COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

No. SJC - 12471

COMMITTEE FOR PUBLIC COUNSEL SERVICES
& OTHERS,

v.

ATTORNEY GENERAL OF MASSACHUSETTS
& OTHERS

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

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

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March 2018

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INTRODUCTION

In 2017, this Court established a protocol that led to the dismissal of nearly 22,000 convictions tainted by the misconduct of former state chemist Annie Dookhan. Citing "the absence of any evidence of misconduct by a prosecutor," the Court did not impose the "very strong medicine" of ordering specific dismissals. *Bridgeman v. Dist. Attorney for the Suffolk Dist.*, 476 Mass. 298, 322-23 (2017) ("*Bridgeman II*"). That medicine, and further remedies, are now needed to address the Amherst Lab crisis, which involves not only the undisputed lab misconduct of former state chemist Sonja Farak, but also the unprecedented attorney misconduct of the Attorney General's Office and the District Attorney's Offices, which further prejudiced Farak's victims.

From 2004 to January 2013, Farak used drugs that she stole from or manufactured in the Amherst Lab, causing thousands of people to be wrongfully convicted of drug crimes based on unreliable evidence. Unlike Dookhan's misconduct, Farak's misconduct was not limited to the samples assigned to her; she also tampered with samples assigned to other chemists.

From the outset, rather than work to remedy the Amherst Lab crisis, prosecutors have tried to conceal and minimize its scope. Beginning in 2013, former As-

sistant Attorneys General Kris Foster and Anne Kaczmarek covered up the extent of Farak's misconduct. They did so primarily by withholding exculpatory evidence and misleading the Superior Court into finding, incorrectly, that Farak's drug use began in the summer of 2012 rather than sometime in 2004. Superior Court Judge Richard Carey found, and the AGO does not dispute, that these attorneys committed egregious misconduct and "a fraud upon the court." Add. 86.[1]

Meanwhile, the AGO consistently failed to investigate the full impact of Farak's misconduct. It scarcely investigated Farak at all before April 2015, when this Court called for an investigation. *Commonwealth v. Cotto*, 471 Mass. 97 (2015). Even then, the AGO issued a report that uncritically repeated Farak's account of her misconduct, while failing to assess how Farak's actions affected defendants whose samples were assigned to other chemists. RA 312-366.

Even after that lab and attorney misconduct came to light, the AGO and DAOs effectively blocked its victims from seeking relief. In November 2014, Attorney Luke Ryan discovered the withheld evidence and immediately notified the AGO, which simply forwarded

[1] References to the record are as follows: Record Appendix is RA; Addendum is Add.; Exhibits are Ex.; and Cotto evidentiary hearing transcripts are T1-T6.

that evidence to the DAOs without informing them, *or any court*, that the AGO had made material false statements to the Superior Court about Farak's misconduct. As a result, this Court upheld findings secured by patent falsehoods. *Cotto*, 471 Mass. at 111; *Commonwealth v. Ware*, 471 Mass. 85, 94 (2015). Similarly, with the exception of two District Attorney's Offices, neither the AGO nor most DAOs identified and notified the defendants harmed by Farak, Foster, and Kaczmarek.

Thus, before the fall of 2017, when this case was filed and DAOs agreed to an estimated 8,000 dismissals, most victims of the Amherst Lab crisis had received no relief whatsoever. They were kept in the dark even as this Court issued regular directives about the Commonwealth's duty to identify and notify wrongfully convicted people. *Cotto*, 471 Mass. at 112; *Ware*, 471 Mass. at 95-96; *Bridgeman v. Dist. Attorney for the Suffolk Dist.*, 471 Mass. 465, 481 (2015) ("*Bridgeman I*"). These cases did not prevent the attorney misconduct at issue here; they couldn't even slow it down.

This remarkable record calls for relief beyond the case law this Court has already established, and beyond the dismissals to which the DAOs have already agreed. To start, the Court should dismiss not only the drug convictions of all defendants whose samples

Farak tested, but also the convictions of all defendants whose samples were processed by the Amherst Lab during Farak's tenure. Because of the AAGs' fraud and the AGO's failure to investigate, as well as the AGO's and DAOs' failure to identify and notify the wrongfully convicted individuals, every Amherst Lab defendant was prevented from gathering information about whether misconduct compromised the evidence in their cases. The Court should also issue two other prophylactic remedies: standing orders designed to prevent future scandals and reform the Commonwealth's handling of wrongful convictions, and monetary sanctions designed to remedy the AGO's misconduct and deter its recurrence.

Together, these remedies can mitigate the harm to defendants, inoculate against further crises, and restore the justice system's integrity.

ISSUES PRESENTED

1. Following Sonja Farak's undisputed lab misconduct of Sonja Farak, did government attorneys violate the rights of defendants by committing a fraud on the court, failing to investigate adequately the impact of Farak's actions, and failing to identify and notify Farak's victims?

2. Given the unprecedented scope of attorney misconduct at issue here, should this Court require

the vacatur and dismissal of all drug convictions arising from the Amherst Lab during Farak's tenure?

3. To repair the damage of the misconduct and ensure that it does not happen again, should this Court impose additional prophylactic remedies, including standing orders and monetary sanctions?

STATEMENT OF THE CASE

A Single Justice (Gaziano, J.) reserved and reported this case on January 26, 2018. RA 386-389. The Reservation and Report incorporates Judge Carey's June 2017 ruling in *Cotto*, thus connecting this case to litigation that began in 2013. RA 388.

In 2013, relying on statements by the Attorney General's Office, Superior Court Judge C. Jeffrey Kinder found that Farak's misconduct began in July 2012 and ended with her January 2013 arrest. The Commonwealth defended that finding on appeal — without contradiction by the AGO — and this Court upheld it in April 2015, while also calling for an investigation of Farak's misconduct. *Cotto*, 471 Mass. at 112-16.

In response to this Court's *Cotto* decision, the AGO issued a report in April 2016, which disclosed that Farak's misconduct began in 2004, and thus affected thousands more defendants than the AGO had previously claimed. RA 312-366.

On June 26, 2017, Judge Carey ruled in *Commonwealth v. Cotto*, 0779CR00770 (and other cases), that Judge Kinder's inaccurate findings had been secured by the egregious misconduct of former AAGs Foster and Kaczmarek. Add. 78, 140. Judge Carey found that Foster and Kaczmarek intentionally withheld exculpatory evidence and that Foster deceived Judge Kinder. Add. 86. Judge Carey found that these actions were "a fraud upon the court," Add. 86, and ruled that, with respect to certain defendants, dismissal with prejudice was an appropriate remedy. Add. 94.

In September 2017, Petitioners filed this case in the Supreme Judicial Court for Suffolk County. RA 14-42. Following a Single Justice order dated November 2, 2017, the DAOs agreed to the dismissal of an estimated 8,000 cases. RA 386. Meanwhile, in response to the petition, the AGO has declined to dispute Judge Carey's June 2017 finding that its former AAGs committed egregious misconduct. RA 291. The AGO also supported petitioners' request to report this case to the full court. RA 6 (Dkt. #64). But the AGO has not said what remedies it believes to be warranted by the misconduct of its former AAGs, or by the AGO's later failures to take corrective action.

STATEMENT OF FACTS

The Amherst Lab crisis began with Farak, who engaged in government misconduct for nearly a decade, compromising thousands of drug cases. But it did not end there. Following Farak's arrest in January 2013, the scandal metastasized because of the AGO's intentional misconduct, and because of the DAOs' failure to comprehensively identify and notify defendants. As a result, for years, thousands of people have continued to suffer the harsh consequences of wrongful convictions.

I. Farak's misconduct

Practices at the Amherst Lab were "generally poor" and its security gaps were "highly problematic." Add. 27. "[M]ore laid back" than the Hinton Lab, the Amherst Lab had "basically . . . no oversight," RA 183-184, ¶¶87, 92, which meant that the "theft of controlled substances could go undetected." Ex. 185 at 6.

