COMMONWEALTH OF MASSACHUSETTS

KEVIN BRIDGEMAN,
YASIR CREACH, and
MIGUEL CUEVAS,

Petitioners,

v.

DISTRICT ATTORNEY FOR SUFFOLK COUNTY and
DISTRICT ATTORNEY FOR ESSEX COUNTY,

Respondents.

SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY
DOCKET NO.:

MEMORANDUM IN SUPPORT OF PETITION SEEKING RELIEF PURSUANT TO GEN. LAWS C.211, §3

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In light of the unprecedented crisis at the William A. Hinton State Laboratory Institute, which has violated the due process and common law rights of more than 40,000 defendants ("Dookhan defendants"), this Court should exercise its authority under G.L. c.211, §3, to address the following questions:

1. Whether, to vindicate the rights of Dookhan defendants, to eliminate the apprehension of vindictive prosecution from chilling their exercise of post-conviction rights and to restore the integrity of the criminal justice system, due process and common law principles require a clear, prophylactic rule that Dookhan defendants who seek post-conviction relief cannot be subjected to more severe punishment as a result of the reinstatement of previously dismissed charges, any prosecution of new charges based on the same conduct, or the imposition of increased sentences?

2. Whether inordinate and prejudicial delay in providing post-conviction relief to Dookhan defendants violates due process, where it has already been more than two years since managers in the Hinton Lab learned of serious misconduct by chemist Annie Dookhan, yet the vast majority of Dookhan defendants have not even been assigned counsel, much less been provided discovery, had their convictions reviewed, or received any relief whatsoever?

INTRODUCTION

For almost a decade, chemist Annie Dookhan perpetrated an extensive and unprecedented fraud at the Hinton Lab. Her outrageous misconduct, which was exacerbated by the chronic mismanagement of the lab, reportedly affected at least 40,323 defendants who have been convicted of state drug offenses in the Commonwealth.

Now, long after lab managers discovered misconduct by Dookhan in June 2011, many Dookhan defendants fear that, if they pursue justice and challenge their tainted drug convictions, either by withdrawing their guilty pleas or moving for new trials, they could be subjected to even harsher punishments than they initially received. Worse yet, such challenges have been inordinately and prejudicially delayed by factors well beyond the control of these defendants.

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

The scandal at the Hinton Lab is, by now, well known. Serving as an employee of the Commonwealth and member of the "prosecution team," Dookhan failed adequately to test an untold number of alleged drug samples. In many cases, Dookhan falsely certified that she had performed the required tests and also that samples, in fact, tested positive for illegal drugs. For that reason, the convictions of tens of thousands of defendants for state drug offenses appear to have been obtained by fraud.

That this egregious misconduct occurred is undisputed; that it affects at least 40,323 defendants has been established; and that this scandal involves the unprecedented violation of the due process and common law rights of these Dookhan defendants is without refutation. As this Court has already recognized:

> It is undisputed that the allegations of serious and far-reaching misconduct by Dookhan at the Hinton drug lab have raised significant concerns about the administration of justice in criminal cases where a defendant has been convicted of a drug offense and the drugs at issue were analyzed at that facility.

Commonwealth v. Charles, 466 Mass. 63, 89 (2013) (noting that "thousands of cases may have been compromised").

It is less well known, however, that little progress has been made toward remedying this vast injustice. The Committee for Public Counsel Services ("CPCS") has been able to assign counsel to approximately 8,700 defendants, a small fraction of

the 40,323 defendants identified to date. See Affidavit of Anthony Benedetti ("Benedetti Aff.") at R. 271, ¶ 12; R. 272, ¶ 16. This effort has been exceedingly difficult because, remarkably, in January 2014, there is still no list of case numbers associated with all of the 40,323 Dookhan defendants. See Affidavit of Nancy Caplan ("Caplan Aff.") at R. 241, ¶ 36. Meanwhile, many defendants are afraid to seek post-conviction relief. Despite having colorable claims, they fear that challenges to their convictions may trigger vindictive prosecutions; for example, prosecutors might reinstate previously dismissed charges that carry mandatory minimum sentences. See Affidavit of Veronica White ("White Aff.") at R. 323, ¶ 15; Caplan Aff. at R 236-238, ¶¶ 18-22. In addition, inordinate and prejudicial delays have stymied those defendants who, despite the risks and uncertainty, are willing to proceed in court. See Affidavit of Miguel Cuevas ("Cuevas Aff.") at R. 11, ¶ 13; White Aff. at R. 319-321, ¶¶ 8-11. Thus, many Dookhan defendants do not know how to challenge their tainted convictions, how long those proceedings will take, and whether those proceedings will ultimately help or hurt them. Adding further insult to the injuries suffered by Dookhan defendants is the simple fact that the Commonwealth is at fault and bears the burden of remedying this "systemic lapse." Charles, 466 Mass. at 75, quoting Lavallee v. Justices in the Hamden Super. Ct., 442 Mass. 228, 246 (2004).

This petition seeks a remedy. Petitioners were convicted of drug offenses only after Dookhan certified that the substances allegedly in their possession were illegal drugs. They seek two rulings concerning their tainted convictions. First, because the fear of harsher punishment chills the exercise of post-conviction rights, this Court should rule that Dookhan defendants who seek post-conviction relief cannot be penalized with outcomes that are worse – in terms of the seriousness of the offenses charged or the length of the sentences imposed – than the original outcomes of their cases. Second, because justice has been unduly delayed, with no end in sight, this Court should vacate all tainted convictions and afford prosecutors only a time-limited opportunity to re-prosecute any Dookhan defendants. Shielding defendants from more severe punishment will allow them to challenge their convictions without any fear of vindictive prosecution, and setting clear deadlines to resolve these cases will ensure that the burden falls squarely where it belongs: on the Commonwealth.

Petitioners make this request knowing that it is not the first proposal to this Court by Dookhan defendants, and their counsel, for a comprehensive remedy. See Pet. at 8-13. A similar call for a combination of dismissals and deadlines, advanced in a CPCS amicus brief, is pending before this Court. See Brief of CPCS as Amici Curiae, Commonwealth v. Rodriguez, et al., Nos.

