

EXHIBIT 1



October 11, 2012

Via Email and First-Class Mail

The Honorable Martha Coakley
Attorney General of Massachusetts
One Ashburton Place, 20th floor
Boston, MA 02108

County District Attorneys
(See below for full list)

Re: The Hinton State Lab Scandal

Dear Attorney General Coakley and County District Attorneys:

The American Civil Liberties Union of Massachusetts (ACLUM) and Families Against Mandatory Minimums (FAMM) write concerning the crisis arising from misconduct at the Hinton State Laboratory. The Commonwealth's current plan for addressing the crisis—adjudicating countless cases one by one—threatens instead to worsen it. We urge you to chart a better course, one that will restore the Commonwealth's damaged reputation.

The scandal will trigger an explosion of litigation. Chemist Annie Dookhan, who is accused of falsifying tests of drug samples, is now associated with 34,000 cases. But Dookhan also allegedly forged signatures and had not-by-the-rulebook communications with prosecutors and police officers. So it is unclear how far this scandal will reach.

It is clear, however, that tens of thousands of defendants could seek to vacate their convictions. Special courts have been constituted, and prosecutors estimate that a case-by-case approach will cost them \$50 million. Defense and court costs figure to equal at least that much.

That expenditure of time and money would be a waste of both. Abundant evidence shows that drug prosecutions fail to reduce overall drug use even in cases that do *not* involve tainted evidence. Accordingly, it makes no sense to re-prosecute tens of thousands of cases that *do* involve tainted evidence.

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The spectacular failure of the Hinton lab is thus a reason to dismiss cases, rather than to spend \$100 million relitigating them. To that end, we propose that District Attorneys, in cooperation with the Attorney General, as the Commonwealth's chief law enforcement officer, jointly agree to dismiss *all* cases in any one of the following categories:

- cases that do not charge violent crime or weapons offenses;
- cases involving a police officer or prosecutor who, at any time, communicated directly with Annie Dookhan; or
- cases in which the defendant has served at least half of his or her sentence.

Endorsing this broad-based approach would enable prosecutors to repair the integrity of the Commonwealth's justice system, save taxpayer dollars, and assure a consistent statewide approach to these cases. It would also provide at least some justice to this scandal's victims. Dookhan's word has convicted literally thousands of people, who in turn have suffered unjust imprisonment and severe collateral consequences. They have lost jobs. They have been deported. They have lost custody of children.

In light of this scandal, it is time for the Commonwealth's leaders to demonstrate their commitment to justice and sound policy. It is not time for an expensive, misguided, and ill-fated do-over.

Discussion

The discussion below describes (1) the costs of the current plan, (2) the relatively low value of re-prosecuting drug cases, and (3) an alternative approach.

I. The Current Plan

We understand that the current plan is to litigate tainted drug cases one at a time, as if the Commonwealth had just indicted 34,000 drug cases. The costs and management problems of such an undertaking will be staggering.

The first step will be hearings, starting on October 15, to address the “immediate liberty interests” of roughly 1,140 people who are still “serving time in connection with a drug conviction stemming from a questionable drug analysis.”¹

But that is just the tip of the iceberg. Cases will next head toward full re-adjudication. Given that each of those cases lacks a trustworthy drug certification, full adjudication will be exceedingly complex, and perhaps impossible.

Defendants will first need full discovery on misconduct at the Hinton lab, including all of Dookhan’s communications with prosecutors and police officers. Defendants will then file motions to set aside convictions and suppress evidence. Each one could require briefing, hearings, witness testimony, and court rulings.

Although the 1,140 cases involving incarcerated people will understandably go first, they represent only a fraction of the total caseload. Tens of thousands of other defendants may also file motions seeking to vacate their tainted convictions.

As evidenced by the recent \$50 million estimate of prosecution costs,² the litigation will last years and explode budgets. Defense costs might be even higher than prosecution costs because, unlike prosecutors, defense attorneys represent different individual clients and cannot ask the police to do their investigations. Court costs, too, will be high.

