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

AMICI CURIAE **BRIEF OF THE CATO INSTITUTE AND THE CENTER ON ADMINISTRATION OF CRIMINAL LAW IN SUPPORT OF PETITIONERS**

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INTRODUCTION AND SUMMARY OF ARGUMENT

For the reasons articulated by the petitioners the Committee for Public Counsel Services (CPCS), the Hampden County Lawyers for Justice, and individuals Herschelle Reeves and Nicole Wescott, this Court should adopt broad remedies to hold the Attorney General's Office (AGO) and the District Attorney's Offices (DAOs) accountable for their egregious misconduct in failing to disclose exculpatory evidence related to Sonja Farak's mishandling of thousands of drug samples, concealing their actions through fraudulent statements to the court, and preventing wrongly convicted individuals from effectuating their post-conviction rights by failing to identify and notify them. Broad relief is appropriate in this case, and undersigned *amici* support Petitioners' request for dismissal of all relevant Amherst Lab cases, standing orders, and financial penalties.

Amici write separately to provide historical, legal, and policy-based support for the broad individual and prophylactic remedies sought by petitioners. As plea bargaining has almost entirely replaced the jury trial, prosecutors now have the power to charge, shape the facts, and dictate harsh prison sentences with little or

no oversight from the judicial branch. While such a concentration of power dramatically increases the risk of abuse and has, in fact, spurred an epidemic of *Brady* violations, prosecutors repeatedly escape accountability due to various factors, including the judicial doctrine of harmless error in appellate and post-conviction proceedings, civil immunities from suit, and disciplinary boards' abdication of their oversight roles with respect to prosecutors. Legal experts—including judges, prosecutors, defense attorneys, and academics—have studied these issues and proposed frameworks for preventing such prosecutorial misconduct and restoring the integrity of the criminal justice system.

The Court should remedy this systemic and widespread injustice by issuing the relief requested by the petitioners, including dismissals of all the Farak cases and issuance of monetary sanctions. It should also prevent future prosecutorial misconduct against other defendants by ensuring that judges proactively hold prosecutors accountable through clearly defined Brady standing orders, strong sanctions for noncompliance, and mandatory reporting to disciplinary boards.

STATEMENT OF INTEREST OF AMICI CURIAE

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999, and focuses on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement and prosecutors. Toward that end, Cato publishes books and studies, conducts conferences and forums, publishes the annual Cato Supreme Court Review, and submits amicus briefs to this Court and other courts across the Nation.

The Center on the Administration of Criminal Law (the "Center"), based at New York University School of Law, is dedicated to defining and promoting best practices in the administration of criminal justice through academic research, litigation, and public policy advocacy. The Center regularly participates as amicus curiae in cases raising substantial legal issues involving prosecutorial discretion and prosecutors'

ethical and constitutional disclosure obligations under the United States Constitution and applicable rules.[1]

STATEMENT OF THE CASE AND FACTS

Amici adopt the statement of the case and the statement of facts set forth in the petitioners' brief.

ARGUMENT

A. The Dominant Role of Prosecutors in Securing Guilty Pleas Was Never Contemplated by the Framers and Has Resulted in a System Ripe for Abuse.

In both the Hinton and Amherst Drug lab scandals, which together comprise tens of thousands of wrongful convictions based on tainted drug evidence, all but a small percentage of defendants pled guilty instead of exercising their constitutional rights to a fair trial. *See, e.g.*, Leon Neyfakh, *A Shocking Reminder of How Reliant Prosecutors Are on Plea Deals*, Slate Magazine (July 21, 2016), http://www.slate.com/articles/news_and_politics/crime/2016/07/the_annie_dookhan_case_in_massachusetts_shows_how_reliant_prosecutors_are.html (last accessed Apr. 24, 2018) ("less than 5 percent of the 7,500 convictions the Suffolk County District Attorney's Office has identified as being possibly

[1] No part of this brief purports to represent the views of New York University School of Law, or New York University, if any.

tainted by Dookhan went to trial."); Adam Frenier, *Drug Convictions With Ties To Chemist Sonja Farak Will Be Dismissed*, New England Public Radio, *at* http://nepr.net/post/drug-convictions-ties-chemist-sonja-farak-will-be-dismissed#stream/0 (last accessed Apr. 24, 2018) (noting that over 99 percent of defendants pled guilty in some counties impacted by Sonja Farak's mishandling of drug evidence).

Prosecutors have amassed substantial power through the proliferation of plea bargains, which account for almost all resolutions of criminal matters. Prosecutors control charging decisions (often charging defendants with mandatory minimum sentences), the discovery provided to defendants prior to a plea, and the terms of plea bargains, which often dictate sentencing and post-release conditions, with little if any oversight by judges. The effect of this wholesale transformation of our criminal justice system is that we have traded the transparency, accountability, and legitimacy that arises from public jury trials for the simplicity and efficiency of a prosecutor-driven conviction machine. As the repeated misconduct by the AGO and DAO in this matter demonstrates, the concentration of such power in the prosecution—without oversight and accountability—is ripe for abuse and creates a high risk of wrongful

convictions, which undermine the integrity of the criminal justice system.

The Framers of the Constitution and the Massachusetts Declaration of Rights envisioned a criminal justice system that protected against a system dominated by one branch of government. The right to a jury trial was meant to be the centerpiece. The Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. amend. VI. As the Supreme Court has recognized, the purpose of the jury trial was to provide for an "inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U.S. 145, 151, 156 (1968). The right to a jury trial developed as a necessary "check or control" on executive power—an essential "barrier" between "the liberties of the people and the prerogative of the crown." *Id.*; *see also Jones v. United States*, 526 U.S. 227, 246 (1999) (quoting Blackstone's characterization of "trial by jury as 'the grand bulwark' of English liberties").