On January 18, 2013, the Amherst Lab's supervisor found packaging from missing drug samples at Farak's workstation and contacted the Massachusetts State Police, which immediately closed the Lab. Add. 39. The next day, officers arrested Farak after searching her car and finding evidence that, beyond tampering with samples, she stole and consumed drugs. Add. 46. Farak was later charged with tampering with evidence, steal-

ing drugs, and drug possession, to which she pleaded guilty on January 6, 2014. Add. 79.

The Commonwealth has conceded that "Farak committed egregious government misconduct in all cases in which she signed drug lab certificates at the Amherst lab." Add. 83; Ex. 164. Almost daily while working at the Lab, from August 2004 until January 18, 2013, Farak was under the influence of methamphetamine, amphetamine, phentermine, ketamine, MDMA, MDEA, LSD, cocaine, and other narcotics (or suffering withdrawal from those substances). Add. 38. Farak's use of narcotics while at the lab caused her to experience hallucinations and other visual distortions, to experience what she described as "ridiculously intense cravings," and to feel like her mind was racing. Add. 38. By 2009 (and possibly earlier), Farak regularly stole and consumed police-submitted samples of cocaine, some of which had been analyzed by other chemists. Add. 38. She replaced samples with counterfeit substances and altered the weights recorded in the Lab's computer system. Add. 38.

The impact of Farak's misconduct was not limited to her cases; it affected all of the cases submitted to the Amherst Lab. Add. 33. Farak extensively consumed and tampered with "standards," which are pure forms of drugs that are used to test alleged drug sam-

ples. Add. 28-30. She also tampered with many of her colleagues' samples. Add. 33. Farak has insisted, without corroboration, that she did not tamper with other chemist's samples before the summer of 2012, Add. 33, and that she did not steal from unassigned samples from the drug safe before the end of 2012. RA 205-206, ¶¶252-256. But Farak had access to all samples at the Lab during her entire tenure, including unsealed samples left overnight in the temporary safe. Add. 23, 26. She also had access to the heat sealer, which she manipulated so she could steal evidence more easily, and to the computer system, which allowed her to alter gross sample weights. Add. 34.

II. The AGO's misconduct

The AGO prosecuted Farak. Paralleling its approach to prosecuting Annie Dookhan in the Hinton Lab scandal, the AGO agreed with the DAOs on a protocol: the AGO would send the DAOs Farak-related evidence that tended to exculpate defendants in drug cases prosecuted by the DAOs, so that the DAOs could disclose that evidence to defendants. RA 250; T5:107, 133, 210-11. As the DAs have correctly observed, this protocol presumed that they could "reasonably rel[y] on the representations of the AGO." RA 378. But the AGO did not uphold its end of the bargain. As explained below, AAGs Foster and Kaczmarek engaged in a

cover-up, and the AGO later failed to alert the courts and defendants whom they had misled. In the words of one Assistant District Attorney, the scope of Farak's misconduct became a "moving target."[2]

A. The AGO's withholding of exculpatory evidence through deception

The AGO assigned AAG Kaczmarek to prosecute Farak, and it assigned AAG Foster to respond to subpoenas concerning that prosecution. Add. 40-41. In those roles, AAGs Kaczmarek and Foster repeatedly misled defense counsel about Farak's misconduct; withheld exculpatory evidence from defendants; and deceived the Superior Court. Add. 86.

After Farak's arrest, "a major question" for the AGO was "how many drug lab convictions [Farak] may have undermined." Add. 50-51. But the AGO failed to conduct an investigation to answer this question, and AAG Kaczmarek even "encourage[ed] OIG Senior Counsel Audrey Mark to decline any request to investigate the Amherst lab." Add. 87 n.37.

Meanwhile, the AGO "assumed" that Farak's misconduct was limited to late 2012, an assumption "at odds with the evidence uncovered" by the Massachusetts

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[2] Affidavit of First Asst. Dist. Attorney Jennifer N. Fitzgerald in Support of District Attorney for Hampden County's Response to Petition at 18 ¶28 (Nov. 28, 2017).

State Police, and known to the AGO, at an "early juncture." Add. 51. In January 2013, the MSP searched Farak's car and found "mental health worksheets" containing admissions by Farak that she had stolen and used police-submitted samples at work; documentation that Farak had sought counseling for addiction; and proof that Farak had been stealing and abusing drugs since at least 2011 (not 2012, as the AGO claimed). Add. 46. On February 14, 2013, MSP Sergeant Joseph Ballou sent these worksheets to AAG Kaczmarek and AAG John Verner, chief of the criminal bureau, in an email entitled "FARAK Admissions." Add. 54-55; RA 91-102. Ex. 205.

The AGO recognized that these worksheets were "significant and exculpatory." Add. 58. In late March 2013, AAG Kaczmarek drafted a memo referencing the worksheets and acknowledging case law suggesting that they were *not* privileged. Add. 55-56; Ex. 163. AAG Verner noted on this memo: "Paperwork not turned over to DA's Office yet." Add. 56; Ex. 163.

Because the AGO had not turned over this evidence to defendants either, several defendants attempted to learn what the MSP had found in Farak's car. Add. 61. The defendants pursued exculpatory evidence "through multiple avenues," Add. 61, including discovery motions and subpoenas, and the AGO assigned AAG Foster

to respond. At a Superior Court hearing on September 9, 2013, AAG Foster failed to produce Ballou's file which had been summonsed to court. Add. 67-69. Although she had not reviewed the file, AAG Foster argued for a protective order. Add. 67. Consequently, Judge Kinder required AAG Foster to produce for *in camera* inspection any documents that the AGO sought to protect. Add. 68-69.

AAG Foster emailed five AGO colleagues about Judge Kinder's order, including AAG Kaczmarek, who informed the group that Ballou's file included Farak's "mental health worksheets." Add. 70; RA 127; Ex. 210. Yet Foster neither produced the worksheets nor reviewed the file. Add. 64. Instead, in September 2013, she wrote Judge Kinder a letter falsely asserting that, "after reviewing" the file, "every document" possessed by Ballou "has been disclosed." Add. 71; RA 129; Ex. 193.

September 16, 2013

Honorable Jeffrey Kinder
Hampden County Superior Court
Hall of Justice
P.O. Box 559
Springfield, MA 01102-0559

RE: *Commonwealth v. Jermaine Watt, et al*, HDCR2009-01068, evidentiary hearing

Dear Judge Kinder:

On September 9, 2013, pursuant to a subpoena issued by defense counsel, you ordered the Attorney General's Office to produce all documents in Sergeant Joseph Ballou's possession that the Attorney General's Office believes to be privileged by September 18, 2013, to be reviewed by your Honor in camera. After reviewing Sergeant Ballou's file, every document in his possession has already been disclosed. This includes grand jury minutes and exhibits, and police reports. Therefore, there is nothing for the Attorney General's Office to produce for your review on September 18, 2013.

Please do not hesitate to contact me should your require anything further.

Sincerely,

Kris C. Foster
Assistant Attorney General
(617) 963-2833

Judge Carey found that this letter was "intended to, and did," give Judge Kinder "the false impression that Foster had personally reviewed Ballou's file." Add. 71. These misrepresentations were not inadvertent, rather, the AGO "piled misrepresentation upon misrepresentation to shield the mental health worksheets from disclosure." Add. 74.

But for the efforts of defense counsel, the AGO might have gotten away with it. In July 2014, Attorney Luke Ryan finally secured leave to examine the evidence seized from Farak's car. Add. 79. Attorney Ryan inspected the evidence in October 2014, and he found

the worksheets and other previously undisclosed documents. Add. 79.