SJC-11462 to 11466 (argued Oct. 10, 2013). But a comprehensive remedy, particularly one that addresses the fear of vindictive prosecution that chills the exercise of post-conviction rights, is by no means promised in Rodriguez.

Therefore, petitioners request that this petition be referred to Justice Botsford, who has continuing jurisdiction over Hinton Lab matters by virtue of the rulings in Charles, or else that this petition be reserved and reported to the full Court. Ultimately, petitioners seek the following relief:

1. This Court should establish a clear, prophylactic rule that defendants who seek post-conviction relief based upon Dookhan's outrageous misconduct in the Hinton Lab cannot be convicted of more serious offenses than those underlying their tainted convictions, or be sentenced to longer prison terms than were previously imposed.

2. This Court should order that prosecutors have 90 days to notify individual defendants, or their counsel, whether they intend to re-prosecute them, and further that:

a. If notice is not provided within 90 days, the underlying convictions will be vacated with prejudice; or

b. If timely notice of re-prosecution is provided, prosecutors will have six months to bring such cases to trial or to conclude them with guilty pleas.

STATEMENT OF FACTS

I. ANNIE DOOKHAN'S OUTRAGEOUS MISCONDUCT IN THE HINTON LAB.

The facts concerning Dookhan's fraud have been recounted in other cases, are described in greater detail in the affidavits accompanying this petition, and require little further elaboration here. See, e.g., Affidavit of Kevin Bridgeman ("Bridgeman Aff."); Affidavit of Yasir Creach ("Creach Aff."); Cuevas Aff.; Caplan Aff.; Benedetti Aff.; Affidavit of Anne Goldbach ("Goldbach Aff."); Affidavit of Thomas Workman ("Workman Aff."); Affidavit of Joanna Sandman ("Sandman Aff."); White Aff..

Among other acts of misconduct, Dookhan, a chemist in the Hinton Lab, an employee of the Commonwealth, and a member of the "prosecution team," repeatedly and deliberately falsified test results, tampered with evidence, and forged the signatures of her colleagues, including an evidence officer. See Goldbach Aff. at R. 55, ¶ 59; see also Goldbach Aff., Att. C at R. 89 (Executive Summary highlighting "the damage that can potentially be done by a rogue employee who can maliciously manipulate the testing and documentation process to minimize the chance of discovery").

This fraud lasted seemingly from November 2003, when Dookhan was hired, until June 2011, when she was caught improperly checking out samples and forging records to cover her tracks. Through her entire tenure, Dookhan consistently reported "testing" a volume of samples that was at least 50% higher than the second

most productive chemist. See Workman Aff. at R. 295, ¶¶ 30-33; Goldbach Aff. at R. 52, ¶ 45; Goldbach Aff., Att. C at R. 85. For example, during her first two years at the Hinton Lab, Dookhan often reported testing more than 1000 samples per month. See Workman Aff. at R. 295, ¶ 32. Even after the Supreme Court ruled, in Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009), that chemists had to take time off from their lab work to be available for testimony in court, Dookhan claimed to have continued testing a similarly extraordinary volume of samples. See id. at R. 295-297, ¶¶ 34-42.

Yet Dookhan was not fired, and her blatant misconduct was not publicly disclosed for over a year after the events of June 2011. See Goldbach Aff., Att. C at R. 86-87. Until December 2011, Dookhan's misconduct was not formally investigated at all. Id. Subsequently, from December 2011 to February 2012, the Department of Public Health ("DPH") reviewed only the June 2011 incident. See id. Dookhan was then permitted to resign in March 2012. See id. at R. 88. Responsibility for the Hinton Lab was later transferred to the State Police, which undertook a broader review of Dookhan's misconduct. See id. at R. 80. The Hinton Lab was finally shut down on August 30, 2012, and Dookhan's misconduct was disclosed to the public.

Discovery in ongoing litigation and the prosecution of Dookhan have yielded additional, troubling revelations regarding what transpired in the Hinton Lab, including the following:

- Dookhan postdated entries in the evidence log book, including not only her own initials but also the forged initials of an evidence officer. See Goldbach Aff. at R. 49-50, ¶ 39.

- Dookhan improperly loaded and ran her own samples on the Gas Chromotograph/Mass Spectrometer, misusing the machine critical to accurate testing and deviating from the two-chemist system . See id. at R. 52, ¶¶ 43-44.

- In violation of lab protocols, Dookhan left samples on her bench top work space, and she submitted multiple racks of sample vials to the confirmatory chemists. See id. at R. 52, ¶ 44.

- Dookhan improperly expedited the testing of specific samples at the request of assistant district attorneys. See id. at R. 53, ¶ 49.

- As her email messages demonstrate, Dookhan acted as a partisan member of the prosecution team, not a neutral expert witness. See id. at R. 59, ¶ 73; see also, e.g., Goldbach Aff., Att. I at R. 165 ("We are more than willing to provide discovery packets to the ADAs as long as it will help in getting a plea or stipulation."), R. 174 ("Tell the defendant, he is getting an extra 5 years for p-off the chemist."), R. 156 ("[The defendant] needs to be locked up and throw away the key"), R. 162 ("Defaulted [the defendant] . . . must be in the Dominican republic on the beach with my other default defendants")

- Dookhan reported sample weights that were, on average, three times higher than those reported by other chemists suggesting further fraud or incompetence. See Workman Aff. at R. 299, ¶ 49; Goldbach Aff. at R. 52, ¶ 45.

Dookhan pleaded guilty to several crimes on November 22, 2013, and she was sentenced to three to five years' imprisonment. In connection with her plea, the Commonwealth acknowledged some, but not all, of Dookhan's misconduct. The Commonwealth's sentencing memorandum noted that the initial DPH investigation determined that Dookhan "regularly failed to follow proper protocols for signing out drug samples from the evidence room, and in fact tampered with evidence by forging the initials of an evidence officer to cover-up her misconduct." R. 699 (Com. Sent. Mem.). It further noted that the later State Police investigation discovered that Dookhan had "dry labbed" samples, "the practice of merely visually identifying samples instead of performing the required chemical test on them to determine if the sample was in fact a controlled substance." Id.[1] In urging the trial judge to impose a sentence of five to seven years in state prison, the Commonwealth stated:

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

Id. at 702. It also stated that the scandal has already cost "hundreds of millions of dollars." Id. at 703.

