for reconsideration should have been heard in the first instance by a Superior Court judge. Instead, she announced that she would appeal S.J.M. Cratsley's ruling within 48 hours, "going by the procedures that were set out in [the Order of Assignment]." SRA 152.

Milette posted bail on February 12, and the Commonwealth filed objections on February 13 with Judge Lu. SRA 90. On February 13, after receiving those objections, Judge Lu modified Milette's stay by ordering home confinement. SRA 162.

On February 27, 2013, Judge Lu held a hearing. SRA 163-96. He ruled that, due to Rule 47 and the Order of Assignment, S.J.M. Cratsley "had the authority to issue the stay of execution and set bail." SRA 198. Judge Lu also ruled that changed circumstances – including the Commonwealth's indictment of Annie Dookhan, "extensive evidence concerning that malfeasance," and the prospect of further revelations – "would warrant . . . reconsideration" of the initial denial of Milette's motion for a stay. SRA 199. Thus, Judge Lu stated that, if instructed that he *could* stay Milette's sentence, he "would rule as [he] did on February 13, 2013, on the papers: $2,000 cash bail, and strict pretrial probation with '24/7' electronic home confinement." Id.

Yet Judge Lu vacated the stay altogether. He expressly did so only because, on February 15, 2013, Justice Botsford had entered an order staying the stay of defendant Charles's sentence. SRA 199.

As a result of Judge Lu's February 27 ruling, Milette was returned to custody. SRA 391. But instead of being returned to minimum security at MCI-Shirley, he was imprisoned at the maximum security facility at

MCI-Cedar Junction. Id. Milette has now served more than six months of his sentence since filing for post-conviction relief.

At a status hearing on April 8, 2013, S.J.M. Cratsley calendared Milette's new trial motion for a hearing on May 23, 2013. SRA 87. The prosecutor stated that the Commonwealth would not be able to provide Milette's Hinton Lab file before that hearing. 4/8/2013 Milette Tr. 10.[4/] S.J.M. Cratsley then noted that, when defendants have pressed new trial motions, Essex County

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[4/]The April 8, 2013, transcript is the subject of a motion presently pending before this Court, filed by Milette, seeking to supplement the record. Milette recognizes that an appellate court ordinarily "cannot go beyond the record in the present case," Whitney v. Whitney, 325 Mass. 28, 30 (1949), but provisionally references the April 8 transcript, pending this Court's decision on his motion, for three reasons.

First, the Commonwealth has brought Milette's case before this Court on interlocutory review, rather than final review, while the post-conviction proceedings in the trial court continue. Milette RA 3. Second, statements by S.J.M. Cratsley and counsel on April 8 shed light on issues relevant to the Single Justice's Reservation and Report to this Court. Information this vital, such as the how the special judicial magistrates interpret their delegated powers, should be shared with this Court so that it is not left with an incomplete or erroneous impression of the proceedings below. See Commonwealth v. Ford, 18 Mass. App. Ct. 556, 560 (1984) ("Counsel has a duty to present to an appellate court a complete and fair picture, within the bounds of vigorous advocacy, of what occurred at trial"). Third, particularly because the Commonwealth was represented by counsel at the April 8 hearing, the transcript of that hearing is an appropriate subject of judicial notice. See Jarosz v. Palmer, 436 Mass. 526, 530 (2002) ("[A] court may also take judicial notice of the records of other courts.").

prosecutors have argued that they should have waited for their Hinton Lab files. Id. at 11.

S.J.M. Cratsley also addressed his February 2013 ruling on Milette's motion to reconsider the denial of his motion for a stay. Specifically, S.J.M. Cratsley stated that Judge Lowy had *expressly* instructed him to "go ahead and do the reconsiderations" as part of the overall effort to "ease the burden on the sitting Judges as much as possible." Id. at 5-6.

**B. Shubar Charles**

1. Charles's Convictions and Sentences

On October 18, 2010, Charles pled guilty to so much of Essex County indictment number ESCR2009-00697, charging him with one count of possession of a Class B substance with intent to distribute; one count of unlawful possession of ammunition, G.L. c.269, § 10 (i.e., one bullet); and one count of being a felon in possession of ammunition, G.L. c.260, § 10G(a) (the same bullet). SRA 5. Other pending charges in the indictment were the subjects of a nolle prosequi filed by the Commonwealth. Id.

Annie Dookhan was the primary chemist for the substance alleged to be cocaine in the distribution charge. SRA 252-53. For the charges of possession of a Class B substance with intent to distribute, and being a felon in possession of ammunition, Charles was sentenced to concurrent prison terms of no less than

four nor more than seven years. SRA 5. For the "straight" possession of ammunition charge, Charles was sentenced to two years in the House of Correction, to be served concurrently with the State prison sentences. Id. Charles received 463 days of jail credit, pursuant to G.L. c.279, § 33A. SRA 20. Therefore, as of this writing, he has completed his sentence on the straight possession charge, and with earned good time, became parole eligible last month on the state prison sentences.[5/] SRA 24-25.

2. Post-Conviction Proceedings

The defendant's motion to stay the execution of his sentence was heard by S.J.M. Cratsley on January 31, 2013. SRA 21. Charles asserted that "the plea to the drug indictment was the trigger that caused the plea to the other two indictments," and that "the evidence [for the drug charge] was the strongest for that indictment." SRA 25. Since all of Annie Dookhan's work had become wholly suspect, counsel argued, Charles was likely to succeed on his motion for a new trial, because the most damaging facts, had Charles gone to trial, would have centered upon the discovery by Lynn

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[5/]While incarcerated at Souza Baranowski, Charles earned his GED, participated in substance abuse programs, "anti-violence" programs, and holds a job in the kitchen prison. SRA 24-25, 64; see generally Connery v. Commissioner, 414 Mass. 1009, 1011 (1993) (rescript) (good time credits earned under G.L. c. 127, § 129D, are to be deducted from parole eligibility date as calculated pursuant to G.L. c. 127, § 133).

police of the putative "narcotics" in his pants pocket when they arrested him in connection with allegations of assault in New Bedford. SRA 22-24. Defense counsel represented that there were viable defense theories for the adjunct ammunition charges.[6/] SRA 23.

With respect to the public's safety if the defendant were released from incarceration, counsel argued that the defendant had done well while incarcerated at Souza Baranowski, see n.5, ante. In addition, the defendant's March 2013 parole eligibility militated against his risk of flight, and he had different employment options upon release. SRA 24-25. The Commonwealth opposed the defendant's motion to stay, and presented an account of the underlying facts of the defendant's arrest in Lynn, which was prompted by events to which he reportedly pled guilty in Bristol County. Comm. Charles Br. 13-14.

Following argument from the parties, S.J.M. Cratsley allowed Charles's motion to stay the sentences. SRA 32. He found that Charles had, by that time, "served almost all of his minimum sentence of

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[6/]The ammunition indictments were triable, counsel said, "because [the Lynn police] had searched [the defendant] as I remember two times before they happened to find [a single bullet in a pocket of a jacket worn by the defendant] back at the police station and we developed an alternative trial theory for that. . . . [W]e were ready to try and would have tried but for the drug indictment." SRA 23.

four years on both crimes[,]"[1/] SRA 33, having noted previously that a motion to suppress had been filed, litigated, and denied. SRA 26. S.J.M. Cratsley also found that "[Charles's] guilty plea to felon in poss[ession] was likely motivated by the deal on his drug case plea, and involved one bullet." SRA 255. He set a $5,000 cash bail, with conditions that Charles reside with his brother, be monitored by GPS, and report weekly to the Probation Service. SRA 32-33.

On February 8, 2013, the Commonwealth appealed S.J.M. Cratsley's order of stay to Judge Lu. SRA 49. The Commonwealth argued that S.J.M. Cratsley's order of stay was not authorized by Massachusetts Rule of Criminal Procedure 31 because an actual appeal from the denial of a motion for a new trial was a necessary condition precedent, and here, no such "actual appeal" was pending. SRA 50. Relatedly, the prosecutor argued that the circumstances of this case were insufficiently "extraordinary" to permit the entry of a stay of execution of sentence. Id. The Commonwealth also argued that the Order giving S.J.M. Cratsley his powers "did not . . . suggest that he had the authority to actually stay a sentence." Id. Finally, the Commonwealth argued that "the fact[s] and the circumstances in this case"

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[1/]At that point, the defendant had already served three years, and almost ten months in prison on the offenses.

did not meet the criteria for a stay. SRA 50-51.