In June 2017, based on the failure to disclose, the subsequent cover-up, and *numerous* other actions,[3] Judge Carey concluded that AAGs Foster and Kaczmarek had committed egregious misconduct with a "systemic" impact. Add. 86-87. Judge Carey ruled that Judge Kinder's finding about the scope and duration of Farak's misconduct had been based on "misrepresentations made by Foster and the limited evidence before him." Add. 78. But for the AGO's fraud, Judge Carey found, Farak defendants "*would have obtained discovery* to support their claims for relief *and would not have spent as much time incarcerated*." Add. 87 (emphasis added). Judge Carey also found that Kaczmarek attempted to deceive *him* during her December 2016 testimony, when she "feign[ed] that she forgot about the mental health worksheets." Add. 86-87.

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[3] *See*, *e.g.*, Add. 73-74 (noting the AGO's "patently false" claim that evidence seized from the car was "irrelevant"); Add. 77 (finding that AGO failed to "squarely or honestly" address a discovery request about third-party knowledge of Farak's misconduct); Add. 86 (finding that AAGs Foster and Kaczmarek "withh[e]ld the mental health worksheets through deception); Add. 86 (finding that misrepresentations by AAGs Foster and Kaczmarek "did not stop in 2013").

Judge Carey concluded that AAGs Foster and Kaczmarek committed "a fraud upon the court," Add. 86, which he summarized as follows:

> Kaczmarek and Foster managed to withhold the mental health worksheets through deception. They tampered with the fair administration of justice by deceiving [the court] and engaging in a pattern calculated to interfere with the court's ability impartially to adjudicate discovery in the drug lab cases and to learn the scope of Farak's misconduct. . . . Their conduct constitutes a fraud upon the court.
>
> * * *
>
> Kaczmarek knew that the mental health worksheets were exculpatory admissions by Farak, that the drug lab defendants were entitled to them, that the AGO had not turned them over to the drug lab defendants, and that it had no intention of doing so.
>
> * * *
>
> Foster's denial in December 2016 of having made any mistakes underscores her lack of a moral compass. As attorneys, officers of the court, and agents of the Commonwealth of Massachusetts, Kaczmarek's and Foster's conduct is reprehensible and magnified by the fact that it was not limited to an isolated incident, but a series of calculated misrepresentations.

Add. 86-87.

B. The AGO's failure to correct its false statements

Two days after finding the withheld worksheets, Attorney Ryan wrote the AGO on November 1, 2014, to sound the alarm. "It would be difficult," his letter explained, "to overstate the significance of these documents." Add. 80; RA 164; Ex. 166. AAG Verner was "shocked" and "pissed" that the AGO had not turned over the worksheets. T5:196:8-16, 198:4-5. Yet the AGO did not alert the courts or defendants who were prejudiced by AAG Foster's and Kaczmarek's deception. Nor did it alert *this Court*, where Judge Kinder's rulings were on appeal, to confess error. *See Cotto*, 471 Mass. 97; *Ware*, 471 Mass. 85.

Instead of correcting its *false statements*, the AGO corrected (in part) its *failure to disclose exculpatory evidence*. On November 13, 2014, the AGO sent the DAOs almost 300 pages of previously undisclosed evidence from Farak's car. Add. 80; Ex. 167. The AGO acknowledged these were "potentially exculpatory" materials that it was "oblig[ed]" to disclose. Ex. 167. But the AGO failed to mention that it had possessed this evidence for twenty-two months, or that the AGO's falsehoods had infected still-pending litigation which the DAOs were then conducting. Ex. 167.

The AGO's misconduct had consequences. At oral argument in *Cotto* and *Ware*, a Hampden County ADA —

perhaps unaware of all facts known to the AGO — defended Judge Kinder's erroneous finding, based on the AGO's falsehoods, that Farak's misconduct began in the summer of 2012.[4] This Court then upheld those findings, *Cotto*, 471 Mass. at 111 & nn.13-14, concluded that Farak's misconduct was not "comparable" to Dookhan's, and declined a "conclusive presumption of egregious misconduct" in Farak's cases. *Cotto*, 471 Mass. at 111; *Ware*, 471 Mass. at 93.

C. The AGO's failure to notify defendants

To this day, the AGO has not comprehensively identified or notified defendants harmed by AAGs Foster and Kaczmarek. Instead, it claims to have assisted the DAOs in *their* efforts to identify defendants. RA 294-95, 305 ¶10, 309 ¶45. In October 2015, a Deputy Attorney General represented that he would contact the DAOs to convene a discussion about identifying and notifying defendants, RA 76-77, 80-83, but the AGO has not claimed that he ever followed through. RA 308.

The AGO did not change course even in December 2016, when Foster gave testimony that was both self-incriminating and contrary to the testimony of her former AGO colleagues. On the witness stand, Foster

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[4] The *Cotto* and *Ware* arguments are available at http://www.suffolk.edu/sjc/pop.php?csnum=SJC_11761, and http://www.suffolk.edu/sjc/pop.php?csnum=SJC_11709.

confessed that she had made her representations about the evidence in its possession to Judge Kinder even though she had "not reviewed one document in the Farak case," T3:64, and, thus, without knowing whether her representations were true. Foster also testified that her AGO supervisors instructed her to make those representations, an accusation that the supervisors denied. Add. 62-63. Even so, the AGO insisted that AAGs Foster and Kaczmarek made only "unintentional mistakes," and it opposed vacating *any* convictions based on their actions. RA 243, 246, 247, 248, 256, 257, 264, 270, 280, 286, 288.

Although the AGO has more recently asserted that it is "open to a broader remedy in this case than the one that resulted from *Bridgeman*,"[5] it has yet to propose any remedy for people who were prejudiced by its own misconduct in addition to Farak's misconduct.

III. The District Attorneys' Offices' failure to notify defendants

After Farak's January 2013 arrest, District Attorneys pledged to be "proactive in identifying cases, notifying defense counsel and bringing them before the court."[6] But according to their own submissions, the

[5] Attorney General's Response to the Court's Dec. 8, 2017 Interim Order at 3 (Dec. 18, 2017).

[6] Statement from Massachusetts District Attorneys, Jan. 20, 2013, at https://www.northwesternda.

DAOs limited notice to the relatively few defendants who were still incarcerated on Farak-involved cases. Before this case was filed, only two DAOs — Worcester and Suffolk — attempted to give any notice in cases involving non-incarcerated defendants.[7]

Thus, for nearly five years, there has been no systematic notice to defendants harmed by this scandal. None of the DAOs provided such notice in 2013, following Farak's arrest. Nor did they do so following the AGO's belated disclosure, in November 2014, of previously withheld evidence. Nor did they even do so in August 2016, when they acknowledged that Farak had engaged in egregious misconduct affecting *all* of her cases. *Cf.* RA 375-76 (referencing "complete or partial lists" provided by the Worcester and Suffolk DAOs "during the summer of 2016").

The DAOs failed to notify defendants, even though they were repeatedly urged to chart a different

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org/news/statement-da-sullivan-amherst-drug-lab-allegations.

[7] *See, e.g.,* Affidavit of First Asst. Dist. Attorney Jane A. Sullivan in Support of District Attorney for Worcester County's Response to Petition at 4-5 ¶¶5-6 (Nov. 29, 2017) (referencing letters prepared for defendants); Affidavit of Asst. Dist. Attorney Ian Leson in Support of District Attorney for Suffolk County's Response to Petition at 7 ¶11 (Nov. 30, 2017) (discussing list of defendants provided to CPCS in August 2016).

course. For example, the AGO's Criminal Bureau Chief, Kimberly West, emailed the DAOs in August 2015 to say that notification of non-incarcerated defendants was "'something we should talk about as a group.'" RA 308 ¶30. On October 1, 2015, West conferred with the DAOs, but did not "come to a conclusion," on "how [notification] could be done." *Id.* ¶33.

