COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-11764

KEVIN BRIDGEMAN, YASIR CREACH AND MIGUEL CUEVAS

v.

DISTRICT ATTORNEY FOR SUFFOLK COUNTY AND DISTRICT ATTORNEY FOR ESSEX COUNTY

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE*

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Dated: December 18, 2014

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ISSUE PRESENTED

When, on behalf of the Commonwealth, one of its employees repeatedly, systematically, and in bad faith falsifies evidence against criminal defendants to induce plea agreements or guilty verdicts, is the Commonwealth required to timely disclose its misconduct to the affected defendants, or their counsel, if it wants to avoid having the convictions vacated and the underlying charges dismissed with prejudice?

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

This brief is submitted on behalf of the National Association of Criminal Defense Lawyers ("NACDL") and the Massachusetts Association of Criminal Defense Lawyers ("MACDL") as *amici curiae* in support of petitioners. NACDL is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL, founded in 1958, has a nationwide membership of approximately 10,000 lawyers including private

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[1] Undersigned counsel confirm that no counsel for a party authored any part of this brief, nor did any person or entity, other than *amici* or its counsel, provide financial support for the preparation or submission of this brief.

criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL files numerous *amicus* briefs each year in the United States Supreme Court and other courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

This case presents a question of great importance to NACDL because in courtrooms across the nation, whether by verdict or by guilty plea, accused persons are convicted without ever having seen information that was favorable to their defense. The fundamental due process right enshrined in *Brady v. Maryland* to have such favorable information disclosed has been violated in every one of the tens of thousands of cases handled by Annie Dookhan. Furthermore, the closely related duty to disclose favorable information to the defense imposed on prosecutors by Massachusetts Rule of Professional Conduct 3.8 ("Rule 3.8") has also been violated. Together, *Brady* and Rule 3.8 should work to ensure not only that defendants going to trial

are notified of all favorable information held by the prosecution, but also that defendants have that information before making the decision to plead guilty.

The frequency with which such information remains undisclosed, however, and the role such non-disclosure plays in wrongful convictions prompted NACDL and other partners to undertake a study of *Brady* claims litigated in federal courts over a five-year period and issue a report, *Material Indifference: How Courts Are Impeding Fair Disclosure in Criminal Cases*. Kathleen "Cookie" Ridolfi, *et al.*, Nat'l Assoc. of Criminal Defense Lawyers, 1 (2014), http://www.nacdl.org/report/materialindifference/pdf/.

This case presents an important opportunity for NACDL to share with this Court the product of its work both relating to its publication of *Material Indifference* and otherwise. NACDL's other work on disclosure of exculpatory information includes collaboration with the Department of Justice and the FBI on the Microscopic Hair Comparison Analysis Review Project, a joint effort of law enforcement and the criminal defense community to ensure meaningful notification to defendants nationwide whose

convictions have been tainted by scientifically erroneous and misleading testimony originating from the FBI's crime lab. NACDL's commitment to this DOJ/FBI Review underscores our mission to ensure every defendant the right to be convicted through a fair process and the right to appropriate remedies in the post-conviction setting when later-discovered evidence casts doubt on the process by which a conviction was obtained.

MACDL is an incorporated association representing more than 1,000 experienced trial and appellate lawyers who are members of the Massachusetts Bar and who devote a substantial part of their practices to criminal defense. MACDL devotes much of its energy to identifying, and attempting to avoid or correct, problems in the criminal justice system. It files *amicus curiae* briefs in cases raising questions of importance to the administration of justice. MACDL is the Massachusetts affiliate of NACDL.

INTRODUCTION AND SUMMARY OF THE ARGUMENT OF AMICI CURIAE

Petitioners' Opening Brief demonstrated not only why this Court must fashion a remedy for tens of thousands of defendants whose convictions have been

tainted by the active malfeasance of former state employee Annie Dookhan, but also that the Constitution's due process guarantee requires that such a remedy be systematic, applicable on its face to all affected defendants.