The Commonwealth also disputed defense counsel's account that the factual strength of the drug charge caused the plea to the other two indictments. SRA 25. Defense counsel reiterated that the defendant's guilty plea was not knowing and voluntary, because Annie Dookhan's status as the primary chemist "certainly casts . . . into doubt" the reliability of her finding that the substance in question was cocaine. SRA 59. Counsel also argued that the revelation of Dookhan's fraudulent conduct constituted "newly discovered evidence," and as such, the court must determine whether that new evidence "casts a real doubt on the justice of the conviction." SRA 60.

Following the hearing, Judge Lu – acting in a "de novo" capacity, SRA 68 – "re-f[ou]nd all of the findings made by the Special Magistrate," but modified the order of stay with a number of formidable restrictions,[8/] most notably GPS-monitoring and continuous home detention, with permission to leave home only for medical emergencies and court appearances.[9/] SRA 66.

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[8/]In addition to GPS-monitored home confinement, these additional conditions include random drug and alcohol testing and consent to searches of his person, home, bedroom and vehicle at the direction of probation, police or federal agents. SRA 66-67.

[9/]Judge Lu emphasized the stringency of the home

(continued...)

## Summary of Argument

**I.** There are two independent sources for the Superior Court's authority to stay sentences in Hinton Lab cases while new trial motions are pending: this Court's Order of November 9, 2012, and the Superior Court's inherent equitable powers.

**I.A.** This Court's November 9 Order authorized Superior Court judges to stay sentences pending the resolution of Rule 30 motions concerning the Hinton Lab. The Order's explicit purpose – to expedite Hinton Lab cases – confirms this Court's view that the burden of the "systemic lapse" should not be borne by defendants. Lavallee v. Justices in the Hampden Superior Court, 442 Mass. 228, 246 (2004). Consistent with that purpose, the Order's text is deliberate, specific, and broad. Expressly overriding any contrary Rule or Standing Order, it allows delegation of "any" Hinton Lab post-conviction motion for "all purposes," conferring significant leeway to improve the efficiency of the judicial process. Thus, "any" motion should be construed to mean just that: *any* such motion. Indeed, on November 9, Superior Court judges had already granted numerous motions to stay sentences. It is permissible to presume this Court was aware of these

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2/(...continued)
detention order: "It really means 24/7 home detention. Really, really means it." SRA 69.

circumstances when issuing its Order. (Pp. 28-34.)

The Commonwealth's approach would impede this Court's objectives, frustrate the work of trial courts confronting the Hinton Lab crisis, and ignore that this crisis arose from a pattern of apparently falsified evidence. These cases cannot be remedied in the normal course, because "the course of the proceedings in these cases is per se not normal." Lavallee, 442 Mass. at 240. Although the Commonwealth argues that sentences cannot be stayed unless an appeal is pending, that argument overlooks that a Rule 30 motion brought by a defendant who pled guilty is, in effect, that defendant's *only* means of appealing the plea's validity. Thus, the new trial motions filed by Milette and Charles amounted to appeals from putatively tainted convictions. (Pp. 34-39.)

**I-B.** By the authority of Rule 47, and through Orders of Assignment issued on November 26, 2012, the Superior Court appropriately delegated to special judicial magistrates the power to stay sentences pending the resolution of Rule 30 motions. The Orders of Assignment gave special judicial magistrates the power to "conduct hearings on post conviction motions" and to issue orders on "discovery[] and other matters." That power was necessary to move post-conviction cases along crowded dockets to hearings and dispositions. Given the "intricate systemic implications" of the

Hinton Lab emergency, "we should allow those who administer our criminal justice system sufficient flexibility to experiment with procedures that would satisfy the constitutional mandate" of the federal and state due process clauses. Jenkins v. Chief Justice of Dist. Court Dep't, 416 Mass. 221, 238 (1993).

While the Orders of Assignment do not specifically mention stays of sentences, they do not have to. The special judicial magistrates could reasonably interpret their powers, in the unique context of the Hinton Lab crisis, to include the power to stay a sentence during the pendency of a Rule 30 motion. (Pp. 39-43.)

**I-C.** Wholly apart from this Court's November 9 Order, the stays at issue here are proper exercises of authority inherently vested in judges of the Superior Court and appropriately delegated to special judicial magistrates of that court. Courts have inherent powers to control their dockets and to achieve justice by suspending judgments that lead to inequitable results. Those powers include the power to stay sentences. Commonwealth v. McLaughlin, 431 Mass. 506, 520 (2000). In McLaughlin, the Court vacated a stay designed to lengthen a defendant's incarceration. Contrary to the Commonwealth's contention, that ruling does not undermine stays designed, in the context of the Hinton Lab crisis, to provide defendants with some relief from sentences possibly tainted by fraud. (Pp. 43-47.)

**I-D.** If this Court accepts the Commonwealth's proposed limits on the power to stay, it would raise grave due process concerns under the Fourteenth Amendment to the United States Constitution and article 12 of the Massachusetts Declaration of Rights. This Court is "not content" to permit Rule 30 motions to languish and "drift, without explanation, until the petitioner suffers a prejudicial due process violation." Sellers v. Commonwealth, 464 Mass. 1015, 1015 & n.1 (2013). Here, Rule 30 motions are already drifting, and the drift will be exacerbated if this Court limits the authority of the Superior Court to stay sentences. Many months have elapsed since defendants first began moving for new trials, and the Commonwealth concedes that it will be "months, if not longer," before hearings conclude. These delays are due to factors beyond the defendants' control, including malfeasance by a state employee.(Pp. 48-53.)

Therefore, Massachusetts should emulate the Texas criminal justice system, which has moved swiftly and publicly – even in cases where evidence is supposedly available to retest – to redress milder malfeasance attributed to a forensic chemist. (Pp. 53-55).

**II-A.** S.J.M. Cratsley's grant of Milette's stay, on February 12, 2013, did not improperly reconsider Judge Lowy's prior denial of the stay on November 13, 2012. It was authorized, both before and after the

fact, by: (1) Chief Justice Rouse's Order, dated November 26, 2012, assigning S.J.M. Cratsley to hear Hinton Lab motions; (2) Judge Lowy's instruction that S.J.M. Cratsley rule on Milette's motion for reconsideration; and (3) Judge Lu's rulings of February 13 and 27, which modified the stay and affirmed S.J.M. Cratsley's authority to issue it. (Pp. 55-58.)

**II-B.** S.J.M. Cratsley's grant of the stay was also justified by changed circumstances. In the context of bail – which is analogous to stays of sentences – changed circumstances can permit a judge to reconsider a superior judge's ruling. Here, both S.J.M. Cratsley and Judge Lu correctly found changed circumstances. They noted Milete's service of additional prison time; the possibility that litigation delays would limit Milette's chances for meaningful post-conviction relief; and the investigation of, and indictments against, Annie Dookhan. Although the Commonwealth now claims that three indictments against Dookhan had been returned when Milette's stay was denied in November 2012, that claim is inaccurate: all the indictments are changed circumstances. (Pp. 58-61.)

**III-A.** This Court should order the release of both defendants. Most important, they are likely to succeed on their new trial motions. Both Milette and Charles pled guilty following receipt of drug certification by Annie Dookhan, and they both can

demonstrate that Dookhan's apparently fraudulent conduct was material to their decisions to plead guilty. As a result, their pleas were involuntary. United States v. Fisher, --- F.3d ----, 2013 WL 1286985 (4th Cir. Apr. 1, 2013). S.J.M. Cratsley and Judge Lu correctly found that neither Milette nor Charles pose undue security risks if released. Contrary to the Commonwealth's argument, the merits of a new trial motion do not hinge on whether the Commonwealth *would* secure an untainted conviction at a new trial, but instead on whether it *did* secure a conviction that is "surely unattributable" to tainted evidence. Sullivan v. Louisiana, 508 U.S. 275, 279 (1993). (Pp. 62-65.)