Likewise, in January 2017, CPCS and the ACLU of Massachusetts wrote the DAOs to ask if, how, and when they intended to notify Farak defendants. RA 45 ¶14, 55-57. These letters also suggested that the DAOs may wish to access drug-case data that had been supplied to the parties in *Bridgeman*, and which the DAOs in that case had used to identify Dookhan defendants. *Id.* Following brief discussions, the DAOs appeared to decide to wait for Judge Carey's ruling. RA 45-46 ¶¶15-19.

IV. The affected defendants

There may be 8,000 drug convictions in which Farak signed the relevant certificate of analysis, and CPCS estimates that there may 19,000 total drug convictions (including the Farak-involved convictions) involving samples tested at the Amherst Lab during Farak's tenure. RA 386; Add. 148. Because the AGO sought to obscure all but a few months of Farak's near decade-long tenure at the Amherst Lab, it seems that

more than 7,000 convictions in which Farak signed the underlying certificate of analysis — now slated for agreed-upon dismissals — would have remained on the books indefinitely if the AGO's misconduct had not been discovered.

The petitioners here are the Committee for Public Counsel Services (CPCS), the bar advocate organization Hampden County Lawyers for Justice (HCLJ), and two individuals: Herschelle Reaves and Nicole Westcott. Ms. Reaves is a community activist whose advocacy addresses unfairness in the justice system. RA 70-71. She was convicted in 2008 of a drug possession offense in which Farak signed the drug certifiate. RA 71. Ms. Westcott works for ServiceNet, a company that provides services to people suffering from addiction. RA 73. She sustained at least three adverse dispositions in which Farak signed the drug certificate. RA 74-75. No one on behalf of the Commonwealth informed Ms. Reaves or Ms. Westcott of Farak's misconduct, or the misconduct of AAGs Foster and Kaczmarek, before they filed this case. RA 72, 75.

SUMMARY OF THE ARGUMENT

I. The sheer magnitude of government misconduct in this case is unprecedented. Following Sonja Farak's extensive misconduct, AAGs Foster and Kaczmarek violated the due process rights of all Amherst Lab de-

fendants by withholding exculpatory evidence through a fraud on the court. The AGO violated its constitutional duties by twice failing to properly investigate Farak's misconduct, especially its impact on samples not tested by Farak herself. And the AGO and the DAOs blocked the appellate and post-conviction rights of Amherst Lab defendants; the AGO failed to alert courts to AAG Foster's false statements, and both the AGO and most DAOs failed to notify affected defendants of the government misconduct by Farak, Foster, and Kaczmarek. (Pp. 23-36)

II. All drug convictions from Farak's tenure at the Amherst Lab — not just those in which she signed a drug certificate — should be dismissed for two reasons. First, all Amherst Lab defendants have been irremediably prejudiced by the Commonwealth's misconduct, because it prevented them from timely investigating actionable claims about the impact of Farak's misconduct on their convictions. Second, prophylactic considerations are of paramount importance here, to account for the due process rights of defendants, the integrity of the criminal justice system, and the efficient administration of justice. This Court should leave "no doubt that such conduct will not be tolerated." *Commonwealth v. Manning,* 373 Mass. 438, 444 (1977). (Pp. 36-44)

III. This Court should order further prophylactic remedies, such as standing orders and monetary sanctions, both to deter future misconduct by government attorneys and to penalize the Commonwealth for its misconduct. Petitioners suggest three standings orders: (1) an order mandating the *Bridgeman* protocol for any outbreak of egregious misconduct of a member of the prosecution team; (2) an order mandating notice of and investigation into criminal cases that may have tainted by a government attorney; and (3) an order more clearly defining the Commonwealth's discovery obligations. Imposing monetary sanctions on the AGO or, in the alternative, individual AAGs, will both remedy past wrongs and deter future ones. (Pp. 44-53)

ARGUMENT

I. Assistant Attorneys General, the Attorney General's Office, and District Attorneys' Offices have each committed misconduct that has exacerbated the Amherst Lab scandal.

Farak's misconduct was only the beginning of almost five years of misconduct that is not just legally *attributable to* the government, but was in fact *committed by* prosecutors. This attorney misconduct included: (1) the fraud on the court by AAGs Foster and Kaczmarek, who withheld exculpatory evidence and made false statements about the timing and scope of Farak's misconduct; (2) the AGO's repeated failure to thor-

oughly investigate Farak's misconduct; and (3) the deliberate blocking of defendants' appellate and post-conviction rights by both the AGO, which failed to alert the Superior Court or this Court to its attorneys' material false statements, and the DAOs, who largely joined the AGO in failing to identify and notify defendants.

A. AAGs Foster and Kaczmarek violated defendants' constitutional rights and defrauded the court.

"[S]uppression by the prosecution of requested material evidence which is favorable to the accused is a denial of due process." *Commonwealth v. Ellison*, 376 Mass. 1, 21 (1978). That is what happened here, in thousands of cases.

Rather than turn over the most significant exculpatory evidence in their possession, AAGs Foster and Kaczmarek "deliberately used deceptive tactics to shield the mental health worksheets from disclosure." Add. 102. They disregarded their constitutional and ethical obligations and "tampered with the fair administration of justice by deceiving Judge Kinder and engaging in a pattern calculated to interfere with the court's ability impartially to adjudicate discovery in the drug lab cases and to learn the scope of Farak's misconduct." Add. 86.

That deception went to the heart of what Judge Kinder was trying to ascertain. As detailed above, AAG Foster's September 2013 letter was "intended to, and did," give Judge Kinder "the false impression that Foster had personally reviewed Ballou's file." Add. 71. She also deceived Judge Kinder into believing the AGO turned over all relevant documents. Add. 85-86. As Judge Carey later found, AAG Foster filed pleadings with "no reasonable basis to believe that any of [her] arguments had merit," and that "did not squarely or honestly address" the issues before the court. Add. 65, 77. And she did all this with the intent "to relieve the AGO from having to produce" exculpatory evidence. Add. 65.

AAG Kaczmarek was equally deceptive. She purposefully withheld the exculpatory mental health worksheets from defense counsel and intentionally gave at least one ADA the misimpression that "all relevant discovery" had been provided.[8] Add. 64 n.31, 123. Judge Carey found that Kaczmarek lied to him at the

[8] Withholding this evidence was especially egregious because defendants specifically and repeatedly requested it. *See Commonwealth v. Tucceri*, 412 Mass. 401, 407 (1992) ("when the omission of the prosecution is knowing and intentional or follows a specific request, a standard of prejudice more favorable to the defendant is justified in order to motivate prosecutors to be alert to defendants' rights to disclosure").

December 2016 evidentiary hearing, "feigning that she forgot about the mental health worksheets," when in fact she knew they had not been turned over because she had "no intention" of turning them over. Add. 86-87.

As Judge Carey found, Foster and Kaczmarek's misconduct constituted "a fraud upon the court." Add. 86. Indeed, deceiving a court about the existence of undisclosed exculpatory evidence is the very definition of fraud on the court. *See Comm'r of Probation v. Adams*, 65 Mass. App. Ct. 725, 730 (2006), citing *In re Neitlich*, 413 Mass. 416, 423 (1992) (fraud on court where attorney made false statement with intent to deceive court); *Rockdale Mgmt. Co. v. Shawmut Bank, N.A.,* 418 Mass. 596, 598 (1994) ("[f]raud on the court" includes "deceiving the institutions set up to protect and safeguard the public") (cleaned up).[9]

If the fraud by AAGs Foster and Kaczmarek had affected only one case, that would have been significant. But their misconduct affected thousands of defendants, making this scandal the most significant malfeasance by prosecutors in the history of the Commonwealth's justice system.

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[9] This brief uses (cleaned up) to indicate that internal quotation marks, alterations, and citations have been omitted from quotations. *See, e.g.*, *United States v. Reyes*, 866 F.3d 316, 321 (5th Cir. 2017).

