COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 2007-770

COMMONWEALTH of MASSACHUSETTS.,	)
v.	)
ERICK COTTO, JR., and related cases.[1]	)

MEMORANDUM OF
THE INNOCENCE PROJECT, INC.,
THE NEW ENGLAND INNOCENCE PROJECT,
THE AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS,
AND PROFESSORS DANIEL MEDWED AND ELLEN YAROSHEFSKY
AS *AMICI CURIAE*

[1] *Commonwealth v. Aponte*, 1279CR00226; *Commonwealth v. Brown*, 0579CR01159; *Commonwealth v. Harris*, 1079CR01233; *Commonwealth v. Liquori*, 1279CR00624; *Commonwealth v. Penate*, 1279CR00083; *Commonwealth v. Richardson*, 1279CR0399; *Commonwealth v. Ware*, 0779CR01072, 0979CR01072 & 1079CR00253; *Commonwealth v. Watt*, 0979CR01068 & 0979CR01069; and *Commonwealth v. Vega*, 0979CR00097.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The "Farak" cases raise critical questions of public trust, legal ethics, and government accountability. As the Annie Dookhan scandal demonstrated, fairly addressing harm caused by a state scientist whose misconduct may have tainted thousands of cases, can be complex but must be done. *See Bridgeman v. Dist. Attorney for the Suffolk Dist.*, 476 Mass. 298 (2017) ("*Bridgeman II*") (calling for district attorneys to identify, by April 18, 2017, "large numbers" of potentially affected cases for dismissal or new trials). Here, the harm to the defendants caused by the chemist has been compounded by the serious misconduct of prosecutors, who were obliged to assess and disclose the scope of the chemist's wrongdoing, and failed to do so. A meaningful and prompt judicial remedy is imperative because, as the evidence makes clear, the Commonwealth's attorneys, either intentionally or recklessly, failed to carry out their professional responsibilities, and the defendants have been irreparably harmed.

More than four years have passed since state chemist Sonja Farak was arrested for tampering with drug samples, and she has been convicted and served her time. Yet remarkably little is known about how many people may have been convicted of and sentenced for drug crimes due to her misconduct, untold numbers of whom may still be incarcerated or suffering the considerable collateral consequences of their convictions. After repeatedly (and falsely) telling courts that Farak's misconduct predated her arrest by only a few months, the Commonwealth has now conceded that it had actually gone on for *eight years*. By one estimate, drug certificates signed by Farak have helped secure over 8,000 convictions; an estimate was necessary because there is no "Farak list" of impacted defendants to whom prosecutors have provided notice.[2]

[2] *See* Affidavit of Christopher K. Post 1-2, 7-8, *Bridgeman v. Dist. Attorney*, No. SJ-2014-005 (Mass. June 29, 2016) (estimating that there are 8,411 adverse drug dispositions for which Farak was the chemist, and that there were 18,303 adverse drug dispositions involving the Amherst Lab during Farak's tenure), https://aclum.org/wp-content/uploads/2015/06/2016_06_29-CPCS-affidavits.pdf, pg. 136.

The infancy of these remedial efforts is not the fault of the impacted defendants (the "Farak Defendants"). Though scarcely mentioned in the memorandum by the Attorney General's Office ("AGO Memo in Opp."), there is no dispute that in 2013, the AGO made claims to the Superior Court about the extent of its disclosures and the scope of Farak's misconduct, and that those claims turned out to be untrue. There is also no dispute that, within weeks of Farak's arrest, the AGO was given "mental health Worksheets" dating to December 2011 in which Farak had contemporaneously recorded her own misconduct. True, former AGO attorneys have testified that they did not appreciate that the Worksheets were from 2011. But even if that testimony is credited, the AGO certainly did appreciate that the documents were *significant*. Before the AGO's statements to the Superior Court, these documents were emailed to AGO officials under the not-subtle header "FARAK admissions," they were directly referenced in the AGO's prosecution memo, and they were raised in internal emails undertaken for the very purpose of determining what exculpatory information had yet to be disclosed. Yet, in response to Judge Jeffrey Kinder's instruction to produce all documents for his review, the Worksheets were neither produced nor mentioned.

The truth finally came to light only because of the tireless efforts of defense lawyers who were duly suspicious of the AGO's claims. As the Court knows, the Worksheets discovered by one of these attorneys revealed that Farak used drugs at work on the *very day* she signed his client's drug certificate. As discussed below, the record also demonstrates:

- The AGO's lead prosecutor in the Farak case, Anne Kaczmarek, was alerted by police within weeks of Farak's 2013 arrest to not one but two other narcotics cases that may have involved tampering by Farak—one of them dating back to 2005. Kaczmarek's response was not to investigate the new allegations. Rather, she expressed fear that the Farak scandal would broaden beyond her "working theory" that Farak's misconduct was limited to merely a few months. Kaczmarek would later admit that she dreaded a potential "avalanche" of Farak misconduct claims.

- Neither Kaczmarek nor anyone appearing for the Commonwealth at hearings on motions to quash made any effort to compare the mental health Worksheets provided to Kaczmarek as "FARAK admissions" against a calendar. Had they done so, they would have immediately seen that Farak's drug use occurred more than a year before her arrest, and during the period when Farak tested drugs allegedly seized from defendants whose cases were in active litigation.

- After being repeatedly chastised by Judge Jeffrey Kinder for asserting potential privileges against disclosure of a Farak file that she had not reviewed, Assistant Attorney General Kris Foster admitted that she defied the Court's directive to conduct that review and amend her response. Instead, Foster deliberately worded a letter to the Court in a manner that concealed the fact that she still had not read a single document.

- Without reviewing a single pertinent document, Foster inaccurately told the Court in October 2013 that "every document" gathered by Sergeant Joseph Ballou "had been disclosed" as of September 2013. She also dismissed a defense request for discovery on that issue as nothing more than a "fishing expedition."

- AGO officials have given contradictory accounts of how Foster came to make these egregious misstatements. For her part, Foster testified that her "superiors" directed her *not* to review the Farak investigative file and instructed her to simply inform the Court that all of Sgt. Ballou's documents had already been "turned over." For their part, other current and former AGO attorneys were just as adamant that they never gave Foster any such directive. To the contrary, one of them testified that she specifically instructed Foster to review the file before preparing her response, and that Foster informed her she had done so.

- AGO supervisors testified that they were "shocked," "upset," and "angry" to learn of these egregious errors in November 2014. Basic rules of candor required the AGO to *tell courts* about its realization so that Foster's material false statements would do no further damage. But that is not what happened. No one from the AGO or the DA alerted the Superior Court or the Supreme Judicial Court, and the SJC decided two Farak cases in April 2015 without hearing from the Commonwealth that the record on which it relied was infected with the AGO's false statements.

The AGO's February 2017 memorandum claims that these facts are nothing but a series of "unintentional mistakes." This claim understates the severity of the AGO's conduct and incorrectly characterizes the applicable ethics rules. The AGO proceeds as though the only ethics issue here is the duty to disclose exculpatory evidence. It argues erroneously that the conclusions Kaczmarek and Ballou reached after their cursory investigation of Farak was

entirely "reasonable." Even more remarkably, the AGO newly contends that its attorneys were *under no obligation whatsoever* to disclose information about Farak's drug use while working as a state drug lab chemist—no matter how exculpatory—to any defendant other than Farak herself. These arguments are supported neither by the record, the law, nor the ethics rules governing a prosecutor's duty to disclose evidence. But even if the AGO could withstand claims about disclosure, its memorandum still fails to address *numerous other ethical duties*—including but not limited to the duties to (1) demonstrate candor to the court; (2) correct false statements; and (3) conduct a reasonable investigation. As demonstrated below, all of these duties were violated.

These cases cry out for a decisive judicial remedy. Particularly given the SJC's guidance in *Bridgeman II*, this Court should reject the AGO's claim that a fair and meaningful response to the Farak scandal can now be achieved through belated litigation of potentially thousands of claims, the vast majority of which will have been delayed by the AGO's failure to do its job. Certainly, that remedy is inadequate for the individual defendants before this Court, whose diligent pursuit of a fair hearing was thwarted for years by the AGO's misconduct.

It may never be known just how many years of incarceration were collectively served by wrongly convicted Farak Defendants while her misconduct, and then the AGO's misconduct, went undetected. But it is clear that if such serious prosecutorial mishandling of a major scandal is not met with appropriate consequences, the public cannot have confidence that, in future scandals, Commonwealth attorneys will act with the requisite degree of care and candor.

INTERESTS OF THE AMICI

The amici are nonprofit organizations and scholars who work on issues involving innocence, wrongful convictions, forensic science, and prosecutorial misconduct. Their interests are set forth more fully in their motion for leave to file this memorandum.

STATEMENT OF FACTS

The following summary is drawn from exhibits admitted into evidence by this Court and the testimony of current and former AGO employees. This testimony is contradictory and incomplete. In this proceeding, AGO officials provided irreconcilable accounts of how certain key misrepresentations came to be made, while also disclaiming any memory of key details of internal discussions concerning exculpatory evidence.

But certain crucial facts are manifest. At worst, one or more AGO attorneys: (1) may have withheld evidence that they knew or had reason to know could establish a far broader scope of Farak's drug abuse and, thus, a vastly expanded pool of Farak Defendants, and (2) made false statements to the Superior Court in 2013 about the evidence in the AGO's possession and the office's disclosures. Even accepting the AGO's account, the AGO attorneys entrusted with the critical task of investigating and disclosing the scope of Farak's misconduct made numerous demonstrably false statements to the Superior Court and the Supreme Judicial Court that were not corrected even after being uncovered.