**III-B.** Even if the Superior Court lacked the authority to release the defendants, this Court should exercise its own authority to release them while these cases are pending. These cases arise from petitions under G.L. c. 211, § 3, a provision this Court has frequently used to safeguard constitutional rights that cannot be vindicated in the ordinary course of appeal. Both Milette and Charles are now serving out their sentences only because the Commonwealth selected their cases to test its theory about the limits on the Superior Court's authority. This Court should release Milette and Charles because they should not bear the burden of a fraud that had apparently been perpetrated on the courts for many years. (Pp. 65-66.)

## Argument

### I.

**JUDGES AND SPECIAL MAGISTRATES OF THE SUPERIOR COURT MAY STAY A SENTENCE AFFECTED BY THE HINTON LAB CRISIS WHILE A NEW TRIAL MOTION IS PENDING.**

There are two separate and independent sources for the Superior Court's authority to stay sentences in Hinton Lab cases while new trial motions are pending: this Court's Order of November 9, 2012, and the Superior Court's inherent equitable powers to do justice and control its docket. Judges of the Superior Court have appropriately exercised that stay authority themselves and have also, through Orders of Assignment issued on November 26, 2012, appropriately delegated that authority to special judicial magistrates. Indeed, given the enormous challenges facing both the judges and litigants in the Superior Court as a result of the Hinton Lab crisis, holding that the Superior Court has exceeded its authority to issue stays would have serious consequences for due process and the courts' management of their dockets.

#### A. This Court's November 9 Order empowered the Superior Court to stay sentences before resolving new trial motions.

This Court's November 9 Order authorized Superior Court judges to assign "for all purposes, including disposition, any post conviction motion" implicating the Hinton Lab crisis. The Order's broad text and clear purpose – to expedite Hinton Lab cases – compel the

conclusion that it permits Superior Court judges to stay sentences while new trial motions are pending.

1. This Court's Order was intended to avert a severe, adverse impact on the administration of justice caused by the Hinton Lab crisis, and thus conferred latitude on the trial courts to address the problems caused by the controversy.

The context for this Court's November 9 Order is crucially important. Just as a statute is "considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished," Harvard Crimson, Inc. v. President & Fellows of Harvard College, 445 Mass. 745, 749 (2006), quoting Hanlon v. Rollins, 286 Mass. 444, 447 (1934), so must this Court's Order be considered in light of its stated purpose: to manage cases arising from massive misconduct at the Hinton Lab.

The Order evidently invoked this Court's "general superintendence" power "to correct and prevent errors and abuses," and to direct the "administration of all courts of inferior jurisdiction." G.L. c.211, § 3. When the constitutional rights of litigants have "not yet been adequately addressed," this Court's "powers of general superintendence require [it] to fashion an appropriate remedy to the continuing constitutional violation suffered by indigent criminal defendants." Lavallee, 442 Mass. at 244. The Court has explained that its superintendence powers should be exercised to avert "a severe, adverse impact on the administration

of justice." Sullivan v. Chief Justice for Admin. & Mgmt. of the Trial Court, 448 Mass. 15, 43 (1996). "While these powers are by nature extraordinary, in an appropriate case this court could and should act at whatever stage in the proceedings it becomes necessary to protect substantive rights." Barber v. Commonwealth, 353 Mass. 236, 239 (1967).

That is what the Court did on November 9. By then, the Hinton Lab crisis – resulting from apparent gross misconduct involving State criminal matters – portended thousands of post-conviction motions. Those motions threatened to strain all components of the criminal justice system, including the Superior Court. SRA 270-71. As that court has acknowledged, the sheer size of the crisis also created the "real risk of manifest injustice if defendants remained incarcerated while their new trial motions were stalled by the various ongoing investigations." Opp. of the Superior Court at 33, District Attorney for the Eastern District v. Superior Court, No. SJ-2013-0092 ("Superior Court Opp."). Thus, on November 9, this Court faced the probability that defendants would be denied timely relief not because their filings might lack merit, but instead because their challenges could not be adjudicated punctually even when they have merit.

That circumstance gave rise to the exercise of this Court's general superintendence power, because

"the burden of a systemic lapse is not to be borne by defendants." Lavallee, 442 Mass. at 246. Instead, when faced with a systemic lapse, this Court's duty "is to remedy an ongoing violation of a fundamental constitutional right . . . consistently with the government's legitimate right to protect the public's safety." Id. The Court ensures the "provision of services constitutionally necessary to the continued performance of the judicial branch in the most efficient and least costly manner." County of Barnstable v. Commonwealth, 422 Mass. 33, 47 (1996).

2. The Order's text maximized the authority conferred upon the Superior Court.

Consistent with its aim of protecting defendants' rights and assisting the Superior Court, the text of the November 9 Order was crafted to give considerable administrative flexibility to the Superior Court: it allows the assignment for "all purposes" of "any post conviction motion" to "any judge." SRA 265.

For four reasons, that flexibility necessarily includes the authority to stay sentences while new trial motions are pending. First, the Order's delegation of Hinton Lab post-conviction matters to any judge for "all purposes" reflects a certitude that the trial courts can act efficiently on the remedies provided to them by this Court. The term "all purposes" indicates "that [this Court] intended to give [a Chief Justice of a Trial Court Department] significant leeway

to experiment with possible improvements in the efficiency of the judicial process that had not already been tried or even foreseen." Peretz v. United States, 501 U.S. 923, 932 (1991) (federal magistrates are appointed and subject to removal by Article III judges). Had the November 9 Order intended to strictly limit the trial court's powers to a specific set of limited functions, then it would have instead included a bill of particulars. Id. at 932-933. Construing the "all purposes" provision "absent concerns about raising a constitutional issue or depriving a defendant of an important right, we should not foreclose constructive experiments that are acceptable to all participants in the trial process and are consistent with the basic purposes of the [November 9 Order]." Id.

Second, the November 9 Order expressly overrode "any provisions to the contrary in any Rule of Court or Standing Order." That language confirmed that this Court's Order was itself issued pursuant to its powers of superintendence, and consequently, that the Superior Court's implementation of that Order would not be bounded by the rules that normally restrict the authority of lower courts. More fundamentally, that language reflected this Court's vital concerns over "allegations of misconduct at the [Hinton State Lab]," and expressly countermanded any other rule-based procedural provisions governing practice in the courts

that create "obstacles to the accomplishment of [this Court's] objectives." City of Boston v. Commonwealth Empl. Rels. Bd., 453 Mass. 389, 396 (2009).

Third, the Order's application to "any post conviction motion in which a party seeks relief based on alleged misconduct at the Hinton State Laboratory" defines the extent of the Order's command. "Any post conviction motion" should be construed to mean just that: *any* such motion. "If a sensible construction is available, we shall not construe a [standing order] . . . to produce absurd results." Commonwealth v. Raposo, 453 Mass. 739, 745 (2009) (citation omitted). Under the usual rules of construction, an undefined term in an official proclamation such as a standing order ought to be given its "plain and ordinary meaning" unless a contrary intended design is demonstrated. Henry v. Board of Appeals of Dunstable, 419 Mass. 841, 843 (1994); Shirley Wayside Ltd. P'ship v. Board of Appeals, 461 Mass. 469, 477 (2012), and cases cited ("[w]hen the meaning of the language is plain and unambiguous," it must be enforced "according to its plain wording unless a literal construction would yield an absurd or unworkable result").

Finally, the Court's use of the terms "all purposes" and "any post conviction motion" was especially meaningful on November 9, 2012, because by then, Superior Court judges had already been staying

sentences pending rulings on new trial motions. SRA 267-70; Milette RA 109. Thus, when this Court ordered that any post-conviction motion could be assigned to any judge for "any purpose," presumably it knew that one such purpose was staying the execution of sentences. See, e.g., Rhodes v. AIG Domestic Claims, Inc., 461 Mass. 486, 501 (2012), and cases cited (permissible to presume that Legislature was aware of prior enactments and courts' interpretations thereon when it enacted subsequent legislation).