Likewise, Article 12 of the Massachusetts Declaration of Rights provides for the right to trial by jury in criminal matters involving "capital or infamous punishment." Mass. Decl. Art. 12. This Court has repeatedly recognized that the purpose of the jury trial is

> to protect the citizen against arbitrary power and to ensure to him that issue of fact shall be determined by the composite judgment of a fairly numerous and representative body of impartial residents of the county selected at large *rather than by the judgment of one or of a small number of single individuals who may be subject to peculiar prejudices or whose station and personal experiences in life may have failed to provide them with sufficient understanding of the conditions and circumstances in which the parties acted*.

Opinions of the Justices to the Governor, 360 Mass. 877, 884 (1971) (quoting *Commonwealth v. Bellini*, 320 Mass. 635, 639-40 (1947) (emphasis added)); *see also Ludwig v. Massachusetts*, 427 U.S. 718 (1976) (finding that within Massachusetts' two-tier court system "the jury serves its function of protecting against prosecutorial and judicial misconduct" and thereby concluding that the system complies with the Sixth Amendment).

In order to effectively check prosecutorial overreach, the Framers envisioned trials in open court that promoted truth-seeking and fairness to the accused.

Consequently, the Constitution guarantees that the defendant has the right to the assistance of counsel, to confront and cross-examine witnesses against him, and to present evidence in his defense. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."); *Crawford v. Washington,* 541 U.S. 36, 50 (2004) ("[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.").

The Massachusetts Declaration of Rights similarly guarantees that "every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his council, at his election." Mass. Decl. Art. 12. The prosecution's burden at trial is not just to prove the defendant's guilt, but to overcome the presumption of his innocence and prove his guilt beyond a reasonable doubt by a unanimous verdict. *See Sullivan v. Louisiana,* 508 U.S.

275, 278 (1993); *Commonwealth v. Conefrey*, 420 Mass. 508 (1995).

But the criminal defendant's right to a jury trial and its concomitant protections have eroded with the expansion of plea bargaining. The country's "system of trials" has been reduced to a "system of pleas." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012); *see also* George Fisher, *Plea Bargaining's Triumph*, 109 Yale L.J. 857, 859 (2000) (observing that plea bargaining "has swept across the penal landscape and driven our vanquished jury into small pockets of resistance"). Indeed, plea bargains now comprise all but a few convictions. *See Lafler*, 566 U.S. at 170 (in 2009, pleas made up "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions"); Suja A. Thomas, What Happened to the American Jury?, 43 Litigation 3, Spring 2017, at 25, 25 ("[J]uries today decide only 1–4 percent of criminal cases filed in federal and state court."). Jury trials declined substantially following the imposition of mandatory minimum sentences for drug and other offenses in the 1980s, with 19 percent of federal defendants going to trial in 1980 and less than 3 percent in 2010, a figure that continues to this day. Jed S. Rakoff, *Why Innocent People Plead Guilty*, The New York Review of Books (Nov. 20, 2014), http://www.nybooks.com/articles/2014/11

/20/why-innocent-people-plead-guilty/ (last accessed Apr. 24, 2018).

The terms of plea bargains are largely determined by prosecutors, who often charge defendants with the most severe offenses possible (including those with mandatory minimum sentences) and use those charges to pressure defendants to plead out before trial. Rakoff, *supra* (observing that mandatory sentences "provide prosecutors with weapons to bludgeon defendants into effectively coerced plea bargains").

Prosecutors control which charges they are willing to drop or reduce and the corresponding sentences they are willing to agree to. Despite the fact that judges can reject plea agreements setting forth agreed-upon dispositions, *see* Fed R. Crim. P. 11(c)(5); Mass. R. Crim. P. 12(d)(4), they rarely do, and as a result, the prosecutors' decisions regarding plea agreements and proposed dispositions largely dictate sentences ultimately imposed by judges. Rakoff, *supra*.

With little judicial oversight, plea bargains take place behind closed doors and with prosecutors in a substantially better bargaining position relative to defense lawyers because they have access to police reports, crime scenes, witnesses, and other evidence before most defense lawyers are even involved in cases. J.F. Reinganum, *Plea Bargaining & Prosecutorial Discretion*, 78 The American Economic Review

713(1988). As many commentators have observed, regardless of whether their evidence is accurate or reliable, prosecutors tend to exhibit confirmation bias about the strength of their cases, which makes them overconfident in defendants' guilt. Rakoff, *supra*; Cynthia E. Jones, *Here Comes the Judge: A Model for Judicial Oversight and Regulation of the* Brady *Disclosure Duty*, 46 Hofstra L. Rev. 87, 105-06 (2017); Ellen Yaroshefsky, *Why Do Brady Violations Happen? Cognitive Bias and Beyond* (2013), *available at* http://scholarlycommons.law.hofstra.edu/faculty_scholarship/1025/; Alafair S. Burke, *Prosecutorial, Passion, Cognitive Bias, and Plea Bargaining*, 91 Marq. L. Rev. 183 (2007).