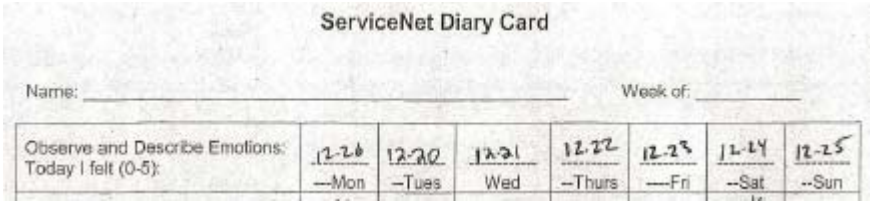
A. The AGO Failed to Disclose Key Exculpatory Evidence and Take Reasonable, Available Steps to Investigate Farak's Misconduct

The AGO was responsible for investigating and prosecuting Farak, with Assistant Attorney General Anne Kaczmarek assigned as Farak's lead prosecutor. Tr. V, at 125:18-21 (Verner). At this time, Kaczmarak was the lead prosecutor in the case against state chemist Annie Dookhan, who the AGO started investigating six months before it began investigating

Farak.[3] Yet Kaczmarek did not pursue leads undermining her "theory" that Farak's misconduct lasted approximately six months and that Farak used and stole only cocaine. In particular, Kaczmarek ignored two instances of drug sample discrepancies that she was told may have occurred on Farak's watch, and a vial of white powder found in Farak's workstation. She also failed to take cursory steps to look up the dates of papers found in Farak's car that would have immediately revealed that Farak was using drugs at work at least as far back as 2011. There is also evidence that Kaczmarek referred derisively to defense counsel; that she expressed dread of a more far-reaching scandal; and that she urged a colleague not to participate in an audit of the Amherst laboratory by representing that the lab had effective quality controls in place, when Kaczmarek herself was aware of information to the contrary.

1. The Massachusetts State Police Searched Farak's Car

On January 19, 2013, the State Police executed a warrant to search Farak's car. Ex. 172. They found evidence of drug use, and Farak was arrested for theft, drug possession, and evidence tampering. The police found drug paraphernalia, crack cocaine, and a ServiceNet Diary Card and Emotion Regulation Worksheets (collectively "Worksheets") where Farak chronicled her urges to use drugs. Ex. 163, at 5. The ServiceNet Card included handwritten dates of the week for Tuesday, December 20, through Monday, December 26 (Ex. 205):



ServiceNet Diary Card

Name: _____ Week of: _____

Observe and Describe Emotions: Today I felt (0-5):	12-20 --Mon	12-20 --Tues	12-21 Wed	12-22 --Thurs	12-23 --Fri	12-24 --Sat	12-25 --Sun

[3] *See Commonwealth v. Scott*, 467 Mass. 336, 339 (2014).

In an entry dated Saturday, December 24, Farak wrote that she was upset about missing part of the Patriots football game. Ex. 205.[4] For Thursday, December 22, Farak wrote that she "tried to resist using @ work, but ended up failing." Ex. 205.

A simple comparison of these dates against any calendar—such as those that come standard issue with essentially all personal computers and cell phones—would have immediately shown that these entries were from December 2011, 13 months earlier. In 2012, December 22 fell on a Saturday; it was in *2011* that December 22 fell on a Thursday. *Id.* Similarly, December 24, 2012, fell on a Monday, and the Patriots did not play that day; they did, however, play on Saturday, December 24, *2011*. Other documents found in the car, including the Patriots calendar, were also from 2011.

2. Days After Farak's Arrest, The AGO Had Evidence That May Have Implicated Farak In Tampering With Multiple Drugs

Four days after the search of Farak's car and her arrest, on January 23, 2013, State Police Sergeant Joseph Ballou informed Kaczmarek that an ADA may have found two cases Farak tampered with. The first was a 2005 cocaine sample that was "light by four grams," meaning that the seized sample weighed four grams less when Farak certified it than when the police weighed it. The second case involved 51 alleged oxycodone tablets, which reportedly tested negative for a controlled substance, and which, upon later inspection, contained 61 tablets and looked different than the officer remembered. Ex. 231.

Ballou noted that "neither of these cases seem to fit the scheme that we think Farak was perpetrating. . . . They also go back a lot further than the cases we are looking at. *Still, it warrants investigation of course*." *Id.* (emphasis supplied). The next day, Sergeant Ballou emailed Kaczmarek that the ADA told him that the cocaine sample was tested in 2005.

[4] Farak's belongings included a 2011 Patriot's calendar reflecting the December 24th game. *See* Ex. 224, at 585.

Kaczmarek did not reply by instructing Ballou to investigate further. Instead, Kaczmarek wrote: "Please don't let this get more complicated than we thought. If she were suffering from back injury- maybe she took some oxys?" *Id.* Kaczmarek has conceded that her comment was "*kind of a plea to God*" about the "*avalanche of work*" that the Farak scandal might deliver. Tr. VI, at 102:6-102:8 (emphasis added).

Kaczmarek would later claim, after some additional inquiry, which did not occur in the oxycodone case until several months after she was notified of the potential discrepancy, that the AGO was "unable to establish enough evidence that it was a sample that Farak tampered with."[5] Tr. VI, at 98:23-25 (Kaczmarek); *see also* Ex. 144; Tr. III, at 183:14-184:20 (Ballou).

On or around January 28, 2013, Sergeant Ballou seized a vial of white powder from Farak's workstation. Tr. III, at 189:22-25 (Ballou); Ex. 174. At first, Ballou assumed that the vial was a cocaine standard for testing. When eventually tested in February 2013, however, the sample turned out to be a mixture of acetaminophen and oxycodone. *Id.* Tr. 189:22-190:24 (Ballou); Ex. 6A, at 3305.

3. The AGO Discovered Key Farak Admissions in February 2013

In February 2013, Sergeant Ballou found the Worksheets. He was "excited" because they appeared to constitute detailed, direct admissions of drug use on the job by Farak herself. Tr. III, at 176:19-23; 209:2-11 (Ballou); Tr. IV 33:5-8 (Ballou). Ballou told Kaczmarek about them, and Kaczmarek asked to see them herself. Tr. III 159:2-6 (Ballou).

Subsequently, on February 14, 2013, Ballou emailed documents, including the Worksheets, to Kaczmarek, copying both his State Police colleague Robert Irwin and John Verner, Chief of the Criminal Division at the AGO, under the pointed subject headline, "FARAK

[5] The AGO also declined to enter into a proffer with Farak that would have allowed it to ascertain the scope of her misconduct, despite Farak's willingness to do so. Tr. VI, at 159:11-15; *see* Ex. 267.

admissions." Ex. 205. Ballou's email contained the accompanying message: "Here are those forms with the admissions of drug use I was talking about" as well as "news articles with handwritten comments about other officials being caught with drugs. All of these were found in her car inside of the lab manila envelopes."[6] *See id.* The articles were printed and annotated by Farak in 2011, more than a year before they were seized in her car. *Id.*

As Farak's prosecution continued, Kaczmarek developed what she later described as a "working theory" that Farak had been using drugs over the course of approximately six months and that Farak only used cocaine. Tr. VI, at 126:23-127:1 (Kaczmarek). Kaczmarek said she relied on the Grand Jury testimony of Farak's colleague, James Hanchett, whom she recalled as saying that Farak "had a great performance" until about four to five months before her arrest. *Id.* at 127:11-14. Kaczmarek also cited her own assessment of Farak's physical appearance—Kaczmarek had met Farak when she was investigating Dookhan earlier in 2012, and testified that "she looked like a completely different human being" at her arraignment. *Id.* at 128:11-14. Kaczmarek also justified her assumption that Farak was not tampering with oxycodone or other narcotics samples by citing her own "experience" prosecuting drug offenders, during which, she claimed, she learned that drug abusers typically "stick" to one drug. *Id.* at 101:23-25. Finally, Kaczmarek testified that she failed to investigate the dates on the Worksheets and simply presumed they were from 2012 because she could not "imagine" that Farak, or anyone else, would keep papers in their car for a year or more—even though she knew that the items seized during Farak's arrest in January 2013 included news articles from 2011. *Id.* at 166:10-12.

[6] Verner testified that he has "no memory" of reading this email. Tr. V, at 119:20-21 (Verner).

4. Kaczmarek Promised Farak's Attorney that the AGO Would Not Disclose Farak's Worksheets to Defense Attorneys Despite the AGO's Conclusion that the Worksheets Were Likely *Not* Privileged

Kaczmarek disclosed the Worksheets to Farak's attorney, Elaine Pourinski, but told her that the AGO had decided that "they weren't going to be turned over to the defense" in cases where people were being prosecuted based on drug certificates signed by Farak. *See* Tr. VI, at 25:13-14 (Pourinski). According to Pourinski, Kaczmarek said that that AGO "decided they were privileged and they were not going to be turned over." Tr. VI, at 22:2-7 (Pourinski). Kaczmarek, however, eschewed privilege as a ground for withholding the worksheets. She testified that she "would've have gotten an order" from the judge to relieve her of any privilege issues and "would have turned [the Worksheets] over" to other defense attorneys if she had understood that they reflected drug use in 2011. Tr. VI, at 113:4-8 (Kaczmarek).

In fact, Kaczmarek's own research led her to conclude that the Worksheets were likely not privileged. Kaczmarek drafted a prosecution memo concerning Farak that, after being sent to supervisors for comment, was approved on March 27, 2013. Ex. 163. Kaczmarek wrote that, while the Worksheets had not been submitted to the grand jury "out of an abundance of caution in order to protect possibly privileged information," her assessment was that "[c]ase law suggests . . . that the paperwork is *not* privileged." *Id.* at 5 n.7 (emphasis supplied). John Verner noted on the memo that the Worksheets had not "yet" been turned over to the DAs; his intention was for the AGO to disclose the Worksheets to the DAs so that they, in turn, could make necessary *Brady* disclosures. *Id.*; Tr. V, at 171:1-4 (Verner).

5. Kaczmarek Then Urged a Colleague at the Inspector General's Office to "Say No" to a Broader Audit of Farak's Laboratory

Ten days after Farak's arrest, on January 29, 2013, Kaczmarek expressed her own doubts about the Amherst lab's "professionalism." In an internal e-mail to her colleagues *within*

the AGO, she wrote that it was "a little embarrassing how little quality control they had" at the Amherst lab. Her conclusion was based on audit reports that were provided to Kaczmarek and others at the AGO. Ex. 269.

Nonetheless, on February 26, 2013—a month after learning of two possible evidence-tampering cases against Farak, and almost two weeks after receiving the "FARAK Admissions"—Kaczmarek sent Audrey Mark, then Senior Counsel at the Office of the Inspector General, an email regarding the Amherst lab. Kaczmarek urged Mark to "say no" to auditing the Amherst lab because it was "very different than JP," and "a professional lab." Tr. VI, at 90:1-22 (Kaczmarek).