3. A narrow interpretation of this Court's Order would undermine its purpose.

A contrary construction of the Order would create "obstacles to the accomplishment" of its objectives,[10] and frustrate the work of trial courts confronting the voluminous, complex problems raised in the wake of fraudulent Hinton Lab convictions. Indeed, if this Court were to adopt the Commonwealth's proposed

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[10] For example, following reversal on appeal, remand to a different trial judge is unusual because it would normally "'entail wasteful delay or duplicated effort.'" Civil Service Com. v. Boston Municipal Court Dep't, 27 Mass. App. Ct. 343, 349 (1989), quoting United States v. Robin, 553 F.2d 8, 11 (2d Cir. 1977). Here, by endorsing assignments to "any judge" of the Trial Court Department, this Court recognized the enormity of the looming administrative burdens. By specific references to "facilitat[ing]" and "expedit[ing]" post-conviction challenges to Hinton Lab cases, the Order is analogous to emergency legislation that "is necessary for the *immediate preservation* of the public peace, health, safety or convenience." Molesworth v. Secretary of Commonwealth, 347 Mass. 47, 48 (1964) (emphasis added).

application of Mass. R. Crim. P. 31 (permitting consideration of a stay of execution of sentence in those cases where an appeal has been claimed)[11] to supersede the entry of stays of execution of sentences where a defendant's motion for a new trial in a Hinton Lab case is pending disposition, it would constitute an obstacle to the accomplishment of the November 9 Order's objectives for two important reasons.

First, the harm involved here is a colossal pattern of falsified evidence generated by Annie Dookhan (and possibly others), occasioning massive litigation on an unprecedented human and fiscal scale. These cases "cannot be remedied in the normal course of [proceedings] because an essential component of the 'normal course' . . . is precisely what is missing here. The course of the proceedings in these cases is per se not normal." Lavallee, 442 Mass. at 240 (constitutional crisis was created when indigent criminal defendants lacked counsel due to shortage of lawyers in bar advocates program).

If intrinsic fraud is a ground for setting aside a judgment, Pina v. McGill Dev. Corp., 388 Mass. 159, 165

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[11]Rule 31 provides that "the entry of an appeal shall not stay the execution of [a] sentence unless the judge imposing it or, pursuant to Mass. R. App. P. 6, a single justice of the court that will hear the appeal, determines in the exercise of discretion that execution of said sentence shall be stayed pending the determination of the appeal."

(1983), and a court has the inherent power to vacate a judgment obtained by fraud on the court, Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244 (1944), overruled on other grounds sub nom. Standard Oil Company v. United States, 429 U.S. 17 (1976), then the court surely has the *milder* power to stay the execution of a sentence obtained by fraud. "A court must be sufficiently empowered in order to prevent fraud on the court, because allowing the court to be manipulated by fraud poses a danger to its authority." Commissioner of Prob'n v. Adams, 65 Mass. App. Ct. 725, 730 (2006).

Intrinsic fraud includes "[u]se by a winning party of perjured testimony." Pina, 388 Mass. at 165. To establish intrinsic fraud based upon perjury, the defendant must prove "'the most egregious conduct involving a corruption of the judicial process itself,' . . . by establishing to the satisfaction of the trial judge that there was perjured testimony which influenced the judgment of the court." Id., quoting Lockwood v. Bowles, 46 F.R.D. 625, 632 (D.D.C. 1969).

The Hinton Lab cases involve a party's "use" of perjured testimony because a state employee – Annie Dookhan – made drug certifications under oath for use by the Commonwealth and for the benefit of the court. See Rockdale Mgmt. Co. v. Shawmut Bank, N.A., 418 Mass. at 598, quoting Aoude v. Mobil Oil Corp., 892 F.2d

1115, 1118 (1st Cir. 1989) (fraud on court is an "unconscionable scheme" calculated to interfere with the judicial system "by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense"). The Commonwealth asserts that having pled guilty to possessing cocaine, defendants Charles and Milette cannot make the requisite "substantial showing" that the drug analyses in their own cases were tainted, but this only supports the defendants' point that "[t]he essence of fraud is that its perpetrator has persuaded his victim to believe, beyond the dictates of reason or prudence, what is not so." United States v. Church, 888 F.2d 20, 24 (5th Cir. 1989). The victims of fraud in the Hinton Lab cases were defendants, the public, and the courts. S.J.M. Cratsley was entitled to conclude, in the context of that fraud, that a stay of sentence was appropriate where Dookhan's perjury sought to influence the courts of the Commonwealth of Massachusetts.

Second, the Commonwealth's view – that the Hinton Lab defendants lack pending "appeals" justifying the right to stays – is not consistent with the law in this area. Both Charles and Milette, like thousands of other defendants harmed by a pattern of misconduct in the Hinton Lab, originally tendered changes of plea. Direct appeals therefrom are not available under Massachusetts law. Rather, new trial motions – such as those filed

here – "provide[] the only avenue for appellate review of the validity of the guilty plea." Commonwealth v. De La Zerda, 416 Mass. 247, 250 (1993); Commonwealth v. Fernandes, 390 Mass. 714, 715 (1984). In such cases, "a [R]ule 30 motion challenging a guilty plea or, as in this case, its equivalent for lack of voluntariness[,] *might be seen as a direct appeal, in that such a motion provides the only avenue for appellate review of the validity of the guilty plea.*" De La Zerda, 416 Mass. at 250 (emphasis added; citations omitted).

Thus, the new trial motions filed by Milette and Charles were equivalent to appeals from putatively tainted convictions, and no final ruling thereon was required before the defendants could press motions for stays of execution of their sentences. At most, they were required to, and did, make the showings necessary for all petitioners seeking stays of their sentences: first, whether the defendant on appeal (i.e., on presentation of a motion for a new trial) presents "some reasonable probability of a successful decision," Commonwealth v. Hodge, 380 Mass. 851, 852 (1980), quoting Commonwealth v. Allen, 378 Mass. 489, 498 (1979); "and second, the risks raised by release – the possibility of flight, the potential danger to any person or to the community, and the likelihood the defendant will commit criminal acts during the pendency of the appeal." Polk v. Commonwealth, 461 Mass. 251,

253 (2012), quoting Hodge 380 Mass. at 855. In the context of a Rule 30 motion qua direct appeal, a judge of the trial court that will decide the Rule 30 motion "is in the best position to determine whether there is 'some reasonable probability of a successful decision.'" Polk, 461 Mass. at 253.

For those reasons, this Court's November 9 Order gave Superior Court judges the authority to stay the execution of sentences for these defendants, pending disposition of new trial motions.

### B. The Superior Court's Orders of Assignment conferred "power and authority" on the special judicial magistrates to hear "post-conviction motions," including stays.

On November 26, after this Court's November 9 Order authorizing the Chief Justice of the Superior Court to assign Hinton Lab matters for "all purposes", the Superior Court issued Orders of Assignment properly delegating to special judicial magistrates the authority to "conduct hearings on post conviction motions" and to issue orders on "discovery[] *and other matters*" (emphasis added). That delegation occurred both through the operation of Rule 47 and through the text of the Orders of Assignment.

There are three compelling purposes for this infrastructure of special judicial magistrates. First, they move post-conviction cases along crowded dockets to hearings and dispositions. Second, they are specifically authorized by the Orders of Assignment to

"conduct hearings on post conviction motions" and to issue orders on "discovery[] and other matters" which, like this Court's reference in its November 9 Order to "any post conviction motion," confers expansive powers to assist the enormous number of defendants likely affected by massive fraud at the Hinton Lab. Third, the magistrates contribute to the "'well-established' right of access to the courts[,] [which] is one of those aspects of liberty that States must affirmatively protect." Lewis v. Casey, 518 U.S. 343, 405 (1996) (Stevens, J., dissenting).

Facing a constitutional crisis, "[t]he . . . judiciary act responsibly when they provide and explore new, flexible methods of adjudication." See Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc., 725 F.2d 537, 547 (9th Cir. 1984) (Kennedy, J.). These innovations are to be supported, "especially where the evolution of the innovative mechanism is *left in large part under the control of the judiciary itself.*" Id. (emphasis added). Given the extraordinary "intricate systemic implications" of the Hinton Lab emergency, "we should allow those who administer our criminal justice system sufficient flexibility to experiment with procedures that would satisfy the constitutional mandate" of the federal and state due process clauses. Jenkins, 416 Mass. at 238. This includes the authority of the special judicial magistrates, as innovations

specifically appointed to assist in redressing the unjust consequences of fraudulent conduct at the Hinton Lab, to order stays of execution of sentences.