Because the work is already underway, taxpayers will get the bill only *after* a lot of their money has been spent. Worse yet, the scandal might widen while the case-by-case approach is ongoing. For example, given that Dookhan allegedly forged signatures, she may have tainted more cases than those bearing her name.

The scandal could also generate more tainted cases by reaching additional people. For years, lab employees noticed that Dookhan “tested” more samples than seemed humanly possible. But when a supervisor learned of this problem, she merely gave Dookhan a “special project.” Even in the fall of 2011, after Dookhan was finally

¹ Supreme Judicial Court, Public Information Office, *Trial Court Designates Judges to Manage Drug Lab Cases* (Oct. 2, 2012), at <http://www.mass.gov/courts/press/pr100212.html>.

² John Ellement, *DAs say resolving tainted cases will cost \$10 million a year*, Boston Globe, Oct. 5, 2012, at http://articles.boston.com/2012-10-05/metro/34259888_1_criminal-cases-drug-cases-district-court-cases.

banned from the lab, an employee found her at a lab computer with the door shut and the lights off.³

As Governor Patrick has noted, these facts raise the question: “Why would anyone do this?”⁴

Although the answer to that question is unknown, there are signs that Dookhan’s conduct benefited others. She reportedly became a “go-to person” for lab results; prosecutors and police officers allegedly called Dookhan directly about drug samples, even though the proper procedure was to call the lab’s evidence office. Possibly for that reason, Dookhan sought out samples from specific locations, such as Norfolk County.⁵

These facts should be thoroughly and independently investigated. For now, it suffices to say that current guesses about the scandal’s costs, though astronomical, are probably too low.

II. The Limited Value of Drug Prosecutions

If drug cases uniformly produced useful results, then the cost of re-prosecuting 34,000 of them might be worthwhile. But the so-called war on drugs produces little discernible benefit. So this latest drug war catastrophe isn’t a reason to relitigate tainted cases; it’s a reason to clear the criminal records of people wrongly convicted based on falsified or tainted evidence.

The drug war means imprisoning people even when treatment or other forms of diversion might more effectively target the demand for drugs and prevent recidivism. In the Commonwealth, the prison population more than tripled between 1980 and

³ For information on these facts, see Massachusetts State Police Detective Lieutenant Robert Irwin’s Reports on his interviews with Nicole Medina (Aug. 27, 2012), Peter Piro (Aug. 27, 2012), Charles Salemi (Aug. 22, 2012), and Elizabeth O’Brien (Aug. 7, 2012).

⁴ Greater Boston, *More Lies from State Lab’s Dookhan*, New England Cable News, Sept. 26, 2012, at <http://www.wgbh.org/programs/Greater-Boston-11/episodes/Sept-26-2012-More-Lies-from-State-Labs-Dookhan-41490> (2 minutes and 15 seconds into video).

⁵ For information on Dookhan’s relationships with police officers and prosecutors, see Massachusetts State Police Detective Lieutenant Robert Irwin’s Reports on his interviews with Daniella Frasca (Aug. 28, 2012), Nicole Medina (Aug. 27, 2012), Peter Piro (Aug. 27, 2012), Gloria Phillips (Aug. 22, 2012), Hevis Lleshi (Aug. 22, 2012), and Elizabeth O’Brien (Aug. 7, 2012).

2008, with drug arrests responsible for much of the spike.⁶ By 2007, the Commonwealth was spending about as much on corrections as it was on higher education.⁷ Yet in 2009, a state commission called addiction a “public health epidemic.”⁸ That same year, a Massachusetts Bar Association task force found that the Commonwealth had made “not a dent” in drug use.⁹

If the drug war cannot be won by prosecuting *typical* cases, it makes little sense to re-prosecute cases involving tainted evidence.

The impulse to re-prosecute those cases is understandable. Just because thousands of people were unjustly convicted does not mean they are all innocent. In fact, some people who now figure to be released may well commit drug offenses in the future.