In addition to having no control over the charges and limited access to the evidence, many defendants are indigent and are subjected by the court (often at the prosecution's urging) to bail, which they cannot afford, and thus must be remanded to pretrial confinement or subjected to other onerous conditions before trial. Their attorneys, either public defenders or private assigned counsel, are burdened with heavy caseloads and are unlikely to be able to meet with them frequently or quickly push their cases to trial, particularly when defendants are held in pretrial detention. Being confined to jail prior to trial and consequently deprived of familial relationships and the ability to work is a major source of

pressure on poor defendants to plead guilty to resolve the case quickly and move on with their lives. *See Brangan v. Commonwealth*, 477 Mass. 691, 709 n.23 (2017) (recognizing that "[p]retrial detention disrupts a defendant's employment and family relationships, with often tragic consequences. . . . [and] disproportionately affects ethnic and racial minority groups."); *see also* Lauren-Brooke Eisen & Inimai Chettiar, *Criminal Justice: An Agenda For Candidates, Activists, and Legislators*, Brennan Center for Justice, 10 (2018), https://www.brennancenter.org/sites/default/files/publications/2018_04_CriminalJusticeAgenda.pdf ("Jailed defendants are quicker to plead guilty after experiencing horrific conditions. They therefore often decide to plead guilty to a lower charge and accept fewer years behind bars rather than roll the dice at trial on a higher charge carrying more time — even if they could win in court.")

Given that the vast majority of criminal defendants, whether guilty or innocent, are compelled to accept plea bargains, most defendants never get the benefit of their constitutional rights to a fair trial. The prosecution's evidence is therefore rarely tested by the adversarial system and consequently prosecutors escape much of the constitutional accountability of our jury trial system.

B. Prosecutorial Misconduct, Particularly in the form of *Brady* Violations, Is Pervasive and Creates a Substantial Risk of Wrongful Convictions.

The prosecutor's duty to disclose exculpatory and impeachment evidence to the defendant, as recognized by both federal and Massachusetts law, is a critical component of a defendant's fair trial rights. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that due process requires disclosure of evidence material to guilt or punishment "irrespective of the good or bad faith of the prosecutor"); *Giglio v. United States*, 405 U.S. 150, 154–55 (1972) (recognizing that the *Brady* obligation includes disclosure of evidence of witness credibility when "'reliability of a given witness may well be determinative of guilt or innocence'" (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959*)); Commonwealth v. Tucceri*, 412 Mass. 401, 404-05 (1992) ("Due process of law requires that the government disclose to a criminal defendant favorable evidence in its possession that could materially aid the defense against pending charges."). As the Supreme Court has recognized, such disclosure is necessary to comport with due process because "[a] prosecution that withholds evidence on demand of an accused which, if made

available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice." *Brady,* 373 U.S. at 87-88.

The burden to produce exculpatory evidence is on the prosecution even without a specific request because the prosecutor "must always be faithful to his client's overriding interest that 'justice shall be done.' He is the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer." *United States v. Agurs,* 427 U.S. 97, 110-11 (1976) (internal quotations omitted), *citing Berger v. United States,* 295 U.S. 78, 88 (1935). This obligation "extend[s] to materials and information in the possession or control of members of his staff and any others who have participated in the investigation or evaluation of the case[.]" *Commonwealth v. St. Germain*, 381 Mass. 256, 261 n.8 (1980). Evidence in possession of the prosecution or the police is *Brady* material even if the prosecutor is unaware of it, so the prosecutor has a duty to inquire. *Commonwealth v. Martin*, 427 Mass. 816, 823-24 (1998); *Kyles v. Whitley*, 514 U.S. 419 (1995).

The ethical duties of the prosecutor extend beyond this constitutional rule. Both the ABA Model Rules and the Massachusetts Rules of Professional Conduct recognize that the prosecutor has the obligation to "make timely disclosure to the defense of all evidence of information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense." Mass. R. Prof. Conduct 3.8(d); *see also* ABA Model Rule 3.8(d) "Disclosure is required when the information tends to negate or mitigates the offense without regard to the anticipate impact of the information . . . [and] exist independently of any request for the information." Note 3A to Mass. R. Prof. Conduct 3.8.

The ethical rules therefore require broad disclosure before trial, unrestricted by any materiality analysis. In Massachusetts, both state and local federal rules are consistent with constitutional law and ethical considerations, and both courts provide for automatic discovery of exculpatory evidence. *See* Reporter's Notes to Mass. R. Crim. P. 14(a)(1)(A)(iii) (observing that the rule "requires the prosecution to provide automatic discovery of 'any facts of an exculpatory nature'"); Fed Ct. of the Dist. of Mass. L.R. 116.2.

Although it has been the law of the land for over five decades and has been reinforced and expanded by state law, procedure, and ethical rules, "violations of *Brady* are the most recurring and pervasive of all constitutional procedural violations." Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 Case W. Res. L. Rev. 531, 533 (2007). While many prosecutors no doubt comply with their legal and ethical obligations, "*Brady* violations have reached epidemic proportions in recent years." *United States v. Olsen*, 737 F.3d 625, 631-32 (2013) (Kozinski, J., dissenting from order denying pet. for r'hrg en banc) (collecting federal and state cases in which courts have vacated convictions and ordered new trials due to the suppression of exculpatory material).

Prosecutors' failure to disclose exculpatory evidence is a substantial factor in wrongful convictions. Studies have shown that in DNA exonerations involving claims of prosecutorial misconduct, 41% of the cases "involved withholding potentially exculpatory evidence such as knowledge of alternative suspects and forensic science evidence that may have weakened the prosecution's case." Emily M. West, *Court Findings of Prosecutorial Misconduct Claims in Post-Conviction*

Appeals and Civil Suits Among the First 255 DNA Exoneration Cases, Innocence Project (Oct. 2010), at 4, *at* https://www.innocenceproject.org/wp-content/uploads/2016/04/pmc_appeals_255_final_oct_2011.pdf. Studies of broader case law, including those not involving DNA exonerations, suggest that ten percent of all convictions reversed on appeal or in post-conviction proceedings involve prosecutors' suppression of exculpatory evidence. *See* Daniel S. Medwed, *Brady's Bunch of Flaws*, 67 Wash. & Lee Rev. 1533, 1540 n.40 (2010); Shawn Musgrave, *Wayward Prosecutors: Scant discipline follows prosecutors' impropriety in Massachusetts*, New England Center for Investigative Reporting (Mar. 6, 2017), https://www.necir.org/2017/03/06/scant-discipline-follows-prosecutors-impropriety-massachusetts/ (last accessed Apr. 24, 2018) (finding appellate reversals in 120 out of 1,000+ Massachusetts cases involving allegations of prosecutorial misconduct and at least ten percent involved suppression of exculpatory evidence).