B. The AGO breached its duty to investigate not once, but twice.

When Farak's misconduct came to light, the Commonwealth had a duty to investigate stemming from its "duty to learn of and disclose to a defendant any exculpatory evidence that is 'held by agents of the prosecution team.'" *Ware*, 471 Mass. at 95, quoting *Commonwealth v. Beal*, 429 Mass. 530, 532 (1999). The AGO twice neglected this duty. Its first failure came in 2013, when it somehow managed to prosecute Farak without investigating the scope of her misconduct. Its second failure followed this Court's *Cotto* decision in 2015, when it conducted an investigation that failed to meaningfully scrutinize the impact of Farak's misconduct on defendants whose samples were tested by other chemists.

1. In 2013, the AGO failed to investigate the scope of Farak's misconduct.

Judge Carey found no evidence "that a comprehensive, adequate, or even reasonable investigation by any office or agent of the Commonwealth had been attempted, concluded, or disclosed" until, only at this Court's request, the AGO issued a report in April 2016 (the "*Cotto* Report"). Add. 88-89; RA 312. Comparing the Commonwealth's response to the Hinton Lab scandal illustrates how "very limited" the initial investiga-

tion into Farak's misconduct was. *Ware*, 471 Mass. at 93.

In 2012, upon learning of an instance of Dookhan's misconduct, the State police detective unit of the Attorney General's Office "launched a broader investigation . . . to ensure that her misconduct was limited to [this] incident." *Commonwealth v. Scott*, 467 Mass. 336, 339 (2014). They found it to be "the proverbial tip of the iceberg." *Id.*

In January 2013, when confronted with Farak's misconduct by a chemist, the AGO pretended the iceberg did not exist. AAG Kaczmarek was particularly concerned that an investigation might trigger "an avalanche of work." Add. 52. Consequently, rather than conduct an investigation, the AGO ignored evidence that Farak's misconduct was occurring as early as 2011 and affected other chemists' samples, and it disregarded any leads that did not comport with its implausibly narrow theory of the case.

The AGO proceeded as though the misconduct was limited in scope, which was "at odds with the evidence uncovered even at that early juncture." Add. 51. AAG Kaczmarek even discouraged another attorney from investigating. Add. 54. This "[i]ntentional[] avoid[ance]" of "information that may be exculpatory [was] a serious breach of prosecutorial ethics," *Com-*

monwealth v. Beal, 429 Mass. at 535 n.4, and a serious violation of the constitutional rights of every defendant at the Amherst Lab.

2. In 2015, the AGO again failed to adequately investigate the scope of Farak's misconduct.

"[W]here there is egregious misconduct attributable to the government in *the investigation* or prosecution of a criminal case, the government bears the burden of taking reasonable steps to remedy that misconduct." *Bridgeman II*, 476 Mass. at 315 (emphasis added). In *Cotto*, this Court directed the Commonwealth to "thoroughly investigate the timing and scope of Farak's misconduct at the Amherst drug lab" not only to assess Farak's actions, but to "remove the cloud that has been cast over the integrity of the work performed at that facility, which has serious implications for the entire criminal justice system." *Cotto*, 471 Mass. at 115. Yet the AGO has never adequately investigated the effect of Farak's misconduct on *defendants whose drug certificates she did not sign*.

In response to *Cotto*, the AGO issued a report in April 2016, which documented rampant drug use by Farak, including her consumption of "standards" used for testing drug samples. RA 312-66. It recounted Farak's admissions that she consumed samples assigned to other chemists. RA 326-327. The *Cotto* Report did

not, however, independently assess the impact of Farak's misconduct on the Amherst Lab or all defendants who had samples analyzed there.[10]

There is reason to doubt Farak's flawed and self-serving testimony that she started to tamper with other chemists' samples only in the summer of 2012, and only after those samples had already been tested. To start, Judge Carey found that Farak likely "minimize[d] her substance abuse." Add. 28 n.11. And because she was habitually under the influence of drugs, or suffering from symptoms of withdrawal, Add. 139, Judge Carey observed that Farak's testimony that there were no inaccuracies in her testing "defie[d] logic" and was "undercut by her report to her therapists that at times, stimulants caused her to experience visual disturbances." Add. 29, 32.

Additionally, at least some of Farak's testimony was inaccurate. By way of example, Farak stated that she did not do any testing on January 9, 2012, a day she was extremely impaired from her use of LSD. Add. 32. However, this was directly contradicted by records

[10] Instead, the AGO simply repeats Farak's testimony about what she supposedly did, while noting that it "has provided the facts gleaned from its investigation without evaluation, without any determination about the credibility of any of the witnesses, and without the drawing of any conclusions." RA 366 n.43.

showing that she ran the GC/MS and signed certificates of analysis on that date. Add. 32.

There is no reason to believe that Farak could give, let alone attempted to give, an accurate account of her tampering with samples tested by other chemists. It would be unreasonable to credit Farak's testimony about when she began stealing from other chemists' samples, which samples those were, and whether she did so before they were tested. Add. 33. Nor is there any reason to believe that Farak's inflated sense of her own competence did not extend to her purported ability to ensure that, when she tampered with a sample before it was assigned, it would always be assigned to her. Add. 33.

In these circumstances, a "reasonable step" to remedy the failure to conduct an adequate investigation would have been to look beyond Farak's testimony for reliable evidence about the scope of her misconduct. At the very least, the AGO should have: (1) identified the samples tested by other chemists that Farak said she tampered with, to confirm that her memory was accurate; (2) spot-checked other chemists' samples, both within and before the summer 2012 timeframe, to see if the timeframe Farak provided was accurate; and (3) ascertained whether Farak compro-

mised the integrity of the Amherst Lab's computer inventory system. Add. 83 n.36.

By failing to look behind Farak's own account of whether she compromised other chemists' samples, the AGO compounded, rather than remedied, its initial failure to conduct a thorough investigation. As a result, defendants whose samples passed through the Amherst Lab, but whose drug certificates were not signed by Farak, will likely never be able to establish how her misconduct affected their cases. *Cf. Scott*, 467 Mass. at 352 ("[I]t is unlikely that [Dookhan's] testimony, even if truthful, could resolve the question whether she engaged in misconduct in a particular case").

C. Both the AGO and the DAOs deliberately blocked defendants' appellate rights.

State agents violate due process when they deliberately block a defendant's appellate rights, *Commonwealth v. Libby*, 411 Mass. 177, 178 (1991), and such "deliberate blocking" warrants dismissal. *Commonwealth v. Lee*, 394 Mass. 209, 220-221 (1985). Here, the AGO deliberately blocked defendants' appellate and post-conviction rights, not only by withholding exculpatory evidence and failing to conduct an investigation, but by failing to notify the courts of its false statements. The DAOs further blocked defendants' appellate

and post-conviction rights by not notifying them of Farak's misconduct. These actions unconstitutionally prevented defendants from challenging their convictions.

1. The AGO violated due process by failing to alert courts to its attorneys' false statements and by failing to notify defendants of its attorneys' misconduct.

When Attorney Ryan advised the AGO that its attorneys had withheld exculpatory evidence and made material false statements to Judge Kinder, RA 155-65, the AGO had a duty to notify this Court and the trial court of its misrepresentations. *See Commonwealth v. Hill*, 432 Mass. 704, 714 (2000). Due process, under both the federal and state constitutions, prohibits the Commonwealth from allowing false information "to go uncorrected." *Napue v. Illinois*, 360 U.S. 264, 269 (1959). *See* U.S. Const. amend. XIV; Part II, c. 1, § 1, art. 4 of the Massachusetts Constitution; Massachusetts Declaration of Rights, arts. 1, 10, 12. The AGO, as "chief law officer of the Commonwealth," also has common law and ethical duties to correct its employees' false statements to courts. *Secretary of Administration and Finance v. Attorney General*, 367 Mass. 154, 159 (1975).[11]

[11] *See also* former Mass. R. Prof. C. 3.3(a)(2), Add. 9 (requiring disclosure of "a material fact to a

Yet the AGO did not inform Judge Kinder that his decision as to the timing and scope of Farak's misconduct was based on the AGO's false statements. Nor did it inform this Court — where *Cotto* and *Ware* were pending until April 2015 — that one of Judge Kinder's most important findings, on the starting date of Farak's misconduct, had been secured through false statements. Instead, in violation of due process and its common law and ethical duties, the AGO allowed this Court to render decisions based on inaccurate information.