But the delay and prejudice suffered by Petitioners, and explained at length in their Opening Brief, are not the only reasons why the Constitution and the law require that the onus for solving the problem it created must rest with the Commonwealth. The obligations imposed on the Commonwealth and its lawyers by the Constitution and by the Rules of Professional Conduct are further reasons why this Court should declare a systematic remedy which the Commonwealth must implement in order to avoid having the charges upon which Petitioners have been convicted dismissed with prejudice.

Specifically, the constitutional requirements articulated in *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and the ethical requirements set forth in Rule 3.8 demand that any remedy fashioned by this Court require the Commonwealth and its prosecutors to bear responsibility for rectifying the problem created by Dookhan's misconduct. This includes:

- Promptly notifying all defendants whose cases Dookhan worked on;

- Seeking to have all convictions of defendants whose cases could have been affected vacated; and

- Promptly re-examining the untainted evidence in each case to decide whether to re-prosecute.

The Commonwealth must be ordered to take these steps without any further delay.

ARGUMENT

Due Process and the Rules of Professional Conduct Require the Prosecutors to Promptly Notify Individual Defendants of the Exculpatory Evidence in Each Affected Case.

The first, and most critical step, of any remedy is requiring the Commonwealth to immediately notify all defendants whose cases could have been affected by Dookhan's work. Although Dookhan's misconduct was first discovered in June 2011, the Commonwealth did not disclose her misconduct to the public for more than a year. Goldbach Aff., Att. C at R. 86-87. It then took another two years for the Commonwealth to complete an assessment of all defendants "whose drug cases potentially may have been affected by the alleged conduct of Ms. Dookhan." R. 249.

Although the Commonwealth now has a list of 40,323 names of potentially affected individuals, CPSC has only appointed counsel to approximately one-fifth of all of the potentially affected defendants. R. 271, ¶ 12 (counsel has been appointed in 8,700 of the 40,323 affected cases). There is no justifiable excuse for the delay in notifying and providing relief for the remaining four-fifths of affected defendants. The remedy fashioned by this Court should require such prompt, individual notification for all potentially affected defendants, not just the one-fifth that has been fortunate enough to have already been appointed counsel.

A. Because the Commonwealth Was Aware of This Exculpatory Evidence at the Time of Each Trial or Plea, *Brady v. Maryland* Requires Prompt Disclosure to Each Defendant.

The central evil against which the rule of *Brady v. Maryland* is designed to protect is present in each of the tens of thousands of cases that Dookhan touched. In *every* case, the Commonwealth suppressed material evidence in its possession which was favorable, even exculpatory, to the defense. As the Court in *Brady* explained, its affirmative requirement of disclosure of exculpatory evidence is based on the

principle that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Brady*, 373 U.S. at 87. The Supreme Court in *Brady* went on to explain that failing to disclose exculpatory evidence in possession of the state "casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice." *Id.* at 87-88; *see also*, U.S. Dep't of Justice, Office of Inspector Gen., *An Assessment of the 1996 Dep't of Justice Task Force Review of the FBI Laboratory*, 83 (July 2014), http://www.justice.gov/oig/reports/2014/e1404.pdf (concluding, among other things, that in cases tainted by unreliable or overstated testimony of FBI laboratory analysts, Justice Department prosecutors should "[p]rovide *case-specific* notice to currently and previously incarcerated defendants whose cases were reviewed by the Task Force" unless the issue has been previously litigated or deemed immaterial).

It is hard to imagine a set of circumstances that more directly illustrates the notion of state actors designing and building criminal proceedings in a manner inconsistent with standards of justice than the

set present here: Dookhan pre-determined that individuals charged with controlled substance offenses were guilty, completely abdicated her responsibility to reliably and objectively test the controlled substances, then ensured the convictions of these individuals by falsifying evidence. And the Commonwealth's own description of Dookhan's conduct highlights this very point: "[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." R. 702. Meanwhile, the Commonwealth failed to disclose this information to Petitioners prior to their convictions *and the Commonwealth and its lawyers seemingly still have not notified individual Petitioners* of this information today.

