COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

SUFFOLK, SS. No. SJC-12471

COMMITTEE FOR PUBLIC COUNSEL SERVICES & OTHERS,
Petitioners-Appellants,

v.

ATTORNEY GENERAL OF MASSACHUSETTS & OTHERS,
Respondents-Appellees.

ON RESERVATION AND REPORT FROM
THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

BRIEF OF THE ATTORNEY GENERAL

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INTRODUCTION

For the second time in recent years, this Court must address the consequences of egregious misconduct by a state employee whose work formed the factual predicate for thousands of criminal convictions. *See generally Commonwealth v. Cotto*, 471 Mass. 97 (2015) ("*Cotto I*"). The Single Justice has already dismissed with prejudice more than 8,000 convictions — almost all of those for which Sonja Farak signed the drug certificate during her nine-year tenure as a chemist at the Amherst Drug Lab. *See* Dkt. #173, No. SJ-2017-347. The question for this Court is the extent of further relief that may be warranted, given the extraordinary nature of Farak's misconduct and the deeply regrettable fact that two former Assistant Attorneys General themselves engaged in conduct that the Superior Court (Carey, J.), considering post-conviction motions in *Cotto*, described as "a fraud upon the court." *Commonwealth v. Cotto*, No. 2007-770, slip op. at 69, 123 (Hampden Super. Ct. June 26, 2017) (reproduced beginning at R.Add. 12).[1]

As this Court has already recognized, the extraordinary circumstances of this case "ha[ve]

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[1] References to PB__ are to the petitioners' brief; to R.Add.__ are to the petitioners' record addendum; to R.App.__ are to the petitioners' record appendix; to T(date)__ are to transcripts; and to AGO Add.__ are to the addendum to this brief.

serious implications for the entire criminal justice system." *Cotto I*, 471 Mass. at 115. Cases like this one challenge fundamental assumptions about how that system operates, and demand that we examine our understanding of each component of the phrase "criminal justice system."

Taking them out of order: "justice" is not easily defined, but it is surely the goal of any proceeding involving the coercive power of the state. As this Court has explained, "[t]he purpose for which courts are established is to do justice." *Crocker v. Justices of the Superior Court*, 208 Mass. 162, 179 (1911). And "the Attorney General, as 'chief law officer of the Commonwealth,'" *Sec'y of Admin. & Fin. v. Att'y Gen.*, 367 Mass. 154, 159 (1975), has a special responsibility to ensure, insofar as her authority allows, that justice is done in every case.

Since taking office in 2015, Attorney General Healey has embraced that responsibility, and her office will continue to work cooperatively with this Court, the District Attorneys, and the petitioners, in order to achieve justice in this matter. We are especially cognizant that misconduct committed by former Attorney General's Office ("AGO") staff has contributed to the ways in which justice was not done in this case. The AGO therefore concurs with the petitioners' recommendations for significant forward-

looking measures designed to avoid misconduct in future cases. *See infra*, Argument Section III. The AGO also believes that, where confidence has been irremediably undermined in the integrity of evidence supporting a conviction, justice has not been done. Accordingly, the AGO supports the dismissal of charges against certain additional defendants, beyond the 8,000-plus already dismissed. *See infra*, Argument Section I(A).

Relatedly, contemporary criminal justice is a complex "system" that involves the intersection of, at least, policymakers, police, investigators, support staff, prosecutors, defense attorneys, judges, juries, witnesses, victims, and defendants. The nature of such interconnected systems is that a failure at any point can resonate throughout the entire system, and can damage confidence in its overall functioning. Judge Carey found this to be such a case, because "Farak's theft, tampering, and use of narcotics at the lab created a problem of systemic magnitude," R.Add. 38-39, and because the "ramifications" of the misconduct of the two former Assistant Attorneys General were "nothing short of systemic," R.Add. 87. The AGO believes that both justice and efficiency will best be served by system-wide remedies, as described herein, given the system-wide failures in this case.

Finally, the people of the Commonwealth, through their elected representatives, have determined that the conduct described in G.L. c. 94C is "criminal" conduct that harms society and therefore merits punishment. Where conduct duly defined as "criminal" has been proven, and where the proof has not been undermined, society retains an interest in upholding the resulting convictions. That interest, too, is part of criminal justice - as Judge Carey explained, "[c]ourts must tailor remedies for prosecutorial misconduct to the injury suffered and balance the defendants' rights against the need to preserve society's interest in the administration of justice." R.Add. 93 (citing *Commonwealth v. Cronk*, 396 Mass. 194, 199 (1985)). And, for that reason, the AGO concurs with Judge Carey's conclusion that, for defendants as to whom the record shows no indication that Farak tainted the evidence underlying their conviction, the extraordinary remedy of dismissal with prejudice is not warranted "because the egregious government misconduct had no material connection with them." R.Add. 95; *see also id.* at 139 ("There is no factual basis, as asserted by some defendants, that all testing performed at the Amherst lab during Farak's tenure is suspect.").

In devising appropriate remedies in this case, these three components should be kept in mind.

Because "criminal" conduct is involved, it is important to balance society's interests with those of individual defendants; because "justice" is the ultimate goal of all judicial proceedings, broad backward- and forward-looking remedies are appropriate; and because the "system" of criminal justice was compromised in this case, the usual case-by-case proceedings do not suffice. In what follows, the AGO strives to be guided by these principles in order to arrive at a position that appropriately balances the interests of defendants and of society, and that ultimately can begin to restore the confidence in the criminal justice system that this case has, justifiably, shaken.

REPORTED QUESTIONS

The AGO will address the reported questions in the following order:

1. Whether the definition of "Farak defendants" being employed by the District Attorneys in this case is too narrow; specifically, based on the material in the record of this case, whether the appropriate definition of the class should be expanded to include all defendants who pleaded guilty to a drug charge, admitted to sufficient facts on a drug charge, or were found guilty of a drug charge, if the alleged drugs were tested at the Amherst Laboratory during Farak's employment there, regardless whether Farak was the

analyst or signed the certificates in their cases.

2. Whether the defendants in some or all of the "third letter" cases are entitled to have their convictions vacated, and the drug charges against them dismissed with prejudice, given the undisputed misconduct of the Assistant Attorneys General found by Judge Carey in *Commonwealth vs. Erick Cotto*, Hampden Sup. Ct., No. 2007-770 (June 26, 2017) (memorandum and order on postconviction motions), and given the conduct of the District Attorneys that the petitioners allege was improper.

3. Whether, as the petitioners request, the record in this case supports the court's adoption of additional prophylactic measures to address future cases involving widespread prosecutorial misconduct, and whether the court would adopt any such measures in this case.

STATEMENT OF THE CASE

I. Prior Proceedings

This matter has reached the Court on a Reservation and Report of three questions by a Single Justice (Gaziano, J.). R.App. 387-88.

Several cases raising issues involving the misconduct of former state chemist Sonja Farak, and other alleged misconduct in connection with the Farak investigation, were consolidated for case management and decision in Hampden Superior Court. The Court

(Carey, J.) conducted a six-day evidentiary hearing, taking the testimony of some nineteen witnesses and receiving hundreds of exhibits. Based upon the evidence before it, the Court found that Farak committed egregious misconduct at the Amherst Laboratory by consuming drugs while at work and tampering with samples of drug evidence that had been submitted by the police. *See* R.Add. 83-84. The Court also found that two former Assistant Attorneys General committed egregious misconduct by withholding exculpatory evidence about the scope of Farak's misconduct. R.Add. 84-87.

Based upon the Superior Court's findings, the petitioners filed a petition for relief under G.L. c. 211, § 3, and G.L. c. 231A, § 1. R.App. 2, 14-42. They contended that the misconduct found by Judge Carey warranted the dismissal of convictions of all "Farak Defendants," which they defined to "include anyone with a nonfrivolous ground for bringing a post-conviction claim arising from the misconduct at the Amherst lab." R.App. 17.

Subsequent to the filing of the petition, the Single Justice convened two hearings and directed the AGO and the District Attorneys' Offices (DAOs) to respond to the petition and submit a proposal for questions to be reported to the full Court. R.App. 3, 5. For its part, the AGO "accepted all of the factual

findings in Judge Carey's 127-page opinion in order to facilitate this litigation and bring expeditious relief to thousands of affected defendants." Dkt. #64 at 4, No. SJ-2017-347. The AGO urged the parties to act quickly to "execute a *Bridgeman*-based protocol for dismissing as many cases as possible, in a manner that provide[d] all necessary due process protections." Dkt. #64 at 2, No. SJ-2017-347; *see Bridgeman v. Dist. Atty. for the Suffolk Dist.*, 476 Mass. 298 (2017). And the AGO maintained that if there remained convictions that were not dismissed under the *Bridgeman* protocol, "the question of any further remedy" should be reported to the full Court.[2] R.App. 302. The DAOs also agreed that the *Bridgeman* protocol should be followed, and asked the Single Justice to dismiss more than 8,000 convictions that were obtained using drug certificates signed by Farak.[3] R.App. 6, 368, 386. The Single Justice recently issued a judgment, dismissing with prejudice thousands of convictions identified by the DAOs. Dkt. #173, No. SJ-2017-347. The AGO understands that the DAOs will seek the dismissal of additional convictions.

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[2] The AGO has not identified any criminal cases that it initiated in which drug evidence was tested by Farak at the Amherst lab. R.App. 310.

[3] The District Attorney for Bristol County filed his own, separate submissions before the Single Justice. *See, e.g.*, Dkt. #52, #77, No. SJ-2017-347.