Moreover, once AAGs Foster and Kaczmarek committed misconduct, *their* actions, and not just Farak's, became exculpatory evidence in Amherst Lab cases. The AGO therefore had a duty to disclose that evidence to thousands of defendants. *Bridgeman II*, 476 Mass. at 315; *Ware*, 471 Mass. at 95; *Cotto*, 471 Mass. at 112. Yet the record contains no evidence that, before this case was filed, the AGO directly notified a single de-

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tribunal when disclosure is necessary to avoid assisting a . . . fraudulent act by the client"); former Mass. R. Prof. C. 3.3(a)(4), Add. 9-10 (stating, if an attorney offers "material evidence" and comes to know of its falsity, the attorney must "take reasonable remedial measures"). As of July 2015, Rule 3.3 even more explicitly requires an attorney "to correct a false statement of material fact or law previously made to the tribunal by the lawyer." Mass. R. Prof. C. 3.3(a)(1), as appearing in 471 Mass. 1416 (2015).

fendant or defense lawyer of the actions of Kris Foster or Anne Kaczmarek. *See* RA 304-310.

2. The DAOs violated due process by failing to notify defendants of Farak's misconduct.

In the context of the Commonwealth's lab scandals, one of the "reasonable steps" required of prosecutors is the timely and effective notification of defendants. *Bridgeman II*, 476 Mass. at 315; *see also Ware*, 471 Mass. at 95 (discussing the Commonwealth's duty to disclose exculpatory evidence held by the prosecution team); *Cotto*, 471 Mass. at 112 (same).

The DAOs repeatedly failed to take this "reasonable step." *Bridgeman II*, 476 Mass. at 315. After Judge Kinder found, in October 2013, that Farak committed egregious government misconduct starting in July 2012, the DAOs did not identify or notify the defendants whose cases fell within that period. After Attorney Ryan alerted the AGO, in November 2014, to evidence in the AGO's possession demonstrating that Farak's misconduct was occurring in 2011, no one identified or notified the impacted defendants whose cases fell within this larger timeframe. In 2015, AAG West had discussions with the DAOs about identifying and notifying all impacted defendants, yet the DAOs identified and notified only those who were then incarcerated on a Farak case. RA 308. And even after all eleven dis-

trict attorneys conceded, in August 2016, that Farak's misconduct warranted a conclusive presumption of misconduct back to August 2004, only two DAOs attempted some form of notice to defense counsel. *See supra*, n.5.

II. This Court should vacate and dismiss the convictions of all Amherst Lab defendants.

In *Bridgeman II*, when this Court stopped short of dismissing all tainted convictions, it emphasized the lack of evidence of misconduct by any prosecutor. *Bridgeman II*, 476 Mass. at 322, 328. Here, evidence of prosecutor misconduct is abundant. Dismissals with prejudice are the only appropriate remedy for that misconduct, which includes outrageous violations of due process, fraud on the court, and the deliberate blocking of appellate rights. Dismissals are also a necessary prophylactic in response to the Commonwealth's transforming the courts into unwitting agents of injustice.

As of this filing, there remains a "cloud" over the integrity of all testing at the Amherst Lab, *Cotto*, 471 Mass. at 115, and every defendant who sustained a drug conviction involving that Lab has been harmed by prosecutor misconduct. To leave "no doubt that such conduct will not be tolerated," *Manning*, 373 Mass. at 445, this Court should dismiss with prejudice

the wrongful convictions of all Amherst Lab defendants.

A. Dismissals with prejudice are warranted here.

Individually, each instance of misconduct warrants dismissing cases. In combination, justice demands it.

1. Dismissals are warranted because the misconduct harmed all Amherst Lab defendants.

By intentionally concealing Farak's misconduct and twice failing to adequately investigate its timing and scope, the AGO foreclosed, or at least prejudicially delayed, all Amherst Lab defendants from seeking post-conviction relief from their wrongful convictions.

Dismissal of charges is appropriate where "delayed disclosure was due to deliberate and egregious action by the prosecutor." *Commonwealth v. Cronk*, 396 Mass. 194, 199 (1985). The Commonwealth's purposeful failure to disclose exculpatory evidence made it impossible for defendants to make effective use of that evidence, and the prejudicial effect of the misconduct is irremediable. *See id.* at 199; *Commonwealth v. Light*, 394 Mass. 112, 114 (1985) (dismissal of charges appropriate where prejudice not remedied by new trial). It makes no difference that the defendants even-

tually received the evidence; dismissal is required because "[t]he opportunity eventually to present this claim [does] not cure the loss of the earlier opportunity to present it." *Commonwealth v. Washington W.*, 462 Mass. 204, 216-217 (2012).

Dismissal is also required due to the Commonwealth's constitutionally inadequate investigation. After ruling in *Cotto* that the Commonwealth had "an obligation to conduct an investigation" into Farak's misconduct, this Court remanded, stating:

> It is imperative that the Commonwealth thoroughly investigate the timing and scope of Farak's misconduct at the Amherst drug lab in order to remove the cloud that has been cast over the integrity of the work performed at that facility, which has serious implications for the entire criminal justice system.

Cotto, 471 Mass. at 115. Yet on remand, the Commonwealth failed again to thoroughly assess the scope of Farak's misconduct on other chemists' cases.

2. Dismissals with prejudice are also warranted as a prophylactic remedy and to protect the justice system's integrity.

In addition to dismissing cases when attorney misconduct prejudices defendants, courts may do so to deter further misconduct and to protect the justice system's integrity. One purpose of this prophylactic is "to create a climate adverse to repetition of that

misconduct that would not otherwise exist." *Bridgeman II* at 317, quoting *Commonwealth v. Lewin*, 405 Mass. 566, 587 (1989). Indeed, "prophylactic considerations assume paramount importance in fashioning a remedy" for attorney misconduct, because the "deliberate undermining of constitutional rights must not be countenanced." *Manning*, 373 Mass. at 444. For similar reasons, "prosecutorial misconduct that is egregious, deliberate, and intentional, or that results in the violation of constitutional rights may give rise to presumptive prejudice" even when no actual prejudice has been proved. *Cronk*, 396 Mass. at 198-199 (cleaned up).

Attorney misconduct involving the deliberate deception of a court is especially likely to trigger these concerns because it is incompatible with "rudimentary demands of justice." *Giglio v. United States*, 405 U.S. 150, 153 (1972) (cleaned up). To protect the integrity of the justice system, courts have the inherent authority to dismiss a case upon a finding of fraud on the court. *See Rockdale Mgmt. Co., N.A.*, 418 Mass. at 598-599. This inherent power may be invoked when an attorney knowingly makes misrepresentations to the court, intentionally misleads the court, or knowingly conceals information that it has a duty to provide to the court. *See Wong v. Luu*, 472 Mass. 208, 219 (2015) (court may sanction attorney using inherent

powers). While this judicial power is invoked sparingly, its exercise is justified by exceptional circumstances. *See Commonwealth v. Pagan*, 445 Mass. 315, 322 (2005). If hiding exculpatory evidence, lying to a court, and then covering up the original lies with more lies are not exceptional circumstances, it is hard to imagine what is.