The Commonwealth was both the "architect" and the builder responsible for the flaws that cracked the foundation of its cases against Petitioners and that have shaken the foundation of the criminal justice system in Massachusetts. *See, e.g., Commonwealth v. Charles*, 466 Mass. 63, 65, 992 N.E.2d 999, 1003-04 (2013) ("In October, 2012, the Chief Justice of the

Superior Court assigned specific judges in seven counties to preside over special 'drug lab sessions' . . . . From October 15 to November 28, the judges presiding over the drug lab sessions held 589 hearings, placing an enormous burden on the Superior Court."). And while this Court is empowered to design the solution for this problem, *Brady* requires that the Commonwealth and its lawyers – not the defendants or their lawyers - implement any such solution.

1. That a *Brady* violation occurred in each Dookhan defendant's case is clear.

To establish a *Brady* violation, a defendant must show that the prosecutors failed to disclose material evidence in their possession that was favorable to the defendants. *See, e.g., Drumgold v. Callahan*, 707 F.3d 28, 38 (1st Cir. 2013). All of the Dookhan-tainted convictions meet the following three requirements. First, there is no question that Dookhan's misconduct was not disclosed to the defendants on whose cases she worked; that has never been contested. Second, although the prosecutor may not have known about Dookhan's misconduct, Dookhan was part of the state law enforcement team and therefore her knowledge of her own misconduct is imputed onto the prosecutor for

purposes of *Brady*. *Id.* (citing *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995)) As the court in *Drumgold* explained, "[a]lthough the responsibility for obtaining and disclosing . . . evidence remains the duty of the prosecutor, law enforcement officers have a correlative duty to turn over to the prosecutor any material evidence that is favorable to a defendant." *Id.* (internal quotations and citations omitted). This also extends to other public officials, including state crime lab technicians. *See Brown v. Miller*, 519 F.3d 231, 237-38 (5th Cir. 2008) (holding that a state crime lab technician's misconduct amounted to a *Brady* violation); *see also Commonwealth v. Scott*, 467 Mass. 336, 350, 5 N.E.3d 530, 543 (2014) (specifically imputing Dookhan's misconduct to the government in cases, like Petitioners', in which she was involved as a lab analyst).

Third, evidence of Dookhan's fraud was certainly material. As the First Circuit has explained, "[e]vidence is material if there is a 'reasonable probability' that, had it been disclosed, the result of the proceeding would have been different." *Drumgold*, 707 F.3d at 38-39 (citation omitted). This analysis does not ask "whether the defendant would

more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* at 39. Having clarified this distinction, the First Circuit concluded that "a reasonable probability exists when the withholding of evidence undermines confidence in the outcome of the trial." *Id.*

This Court has articulated the general standard in slightly different terms, grouping potential *Brady* violations into three categories depending on the factual scenario: (1) false testimony known to the prosecutor[2]; (2) failure to disclose information in light of a specific request for the information; and (3) failure to disclose information in light of no request or a general "Brady request." *Commonwealth v. Collins*, 386 Mass. 1, 9, 434 N.E.2d 964, 969 (1982).

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[2] As noted previously in this brief, and as the Commonwealth has never challenged, the U.S. Supreme Court's holding in *Kyles* makes clear that knowledge of misconduct, including knowledge held by Dookhan in these cases, is imputed to the prosecutor. *Kyles*, 514 U.S. at 437-38; *see also Commonwealth v. Beal*, 429 Mass. 530, 531-32, 709 N.E.2d 413, 415-16 (1999) (applying *Kyles*, collecting cases of this Court, and confirming that prosecutors' disclosure obligations "extend to information in possession of a person who has participated in the investigation or evaluation of the case and has reported to the prosecutor's office") (internal quotations and citations omitted).