These already-troubling figures almost certainly understate the impact of *Brady* violations because the very nature of such misconduct, which involves the withholding of evidence that a defendant may never

discover, makes it "highly unlikely wrongdoing will ever come to light in the first place." *Olsen*, 737 F.3d at 630. "[P]roven Brady errors hint at a larger problem because the vast majority of suspect disclosure choices occur in the inner sanctuaries of prosecutorial offices and never see the light of day." Daniel S. Medwed, *supra*, at 1540.[2]

C. Prosecutors Are Not Generally Held Accountable for Their Wrongdoing.

Sonja Farak's egregious misconduct might never have come to light if it was not for the fact that the Amherst Drug Lab and Farak were being investigated by state authorities and members of the defense bar who persisted

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[2] *See also* Ellen Yaroshefsky, *Foreword: New Perspectives on Brady and Other Disclosure Obligations: What Really Works?*, 31 Cardozo L. Rev. 1943, 1945 (2010) ("Brady is a hidden problem for which it is impossible to gather accurate data because attorneys raise most Brady or other disclosure issues at trial, on appeal, or in post-conviction proceedings. Since most cases result in guilty pleas, it is very difficult to gather data and to actually study the extent to which disclosure issues are a significant problem."); Bruce A. Green, *Beyond Training Prosecutors About Their Disclosure Obligations: Can Prosecutors' Offices Learn from Their Lawyers' Mistakes*, 31 Cardozo L. Rev. 2161, 2175 (2010)(noting that surfaced disclosure errors are likely the "tip of the iceberg," and pointing out that "[c]laims about the frequency of disclosure error are hard to prove or disprove, precisely because prosecutors have not systematically studied their mistakes," and "[n]o one else can do so, given that prosecutors ordinarily have exclusive access to information needed to assess how and why—and often whether—disclosure errors occurred").

in requesting exculpatory evidence on behalf of their clients. Even with this increased scrutiny and the strong likelihood that the relevant misconduct would be exposed, the AAGs deliberately misled the court and defense lawyers about the evidence against Farak, and the DAOs have repeatedly failed to do the work of identifying and notifying all defendants impacted by her misconduct to ensure they can effectuate their post-conviction rights. While many prosecutors abide by their constitutional and ethical obligations, others do not and there is little if any accountability for wrongdoing.

1) The Materiality or Harmless Error Standards of Appellate or Post-Conviction Review Weaken Any Meaningful Accountability.

Because most defendants plead guilty before trial, there is little incentive for prosecutors to comply with their *Brady* obligations prior to plea negotiations. Although both Massachusetts courts and the local federal court require disclosure of *Brady* material some time period before trial, many cases plead before then, and judges are not required to confirm that defendants have received all exculpatory evidence prior to negotiating

and accepting guilty pleas. *See* Mass. R. Crim. P. 14; Dist. of Mass. L.R. 116.2.

Moreover, defendants typically waive their right to appellate review and collateral attack when they plead guilty. *Wilkins v. United States*, 754 F.3d 24, 28 (1st Cir. 2014) ("As a general matter, a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked."). A defendant can attack his conviction only by satisfying the high burden of proving that "some egregiously impermissible conduct (say, threats, blatant misrepresentations, or untoward blandishments by government agents) antedated the entry of his plea" and "that the misconduct influenced his decision to plead guilty or, put another way, that it was material to that choice." *Id.*

It is rare, however, for a defendant in most cases to prove that "egregiously impermissible conduct" predated the plea bargain. Exculpatory evidence may come to light after a plea, but may not have predated the plea because it related to witness credibility or evidence discovered after the fact. Furthermore, it is extremely difficult for a defendant to prove materiality in the context of a case involving a guilty plea. With

pleas, the defendant does not have the benefit of a trial record, which would include transcripts of cross-examination of government witnesses and shed light on witness credibility, to argue the suppressed evidence would have been material. Indeed, with respect to the Hinton Lab scandal cases that were collaterally attacked in federal court, although the courts accepted that egregious misconduct took place, most did not vacate guilty pleas because evidence related to misconduct of the chemist Annie Dookhan was not considered material to the defendants' decisions to plead guilty. *See United States v. Castro,* 272 F. Supp. 3d 268, 274 (2017) ("Of the federal courts to have addressed post-conviction petitions under *Brady* and *Ferrara* in the wake of the Dookhan scandal, not one has vacated a guilty plea." (citing *United States v. Hampton*, 109 F. Supp. 3d 431, 436 (D. Mass. 2015))).

Likewise, prosecutors face minimal scrutiny of *Brady* issues on appeal or in post-conviction proceedings because courts analyze the materiality of the exculpatory evidence with the benefit of the full trial record and hindsight. Even when courts make findings of prosecutorial misconduct, studies show that the majority of these findings are ruled as harmless, meaning that

the court has concluded the conduct does not change the outcome of the case. *See* Medwed, *supra*, at 1543-44 (collecting studies showing that less than twelve percent of cases involving *Brady* allegations were reversed).