As subordinate judicial officers, the special judicial magistrates are empowered to perform any of the duties entrusted by law to a magistrate. McCarthy v. Manson, 554 F. Supp. 1275, 1285 n.10 (D. Conn. 1982). As pertinent here, one source of authority for special judicial magistrates is Rule 47, which confers authority ranging from specified pretrial powers to general, and potentially broad, equitable powers and duties "as may be authorized by order of the Superior Court." Id. An equally important, if derivative, source of the magistrates' authority is this Court's November 9 order, which exercised this Court's superintendent power to confer upon the Superior Court great latitude in responding to the Hinton Lab crisis.

The Superior Court's Orders of Assignment exercised both of those sources of authority. The Orders specifically enumerate powers of special judicial magistrates in a "bill of particulars," Peretz, 501 U.S. at 932-933, authorizing them, inter alia, "to conduct hearings on post conviction motions . . . and to make proposed findings and rulings to the Regional Administrative Justice." The Orders of Assignment also contain a "residuary clause," Id. at 933, authorizing the adjudication of "other matters."

Equally important, orders of special judicial magistrates are fully reviewable. "Implicit in the power to appoint [an S.J.M.] is the power to oversee the actions of [those] whom the court appoints." Adoption of Vito, 431 Mass. 550, 571 (2000) (Cowin, J., concurring).

The Orders of Assignment did not specifically mention stays, but they did not have to. Special judicial magistrates could reasonably interpret their powers (and have done so), in the unique context of the Hinton Lab crisis, to include the power to stay a sentence during the pendency of a Rule 30 motion. Like this Court's November 9 Order, the Orders of Assignment were issued amid hearings on stays held by judges of the Superior Court. SRA 266-85; Milette RA 109. Thus, when the Orders refer to the power "to conduct hearings on post conviction motions . . . and to make proposed findings and rulings to the Regional Administrative Justice," it is reasonable to conclude that they encompassed the power to hear, and make proposed findings and rulings on, motions to stay sentences. See Raposo, 453 Mass. at 745 (preferring "sensible construction" of governing language over "absurd results"); Harvard Crimson, Inc., 445 Mass. at 749 (intent of legal order must be construed "in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be

accomplished"). That conferral of authority was fully consistent with Rule 47 and this Court's prior Order.

Thus, where Rule 30 motions are pending before a special judicial magistrate, the magistrate performs the same function as a Superior Court judge would in hearing – and adjudicating – a defendant's motion to stay execution of sentence. The standards for a stay to be applied by the special judicial magistrate would be identical to those considerations incumbent upon a judge entertaining the identical motion. Cf. Hodge, 380 Mass. at 852; Allen, 378 Mass. at 498; Polk, 461 Mass. at 253.

### C. Superior Court judges have inherent authority to stay sentences, and to authorize special judicial magistrates to stay sentences, in the exceptional circumstances of the Hinton Lab crisis.

Even if this Court had never issued its November 9 Order, the stays at issue in these cases would still have been proper exercises of the Superior Court's inherent authority. And, in the context of the Hinton Lab crisis, Superior Court judges could delegate that authority to special judicial magistrates.

Certain inherent powers of the courts are rooted in the notion that a trial court "possesses all of the common law equity tools . . . to process litigation to a just and equitable conclusion." ITT Community Dev. Corp. v. Barton, 569 F.2d 1351, 1359 (5th Cir. 1978). "Included among the courts' traditional inherent powers

is the authority to issue injunctive relief, such as *the power to stay court orders*." Hadix v. Johnson, 144 F.3d 925, 937 (6th Cir. 1998) (emphasis added); see also Landis v. North American Co., 299 U.S. 248, 254 (1936) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants"). This authority derives partly from the power of courts to "manage their own affairs," Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991), but also "furthers the pursuit of achieving complete justice by enabling the court to suspend those judgments whose enforcement leads to inequitable results." Hadix, 144 F.3d at 937; cf. United States v. Morgan, 307 U.S. 183, 197 (1939) (there is a "power inherent in every court of justice so long as it retains control of the subject matter and of the parties, to correct that which has been wrongfully done by virtue of its process").

Although "the exercise of the inherent power of lower . . . courts can be limited by statute and rule," Chambers, 501 U.S. at 47, "the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command." Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946). The Legislature must "make plain its desire to limit the courts' inherent powers because 'the great

principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.'" Hadix, 144 F.3d at 937, quoting Porter, 328 U.S. at 398.

In the Commonwealth's trial courts, the authority to stay sentences is alive and well. Apart from the specific rule-based authority conferred on the Superior Court to stay the execution of a sentence, the power "to stay the execution of [a] sentence" is part of an ancient arsenal of equitable responses by a judge to ensure the doing of justice, King v. Commonwealth, 246 Mass. 57, 58-59 (1923), and not dependent upon any particular statutory or rule-bound authority. See Commonwealth v. Pagan, 445 Mass. 315, 324 (2005) (permitting a bail revocation order to be reconsidered based on "manifest injustice," notwithstanding contrary statutory language); cf. Worcester v. Worcester Div. of the Juvenile Court Dep't, 410 Mass. 831, 834-835 (1991) ("[i]mplied powers have been recognized as 'inherent' in courts where the power is necessary to allow the court to function" [citations omitted]); Jake J. v. Commonwealth, 433 Mass. 70, 77 (2000) (same); Mass. R. Civ. P. 60(b)(3) (notwithstanding provision affording relief from judgment where there has been "fraud . . . misrepresentation, or other misconduct of an adverse party," also providing under R. 60(b)(6) that relief may be granted for "any other reason justifying relief

from the operation of the judgment").[12/]

The Commonwealth argues that Rule 31 permits stays of sentences only when an appeal is pending, and that the "so-called Drug Lab scandal" does not call for "extraordinary relief" beyond the confines of Rule 31. Comm. Charles Br. 22-30; Milette RA 107. But even if this Court were to agree that the trial court's authority to stay a sentence *under Rule 31* calls for the condition precedent of a pending appeal, it would remain true that the trial court has comprehensive equitable powers to do justice where necessary. Nowhere in Rule 31, or the Reporter's Notes thereto, has this Court "ma[d]e plain its desire to limit the courts' inherent powers" to secure complete justice. Hadix, 144 F.3d at 937.

In fact, the primary case on which the Commonwealth relies confirms that stays are available in the "exceptional" circumstances present here. In Commonwealth v. McLaughlin, 431 Mass. 506, cited in Comm. Charles Br. 22-26, the defendant was convicted of involuntary manslaughter and arson of a dwelling house, but found not guilty by reason of insanity of two

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[12/]While relief under the "catchall provision" of Rule 60(b)(6) is to be awarded only in "extraordinary circumstances," Sahin v. Sahin, 435 Mass. 396, 406 (2001), it vests "power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice[.]" Parrell v. Keenan, 389 Mass. 809, 815 (1983), quoting Klapprott v. United States, 335 U.S. 601, 615 (1949).

counts of first-degree murder. He was then sentenced to mixed sentence of imprisonment and civil commitment. Id. at 514. The trial judge, however, sought to *lengthen* the total sentence by staying the defendant's prison term during his civil commitment. This Court vacated the stay, noting that the inherent power to stay sentences should be exercised only for "exceptional reasons" and "for short periods of time." Id. at 520.

That holding was expressly geared to avoid "an expansive reading of judicial powers that would allow stays of execution of sentence for *punitive purposes.*" Id. at 518 (emphasis added). The Court emphasized that "a trial judge should not use his or her power to stay execution of sentence in order to lengthen the defendant's confinement beyond the period announced by the judge in imposing sentence." Id. at 520. But the Court did not discourage, let alone prohibit, using a stay in exceptional circumstances to *shorten* the defendant's confinement.

That is the relief warranted by the Hinton Lab crisis. The courts were defrauded by a government employee who was intrinsic to the prosecution of people now incarcerated. Surely the courts must be permitted to use all available tools, including their traditional inherent powers, to correct that injustice.