For the second scenario, the Court will find that a *Brady* violation has occurred unless "the error did not influence the jury, or had but very slight effect"; for the third scenario, the Court will find that a *Brady* violation occurred "if the omitted evidence creates a reasonable doubt that did not otherwise exist." *Id.* at 9-10 (internal quotations and citations omitted). Under any of the above formulations, Dookhan's active malfeasance and repeated disregard for the truth is material.

The potentially exculpatory evidence in the cases at hand ranges from direct evidence of Dookhan falsifying test results, tampering with evidence, and forging the signatures of her colleagues (for the cases where such conduct can be proven), to the fact that Dookhan had committed such egregious acts previously as a means to impeach her credibility as a witness (for the cases where specific conduct cannot be proven). Whether directly exculpatory itself, or whether favorable to the defense for its impeachment value, such evidence is material in every one of the Dookhan defendants' cases. Of course, in a case where the substances in question would have tested negative but for the results invented by Dookhan, those results

are directly exculpatory and their suppression violated (and continues to violate) *Brady*. *E.g.*, *Whitlock v. Brueggemann*, 682 F.3d 567, 587 (7th Cir. 2012) (reaffirming its holding from *Steidl v. Fermon*, 494 F.3d 623, 625 (7th Cir. 2007), that "the *Brady* line of cases has clearly established a defendant's right to be informed about exculpatory evidence throughout the proceedings, including appeals and authorized post-conviction procedures, when that exculpatory evidence was known to the state at the time of the original trial"). Also, suppression of impeachment evidence constitutes a *Brady* violation "where the evidence is highly impeaching *or* when the witness' testimony is uncorroborated and essential to the conviction." *Conley v. United States*, 415 F.3d 183, 189 (1st Cir. 2005) (internal quotations and citation omitted); *Collins*, 386 Mass. at 8, 434 N.E.2d at 969 ("Evidence tending to impeach the credibility of a key prosecution witness is clearly exculpatory."); *see also Giglio v. United States*, 405 U.S. 150 (1972).

In all of these cases, Dookhan provided the essential evidence regarding the nature and weight of the alleged controlled substance—two critical elements

of controlled substance offenses. Her willingness to lie on behalf of the Commonwealth and the nonchalant manner in which she treated her oath in the past, certainly undermine the sanctity of any verdict or plea which rested on her lab work.

2. Prior decisions of both the U.S. Supreme Court and this Court support the conclusion that *Brady* requires disclosure for defendants whose trials included Dookhan-tainted evidence.

The government's *Brady* obligations - obligations to notify defendants in each case of Dookhan's criminal conduct - do not vanish simply because a defendant has been convicted or sentenced. *See, e.g., Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) ("[T]he duty to disclose [exculpatory information] is ongoing[.]"); *Monroe v. Blackburn*, 476 U.S. 1145, 1148 (1986) (Marshall, J. dissenting from denial of certiorari) (explaining that the Constitution requires *Brady* obligations to survive conviction because the justice system's "quest for truth may not terminate with a defendant's conviction"); *see also Smith v. Roberts*, 115 F.3d 818, 820 (10th Cir. 1997) ("the duty to disclose is ongoing and extends to all stages of

the judicial process"); *Whitlock*, 682 F.3d at 587-88.[3] Rather, "*Brady* continues to apply to an assertion that one did not receive a fair trial because of the concealment of exculpatory evidence known and in existence at the time of that trial." *Id.* at 588. Like the plaintiffs in *Whitlock*, who accused police of withholding exculpatory evidence through trial and post-conviction proceedings, the Petitioners here allege that the Commonwealth possessed and suppressed exculpatory evidence throughout the course of their trial, and that such conduct negated the presumption that they were "proved guilty after a fair trial." *Id.* at 587-88 (internal quotations and citation omitted); *cf. also Scott*, 467 Mass. at 352, 5 N.E.3d at 544 (categorizing Dookhan's misconduct as "a lapse of systemic magnitude in the criminal justice system," thus necessarily concluding that convictions tainted

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[3] This principle remains unchanged even after the Supreme Court's ruling in *District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. 52 (2009), that a prosecutor had no obligation to turn over DNA samples in the post-conviction process which might produce exculpatory evidence. As the Seventh Circuit explained in *Whitlock*, *Osborne* only addressed the issue of exculpatory evidence that is discovered, or created, after the defendant had been "proved guilty after a fair trial." *Whitlock*, 682 F.3d at 587-88 (internal quotations and citation omitted).

by her participation were not the products of fair trials).