The materiality and harmless error standards focus on the evidence against the defendant rather than the misconduct of the prosecutor. This sends a message to the prosecutor that the misconduct is acceptable as long as the defendant is guilty, which is what the prosecutor is predisposed to believing in the first place. Such findings fail to meaningful address the prosecutor's misconduct, much less sanction them to deter future misconduct.

2) Civil Remedies Are Insufficient Due to the Doctrines of Absolute and Qualified Immunity and Other Legal Protections.

Although 42 U.S.C. § 1983 creates a civil damages remedy against "every state official for the violation of any person's federal constitutional or statutory rights," in practice the reach of the statute with respect to prosecutorial misconduct is limited by both absolute and qualified immunity. Under the rule set forth in *Imbler v. Pachtman*, 424 U.S. 409 (1976), prosecutors who act within the scope of their duties in

initiating and pursing a criminal prosecution and presenting their case are completely immunized from civil liability, even for "malicious or dishonest action deprives [a genuinely wronged defendant] of liberty." *Id.* at 427. By immunizing prosecutors for the conduct within the scope of their duties, the Supreme Court elevated "the broader public interest" in "the vigorous and fearless performance of the prosecutor's duty" over the fair trial rights of individual defendants. *Id.* at 427-28. In foreclosing civil redress against prosecutors, the *Imbler* Court assumed prosecutors would be deterred by criminal penalties or the scrutiny of bar disciplinary rules, which as set forth *infra* is rarely if ever applied. *Id.* at 429.

To the extent that prosecutors are engaging in non-prosecutorial functions, such as acting as a complaining witness, providing advice to the police, or conducting investigation, they are still protected from suit under the doctrine of qualified immunity. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993), *Burns v. Reed*, 500 U.S. 478 (1991), *Kalina v. Fletcher*, 522 U.S. 118 (1997). Qualified immunity requires the plaintiff to meet the high burden of showing that the prosecutor violated clearly established law at the time and that no

reasonably trained prosecutor could have believed his conduct was lawful. *Saucier v. Katz*, 533 U.S. 194 (2001). The standard is considered "more protective of officials than it was at the time *Imbler* was decided," *Burns*, 500 U.S. at 494, and protects "all but the plainly incompetent or those who knowingly violate the law," *id.* at 495.[3]

In addition to these broad immunity protections, prosecutors are not subject to Sixth Amendment ineffective assistance of counsel or legal malpractice claim, in contrast to their criminal defense counterparts. As public officials, they are not held accountable by individual clients like most members of the bar.

3) Disciplinary Bars Have Taken Little, if Any, Action Against Prosecutors.

Prosecutors have been afforded the protection of absolute and qualified immunity under the assumption they are subject to the possibility of professional discipline, but in reality, disciplinary boards exercise

[3] The Supreme Court has also issued broad protections for prosecutor's offices to limit their institutional liability under § 1983 based on a theory of municipal liability under *Monell*. *See Connick v. Thompson*, 563 U.S. 51 (2011).

virtually no oversight or discipline of prosecutors. *See Medwed*, *supra*, at 1544-45 (collecting authorities).

The New England Center for Investigative Reporting recently reviewed over 1000 cases involving claims of prosecutorial misconduct and determined that, although convictions had been reversed at least 120 times in whole or in part because of prosecutorial misconduct, there were only two publicly available decisions since 1980 from the Massachusetts Board of Bar Overseers (BBO) naming prosecutors who were disciplined for improper trial behavior. Musgrave, *supra*. Nine other prosecutors received admonishments without their names being released. *Id.* To put those infinitesimal numbers in context, since 2005, the BBO has disciplined more than 1400 attorneys. *Id.* There has been almost no discipline of prosecutors in Massachusetts even though there have been findings that prosecutors engaged in "improper" conduct in more than 100 cases, conduct that was described as "misconduct" or "egregious" in 20 cases. *Id.* These court decisions for the most part failed to identify the prosecutors, only doing so a handful of times. As a result, most of these prosecutors were neither disciplined, nor is there any public record identifying them.

Even when disciplinary boards investigate prosecutorial misconduct, they take limited action and issue weak sanctions. Last year, the BBO disciplined Martha's Vineyard Assistant District Attorney Laura Meshard, which appears to be a rare disciplinary proceeding against a prosecutor in Massachusetts. George Brennan, *Martha's Vineyard prosecutor guilty of misconduct*, MV Times, Oct. 30, 2017, https://www.mvtimes.com/2017/10/30/marthas-vineyard-prosecutor-guilty-misconduct/.Although she was tried on disciplinary charges related to suppressing exculpatory evidence, failing to correct false testimony, and meeting with a represented witness without notifying or obtaining permission from the witness's lawyer, she was only disciplined for the last count. *Id.* Her lawyer successfully argued that no prosecutor in Massachusetts has ever been disciplined for failure to disclose exculpatory evidence and apparently convinced the Board that discipline on those grounds would be unprecedented. Barry Stringfellow, *Disciplinary hearing begins for assistant district attorney*, MV Times, May 3, 2017, http://www.mvtimes.com/2017/05/03/disciplinary-hearing-begins-assistant-district-attorney/. Moreover, the discipline given was merely a public reprimand

rather than more serious consequences, such as suspension of her license. Brennan, *supra*. Despite the fact that the BBO found that she had committed a serious ethical violation, the District Attorney appears to have taken no adverse employment action against her and is supporting her appeal of the findings. *Id.*

D. This Court Should Exercise Its General Superintendence Power to Issue Orders Holding Prosecutors Accountable for the Egregious Misconduct Here and To Prevent Future Misconduct.

Acting under its general superintendence power, this Court has the authority to issue "such orders, directions and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration." G.L. c. 211, § 3.

