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LAW

Drug Lab Scandal: The Massive Failures Of Many Collided In A Perfect Storm

Former state lab chemist Annie Dookhan, center, stands in Middlesex Superior Court for arraignment on Wednesday, Jan. 9, 2013. Dookhan pleaded not guilty to three counts of obstruction of justice. She is charged in connection with altering drug evidence during the testing process and obstructing justice. Prosecutors allege Dookhan fabricated test results and tampered with drug evidence while testing substances in criminal cases. (Suzanne Kreiter/ AP, Pool)

The drug scandal at the Hinton State Laboratory — where analyst Annie Dookhan falsified drug results — is the perfect storm.

It explodes between deficient forensic science, on the one hand, and the failed drug war, on the other. And while the response of many has been commendable, it is not entirely clear that the true scope of the problem has been addressed.

The first “storm” is the failed drug war. The drug war began in earnest during the Nixon Administration, but peaked in the 1980s, when Congress and many states enacted laws with onerous and mandatory prison terms, from which a judge could not deviate. But that was only part of the problem. These laws made sentences almost entirely dependent on the nature and amount of the drugs with which the defendant was associated. To be sure, quantity always mattered; it was one piece of evidence bearing on whether you were a small or large scale dealer. Also relevant, however, was your lifestyle: whether you had any other income or means of support, whether you had a fleet of fancy cars or were living out of your car, whether you were being directed to distribute the drugs or directing the operation yourself.

But suddenly, in federal and some state criminal cases, quantity was the dispositive factor. One gram less than the cutoff and you were in one category, one gram more and you were in another. Quantity could get you federal sentences ranging from a mandatory minimum of five to 40 years, or 10 years to life.

This applied even to those who didn't have a criminal record. If the drug classification and quantity triggered the mandatory minimum, everyone involved in that crime,

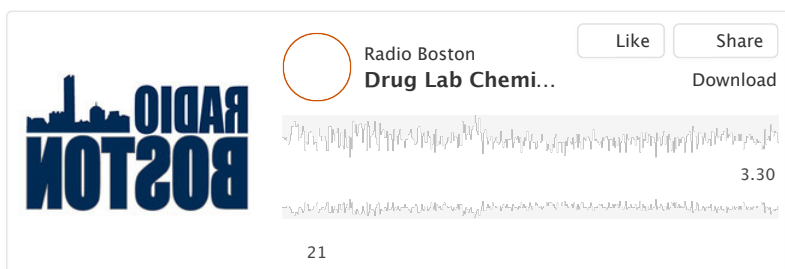
It is absurd to say, as some have, that this scandal makes no difference, since the defendants are all guilty. They are guilty so it doesn't matter that the evidence was falsified? They are guilty so it doesn't matter that a public employee lied under oath?

whatever their role — major dealer, middleman, peripheral or gofer — was subject to it. (But this is a topic for another day.)

Drug analysis became more important than ever before. The Supreme Court said as much in 2009 in *Melendez-Diaz v. Massachusetts*. In that case, Luis E. Melendez-Diaz was convicted of cocaine trafficking. Part of the evidence against him was a laboratory report stating that bags of white powder said to have belonged to him contained cocaine. The prosecutor submitted the report with only an analyst's certificate, which the Commonwealth of Massachusetts insisted was good enough. The Supreme Court disagreed, ruling that a lab technician is required to come forward and testify, to be subject to cross examination, to be sized up in person by a jury.

While the decision was based on the Constitution's Confrontation Clause (the right to confront the witnesses against you), it was welcomed by many criminal justice professionals for practical reasons. It came after of a wave of scandals involving tainted cases at crime laboratories in Michigan, Texas and West Virginia — scandals that seemed to underscore the need for live testimony to explore shortcomings and shortcuts of the analyst's reports.