But the evidence is clear: spending money on drug prosecutions reduces neither drug offenses nor drug abuse and addiction. Even assuming it makes sense to spend some of that money once, it makes no sense to spend it twice.

III. The Alternative to Case-By-Case Adjudication

Instead of litigating thousands of cases one at a time, prosecutors should work with defense attorneys, judges, and public officials to identify categories of defendants whose cases should be dropped entirely. That approach would deliver justice to the wrongly convicted and avoid needlessly spending taxpayer money.

A broad-based approach would also assure consistency. If each case is litigated one by one, defendants will inevitably be subject to different standards. The Attorney General and county District Attorneys, however, can assure both justice and consistency by agreeing on the groups of defendants who should receive relief.¹⁰

⁶ See Massachusetts Bar Association Drug Policy Task Force, *The Failure of the War on Drugs: Charting a New Course for the Commonwealth* (2009), at 15-16 (“MBA Task Force”).

⁷ Pew Center on the States, *One in 100: Behind Bars in America 2008* (2008), at Tables A-2 and A-3 (\$1.14 billion in corrections versus \$1.16 billion in higher education).

⁸ Massachusetts OxyContin and Heroin Commission, *Recommendations of the OxyContin and Heroin Commission* (2009), at 5.

⁹ MBA Task Force, *supra* n.6, at 14.

¹⁰ See *Town of Burlington v. District Attorney for the Northern District*, 381 Mass. 717, 720 (1980) (“The Attorney General, however, as ‘chief law officer of the Commonwealth’ . . . having wide access to the courts in criminal matters, may supersede a district attorney as prosecutor, whether in the Superior Court or District Court.”).

This letter proposes three groups. Although these proposals may seem to paint with a broad brush, that is the point.

First, prosecutors should agree to relief for all defendants in tainted drug cases who were not charged with violent crime or weapons offenses. They are the cases least likely to be worth litigating again because they are the cases least likely to have been worth litigating in the first place. This approach would track the Legislature's 2010 reforms, which allowed certain county prisoners serving mandatory minimum sentences for drug offenses to be eligible for parole if their offenses did not involve weapons or violence.¹¹ As Governor Patrick recently observed, "the warehousing of non-violent drug offenders has proven to be a costly failure."¹² The Commonwealth's response to this failure should not unduly repeat it.

Second, prosecutors should agree to relief in all cases involving a police officer or prosecutor who ever communicated with Annie Dookhan. Given the allegedly improper communications among Dookhan, prosecutors, and police officers, dropping those cases is necessary to ensure the integrity of the criminal justice system.

That approach would also be consistent with other responses to criminal justice scandals:

- In 2003, Texas Governor Rick Perry pardoned 35 of the 38 residents of the town of Tulia who were convicted on drug charges based on the testimony of a corrupt police officer. His pardons followed a unanimous recommendation by the Texas Board of Parole and Pardons. Although the convicted residents proclaimed their innocence, Perry focused on process: "Questions surrounding testimony from the key witness in these cases weighed heavily on my final decision. Texans demand a justice system that is tough but fair."¹³
- Similarly, following the police abuse and corruption crisis in Los Angeles in the late 1990s, "the Los Angeles County District Attorney decided that it

¹¹ See G.L. c. 94C, § 32(c).

¹² Statement from Governor Patrick on Crime Bill, July 31, 2012, available at <http://www.mass.gov/governor/pressoffice/pressreleases/>.

¹³ Office of the Governor press release, *Gov. Perry Grants Pardons to 35 Tulia Defendants*, at <http://governor.state.tx.us/news/press-release/4995/>.

would seek to set aside a person's conviction if it had lost faith in the conviction's integrity, regardless of the person's actual guilt or innocence."¹⁴

- Most recently, the San Francisco drug lab was closed down in 2010 due to a lab technician's theft of cocaine and possibly other drugs. The San Francisco County District Attorney dismissed at least 600 drug prosecutions, calling the lab's transgressions a "violation of the public trust."¹⁵

Here, the same commitment to the public trust means setting aside any conviction involving someone who is linked to Annie Dookhan.