This Court should exercise that plenary authority to limit future prosecutorial misconduct through more active judicial management and oversight of criminal discovery and by adopting measures to hold prosecutors accountable for misconduct.

While the errors at issue in this case are examples of egregious conduct occurring on a wide scale, not all failures to disclose information will be widespread

systemic failures subject to discovery by diligent defense counsel. The question, therefore, is not merely how to respond to the egregious misconduct in this case, but how to reduce the likelihood of future violations.[4]

Scholars, judges, and practitioners concur on the need for increased judicial involvement in managing criminal discovery and meaningful sanctions for prosecutorial misconduct. *See, e.g.*, Jones, *supra*, at 129 (urging greater judicial management of *Brady* disclosures in combination with sanctions); *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31

[4] Scholarship urging courts to meaningfully address *Brady* violations stretches back at least 25 years. See, e.g., Cynthia E. Jones, *Here Comes the Judge: A Model for Judicial Oversight and Regulation of the* Brady *Disclosure Duty*, 46 Hofstra L. Rev. 87 (2017); Thomas P. Sullivan & Maurice Possley, *The Chronic Failure to Discipline Prosecutors for Misconduct: Proposals for Reform*, 105 J. Crim. L. & Criminology 881 (2015); Mitchell Caldwell, *The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal*, 63 Cath. U. L. Rev. 51 (2014); Daniel S. Medwed, *Brady's Bunch of Flaws*, 67 Wash. & Lee Rev. 1533 (2010); Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, UDC/DCSL L. Rev. 275 (2004); Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 Okla. City U. L. Rev. 833 (1997); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. Rev. 693 (1987).

Cardozo L. Rev. 1961, 2035 (enumerating the following best practices for external regulation of Brady: more judicial oversight; checklists and privilege logs; discovery provided before plea bargaining; mandatory pretrial conferences; requiring judicial reporting of violations; assigning cases to a single judge; data collection). "Courts must take steps to force prosecutors to reach the conclusion that it is far easier to comply with the *Brady* disclosure duty than risk the sanctions that the court will impose. This assessment will only be reached by prosecutors if courts institute a range of sanctions designed to hold prosecutors accountable and deter would-be violators of the Brady disclosure duty." Jones, *supra*, at 129.

1) This Court Should Issue Standing Orders That Promote Pre-Plea Compliance with *Brady* Obligations and Deter Misconduct.

An "essential component[] of judicial management and regulation of Brady" includes "comprehensive standing orders." Jones, *supra*, at 110; *see also New Perspectives*, *supra*, at 2035; Thomas P. Sullivan & Maurice Possley, *The Chronic Failure to Discipline Prosecutors for Misconduct: Proposals for Reform*, 105 J. Crim. L. & Criminology 881, 908 (2015) (urging trial

courts to issue orders requiring compliance with ABA Model Rule of Professional Conduct 3.8(d)).

A standing *Brady* order should include the following:

- A definition of the scope of required disclosure, including the relevant constitutional standard and the requirements of the state rules; *see* Standing Brady Order, No. XX-XX (EGS), at http://www.dcd.uscourts.gov/sites/dcd/files /StandingBradyOrder_November2017.pdf (hereinafter "Standing Order"),[5] at 1-2 (including a reminder that the constitutional requirement reaches all evidence "material either to guilt or punishment" and includes impeachment evidence); Mass. R. of Prof. C. 3.8(d); Mass. R. Crim. P. 14(a)(1)(A)(iii);

- A reminder of the requirement that a prosecutor learn of favorable evidence known to others acting on the government's behalf, including the police, *see, e.g.,* Standing Order at 1;

- A requirement that doubts about the materiality of evidence be resolved "in favor of full disclosure," *id.* at 2;[6]

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[5] This Standing Order was adopted by the federal trial court that had overseen the prosecution of Alaska Senator Ted Stevens after the disclosure of extensive prosecutorial misconduct in that proceeding. *See* Emmet G. Sullivan, *Enforcing Compliance with Constitutionally-Required Disclosures: A Proposed Rule*, 2016 Cardozo L. Rev. de novo 138, 140-41, 149.

[6] See also Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 Wis. L. Rev. 541, 595 (2006)(arguing that criminal discovery should flow from the presumption that information is discoverable, with the burden of non-disclosure placed on the prosecution).

- Deadlines for disclosure, including a requirement that any exculpatory evidence be produced prior to plea negotiations, *see id.* at 3; *see also* Jones, *supra*, at 112 (urging that deadlines be included in such standing orders);

- A requirement that trial court judges actively manage the disclosure required by the standing order, *see infra*, Part D(2) (discussing colloquy and checklists);

- A requirement that the government submit for *in camera* review "*any* information which is favorable to the defendant but which the government believes not to be material," Standing Order, at 4 (emphasis added);[7] and

- A reminder that non-compliance with the order will subject a litigant to sanctions, including contempt, BBO reporting, and court-imposed discipline, *see* Jones, *supra*, at 112; *see also infra* Part D(3) (outlining potential sanctions).

A standing order that sets forth clear expectations and advises prosecutors of the consequences of violating these expectations is a necessary and an appropriate remedy to ensure future compliance with the law.

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[7] This provision addresses the serious "flaw in the *Brady* rule," namely "that the prosecutor is not required to advise the defense lawyer what he has deemed not exculpatory and therefore has decided not to produce, nor is he required to seek the advice of the court as to his obligation to produce." Sullivan & Prossley, *supra*, at 916. However, at least one scholar has cautioned that even this approach is "fundamentally flawed," because of its "vulnerability to cognitive bias even for those players—judges . . . and others—one step removed from the heat of litigation." Medwed, *supra*, at 1554.