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[1] In addition to her misconduct in the Hinton Lab, Dookhan also repeatedly gave false testimony, as an expert witness, about her qualifications. See R. 701-702.

Of course, the true damage that Dookhan has caused cannot be quantified in dollars, as the Commonwealth has acknowledged:

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

Id. at 702-703. The trial judge who sentenced Dookhan also noted the "catastrophic" consequences of her behavior, finding that "innocent persons were incarcerated" and "the integrity of the justice system has been shaken to the core." R. 707 (Sent. Dec.).

The strain on the criminal justice system has been felt by the courts, District Attorneys' Offices and, most particularly, CPCS, which is responsible for representing thousands of Dookhan defendants. According to its Chief Counsel, Anthony Benedetti, the case-by-case approach to this crisis has been "impeding [CPCS's] ability to carry out its core mandate." Benedetti Aff. at R. 268-69, ¶¶ 4-5, 19. That approach, Benedetti warns, would require CPCS "to obtain millions of additional dollars in funding" while "fail[ing] to deliver justice to many thousands of

indigent defendants whose rights have been violated." Id. at R. 271-272, ¶ 15. Simply providing attorneys to the affected defendants, Benedetti observes, "would take months if not years" and "cause incalculable damage to CPCS, its clients, and Massachusetts' criminal justice system." Id. at R. 274, ¶ 23.

II. INORDINATE AND PREJUDICIAL DELAYS IN ADDRESSING THE CRISIS.

Justice for Dookhan defendants has been substantially delayed, first by failing to disclose Dookhan's misconduct to the public until August 2012, and now by other factors. Four deserve special mention here.

First, poor recordkeeping at the Hinton Lab has obscured vital information. In September 2012, Governor Deval Patrick created a Task Force to identify the defendants associated with drug certificates that Dookhan signed as the primary or secondary chemist. Relying upon a database from the Hinton Lab, the Task Force initially disclosed a list of approximately 37,500 names. To generate a more thorough list, the Task Force had to conduct a file-by-file review. Nearly a year later, in August 2013, the Task Force issued its Final Report, identifying 40,323 defendants "whose drug cases potentially may have been affected by the alleged conduct of Ms. Dookhan." Caplan Aff., Att. A at R. 249. Even then, however, the Task Force was unable to identify birthdates, social security numbers, or docket numbers as-

sociated with those defendants. See id. at R. 241, ¶ 36. Due to this lack of identifying information, lawyers have been appointed for only 8,700 Dookhan defendants, not all 40,323 of them. See Benedetti Aff. at R. 271, ¶ 12.

Second, given the magnitude of the misconduct and mismanagement in the Hinton Lab, the official investigation is not yet complete. In November 2012, Governor Patrick directed Inspector General Glenn Cunha to determine "whether the lab's failures [were] limited to Dookhan and her supervisors and managers." R. 710. That investigation remains ongoing, with its report expected in January 2014. In the meantime, Dookhan defendants who wish to challenge their convictions must make do with piecemeal discovery. See Caplan Aff. at R. 233-234, ¶¶ 7-10. For example, before June 2013 defendants litigating new trial motions were unable to get documents from the Hinton Lab associated with the analyses of their specific samples. See id. at R. 234, ¶ 11; White Aff. at R. 322-323, ¶ 14. Other documents, such as Hinton Lab training materials, have also been difficult to acquire. Caplan Aff. at R. 235, ¶ 13. In addition, defendants must contend with prosecutorial practices that have varied widely from county to county and even within counties over time. See id.; Sandman Aff. at R. 313-314, ¶¶ 10-11, 13.

Third, the criminal defense system cannot handle the outsized demands of this extraordinary crisis. At least 40,323 de-

fendants might need counsel, but no more than 300 qualified defense attorneys are willing to handle post-conviction cases at the low hourly rates that CPCS is authorized to pay. See Benedetti Aff. at R. 274, ¶¶ 22-23. Moreover, defense attorneys willing to represent Dookhan defendants are hamstrung by the unavailability of police reports and certificates of analysis necessary to identify the specific cases associated with the names in the Meier Report. See Caplan Aff. at R. 244, ¶¶ 45, 46.

Fourth, and finally, Dookhan defendants are concerned about their exposure to longer sentences and more serious charges, including those the Commonwealth voluntarily dismissed, if they challenge their convictions based upon Dookhan's misconduct. See White Aff. at R. 323, ¶ 15 (detailing clients' concerns that if their convictions are vacated, "the Commonwealth will pursue their cases with heightened vigor and that they will be punished for 'fighting the system.'"); Caplan Aff. at R. 238, ¶¶ 18-22. In this regard, the recent case of Angel Rodriguez is a cautionary tale. Rodriguez was indicted for trafficking cocaine over 100 grams but, in 2008, pleaded guilty to a reduced charge of trafficking over 28 grams and received a sentence of five to seven years. R. 722-723. Following the revelations about the Hinton Lab, Rodriguez successfully moved to vacate his guilty plea. R. 724. In response, the prosecution reinstated the original 100-gram charge, a jury convicted Rodriguez, and the

court sentenced him to eight years and one day, a longer sentence than it had originally imposed. R. 725-27. Petitioners and other Dookhan defendants are well-aware of Rodriguez's fate, which received media attention. R. 729, 731-32; Cuevas Aff. at R. 11, ¶ 13; Caplan Aff. at R. 238-239, ¶¶ 23-27. Indeed, as discussed below, petitioner Kevin Bridgeman has avoided filing a Rule 30 motion because he fears vindictive prosecution. See Bridgeman Aff. at R. 4, ¶ 17; Pet. at 6; Caplan Aff. at R. 237, ¶ 21.