II. Factual Background

A. Sonja Farak's Misconduct

Sonja Farak was hired by the Commonwealth of Massachusetts in 2002 to conduct HIV testing. R.Add. 28. At that time and over the next approximately sixteen months, she consumed alcohol, marijuana, and ecstasy. R.Add. 28. She also tried methamphetamine. R.Add. 28. In mid-2003, she transferred to the Hinton State Drug Laboratory in Jamaica Plain. R.Add. 28. And in August of 2004, she transferred to the state drug laboratory in Amherst (the "Amherst lab"), where she worked alongside James Hanchett (the supervisor of the lab), Sharon Salem (the evidence officer), and Rebecca Pontes (a fellow chemist), until the lab closed on January 18, 2013. R.Add. 21.

In late 2004 or early 2005, Farak began to consume some of the methamphetamine "standard" from the Amherst lab. R.Add. 28. A "standard" is a known substance (*i.e.*, drug) against which police-submitted evidence samples are compared for testing and identification. R.Add. 24. Over the next several years, Farak's drug use escalated sharply both in the types of drugs that she was consuming and in the frequency with which she was consuming them; she also began to consume portions of police-submitted evidence samples. R.Add. 27-38. By the middle of 2012, she

was stealing from samples that were assigned to other chemists. R.Add. 33.

On January 18, 2013, after lab workers realized that two samples of police-submitted cocaine were missing and that Farak was the likely culprit, her misconduct was reported to the State Police, which had assumed control of the lab from the Department of Public Health. R.Add. 21, 39. The State Police closed the lab immediately, and Farak was arrested the next day. R.Add. 39. Eventually, on January 6, 2014, she pled guilty to four counts of tampering with evidence, four counts of stealing cocaine from the Amherst lab, and two counts of unlawful possession of cocaine; she was sentenced to a total of 2½ years in jail, with one year suspended and a five-year term of probation. Exh. 180 at 41, 44-45. Based upon these circumstances, the Commonwealth conceded, and the Superior Court found, that Farak engaged in egregious misconduct. R.Add. 83.

B. Misconduct Of Two Former Assistant Attorneys General

Former Assistant Attorney General Anne Kaczmarek was assigned to handle the investigation into Farak's misconduct and the criminal charges that eventually were brought against Farak. R.Add. 46. As part of the investigation, State Police troopers executed a search warrant for Farak's car, and they seized

certain evidence. R.Add. 42. Some of the evidence showed that, in 2011, Farak had sought mental health treatment and had consumed, or had grappled with the urge to consume, drugs. R.Add. 43-47. Yet, the investigation into Farak's misdeeds had been focused upon late 2012, which was the timeframe associated with the conduct for which she was arrested. R.Add. 53. Kaczmarek did not present the 2011 mental health evidence to the grand jury, and it was not disseminated to the DAOs.[4] R.Add. 56-57.

Some defendants, upon learning of Farak's misconduct, moved to dismiss the indictments against them or for collateral relief under Mass. R. Crim. P. 30 in cases where she analyzed and certified the drug evidence. R.Add. 79-80. They also filed motions for discovery, which included requests to compel the production, or allow the inspection, of materials related to Farak's arrest and the criminal proceedings against her. R.Add. 43-45.

Former Assistant Attorney General Kris Foster was assigned to respond to certain of those discovery requests. R.Add. 62. She opposed them in written filings and at hearings before the Superior Court in September and October of 2013. R.App. 103, 130, 144.

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[4] The AGO was providing the DAOs with certain materials that had been gathered during the Farak investigation. *E.g.*, Exh. 165, 260.

But she did so without having personally reviewed the evidence itself, which contained the 2011 mental health and drug-use evidence. R.Add. 62-64. Instead, she relied upon representations from Kaczmarek to, in turn, make representations to the Superior Court, including inaccurate statements that all materials responsive to the discovery requests had already been disclosed and that the evidence seized from Farak's car and workstation was irrelevant. R.Add. 62-64, 71, 74.

Because the 2011 mental health and drug-use evidence was not disclosed, the Superior Court (Kinder, J.) found (on the basis of the only evidence then before it) that Farak's misconduct was limited to a period of approximately six months, from July of 2012 until January of 2013, and it denied relief in cases where Farak had tested the drug evidence on dates outside of that range. R.Add. 19, 78. In late October of 2014 (after Judge Kinder's decision), a defense attorney obtained access to the evidence that had been seized from Farak's car, found the 2011 mental health and drug-use evidence, and informed the AGO of his discovery. R.Add.79-80.

When it came to light that the 2011 mental health evidence had not been disclosed, there was a "flurry of activity" within the AGO's Criminal Bureau. T(12/16/16) 70. The then-Chief of the Criminal

Bureau, John Verner, went back through his email from the relevant time period and spoke with others in the office in an attempt to reconstruct and understand what had happened. T(12/15/16) 203; *id.* at 198, 220-21. At the same time, he directed his subordinates to assess whether any other materials should have been, but were not, disclosed. T(12/15/16) 199, 221. The Bureau's first priority, as identified by Verner, was to release to the DAOs any materials that should have been released earlier. *Id.* On November 13, 2014, the AGO sent the mental health evidence and other documents not previously disclosed to the DAOs. R.Add. 80.

The Superior Court (Carey, J.) ultimately determined that former Assistant Attorneys General Kaczmarek and Foster "tampered with the fair administration of justice by deceiving [the court] and engaging in a pattern calculated to interfere with the court's ability to adjudicate discovery in the drug lab cases and to learn the scope of Farak's misconduct." R.Add. 86. The Court found that their conduct constituted a "fraud upon the court." R.Add. 86. The Superior Court did not, however, impute their misconduct to other members of the AGO. To the contrary, it specifically found that their "colleagues" – that is, those who worked with them in

the Attorney General's Office — were "committed and principled public servants." R.Add. 141.

C. The Caldwell Investigation And AGO Efforts To Identify Defendants Affected By Farak's Misconduct

In *Cotto I*, the full Court indicated that the Commonwealth should investigate "the timing and scope of Farak's misconduct at the Amherst drug lab in order to remove the cloud that ha[d] been cast over the integrity of the work performed at that facility . . . ." 471 Mass. at 115. The AGO agreed to undertake the investigation and assigned Assistant Attorney General Thomas Caldwell to conduct it. R.App. 304; R.App. 312. Caldwell convened two grand juries, called several witnesses, reviewed voluminous other evidence, and issued a 54-page report. R.App. 304; R.App. 313, 315-16 (summarizing the testimony of the grand jury witnesses). Noting that *Cotto I* "mandated an expeditious investigation," the Superior Court "commend[ed] what Caldwell. . . accomplished in a reasonable period."[5] R.Add. 83 n.36.

In addition to Caldwell's efforts, other officials in the AGO were taking steps to identify defendants who may have been affected by Farak's misconduct. To that end, in April 2015, the new Criminal Bureau Chief, Kimberly West, consulted with

[5] The Superior Court's opinion considered and rejected an allegation that Caldwell's investigation was inadequate. R.Add. 83 n.36; *cf.* PB 29-32.

supervisory prosecutors in the AGO's Enterprise and Major Crimes Division and confirmed that none of the drugs in cases prosecuted by the AGO were analyzed at the Amherst lab. R.App. 305. Subsequently, the AGO also searched its own internal case-management system, DAMION, and generated a list of all prosecutions that it had undertaken for violations of Chapter 94C of the General Laws. R.App. 309. A staff member then compared the names on the DAMION-generated list to the names on spreadsheets that West had obtained from the State Police and the Executive Office of Public Safety and Security, containing records of criminal cases in which drug evidence had been tested at the Amherst lab. R.App. 309. There did not appear to be any relevant matches between defendants that the AGO had prosecuted for drug offenses and those for whom Farak had served as the drug evidence analyst. R.App. 309.

In addition, to assist the DAOs in their efforts to identify Farak defendants, West provided them with the State Police spreadsheets and other relevant data as they became available. R.App. 305-06, 309. West also coordinated certain efforts among the AGO and DAOs to address: (1) the extent to which each office had cases affected by Farak's misconduct; (2) methods for identifying and notifying affected defendants; (3) whether each office had sufficient resources to identify potentially affected defendants; (4) whether

local police departments were preserving drug samples; and (5) whether to grant Farak immunity in connection with Caldwell's investigation. R.App. 305-08. Further, in light of the Hampden County District Attorney's Office's disproportionately high number of affected cases, the AGO also provided staff support to that office to aid in the review of case files and the identification of Farak defendants. R.App. 309.

D. The Superior Court's Decision in Cotto Did Not Call Into Question The Integrity of Testing By Other Chemists At The Amherst Lab.

Some of the defendants before the Superior Court argued that Farak's misconduct and other practices at the Amherst lab formed a basis for relief in cases where the drug evidence was tested by other chemists. The Superior Court flatly rejected that argument, finding that "the accuracy of drug analysis certificates signed by chemists other than Farak is not in question." R.Add. 83-84.[6]

At the evidentiary hearing, the Commonwealth had offered the testimony of Dr. Robert Powers, an associate professor in the Department of Forensic Sciences at the University of New Haven. T(12/15/16)

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[6] *See also* R.Add. 139 (Superior Court finding that, "apart from Farak's misconduct, the deficiencies at the Amherst lab do not give the defendants grounds for post-conviction relief. There is no factual basis, as asserted by some defendants, that all testing performed at the Amherst lab during Farak's tenure is suspect.").

136; Exh. 264. Powers had held leadership positions in laboratories around the country, including a stint as the Director of the Controlled Substances and Toxicology Laboratory for the Connecticut Department of Public Safety. Exh. 264. He also served as an inspector for the American Society of Crime Laboratory Directors, a body that accredits crime laboratories throughout the nation. T(12/15/16) 138.