Live testimony, cross examination, being held accountable by a jury, however, was still not enough in the case of Annie Dookhan, the laboratory technician charged with falsifying not just the nature of the drugs but the amount. The Melendez-Diaz ruling produced a backlog of cases, but that doesn't explain Dookhan's misconduct, which predated the decision. The National Institute of Justice (NIJ) allocated at least \$1.2 million to state police from 2009 to 2011 to address the impact of Melendez-Diaz. Indeed, spokeswoman for the NIJ confirmed that some of the funding was routed to the lab where Dookhan worked.



Which brings me to the second “storm,” which is the documented inadequacies of forensic science — including chemical analysis of drugs.

In 2009, the National Academy of Science (NAS) issued a sweeping critique of the nation's crime labs. Forensic scientists working for law enforcement agencies “sometimes face pressure to sacrifice appropriate methodology for the sake of expediency,” the blue ribbon panel suggested. While drug analysis had a strong scientific underpinning using methods from analytic chemistry, and while there was broad agreement about best practices, the report noted that there was no structure to insure that standards were followed in laboratories across the country.

Concerns about “observer bias,” the impact of a forensic scientist’s relationship to the prosecutors, also figured prominently in the Dookhan case. In my court, the prosecutors reported that they were in regular touch with the state crime lab (whose results were used in federal cases), to check on the progress of their samples. The NAS described the pressure as the “squeaky wheel gets the grease,” the persistent prosecutor who called the most, got his results expedited. The chemists, for their part, understood precisely which side they were on. In the Hinton laboratory case, emails obtained by the Boston Globe described Dookhan’s close relationship with prosecutors, including one to whom she poured her heart out about her desire to put suspects behind bars.

In that context, the idea that the Dookhan situation could have been prevented by moving the drug lab from the Department of Public Health to the State Police makes absolutely no sense. Just the opposite: The NAS report makes clear that it was essential to remove the forensic laboratories from the administrative control of law enforcement agencies.

The situation could not be more serious. It is absurd to say, as some have, that this scandal makes no difference, since the defendants are all guilty.

This is a scandal that directly undermines the “justice” part of the criminal justice system.

They are guilty so it doesn’t matter that the evidence was falsified? They are guilty so it doesn’t matter that the sentences they received were disproportionate because of the quantity of drugs found? They are guilty so it doesn’t matter that a public employee lied under oath?

And what does “being guilty” mean, anyway? The critical question, after all, is “of what”? How many defendants pleaded guilty to a more serious offense because the drug laboratory results about quantity or drug type seemed incontrovertible? How many had their sentences increased because of prior convictions that had been based on phony results under Dookhan’s watch? How many lawyers advised their clients that there was no defense in the light of the analyst’s report? In a system in which 97 percent of defendants plead guilty, how many plea bargains were fundamentally distorted because the defendant felt he or she had no meaningful alternative, unwilling to risk onerous mandatory minimum sentences if convicted? This is a scandal that directly undermines the “justice” part of the criminal justice system.

What is to be done? The courts, the prosecutors, the defenders are appropriately looking at every individual case to see if Dookhan’s tainted evidence was involved. But I wonder if there is a more direct approach.

Take California for example. In response to prison overcrowding (which is a violation of the Constitution), state law enforcement officials began releasing non-violent drug offenders. Does it say something that California officials looked to that population first? Perhaps this crisis can force us to take a closer look at who we are prosecuting, why, and at

what cost? Perhaps drug sentences not accompanied by gun possession charges or a record of violence should be reconsidered, even dismissed outright given this scandal?

Many are lamenting that defendants who have been released as a result of the Dookhan case lack proper supervision and are thus reoffending. The comment is interesting. It presumes that imprisonment has and will produce a better outcome. These defendants may well reoffend regardless, because the system is so flawed.

If we reallocated resources from the failed drug war and invested instead in things that actually work — preventive programs to keep people out of the drug trade, well-regulated laboratories for those who are prosecuted, or on meaningful post-prison supervision — perhaps we could make a difference.

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