ARGUMENT

Years ago, petitioners were convicted based upon Dookhan's fraud in the Hinton Lab, and all three of them would have made different decisions (and would have received different advice from their counsel), if they had known of Dookhan's extensive and egregious misconduct. In this way, petitioners and the other Dookhan defendants have suffered – and will continue to suffer – violations of their due process and common law rights through no fault of their own. Without the requested remedy from this Court, they have no meaningful relief in sight.

Responsibility for this unprecedented crisis lies entirely with the Commonwealth, not the defendants. This petition requests a comprehensive remedy that vindicates the rights of the petitioners, and all other Dookhan defendants, and that also

puts the burden of resolving this vast injustice on the Commonwealth.

I. DUE PROCESS AND COMMON LAW PRINCIPLES DO NOT PERMIT SUBJECTING DOOKHAN DEFENDANTS WHO SEEK POST-CONVICTION RELIEF TO MORE SEVERE PUNISHMENT.

Many Dookhan defendants, including petitioners Bridgeman, Creach and Cuevas, fear that challenging their tainted convictions will make matters worse. They worry that, if they win new trials, they will face more severe penalties if convicted again, either of the charges to which they previously pleaded guilty or of additional charges that prosecutors voluntarily dismissed.

Such pyrrhic victories would not do justice and cannot be justified. No Dookhan defendants should be subjected to more severe penalties, whether due to reinstating more serious charges or resentencing, than those that the Commonwealth was willing to accept before Dookhan's misconduct came to light. A contrary result – one that would impose even more incarceration on Dookhan defendants who successfully challenge their tainted convictions – would undermine their due process and common law rights to meaningful post-conviction proceedings and relief.

A. DUE PROCESS AND COMMON LAW PRINCIPLES PROHIBIT OUTCOMES THAT WOULD DISCOURAGE DEFENDANTS FROM CHALLENGING THEIR TAINTED CONVICTIONS.

The Hinton Lab litigation resembles other contexts in which courts have consistently barred prosecutors from seeking, or

judges from imposing, harsher punishments on defendants who successfully challenge their convictions.

One relevant context involves defendants who were convicted at trial. In North Carolina v. Pearce, 395 U.S. 711 (1969), the Supreme Court held that, when defendants successfully appeal from convictions, trial courts may not impose longer sentences after retrials, because it is "patently unconstitutional" to "penaliz[e]" defendants for exercising their rights. Id. at 724. Moreover, "the very threat" of longer sentences following retrials "serve[s] to 'chill the exercise of basic constitutional rights.'" Id. (quoting United States v. Jackson, 390 U.S. 570, 582 (1968)). Due process requires that defendants "be freed of apprehension" about any potential penalties for seeking post-conviction relief. Id. at 725.

To eliminate the "apprehension" of vindictiveness, the Supreme Court held, in Pearce, that defendants who prevail on appeal may not be subjected to stiffer sentences after retrials. This rule protects defendants who assert their post-conviction rights, and it also "prevent[s] chilling the exercise of such rights by other defendants who must make their choices under similar circumstances in the future." United States v. DeMarco, 550 F.2d 1224, 1227 (9th Cir. 1977).

In Commonwealth v. Hyatt, 419 Mass. 815 (1995), this Court adopted a similar rule as "a common law principle." Id. at 823.

Hyatt had received concurrent sentences after being convicted of rape and armed robbery, but following his successful appeal, he was again convicted and sentenced by a new judge to consecutive sentences. See id. at 816. Applying the rule of Pearce, this Court vacated Hyatt's sentence and remanded for resentencing:

> That rule, easy of application, effectively safeguards a successful appellant upon retrial from the possibility, however slight, of retaliatory vindictiveness following reconviction, and protects a convicted defendant's right to an appeal from any chilling effect emanating from the possibility that an enhanced second sentence might result from a retrial on the same facts.

Id. at 823, quoting State v. Violette, 576 A.2d 1359, 1361 (Me. 1990) (McCusick, C.J.). Like the Supreme Court, this Court was concerned with "any chilling effect" on defendants who fear that more severe punishment may follow successful post-conviction challenges.

In Blackledge v. Perry, 417 U.S. 21 (1974), the Supreme Court extended the "presumption of vindictiveness" from the sentencing context to the charging decision. The Court held that a defendant must be permitted to pursue post-conviction relief "without apprehension that the State will retaliate by substituting a more serious charge for the original one." Id. at 28. This Court has recognized that the "essential underpinnings" of Pearce and Perry are "found ... in a rule deterring abuse of the

criminal process by 'vindictive' behavior by the judges or prosecutors." Commonwealth v. Tirrell, 382 Mass. 502, 508 (1981).

"'Vindictiveness,' under Pearce and Perry, does not require actual retaliatory motivation, but only a reasonable appearance of the same; nor does it require a showing of bad faith or malice on the part of the judge or prosecutor." Id. at 508 n.8.[2] The paramount concern is any potential chilling effect on defendants, not the bad faith of prosecutors. A defendant "should not have to fear even the possibility that his exercise of his right to appeal will result in the imposition of a direct penalty for doing so." Marano v. United States, 374 F.2d 583, 585 (1st Cir. 1967). That principle requires the same rule in the Hinton Lab context.

B. DOOKHAN DEFENDANTS WHO WITHDRAW THEIR PLEAS SHOULD NOT FACE MORE SERIOUS CHARGES OR LONGER SENTENCES.

Pearce, Perry and Hyatt apply straightforwardly to protect Dookhan defendants who were convicted at trial, and the principle underlying these cases applies equally to defendants who wish to challenge their guilty pleas. Those defendants now face the possibility that withdrawing their pleas could, paradoxically, yield harsher penalties if prosecutors pursue previously

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[2] In Hyatt, the record did not suggest that "the judge was in fact vindictive," but it also did not explain the harsher, second sentence, and thus, it failed to overcome the "presumption of vindictiveness." 419 Mass. at 821. Similarly, in Perry, the presumption of vindictiveness applied even though there was "no evidence" that the prosecutor acted in "bad faith or maliciously." 417 U.S. at 28.

dismissed charges or if they are convicted at trial and sentenced to longer prison terms. As explained below, these harsher outcomes should be barred for the same reason that similarly unfair results were not permitted in Pearce, Perry and Hyatt: they cause defendants to fear potential vindictiveness, which in turn chills the exercise of their post-conviction rights. That result would be especially troubling here, because the Commonwealth bears complete responsibility for Dookhan's outrageous misconduct.

1. The potential to suffer harsher punishment, after seeking post-conviction relief, causes Dookhan defendants to fear prosecutorial vindictiveness.

The Supreme Court has explained why any apprehension of vindictiveness in the post-conviction process must be eliminated: "[T]he fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction." Pearce, 395 U.S. at 725. In holding that "it would be a flagrant violation of the Fourteenth Amendment" for a state to "punish[] the defendant for having succeeded in getting his original conviction set aside," the Supreme Court has not distinguished between different procedural avenues for vacating "[an] original conviction." Id. at 722.

For Dookhan defendants, the primary means to set aside their tainted convictions are motions for new trial under Mass. R. Crim. P. 30. In each of these cases, it has been revealed

that the original convictions or initial plea bargains may have rested on the fraud committed by Dookhan, an employee of the Commonwealth and member of the prosecution team. Because that revelation is uniformly unfavorable for the prosecution, there is no reason, other than "punishing the defendant for his having succeeded in getting his original conviction set aside," Pearce, 395 U.S. at 722, why any of these defendants should now face worse outcomes. Thus, this Court should establish a clear, prophylactic rule to eliminate any fear of vindictive prosecution that chills the exercise of critical post-conviction rights.

True, in Alabama v. Smith, 490 U.S. 794 (1989), the Supreme Court held that a presumption of vindictiveness does not arise "when the first sentence was based upon a guilty plea, and the second sentence follows a trial." Id. at 795. But Smith focused narrowly on judicial vindictiveness; this case involves the potential for prosecutorial vindictiveness. See Turner v. Tennessee, 940 F.2d 1000, 1002 (6th Cir. 1991) ("The Court in Alabama v. Smith simply did not speak to prosecutorial conduct."). The Supreme Court's observation that, during trial, a judge "may gather a fuller appreciation of the nature and extent of the crimes charged" and "insights into [the defendant's] moral character and suitability for rehabilitation," does not apply

to a prosecutor. Id. at 1001-02 (quoting Smith, 490 U.S. at 801).

> [T]he prosecution can be expected to operate in the context of roughly the same sentencing considerations . . . and any unexplained changes in the sentence is therefore subject to a presumption of vindictiveness.

Turner, 940 F.2d at 1002, quoting Smith, 490 U.S. at 802. Here, the Commonwealth will not gain any new information or insights by trying Dookhan defendants who previously pleaded guilty.

A far more likely scenario is that the prospect of harsher punishment will unconstitutionally chill the exercise of Rule 30 rights by defendants, like petitioners, who have already served their sentences. These defendants cannot get any relief by tendering new pleas, such as the "time served" plea agreements offered to the defendants in Charles and Milette. Instead, Dookhan defendants who have already served their time can seek justice only by having their tainted convictions vacated. But if such defendants are told that they may be tried, convicted and sentenced to even more time in prison, only "the most hardy defendants" will seek justice. Perry, 417 U.S. at 28. That result would be worse than unconstitutional; it would allow prosecutors to reap the rewards of Dookhan's misconduct by intimidating defendants who have already served tainted sentences.

For much the same reason, prosecutors should not be permitted to revive charges that they voluntarily dismissed in connection with prior pleas by Dookhan defendants. Because prosecutors were willing to drop those charges when Dookhan's misconduct was not known, there is no reason – other than to punish defendants for challenging tainted convictions – for prosecutors to pursue those charges now. See United States v. Kupa, No. 11-cr-345, 2013 U.S. Dist. Lexis 146922, at *7-8 (E.D.N.Y. Oct. 9, 2013) ("To coerce guilty pleas, . . . prosecutors routinely threaten ultra-harsh, enhanced mandatory sentences that no one – not even the prosecutors themselves – think are appropriate."); see also "An Offer You Can't Refuse," Human Rights Watch Report (Dec. 5, 2013) (detailing the pressures faced by defendants to plead guilty when prosecutors threaten harsh sentences based on mandatory minimums).

In this regard, the recent decision in United States v. LaDeau, 734 F.3d 561 (6th Cir. 2013), is instructive. After LaDeau successfully moved to suppress critical evidence, without which the prosecution could not prove he had possessed child pornography, the prosecution obtained a superseding indictment, alleging that he conspired to receive child pornography, a more serious charge that triggered a minimum mandatory sentence. LaDeau moved to dismiss the superseding indictment as a viola-

tion of his due process rights. Analyzing that claim, the appeals courts explained:

> [T]he Blackledge rule is a prophylactic one; it safeguards a defendant's due process rights by eliminating apprehension of prosecutorial retaliation where circumstances reasonably indicate retaliation, even if there is no direct evidence that the prosecutor was in fact improperly motivated.

Id. at 566. Despite the pre-trial setting, in which prosecutors have broad discretion over charging decisions, the court applied the presumption of vindictiveness for two reasons. First, there was no reason to believe that the prosecution's view of the case had "changed significantly," because the evidence against LaDeau was unchanged. Id. at 568. Second, after critical evidence was suppressed, the prosecution was "saddled with the prospect of restarting [the] prosecution from scratch." Id. at 569.

The same is true here. From the prosecution's perspective, Dookhan's misconduct did not strengthen the Commonwealth's cases against petitioners or any other defendants; to the contrary, it clearly weakened them. Moreover, as a result of successful new trial motions and withdrawn guilty pleas, District Attorneys may have to "restart ... prosecution[s] from square one in order to prevent [defendants] from 'going free.'" Id. at 570.

> When the prosecution is forced to do over what it thought it had already done correctly, or where duplicative expenditures of prosecutorial resources are required, the prosecution's stake in discouraging the de-

> fendant's exercise of a right may be "considerable."