3. Prior decisions of both the U.S. Supreme Court and this Court support the conclusion that *Brady* requires disclosure for defendants in Dookhan-tainted cases who pled guilty.

The same due process analysis that applies to trials infected by Dookhan's participation applies equally to Dookhan defendants who entered pleas of guilty in cases in which Dookhan participated. Within the specific context of guilty pleas entered by defendants whose cases were tainted by Dookhan's misconduct, this Court, applying the rationale of the First Circuit in *Ferrara v. United States*, 456 F.3d 278 (1st Cir. 2006), has previously explained that where defendants seek to vacate their guilty pleas because of government misconduct "rather than [because of] a defect in the plea procedures, the defendant must show both that egregiously impermissible conduct . . . by government agents . . . antedated the entry of his plea and that the misconduct influenced his decision to plead guilty or, put another way, that it was material to that choice." *Scott*, 467 Mass. at 346, 5 N.E.3d at 541 (internal quotations omitted) (citing *Ferrara*, 456 F.3d at 290). Beyond simply

articulating the legal standard applicable here, this Court in *Scott* concluded "that Dookhan's misconduct is the sort of egregious misconduct that could render a defendant's guilty plea involuntary" and it "further conclude[d] that Dookhan's actions may be attributed to the government for the purposes of the *Ferrara* analysis." *Scott*, 467 Mass. at 354, 5 N.E.3d at 546 (ultimately adopting a "special evidentiary rule" (*id.* at 353, 5 N.E.3d at 546) that a defendant who proffers a drug certificate signed by Dookhan "is entitled to a conclusive presumption that egregious government misconduct occurred in the defendant's case" (*id.* at 352, 5 N.E.3d at 545)).

Footnote five of *Scott* is not to the contrary. That note explained this Court's view that the question of whether a later-discovered *Brady* violation establishes an *independent* and adequate ground to withdraw a plea remains open.[4] Rather than deciding

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[4] To the extent this Court believes it must answer here the question left open in *Scott*, 'whether a defendant may assert a violation of his right to prosecutorial disclosure of exculpatory evidence as a ground to withdraw a guilty plea,' on the extraordinary facts of this case, *amici* respectfully urge the Court to answer that question in the affirmative, holding that Dookhan defendants may assert a *Brady* violation as an independent, adequate ground to withdraw their pleas.

this question directly, that note instead confirmed that a *Brady* violation can support a showing, applying existing standards, that a plea was involuntary. *Scott*, 467 Mass. at 346 n.5, 5 N.E.3d at 541. As discussed elsewhere in this brief, though, both *Scott* and prior decisions of this Court and the U.S. Supreme Court support the conclusion that *Brady* requires prompt, individualized *disclosure* of the misconduct at issue. Indeed, a requirement of such disclosure is inherent in *Scott's* explanation that a *Brady* violation forms part of the voluntariness calculus. Unless such violations are disclosed to the defendant by the prosecution, they would rarely, if ever, be presented to a court as part of the calculus *Scott* requires.

This Court's holding in *Scott*, and the application of that holding urged here, are entirely consistent with recent holdings of the U.S. Supreme Court, which have both recognized the overwhelming presence of plea bargaining in modern American criminal justice and, with that in mind, have protected the fundamental rights of defendants throughout plea negotiations. *See Padilla v. Kentucky*, 559 U.S. 356 (2010) (allowing defendants to withdraw pleas when their counsel failed to inform

them of collateral consequences stemming from their convictions; *Lafler v. Cooper*, 132 S. Ct. 1376 (2012) (requiring the state to offer the petitioner the plea deal that he would have taken but for his attorney's ineffective assistance); *Missouri v. Frye*, 132 S. Ct. 1399 (2012) (same). These cases highlight the fact that defendants retain their fundamental rights at the plea negotiation stage of their case.