In testimony before this Court, Kaczmarek insisted that she did not send this email to Mark to preempt a broader lab audit. Instead, she claimed that she did so because she knew her "friend" at the IGO had two young children and Kaczmarek was concerned about the added workload a major new undertaking would impose on her. Tr VI, at 173:3-174:4.[7]

6. The AGO Did Not Disclose Exculpatory Evidence to State DAs or Farak Defendants in Violation of its Own Procedures

While their investigation was ongoing, the AGO periodically sent discovery to the DAs who had cases affected by Farak's wrongdoings, following the same procedures used in the AGO's ongoing investigation and prosecution of chemist Annie Dookhan. *See* Tr. V, at 107:24-109:19 (Verner); Exs. 259, 260. In addition, the DAs had to coordinate with Kaczmarek to present witnesses during the Farak Defendants' prosecutions, many of which were still pending at the time of Farak's arrest. Tr. II, at 168:12-18 (Flannery). On March 27, 2013, the AGO sent

[7] It would seem, however, that if Kaczmarek's true motivation was to protect her friend from taking on a complex and time-consuming investigation, she would not emphasize the "professionalism" of the lab in question—a factor that would presumably make the audit *less* demanding for Mark to undertake, not more so.

its first disclosure of discovery materials to the DAs. Ex. 260. The AGO executed its first Certificate of Discovery on April 22, 2013. *See* Ex. 168.

Even after Kaczmarek determined that the Worksheets were not privileged,[8] and Verner determined that they needed to be disclosed, the AGO did not do so. That summer, however, the AGO made representations to county DAs that all relevant discovery *had* been disclosed. For example, On September 4, 2013, Kaczmarek told Berkshire County District Attorney John Bosse that all relevant discovery from the Farak prosecution had already been provided to the Berkshire County DA's office. *See* Tr. VI 117:11-12; Exs. 177-79, 233. Bosse then drafted a letter stating as much to defense attorney Karen Morth, which he asked Kaczmarek to confirm before sending on September 30. Exs. 177-79, 233. Even though the AGO set up a system to provide discovery to the DAs, and even though Kaczmarek knew the Worksheets were the most significant evidence against Farak, and even though Kaczmarek confirmed that all relevant discovery was provided to the DAs in 2013, the DAs were not provided the Worksheets in 2013.

B. Foster Asserted to the Court that All Evidence Had Been Turned Over Without Ever Reviewing a Single Document in the Case

While Farak's prosecution was ongoing, defense counsel subpoenaed Sergeant Ballou and Kaczmarek in search of additional evidence. Kris Foster, an Assistant Attorney General in the Appeals Division of the AGO, was assigned to handle motions to quash these subpoenas. During her litigation of the motions to quash, Foster made material representations, arguments, and assertions to the Superior Court without checking their validity.

[8]As reported to her supervisors in the Prosecution Memo, Kaczmarek's research led her to conclude that the Worksheets were likely not privileged. *See* Ex. 163, at 5 n.7. Nothing in the record indicates that Kaczmarek subsequently found authority to the contrary or that anyone disagreed with her initial findings.

1. Foster Drafted and Filed a Motion to Quash Without Reviewing Any of the Underlying Documents

On August 30, 2013, in connection with the case *Commonwealth v. Watt*, HDCR2009-01068, Sergeant Ballou received a subpoena commanding him to appear before this Court on September 9, 2013, to give evidence and to bring to court "a copy of all documents and photographs pertaining to the investigation of Sonja J. Farak and the Amherst drug laboratory." Ex. 249 (the "Watt Subpoena"). On September 5, 2013, Foster sent Susanne Reardon, Deputy Chief of the Appeals Division, a first draft of a motion to quash the Watt Subpoena with a cover email stating "Bear with me as this is my first time doing anything with subpoenas and I'm still figuring out the privileges." *See* Ex. 248. Foster initially raised various bases for quashing the subpoena issued to Sergeant Ballou, including the investigative privilege, prompting Reardon to respond, "I would be more comfortable knowing *what documents are at issue or what was already turned over* before we raise that privilege," and instructing Foster to review the file. *Id.*; Tr. III, at 46:24-47:3 (Foster); Tr. IV, at 178:6-13, 196:9-11 (Reardon) (emphasis supplied).

2. Judge Kinder Instructed Foster to Review the Underlying Documents and Submit them for His *In Camera* Review

On September 9, 2013, Judge Kinder held a hearing on the motions to quash. Prior to the hearing, the AGO was put on notice about the issues regarding Farak's drug use that the Court expected the parties to address. *See, e.g.*, Ex. 253.

At the hearing, Judge Kinder's first question to Foster was whether she "*personally reviewed the file*" to assess whether any documents actually "fit the description of those that you wish to be protected." Ex. 80, at Tr. 15:14-18 (emphasis supplied). She deflected the Judge's question by saying that she talked to Kaczmarek about them, *id.* at 15:19-23, but ultimately conceded that she did not have Ballou's file. *Id.* at 15:24-16:1. Judge Kinder instructed Foster to submit, for his *in camera* review, "copies of all of these documents that you

believe . . . should be protected." *Id.* at 19:2-8. Judge Kinder told Foster he was "disturbed" that Foster had not already produced the file, "absent a determination by me as to whether it should or should not be produced." *Id.* at 19:9-12. Foster recalled that Judge Kinder had actually "yelled" at her during this colloquy. Tr. III, at 53:23-54:1, 107:15 (Foster).

At the hearing, Sergeant Ballou initially testified that everything in his case file had been turned over to defense attorneys, but he ultimately conceded that he was only certain that he had turned everything over *to the AGO*. Tr. III, at 167:22-25 (Ballou); Ex. 80, at Tr. 150:18-19.

3. Without Reviewing a Single Document, Foster Asserted to Judge Kinder That All Documents Had Been "Reviewed" and "Produced"

On September 10, 2013, Verner emailed Kaczmarek, copying Foster and Dean Mazzone, a Senior Trial Counsel in the Criminal Division, asking about the hearing. *See* Ex. 258. Foster responded to Verner, Kaczmarek, and Mazzone, copying Reardon and Randall Ravitz, Chief of the Appeals Division, that her motion to quash was "flat out rejected." *Id.* She wrote that the AGO needed to "go through Sgt. Ballou's file and anything in it we think is privileged/shouldn't be disclosed we have to give it to Judge Kinder to review in camera along with a memo explaining why we think each document is privileged." *Id.* She then warned Kaczmarek that she would "not be surprised" if Kaczmarek herself "was subpoenaed for the next date . . . [since] defense counsel was frustrated by Sgt. Ballou's lack of memory and kept indicating that maybe you'd have a better memory." *Id.*

Verner responded by asking Kaczmarek to assist with the AGO's supplemental response—specifically, if she could "get a sense from Joe what is in his file? Emails etc?" *Id.* Kaczmarek responded that Ballou had "all his reports and all reports generated in the case . . . Copies of the paperwork seized from her car regarding new [sic] articles and her *mental health*

worksheets." *Id.* (emphasis added).[9] The record reflects no further inquiries by Foster as to what these "mental health worksheets" were or whether they had been previously turned over to district attorneys or defense counsel. And even though Kaczmarek would later concede, in her testimony before this Court, that she knew back in September 2013 that the AGO had not yet turned over the Worksheets, in none of the emails she sent to her supervisors and other colleagues did she inform any of them of that critical fact. Tr. VI, at 133:10-15.

Six days later, on September 16, 2013, Foster wrote a letter to Judge Kinder asserting: "After reviewing Sergeant Ballou's file, every document in his possession has already been disclosed." Ex. 193. Although Foster had just received Kaczmarek's email noting that Ballou's file included "*mental health worksheets*," Foster nevertheless told Judge Kinder that the file "includes grand jury minutes and exhibits, and police reports." *Id.* Before writing this letter, Foster did not review even one document in the AGO's or Sergeant Ballou's file, nor the AGO's prior discovery responses. *See, e.g.*, Tr. III, at 64:22-23 (Foster).

Duly skeptical, defense attorney Luke Ryan emailed Foster with a simple follow-up: to personally inspect the evidence seized from Farak's car. But his cordial persistence was met only with hostility. When Foster forwarded Ryan's request to Kaczmarek for her "thoughts," Kaczmarek responded, "No. Why is that evidence relevant to his case. *I really don't like him*"—an attorney she had never met and knew nothing about, aside from his requests for information about Farak's misconduct. Ex. 211 (emphasis added); Tr. VI, at 78:9-11, 78:20-79:18 (Kaczmarek).

On September 17, 2013, Foster told Ryan that defense counsel would not be permitted to inspect the evidence from Farak's car because it was "irrelevant to any case other

[9] Foster recalled Kaczmarek saying that there were documents she did not want produced and that everything had been produced. Tr. III, at 16:9-11 (Foster). Reardon recalls a meeting with Kaczmarek and Foster where Kaczmarek said that she thought that everything in Ballou's file had been produced. Tr. IV, at 213:5-15 (Reardon).

than Farak's." Ex. 214. Foster did not explain how that stance could be compatible with her letter from the day before, which asserted to Judge Kinder that *everything* had been turned over.

4. Foster Continued to Assert That All Documents Had Been Turned Over, and That Efforts to View them Were a "Fishing Expedition"

On October 1, 2013, the AGO filed motions to quash subpoenas that had been served in August on Ballou and Kaczmarek in *Commonwealth v. Penate*, HDCR2012-00083. Tr. IV, at 169:12-15 (Reardon), Ex. 199, at 4. On October 2, 2013, Attorney Ryan served on the AGO a motion to inspect the physical evidence as well as an opposition to quash the subpoena served on Kaczmarek. Exs. 214, 217. That same day, Judge Kinder held a hearing on these motions in which he explained his understanding of Foster's letter of September 16:

> [A] motion to quash the subpoena issued to Sergeant Ballou, which appears to be identical to the one you previously filed expressing concern about the contents of Mr. Ballou's file, ***only to disclose to me that you hadn't reviewed the file; and then when I asked you to submit to me those parts of the file that you were objecting to producing I received a letter from you saying that, in fact, the entire file had already been produced.***

Ex. 170, at Tr. 8:2-10. Foster responded, "It has, Your Honor." *Id.* at Tr. 8:11.