Prophylactic considerations are also especially important where, as here, an attorney's deception turns a court into an unwitting "instrumentality" of injustice. *Manning*, 373 Mass. at 444. Such misconduct is acutely dangerous because "only when the importunings of government agents are unsuccessful will the matter come to the attention of the courts." *Id.* at 444. Without a doubt, that is what the AGO's agents attempted here. The AGO obtained, through deception, court orders denying defendants access to exculpatory evidence. It had courts send people back to jail, to serve time they would not otherwise have served, based on false representations as to the extent of the misconduct of another government actor. And it induced this Court to hold that defendants with a drug certificate signed by Farak did not deserve conclusive presumptions of misconduct when they did, and the Commonwealth has since so conceded.

Dismissing all convictions tainted by this misconduct will also help to restore what this Court has called the "fundamentals of our justice system." *Bridgeman II*, 471 Mass. 465, 487, quoting *Scott*, 467 Mass. at 354 n.11. Previously, this Court has expressed concern that dismissing cases with prejudice could "allow the misconduct of one person to dictate an abrupt retreat from" those fundamentals. *Id.* However, given the egregious and all-encompassing misconduct by many government actors that occurred here, dismissal with prejudice would not be an abrupt retreat from the fundamentals of our criminal justice system, but a powerful and necessary validation of them.

The fundamentals of our justice system require prosecutors to disclose exculpatory evidence. The fundamentals of our justice system require prosecutors to be honest with the court. The fundamentals of our justice system hold that "the duties of a prosecutor to administer justice fairly, and particularly concerning requested or obviously exculpatory evidence, go beyond winning convictions." *Ware*, 471 Mass. at 95, quoting *Commonwealth v. Tucceri*, 412 Mass. at 408. This Court should confirm that these fundamentals are not optional, and that if they are not adhered to this Court will impose strong remedies. Under these "extreme con-

ditions," dismissal with prejudice is the only appropriate remedy for the Commonwealth's substantial violations of due process. *Petition of Williams*, 378 Mass. 623, 628 & n.8 (1979).

B. The dismissals should apply to all Amherst Lab defendants.

At the very least, every conviction in which Farak signed a drug certificate should be vacated and dismissed. It is undisputed that Farak committed egregious misconduct, and thus it cannot be disputed that the AGO's misconduct prevented those defendants from promptly or effectively exercising their rights.[12]

But the prosecutor misconduct at issue here warrants the dismissal with prejudice of every case arising from the Amherst Lab during Farak's tenure. Court-ordered dismissals based on misconduct by a government attorney should not be limited to cases where lab misconduct is undisputed. Instead, prosecutor misconduct should result in the dismissal of any case where the defendant has an *actionable claim* of relief that was delayed or impaired by prosecutor misconduct.

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[12] Defendants who pleaded guilty after January 2013 are also entitled to relief: their pleas were involuntary because they were prevented from litigating their post-conviction motions with full knowledge of Farak's misconduct by the same egregious attorney misconduct.

Every Amherst Lab defendant has such a claim. It is undisputed that misconduct at the lab extended beyond samples assigned to Farak, and the precise scope of that misconduct is unknown (and at this point, unknowable) due the Commonwealth's misconduct in failing to conduct a prompt and adequate investigation.

Nor would it be fair to give the AGO yet another do-over. The Commonwealth was obliged to conduct a "timely" investigation because "[t]he burden of ascertaining whether Farak's misconduct at the Amherst drug lab has created a problem of systemic proportions is not one that should be shouldered by defendants." *Cotto*, 471 Mass. at 112. *Bridgeman II*, 476 Mass. at 317 ("[W]here large numbers of persons have been wronged, the wrong must be remedied in a manner that is not only fair as a matter of justice, but also timely and practical."). Defendants whose cases were tested at the Amherst Lab have unfairly shouldered this burden for almost five years. They should not have to do it any longer.

In fashioning a remedy, this Court should account for the due process rights of defendants, the integrity of the criminal justice system, [and] the efficient administration of justice." *Scott*, 467 Mass. at 352. These principles compel the conclusion that all Amherst Lab cases must be dismissed. It would not

be efficient to wait for the Commonwealth to complete an adequate investigation, and it is not fair to defendants that one has not been completed already. The AGO should not be given a third bite at the apple when the due process rights of defendants continue to be adversely impacted by its "unacceptably glacial systemic response." *Bridgeman II*, 476 Mass. at 332 (Lenk, J., concurring).

III. The attorney misconduct at issue here warrants additional prophylactic remedies.

"Every day," counsel for one District Attorney recently observed, "there are collateral consequences" for wrongfully convicted people.[13] Unfortunately, now that prosecutors have improperly prolonged those consequences for thousands of people, dismissals alone cannot meaningfully repair the damage. Nor can dismissals, without more, deter misconduct by other government attorneys. After all, under the *Bridgeman* protocol, misconduct by a chemist *and no one else* has yielded the dismissal of nearly all affected convictions. It follows that, when government attorneys cov-

[13] Statement of Asst. Dist. Attorney Ian Leson, *Committee for Public Counsel Services v. Attorney General*, SJ-2017-0347 (Feb. 22, 2018) (transcript not yet available); *see Commonwealth v. Pon*, 469 Mass. 296, 315-16 (2014) ("[J]udges may take judicial notice that the existence of a criminal record . . . can present barriers to housing and employment opportunities").

er up a chemist's misconduct, thereby delaying relief for thousands of injured individuals for years, the remedy should exceed an uptick in the percentage of cases dismissed. Here, at least two other remedies are appropriate: standing orders and monetary sanctions.

A. This Court should issue standing orders on the responsible handling of government misconduct and exculpatory evidence.

The Amherst Lab scandal's victims have learned, the hard way, that case law is not self-executing. Despite several key decisions by this Court, and the passage of several years since Farak's arrest, there was no comprehensive list of Farak's cases when this case began. Standing orders, as opposed to more lawsuits, would create a better mechanism for addressing government misconduct and ensuring disclosure of exculpatory evidence.

This Court has ample authority to issue standing orders responsive to this crisis. With respect to "the administration of the courts and the trial of cases, [this Court] may impose requirements (by order, rule or opinion) that go beyond constitutional mandates." *Commonwealth v. Bastarache*, 382 Mass. 86, 102 (1986). For example, this Court has approved "model notices and orders for use in all criminal cases" involving the pretrial inspection of certain records that may be

statutorily privileged.[14] And one of the Court's early interventions in the Hinton Lab crisis was a standing order.[15]

Given the subsequent conduct of the AGO and DAOs, the Court should issue three standing orders on government misconduct and exculpatory evidence.

1. *Standing* Bridgeman *Order*. This Court should issue a standing order, modeled on the *Bridgeman* protocol, governing criminal cases that any member of the prosecution team, including an analyst responsible for forensic evidence, may have tainted. The *Bridgeman* protocol, of course, provided crucial guidance in the Hinton Lab crisis. But even as prosecutors followed that protocol in *Bridgeman* itself, they were failing to do so in the Amherst Lab crisis, where (until recently) no one had sued them. When prosecutors learn of misconduct by a member of the prosecution team, it should not take a lawsuit for the *Bridgeman* protocol to begin; the protocol should be automatic.

A standing order should therefore mandate the *Bridgeman* protocol for any instance of egregious misconduct by any member of a prosecution team that has

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[14] *In re: Order dated December 29, 2006 entered in* Commonwealth v. Dwyer*, 448 Mass. 122 (2006)*, Supreme Judicial Court (Nov. 30, 2007).

[15] *See* Order, Supreme Judicial Court (Nov. 9, 2012).

likely resulted in wrongful convictions. Under this *Bridgeman* Order, when a prosecutor knows or has reason to believe that misconduct occurred in one or more of her cases, the prosecutor's office should have no more than 90 days to supply a list of relevant cases to the Chief Justice of the Trial Court and CPCS. *See Bridgeman II*, 476 Mass. at 300. For each case, the *Bridgeman* Order should require the office to say whether it agrees that the listed conviction(s) should be vacated and dismissed with prejudice. *Id.* at 327-28. For each conviction the office does not agree to have dismissed, the Order should require the prosecuting office to certify that it has untainted evidence sufficient to permit a jury to find the elements of the offense beyond a reasonable doubt. *Id.*

The *Bridgeman* Order should require the dismissal with prejudice of any conviction for which the prosecuting office makes no certification in 90 days, unless within that window the office obtains a court order finding compelling reasons to extend the deadline.