Plea bargaining is an essential part of any criminal proceeding. *Lafler*, 132 S. Ct. at 1388. Indeed, explaining why a defendant's constitutional rights must apply during plea bargaining as well as during trial, Justice Kennedy in *Lafler* highlighted that "criminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." *Id.* For the same reasons noted by the Supreme Court in *Padilla*, *Lafler*, and *Frye*, that a criminal defendant has the right to effective assistance of counsel to make an informed choice as to whether to accept a plea offer, it follows that a defendant also has the right to make that decision having been apprised of that information which the state is

constitutionally required to disclose. *See also Brady v. United States*, 397 U.S. 742 (1970) (holding that a plea must be voluntary and knowing); *Scott*, 467 Mass. at 345-46, 5 N.E.3d at 540-41 (explaining that due process requirement of a voluntary plea includes, in certain circumstances, consideration of "external circumstances or information that later comes to light") (citation omitted); *cf.* Univ. of Mich. L. Sch., *Nat'l Registry of Exonerations*, http://www.law.umich.edu/special/exoneration/Pages/browse.aspx (last visited Dec. 18, 2014) (collecting "detailed information about every known exoneration in the United States since 1989," including details on 164 cases in which defendants pled guilty and were later conclusively exonerated based on a combination of factors including perjury, official misconduct, and false or misleading forensic evidence).

In short, the Commonwealth had a constitutional responsibility at the time of each of the cases to disclose Dookhan's malfeasance and that duty continues even after the convictions were made final. Thus, the duty remains on the Commonwealth to promptly notify each of the tens of thousands of Dookhan defendants

that their convictions are tainted by government wrongdoing.

B. All Prosecutors of Dookhan Cases Have an Ethical Obligation to Promptly Disclose This Exculpatory Evidence Pursuant to Massachusetts Rule of Professional Conduct 3.8(d).

In addition to the constitutional requirements discussed above, each prosecutor of a Dookhan case has an ethical obligation to notify each defendant of the presence of the exculpatory evidence in their case.[5] *See, e.g., Cone v. Bell*, 556 U.S. 449, 470 n.15 (2009) (distinguishing standards under which a court must evaluate *Brady* claims from the "obligation to disclose evidence favorable to the defense [that] may arise *more broadly* under a prosecutor's ethical or statutory obligations") (emphasis added) (citing Standard 3-3.11(a) of the Prosecution Function Standards and Rule 3.8(d) of the ABA Model Rules). Rule 3.8 provides:

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[5] Rule 3.8 imposes this duty on the individual prosecutors of each case, while that Rule in conjunction with Massachusetts Rule of Professional Conduct 5.1 imposes those duties on the former and present supervisors of those prosecuting offices as well. *E.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454 (2009), at 8 (explaining, among other things, that supervising lawyers in prosecutors office "are subject to discipline for ordering, ratifying or *knowingly failing to correct discovery violations*") (emphasis added).

> The prosecutor in a criminal case shall: (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense.

The Massachusetts rule is patterned after the corresponding ABA Model Rule, which "reflects the legal community's long-standing consensus, first expressed in the ABA's 1908 Canons of Professional Ethics . . . that it would be 'highly reprehensible' to allow prosecutors to withhold evidence that might establish a defendant's innocence." Brief of the American Bar Association as *Amicus Curiae* in Support of Petitioner at 7, *Smith v. Cain*, 132 S. Ct. 627 (2012) (No. 10-8145) ("ABA *Smith* Br.").