Judge Kinder also asked Foster directly: "And you, therefor[e] agree that all of the contents of Mr. Ballou's file have already been turned over?" *Id.* at Tr. 8:17-18. Foster replied: "They have, Your Honor." *Id.* at Tr. 8:19. Foster also argued that permitting Ryan to view the evidence seized from Farak's car would open up floodgates to similar requests by "every single defendant who has ever had an Amherst case . . . to look at, essentially, irrelevant evidence." *Id.* at Tr. 14:25-15:5. In response to pointed questioning by Judge Kinder, Foster did not deny that if there had been "an email exchange" indicating that Farak's misconduct "ha[d] been ongoing for some time," that would be "exculpatory information" she would be required to produce. *Id.*

at Tr. 35:25-36:19. Nevertheless, she assured the Court that no such exchange existed, nor was there any other document in the AGO's possession that so indicated. *Id.* at Tr. 36:24-38:8.

Foster could not have known whether her statements to Judge Kinder were true because, according to her December 2016 testimony, she never reviewed any of the documents.

5. Foster Now Blames Other AGO Attorneys for Her False Statements to the Superior Court

At the hearing before this Court after the Worksheets came to light, Foster made a series of remarkable claims and admissions. First, Foster admitted that *she never reviewed the Farak file*—not just before the September 9 hearing, but even after Judge Kinder "yelled" at her for failing to personally inspect it. *See, e.g.*, Tr. III, at 17:17-24, 19:8-10. Second, she claimed that the reason she did not review the file even after Judge Kinder directed her to do so was that her "superiors" *instructed her that there was no need to look at it*. Tr. III, at 94, 96:18-25 (Foster). Foster also claimed that, at a meeting before the September 9th hearing with Ravitz, Verner, Mazzone, and possibly others, she "was told" by one of the supervisors present that everything in Sergeant Ballou's file "had been already been turned over," and Ravitz directed her to so inform the court. Tr. III, at 15:6-10, 20:18-23, 21:22-23, 94:3-97:6 (Foster). Finally, she admitted that she purposely did not refer to herself when telling Judge Kinder that the file had been "review[ed]," because her superiors had instructed her to simply rely on their review. *Id.* at 93:24-94:9 (Foster).

None of Foster's former colleagues confirmed or defended her account. Suzanne Reardon not only denied telling Foster not to bother to look through the Farak file—she specifically recalled that *she had instructed Foster to review it, and Foster had reported back that she had done so*. Tr. IV, at 178:2-13; 201:6-25; 210:7-14 (Reardon). Ravitz had no recollection of Foster ever telling him she had not reviewed the file, nor of anyone instructing

her not to do so. Tr. V, at 70:14-17, 95:21-96:3 (Ravitz). John Verner testified that he "never" told Foster not to check the file herself, and that he was unaware she had failed to do so until 2014, when he confronted her about the allegations in Luke Ryan's letter. *Id.* at 224:8-12, 201:13-25 (Verner); Ex. 266. He also maintained that Foster "never" gave him the explanation she gave the Court for why she did not examine the documents: that "her bosses told her that everything had been turned over." Tr. V, at 230:6-10 (Verner). As for Kaczmarek, even after reviewing relevant correspondence and calendar entries, she claimed that she could not recall any conversations with Foster whatsoever regarding these issues. Tr. VI, at 172:2-8, 185:1-10. She maintained, however, that Foster never asked her anything about the contents of the Farak file, including what documents had or had not already been disclosed ("[i]t did not happen"). *Id.* at 183:1-10.[10] Kaczmarek also denied that she—or, to her knowledge, anyone else at the AGO—ever told Foster not to examine the file, nor to represent to Judge Kinder that its complete contents had already been turned over. *Id.* at 185:10-19.

Hindsight had no impact on Foster's perspective. Testifying in December 2016, she maintained that there was no need to look at the file, even when Judge Kinder ordered her to, because she was "balancing" his order against what she was allegedly told by her superiors. Tr. III, at 92:4-22, 94:3-9, 96:18-25, 106:19-107:20. Now general counsel at a state commission, Foster declined to concede that her handling of the Farak motions was "poor practice." Tr. III, at 80:22-81:1, 92:4-22, 96:14-25, 106:19-107:20.

[10] When pressed by the Court, Kaczmarek amended her testimony to clarify that she had "no recollection of it happening" as Foster claimed. Tr. VI, at 183:12-14.

C. The AGO Learned About the Scope of Farak's Misconduct But Did Not Disclose It To the Superior Court or the SJC

1. The Superior Court Relied on the AGO's Inaccurate Representations to Defendants' Detriment

Because the Worksheets were not disclosed, Judge Kinder found that Farak's drug use was limited in duration and denied relief to certain defendants based on a misapprehension that their cases predated Farak's misconduct.[11] Judge Kinder found that it was not "reasonable to infer from Farak's possession of newspaper articles downloaded in 2011, about other chemists charged with theft of controlled substances, that she was doing so at the time." *See, e.g.*, Ex. 184, at 14-15 n.1.

2. In November 2014, the Northwestern DA's Office Learned that the Worksheets Had Not Been Disclosed

Luke Ryan uncovered the Worksheets and wrote the AGO about them in November 2014. Verner testified that he was "shocked" and "pissed" when he learned that the Worksheets had not been turned over. *See* Tr. V, at 196:8-16, 198:4-6 (Verner). No one testified that they believed the Worksheets had been withheld on grounds of privilege.

Around November 13, 2014, Verner sent Northwestern District Attorney David E. Sullivan a letter providing 289 pages of previously undisclosed materials relating to Farak, including the Worksheets. Ex. 167. Verner acknowledged these materials contained "potentially exculpatory information" that his office had an "obligation" to disclose. *Id.*; Tr. V, at 211:20-25, 222:14-21 (Verner). Mazzone also believed that he had an ethical obligation to disclose exculpatory evidence to the DA's office. Tr. VI, at 58:16-59:2 (Mazzone). Verner's letter failed to mention that his office had possessed this exculpatory information for 22 months.

[11] *See, e.g.*, Ex. 184, at 13-15 (Memorandum of Decision and Order, *Commonwealth v. Cotto*, No. 2007-00770 (Oct. 30, 2013); Ex. 185, at 14 (Memorandum of Decision and Order, *Commonwealth v. Watt*); Ex. 186, at 14-15 (Memorandum of Decision and Order, *Commonwealth v. Harris*, No. 2010-01233 (Nov. 12, 2013).

3. Neither the AGO Nor the DA's Office Corrected the AGO's Prior False Statements to the Superior Court or the SJC, which Relied on those False Statements to Defendants' Detriment

Following attorney Ryan's November 2014 letter, no one on behalf of the Commonwealth told the Superior Court or the SJC that the AGO had made incorrect representations to Judge Kinder about the discovery provided to the defendants and about the scope of Farak's misconduct. At that time, the SJC was considering two Farak cases in which Judge Kinder made the crucial findings of fact. Those cases were briefed during the summer and fall of 2014, argued on December 4, 2014, and decided on April 8, 2015. *See Commonwealth v. Cotto*, 471 Mass. 97 (2015); *Commonwealth v. Ware*, 471 Mass. 85 (2015). During that entire time, neither the AGO nor the District Attorney informed that SJC that Judge Kinder had been laboring under misapprehensions arising from Kris Foster's inaccurate letter, written submissions, and in-court statements.[12]

The SJC expressly relied on Judge Kinder's finding that Farak's drug use was limited in time and scope. *Ware*, 471 Mass. at 95; *Cotto*, 471 Mass. at 111. In *Cotto*, for example, the SJC held that Judge Kinder did not abuse his discretion in finding that Farak had not begun stealing controlled substances in 2011. *See Cotto*, 471 Mass. at 101 n.7, 108, 111 n.13. However, "given the absence of a thorough investigation into the matter by the Commonwealth, and the cloud that overshadows the integrity of drug analyses performed by Farak at the Amherst drug lab," the SJC required the Commonwealth, within one month after it issued its opinion, to notify the judge below whether it intended to undertake an investigation. *Id.* at 108.

[12] Attorney Ryan filed an amicus brief in November 2014, describing the Worksheets and arguing that the Superior Court's determination that Farak began tampering with evidence in July 2012 was no longer tenable. *See* Brief of Rafael Rodriguez as *Amicus Curiae*, *Com. v. Cotto*, No. SJC-11761 (Mass. Nov. 2014), at 16-20.

On April 1, 2016, the AGO completed the investigation it had been directed to perform in *Cotto*, finding that Farak had committed extensive misconduct *for over eight years*. Nevertheless, with the possible exception of its February 2017 submissions in this case, the Commonwealth has never informed any court that previously relied on its contrary statements to Judge Kinder in 2013 that those prior assertions and resulting findings were, in fact, false.

D. These Proceedings

The Farak Defendants in this hearing pleaded guilty to or were found guilty of charges involving possession or distribution of drugs.[13] The evidence used to indict the defendants was initially tested at the Amherst drug laboratory by Farak, Rebecca Pontes, or James Hanchett. The Farak Defendants have filed various motions including motions for new trials, to vacate convictions, to withdraw guilty pleas, and for sanctions, among other relief. In December 2016, this Court held evidentiary hearings concerning the AGO's conduct, at which twenty witnesses testified, including numerous current and former AGO officials.

On February 17, 2017, the AGO filed a memorandum opposing the Farak defendant's motions to dismiss, arguing that its conduct was not egregious and the defendants cannot show prejudice from the false statements about the scope of Farak's misconduct made in the earlier proceedings. AGO Memo in Opp. at 2. On March 1, 2017, the Hampden County District Attorney's Office filed its response to the Farak Defendants' motions. The DA assented to new trials (but not dismissals) for defendants Omar Harris and Rolando Penate and conceded that the *Bridgeman* exposure cap—where defendants in the Dookhan lab scandal could not be charged with more serious crimes or given more severe sentences if a motion to withdraw a

[13] *See* HDCR2005-01159 (Omar Brown ("Brown")); HDCR2009-00097 (Lizardo Vega ("Vega")); HDCR2009-01068 and HDCR2009-01069 (Watt); HDCR2012-00399 (Wendall Richardson ("Richardson")); HDCR2007-01072, HDCR2009-01072, and HDCR2010-00253 (Bryant Ware); HDCR2005- 01159 (Cotto); HDCR2012-00226 (Glenda Aponte ("Aponte")); HDCR2010-01233 (Omar Harris ("Harris")); HDCR2012-00624 (Liquori); HDCR2012-00083 (Penate).

guilty plea is allowed—applied to defendants in this case and that defendants Brown and Vega would receive the benefit of it if they decide to file motions to withdraw their guilty pleas. (*See* DA Memo at 11-17, 47-51). Otherwise, the DA's motion opposed the relief sought by the remaining defendants, and advocated that the court adopt the AGO's proposed findings of facts.[14]

ARGUMENT

Several provisions of the Massachusetts Rules of Professional Conduct ("MRPC" or "Rules") are at issue in this case, including:

- MRPC 3.3, requiring candor towards the court;
- MRPC 3.4, requiring fairness to opposing party and counsel;
- MRPC 3.8, imposing additional ethics requirements on prosecutors; and
- MRPC 4.1, requiring truthfulness in statements to others.[15]

As set forth more fully below, the AGO violated each of these rules. Whether or not any of these violations were intentional (that is, whether or not the AGO *knew* it was suppressing exculpatory evidence or making false statements to the courts), these wholly inexcusable errors are egregious. Particularly in a case of this magnitude—involving issues of government accountability and public trust that may impact thousands of defendants—such conduct warrants a swift and serious remedy.