2. *Standing* Cotto *Order.* This Court should also issue a standing order governing criminal cases — whether pre- or post-conviction — that a government *attorney* may have tainted. Under this Order, when a government attorney knows that attorney misconduct may have affected a criminal case, the attorney or the

agency that employs her should have 30 days to notify the Chief Justice of the Trial Court, CPCS, and the Bar Counsel's office of the Board of Bar Overseers. *Cf.* Mass. R. Prof. C. 8.3. Notices provided under this Order should specify: (a) the key facts known to the reporting attorney or agency; (b) the potentially affected cases; and (c) whether, how, and by when the agency will investigate the misconduct. *Cf. Cotto*, 471 Mass. at 114. The *Cotto* Order should also provide that, if the agency declines to investigate, or if a court later finds that the agency's investigation was inadequate, the court may call for an independent investigation at the agency's expense. In fact, this Court could appropriately do so in this very case, because a thorough and independent investigation of the AGO's misconduct has never occurred.[16]

The *Cotto* Order should include a safe harbor for compliance and penalties for noncompliance. For example, the Order might disfavor sanctions against an agency that forthrightly discloses the misconduct of one of its attorneys. But it might favor sanctions,

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[16] *Compare* Aff. of the Hampden County Dist. Attorney's Office in Support of DAs' Response to Petition at 4-6,8 (Nov. 30, 2017) (discussing March 2016 letter by a Special AAG and a Special ADA that found, without discussion, "no evidence of prosecutorial misconduct").

including referrals to Bar Counsel and the monetary sanctions proposed below, when an agency fails to make a required disclosure — especially when, as here, that failure harms wrongfully convicted defendants.

3. Standing Brady *Order.* Finally, in criminal cases, this Court should require trial courts to issue an order governing prosecutors' disclosure obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and Massachusetts law. The *Brady* Order should set disclosure deadlines, and it should emphasize that the duty to disclose exculpatory evidence extends throughout the case. The Order should specify sanctions for violating it.[17]

B. This Court should also order monetary sanctions responsive to the AGO's misconduct.

Remedying past wrongs is one of the legal system's primary tools for deterring future wrongs. When criminal conduct harms others, courts can order de-

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[17] *See, e.g.*, Standing *Brady* Order, No. XX-XX (EGS), at http://www.dcd.uscourts.gov/sites/dcd/files/StandingBradyOrder_November2017.pdf; Chief Judge DiFiore Announces Implementation of New Measure Aimed at Enhancing the Delivery of Justice in Criminal Cases, N.Y. Unified Court System (Nov. 8, 2017), at https://www.nycourts.gov/PRESS/ PDFs/PR17_17.pdf; *see also* Cynthia E. Jones, *Here Comes the Judge: A Model for Judicial Oversight and Regulation of the* Brady *Disclosure Duty*, 138 Hofstra L. Rev. 87, 111-13 (2017).

fendants to pay restitution, which can both remediate and deter. *See Cepulonis v. Commonwealth*, 426 Mass. 1010, 1011 (1998).

When attorney misconduct harms others, as occurred here, courts can order the offending attorneys to pay monetary sanctions. This Court should do so here. Because AGO employees committed a "fraud upon the court," and because that fraud harmed thousands of people, this Court should order the AGO, or in the alternative individual former AAGs, to pay a monetary fine that compensates the victims and deters future wrongdoing.

The reasons for this sanction are well established. "[P]rophylactic considerations may assume paramount importance" when attorneys commit intentional misconduct, warranting measures "to create a climate adverse to repetition." *Bridgeman II,* 476 Mass. at 316-17; *see Manning*, 373 Mass. at 444. To advance those considerations, the Court has recognized that "[o]ther sanctions," beyond dismissing charges, "clearly are available against attorneys who are shown to be in willful disregard of appropriate court orders." *Cronk*, 396 Mass. at 201 n.3.

There are several legal bases to order monetary sanctions here. This Court can order fines, costs, and fees to "correct and prevent errors and abuses . . .

if no other remedy is expressly provided." G. L. c. 211, § 3. Because AAG Foster's false statements to Judge Kinder came in response to *civil* process in a *criminal* case, the Court can also impose sanctions under the civil or criminal rules. *See, e.g.*, Mass. R. Civ. P. 11; Mass. R. Crim. P. 14, 48. Under the criminal rules, Rule 14 authorizes only remedial sanctions, *Commonwealth v. Carney*, 458 Mass. 418, 418-19 (2010), but Rule 48 also permits sanctions that punish past misconduct, *Commonwealth v. Firth*, 458 Mass. 434, 442-43 (2010), thereby deterring future misconduct. Rule 48 provides:

> A wilful 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.

Rule 48's elements are satisfied here, and a fine would serve the interests of justice.

First, monetary sanctions against the AGO are appropriate because its attorneys repeatedly and willfully violated court orders to the detriment of thousands of people. In 2013, AAG Foster moved to quash subpoenas issued to AAG Kaczmarek and Ballou. Judge Kinder denied AAG Foster's motions to quash, noting she was under "a court order" to produce the subpoe-

naed evidence. RA 118, 121. Foster did not do so. Similarly, AAG Foster's deceptive letter of September 2013 came in response to an order, issued orally by Judge Kinder, giving her a deadline to produce Ballou's file. RA 126. Instead of complying, AAG Foster deceived Judge Kinder about what he had called "the Attorney General's obligation with respect to Sergeant Ballou's file." RA 125; *see also* RA 122, 123.

Second, this Court should impose monetary sanctions on the AGO, no matter whether it also sanctions Foster and Kaczmarek. In 2013 and 2014, AAGs Foster and Kaczmarek acted on the Attorney General's behalf as attorneys for her law firm. RA 103-04, 105-14 (pleadings signed by Foster on behalf of "MARTHA COAKLEY[,] ATTORNEY GENERAL"). The AGO is therefore a "counsel" subject to sanctions under Rule 48.

Holding the AGO accountable for Foster and Kaczmarek's fraud will deter future prosecutorial misconduct. The AGO is ideally suited to prevent or mitigate misconduct by its attorneys, and that is precisely what it failed to do. Instead, for *years*, it made things worse, first by declining to alert courts to AAG Foster's falsehoods, and later by opposing relief for people harmed by those falsehoods. Thousands of people, including petitioners Reaves and Westcott, were harmed not just by AAGs, but by the AGO itself.

Cf. Mass. R. Prof. C. 5.1 (discussing supervisory responsibility).[18]

Accordingly, this Court could order the AGO to create and fund an account for the defendants it harmed, from which disbursements could be made under the Single Justice's supervision. The Court could also consider requiring the AGO to pay attorneys' fees and costs for proceedings necessitated by its misconduct.

CONCLUSION

"The purpose for which the courts are established is to do justice." *Crocker v. Justices of Superior Court*, 208 Mass. 162, 179 (1911). Here, justice mandates the dismissal of all Amherst Lab cases, the entry of standing orders, and the imposition of monetary sanctions.

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[18] This Court has already rejected as "unavailing" any argument that sovereign immunity shields the Commonwealth's agents from court-ordered sanctions. *Carney*, 458 Mass. at 433 n.20. In the Commonwealth, governmental immunity is a "judicially created concept" that this Court may waive where "justice and public policy" do not call for it. *Morash and Sons, Inc. v. Commonwealth*, 363 Mass. 612, 619, 623 (1973).

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the Massachusetts Rules of Appellate Procedure.

3/15/18
Date

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ADDENDUM TABLE OF CONTENTS

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

BRIEF OF THE PETITIONERS