Id. (internal citations and quotation marks omitted). That considerable stake drives the fear of vindictiveness and, in turn, chills the exercise of post-conviction rights.

2. The extraordinary magnitude of the Hinton Lab crisis presents special concerns about protecting the post-conviction rights of Dookhan defendants.

The analysis above would warrant applying Pearce, Perry and Hyatt to the Hinton Lab context even if petitioners Bridgeman, Creach and Cuevas were the only defendants with tainted convictions. But, of course, they are only three people among tens of thousands of Dookhan defendants. The tremendous magnitude of this crisis presents additional concerns about the potential for prosecutorial vindictiveness and, thus, amplified reasons to follow Pearce, Perry and Hyatt.

"It is beyond dispute that a defendant's decision whether to plead guilty or proceed to trial is a critical stage in a criminal proceeding for which he is constitutionally entitled to the effective assistance of counsel." Commonwealth v. Mahar, 442 Mass. 11, 14 (2004); see Lafler v. Cooper, 132 S. Ct. 1376 (2012); Missouri v. Frye, 132 S. Ct. 1399 (2012). "Because plea bargaining requires defendant to waive fundamental constitutional rights," courts have consistently held prosecutors "to the most meticulous standards of both promise and performance" in

plea bargaining. United States v. Velez Carrero, 77 F.3d 11, 11 (1st Cir. 1996) (quotations omitted). By entering plea agreements with Dookhan defendants, while a member of the prosecution team was willfully tampering with key evidence, the Commonwealth "undermined the whole system of trust upon which plea negotiations must be based." United States v. Dicus, 579 F. Supp. 2d 1142, 1158 (N.D. Iowa 2008). It breached the implicit representation that the prosecution's evidence was not the result of fraud. As this Court held in Charles, Dookhan's outrageous misconduct "raises significant questions regarding the veracity of the drug analysis, which purportedly served as the as the basis for [the defendant's] guilty plea." 466 Mass. at 74.

If prosecutors have ever had a "considerable stake" in discouraging defendants from seeking post-conviction relief, it is in cases arising from the Hinton Lab. Noting the "exceptional circumstances" of this scandal, this Court has recognized the danger that the criminal justice system may be buried under "an anticipated avalanche of cases." Id. at 90. Even if re-prosecuting tens of thousands of cases were possible – and it is not – doing so would "require increased expenditures of prosecutorial resources" and "may even result in ... formerly convicted defendant[s] going free." Perry, 417 U.S. at 27-28. Those concerns can motivate the prosecution to "up[] the ante," thereby discouraging defendants from seeking post-conviction relief.

Id. Beyond forestalling an "avalanche" of retrials, prosecutors may also wish to discourage further discovery by defendants into the shocking disarray at the Hinton Lab. Thus, this Court should establish a clear, prophylactic rule that Dookhan defendants will not face more serious charges or longer sentences (for the same underlying conduct) if they successfully challenge their tainted convictions.

II. DUE PROCESS GUARANTEES MEANINGFUL POST-CONVICTION RELIEF FOR DOOKHAN DEFENDANTS WITHOUT INORDINATE AND PREJUDICIAL DELAY.

The longer that the Hinton Lab crisis continues without a comprehensive remedy, the more uncertain becomes the position of the petitioners and the other Dookhan defendants. Although the crisis has been festering for more than two years, the vast majority of Dookhan defendants have still not had their day in court, much less any post-conviction relief. That inordinate and prejudicial delay violates due process, particularly because the defendants are not to blame for it.

A. UNDUE DELAY IN POST-CONVICTION PROCEEDINGS VIOLATES DUE PROCESS.

It is fundamentally unfair, in violation of due process, for petitioners and the other Dookhan defendants to be forced – through no fault of their own – to wait indefinitely for meaningful post-conviction relief from their tainted convictions.

"[I]nordinate and prejudicial delay" in the appellate process "may rise to the level of constitutional error," because such delay violates the right of due process guaranteed by the Fifth Amendment and Article 12. In re Williams, 378 Mass. 623, 625 (1979), quoting Commonwealth v. Swenson, 368 Mass. 268, 279-280 (1975); see Commonwealth v. Weichel, 403 Mass. 103, 109 (1988); see also State v. Bianco, 511 A.2d 600, 607-608 (N.J. 1986) (recognizing a defendant's due process right against undue delay in the appellate process, because "justice is denied if it is delayed").

Fundamental fairness requires an expedient process for reviewing criminal convictions, and providing post-conviction relief, because "an appeal that is inordinately delayed is as much a 'meaningless ritual' as an appeal that is adjudicated without the benefit of effective counsel or a transcript of the trial court proceedings." Harris v. Champion, 15 F.3d 1538, 1558 (10th Cir. 1994), quoting Douglas v. California, 372 U.S. 353, 358 (1963); see generally Mathews v. Eldridge, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." (internal quotation marks omitted)). This is particularly true when, during the period of delay, defendants remain incarcerated or suffer other collateral consequences of their criminal convictions. See White Aff. At R. 324, ¶ 17.

Courts have applied the same due process analysis to delays concerning new trial motions.

> [T]he interests protected by preventing unreasonable delay from arrest through sentencing and throughout the appellate process are also endangered by delay in deciding a motion for a new trial based on newly discovered evidence. Faded memories or misplaced evidence may impair a defendant's ability to adequately defend himself if he is granted a new trial. See Barker v. Wingo, 407 U.S. 514, 526 (1972). Delay may also produce anxiety or drain a defendant's financial resources. Moore v. Arizona, 414 U.S. 25, 27 (1973). Because of these similarities, we see no reason to exempt a motion for a new trial based on newly discovered evidence from protection against unreasonable delay.

United States v. Yehling, 456 F.3d 1236, 1243 (10th Cir. 2006). Here, this Court must consider whether inordinate and prejudicial delays in resolving new trial motions for tens of thousands of Dookhan defendants, including petitioners, violates their due process rights to fundamental fairness.