As suggested by the Court in *Cone*, and confirmed by the ABA's *amicus* brief in *Smith*, Rule 3.8(d) imposes a broader responsibility to disclose information than the obligation imposed by *Brady*. This broader responsibility stems from the longstanding principle that prosecutors have "special obligations as representatives 'not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all.'" ABA Formal Op. 09-

454 at 3 (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)).[6] ABA Formal Opinion 09-454 also relies (at 3) on the commentary to Rule 3.8 that "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice . . . and that special precautions are taken to prevent and to *rectify* the conviction of innocent persons." ABA Model R. 3.8(d) cmt. 1 (emphasis added). Relying on these tenets, the ABA has consistently explained that prosecutors have an ethical duty that goes beyond the Constitutional confines of *Brady* to ensure that convictions are just and that the rights of defendants are procedurally safeguarded. *See, e.g.*, ABA *Smith* Br. at 13 (explaining that disclosure obligation imposed by ethical rule "goes beyond the corollary duty imposed upon prosecutors by constitutional law") (internal quotations and citation omitted).

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[6] Although Opinion 09-454 addressed Rule 3.8(d) in a different context, considering whether the materiality requirement of *Brady* also applied to Rule 3.8(d), the opinion's analysis of the Rule's background and history equally supports the Rule's application to compel, under the unique circumstances of this case, the individualized disclosure sought by Petitioners and supported by *amici*.

Thus, the plain language of the Massachusetts Rule and the ABA Model Rule, as well as the commentary for, and history of, those rules, places an ethical obligation on each prosecutor, or his or her office's supervisory lawyers, to timely notify any affected defendant of Dookhan's conduct, regardless of when the information came to light.[7]

CONCLUSION

The harm caused by Dookhan's corruption is unprecedented, and hopefully something this Court and this Commonwealth will never face again. But this Court is currently tasked with addressing how to remedy the harm she has caused for tens of thousands of individuals. The Constitution and the Rules of Professional Responsibility make clear that the onus to meaningfully notify each individual defendant of their tainted conviction falls on the Commonwealth and its able lawyers.

As described above, and as Petitioners' Opening Brief demonstrated in further detail, the law is

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[7] The systematic remedy urged here would presumably guide prosecutors in discharging their ethical responsibilities under these singular circumstances, but until one is fashioned, each prosecutor is bound by the duties set forth in Rule 3.8(d) and risks violating this ethical obligation by delaying notification any further.

equally clear that all of these individuals have had their due process rights violated by Dookhan's conduct. Thus, the second step should be to vacate all of the convictions tainted by Dookhan's conduct.

Of course, this Court's remedy must not only recognize and vindicate the rights of affected defendants, but it also must recognize and vindicate the Commonwealth's right to protect the public. The systemic solution proposed by Petitioners and which *amici* here support, does that. By setting forth a timeline by which the Commonwealth has to act and giving the political branches of government for the Commonwealth the responsibility of determining how they will meet those guidelines, defendants' rights are protected but the Commonwealth retains its right to guard its interests in a constitutional manner.

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Respectfully submitted,

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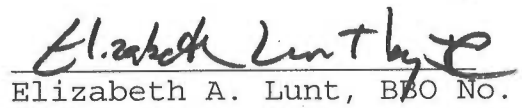
By its attorney,



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Dated: December 18, 2014

MASS. R. APP. P. 16(K)

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

Jean-Jacques Cabou

AFFIDAVIT OF SERVICE

I, Jean-Jacques Cabou, counsel for National Association of Criminal Lawyers, does hereby certify under the penalties of perjury that on this 18th day of December, 2014, I caused a true copy of the foregoing document to be served by first class mail and electronic mail on the following counsel for the other parties:

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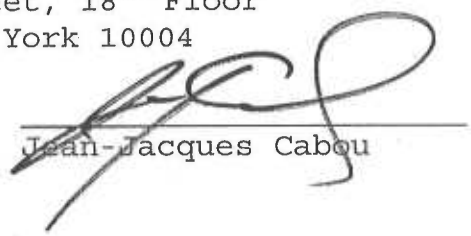

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