At the Commonwealth's request, Powers reviewed certain documents and testimony regarding the Amherst lab. He concluded that the actual drug testing processes at the Amherst lab "were producing reliable results." T(12/15/16) 161. In addition, he determined that the "core" analyses being performed at the Amherst lab – that is, "determining whether or not a particular drug was or was not a particular controlled substance" – were "well within" the guidelines set forth by the Scientific Working Group for Seized Drug Analysis, a "worldwide group, whose purpose was to provide workable guidelines which would set . . . a minimal level of acceptability for the process of analysis of seized drugs." T(12/15/16) 142-43. He disputed the suggestion that the Amherst lab's use of so-called "secondary standards" was necessarily a poor or unreliable practice.[7]

[7] "There are two types of standards: primary standards, which labs purchase from pharmaceutical

T(12/15/16) 147-55. And he confirmed that the lab's results were not rendered unreliable simply because the chemists did not run a blank through the testing machines between each sample.[8] T(12/15/16) 155-56.

In addition to Powers's testimony, the record also contained the transcript of testimony by Cathleen Morrison, a forensic scientist in the Quality Assurance Section of the Massachusetts State Police Forensic Services Group.[9] Exh. 80 at 32. Morrison was part of a team from the Quality Assurance Section that performed an audit of the Amherst lab in October of 2012, after the State Police assumed control of it. Exh. 80 at 34-35. Though the audit team identified certain procedures as needing improvement, Exh. 1, Morrison repeatedly insisted that the "way the [drug] testing was conducted" at the Amherst lab did not

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companies and bear a certificate of analysis, and secondary standards, which are manufactured in the lab using police-submitted drug samples." R.Add. 24; T(12/8/16) 144-45. Owing to budgetary constraints, secondary standards were manufactured and used in the Amherst lab. R.Add. 25. The Superior Court specifically found that "the secondary standards . . . yielded sufficiently accurate analytical results," and that the use of secondary standards "was acceptable, reliable, and consistent with the lab's goal of identifying controlled substances." R.Add. 25.

[8] The Superior Court specifically credited Powers's testimony about the use of blanks and discredited the contrary testimony of an expert offered by the *Cotto* defendants. R.Add. 24.

[9] Morrison testified at an evidentiary hearing before Judge Kinder in September of 2013. The transcript of her testimony was one of the many exhibits submitted to Judge Carey. Exh. 80.

raise "any concerns in [her] mind about the reliability of the end result." Exh. 80 at 85, 86, 87; see also Exh. 1 at 3 (actual audit report, finding "no deficiency" in "analytical procedure"); Exh. 184 at 6 (Judge Kinder's finding that the State Police audit "did not reveal any unreliable testing").

Finally, all three chemists who worked alongside Farak at the Amherst lab expressed a belief that the results of their own testing were reliable. Pontes declared that she generally had no reason to question the reliability of the testing that she had performed at the lab over her ten-year tenure.[10] T(12/14/16) 78. Salem stated unequivocally, "Our analysis of the drugs was proper." T(12/12/16) 194. And Hanchett agreed that the actual processes used to analyze suspected drugs met the minimum requirements for the Scientific Working Group for Seized Drug Analysis. T(12/8/16) 123-24.

SUMMARY OF ARGUMENT

There is no question that the misconduct that occurred here tainted the evidence underlying thousands of drug convictions. Systemic relief, designed to address that taint, is needed in order to

[10] Pontes did have reservations about whether the results of her testing would have been accurate if Farak had tampered with the evidence before she analyzed it, a point the AGO addresses *infra*, Argument Section I(A). T(12/14/16) 78-79.

restore confidence in the criminal justice system. In addition to the many thousands of defendants whose drug certifications were signed by Sonja Farak and whose convictions have thus rightly been dismissed, defendants whose convictions rest upon drug evidence that was tested at the Amherst lab between June of 2012 and January of 2013 are also entitled to relief. During that period, Farak tampered with drug samples that had not been assigned to her — and in some instances, before those samples were tested by other chemists. Because such pre-testing tampering could have affected the reliability of any subsequent drug analysis, and because Farak did not identify all such samples, convictions resting upon drug evidence tested at the Amherst lab during this time period should be subjected to the *Bridgeman* protocol. *Infra*, pp. 23-26.

The remaining Amherst lab defendants, whose drug samples were neither tested nor tainted by Farak, are not entitled to relief. The record does not support that drastic outcome, which would be well beyond anything this Court has approved in prior cases. Further, prosecutors have demonstrated that they understand and accept the core rationales that led to the extraordinary relief embodied by the *Bridgeman* protocol. They have identified more than 8,000 convictions that have been dismissed. The dismissal

of such a large number of convictions, the adverse consequences that have befallen the three individuals who were found to have engaged in misconduct, and the other prophylactic measures that have been proposed, send a powerful message of deterrence and provide additional layers of protection for defendants. In these circumstances, dismissal with prejudice of all Amherst lab convictions is not warranted. *Infra*, pp. 26-34.

The AGO has been advised that, as of this writing, the DAOs have decided not to certify any convictions as "third letter" convictions, *i.e.*, convictions that the DAOs both do not wish to dismiss and could re-prosecute without evidence tainted by Farak. The AGO supports this exercise of prosecutorial discretion by the DAOs. Thus, the question of what to do with these "third letter" cases — which was a live issue at the time of the Single Justice's Reservation and Report — is now moot, and this Court need not address it.[11] *Infra*, pp. 34-37.

The new AGO administration is committed to preventing future misconduct in criminal cases in the Commonwealth. To that end, the AGO endorses

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[11] Should the Court nonetheless wish to address the issue, however, the AGO offers some comments regarding the important criminal justice interests implicated in any consideration of dismissal of cases as a sanction for misconduct, where prejudice to the defendants can be remedied.

petitioners' proposal that this Court issue standing orders to protect defendants in criminal prosecutions. The AGO has also taken a number of steps, and will shortly take additional ones, intended to prevent a repetition of the misconduct that occurred in this case. In light of these measures and the other deterrents noted above, as well as this Court's precedent, the imposition of prophylactic or remedial fines against the AGO is unwarranted. However, under *Nelson v. Colorado*, defendants whose convictions have been dismissed are entitled to refunds for certain fines, fees and restitution. The precise scope of those refunds, as well as the appropriate mechanism to accomplish them, are questions presently before this Court in two pending cases, the resolution of which will dictate the procedures that need to be implemented here. *Infra*, pp. 37-52.

ARGUMENT

I. Some Amherst Lab Defendants Whose Convictions Rest Upon Drug Evidence Tested By Chemists Other Than Farak Are Entitled To Relief

The AGO agrees with the petitioners that the interests of justice require relief for additional defendants, beyond the thousands whose convictions have already been dismissed or identified for dismissal. Specifically, the AGO supports the granting of relief to all defendants with convictions that rest upon drug evidence that was tested at the

Amherst lab between June of 2012 and January of 2013, when Farak was arrested, regardless of who signed the drug certificate. During that period of time, the record suggests that Farak tampered with drug samples that she had not been assigned to analyze. Because she did not identify those samples with specificity, and because it is not clear that all such samples could be discerned with confidence or precision at this time, the *Bridgeman* protocol should be followed with respect to each of the above-described convictions.

A. In Cases Where Convictions Rest Upon Drug Evidence That Was Tested At the Amherst Lab Between June Of 2012 And January Of 2013, The *Bridgeman* Protocol Should Be Followed

The *Bridgeman* protocol should be followed in cases where convictions rest upon drug evidence that was tested at the Amherst lab between June of 2012 and January of 2013.[12]

In grand jury testimony, Farak recalled that she first began to steal from other chemists' samples in the summer of 2012. Exh. 56 at 154; *accord* Exh. 62 at 5 (Farak's proffer). Farak insisted that she stole

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[12] It does not appear that the Superior Court was specifically asked to decide whether to grant relief for defendants with convictions based upon evidence that was tested at the Amherst lab, but not by Farak, during this time period. In each of the cases before Judge Carey, Farak had signed the relevant drug certificate, R.Add. 101, 106, 108, 111, 117, 120-21, 130, 134, or the evidence was tested by another chemist before June of 2012, R.Add. 120, 128, 134.

from only one sample that had been assigned to Pontes but she was less precise about the number of samples assigned to Hanchett, estimating that she had tampered with "[p]robably half a dozen." Exh. 56 at 156-57. Farak described this aspect of her conduct as crossing a line that she thought she would "never cross." Exh. 56 at 159.

Judge Carey's findings tend to corroborate Farak's testimony that her condition deteriorated during this timeframe. According to Judge Carey, "[i]n 2012, co-workers sensed changes in Farak." R.Add. 34. Specifically, according to Judge Carey, "Hanchett noticed in the late summer or early fall that Farak's productivity had dropped, that her work station had become messy, that stacks of paper were not being filed properly, that her physical appearance had deteriorated, and that she was nosey about large samples submitted in drug trafficking cases." R.Add. 34-35. Judge Carey further found that "Salem noticed in the last months of 2012 that Farak had lost weight and was moody," and that "Salem and Pontes observed in those months that Farak was leaving the lab frequently during the day."[13] R.Add. 35.

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[13] The petitioners doubt the accuracy of Farak's memory on the ground that she was often under the influence of drugs or suffering from the symptoms of withdrawal. PB 30. But, as mentioned, her testimony on this point is corroborated by Judge Carey's findings.

By the end of 2012, Farak was going into the drug safe, stealing from unassigned samples, and consuming the stolen drugs to obtain "the desired narcotic effect" in the lab. Exh. 56 at 160-61. Because Farak was stealing from, and consuming portions of, unassigned samples, she was particularly concerned that the weight of the sample, as recorded when it was submitted to the lab, would differ from the weight that the testing chemist ultimately would record as part of the drug analysis. Exh. 56 at 162. To reduce the possibility that such discrepancies would draw scrutiny, she manipulated the lab's assignment and inventory systems. Exh. 56 at 143-44, 162-65. Farak did not purport to offer a comprehensive or definitive listing of all of the unassigned samples with which she had tampered.