2) Implementation of a *Brady* Standing Order Would Be Improved by Active Judicial Engagement and Checklists to Ensure Compliance.

A *Brady* standing order would also benefit from "active engagement by the trial judge" in managing *Brady* disclosures, in order to make "the process more formal and transparent." Jones, *supra*, at 122. To that end, one narrowly tailored reform proposal suggests increasing and improving judicial involvement in discovery compliance through a more probing discovery colloquy. Jason Kreagh, *The Brady Colloquy*, 67 Stan. L. Rev. Online 47 (Sept. 2, 2014); *see also* Jones, *supra*, at 110.

Thus, in ensuring implementation of a *Brady* standing order, during a pre-trial hearing and before entry of any plea, a judge should review the standing order, and specifically inquire of a prosecutor: "whether the prosecutor has (1) identified all members of the prosecution team; (2) conducted a thorough inquiry to ascertain whether any member of the team has favorable information; (3) reviewed all the government's files to identify favorable information; and (4) disclosed favorable information to the defense in a manner that allows the defense to make effective use of the material. Jones, *supra*, at 120.

Specific potential questions include:

- "Have you reviewed your file, and the notes and file of any prosecutor who handled this case before you, to determine if these materials include information that is favorable to the defense?" Kreagh, *supra*, at 50.

- "Have you requested and reviewed the information law enforcement [and other members of the prosecution team] possess[], including information that may not have been reduced to a formal written report, to determine if it contains information that is favorable to the defense?" *Id.* at 50.

- "Have you identified information that is favorable to the defense, but nonetheless elected not to disclose this information because you believe that the defense is already aware of the information or the information is not material?" *Id.* at 50.

- "Are you aware that this state's rules of professional conduct require you to disclose all information known to the prosecutor that tends to be favorable to the defense regardless of whether the material meets the Brady materiality standard?"[8] *Id.* at 50-51; *cf.* Mass. Rules Prof. C. 3.8(d); *see also* Medwed, *supra*, at 1539 (noting that the "tends to negate guilt" language in the ABA's Model Rules of Professional Conduct attempts to create a disclosure obligation broader than Brady).

- "Have you altered your theory of the case, the witnesses you plan to call in your case, or your prosecution strategy in order not to trigger having to disclose certain information to the defense?" Kreagh, *supra*, at 51 n.21.

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[8] *Cf.* Mass. Rules Prof. C. 3.8(d) (requiring prosecutor to make timely disclosure of all evidence that "tends to negate the guilt of the accused or mitigates the offense"); *see also* Medwed, *supra*, at 1539 (noting that similar language in the ABA's Model Rules likely reflects a desire to create a disclosure obligation broader than *Brady*).

- And at trial, after the prosecution's case-in-chief, or the defense opening statement, "Now that you have heard the lines of cross-examination used by the defense and have a more complete understanding of the theory of defense, have you reviewed your file to determine if any additional information must be disclosed?" *Id.* at 51.

Broad-based working groups of judges, practitioners, and scholars have recommended the use of "*Brady* checklists."[9] *New Perspectives*, *supra*, at 2035 (noting that working group of scholars and practitioners "unanimously supported the idea of checklists); *see also* Jones, *supra*, at 113 (noting that ABA has endorsed use of checklists). The use of checklists–as well as privilege logs listing items being withheld and providing reasons for any non-disclosure, *see, e.g.*, *New Perspectives*, *supra*, at 2033, 2035–would also create greater transparency around prosecutorial decision-making, thereby creating a reviewable subsequent record of such decision-making. *See* Medwed, *supra*, at 1549, ("requiring more extensive prosecutorial recordkeeping about discovery decisions would give ethics boards a greater factual foundation upon which to evaluate and

[9] *See* Ctr. on Admin. of Criminal Law, *Establishing Conviction Integrity Programs in Prosecutors' Offices*, 52-56 (2011), http://www.law.nyu.edu/sites/default/files/upload_documents/2011-CACL-Conviction-Integrity-Programs-Report.pdf (sample checklist).

ultimately rest allegations of misconduct"); Sullivan & Prossley, *supra*, at 916 (noting lack of transparency and oversight in Brady decisions); *but see New Perspectives*, *supra*, at 2020 (cautioning that sub-optimally inclusive checklists would create additional risks).

3) Judicial Management of *Brady* Disclosures Should Be Combined with Meaningful Discipline and Sanctions to Hold Prosecutors Accountable for Failures to Meet Their Obligations.

Counsel for a prosecutor engaged in misconduct in this state should not be able to argue that the lack of prior sanctions for such misconduct in Massachusetts makes disciplining a prosecutor unfair or inappropriate. *See* supra Part C(3) (discussing discipline of Martha's Vineyard prosecutor). To change these norms, and to ensure a culture of consistent compliance, increased judicial oversight must be combined with discipline and sanctions that deter and provide accountability. Accountability should not, moreover, be reserved for the most egregious conduct: "because *Brady* is violated regardless of whether the prosecutor intentionally, recklessly, or negligently withheld favorable evidence, a bad faith restriction on the court's authority to sanction *Brady* misconduct would insulate many violations of the *Brady* disclosure duty," thereby directly

undermining efforts at creating a culture of compliance. *See* Jones, *supra*, at 132. Judges and disciplinary authorities can and should calibrate consequences appropriately to reflect the nature of the misconduct.

As the Supreme Court has noted, one way to deter prosecutorial misconduct is to "publicly chastise the prosecutor by identifying him in [the court's opinion]." *United States v. Hasting*, 461 U.S. 499, 506 n.5 (1974); *see also* Adam Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. Davis L. Rev. 1059, 1069 (2009); Violators should not only be named, but violations should be tracked in a database. *See, e.g.*, Jones, *supra*, 133-34. *New Perspectives*, supra, at 2035 ("More data that can reveal how the criminal system is working and not working is needed."); Sullivan & Prossley, *supra*, at 932.