B. THE DELAY IN PROVIDING RELIEF TO DOOKHAN DEFENDANTS HAS BEEN — AND CONTINUES TO BE — INORDINATE.

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

- For almost 10 years, from 2003 until 2011, Dookhan committed extensive fraud in the Hinton Lab, including "dry labbing," tampering with samples and committing forgery. Throughout this period, she operated without meaningful oversight or controls, and she also claimed to have tested an impossibly high volume of samples.

- Dookhan's outrageous misconduct was not disclosed to the public from June 2011 through August 2012, during which time DPH conducted its limited, internal investigation.

- As it has turned out, the misconduct and dysfunction in the Hinton Lab were so grave that the Inspector General's investigation, which began in November 2012, will not conclude until late January 2014 at the earliest.

- Due to these massive problems in the Hinton Lab, a list of "Dookhan" defendants was not disclosed until in August 2013, in connection with the Meier Report. Even then, the list did not include birthdates, social security numbers, or docket numbers, which remain unavailable today.

- Presently, there are no more than 300 qualified defense lawyers willing to handle Hinton Lab cases at CPCS's compensation rates. As a result, lawyers have been appointed for only 8,700 of the 40,323 Dookhan defendants.

- Defendants who have moved for new trials have been confronted with substantial obstacles in getting important discovery, and they have also faced widely disparate approaches by courts and prosecutors.

The delay suffered by the Dookhan defendants undermines the integrity of the criminal justice system in the Commonwealth. In sharp contrast, when an examiner at a Texas drug lab faked test results of a Xanax pill, his actions were quickly noticed, double-checked, and reported to the Department of Public Safety

("DPS"). In just 18 days, DPS alerted the Texas Rangers, the Inspector General, the Forensic Science Commission, the lab's accrediting body, prosecuting attorneys and law enforcement agencies.[3] Why should Dookhan defendants bear the burden of a broken system that took roughly 14 months, rather than 18 days, to make the same progress? Similarly, in Texas, it took less than three months to circulate a list of every potentially tainted case (there were 4,944) and piece of evidence (there were 9,462).[4] Why should Dookhan defendants wait for justice simply because, to this day, the Commonwealth has been unable to identify all of the affected cases?

This dreadful situation is entirely the consequence of state misconduct, and as the Attorney General observed on behalf of the Superior Court, "the delays in resolving defendants' new trial motions are largely beyond defendants' control." Brief of Justices of Superior Court at 28-29 n.18, Dist. Att'y v. Sup. Ct., SJC-11410. Due process does not permit Dookhan defendants to be made to wait for years while the criminal justice system stumbles toward a solution to the massive fraud that has been perpetrated against them.

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[3] See Texas Forensic Science Comm'n, "Report of the Texas Forensic Science Commission," Texas Dep't of Public Safety Houston Regional Crime Laboratory Self-Disclosure at 6-10 (Apr. 5, 2013), available at http://www.fsc.state.tx.us/documents/FINAL-DPSHoustonReport041713.pdf.
[4] Id. at 9.

Moreover, there is no end in sight to this crisis. There is no efficient and reliable process, nor any deadlines, in place for identifying all of the Dookhan defendants, assigning counsel for them, and ruling on their new trial motions, let alone affording them new – and fair – trials on the charges against them. As a result, "[t]he pace of relief [has been] incredibly slow." White Aff. at R. 321, ¶ 11.

The courts, too, have seen their dockets swell with Dookhan defendants. As this Court noted in Charles, it "plac[ed] an enormous burden on the Superior Court" merely to decide about 600 motions to stay sentences (representing only 1.2% of the more than 40,000 cases identified in the Meier Report). 466 Mass. at 65. Stubbornly continuing to adjudicate these cases one-by-one, as the Commonwealth has proposed, would necessarily take many years, even if the courts were willing to accept massive delays in all other matters. It is not just the length of time that makes the delay undue and inordinate, but also the uncertainty surrounding the wait, which is indefinite.

C. THE ONGOING DELAY IN PROVIDING A REMEDY FOR THE HINTON LAB CRISIS IS ALSO PREJUDICIAL.

To state the obvious, for defendants who are currently serving sentences based on tainted convictions, delay "work[s] an irremediable unjust loss of liberty," in the event that their convictions are vacated. Williams, 378 Mass. at 626. That is

because, "[t]he conviction may be reversible, but the time spent in prison is not." Commonwealth v. Levin, 7 Mass. App. Ct. 501, 513 (1979). As this Court held, "the interest of justice is not served by the continued imprisonment of a defendant who may be entitled to a new trial." Charles, 466 Mass. at 74.

For defendants who are not in custody, including those who have already completed terms of imprisonment, delay may nevertheless "entail anxiety, forfeiture of opportunity, and damage to reputation, among other conceivable injuries." Williams, 378 Mass. at 626. Delay also prolongs the collateral consequences for defendants of their tainted convictions, and it squanders limited resources and court time with protracted litigation.

For all defendants, whether currently incarcerated or not, delay risks prejudice through the disappearance of witnesses, the fading of memories, and the loss of other relevant evidence, in the event that retrials prove necessary. See id. at 626. This risk is particularly pronounced for Dookhan defendants because the samples in their cases may be missing or contaminated. Thus, any future re-prosecution could depend on the testimony of live witnesses or other alternative evidence. As time passes, the ability to verify that evidence diminishes.

Beyond the defendants themselves, "the legal system" and "society at large" share a compelling interest "in the expedition of appeals, especially criminal appeals." Id. This Court

has suggested that, in certain cases, "very lengthy unjustified delay" in the appellate process might warrant "dismissal of the charges on that basis itself." Id. at 628 n.8.

The experience of petitioner Miguel Cuevas exemplifies the slow pace of progress to a remedy for Dookhan defendants. After learning of Dookhan's misconduct and obtaining counsel, Cuevas filed three motions on October 18, 2012: to vacate his guilty plea, to stay his sentence, and to obtain discovery. See R. 607-29, 633-34, 630-32. The discovery matter will not be heard until February 13, 2014, and there is no date for a hearing on the merits of his post-conviction claim. Id. Put simply, there is no end in sight. The unacceptable delay in these proceedings is not the fault of Cuevas and should not be borne by him; rather, it is the Commonwealth's burden. Thus, Cuevas and other Dookhan defendant should not have to wait indefinitely for meaningful relief from their tainted convictions.