On the record before this Court, these circumstances offer some evidence, beyond speculation, that between June of 2012 and January of 2013, Farak may have tampered with other chemists' samples before they were tested. Because Farak did not identify those samples with particularity, and because her pre-testing misconduct may have compromised the reliability of any subsequent analysis by other chemists, all defendants who were convicted based upon drug evidence that was tested at the Amherst lab during the relevant time period should be granted

relief under the *Bridgeman* protocol. *See infra*, Sections I(C) (explaining why *Bridgeman* provides appropriate relief in the circumstances of this case). As it has done with other affected cases, the AGO is committed to continuing to work with and support the DAOs to identify the affected cases expeditiously, should this Court concur with the AGO's position.

B. The Record Before This Court Does Not Support The Drastic Outcome of Dismissal With Prejudice Of The Convictions Of All Amherst Lab Defendants

The record before this Court does not, however, support the dismissal of all remaining Amherst lab convictions. The Superior Court found that "the accuracy of drug analysis certificates signed by chemists other than Farak is not in question." R.Add. 83-84, 139. With the exception of the convictions discussed *supra*, Section I(A), which the Superior Court did not specifically consider, there was ample evidence in the record to support that finding.[14]

In summary, both outside evaluators and those who worked in the lab were confident in the reliability of

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[14] The AGO did not initiate the charges that led to any of these convictions. R.App. 309-10. But as the chief law enforcement and prosecuting entity for the Commonwealth, the AGO does have an interest in the potential for such a sweeping dismissal of criminal convictions, particularly where no court has made a finding that the defendants at issue have suffered prejudice and one court has found that such defendants did not. *Town of Burlington v. Dist. Att'y for the N. Dist.*, 381 Mass. 717, 720 (1980); *Commonwealth v. Kozlowsky*, 238 Mass. 379, 388 (1921).

results produced by chemists other than Farak. *See supra*, Statement of the Case, Section II(D) (summarizing testimony of evaluators and lab workers). The Superior Court accepted that testimony. *E.g.*, R.Add. 21, 24. Consequently, on the record before this Court, the dismissal with prejudice of all convictions involving evidence tested at the Amherst lab is unwarranted. *Cf. Bridgeman*, 476 Mass. at 306.

The petitioners assert an alternative basis to find prejudice. They suggest that, by concealing the extent of Farak's misconduct, former Assistant Attorneys General Kaczmarek and Foster prejudiced all Amherst lab defendants because their actions hindered or delayed the ability of such defendants to seek relief. *E.g.*, PB 42-43. But absent some nexus between a particular conviction and Farak herself, there is no basis to conclude the defendant at issue was (or may have been) prejudiced by any delay, because there is no basis to conclude that the defendant was entitled to relief in the first place. Recognizing this, the Superior Court held that defendants for whom Farak did not sign the drug certificate are "not entitled to dismissal of indictments with prejudice because the egregious government misconduct had no material connection with them." R.Add. 95. *Cf. Commonwealth v. Nelson*, 90 Mass. App. Ct. 594, 596 (2016); *see* R.Add. 124

(Superior Court order, noting that evidence that Farak signed certificate was critical to a showing of prejudice). The AGO concurs with that assessment. Accordingly, the petitioners' alternative argument should not be deemed a persuasive basis to dismiss the convictions of all Amherst lab defendants.

C. Adequate Deterrents Exist To Prevent Future Misconduct Without Resorting To The Dismissal With Prejudice Of All Convictions Of Amherst Lab Defendants

Bridgeman struck a balance between "the rights of defendants" on one hand, and "the necessity for preserving society's interest in the administration of justice" on the other. *Bridgeman*, 476 Mass. at 316 (quotation omitted). It offered an innovative and workable protocol for providing relief in instances where misconduct has wide-reaching effects. And it appropriately recognized a core principle: systemic problems require aggressive, systemic solutions.

As of this writing, over 8,000 convictions have been dismissed, and the AGO has been advised that the DAOs have decided not to certify any convictions as "third letter" convictions, *i.e.*, convictions that the DAOs both do not wish to dismiss and could re-prosecute without evidence tainted by Farak. R.App. 386-87; *see infra*, Section II. And well before the instant case was even filed, prosecutors across the state were actively involved in the large-scale

undertaking of identifying affected defendants. *See, e.g.*, R.App. 304-10 (discussing efforts under new AGO administration). These actions demonstrate that prosecutors understand that tainted convictions cannot stand, and they are committed to the core rationale of *Bridgeman*.

Beyond *Bridgeman* itself, at least three other circumstances combine to send an unmistakable message that what happened here must not happen again. First, the standing orders and other measures discussed *infra*, Section III, will add additional layers of deterrence for government officials and protection for defendants. Second, the dismissal of over 8,000 convictions has a powerful deterrent effect. And third, the three actors here who were found to have engaged in misconduct — Farak, Kaczmarek, and Foster — have faced, and continue to face, severe negative consequences, all of which have occurred in the public eye and thus serve as significant deterrents against future misconduct.[15] Farak was imprisoned. R.Add. 79.

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[15] *See Commonwealth v. Lewin*, 405 Mass. 566, 585-87 (1989) (despite "contemptible and disgusting misconduct by police officers," dismissal with prejudice not warranted where repetition of the conduct would "be sufficiently discouraged" because "[t]he officers' police careers [we]re over, their reputations [we]re greatly damaged, . . . they face[d] serious criminal charges," and "[k]nowledge of these adverse consequences to [other] police officers [w]ould be a deterrent to similar future misconduct"); *see also United States v. Hasting*, 461 U.S. 499, 504, 506 n.5 (1983) (public chastisement, disciplinary

Kaczmarek and Foster were severely reprimanded by the state court, have been the subject of extensive negative media coverage, and have been reported to the Board of Bar Overseers for misconduct. *E.g.*, R.Add. 67-70; Tom Jackman, *Testing-lab Misconduct Affects Thousands of Mass. Cases*, Washington Post, Oct. 9, 2017, at A17 (available at 2017 WLNR 30844002).

Taken together, these three aspects of the case make it unnecessary for this Court to adopt the "drastic" "remedy of last resort" — dismissal with prejudice of all Amherst lab convictions, even those as to whom the record shows no taint from Farak's misconduct. *Bridgeman*, 476 Mass. at 316-17 (quotation omitted). After all, "the only reason to dismiss criminal charges because of nonprejudicial but egregious . . . misconduct would be to create a climate adverse to repetition of that misconduct that *would not otherwise exist.*" *Bridgeman*, 476 Mass. at 317 (quotation omitted; emphasis added). Since she took office in January of 2015, Attorney General Healey has been committed to creating a climate that will not tolerate anything like the misconduct that occurred in this case.

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proceedings, and orders to show cause are among lesser sanctions that should be considered before dismissal of convictions for prosecutorial misconduct).

There are additional reasons why dismissal with prejudice for all Amherst lab defendants is not warranted here. First, abrogating the type of case-by-case examination of convictions that *Bridgeman* envisaged disserves "society's interest in the administration of justice." *Bridgeman*, 476 Mass. at 316; see *Commonwealth v. Viverito*, 422 Mass. 228, 230 (1996) (dismissal with prejudice, in the absence of irremediable harm to the defendant, "deprives the public of its ability to protect itself by punishing an offender"); *Commonwealth v. King*, 400 Mass. 283, 290 (1987) ("the public has a substantial interest in prosecuting those accused of crime and bringing the guilty to justice"). "[D]espite its considerable risks and burdens, case-by-case adjudication is the fairest and best alternative to resolve the drug cases potentially tainted by [a wayward chemist's] misconduct." *Bridgeman*, 476 Mass. at 326; *see id.* at 301 (prescribing remedy that "respects the exercise of prosecutorial discretion"); *see also infra*, Section II.

Second, although the wrongdoing at issue here affected multiple cases, the record "does not reveal a pattern of recurring violations by [prosecutors] . . . that might warrant the imposition of a more extreme remedy in order to deter further lawlessness." *United States v. Morrison*, 449 U.S. 361, 365 n.2 (1981); *Bank*

of Nova Scotia v. United States, 487 U.S. 250, 259 (1988) ("we are not faced with a history of prosecutorial misconduct, spanning several cases, that is so systematic and pervasive as to raise a substantial and serious question about the fundamental fairness of the process which resulted in the indictment"). *See* R.Add. 141 (finding that Kaczmarek's and Foster's "colleagues" were "committed and principled public servants").

Finally, it is worth noting that this Court does not ever appear to have ordered or upheld the dismissal with prejudice of a conviction based solely on prophylactic considerations.[16] Instead, a showing of prejudice to a defendant (which is lacking here with respect to most cases in which Farak did not test the drug evidence) has always been a necessary prerequisite to dismissal with prejudice.[17] True,

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[16] *See, e.g., Commonwealth v. Mason*, 453 Mass. 873, 877 (2009) ("Although our cases have suggested that nonprejudicial but egregious prosecutorial misconduct might in some circumstances warrant dismissal of criminal charges . . . we have never dismissed charges in such circumstances in the absence of prejudice.") (citations omitted); *Commonwealth v. Monteagudo*, 427 Mass. 484, 486 (1998) (similar).