A. The AGO Made False Statements to the Court, Opposing Counsel, and Third Parties in Violation of MRPC 3.3, 3.4, and 4.1

The ethical duties implicated here are not limited to the duties to investigate and to disclose exculpatory evidence, which are the focus of the AGO's memorandum of law. There are also the duties of candor to the court and third parties, which the AGO breached. *See* MRPC

[14] The AGO's proposed findings of fact are incomplete and misleading, and they should not be adopted.

[15] *See* Addendum, attached, which contains excerpts of the relevant Rules.

3.3, 3.4, and 4.1. These rules required the AGO to limit its assertions to true statements or statements believed to be true "on the basis of a reasonably diligent inquiry." *See* Rule 3.3 cmt. [3]. In addition, the AGO had an ethical duty to "make reasonably diligent effort to comply with a legally proper discovery request." *See* Rule 3.4(d).

1. The Ethics Rules Require Candor to Courts and Third Parties

The duty of candor to the court prohibits lawyers from knowingly "mak[ing] a false statement of fact or law to a tribunal or fail[ing] to correct a false statement of material fact or law previously made to the tribunal by the lawyer." Rule 3.3(a)(1); *see In re Hilson*, 448 Mass. 603, 610, 616 (2007) (finding that attorney violated Rules 3.3(a)(1) and (a)(4) because attorney made knowing misrepresentation regarding checks written out of his IOLTA account); *Commonwealth v. Sosa*, 79 Mass. App. Ct. 106, 112 & n.6 (2011) (citing Rule 3.3(a)(1) when an attorney made a representation in a brief that directly contradicted the record at the suppression hearing); *In re Stallworth*, No. 11-19919-WCH, 2012 WL 404952, at *6 (Bankr. D. Mass. Feb. 8, 2012) (making a referral to the district court for ethical violations pursuant to Rule 3.3 because attorney repeatedly made knowing false representations that certain documents had been filed, when they had not been).[16]

[16] Courts have found violations of MRPC 8.4(c)—prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation—and MPRC 8.4(d)—prohibiting conduct that is prejudicial to the administration of justice—when attorneys made misrepresentations of material fact to the court. *See, e.g.*, *In re Diviacchi*, 475 Mass. 1013, 1016-20 (2016) (affirming single justice's finding that attorney violated Rules 3.3(a)(1) and 8.4(c) by making a knowingly false statement on his own personal knowledge in verified complaint regarding client's fee arrangement, standard habits, and business routine); *In re Gargano*, 460 Mass. 1022, 1022 (2011) (finding violation of MRPC Rules 8.4(c) and (d), among others, when attorney made knowing misrepresentations to the court and caused false affidavits to be filed by his client).

Disciplinary opinions have also found that statements made "with reckless disregard for their truth or falsity" violate Rules 8.4(d) and (h)—a catch-all provision prohibiting "any other conduct that adversely reflects on [an attorney's] fitness to practice law." *See In Re Bartley*, No. BD-2008-016, 2014 WL 4410444, at *1 (Ma. St. Bar Disp. Bd. July 21, 2014); *In re Serpa*, No. BD-2014-025, 2014 WL 2453014 (Ma. St. Bar. Disp. Bd. May 1, 2014); *accord In re Serpa*, 95 A.3d 393, 394 (R.I. 2014) (ordering reciprocal suspension when attorney made reckless misrepresentations in affidavit in violation of MRPC Rule 8.4(d)).

While an attorney is usually not required to have personal knowledge of matters asserted in litigation documents prepared on behalf of a client, assertions made about *an attorney's personal knowledge*, such as in an affidavit or a statement made in open court, may be made only when the attorney knows the assertion is true or believes it to be true on the basis of a "reasonably diligent inquiry." Rule 3.3 cmt. [3]. Under some circumstances, the failure to make a disclosure can amount to an affirmative misrepresentation. *Id.*; *see also In re Diviacchi*, 475 Mass. 1013, 1020 (2016) (finding violation of Rule 3.3 because attorney made false assertions but offered no evidence that he conducted a reasonably diligent inquiry before making them).

Rule 3.3(a)(3) (formerly Rule 3.3(a)(4)) provides that a lawyer shall not "offer evidence that the lawyer knows to be false." *See* Rule 3.3(a)(3); *see also Stephens-Martin v. Bank of N.Y. Mellon Trust Co.*, No. 12 MISC 465277 AHS, 2015 WL 732087, at *18 (Mass. Land Ct. Feb. 20, 2015) (finding that attorney had an ethical obligation under former Rule 3.3(a)(4) to bring to the court's attention emails that he withheld, which he knew undermined the position that he and his clients had previously taken and to bring to the court's attention that his clients were proffering information he knew to be false). That rule demands that "[i]f a lawyer . . . has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures." *See* Rule 3.3(a)(3).

Attorneys also have a duty of fairness to opposing parties and counsel. Accordingly, a lawyer shall not "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act." MRPC 3.4(a). In pretrial procedure, Rule 3.4 provides that a lawyer shall not "fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party." MRPC 3.4(d).

Comment [2] provides that "[s]ubject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed." *Id.*; *see Mass. Inst. of Tech. v. Imclone Sys., Inc.*, 490 F. Supp. 2d 119, 126 (D. Mass. 2007) (holding that attorney who deprived adversary of a cooperating witness violated Rule 3.4, among others, by prejudicing plaintiff's ability to prosecute the litigation); *In re Munroe*, No. BD-2010-054, 2010 WL 3058195, at *3 (Ma. St. Bar. Disp. Bd. July 21, 2010) (finding a violation of Mass. R. Prof. C. 3.4(a) when attorney impeded administration of an estate by obstructing the special administrator's access to the business premises and records and interfering with her effort to sell the business).

Finally, lawyers have a duty of truthfulness to others outside of active litigation. According to Rule 4.1, "In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6." Comment [1] to Rule 4.1 provides that "a misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements."

Although Rule 4.1 falls under the heading of "transactions with persons other than clients," courts have applied that rule in the litigation context. In *In re Gargano*, 460 Mass. 1022, 1024 (2011), an attorney, in an opposition to a motion to dismiss an amended complaint, made a representation that the initial complaint had overlooked a specific judicial opinion. The representation, however, was not true—the case had been cited in court filings related to the first

complaint. *Id.* The attorney argued that he did not review the opposition, an assertion that the hearing committee did not credit. *Id.* In affirming a violation of Rule 4.1, the SJC found that the attorney was responsible for the papers he filed, and that the attorney could not avoid the fact that he knowingly made a misrepresentation to the court, which substantiated the violation of Rule 4.1. *Id.*

Courts have also stated that attorneys "may not permissibly mislead or intentionally make false statements, particularly knowing full well that third parties or opposing counsel will rely on such assertions—here, a promise—to their detriment." *Nova Assignments, Inc. v. Kunian*, 77 Mass. App. Ct. 34, 45 (2010) (Brown, J., concurring) (noting that, if plaintiff proves its allegation that its law firm detrimentally relied on defendant attorney's misrepresentations, the attorney would also be in violation of Rule 4.1); *In re Malden Mills Indus., Inc.*, 361 B.R. 1, 8 (Bankr. D. Mass. 2007) (finding a violation of Rule 4.1(a) because debtor and agent sought to have creditor trust assent to a motion for a final decree when they knew that they would immediately refile in a different venue, and by offering a misleading, or at least an incomplete, explanation in response to a direct question).

2. The AGO Breached Its Duties of Candor and Fairness

The AGO did not meet its duties of candor and fairness to the court, opposing counsel, or others. At best, Foster made several statements that she had no basis to believe were true—because she did not review any documents in the file—and which, in fact, were false. For example, Foster defended the AGO's erroneous position, in statements to the court and others, that Farak's misconduct lasted "roughly four months," that attempts to prove otherwise were a "fishing expedition," and that the evidence was "irrelevant." *See* Ex. 199, at 9; MRPC 3.3, 3.4, 4.1. By making these false statements without reviewing any documents, *see, e.g.*, Tr. III, at 72:8-11, Foster made assertions purporting to be on her own personal knowledge that were not

on the basis of a "reasonably diligent inquiry." *See* Rule 3.3 cmt. [3]; *In re Diviacchi*, 475 Mass. 1013, 1020 (2016); *see also* Mass. R. Civ. P. 11 ("The signature of an attorney to a pleading constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is a good ground to support it.").[17]

Foster's letter to Judge Kinder is even more problematic because, in addition to being false, it appears to have been designed to mislead him. According to Foster's testimony, Judge Kinder "yelled" at her on September 9, 2013, for not reviewing the file. Tr. III, at 53 (Foster). She then wrote him a letter saying that, "after reviewing" everything in the file, it had all been turned over. Foster testified that she made a decision to word the letter that way to avoid saying "I." In that letter, she did not even intimate that it was "her colleagues" who had reviewed the file. Tr. III, at 94 (Foster). Foster thus intended to give Judge Kinder the false impression that she had reviewed the file, while allowing her to claim later on that she had been referring to other people whom she never mentioned to Judge Kinder. That is deception.[18]

3. The AGO's Defense of Foster is Misplaced

The AGO's account of Foster's actions is both incomplete and inaccurate. First, the AGO argues that Judge Kinder's inquiry during the hearing on September 9, 2013, was "focused on Sergeant Ballou and his 'file[,]'" and argues that the fact that Ballou had returned the Worksheets to the evidence room somehow excuses the AGO's failure to produce them. AGO Memo in Opp. at 11, 29; AGO Proposed Findings of Facts ¶¶ 113-31, 278, 341, 443; Ex. 80. However, the subpoena at issue was for all the documents and photographs pertaining to the

[17] In addition, under Massachusetts law, even negligent misrepresentation "does not require an intent to deceive or actual knowledge that a statement is false." *Infinity Fluids Corp. v. Gen. Dynamics Land Sys., Inc.*, No. CV 14-40089-TSH, ___F. Supp. 3d ___, 2016 WL 5660359, at *10 (D. Mass. Sept. 29, 2016) (citing *Cumis Ins. Soc'y, Inc. v. BJ's Wholesale Club, Inc.*, 455 Mass. 458, 471–72 (2009)).