Third, prosecutors should agree to post-conviction relief in all tainted cases involving defendants who have served at least half of their sentences. Dismissing these cases would acknowledge that each and every one of these defendants was convicted on possibly falsified or tainted evidence. It would also recognize the unfortunate reality that, simply by relitigating cases, prosecutors could run out the clock on tainted sentences.

Dismissing this third group of cases would also alleviate prison overcrowding. State prisons are operating, on average, at over 140 percent of capacity.¹⁶ Some county facilities are far worse, such as the Bristol County Jail and House of Correction, which is operating at an appalling 384 percent of capacity.¹⁷ One obvious way to ease that problem is to release people who have served substantial portions of tainted sentences. They should be permitted to clear their names and move on with their lives.

¹⁴ Blue Ribbon Rampart Review Panel, *Rampart Reconsidered: The Search for Real Reform Seven Years Later* (2006), at 71. The LAPD's Community Resources Against Street Hoodlums (or CRASH) anti-gang unit was found to have engaged in widespread planting of evidence, framing suspects and perjury, along with unprovoked beatings and shootings.

¹⁵ San Francisco News, *Crime Lab Scandal Prompts Call for Independent Testing*, Apr. 23, 2010, at http://abclocal.go.com/kgo/story?section=news/local/san_francisco&id=7403326.

¹⁶ Massachusetts Department of Correction, *Quarterly Report on the Status of Prison Overcrowding, Third Quarter 2011* (Oct. 2011), at 1-4.

¹⁷ Emily Sweeney, *Making Room for Inmates*, Boston Globe, May 17, 2012, at http://www.boston.com/news/local/massachusetts/articles/2012/05/17/south_of_boston_prisons_and_jails_are_operating_beyond_capacity/.

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Conclusion

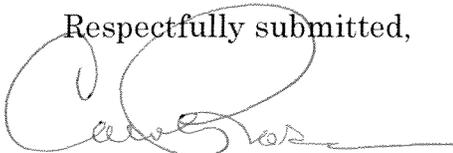
A broad-based approach will enable the Commonwealth's leaders to turn the lab scandal into an example of a criminal justice system at its best. The wrongfully convicted will receive justice, the taxpayers will receive sound policy, and the Commonwealth's reputation for fairness and integrity in criminal justice can be restored. In contrast, a case-by-case approach will deliver only costly and protracted litigation.

We know this first-hand. ACLUM Legal Director Matthew Segal argued *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011) (en banc), a decision holding, in effect, that thousands of defendants had been unjustly convicted of or sentenced for federal crimes in North Carolina. Prosecutors opted for an adversarial case-by-case response. Now, more than a year later, the ensuing litigation continues to bog down courts and delay justice.

That should not happen here. Instead, justice and common sense should prevail.

Thank you for your attention to this matter.

Respectfully submitted,



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To: The Honorable Jonathan W. Blodgett, District Attorney of Essex County
The Honorable David F. Capeless, District Attorney of Berkshire County
The Honorable Daniel F. Conley, District Attorney of Suffolk County
The Honorable Timothy J. Cruz, District Attorney of Plymouth County
The Honorable Joseph D. Early, Jr., District Attorney of Worcester County
The Honorable Gerard T. Leone, Jr., District Attorney of Middlesex County
The Honorable Mark Mastroianni, District Attorney of Hampden County
The Honorable Michael Morrissey, District Attorney of Norfolk County
The Honorable Michael O'Keefe, District Attorney of Barnstable County
The Honorable David Sullivan, District Attorney of the Northwestern
District
The Honorable C. Samuel Sutter, District Attorney of Bristol County

cc: The Honorable Deval L. Patrick, Governor of Massachusetts
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Anthony J. Benedetti, Chief Counsel, Committee for Public Counsel Services
Stephen M. Brewer, Chair, Senate Committee on Ways and Means
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