[17] *See, e.g., Commonwealth v. Washington W.*, 462 Mass. 204, 216 (2012) (dismissal with prejudice where prosecution's "egregious" misconduct denied the juvenile "the opportunity to develop a factual basis in support of his claim"); *Commonwealth v. Fontaine*, 402 Mass. 491, 497 (1988) (dismissal warranted where "misconduct was so pervasive as to preclude any confident assumption that proceedings at a new trial would be free of the taint," but dismissal not warranted where the Commonwealth "met its burden of

apart from *Bridgeman*, none of this Court's cases have involved misconduct with the type of widespread, systemic impacts at issue here. But courts in other states have faced such circumstances and have declined to order the blanket dismissal of all affected cases.[18]

This case should not be the first to depart from that long line of precedent and impose "the most severe sanction that can be had" in such a sweeping number of cases. *Viverito*, 422 Mass. at 230. As stated, the record does not support a finding of prejudice as to all such convictions; the actors who were found to have committed misconduct have faced, and continue to face, severe and public consequences; prophylactic measures can be adopted to deter future misconduct and protect defendants; and thousands of convictions have been dismissed. For these reasons,

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showing no irremediable prejudice to the defendant" (quotation omitted)); *Commonwealth v. Manning*, 373 Mass. 438, 439-40, 444 (1977) (dismissing indictment based on *both* "[p]rophylactic considerations" *and* because of potential "taint" to any future trial); *Commonwealth v. Drumgold*, 423 Mass. 230, 244, 246 (1996) (affirming denial of motion to dismiss because the defendant still could obtain a fair trial); *King*, 400 Mass. at 291 (discussing *Manning* opinion and concluding that dismissal in that case was based on finding that defendant was harmed by misconduct).

[18] *See, e.g., Matter of Investigation of W. Virginia State Police Crime Lab., Serology Div.*, 438 S.E.2d 501, 506-08 (W. Va. 1993); *State v. Irwin*, 2014 WL 6734821, at *9-*10 (Del. Super. Ct. Nov. 17, 2014) (unpublished); *Ex Parte Coty*, 418 S.W.3d 597, 605 (Tex. Crim. App. 2014).

the petitioners' request for the dismissal of all Amherst lab cases should be rejected.[19]

II. The Reported Question Regarding "Third Letter" Convictions Is Now Moot

The Single Justice asked the parties to consider whether so-called "third letter" cases, *i.e.*, cases in which Farak signed the drug certificate but which the relevant District Attorney has certified can be retried without the tainted evidence, *see Bridgeman*, 476 Mass. at 328 (defining "third letter" defendants), should be dismissed. R.App. 387. At the time of the Single Justice's Reservation and Report, approximately 45 such cases, all from Berkshire and Bristol counties, remained. As of this writing, however, the AGO has been advised that the Berkshire and Bristol County District Attorneys have concluded that those 45 cases should be dismissed; no third letter cases remain.[20] Accordingly, the reported question on "third

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[19] If this Court dismisses all Amherst lab convictions, it should treat this case as *sui generis* and narrowly limit the circumstances in which that precedent would apply. *See infra*, Section II; *cf. Bridgeman*, 476 Mass. at 305 (noting that a conclusive presumption was "*sui generis*" and intended to apply only to a very narrow category of cases).

[20] In their brief, the petitioners do not specifically assert that so-called *Ruffin* defendants – that is, those who pled guilty to drug offenses *before* the evidence at issue was tested – are entitled to relief. *See Commonwealth v. Ruffin*, 475 Mass. 1003, 1003-04 (2016). *Ruffin* explained why such defendants are not so entitled: "Where [drug] certificates indicate that [a wayward chemist] analyzed the drugs in [a] defendant's case after the plea proceedings were concluded, even presuming misconduct occurred at that

letter" cases is now moot, and the Court need not address it.

The AGO believes that justice is best served by the DAOs' decision to dismiss the convictions referenced above. By doing so, the DAOs have appropriately exercised their "broad discretion in deciding whether to prosecute," *Shepard v. Attorney General*, 409 Mass. 398, 401 (1991), to achieve a result consistent with the systemic remedial scheme set forth in *Bridgeman*. This Court has emphasized the importance of "mak[ing] justice not only fair but workable," *Bridgeman*, 476 Mass. at 318, while simultaneously "respect[ing] the exercise of prosecutorial discretion," *id.* at 301. In these extraordinary circumstances, the best implementation of the *Bridgeman* protocol is for no third letter cases in which Farak signed the certificate to remain, and the AGO fully supports that result in this case.

To the extent the Court nonetheless wishes to address whether dismissal of third letter cases would be an appropriate sanction for misconduct within the AGO and/or the DAOs, despite the absence of prejudice to the particular defendants, the AGO offers these additional comments. As discussed *supra*, Section

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time, [that chemist's] involvement cannot be said presumptively and retroactively to have induced the defendant's plea months earlier." *Id.* at 1004. That explanation applies equally here.

I(C), it does not appear that this Court has ever ordered or upheld the dismissal with prejudice of a criminal case based solely upon prophylactic considerations. Any such order could have far-reaching and unintended consequences. Crime generally affects victims and society in matters of degree; a homicide is far more serious than an incident of shoplifting. Though this case involves misconduct that affected only convictions for drug offenses, one could easily imagine a similar case involving a serologist who had tested and compromised hundreds of samples in connection with murder and sexual assault prosecutions. *Cf. Matter of Investigation of W. Virginia State Police Crime Lab., Serology Div.*, 438 S.E.2d at 506-08. Dismissing cases of that kind as a prophylactic measure, even though they could be successfully retried without the tainted evidence, could be a profound disservice to victims and could undermine confidence in the administration of criminal justice. And it would take away prosecutors' ability — indeed, obligation — to exercise sensible discretion in seeking to ensure that society's most serious offenders are punished.

Without question, justice demands that tainted convictions be remedied, and that principle does not vary with the seriousness of the underlying offense. That is why the AGO supports relief in the thousands

of cases already dismissed by the Single Justice, the additional cases described *supra*, Section I(A), and the convictions that had previously been classified as third letter cases. In general, consideration of the extraordinary remedy of dismissing criminal charges as a prophylactic measure should take into account the competing interests described above and the role they may play in other contexts, involving different kinds of criminal cases. The precise weighing of the relevant factors should await a case in which the issue is squarely presented.

III. The AGO Supports Prophylactic Measures Designed To Deter And Prevent Misconduct In Future Cases

The AGO's determination to see that justice is done in this matter encompasses both backward-looking relief for affected defendants, as explained *supra* Parts I and II, and forward-looking measures designed to prevent misconduct of the kind at issue here from recurring. To that end, the AGO endorses the three standing orders proposed by the petitioners, as further explicated below. Further, in light of the Superior Court's findings of misconduct by two former Assistant Attorneys General, the AGO is particularly concerned with ensuring that its own personnel understand and adhere to the highest ethical standards of legal practice. In the years since the misconduct was discovered, the new AGO administration has been

implementing measures along those lines and is moving to implement additional measures, as described *infra*, Section III(C).

The AGO does not support the imposition of monetary sanctions. However, the AGO agrees that, under *Nelson v. Colorado*, 137 S. Ct. 1249 (2017), certain fines and fees must be returned to defendants whose criminal charges have been dismissed. Issues relating to exactly which monetary exactions are covered, and the mechanism by which returns must be made, are before this Court in two pending cases,[21] and the AGO will participate, as appropriate, in implementing whatever procedures are necessary in light of this Court's decisions in those cases.

A. Standing Orders Are An Appropriate Prophylactic Measure

The AGO supports petitioners' proposal that this Court issue three standing orders as prophylactic measures. *See* PB 45-49.

1. Standing *Bridgeman* Order

The AGO endorses the entry of a standing order, modeled on the *Bridgeman* protocol, to bring speedy relief to defendants affected by systemic misconduct. The order should provide: (1) where a prosecutor has knowledge of egregious misconduct with systemic

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[21] *Commonwealth v. Martinez*, No. SJC-12479, and *Commonwealth v. S.G.*, No. SJC-12480.

effects, he or she must notify the trial court and CPCS as soon as possible, and in any event within 30 days;[22] (2) the trial court must convene a status conference with CPCS and the prosecutor within 14 days of such notification from the prosecutor; and (3) within 30 days of the status conference, a plan must be in place to govern the identification and dismissal of affected convictions.

The purpose of the *Bridgeman* protocol was to address a large-scale event: misconduct affecting so many people that standard approaches, then-dictated by precedent, were untenable. *See Bridgeman*, 476 Mass. at 326 ("the extraordinary magnitude of Dookhan's misconduct has left us with only poor alternatives ... in light of the potential need to adjudicate more than 20,000 motions for a new trial brought by the relevant Dookhan defendants, case-by-case adjudication must be adapted to make it both fair and workable"). The Court developed a novel solution that "preserve[d] the ability of these defendants to vindicate their rights through case-by-case adjudication, respect[ed] the exercise of prosecutorial discretion, and maintain[ed]

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[22] Depending upon the number of cases involved, it may not be feasible to identify and notify each defense attorney in each affected case within 30 days. Notice to CPCS could ensure that defendants' interests are protected, while at the same time permit for the remedial process to begin promptly upon the discovery of systemic misconduct.

the fairness and integrity of our criminal justice system." *Bridgeman*, 476 Mass. at 301. Therefore, contrary to petitioners' proposal, *see* PB 46-47, a *Bridgeman* standing order should similarly be addressed to remedying misconduct with *systemic* effects — that is, to cases in which the usual, always-applicable ethical obligations to promptly disclose instances of misconduct, and the case-by-case approach to addressing them, are not enough.[23]

The level of knowledge on the part of the prosecutor, needed to trigger his or her duty under this standing order, must be defined. The Comments to the Massachusetts Rules of Professional Conduct provide a helpful standard in similar circumstances:

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[23] Indeed, many of the steps of the *Bridgeman* protocol would have no purpose where misconduct affects a single case. For example, where a prosecutor commits misconduct in a single trial by selecting jurors based on discriminatory criteria or deliberately making inappropriate comments in closing, *Bridgeman's* requirements for "each district attorney [to] file three letters with the county clerk" listing defendants by category, and for the court to approve of the form of notice to affected defendants "as to its content, its envelope, and its mode of delivery," *Bridgeman*, 476 Mass. at 327, 329, are simply inapplicable. Because *Bridgeman* addressed systemic misconduct, any *Bridgeman* protocol should be limited to that context. Of course, nothing said here should be construed to suggest that misconduct affecting a single case, or a very small number of cases, should not be remedied promptly. To the contrary, prompt reporting and remedies should take place in any case involving misconduct. *Cf. infra*, Section III(A)(2).

the prosecutor's duty should be triggered when a prosecutor "possesses supporting evidence such that a reasonable lawyer under the circumstances would form a firm opinion that the conduct in question had more likely occurred than not." Cmt. 3, Mass. R. Prof. Cond. 8.3.[24] The protocol should also be clear that privileged information need not be disclosed, except as authorized and required under the Rules. *See* Mass. Rs. of Prof. Cond. 1.6(b), 8.3(c).