Collecting such information in databases would enhance accountability in at least three ways. First, such data collection would provide information to judges about the practices to look for and be aware of in specific cases. Jones, *supra*, at 134. It would also allow courts to identify whether "the court rules, standing orders, and other *Brady* management tools are effective" and/or whether rules should be amended or trainings

conducted. *Id.* Finally, a database would also permit judges to appropriately calibrate sanctions, where necessary. *Id.*

Judges and prosecutors must also take an active role in reporting prosecutorial misconduct. *See New Perspectives*, *supra*, at 2035; *see* Sullivan & Prossley, *supra*, 904-06, 909-10 (noting lack of current judicial reporting and urging reporting); *cf.* Supreme Judicial Court Rule 3:09 Code of Judicial Conduct R. 2.15; Mass. R. of Prof. C. 3.8(d); Mass. R. Crim. P. 14(a)(1)(A)(iii).

Reporting, however, is only meaningful if accompanied by a willingness to rigorously examine–and even to second-guess–prosecutorial decision-making. "Without a substantial shift in the punishment imposed by disciplinary committees when a prosecutor withholds exculpatory evidence, it is difficult to imagine that prosecutorial behavior is much affected by the threat of disciplinary sanctions." Sara Gurwitch, *When Self-Policing Does Not Work: A Proposal for Policing Prosecutors in Their Obligation to Provide Exculpatory Evidence to the Defense*, 50 Santa Clara L. Rev. 303, 318 (2010). One proposal to overcome the institutional

obstacles to imposing discipline[10] is to create independent commissions or "Prosecution Review Boards" within or separate from a state disciplinary body comprised of independent actors–*e.g.*, retired lawyers and judges–to review complaints and to conduct random reviews of routine prosecution decisions. Medwed, *supra*, at 1549-50; *see also* Sullivan & Prossley, *supra*, at 933 (urging "serious consideration" of this sort of proposal); *see* Caldwell, *supra*, at 98-101 (urging creation of independent commissions). Such commissions could be charged with reviewing not only reported discipline, but judicial decisions and media references to prosecutorial misconduct to ensure that under-reporting of misconduct does not hinder the full

[10] An "array of factors" may explain the lack of punishment, including the fact that prosecutors do not have individual clients who will bring such complaints against them (and the complaints of criminal defendants may be viewed skeptically); misconduct is hard to detect; prosecutors are granted broad discretion in their decision-making; and political decisions may also enter into decision-making. Medwed, *supra*, at 1547-48. "Personal relationships may make it difficult and distasteful to report to disciplinary authorities, but the serious policy concerns implicated by prosecutorial misconduct require action." Sullivan & Prossley, *supra*, at 905 (urging trial court judges to more actively report misconduct).

functioning of such a body. *See* Sullivan & Prossley, supra, at 932.

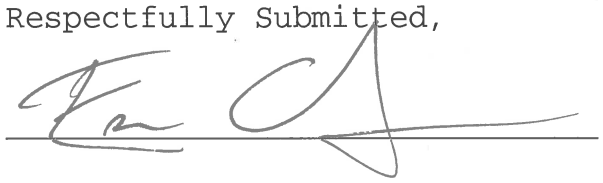
Finally, judges themselves can, of course, also directly sanction prosecutors who engage in misconduct. As the Eleventh Circuit has emphasized, that an appeals court "find[s] an error not to be reversible does not transmute that error into a virtue. The error is still an error." *United States v. Wilson*, 149 F.3d 1298, 1303 (11th Cir. 1998). Courts can and should intervene to regulate the conduct of prosecutors by considering "more direct sanctions to deter prosecutorial misconduct," including "contempt citations, . . . fines, reprimands," suspension from a particular court or session, and "recommendations to bar associations to take disciplinary action." *See id.* at 1304 (citations and quotation marks omitted); *see also* Sullivan & Prossley, *supra*, at 907, 913; Jones, *supra*, at 132-33, 135 (discussing contempt orders and public reprimand).

E. Conclusion

Amici believe that record in this case supports the adoption of prophylactic measures to address future prosecutorial misconduct and urges the Court to adopt the remedies proposed by petitioners and in particular,

to adopt a standing order that includes the provisions discussed above.

Respectfully Submitted,



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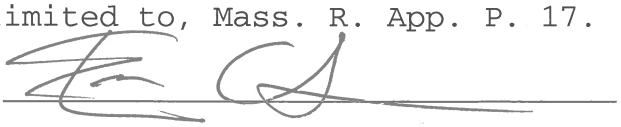
April 27, 2018

CERTIFICATE OF COMPLIANCE

Pursuant to Mass. R. App. P. 16(k), I hereby certify that this brief complies with the rules of court pertaining to the filing of an amicus brief, including, but not limited to, Mass. R. App. P. 17.



Emma Quinn-Judge

CERTIFICATE OF SERVICE

I, Emma Quinn-Judge, do hereby certify under the pains and penalties of perjury, that on this 27th day of April, 2018, I caused two copies of the foregoing document to be served by U.S. Mail on the following counsel:

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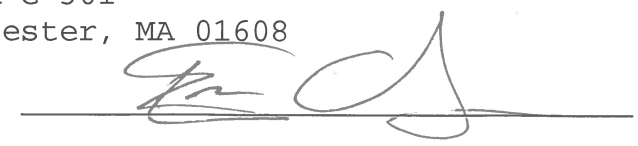

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April 27, 2018