D. A COMPREHENSIVE REMEDY IS REQUIRED TO VINDICATE THE RIGHTS OF DOOKHAN DEFENDANTS, DESPITE THE LIMITED AVAILABLE RESOURCES.

Just as surely as the present delays violate due process, they require a comprehensive remedy. Without such a remedy, the burden of this "'systemic lapse'" will continue "'to be borne by defendants,'" a result this Court has concluded is unacceptable. Charles, 466 Mass. at 74-75, citing Lavallee, 442 Mass. at 246.

In Lavallee, the petitioners were indigent criminal defendants who had no counsel due to a shortage of attorneys in the Hampden County bar advocates program. See id. at 229. At bottom, the problem resulted from the lack of resources in the court system, which deprived the petitioners of their right to counsel. See id. at 232. Faced with various proposed remedies, from increasing the funds allocated for CPCS to conscripting private counsel, this Court emphasized that "[t]he petitioners cannot be required to wait on their right to counsel while the State solves its administrative problems," id. at 240, because "[t]he continuation of what is now an unconstitutional state of affairs cannot be tolerated," id. at 245.

In the end, this Court concluded, "the burden of a systemic lapse" in failing to provide adequate resources for indigent criminal defense "is not to be borne by defendants," rather "[t]he duty to provide such counsel falls squarely on government." Id. at 246. Thus, this Court set two "clear deadlines": if counsel was not promptly assigned, after seven days, defendants had to be released (if held on bail or in preventive detention), and after 45 days, the criminal cases had to be dismissed without prejudice. Id. at 246.

> We intend that these procedures be implemented in a manner that provides prompt relief to those defendants whose right to counsel . . . must be secured in order to proceed with the case or continue to hold a

> defendant. That deadline provides certainty to the defendants who are suffering a violation of their rights, and also provides all concerned with an opportunity of known duration to make all reasonable efforts to cure this violation in the most direct and effective way, i.e., to secure counsel for the defendant.

Id. at 249. That same goal – setting "clear deadlines" to "provide[] certainty" to defendants and ensure "prompt relief" from any constitutional violations – should inform this Court's decision on this petition and an appropriate remedy for petitioners and the other Dookhan defendants.

The due process violations at issue in this petition are even more pressing than those presented by Lavallee. There, the problem was an unfortunate lack of resources. Nevertheless, "the ultimate responsibility for such circumstances must rest with the government rather than the defendant." Barker, 407 U.S. at 531. Here, the crisis is the result of the egregious fraud by Dookhan and the mismanagement of the Hinton Lab. Thus, all the more so, the responsibility to provide justice must be borne by the Commonwealth.

With unlimited resources, the criminal justice system might deal with the Dookhan defendants on a case-by-case basis within a reasonable period of time, as due process requires. But this Court is well aware that resources are already severely constrained. That unfortunate reality does not, and cannot, excuse

the ongoing violations of due process. "Inadequate resources can never be an adequate justification for the state's depriving any person of his [or her] constitutional rights." Hamilton v. Love, 328 F. Supp. 1182, 1194 (E.D. Ark. 1971); see Harris, 15 F.3d at 1562-63 (in context of undue delay in the appellate process, holding that the "lack of funding" was not "an acceptable excuse for delay") (collecting cases). This Court should "not tolerate ... unnecessary infractions of citizens' liberty where the sole justification amounts to little more than the State's inability" to afford defendants post-conviction relief in "an efficient an expeditious fashion." McCarthy v. Manson, 554 F. Supp. 1275, 1300 (D. Conn. 1981). Rather, this Court should now provide a comprehensive remedy for the Hinton Lab crisis, which has resulted from Dookhan's outrageous misconduct, and in fashioning that remedy, "the decisive factor must be the vindication of the petitioners' constitutional rights." Gaines v. Manson, 481 A.2d 1084, 1096 (Conn. 1984).

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this Court provide the comprehensive remedy outlined above to address the Hinton Lab crisis, which has violated the due process and common law rights of petitioners and tens of thousands of other Dookhan defendants.

Respectfully submitted,

KEVIN BRIDGEMAN,
YASIR CREACH, and
MIGUEL CUEVAS,

by their Attorneys

Matthew R. Segal, BBO #654489
Carlton E. Williams, BBO #600973
American Civil Liberties Union
of Massachusetts
211 Congress Street
Boston, MA 02110
(617) 482-3170
msegal@aclum.org

Emma A. Andersson, CA #260637
Ezekiel R. Edwards, NY #4189304
Criminal Law Reform Project
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004
(212) 284-7365
eandersson@aclu.org

Daniel N. Marx, BBO #674523
Christopher E. Hart, BBO #625031
Daniel McFadden, BBO #676612
Caroline S. Donovan, BBO #683274
Shrutih V. Ramlochan-Tewarie,
BBO #685467
Foley Hoag LLP
155 Seaport Boulevard
Boston, MA 02210
(617) 832-1000
dmarx@foleyhoag.com

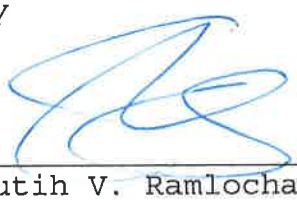
Dated: January 9, 2014

CERTIFICATE OF SERVICE

I, Shrutih V. Ramlochan-Tewarie, an attorney for petitioners, hereby certify that on January 9, 2014, I served the foregoing by causing copies to be mailed, by Federal Express, to the following:

Daniel F. Conley
District Attorney for Suffolk County
One Bulfinch Place
Boston, Massachusetts 02114

Jonathan Blodgett
District Attorney for Essex County
10 Federal Street
Salem, Massachusetts 01970



Shrutih V. Ramlochan-Tewarie
Foley Hoag LLP
155 Seaport Boulevard
Boston, MA 02210
(617) 832-1000

Dated: January 9, 2014.