Lastly, prompt notification to the trial court and a prompt status conference with the court are essential to initiating a speedy process to bring relief to affected defendants. Judges should then exercise their discretion to set appropriate timetables for the remedial events that follow, upon examination of the extent of the misconduct, the nature of the affected convictions, and other practical considerations. For example, it may not be feasible, within a very short period of time, for prosecutors to locate and confer with reluctant witnesses in complex cases to assess whether a large number of those cases could be retried or needed to be

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[24] Rule 5.2(b) of the Massachusetts Rules of Professional Conduct should also be incorporated into the *Bridgeman* standing order. That rule provides that a subordinate lawyer is not in violation of the rule "if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."

dismissed based upon the misconduct of a state actor. On the other hand, misconduct that affects a smaller number of non-complex cases may appropriately be the subject of an accelerated timetable.[25]

2. Standing *Cotto* Order

The AGO also endorses a standing "*Cotto* order" to serve as a specific criminal law supplement to Massachusetts Rule of Professional Conduct 8.3, which creates a general misconduct reporting requirement for all lawyers, regardless of substantive practice area.[26]

The *Cotto* standing order should provide: (1) unless otherwise raised by an objection, a motion pursuant to Mass. R. Crim. P. 30, or other appropriate motion seeking relief, an attorney is required to notify the trial court and counsel for the parties (or, if a privately-retained attorney represented the defendant but is no longer available, CPCS) as soon as possible after, and in any event within 30 days of,

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[25] The AGO believes that leaving such matters to trial judges' discretion is preferable to setting predefined deadlines in the standing order, *see* PB 47. Cases of this kind are by definition extraordinary, and therefore demand attention to each situation's specific facts in crafting appropriate frameworks and timetables for remedies.

[26] Massachusetts Rule of Professional Conduct 8.3(a) provides that "[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the Bar Counsel's office of the Board of Bar Overseers."

acquiring knowledge of deliberate, willful misconduct by an attorney that may have affected the outcome of a criminal case; (2) the trial court must convene a status conference with defense counsel (or, if private counsel is no longer available, CPCS) and the prosecutor within 14 days of such notification; and (3) within 30 days of the status conference, a plan must be in place to govern the identification and remediation of the affected conviction(s).

Attorney misconduct is unacceptable, no matter the scale of its impacts. A standing order that ensures prompt reporting and remedies is appropriate.

As with the proposed *Bridgeman* standing order, the level of "knowledge" that is required to trigger the reporting obligation must be defined. The reporting requirement should be triggered when an attorney "possesses supporting evidence such that a reasonable lawyer under the circumstances would form a firm opinion that the conduct in question had more likely occurred than not." Cmt. 3, Mass. R. Prof. Cond. 8.3.[27] In addition, as with the *Bridgeman* order, the *Cotto* order should provide that privileged

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[27] As with the *Bridgeman* protocol, Rule 5.2(b) of the Massachusetts Rules of Professional Conduct, which provides that a subordinate lawyer is not in violation of the rule "if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty," should also be incorporated.

information need not be disclosed except as authorized and required under the Rules.

With respect to notice, the reporting attorney should be required to specify the key facts then known within 30 days. But, depending upon the type and extent of the misconduct involved, it may not be immediately possible to identify all of "the potentially affected cases" and to describe "whether, how and by when [an] agency will investigate the misconduct." *See* PB 48. Judges should exercise their discretion to consider the facts and circumstances surrounding any disclosed misconduct to fashion an appropriate timetable for expeditious remedial steps, including the further disclosures by the appropriate parties of any matters beyond the reporting attorney's initial disclosure.

3. Standing Disclosure Order

The AGO also endorses a standing order governing prosecutors' disclosure obligations under state and federal law. The portion of the standing order adopted by the New York Courts regarding prosecutorial obligations is an appropriate model. AGO Add. 64. Given that the prosecutor may obtain relevant material at various times during the pendency of the case, any disclosure deadlines in the order should apply to initial deadlines only, with a reminder that a prosecutor's disclosure obligations are continuous.

B. Monetary Fines Against the AGO Are Not Warranted

Petitioners ask this Court to impose both prophylactic and remedial monetary sanctions on the AGO. PB 49-53. This Court's precedent does not support either of those outcomes on this record.

The principle that misconduct generally should be addressed with remedial rather than prophylactic sanctions is well established in Massachusetts law. *See supra*, Section I(C). This Court has specifically applied that principle in the context of monetary sanctions. *See Commonwealth v. Frith*, 458 Mass. 434, 443 (2010) (concluding that judge abused discretion in imposing punitive $5,000 sanction where prosecutor made false representation to court but defendant was not prejudiced, and noting that "[t]he remedy for prosecutorial misconduct in a particular case should be tailored to the injury suffered"); *Commonwealth v. Carney*, 458 Mass. 418, 427 (2010) (holding that sanctions for discovery violations under Mass. R. Crim. P. 14 should be remedial rather than prophylactic, and noting that "[t]hese principles are similar to those that we have applied in other contexts where police or prosecutorial misconduct has been established"); *see also id.* at 433 (finding error of law where court imposed $25,000 punitive fine on Commonwealth based on discovery violation). While this Court has left open the possibility that

prophylactic fines could be permissible to address prosecutorial misconduct under Mass. R. Crim. P. 48, *see Carney*, 458 Mass. at 429, n.15; *Frith*, 458 Mass. at 442-43, the petitioners do not point to any case in which Rule 48 was applied for that purpose.[28]

Neither prophylactic nor remedial sanctions are appropriate here. *See supra*, Section I(C). Because Foster and Kaczmarek are not parties to this proceeding, the imposition of sanctions against them would violate due process and could possibly prejudice proceedings before the Board of Bar Overseers. Sanctions against the AGO as a whole are not supported by the record, where Judge Carey found that Foster's and Kaczmarek's colleagues acted as "committed and principled public servants." And sanctions are not needed to incentivize the AGO to take steps aimed at ensuring that the misconduct at issue does not repeat itself; as explained *infra*, Section III(C), the AGO has already taken such steps, and further measures are planned. In addition, the AGO agrees that, under *Nelson v. Colorado*, 137 S. Ct. 1249 (2017), refunds to

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[28] Nor have petitioners cited any precedent imposing prophylactic sanctions for prosecutorial misconduct under Mass. R. Civ. P. 11 or G.L. c. 211, § 3, two other sources that they cite. PB 50-51. Further, *Commonwealth v. One 1987 Ford Econoline Van*, 413 Mass. 407 (1992), does not support the imposition of sanctions here. That case involved a contingent civil penalty to coerce compliance with a pending court order, not a fine to deter past conduct from recurring. *Id.* at 414-15.

Farak defendants will be due for a range of fees, fines, and restitution dependent upon their criminal convictions. *See supra*, n. 21. As noted above, the AGO will participate, as appropriate, in implementing whatever procedures are necessary in light of this Court's decisions in the two pending cases concerning the implications of *Nelson*.

C. The AGO Has Taken And Will Take Further Steps to Avoid Future Misconduct

The AGO takes the Superior Court's findings of egregious prosecutorial misconduct by two former AGO staff members extremely seriously. Notwithstanding existing policies and procedures, two Assistant Attorneys General engaged in unacceptable conduct that was deemed "a fraud on the court." Attorney General Healey has made clear that such conduct is beneath the high standards she has set for members of her office. The AGO has also recognized the need to take a hard look at its existing policies and procedures to determine ways in which they can be improved to prevent the misconduct that occurred here from happening again. To that end, as detailed below, the AGO has taken steps to improve: its decision-making and supervisory processes where the disclosure of exculpatory information is at issue; its ways of ensuring that Assistant Attorneys General are aware of their legal and ethical obligations; and its own

internal mechanisms for Assistant Attorneys General to seek guidance on matters involving ethics.

Policy (Strother Affidavit ¶¶ 2-5).[29] In response to the failure to timely disclose Farak's 2011 mental health documents, the new administration in the AGO, acting through its new Criminal Bureau Chief (Kimberly West), implemented a policy formalizing and tightening the supervision and reporting requirements regarding the disclosure of exculpatory information to criminal defendants. That policy appropriately recognizes that the decision to withhold exculpatory evidence is such an extraordinarily rare event that it should be subject to multiple layers of review. Under the policy, on the rare occasion when an Assistant Attorney General determines that exculpatory material should be withheld, he or she must consult with his or her Division Chief. If the Division Chief concurs with the line Assistant Attorney General, the Division Chief must notify the Chief of the Criminal Bureau. The Chief of the Criminal Bureau will make the final determination whether exculpatory material must be disclosed. No exculpatory material may be withheld without the approval of the Bureau Chief.