### D. A contrary ruling would threaten the due process rights of thousands of defendants.

The Commonwealth's arguments about stay procedures, if accepted by this Court, would raise grave due process concerns. See U.S. Const. amend. XIV, § 1; art. 12 of the Massachusetts Declaration of Rights. The criminal justice system is strained even with the current stay procedures in place; as the defendants and CPCS argued to the Single Justice, there are problems with identifying defendants, SRA 288-89, assigning counsel, SRA 289-90, obtaining discovery, SRA 291-94, and securing timely rulings. SRA 286-98, 304. The Commonwealth's present argument – that the Superior Court is powerless to stay a sentence while a motion for a new trial is pending – would encumber the litigation even further. If that happens, defendants whose due process rights already have been violated by misconduct at the Hinton Lab will see that violation "compounded" by delays in adjudicating post-conviction motions. See Superior Court Opp. at 28.

1. Appellate delay implicates due process.

This Court has long held that "inordinate delay in the appellate process may rise to the level of constitutional error." Petition of Williams, 378 Mass. 623, 627 (1979). When a "significant delay" occurs, a court must consider "not only the question how it may be feasibly cut short, but also the question whether the particular appellant may not deserve additional

remedy." Id.; see also Campiti v. Commonwealth, 426 Mass. 1004 (1997). Federal courts also recognize that "extreme delay in the processing of an appeal may amount to a due process violation." United States v. Luciano-Mosquera, 63 F.3d 1142, 1158 (1st Cir. 1995), citing United States v. Wilson, 16 F.3d 1027, 1030 (9th Cir.1994); Elcock v. Henderson, 947 F.2d 1004, 1007 (2d Cir. 1991) (if state has provided right to appeal, then "due process requires that an appeal be heard promptly" (internal quotation marks omitted)).

Delayed adjudication of post-conviction motions, where a colorable question exists concerning whether the conviction was obtained by fraud, is particularly harmful to defendants who are incarcerated while they wait. For such a defendant, "delay may work an irremediable unjust loss of liberty in case his conviction is finally overthrown." Williams, 378 Mass. at 626. In fact, "a person convicted of a crime may be receiving punishment the effects of which can never be completely reversed or living under the opprobrium of guilt when he or she has not been properly proven guilty and may indeed be innocent under the law." Rheuark v. Shaw, 628 F.2d 297, 303-304 (5th Cir. 1980).

Those principles apply equally to delays involving new trial motions. In Sellers v. Commonwealth, 464 Mass. 1015, the defendant complained that his new trial motions had been pending for over two years. Although

this Court affirmed the Single Justice's denial of relief, because the defendant had not shown that he had pursued "all measures available to him in the trial court to obtain a ruling on his motions," id. at 1015, the Court also rejected the Commonwealth's suggestion that Sellers lacked a "right to have his motion for a new trial decided in any specific time frame.'" Id. 1015 & n.1. The Court warned that it was "not content . . . to allow the motions to continue to drift, without explanation, until [Sellers] suffers a prejudicial due process violation." Id.[13/]

Yet motions involving the Hinton Lab have already begun to drift. For example, it has been over six months since Milette filed his motion for a new trial, and he has continued to serve his sentence in the meantime. Even if some defendants obtain timely hearings on new trial motions, eliminating the authority of Superior Court judges and special judicial magistrates to stay sentences would frustrate this Court's and the Superior Court's clear intention to provide all defendants with timely hearings. The Superior Court has estimated that the number of post-conviction motions filed in Hinton Lab cases alone will

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[13/]See also United States v. Yehling, 456 F.3d 1236, 1243 (10th Cir. 2006) ("the interests protected by preventing unreasonable delay from arrest through sentencing and throughout the appellate process are also endangered by delay in deciding a motion for a new trial based on newly discovered evidence").

nearly equal the Superior Court's *total* criminal caseload in a typical year. SRA 270-71.[14/]

2. Delays occasioned by malfeasance pose an even greater threat to due process.

The Commonwealth concedes that it might be "months, if not longer," before hearings occur on all pending new trial motions. Comm. Charles Br. 26. But it sees this delay as a reason to *bar* the Superior Court from staying sentences in the meantime. Id. To the contrary, the delay is a reason to affirm the Superior Court's inherent powers to stay sentences. See Durley v. Mayo, 351 U.S. 277, 291 (1956) (Douglas, J., dissenting) ("While the petition did not allege that the prosecution knew that [witnesses] were lying when they implicated [him], the State now knows that the testimony of the only witnesses against petitioner was false. No competent evidence remains to support the conviction. Deprivation of a hearing under these circumstances amounts . . . to a denial of due process of law.").

The Commonwealth mistakenly attributes the present delay to the Inspector General's investigation. In fact, that investigation was occasioned by long-overdue revelations of government malfeasance. "Factors beyond

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[14/]That estimate might not account for the possibility that all defendants whose cases were processed by the Hinton Lab, and not just those linked directly with Annie Dookhan, may file non-frivolous post-conviction motions. See SRA 243-44, 299-323, 335-90.

the defendant's control are relevant considerations in determining the reasonableness of a delay between the filing of a motion and a judge's consideration of that motion." Commonwealth v. Barclay, 424 Mass. 377, 380-381 (1997). But given the reasons that Milette and Charles are before this Court, "months, if not longer" of "total inaction, however occasioned, while they remain incarcerated, seems more than enough." Rivera v. Concepcion, 469 F.2d 17, 19-20 (1st Cir. 1972). "Nor is it to be overcome by a present exercise of diligence . . . . Any such rule would mean that a defendant may be freely given improper consideration until the system, or the parties at fault, are caught out." Id. Thus, as the investigation of the Hinton Lab proceeds, defendants suffer an "irremediable unjust loss of liberty." Williams, 378 Mass. at 626.[15/]

Moreover, although it is easy to understand why the Inspector General is investigating the Hinton Lab, it is unclear why justice for the defendants must await that investigation. There is already abundant evidence of misconduct and mismanagement, which has been

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[15/]Even assuming the Commonwealth is not now impeding the litigation, delays exist only because of misconduct by at least one state employee. See Commonwealth v. Olszewski, 416 Mass. 707, 713 n.5, 715 (1993) (when a "chemist employed by the State police crime laboratory" misplaced evidence, it was "the Commonwealth's negligence"); Commonwealth v. Shipps, 399 Mass. 820, 834, 836 (1987) (when a "chemist for the Commonwealth" failed to photograph evidence that was later damaged through testing, it was a "failure of the government").

acknowledged by the Department of Public Health and by the Commonwealth. SRA 204-20, 224-41.

In contrast to the wait-and-see position held by the Commonwealth, the Texas criminal justice system has moved swiftly to redress injustices caused by a milder crisis. On February 3, 2012, a Texas state lab employee reported to lab managers his suspicions that a colleague had violated protocol. See Report of the Texas Forensic Science Commission at 6-7, Texas Dep't of Public Safety Houston Regional Crime Laboratory Self-Disclosure (Apr. 5, 2013).[16] Three days later the Department of Public Safety ("DPS") notified the Texas Rangers and the Office of Inspector General. Id. Four days after that, the discredited scientist was suspended; he was barred from the lab and resigned within months. Id. By late April 2012, DPS had identified 4,944 drug cases (totaling 9,462 pieces of evidence) that the scientist had worked on during his employment from 2006 to 2012. Id. at 9.

A subsequent investigation found that the scientist "struggled with corrections and an overall understanding of the chemistry, especially in difficult cases" and that while "most of the mistakes were administrative, a few were technical." Id. at 19. Thus,

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[16]The report is available at http://www.fsc.state.tx.us/documents/FINAL-DPSHoustonReport041713.pdf (last visited Apr. 29, 2013).

the malfeasance in Texas, which was first discovered approximately 15 months ago, is far less extreme than the intentional fraud in Massachusetts's constitutional crisis, discovered approximately 22 months ago.

Yet the Texas Court of Criminal Appeals — the state's highest criminal court — is already granting state writs of habeas corpus even where evidence is supposedly available to retest. Ex parte Hobbs, --- S.W.3d ----, 2013 WL 811534 (Tex. Ct. Crim. App. 2013) (per curiam; published). Although the Commonwealth argues that the Texas cases are distinguishable because the Texas lab used only a one-chemist testing protocol, Comm. Charles Br. 36, that argument is undermined by the Texas court's refusal to permit retesting of any evidence touched by the discredited scientist:

> 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. A Department of Public Safety report shows that the lab technician who was solely responsible for testing the evidence in this case is the scientist found to have committed misconduct. *While there is evidence remaining that is available to retest in this case, that evidence was in the custody of the lab technician in question. This Court believes his actions are not reliable; therefore custody was compromised, resulting in a due process violation.* Applicant is therefore entitled to relief [from an eight-year sentence].

Id., 2013 WL 811534, *1 (emphasis added).[17/]

Here, given the undisputed evidence that Dookhan falsified results and fabricated evidence, SRA 209-11, 224-41, Texas's approach would require vacating numerous drug convictions. Thus, Texas is ahead of the Commonwealth in providing relief to affected defendants and restoring the integrity of its criminal processes. If this Court invalidates the stay procedures currently in place, the Commonwealth will fall further behind, at the expense of defendants' due process rights.

## II.

**A SPECIAL JUDICIAL MAGISTRATE MAY ALLOW A MOTION TO STAY EXECUTION OF A DEFENDANT'S SENTENCE, EVEN IF A SUPERIOR COURT JUDGE HAS PREVIOUSLY DENIED A STAY SOUGHT BY THE SAME DEFENDANT, WHEN THERE HAS BEEN AN INTERVENING SUPERIOR COURT ORDER AUTHORIZING THAT RECONSIDERATION.**

Special Judicial Magistrate Cratsley's ruling on Milette's stay motion, styled as a motion to reconsider Judge Lowy's prior denial of a stay, was not improper. Instead, that ruling was expressly authorized by judges of the Superior Court, both before and after the fact. The ruling was also warranted, independently, by changed circumstances between November 2012, when Judge Lowy denied Milette's stay request, and February 2013, when both S.J.M. Cratsley and Judge Lu granted it.

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[17/]See also Ex Parte Hinson, 2013 WL 831183 (Tex. Ct. Crim. App. 2013) (per curiam); Ex Parte Smith, 2013 WL 831359 (Tex. Ct. Crim. App. 2013) (per curiam).

**A. The stay of Milette's sentence was authorized by judges of the Superior Court.**

This Court has endorsed reconsideration "in appropriate circumstances" because "allowing judges to reconsider prior orders within a reasonable time continues to be an efficient and fair means of advancing the administration of justice." Commonwealth v. Cronk, 396 Mass. 194, 196-197 (1985). Even the Commonwealth concedes that "[a] judge has the authority to reconsider an issue that has been decided by another judge." Comm. Milette Br. 26; see Sullivan v. Liberty Mut. Ins. Co., 444 Mass. 34, 37 (2005) (different judges ruled on the motions for summary judgment and for reconsideration). That is what happened here: S.J.M. Cratsley's reconsideration of Judge Lowy's ruling was, on three separate occasions, sanctioned by different Superior Court judges.

First, S.J.M. Cratsley's ruling was authorized on November 26, 2012, by Chief Justice Rouse's Order of Assignment. SRA 112-13. That Order, and not an attempt to evade Judge Lowy's authority, explains why Milette's February 2013 motion for reconsideration was heard by S.J.M. Cratsley even though it had been denied on November 13 by Judge Lowy. The Order assigned S.J.M. Cratsley "to preside over criminal proceedings in connection with [Hinton Lab cases]," and it gave him "the power and authority to conduct hearings on post conviction motions . . . and to make proposed findings

and rulings to the Regional Administrative Justice." Id. Similarly, Rule 47 provides that special magistrates may "preside over criminal proceedings" and "shall have the powers . . . to make findings and report those findings and other issues to the presiding justice or Administrative Justice." Although the Commonwealth now claims that the Order of Assignment did not specify that S.J.M. Cratsley could hear this particular motion, the Order did not limit which post-conviction motions S.J.M. Cratsley could hear, and in light of the crisis that gave rise to the special judicial magisterial appointments, "should be interpreted in a commonsense and realistic fashion." United States v. Ventresca, 380 U.S. 102, 108 (1965).

Second, although the Commonwealth argues that Milette's motion for reconsideration "should have been put to Judge Lowy," Comm. Milette Br. 27, it has come to light that Judge Lowy instructed S.J.M. Cratsley to rule on Milette's motion. 4/8/2013 Milette Tr. 5-6.[18/] Judge Lowy's instruction, together with S.J.M. Cratsley's ruling, evince a shared understanding that the Order of Assignment required S.J.M. Cratsley to adjudicate Milette's motion as part of the overall effort to "ease the burden on the sitting Judges. Id.

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[18/]As explained above, ante n.4, Milette cites this transcript only provisionally, pending the Court's decision whether to grant Milette's motion to expand the record or take judicial notice of the transcript.

at 6 (statement of S.J.M. Cratsley). See also Superior Court Opp. 19-20 n.7 (suggesting that special judicial magistrates may reconsider decisions by Superior Court judges if "the relevant Superior Court judge and parties agree").

Third, S.J.M. Cratsley's ruling on Milette's motion was sanctioned upon review by Judge Lu. Milette was bailed on S.J.M. Cratsley's order only from some time on February 12, 2013, until 1:05 p.m. on February 13, 2013. SRA 162. At that time, Judge Lu entered his own order setting the conditions of Milette's release. Id. Subsequently, on February 28, 2013, Judge Lu held that Rule 47 and the Order of Assignment gave S.J.M. Cratsley "the authority to issue the stay of execution." SRA 199. Judge Lu also reiterated his view that a stay of Milette's sentence was warranted, although he vacated the stay out of deference to the pending matters before the Single Justice. Id.

Accordingly, S.J.M. Cratsley's ruling on Milette's motion for reconsideration was permitted by, rather than contrary to, rulings by Superior Court judges.

**B. Special Judicial Magistrate Cratsley's ruling was also warranted by changed circumstances.**

Special Judicial Magistrate Cratsley's ruling on Milette's motion for reconsideration was also justified by changes in circumstances that occurred between November 13, 2012, when Judge Lowy denied the stay, and February 12, 2013, when S.J.M. Cratsley granted it.

Changed circumstances traditionally justify reconsideration. See Town of Dartmouth v. Greater New Bedford Regional Vocational Technical High School Dist., 461 Mass. 366, 368 n.4 (2012) ("[w]here there has been no change of circumstances, a court or judge is not bound to reconsider a case, an issue, or a question of fact or law, once decided"), quoting Peterson v. Hopson, 306 Mass. 597, 599 (1940). Moreover, in the bail context – which shares important characteristics with post-conviction requests for stays of sentences – inferior judges can effectively reconsider the orders of superior judges. See Pagan, 445 Mass. 315; G.L. c.276, §§ 57-58. For example, if a District Court judge sets bail, and the defendant is then charged with a different offense in Superior Court – while District Court charges are pending – the Superior Court will revoke the bail for sixty days. Id. After those sixty days, the defendant will be returned to the District Court for another bail determination. Id. The District Court judge then reconsiders the bail determination even though a Superior Court judge has revoked bail.

Much like revisitation of bail, motions to stay sentences are interlocutory orders requiring immediacy and flexibility for the courts to keep abreast of changing circumstances. In both contexts, changed circumstances warranting the defendant's confinement or

release are reviewed against the likelihood of return to court (which substantially depends upon potential success on the merits) and the risk to public safety. Accordingly, the Commonwealth's repudiation of S.J.M. Cratsley's reconsideration of Judge Lowy's order is unwarranted. See 1 Pomeroy, Equity Jurisprudence 141 (5th ed. 1941) ("[e]quitable remedies . . . are distinguished by their flexibility, their unlimited variety, their adaptability to circumstances").

Here, there were changed circumstances. As Judge Lu noted, Annie Dookhan "ha[d] been indicted," "extensive evidence concerning [her] malfeasance ha[d] become available," and "ongoing investigations" suggested the prospect of additional revelations. SRA 199. The Commonwealth claims that indictments against Dookhan in three counties were "mentioned in [Milette's] original stay motion," Comm. Milette Br. 27-28, but that is not so. The Commonwealth's citation is to a memorandum filed on January 17, 2013. Milette RA 6, 13. Indictments were first returned against Dookhan in December 2012, SRA 230-36, *after* the initial denial of Milette's stay request in November 2012.

Although the Commonwealth has elected not to address Dookhan's actions in its briefs to this Court, its filings against Dookhan reflect a firm belief that significant misconduct occurred. SRA 225-41; see United States v. Kattar, 840 F.2d 118 (1st Cir. 1988) ("We

agree with Justice (then Judge) Stevens that the assertions made by the government in a formal prosecution . . . 'establish the position of the United States and not merely the views of its agents who participate therein.'"), quoting United States v. Powers, 467 F.2d 1089, 1097 n.1 (7th Cir. 1972) (Stevens, J., dissenting).

The Commonwealth's present submission also focuses on the arguments of Milette's counsel, at the expense of addressing the changed circumstances that mattered to S.J.M. Cratsley. See Comm. Milette Br. 27-28. One changed circumstance was "the length of time that [Milette had] already served," SRA 146, which had increased by roughly three months since Milette's initial stay motion was denied. Another changed circumstance was the increasing likelihood that protracted litigation would limit the prospects for Milette, who had then served 40 months of his 60-month sentence, to secure meaningful post-conviction relief. In granting a stay, S.J.M. Cratsley noted that Essex County prosecutors were taking an approach to the Hinton Lab cases that was "so out of line with all the other counties." SRA 151.

## III.

## THIS COURT SHOULD ORDER THE RELEASE OF BOTH DEFENDANTS.

### A. The stays ordered below do not represent an abuse of discretion.

If this Court concludes that judges and special judicial magistrates of the Superior Court had the authority to stay the defendants' sentences, then it should reinstate those stays to take immediate effect. Although the Commonwealth asserts that the lower court abused its discretion by granting the stays, that assertion is misplaced for several reasons.

First, the defendants' new trial motions are likely to succeed. A new trial is warranted by evidence that "casts real doubt on the justice of the conviction." Commonwealth v. Grace, 397 Mass. 303, 305-306 (1986). The evidence of misconduct at the Hinton Lab creates precisely that type of doubt. Milette, for example, has shown that he is serving committed prison sentences attributable to drug certifications by Annie Dookhan. SRA 125-28. That same reason was vitally central to Charles's plea,[19] SRA 252-53, and like Milette, Charles remains incarcerated. SRA 392.

Milette was indicted and pled guilty only after Dookhan's certifications were completed. SRA 88-89,

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[19]S.J.M. Cratsley found that Charles's "guilty plea to felon in poss[ession of ammunition] was likely motivated by the deal on his drug case plea and involved one bullet." SRA 255.

125-28. Likewise, Charles pled guilty following the issuance of Dookhan's certifications. SRA 5, 252-53. Thus, both defendants can point to "egregiously impermissible conduct" that was "material" to their decisions to plead guilty, such that their pleas "[were] involuntary and violated [their] due process rights" under the Fourteenth Amendment and article 12 of the Declaration of Rights. United States v. Fisher, --- F.3d ----, 2013 WL 1286985, *3, *8 (4th Cir. Apr. 1, 2013) (addressing misrepresentations by a police officer), citing Ferrara v. United States, 456 F.3d 278 (1st Cir. 2006).

Although the Commonwealth asserts that it can prove the defendants' guilt with evidence that is "independent" of Dookhan's work, Comm. Milette Br. 32, that is irrelevant. The merits of a new trial motion do not hinge on whether the Commonwealth *would* secure an untainted conviction at a new trial, but instead on whether it *did* secure a conviction that is "surely unattributable" to tainted evidence. Sullivan v. Louisiana, 508 U.S. at 279. In particular, "[t]he motion judge decides not whether the verdict would have been different, but rather whether the new evidence would probably have been a real factor in the jury's deliberations." Grace, 397 Mass. at 306; see also Commonwealth v. Vasquez, 456 Mass 350, 361 (2010).

Allegations of Dookhan's far-ranging fraudulent

conduct would have been a "real factor" in both defendants' guilty pleas, had such information been available at the time. Moreover, as the Texas cases demonstrate, it is unclear whether the Commonwealth possesses any drug evidence that would be admissible in a new trial against Milette or Charles. See Ex parte Hobbs, 2013 WL 811534, *1 (rejecting "evidence [that] was in the custody of the lab technician in question").

In addition, both S.J.M. Cratsley and Judge Lu individually concluded after full hearings that neither Milette nor Charles pose undue security risks if released. For example, S.J.M. Cratsley noted that Milette has already served two-thirds of his sentence; he has been well-behaved during his time in prison; he was classified to minimum security at MCI-Shirley; and he has a stable place to live upon release. SRA 119. When Judge Lu reviewed that determination, he agreed that a stay was warranted. SRA 198-99.

With respect to Charles, trial counsel argued that the defendant had done well while incarcerated at Souza Baranowski, earning his GED, participating in substance abuse programs, "anti-violence" programs, and holding a job. SRA 24-25, 64. S.J.M. Cratsley found that Charles had, by that time, "served almost all of his minimum sentence of four years on both crimes." SRA 33. He also set a $5,000 cash bail, with conditions that the defendant reside with his brother, be monitored by GPS,

and report weekly to the Probation Service. SRA 32-33. Upon review on February 8, 2013, Judge Lu re-found in a "de novo" capacity "all of the findings made by the Special Magistrate," SRA 68, but he modified the stay to add home detention with GPS monitoring. SRA 67.

### B. This Court should exercise its own authority to release the defendants.[20/]

Even if the Superior Court lacked the authority to release the defendants, this Court should exercise its own authority to effect that release while this case is pending. These cases came to the Court by way of petitions under G.L. c. 211, § 3. This Court has frequently used its authority under that provision to safeguard constitutional rights and to ensure that "the burden of a systemic lapse is not . . . borne by defendants." Lavallee, 442 Mass. at 246. This is especially true where, as here, the defendants' continuing confinement in light of the revelations of fraud deprive them of their substantive "right[s] to be free from unjustified governmental intrusion on physical liberty." Coffin v. Superintendent, Mass. Treatment Ctr., 458 Mass. 186, 188 (2010), quoting Aime v. Commonwealth, 414 Mass. 667, 677 (1993).

Yet, at least to this point, aspects of these petitions have exacerbated the harms of the Hinton Lab crisis. Although Milette was in a minimum security

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[20/]This argument is authorized by the Single Justice's Order of April 9, 2013. SRA 392.

bunkhouse in February, he was sent to a maximum security prison when Judge Lu, out of deference to this Court, revoked the stay. SRA 391. Moreover, both Milette and Charles are now serving out their sentences only because the Commonwealth selected their cases to test its theory about the limits on the authority of judges and special judicial magistrates of the Superior Court, rather than to cope in a practical way with the true problem: an extraordinary and long-lasting fraud on the courts of this Commonwealth.

No matter its ruling on that issue, this Court should order that the defendants be released.

## Conclusion

Based on the foregoing points and authorities, defendants Milette and Charles respectfully request that this Court: (1) hold that judges and special judicial magistrates of the Superior Court may stay sentences in Hinton Lab cases while new trial motions are pending; (2) hold that Special Judicial Magistrate Cratsley's grant of Milette's stay request did not impermissibly reconsider the ruling of a Superior Court judge; and (3) order the release of both defendants.

Respectfully submitted,

Beth L. Eisenberg
BBO #554630
Chris Norris
BBO #669624
COMMITTEE FOR PUBLIC
COUNSEL SERVICES
Special Litigation Unit
21 McGrath Highway
Somerville, MA 02143
(617) 623-0591
beisenberg@publiccounsel.net
***For defendant Shubar Charles***

Matthew R. Segal
BBO #654489
AMERICAN CIVIL LIBERTIES UNION
OF MASSACHUSETTS
211 Congress Street
Boston, MA 02110
(617) 482-3170
msegal@aclum.org
***For defendants Shubar Charles and Hector Milette***

Ezekiel R. Edwards
NY 4189304 (pro hac vice pending)
Emma A. Andersson
CA 260537 (pro hac vice pending)
Criminal Law Reform Project
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street, 18th Floor
New York, New York 10004
(212) 284-7365
eandersson@aclu.org
***For defendant Hector Milette***

April, 2013.