[18] Kaczmarek also made false statements in her conversations with ADA Bosse. Kaczmarek told ADA Bosse that all relevant discovery was provided to the Berkshire DA's office, and ADA Bosse sent a letter to a defense attorney relaying Kaczmarek's representation. *See* Ex. 178, 179. That representation was false. *See* Rule 4.1.

Farak investigation, not just those in Ballou's possession at that time. Regardless, there is no dispute that (1) Ballou provided the Worksheets to the AGO, under the heading "FARAK Admissions," eight months before Foster filed her letter detailing the materials Ballou had gathered but *omitting* any mention of the Worksheets, (2) those Worksheets and the question of whether "emails" needed to be disclosed were specifically discussed among multiple AGO supervisors—including Kaczmarek—when Foster returned from the September hearing and asked senior AGO attorneys for guidance on how to proceed, and (3) Foster has admitted that she did not review *any* documents in the custody of Farak investigators (not Ballou's, Kaczmarek's, or anyone else's) before preparing her response .

Nor does the AGO acknowledge the troubling fact that Foster not only admitted that she did not review "the file" or any other Farak documents, but claimed that her superiors *directed her* not to do so, and to instead make unsupported representations to the Court that the entire investigative file had been produced. Moreover, current and former AGO attorneys vigorously disputed her account (*see supra* Statement of Facts, Part B.5.)—and the AGO has not reconciled (or even addressed) these troubling discrepancies.

Second, the AGO seems to argue that Foster was so inexperienced that her actions were inadvertent. AGO Memo in Opp. at 26, 28. But if Foster's superiors actually believed that she was too inexperienced to know that she should read the relevant documents before making assertions about them, or that she should not write misleading letters to judges, then it was incumbent on them to supervise her very carefully. For example, they could have read Foster's letter before it went out, accompanied her to court, and asked her if she reviewed the file. *See*

MRPC 5.1, 5.2; ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 14-467 (2014).[19] But Foster was far from a novice. She worked in the Suffolk County DA's Appellate Unit for approximately four years before she was hired by the AGO. Tr. V, at 43:25-44:6 (Ravitz). And even now, as the general counsel of a state commission, Foster continues to dispute that she engaged in "poor practice." Tr. III, at 80:22-81:1, 92:4-22, 96:14-25, 106:19-107:20 (Foster). No attorney, no matter how inexperienced, can properly think it is acceptable to write a statement to the court without any basis to believe that it is true. Nor can an attorney's duty to abide by a court order be "balanced" (in Foster's words) against the wishes of a supervisor.

Finally, Judge Kinder specifically instructed Foster, on the record, to review the file, reconsider the AGO's claim of privilege in light of its contents, and provide any undisclosed documents for his *in camera* review along with a privilege log. Ex. 80, at Tr. 19:2-8. Foster had an obligation to do as instructed, and to refrain from writing a letter for the admitted purpose of hiding from Judge Kinder the fact that she had not done so. Thus, the AGO violated Rules 3.3, 3.4, and 4.1 of the MRPC.

B. Beginning by at Least November 2014, the AGO and DA's Office Violated Rule 3.3 by Failing Alert Any Court to Foster's False Statements.

The AGO and DA's office had a duty under MRPC 3.3 to correct Foster's prior misstatements upon learning that the Worksheets had not been disclosed and that the Commonwealth's assertion that Farak had committed misconduct for "roughly four months" was not right. This duty was not fulfilled.

[19] *See also* ABA Comm'n on Ethics & Prof'1 Responsibility, Formal Op. 09-454 (2009), at 8 (noting that supervising attorneys in prosecutors' offices "are subject to discipline for ordering, ratifying or knowingly failing to correct discovery violations").

1. False Statements to Courts Must Be Corrected and Remedied

Rule 3.3(a)(1) requires attorneys "to correct a false statement of material fact or law previously made to the tribunal by the lawyer."[20] In addition, if an attorney offers "material evidence" and comes to know of its falsity, the attorney must "take reasonable remedial measures." MRPC 3.3(a)(3) (formerly 3.3(a)(4)). Under current Rule 3.3(c) (former Rule 3.3(b)), the duties under Rule 3.3(a) "continue to the conclusion of the proceeding, including all appeals, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6." The "conclusion of a proceeding" means "a final judgment in the proceeding has been affirmed on appeal or the time for review has passed." MRPC 3.3 cmt. [13].

A lawyer must take steps to remedy prior false statements even when doing so would entail a departure from typical litigation practice. For example, the client must "seek the client's cooperation" with correcting the record. MRPC 3.3 cmt. [10]. If the client refuses, and "if withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6." *Id.* This is because "[i]t is for the tribunal," not the lawyers responsible for the falsehood, "to determine what should be done." *Id.*

2. The AGO and the DA Did Not Reasonably Remedy Foster's False Statements

The AGO and the DA did not meet their duties to remedy the material false statements that Kris Foster made to Judge Kinder in 2013, even though the court directly relied upon her misstatements to make key factual findings and limit discovery and other relief to the

[20] Prior to July 1, 2015, Rule 3.3(a)(1) prohibited attorneys from knowingly "mak[ing] a false statement of material fact or law to a tribunal" but did not contain the requirement to correct that the current rule does.

defendants. *See, e.g.*, Ex. 184, at 14-15 n.1; *see also* Ex. 184, at 13-15; Ex. 185, at 14; Ex. 186, at 14-15.

The AGO and the Hampden County District Attorney had ample opportunity to remedy this situation. On November 1, 2014, after viewing the Worksheets, attorney Ryan informed the AGO how the Worksheets "memorialize[d] actions Farak took during the week of December 20, 2011, *i.e.* more than six months before Judge Kinder found that there was any evidence that she engaged in criminal behavior." *See* Ex. 166, at 10. John Verner testified that he was "angry," "upset," "shocked," and "frustrated" about this revelation, and confirmed that the materials Ryan cited had not yet been disclosed. *See* Tr. V, at 196:8-16, 198:4-6 (Verner). As the AGO notes, supervisors decided "without any internal debate"—over potential privilege or any other rationale—to send the Worksheets to the DAs and to "third party defendants who requested them." AGO Memo in Opp. 32.

Yet neither the AGO nor the District Attorney went to the Superior Court or the SJC, where the *Cotto* and *Ware* cases were pending, to inform the judiciary that Foster's claims were contradicted by the new disclosures, much less that these documents had been in the AGO's own files since early 2013.[21] In direct consequence of that failure to act, the SJC relied upon an inaccurate account of the documents recovered from Farak's car. *See Cotto*, 471 Mass. at 101; *Ware*, 471 Mass. at 87-88. And the SJC also upheld, as not an abuse of discretion, Judge Kinder's findings about the scope of Farak's misconduct, which in turn were the consequence of Foster's false statements. *See Cotto*, 471 Mass. at 101 n.7, 108, 111 n.13. When the *Cotto* and

[21] *See, e.g.*, Brief of the Commonwealth at 38, *Cotto*, 471 Mass. 97 (filed Nov. 21, 2014) ("Because the judge did not abuse his sound discretion in finding that the defendant failed to meet his burden of showing that Farak's misconduct

antedated his guilty plea, the judge properly denied the defendant's motion for a new trial and his ruling should be affirmed."); Brief of the Commonwealth at 17-18, *Ware*, 471 Mass. 85 (filed Aug. 8, 2014) (arguing that "the defendant has not made an adequate showing that Ms. Farak's misconduct preceded his guilty plea" in February 2011).

Ware decisions were published in April 2015, no one on behalf of the Commonwealth alerted the SJC that its opinion rested on what the AGO now, in February 2017, repeatedly calls "unintentional mistakes." AGO Memo in Opp. at 1, 2, 3, 11, 12, 19, 25, 35, 41.

Even if all of Foster's misrepresentations had been "unintentional," the AGO needed to disclose their existence and consequences to the courts. It was not the AGO's prerogative to decide that disclosing the Worksheets to the DAs and making them available to defendants—but, remarkably, only those "who requested them"—was a sufficient cure. *See* AGO Memo in Opp. at 11. Rather, because false statements had been made to *a court*, "[i]t [was] for the tribunal to determine what should be done." *See* Rule 3.3 cmt. [10]. By failing to make reasonable remedial efforts, the AGO and DA violated Rule 3.3.

C. The AGO Violated Rules 3.3 and 3.8 by Failing to Disclose Farak's Worksheets or Conduct a Minimally Adequate Investigation

1. The AGO and the DA's Office Were On the Same "Prosecution Team," and the AGO Was Obligated to Investigate the Scope of Farak's Misconduct and Provide Exculpatory Evidence

The AGO had a duty to investigate the scope of Farak's misconduct and to disclose evidence that was exculpatory as to defendants being prosecuted by county DAs, because they were members of the same "prosecution team." A prosecutor's obligations extend to material and information in the possession or control of members of his or her staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to his or her office. *See Commonwealth v. Sleeper*, 435 Mass. 581, 605 (2002); *see also* 30A Mass. Prac., Crim. Prac. & Proc. § 26:21. It is well settled that the individual prosecutor has a duty to learn of any favorable evidence known to other persons acting on the government's behalf in the case, including the police. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995); *Strickler v. Greene*, 527 U.S. 263, 281

(1999); *Commonwealth v. Daniels*, 445 Mass. 392, 403 (2005). Indeed, "[w]hen any member of the prosecution team has information in his possession that is favorable to the defense, that information is imputable to the prosecutor." *Mastracchio v. Vose*, 274 F.3d 590, 600 (1st Cir. 2001) (citing *Kyles* 514 U.S. at 437 (1995)).

In addition—and critically—the AGO is the Commonwealth's chief law officer and "has a common law duty to represent the public interest." *See Sec'y of Admin. & Fin. v. Attorney General*, 367 Mass. 154, 163 (1975) (citations omitted); *Commonwealth v. Silva*, 448 Mass. 701, 706 n.6 (2007). The AGO has a duty to "consult with and advise district attorneys in matters relating to their duties." G.L. ch. 12, § 6. Finally, if the AGO appears in any case, it has control of such cases. *Id.* § 27.

Even assuming those special responsibilities do not make the AGO part the "team" in a typical criminal case prosecuted by a District Attorney, the AGO surely was part of those teams in the specific context of the Farak investigation. The AGO knew it was prosecuting a state chemist who tampered with evidence, that her misconduct would tend to exculpate other defendants, and that DAs were *relying on the AGO* to pass on that evidence. The DAs did not have direct access to Farak discovery; for that reason, they asked the AGO in writing to confirm that all such information had been provided to them. Tr. II, at 159:21-160:4 (Flannery); Ex. 177-79, 233. The AGO even set up a mechanism for sending Farak evidence to the DAs.

In other respects, the AGO also behaved as though it and the DAs were on the same team for purposes of the Dookhan and Farak scandals. For example, Kaczmarek asked a Suffolk County ADA for an opposition to a motion for post-conviction relief in the Dookhan case and subsequently shared it with a Berkshire County ADA opposing a motion for post-conviction relief in a Farak case. *See* Tr. VI, at 116:7-20 (Kaczmarek); Ex. 233. And top AGO

attorneys believed that they were under ethical obligations to turn over Farak-related evidence to the DAs. Tr. V, at 211:20-25, 222:14-21 (Verner); Tr. VI, 58:16-59:2 (Mazzone).

Under these circumstances, the AGO had a constitutional and ethical obligation to investigate and to disclose exculpatory evidence to the DAs or to Farak Defendants themselves.[22]

2. The AGO Had an Ethical Obligation to Conduct a Minimally Adequate Investigation Into the Scope of Farak's Misconduct

The AGO had a duty not to blind itself to unwanted facts about Farak, the person it was investigating. Under Rule 3.8(g), a prosecutor cannot intentionally avoid pursuing evidence that will damage the prosecution's case or aid the defendant. MRPC. 3.8(g) [former rule 3.8(j)].[23] Prosecutors have a duty not to keep themselves willfully ignorant of potentially exculpatory evidence. *Commonwealth v. Beal*, 429 Mass. 530, 535 n.4 (1999) (citing former Rule 3.8(j)) ("The prosecutor in a criminal case shall . . . not intentionally avoid pursuit of evidence because the prosecutor believes it will damage the prosecution's case or aid the accused").

Here, the AGO failed to pursue basic investigative leads that could have quickly disproven its "working theory" that Farak's drug use did not pre-date 2012 and was limited to cocaine. Most egregiously, those handling the Farak investigation failed to take a few moments to confirm that Farak's Worksheets, like her Patriots calendar and news articles, were from 2011. This is not because the Worksheets were "identified as significant" for the first time in November

[22] Because the AGO and DA were part of the same prosecution team, the AGO's knowledge is imputed to the DA's office. And because the AGO withheld evidence from the DAs who were prosecuting the Farak Defendants, the AGO arguably caused the DAs to breach their ethical obligations to the Farak Defendants.

[23] Although Rule 3.8(d) does not require prosecutors to search for information of which they are unaware, ABA Formal Opinion 09-454 suggests that prosecutors have an obligation to search for exculpatory evidence if the prosecutor actually knows, infers from the circumstances, or it is obvious that the files contain favorable evidence or information. Thus, Model Rule 3.8(d) "ordinarily would not require the prosecutor to conduct further inquiry or investigation to discover other evidence or information favorable to the defense unless he was closing his eyes to the existence of such evidence or information." *See* ABA Formal Op. 09-454, at 5-6.

2014, as the AGO contents. AGO Memo in Opp. 11. To the contrary, they were identified as significant *immediately* in February 2013. Ballou was "excited" about them, Tr. III, at 176:19-23; 209:2-11 (Ballou); Tr. IV 33:5-8 (Ballou); he and Kaczmarek knew they were the only documents in which Farak confessed to drug use in her own handwriting, and Kaczmarek asked to review them herself as soon as Ballou informed her of their existence. Tr. III, at 159:2-6 (Ballou); Tr. III, at 160:14-18, 176:19-20 (Ballou).

Similarly, the AGO and Ballou conducted only a cursory review of two cases brought to them in February 2013 about possible drug abuse and tampering by Farak dating back to 2005 in one case. *See* Ex. 231. In one case, Ballou did not "investigate" the allegations until May, and did not write a police report until September 2013," while Kaczmarek's response was to speculate that Farak may have stolen highly addictive oxycodone pills for a non-existent "back injury." *Id.*; Ex. 144. Kaczmarek concedes that her speculation was motivated by a concern about "an avalanche of work to hit us" if the AGO were to find reasons to expand her working theory about the scope of Farak's misconduct. Tr. VI, at 102:6-102:8 (Kaczmarek).

A prosecutor who is hoping that her investigation will *not* find evidence inculpating the person she is prosecuting, for fear it will unleash an "avalanche" of evidence that exculpates others, is failing to conduct a reasonable investigation under Rule 3.8(g).

The AGO's defense of this investigation is an exercise in misdirection, focusing on why it did not investigate the Amherst lab. AGO Memo in Opp. 13-18. That is not the issue here. Even assuming the AGO need not have investigated whether deficiencies at *the Amherst lab* enabled Farak's misconduct, it had no excuse for failing to responsibly investigate *Farak* herself, a person the AGO was prosecuting. By failing to make reasonable efforts to get to the bottom of Farak's misconduct, the AGO violated its duty to investigate.

3. The AGO Had an Ethical Obligation to Disclose Exculpatory Evidence to Defendants Whose Cases May Have Been Tainted by Farak's Criminal Conduct

The AGO had an ethical (as well as a state and federal constitutionally grounded)[24] obligation to disclose exculpatory evidence from the Farak investigations to defendants being prosecuted by the Commonwealth based on Farak's work. By failing to disclose the Worksheets when the AGO knew about them and after the AGO was unable to find any legal support for a claim of privilege, the AGO violated MRPC Rules 3.3 and 3.8.

Beyond the ordinary disclosure obligations imposed on all attorneys under Rules 3.3 (and 4.1, discussed above), prosecutors have special obligations of their own under Rule 3.8. Rule 3.8(d) provides that the prosecutor in a criminal case must 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," and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.[25]

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[24] The United States Supreme Court has made clear that *Brady* is principally a trial right, and declined to impose identical *Brady* obligations in post-conviction proceedings (such as an ongoing duty to learn of favorable evidence in the possession of any state official). *See Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009). But the AGO is wrong to argue that prosecutors are relieved of any due process obligation to disclose exculpatory evidence they learn about after conviction. *See* AGO Memo in Opp. at 21. The Supreme Court has never so held. And with good reason: the implications of such a rule would be extraordinary indeed, allowing, for example, a prosecutor to suppress an exculpatory DNA report, evidence confirming a defendant's alibi, or a reliable confession from another suspect simply because he or she learns about it after a conviction is final.

[25] Legal academics have also discussed the scope of prosecutors' ethical obligations as well as proposed changes to the ethics rules to protect defendants' rights. *See generally, e.g.*, Hon. Emmet G. Sullivan, *Enforcing Compliance with Constitutionally-Required Disclosures: A Proposed Rule*, 2016 Cardozo L. Rev. DeNovo 138 (advocating that Fed. R. Crim. P. should be amended to explicitly incorporate constitutionally required prosecutorial disclosures); Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 Wash. L. Rev. 35 (2009) (arguing that, when a defendant's factual innocence is in question, there should be a fuller realization that prosecutors should be "ministers of justice" in the post-conviction context); Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 Ohio St. J. Crim. L. 467 (2009) (discussing prosecutors' affirmative obligations when new evidence is discovered that a convicted defendant might be innocent).

As the AGO notes, Rule 3.8 has amended in April 2016 to specify disclosure responsibilities where a prosecutor finds evidence that potentially exculpates a defendant being prosecuted by a different office. *See* MRPC 3.8(i); AGO Memo in Opp. 23. Comment [7] to Rule 3.8 provides that "Paragraph (i) applies to new, credible, and material evidence regardless of whether it could previously have been discovered by the defense. The disclosures required by paragraph (i) should ordinarily be made promptly."

But Rule 3.8(i) is not necessary to establish the AGO's duty to disclose—either to defendants or DAs—evidence that tended to exculpate Farak Defendants. As shown above, under the specific circumstances of the Farak investigation, the AGO was part of the DAs' "team," and thus was *not* a different office under Rule 3.8. Moreover, interpreting Rules in existence before Rule 3.8(i), the SJC has made clear that the Commonwealth has a specific duty to learn of and disclose exculpatory evidence in connection with prosecuting drug lab misconduct cases—including Farak's. This duty extended not only to defendants in a pre-trial or pre-plea posture, but those who had already been convicted based on Farak's testing:

> When personnel at the Amherst drug lab notified the State police in January, 2013, that Farak may have compromised the evidence in two drug cases, *the Commonwealth had a duty to conduct a thorough investigation to determine the nature and extent of her misconduct, and its effect both on pending cases and on cases in which defendants already had been convicted of crimes involving controlled substances that Farak had analyzed*. It is well established that the Commonwealth has a duty to learn of and disclose to a defendant any exculpatory evidence that is "held by agents of the prosecution team."

Ware, 471 Mass. at 95 (emphasis added); *Cotto*, 471 Mass. at 112 (same); *cf. Bridgeman II*, 476 Mass. at 315 ("[T]he government bears the burden of taking reasonable steps to remedy [egregious] misconduct. . . . Those reasonable steps include the obligation to timely and effectively notify the defendant of egregious misconduct affecting the defendant's criminal

case."); *Ware*, 471 Mass. at 95 ("[T]he duties of a prosecutor to administer justice fairly, and particularly concerning requested or obviously exculpatory evidence, go beyond winning convictions.") (citing *Commonwealth v. Tucceri*, 412 Mass. 401, 402–403 (1992) & MRPC 3.8(d)).

Here, there is no dispute that Kaczmarek and other AGO attorneys knew of the Worksheets' existence, and also knew that the Worksheets contained *direct admissions* by Farak regarding her criminal conduct, at least 18 months before they were finally disclosed. Whether or not Kaczmarek, Foster, or anyone else at the AGO realized back in 2013 that the dates on the Worksheets indicated drug use in 2011 rather than 2012 does not relieve them of their obligation to produce these plainly exculpatory materials; they had an obligation to give the defendants a fair opportunity to investigate the admissions reflected therein.[26] *See, e.g., Commonwealth. v. Ellison*, 376 Mass. 1, 25 (1978) (setting aside verdict because prosecutor's "late, piecemeal, and incomplete disclosures forced on defense counsel the necessity of making difficult tactical decisions quickly in the heat of trial"); *Commonwealth v. Vaughn*, 32 Mass. App. Ct. 435, 443 (1992) (setting aside verdict because prosecutor did not timely disclose witness's material change in testimony that implicated defendant).

As demonstrated above, the AGO had an ethical obligation under MRPC 3.3 to disclose information having "potential evidentiary value," subject to evidentiary privileges or other lawful objections. In addition, pursuant to Rule 3.8(d), the AGO had an ethical obligation

[26] Most obviously, the defendants could have done what the AGO did not: checked the dates against a calendar. Even assuming that the AGO's assumption was correct that the log entries were from 2012, defense counsel was certainly entitled to probe the reasons why Farak was in drug treatment at all—and specifically, whether she had (in her own words) "failed" to resist the "urge" to use drugs on the job at any time prior to the dates on the Worksheets. We now know that both facts are true: the Worksheets *did* constitute direct admissions of drug use from more than a year earlier, *and* those 2011 dates were not the full (nor earliest) accounting of her use.

to timely disclose to the defense all unprivileged mitigating evidence, unless the court relieved it of the obligation.

The AGO also argues that "[n]otwithstanding that Sgt. Ballou had emailed to Ms. Kaczmarek a copy of the mental health records, *Ms. Kaczmarek did not know that the mental health records were not kept in Sgt. Ballou's file* but instead, were in the evidence room." AGO's Proposed Findings of Fact, ¶ 278 (emphasis added); Tr. VI, at 175 (AGO questioning during Kaczmarek's testimony). This is a red herring. Wherever Ballou may have stored the original copies of the Worksheets, he scanned and emailed them to Kaczmarek—at her request—months before this issue was litigated before Judge Kinder. Indeed, she herself listed them in an email among the specific categories of evidence seized by Ballou when she and her colleagues were debating how to respond to Judge Kinder's order to produce "the file" *in camera* for his inspection if not already disclosed. And she apparently failed to mention to those same colleagues what she later conceded at this hearing: that she knew, at that time, that the Worksheets had yet to be disclosed. Tr. VI, at 133:10-15 (Kaczmarek).

And just as it does not take "looking back" to see that the AGO's investigation was inadequate, it does not take "looking back" to see that its disclosures were inadequate as well. *Contra* AGO Memo in Opp. at 18. The Worksheets were flagged in early 2013, as soon as Ballou and Kaczmarek saw them. Kaczmarek set the documents aside and conferred with John Verner about them; they both understood that the documents had not been turned over. In fact, Kaczmarek testified that she would not have told Foster that everything had been turned over because she understood that the Worksheets had not been disclosed. *See* Tr. VI, at 133:10-15 (Kaczmarek). Regardless, the Worksheets were not disclosed to anyone other than Farak's attorney, Elaine Pourinski, who testified that Kaczmarek expressly assured her that the AGO had

made a decision not to disclose them to other defense attorneys. Tr. VI, at 25:13-14 (Pourinski). Based on this evidence, one or more AGO attorneys may have made a deliberate decision not to disclose the Worksheets, even though they knew it was the most important evidence they had.

D. The AGO's Conduct Was Egregious and Warrants a Severe Remedy

"[P]rosecutorial misconduct that is egregious, deliberate, and intentional, or that results in a violation of constitutional rights may give rise to presumptive prejudice." *Bridgeman II*, 476 Mass. at 316 (quoting *Commonwealth v. Cronk*, 396 Mass. 194, 198-99 (1985)). In those circumstances, "prophylactic considerations may assume paramount importance" and dismissal of charges is called for even if the defendant could still obtain a fair trial. *Id.* at 316-17. For example, when two agents of the U.S. Drug Enforcement Administration spoke with a defendant without his attorney's approval and encouraged him to cooperate with them, the SJC dismissed drug charges with prejudice. *See Commonwealth v. Manning*, 373 Mass. 438 (1977). Of course, when the Commonwealth fails to disclose evidence, dismissal with prejudice is appropriate if the defendant can no longer obtain a fair trial. *See Bridgeman II*, 476 Mass. at 316.

In the Dookhan scandal, the SJC has imposed a powerful remedy that stops just short of blanket dismissals with prejudice. The SJC has ordered that, by April 18, 2017, "the district attorneys *shall exercise* their prosecutorial discretion . . . by moving to vacate and dismiss with prejudice all drug cases the district attorneys would not or could not reprosecute if a new trial were ordered." *Bridgeman II*, 476 Mass. at 300 (emphasis added). While the criteria for selecting these cases has been left in significant respects to the district attorneys, the *volume* has not. The SJC has said that "unless the district attorneys . . . dismiss with prejudice the drug convictions of *large numbers* of relevant Dookhan defendants," the court may order wholesale dismissals. *Id.* at 326-27 (emphasis added). In stopping short of issuing that remedy as yet, the

SJC has pointed specifically to "the absence of any evidence of misconduct by a prosecutor." *Id.* at 322.

Here, such evidence is abundant. The question in this case is not whether Farak's misconduct alone warrants dismissals with prejudice. Nor is it whether such dismissals would be warranted if Farak's misconduct had been combined with a single act of prosecutorial misconduct following her arrest. Rather, the question is whether "prophylactic considerations" require dismissals with prejudice where: (1) a state chemist committed misconduct in thousands of cases; (2) state prosecutors withheld key evidence that they knew about and discussed internally for months before and after it was subpoenaed; (3) state prosecutors failed to conduct any reasonable investigation into the scope of the chemist's misconduct, even after hearings were convened for that purpose; (4) a state prosecutor made material, false statements to a court; *and* (5) the Attorney General's Office failed for over two years to alert any court about these falsehoods. To ask this question is to answer it.[27]

The AGO's sole response, other than its mistaken denial of any egregious misconduct, is to argue that "delayed disclosure has not caused prejudice" because defendants now have the documents that the AGO improperly withheld. AGO Memo in Opp. 11. This argument would be easier to accept if the AGO had undertaken substantial efforts to mitigate its mistakes. But, aside from unspecified "training programs" for AGO staff, no such mitigation appears to have happened. *See* AGO Memo in Opp. at 41. More than four years after Farak's arrest, there is still not a comprehensive list of the cases in which Farak was involved, let alone a

[27] *Cf. Kyles v. Whitley*, 514 U.S. 419, 436 (1995) (emphasizing that a court must consider the impact of suppressed evidence on the fairness of the proceeding "collectively, not item by item."); *Smith v. Cain*, 565 U.S. 73, 75 (2012) (explaining that, to grant relief, a *Brady* court need not find that a defendant would have received a different result absent the misconduct, but instead whether the State's actions "undermine[] confidence in the outcome of the trial") (citations omitted).

system in place for re-testing drug samples, providing notice, and assigning counsel to thousands of potentially affected defendants—some of whom may not have committed any crime at all.

Indeed, it is now well-established that the United States criminal justice system convicts innocent people at a rate once thought to be unimaginable. The National Registry of Exonerations, which chronicles exonerations nationwide that have occurred since 1989, reports almost 2000 exonerations as of this date—with 2016 a record year for exonerations of persons who pled guilty to crimes they did not commit.[28] Of the six leading causes of wrongful convictions identified by the Innocence Project, two of them—government misconduct and misapplication of forensic science—are implicated in each of the cases at issue here.[29]

Traditionally, in cases of official misconduct, the rights of defendants must be balanced against the necessity for preserving society's interest in the administration of justice. Society's interest is never served, however, when the administration of justice results in the conviction of innocent people. Here, the conclusion is inescapable that some number of these convictions were of the innocent. Yet because of the AGO's actions, more than four years after Farak's arrest, the process of determining just how many of the thousands of "Farak Defendants" may have actually committed no crimes at all has scarcely begun.

The AGO also ignores the inconvenient fact that defendants like Mr. Penate, who diligently pursued the truth about Farak's impact on his case after her arrest became known, have been incarcerated for years while the Commonwealth delayed providing accurate information. When prosecutorial misconduct causes a substantial delay that keeps people in prison, without access to the very information that could help to secure relief, the delay is decidedly prejudicial.

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[28] See National Registry of Exonerations, *Exonerations in 2016* (Mar. 7, 2017), at 3, http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2016.pdf

[29] *See* The Innocence Project, https://www.innocenceproject.org/ (last visited March 14, 2017).

Cf. Commonwealth v. Washington W., 462 Mass. 204, 217 (2012) ("The opportunity eventually to present this claim would not cure the loss of the earlier opportunity to present it.").

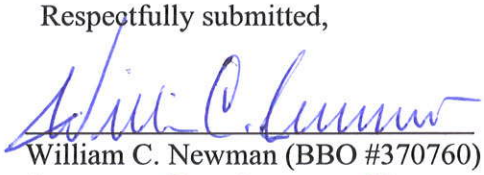
The Massachusetts Attorney General's Office—under its current leadership, and in years past—has been a leader in civil rights issues too numerous to detail here, including criminal justice. But in this case, the AGO's defense of its former assistants' conduct is badly misplaced. For that reason, *amici* urge this Court to use the full breadth of its powers to remedy these violations and restore public trust.

CONCLUSION

Given the sheer volume of problems that the Commonwealth has created in the Farak cases, allowing the Commonwealth a do-over could not possibly "maintain[] the fairness and integrity of our criminal justice system." *Bridgeman II*, 476 Mass. at 301. Accordingly, *amici* respectfully request that this Court make findings on prosecutorial misconduct and fashion a substantial judicial remedy. Any other approach to this scandal would, unfortunately, invite a new one.

March 16, 2017

Respectfully submitted,



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*Motion for admission *pro hac vice* forthcoming

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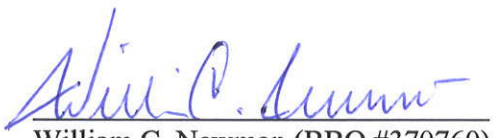

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