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[29] "Strother Affidavit" refers to the affidavit of First Assistant Attorney General Mary B. Strother. The AGO filed a motion to expand the record to include the Strother Affidavit on April 12, 2018.

Training (Strother Affidavit ¶¶ 6-7). The AGO has, for many years, had a mandatory internal continuing legal education requirement for Assistant Attorneys General. Acting through its AG Institute, which is overseen by the AGO General Counsel, the AGO regularly offers training, seminars, and other programs on a wide variety of topics, including those relevant to prosecutors. After the misconduct at issue here came to light, the AGO specifically offered training on prosecutorial ethics and criminal discovery. In July 2015, for example, the AGO held an ethics training that was mandatory for all Assistant Attorneys General hired in the prior year and open to all others. It was presented by the Chief Legal Counsel, the then-Deputy General Counsel, and an Assistant Attorney General, on subjects including attorney candor, fairness, disclosure and discovery. In October 2015, the AGO held a program that was mandatory for all attorneys handling criminal matters in the AGO. It was presented by the General Counsel and Senior Trial Counsel, and covered ethical issues faced by prosecutors in discovery. In July 2016, there was a mandatory program for attorneys in the Criminal Bureau on the Rules of Professional Conduct, with a particular emphasis on the 2016 revision to Rule 3.8. And in August 2017, the AGO held an ethics training on discovery in complex criminal cases, which

was presented by the Center for Ethics and Public Integrity branch of the National Attorneys General Training and Research Institute.

There are plans for similar trainings in the future. The office intends to hold a special office-wide training on prosecutorial ethics, including the obligation to disclose material exculpatory evidence after conviction under revised Rule 3.8(i), in the coming months. That training will be mandatory for all prosecutors in the AGO and will be open to all Assistant District Attorneys in Massachusetts.

Ethics committee (Strother Affidavit ¶¶ 9-10). The AGO's General Counsel and First Assistant Attorney General consider and respond to ethics questions and concerns from attorneys and staff at the AGO. Those two sources continue to be available to all AGO staff. And AGO policies and procedures direct and encourage AGO staff to consult with the General Counsel on any matter related to ethics or the Rules of Professional Conduct. To increase the number of resources available to staff members seeking guidance on ethical issues, the AGO will create an internal ethics committee, composed of members from across the office, which will sit regularly to discuss questions and concerns on ethics issues that arise both within and outside the AGO. Further, the ethics committee will continue the AGO's review of its current policies and

procedures to ensure that they reflect the highest ethical standards.

Ethics CLE (Strother Affidavit ¶¶ 11-12). As mentioned, the AGO has its own internal continuing legal education (CLE) requirement, mandating that all Assistant Attorneys General complete twelve hours of CLE each year. This policy has been in place since 2006 and numerous ethics CLE options have been, and continue to be, available to Assistant Attorneys General to fulfill this requirement. The new AGO administration recognizes that specific ethics CLE programs should be more than just available or even encouraged; they should be required. It therefore has instituted a new mandate that at least two of the required twelve hours consist of CLE on ethics topics, as determined by the AGO General Counsel.

Bar Association Working Group (Strother Affidavit ¶ 13). Both this case and the scandal involving disgraced former chemist Annie Dookhan have underscored the importance of identifying potentially wrongful convictions and correcting them. The AGO is committed to that goal and has agreed to co-chair, with the Massachusetts Bar Association, a statewide Working Group on Conviction Integrity Programs, which will include representatives from DAOs, the defense bar, civil rights organizations, and other key stakeholders.

* * *

The AGO recognizes that addressing the problem of misconduct requires constant vigilance. The AGO is eager to participate in continued, constructive discussions with the petitioners and the DAOs regarding other ways to approach our shared objective of a criminal justice system free from the taint of misconduct.

CONCLUSION

For the foregoing reasons, the Court should order relief according to the principles discussed herein, remanding the matter to the county court for further proceedings as necessary.

Respectfully submitted,

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Date: April 12, 2018

CERTIFICATION PURSUANT TO MASS. R. APP. P. 16(k)

I certify that the foregoing brief complies with all rules of court pertaining to the filing of briefs, including, but not limited to, Mass. R. App. P. 16 and 20.

Thomas E. Bocian
Assistant Attorney General

CERTIFICATE OF SERVICE

I certify that I have this twelfth day of April 2018, caused one (1) true and accurate copy of this brief to be served via e-mail, and two (2) true and accurate copies of this brief to be served via first-class mail, postage prepaid, upon the individuals listed below.

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ADDENDUM

MASSACHUSETTS RULES OF CRIMINAL PROCEDURE

RULE 14 PRETRIAL DISCOVERY

(a) Procedures for Discovery.

(1) *Automatic Discovery.*

(A) Mandatory Discovery for the Defendant. The prosecution shall disclose to the defense, and permit the defense to discover, inspect and copy, each of the following items and information at or prior to the pretrial conference, provided it is relevant to the case and is in the possession, custody or control of the prosecutor, persons under the prosecutor's direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in the case: (i) Any written or recorded statements, and the substance of any oral statements, made by the defendant or a co-defendant. (ii) The grand jury minutes, and the written or recorded statements of a person who has testified before a grand jury. (iii) Any facts of an exculpatory nature. (iv) The names, addresses, and dates of birth of the Commonwealth's prospective witnesses other than law enforcement witnesses. The Commonwealth shall also provide this information to the Probation Department. (v) The names and business addresses of prospective law enforcement witnesses. (vi) Intended expert opinion evidence, other than evidence that pertains to the

defendant's criminal responsibility and is subject to subdivision (b)(2). Such discovery shall include the identity, current curriculum vitae, and list of publications of each intended expert witness, and all reports prepared by the expert that pertain to the case. (vii) Material and relevant police reports, photographs, tangible objects, all intended exhibits, reports of physical examinations of any person or of scientific tests or experiments, and statements of persons the party intends to call as witnesses. (viii) A summary of identification procedures, and all statements made in the presence of or by an identifying witness that are relevant to the issue of identity or to the fairness or accuracy of the identification procedures. (ix) Disclosure of all promises, rewards or inducements made to witnesses the party intends to present at trial.

(B) Reciprocal Discovery for the Prosecution. Following the Commonwealth's delivery of all discovery required pursuant to subdivision (a)(1)(A) or court order, and on or before a date agreed to between the parties, or in the absence of such agreement a date ordered by the court, the defendant shall disclose to the prosecution and permit the Commonwealth to discover, inspect, and copy any material and relevant evidence discoverable under subdivision (a)(1)(A) (vi), (vii) and (ix) which the defendant intends to offer at trial, including the names, addresses, dates of birth, and statements of those persons whom the defendant intends to call as witnesses at trial.

(C) Stay of Automatic Discovery; Sanctions. Subdivisions (a)(1)(A) and (a)(1)(B) shall have the force and effect of a court order, and failure to provide discovery pursuant to them may result in application of any sanctions permitted for non-compliance with a court order under subdivision 14(c). However, if in the judgment of either party good cause exists for declining to make any of the disclosures set forth above, it may move for a protective order pursuant to

subdivision (a)(6) and production of the item shall be stayed pending a ruling by the court.

* * *

(c) Sanctions for Noncompliance.

(1) *Relief for Nondisclosure.* For failure to comply with any discovery order issued or imposed pursuant to this rule, the court may make a further order for discovery, grant a continuance, or enter such other order as it deems just under the circumstances.

(2) *Exclusion of Evidence.* The court may in its discretion exclude evidence for noncompliance with a discovery order issued or imposed pursuant to this rule. Testimony of the defendant and evidence concerning the defense of lack of criminal responsibility which is otherwise admissible cannot be excluded except as provided by subdivision (b)(2) of this rule.

RULE 48 SANCTIONS

(Applicable to District Court and Superior Court)

A willful violation by counsel of the provisions of these rules or of an order issued pursuant to these rules shall subject counsel to such sanctions as the court shall deem appropriate, including citation for contempt or the imposition of costs or a fine.

MASSACHUSETTS RULES OF PROFESSIONAL CONDUCT

RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal confidential information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal confidential information relating to the representation of a client to the extent the lawyer reasonably believes necessary, and to the extent required by Rules 3.3, 4.1(b), 8.1 or 8.3 must reveal, such information:

(1) to prevent reasonably certain death or substantial bodily harm, or to prevent the wrongful execution or incarceration of another;

(2) to prevent the commission of a criminal or fraudulent act that the lawyer reasonably believes is likely to result in substantial injury to property, financial, or other significant interests of another;

(3) to prevent, mitigate or rectify substantial injury to property, financial, or other significant interests of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to the extent permitted or required under these Rules or to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's potential change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, confidential information relating to the representation of a client.

(d) A lawyer participating in a lawyer assistance program, as hereinafter defined, shall treat the person so assisted as a client for the purposes of this Rule. Lawyer assistance means

assistance provided to a lawyer, judge, other legal professional, or law student by a lawyer participating in an organized nonprofit effort to provide assistance in the form of (a) counseling as to practice matters (which shall not include counseling a law student in a law school clinical program) or (b) education as to personal health matters, such as the treatment and rehabilitation from a mental, emotional, or psychological disorder, alcoholism, substance abuse, or other addiction, or both. A lawyer named in an order of the Supreme Judicial Court or the Board of Bar Overseers concerning the monitoring or terms of probation of another attorney shall treat that other attorney as a client for the purposes of this Rule. Any lawyer participating in a lawyer assistance program may require a person acting under the lawyer's supervision or control to sign a nondisclosure form approved by the Supreme Judicial Court. Nothing in this paragraph (d) shall require a bar association-sponsored ethics advisory committee, the Office of Bar Counsel, or any other governmental agency advising on questions of professional responsibility to treat persons so assisted as clients for the purpose of this Rule.

RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

(a) refrain from prosecuting where the prosecutor lacks a good faith belief that probable cause to support the charge exists, and refrain from threatening to prosecute a charge where the prosecutor lacks a good faith belief that probable cause to support the charge exists or can be developed through subsequent investigation;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing, unless a court first has obtained from the accused a knowing and intelligent written waiver of counsel;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, 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;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless:

(1) the prosecutor reasonably believes:

(i) the information sought is not protected from disclosure by any applicable privilege;

(ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(iii) there is no other feasible alternative to obtain the information; and

(2) the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose:

(1) refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule; and

(2) take reasonable steps to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule;

(g) not avoid pursuit of evidence because the prosecutor believes it will damage the prosecution's case or aid the accused; and

(h) refrain from seeking, as a condition of a disposition agreement in a criminal matter, the defendant's waiver of claims of ineffective assistance of counsel or prosecutorial misconduct.

(i) When, because of new, credible, and material evidence, a prosecutor knows that there is a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall within a reasonable time:

(1) if the conviction was not obtained by that prosecutor's office, disclose that evidence to an appropriate court or the chief prosecutor of the office that obtained the conviction, and

(2) if the conviction was obtained by that prosecutor's office, (i) disclose that evidence to the appropriate court; (ii) notify the defendant that the prosecutor's office possesses such evidence unless a court authorizes delay for good cause shown; (iii) disclose that evidence to the defendant unless a court authorizes delay for good cause shown; and (iv) undertake or assist in any further investigation as the court may direct.

(j) When a prosecutor knows that clear and convincing evidence establishes that a defendant, in a case prosecuted by that prosecutor's office, was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the injustice.

(k) A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (i) and (j), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

RULE 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the Bar Counsel's office of the Board of Bar Overseers.

* * *

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6.

* * *

Comment 3. While a measure of judgment is required in complying with the provisions of the Rule, a lawyer must report misconduct that, if proven and without regard to mitigation, would likely result in an order of suspension or disbarment, including misconduct that would constitute a "serious crime" as defined in S.J.C. Rule 4:01, § 12(3). Precedent for determining whether an offense would warrant suspension or disbarment may be found in the Massachusetts Attorney Discipline Reports. Section 12(3) of Rule 4:01 provides that a serious crime is "any felony, and . . . any lesser crime a necessary element of which . . . includes interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy, or solicitation of another to commit [such a crime]." In addition to a conviction of a felony, misappropriation of client funds and perjury before a tribunal are common examples of reportable conduct. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A lawyer has knowledge of a violation when he or she possesses supporting evidence such that a reasonable lawyer under the circumstances would form a firm opinion that the

conduct in question had more likely occurred than not. A report should be made to Bar Counsel's office or to the Judicial Conduct Commission, as the case may be. Rule 8.3 does not preclude a lawyer from reporting a violation of the Massachusetts Rules of Professional Conduct in circumstances where a report is not mandatory.

ADMINISTRATIVE ORDER OF THE
CHIEF ADMINISTRATIVE JUDGE OF THE COURTS

Pursuant to the authority vested in me, and upon consultation with and agreement of the Administrative Board of the Courts, I hereby amend the uniform rules for courts exercising criminal jurisdiction (22 NYCRR Part 200) by adding sections 200.16 and 200.27 as follows, effective January 1, 2018:

* * *

200.16/200.27: Issuance of Order Confirming Disclosure and Notice Obligations

In all criminal actions on an indictment, prosecutor's information, information, or simplified information, where counsel for the defendant has provided the prosecutor with a written demand as specified under CPL 240.10(1) and 240.20, or where the prosecution has waived such demand, the court shall issue an order to prosecution and defense counsel that, inter alia, (1) confirms the prosecutor's disclosure obligations pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), *People v Geaslen*, 54 N.Y.2d 510 (1981), and their progeny; and (2) confirms defense counsel's professional obligation to provide effective assistance of counsel and meet defendant's statutory notice obligations. The order shall be issued on the first scheduled court date, following demand, where both the prosecutor and defense counsel are present. The Chief Administrator of the Courts shall promulgate a model order for this purpose that the court may use as it deems appropriate.

Chief Administrative Judge of the Courts

Dated: November 6, 2017

AO 291/17

STATE OF NEW YORK, _____ COURT
COUNTY OF _____: CRIMINAL TERM, PART __

----------x

PEOPLE OF THE STATE OF NEW YORK,

Case No. _____

-against-

_____, Defendant.

Order to Counsel in Criminal Cases

----------x

_____, J.

The court, pursuant to an Administrative Order of the Chief Administrative Judge and at the recommendation of the New York State Justice Task Force and in furtherance of the fair administration of justice, issues this order as both a reminder and a directive that counsel uphold their constitutional, statutory and ethical responsibilities in the above-captioned proceedings.

To the Prosecutor:

The District Attorney and the Assistant responsible for the case, or, if the matter is not being prosecuted by the District Attorney, the prosecuting agency and its assigned representative, is directed to make timely disclosures of information favorable to the defense as required by *Brady v Maryland*, 373 US 83 (1963), *Giglio v United States*, 405 US 150 (1972), *People v Geaslen*, 54 NY2d 510 (1981), and their progeny under the United States and New York State constitutions, and by Rule 3.8(b) of the New York State Rules of Professional Conduct, as described hereafter.

- The District Attorney and the Assistant responsible for the case have a duty to learn of such favorable information that is known to others acting on the government's behalf in the case, including the police, and should therefore confer with investigative and prosecutorial personnel who acted in this case and review their and their agencies' files directly related to the prosecution or investigation of this case.

- Favorable information could include, but is not limited to:

a) Information that impeaches the credibility of a testifying prosecution witness, including (i) benefits, promises, or inducements, express or tacit, made to a witness by a law enforcement official or law enforcement victim services agency in connection with giving testimony or cooperating in the case; (ii) a witness's prior inconsistent statements, written or oral; (iii) a witness's prior convictions and uncharged criminal conduct; (iv) information that tends to show that a witness has a motive to lie to inculpate the defendant, or a bias against the defendant or in favor of the complainant or the prosecution; and (v) information that tends to show impairment of a witness's ability to perceive, recall, or recount relevant events, including impairment resulting from mental or physical illness or substance abuse.

b) Information that tends to exculpate, reduce the degree of an offense, or support a potential defense to a charged offense.

c) Information that tends to mitigate the degree of the defendant's culpability as to a charged offense, or to mitigate punishment.

d) Information that tends to undermine evidence of the defendant's identity as a perpetrator of a charged crime, such as a non-identification of the defendant by a witness to a charged crime or an identification or other evidence implicating another person in a manner that tends to cast doubt on the defendant's guilt.

e) Information that could affect in the defendant's favor the ultimate decision on a suppression motion.

• Favorable information shall be disclosed whether or not it is recorded in tangible form, and irrespective of whether the prosecutor credits the information.

• Favorable information must be timely disclosed in accordance with the United States and New York State constitutional standards, as well as CPL article 240. Disclosures are presumptively "timely" if they are completed no later than 30 days before commencement of trial in a felony case and 15 days before commencement of trial in a misdemeanor case. Records of a judgment of conviction or a pending criminal action ordinarily are discoverable within the time frame provided in CPL 240.44 or 240.45(1). Disclosures that pertain to a suppression hearing are presumptively "timely" if they are made no later than 15 days before the scheduled hearing date. The prosecutor is reminded that the obligation to disclose is a continuing one. Prosecutors should strive to determine if favorable information exists. Nothing herein shall be understood to diminish a prosecutor's obligation to disclose exculpatory information as soon as reasonably possible.

• A protective order may be issued for good cause, and CPL 240.50 shall be deemed to apply, with respect to disclosures required under this order. The prosecutor may request a ruling from the court on the need for disclosure.

• Only willful and deliberate conduct will constitute a violation of this order or be eligible to result in personal sanctions against a prosecutor.

To Defense Counsel:

Defense counsel, having filed a notice of appearance in the above captioned case, is obligated under both the New York State and the United States Constitution to provide effective representation of defendant. Although the following list is not meant to be exhaustive, counsel shall remain cognizant of the obligation to:

a) Confer with the client about the case and keep the client informed about all significant developments in the case;

b) Timely communicate to the client any and all guilty plea offers, and provide reasonable advice about the advantages and disadvantages of such guilty plea offers and about the potential sentencing ranges that would apply in the case;

c) When applicable based upon the client's immigration status, ensure that the client receives competent advice regarding the immigration consequences in the case as required under *Padilla v Kentucky*, 559 US 356 (2010);

d) Perform a reasonable investigation of both the facts and the law pertinent to the case (including as applicable, e.g., visiting the scene, interviewing witnesses, subpoenaing pertinent materials, consulting experts, inspecting exhibits, reviewing all discovery materials obtained from the prosecution, researching legal issues, etc.), or, if appropriate, make a reasonable professional judgment not to investigate a particular matter;

e) Comply with the requirements of the New York State Rules of Professional Conduct regarding conflicts of interest, and when appropriate, timely notify the court of a possible conflict so that an inquiry may be undertaken or a ruling made;

f) Possess or acquire a reasonable knowledge and familiarity with criminal procedural and evidentiary law to ensure constitutionally effective representation in the case; and

g) When the statutory requirements necessary to trigger notice from the defense are met (e.g., a demand, intent to introduce the evidence, etc.), comply with the statutory notice obligations for the defense as specified in CPL 250.10, 250.20, and 250.30.

So ordered.

_____

Judge or Justice

Dated: