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

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

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INTRODUCTION

This case reveals uncomfortable truths about long-running misconduct at the Amherst Lab, an intentional cover-up by government attorneys, and the inexcusable indifference of powerful institutions. In their submissions to the Single Justice and briefs to this Court, the District Attorneys and Attorney General have now taken key steps forward. But the progress of the past five months, without more, cannot remedy the failures of the past five years.

The DAOs have agreed to the dismissal of all convictions resting on a drug certificate that Sonja Farak signed. DAOs Br. 34. Their final lists of those cases are due on April 30, 2018, and their interim lists enabled the Single Justice, on April 5, to issue a judgment dismissing thousands of tainted convictions. The AGO has endorsed those dismissals and called for the "*Bridgeman* protocol" to resolve convictions involving samples assigned to Amherst Lab chemists other than Farak and processed between June 2012 and January 19, 2013. AGO Br. 22-26. Those steps partially, though belatedly, mitigate Farak's misconduct.

But they do not even begin to reckon with the reprehensible misconduct of government employees who work at law offices rather than laboratories. The AGO now concedes that former Assistant Attorneys General Kris Foster and Anne Kaczmarek intentionally covered

up most of Farak's misconduct. AGO Br. 10-14. The AGO does not deny that the AGO then exacerbated that cover-up, first by knowingly failing to correct the erroneous records before this Court in *Commonwealth v. Cotto*, 471 Mass. 97 (2015), and *Commonwealth v. Ware*, 471 Mass. 85 (2015), and later by inaccurately insisting, until Judge Carey held otherwise, that Foster and Kaczmarek committed only "unintentional mistakes." RA 243-288.

For their part, the DAOs do not deny that before they were sued in this case only two of them tried to distribute complete lists of defendants whose certificates were signed by Farak. Their main explanation for their delay in identifying the victims of this latest lab scandal is that they, too, fell victim to the AGO's cover-up. DAOs Br. 12, 29, 35-36. Thus, this case involves not only misconduct by a chemist, but also "misconduct by a prosecutor," and by institutions. *Bridgeman v. Dist. Attorney for the Suffolk Dist.*, 476 Mass. 298, 322-23 (2017) ("*Bridgeman II*").

Accountability for this misconduct requires three additional steps: first, broader dismissals that eliminate all convictions that reasonably could have been tainted by Farak; second, standing orders that make prosecutors rather than defendants responsible for systemic lapses in the Commonwealth's justice system;

and third, sanctions that hold the AGO responsible for its role in the injustices of the last five years.

ARGUMENT

I. The Attorney General's Office does not dispute, and the District Attorneys' Offices cannot refute, the misconduct alleged by Petitioners.

Tailoring a remedy for this case requires taking stock of the misconduct that now stands uncontested. Petitioners have shown that Farak's misconduct was exacerbated by the fraud committed by former AAGs Foster and Kaczmarek, by the AGO's failure to mitigate that fraud, and by the DAOs' failure to timely notify defendants. Pet. Br. 23-36. The AGO confirms that things are really that bad, and the DAOs' arguments are inconsistent with meaningful commitments to protect due process, prevent prosecutorial misconduct, and restore integrity to the justice system.

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

The AGO and the DAOs do not dispute Judge Carey's finding that Foster and Kaczmarek committed egregious misconduct by hiding crucial evidence from defendants, courts, and the DAOs, and by deceiving Judge Kinder. AGO Br. 7-8; DAOs Br. 34. Nor do they deny that this misconduct violated due process. *See Commonwealth v. Ellison*, 376 Mass. 1, 21 (1978).

But Foster and Kaczmarek did not just violate one person's due process rights. If Farak signed drug certificates in over 7,000 cases, *see* AGO Br. 1; DAOs Br. 31, then Foster and Kaczmarek effectively hid all but a fraction — i.e., those convictions sustained between the summer of 2012 and January 2013 — from courts and defendants. And in each one of these cases, the AGO's misconduct prolonged collateral consequences, if not incarceration, for people like Petitioners Herschelle Reaves and Nicole Westcott.

In short, when AAG Foster falsely told Judge Kinder that, "[a]fter reviewing" the file, everything had been turned over, RA 129, and that Farak's misconduct had spanned "roughly four months," RA 138, she did not just misstate dates; she harmed thousands.

The DAOs try to wish that harm away. Citing the scope of relief ordered by Judge Carey, who lacked this Court's superintendence power, the DAOs claim that defendants were harmed by the AGO only if they filed and lost post-conviction motions between January 2013, when Farak was arrested, and November 2014, when the AGO disclosed the withheld exculpatory evidence. DAOs Br. 45-47. That cannot be right. Precisely because AAGs induced false findings that Farak's misconduct began in the summer of 2012, defendants whose cases *preceded* that cutoff were not identified and no-

tified, and could not have been expected to file post-conviction motions that, due to the AGO's misconduct, they would have lost.

In fact, the DAOs argue that because they were "dependent upon the AGO," DAOs Br. 39,[1] they failed to timely identify and notify thousands of Farak defendants. Thus, the DAOs corroborate Petitioners' contention that the AGO harmed *all* defendants with colorable post-conviction claims.

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

Although the AGO defends its post-*Cotto* investigation, *see infra* Part II, it offers no defense whatsoever of its approach to court cases involving the Amherst Lab scandal between November 2014 and June 2017. Meanwhile, the DAOs do seek to defend their conduct during that period, but that defense misapprehends the record.

The AGO properly concedes that, as the Commonwealth's chief law enforcement entity, it "has a special responsibility to ensure . . . that justice is

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[1] *See id.* at 35 ("The District Attorneys, like the Farak defendants themselves, expected the investigation by the AGO to reveal the full scope and magnitude of Farak's misconduct."); *id.* at 36 (arguing that the DAOs "responded appropriately" in light of "this years-long, ongoing revelation of Farak's misconduct").

done." AGO Br. 2, 26 n.14. In that capacity, "the Attorney General . . . may supersede a district attorney as prosecutor" in any case. *Town of Burlington v. Dist. Att'y for the N. Dist.*, 381 Mass. 717, 720 (1980).[2] Thus, in November 2014, once it received Attorney Luke Ryan's letter explaining that Foster had misled Judge Kinder and withheld critical evidence, the AGO had both the authority and the duty — no matter the DAOs' view — to alert courts, notify defendants, and move to vacate affected convictions.

Yet the AGO did none of those things. The AGO does not dispute that, beginning in November 2014, it had a duty to inform this Court that the factual findings in *Cotto* and *Ware* had been induced by falsehoods. *Compare* Pet. Br. 33-36, *with* AGO Br. 12-13. It does not claim to have generated, or commanded the DAOs to generate, a list of cases tainted by Foster and Kaczmarek. And it does not deny that, even after Foster *confessed on the witness stand* that she had no factual basis for her assertions to Judge Kinder — because she never reviewed a single document — the AGO still opposed relief for Farak defendants based on the remarkable claim that Foster and Kaczmarek made only "unin-

[2] *See* AGO Br. 26 n.14, citing *Town of Burlington* and *Commonwealth v. Kozlowsky*, 238 Mass. 379, 388 (1921).

tentional mistakes." *Compare* RA 243-88, *with* Add. 64-67, 71.[3]

Like the AGO, the DAOs acknowledge the governing law, which required them "to timely and effectively notify each defendant." DAOs Br. 40; *see Cotto*, 471 Mass. at 112; *Ware*, 471 Mass. at 95-96; *Bridgeman v. Dist. Att'y for the Suffolk Dist.*, 471 Mass. 465, 481 (2015) ("*Bridgeman I*"). But unlike the AGO, the DAOs make excuses for why nearly all of them failed to fulfill that obligation before this case was filed.

The DAOs understandably point to the AGO as a source of misinformation and a cause for delay. For example, while the AGO received attorney Ryan's letter in November 2014 — *before* this Court heard argument in *Cotto* and *Ware* — the DAOs assert they learned only later, "in 2015," that Farak's misconduct predated the period found by Judge Kinder. DAOs Br. 29.

But troubling facts remain. Before this case was filed, only two DAOs provided even partial case lists to *CPCS*, let alone notice to *individual defendants*, DAOs Br. 37-39, while nine simply did not notify wrongfully convicted individuals who were believed to have served their sentences. Moreover, the DAOs do not

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[3] *See also* Ethics Scholars' Br. 29, citing *Van Christo Advert., Inc. v. M/A-COM/LCS*, 426 Mass. 410, 414-415 (1998); Mass. R. Civ. P. 11.

explain why, after the AGO encouraged the DAOs to discuss notice in 2015, Pet. Br. 19-20, they did not attempt comprehensive notice.[4] By failing for years to undertake case-by-case notice, the DAOs unconstitutionally prevented defendants from challenging their convictions. *See* Pet. Br. 32-36.

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

In 2014, prosecutors argued to this Court that a conclusive presumption of misconduct was not warranted in Farak cases from 2004 to July 2012 because there was supposedly not enough evidence that Farak's misconduct preceded the summer of 2012. For the most part, this Court agreed. *See Cotto*, 471 Mass. at 111 n.13; *Ware*, 471 Mass. at 94 n.13 (upholding Judge Kinder's findings but noting newspaper articles could have served as basis for finding misconduct occurred

[4] The DAOs claim that Petitioners' counsel have opposed notice and dismissals. DAOs Br. 35-40. That is not so. When DAOs have expressed a preference for dismissing cases individually, *see* DAOs Br. 35 n.36, Petitioners have expressed a preference for dismissals supervised by the Single Justice. Likewise, Petitioners' counsel have repeatedly sought to have the DAOs fulfill their notice obligations, first by asking the AGO to broker meetings about notice in 2015, and later by reminding the DAOs of their notice obligations in January 2017. Pet. Br. 20. The Massachusetts District Attorneys' Association subsequently broke off talks that followed the January 2017 letters. RA 46.

before the summer of 2012). Nevertheless, recognizing that the Commonwealth had not conducted an adequate investigation, this Court remanded so that the Commonwealth could "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." *Cotto*, 471 Mass. at 115.

It is now 2018, and prosecutors are once again arguing that relief for Farak defendants should hinge on a summer 2012 cutoff. This time, the AGO argues that the dismissal of all Amherst Lab cases during Farak's tenure is not warranted because there is supposedly no evidence that Farak tampered with other chemists' samples before the summer of 2012. AGO Br. 26. If this argument sounds familiar, it should. This time, however, the Court should not accept it.

The AGO's argument fails not only because there is compelling evidence that Farak tampered with other chemists' samples before June 2012, but also because any lack of evidence is due to the Commonwealth's inexcusable failure to learn the true scope of this scandal when the evidence of its scope was still available. It is untenable for the AGO to claim that there is insufficient evidence to support the dismissal of all Amherst Lab cases, given that the AGO

twice failed to conduct an investigation into the extent to which Farak tainted her co-workers' samples. Any lack of evidence is directly attributable to the AGO's failure to investigate. *Cf. Commonwealth v. Harris*, 443 Mass. 714, 732 (2005) (exploitation of evidence absent at the Commonwealth's request is fundamentally unfair; having succeeded in excluding evidence, the prosecutor may not ask the jury to make inferences based on the absence of such evidence).

A. Evidence of tampering before the summer of 2012.

The AGO concedes that Farak tampered with other chemists' cases from June 2012 forward. AGO Br. 23. In limiting its concession to this narrow range, the AGO claims it is relying on Farak's testimony that she did not begin tampering with other chemists' samples until that time. AGO Br. 23. The AGO further claims that Farak's testimony has been corroborated by her co-workers, which Judge Carey accepted. AGO Br. 24. This analysis is wrong for the following reasons.

First, Farak did not testify that she started tampering with her colleagues' samples in the summer of 2012. AGO Br. 23. She actually testified as follows:

> Q: Focus on the middle of 2012. You testified previously as to some events that took place around the summer of

> 2012. At any point during this time period ***or outside of this time period I just mentioned***, did you ever manipulate or take samples from other chemists at the laboratory?
>
> A: Yes.

Ex. 56, p.154 (emphasis added). Given the expansive wording of the question, Farak's testimony in no way supports a strict temporal limitation on when she compromised samples assigned to other chemists.

Second, the June 2012 cutoff is not supported by the testimony of Farak's co-workers. AGO Br. 24. Although Salem, Pontes, and Hanchett all asserted that they observed changes in Farak in "late summer, early fall of 2012" — *not* in June 2012 — it is now obvious that these observations have no correlation with Farak's drug use. *See* Ex. 71, p.83; Ex. 79, p.43; Ex. 79, p.96. The AGO's reliance on this testimony reflects its consistent and unwarranted assumption, now known to be false, that Farak's colleagues would not have failed to observe significant misconduct occurring right under their noses. *See* Add. 34-35; *Cotto*, 471 Mass. at 100. But even if that assumption were warranted, there would still be no basis for the additional assumption that Farak's appearance somehow turned on whether she was consuming drugs assigned to *her* or, instead, to *someone else*.

According to Farak, by the end of 2011 she was "totally controlled by [her] addiction." Ex. 56, p.135, 142-143. At this time, her "focus definitely changed" to obtaining drugs. Ex. 63, p.46. Throughout 2012, she was "predominantly focused on crack," rather than on her work, Ex. 63, p.47, and kept crossing lines she "thought [she] would never cross." Ex. 56, p.159. There is no evidence that Farak, a person totally controlled by her addiction, limited her cravings to her own samples, or that she could have done so. It is especially difficult to believe that Farak started stealing from her co-workers only around the time when the state police took over the lab and implemented more stringent policies and procedures.

Finally, Farak's testimony as to when she began tampering with other chemists' cases is demonstrably incorrect, as a comparison of Farak's testimony to actual data demonstrates. Farak claimed to remember tampering with three specific samples assigned to her colleagues: 1) a seventy-three or seventy-four gram Springfield cocaine sample assigned to Pontes; 2) a three and one-half gram Northampton crack sample assigned to Hanchett; and 3) a twenty-four and a one-half gram Pittsfield crack sample assigned to Hanchett. Ex. 56, p.155-157. However, data listing every sample that went through the Amherst Lab does

not list any case matching any of these descriptions. Second Post Affidavit ¶ 5.[5] Although defense counsel requested the drug lab packets associated with these samples, and the court ordered the AGO to turn them over, the AGO never did — probably because they did not exist. Second Ryan Affidavit ¶¶ 9-11.[6] In any event, Farak could not accurately recount what she did with these missing mystery samples or when she did it, and this Court should not limit relief to wrongfully convicted defendants based on Farak's unreliable testimony.

B. The lack of investigation into the impact of Farak's misconduct on other chemists' samples.

Petitioners have already shown that the Commonwealth's investigation into the impact of Farak's misconduct on her co-workers' cases was inadequate; that discussion will not be repeated here. Pet. Br. 27-32. Petitioners note, however, that it is entirely circular to point to Judge Carey's findings that Farak's misconduct did not impact other chemists'

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[5] "Second Post Affidavit" refers to the affidavit of Attorney Christopher Post dated April 25, 2018, and submitted with this reply brief and a motion to expand the record.

[6] "Second Ryan Affidavit" refers to the affidavit of Attorney Luke Ryan dated April 25, 2018, and submitted with this reply brief and a motion to expand the record.

work as proof of an adequate investigation, *see* AGO Br. 24-26; DAOs Br. 44, when those findings were themselves the product of the inadequate investigation.[7]

Just as Judge Kinder's October 2013 decision was limited by the Commonwealth's failure to investigate the timing and scope of Farak's misconduct, so too was Judge Carey's June 2017 decision limited by the Commonwealth's failure to investigate the impact of Farak's misconduct on her co-workers' cases. Judge Carey found that Judge Kinder's findings were based on "the limited evidence before him." Add. 78. The same can be said of Judge Carey's decision as it relates to Farak's impact on other chemists' cases. In both cases, the AGO should have and could have investigated, but did not, in violation of its constitutional duty. *Cotto*, 471 Mass. at 112. Rather than being held accountable for that breach of duty, the Commonwealth seeks to take advantage of it by

[7] Contrary to the AGO's claim, AGO Br. 14 n.5, the Superior Court did not reject the argument that the AGO inadequately investigated how Farak's misconduct affected samples tested by other chemists. While the court commended the AGO for what it accomplished "in a reasonable period," it also acknowledged that the defendants raised an issue as to the AGO's "failure to ascertain the extent to which Farak compromised the integrity of the lab's computer inventory system." Add. 83 n.36.

asking this Court to deny relief based on its failure to ask the necessary questions and follow the relevant leads.[8]

C. It is too late for the application of the *Bridgeman II* protocol in this case.

Even if this Court were to agree with the unjustifiably limited timeframe that the AGO has proposed for whole lab relief, implementing the *Bridgeman II* protocol is inappropriate after more than five years of delay occasioned by the AGO's misconduct. According to this Court, the *Bridgeman II* protocol was appropriate, in the context of the Hinton Lab scandal, because there was no evidence of misconduct by a prosecutor. 476 Mass. at 322. Given the pervasive misconduct by prosecutors in this case, and for the reasons stated in Petitioners' brief at 36-44, the *Bridgeman II* protocol would not be an adequate remedy, and the Commonwealth should not be permitted to keep any conviction potentially impacted by Farak's misconduct.

III. The submissions by the AGO and DAOs confirm the need for standing orders and monetary sanctions.

The AGO's support for standing orders, together with its misplaced objection to monetary sanctions,

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[8] The AGO's brief suffers from the same fundamental flaw as the *Cotto* Report; it repeats Farak's claims as though they were true.

confirm that further prophylactic relief is desperately needed here.

A. Standing orders will ensure that prosecutors take responsibility for government misconduct.

The AGO joins Petitioners in requesting standing orders modeled on *Bridgeman*, *Cotto*, and *Brady*, but its articulation of those order would severely weaken them. AGO Br. 37-44. This Court should enter the orders as proposed by Petitioners, with appropriate input from the amici, rather than as watered down by the AGO.

As a threshold matter, the DAOs seek to be governed not by particularized orders, but instead by a generalized pledge to "take reasonable steps" to ensure that government misconduct is investigated and remedied. DAOs Br. 50. The DAOs' expansive view of reasonableness, however, is one reason why Farak defendants have languished in anonymity while Dookhan defendants received court-supervised identification and notice. *Bridgeman I*, 471 Mass. at 478 & n.20 (noting that, by May 2015, several DAOs had provided preliminary Dookhan case lists).

Ironically, although the Hinton and Amherst Lab scandals began with bad science, they produced a controlled experiment on the difference between misconduct resolved by court order (Hinton), and misconduct

handled by prosecutors interpreting case law (Amherst). This experience establishes the need for standing orders that, without litigation, will activate the principle that "we cannot expect defendants to bear the burden of a systemic lapse." *Bridgeman I*, 471 Mass. at 487; *Commonwealth v. Charles*, 466 Mass. 63, 75 (2013). As Petitioners and amici have shown, and as this Court's cases confirm, standing orders will honor this principle if they contain these elements:

- Prosecutors should promptly **disclose exculpatory evidence** consistent with Rule 14 of the Massachusetts Rules of Criminal Procedure and any applicable trial court orders.[9]

- Prosecutors should promptly **identify and notify** defendants who may have been harmed by a member of the prosecution team.[10]

- Prosecutors should ensure that misconduct is **thoroughly investigated and reported**.[11]

- Courts should set **deadlines** for compliance.[12]

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[9] Pet. Br. 49; Innocence Project Br. 47.

[10] Pet. Br. 46-49; *Cotto*, 471 Mass. at 112; *Ware*, 471 Mass. at 95-96; *Bridgeman I*, 471 Mass. at 481.

[11] Pet. Br. 46-49; AGO Br. 43; Boston Bar Ass'n Br. 14-21.

[12] *See* Pet. Br. 46-49; Innocence Project Br. 43-44; *Bridgeman II*, 476 at 327; RA 391-92 (interim order setting timelines for the provision of Farak case lists); *Lavallee v. Justices in the Hampden Superior Court*, 442 Mass. 228, 246 (2004) ("no defendant enti-

- Courts should prescribe **consequences** for non-compliance or misconduct.[13]

Some of these elements are missing from the AGO's proposals. For example, the AGO's "*Bridgeman* order" envisions a plan for addressing systemic misconduct, but it does not mention deadlines governing identification, notice, and dismissals. AGO Br. 38-39. That proposal, accordingly, does not track the interconnected deadlines and consequences that controlled *Bridgeman* itself, nor does it match the *Bridgeman* protocol that the AGO supports for certain Amherst Lab cases. *See* AGO Br. 22-23. Likewise, the AGO's proposed "*Cotto* order" does not specify any prosecution-centric deadlines or consequences once a prosecutor reports attorney misconduct to a court.

These half-measures are not good enough. A government attorney's disclosure of misconduct should represent the beginning, not the end, of the prosecu-

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tled to court-appointed counsel may be required to wait more than forty-five days for counsel to file an appearance").

[13] *See* Pet. Br. 46-49; Innocence Project Br. 44-45; Pet. Add. 102, 107, 110, 113, 118, 125, 140; Order Regarding Certain Relevant Dookhan Defendants (Dkt. #220), *Bridgeman v. Dist. Attorney for the Suffolk Dist.*, SJ-2014-005 (May 22, 2017) (establishing "a presumption of vacatur and dismissal" of relevant Dookhan convictions that were not identified within the 90-day deadline set by *Bridgeman II*).

tion's duty to resolve tainted convictions. Otherwise, disclosure risks becoming a buck-passing ceremony instead of the first step toward ensuring "that justice is done in every case." AGO Br. 2.

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

The AGO does not question this Court's authority to sanction misconduct by state attorneys. *Compare* AGO Br. 46, *with* Mass. R. Crim. P. 48; Mass. R. Civ. P. 11; G.L. c. 211, § 3; *Commonwealth v. Carney*, 458 Mass. 418, 433 n.20 (2010). Nor does it deny the magnitude of the harm that Foster, Kaczmarek, and the AGO have caused the Commonwealth's courts and people like Herschelle Reaves and Nicole Westcott. *See supra* Part I. Instead, the AGO argues that sanctions are not appropriate "on this record." AGO Br. 45-46. But if this record of egregious misconduct does not warrant sanctions, it is hard to imagine one that would. *Cf. Commonwealth v. Lewin*, 405 Mass. 566, 588 (1989) (Liacos, C.J., dissenting) (warning that the consequences for "deceit and fraud" must go beyond "toothless rhetoric").

As amici confirm, sanctions *on* the AGO are needed to remedy and deter misconduct *by* the AGO. *See* Ethics Scholars Br. 27-38; *Commonwealth v. Manning*, 373 Mass. 438, 444 (1977). The vacatur of convictions, for exam-

ple, and the associated refund of fees, fines, and restitution, flow substantially from *Farak's* misconduct. *See Nelson v. Colorado*, 137 S. Ct. 1249 (2017). The AGO nowhere posits any court proceeding in which the AGO and its former AAGs could be held accountable for anything. It argues that accountability should be imposed, if at all, only on Foster and Kaczmarek, and only via bar counsel proceedings, "negative media coverage," and Judge Carey's "reprimand[.]" AGO Br. 30, 46.

Given the nature of the prosecutorial misconduct and the magnitude of the resulting harm, that is simply not enough. And an overdue reprimand of former employees cannot remedy an *institutional* failure, let alone deter its recurrence. This is especially true where, before throwing its former employees under a bus, the institution spent years trying to help them get out of the way.

To recap: before this case began in September 2017, the AGO's public position was that Foster and Kaczmarek had committed only "unintentional mistakes" that did not warrant relief for any defendant. The AGO argued to Judge Carey that it had already taken adequate steps, including ethics training and a new disclosure policy, to deter such mistakes. RA 286-87;

3/3/17 *Vega* Tr. at 32.[14] Now, citing *the same* policy and training — plus an ethics committee, CLE requirements, and a bar association working group[15] — the AGO says that it has "already taken" measures that can deter not only mistakes, but misconduct. AGO Br. 46. The record proves otherwise. With this policy and training in place, the AGO did not concede, report, or remedy the very misconduct at issue here. In fact, the disclosure policy does not apply to what Foster and Kaczmarek did; it simply requires AAGs to obtain supervisor approval before withholding exculpatory evidence from "criminal defendants being prosecuted by the AGO," and Petitioners are not aware of any mandatory consequences for violating it.[16]

Petitioners appreciate that the remedial measures to which the AGO assents are steps in the right direction. But it is too late to hail them as actions taken "in response to" or "[a]fter" the egregious

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[14] This transcript page has been submitted with this reply brief and a motion to expand the record.

[15] The AGO indicates that this working group will include the defense bar and civil rights organizations. AGO Br. 51. Petitioners' counsel had not heard of it before reading the AGO's brief.

[16] *See* Internal Control Plan submitted with this reply brief and a motion to expand the record. In March 2017, the AGO refused a public records request relating to this policy and training. RA 88-89. The AGO made it available after filing its brief.

misconduct of its former AAGs. AGO Br. 47-49. If anything, it would be troubling to learn that the AGO had acknowledged Foster and Kaczmarek's misconduct internally, even as the AGO denied it to the world. True accountability, and true deterrence, should be delivered in this case.

CONCLUSION

For all of the reasons stated above and set forth in the Petitioners' opening brief, this Court should dismiss all Amherst Lab cases during Farak's tenure, order the entry of standing orders, and impose monetary sanctions.

Respectfully submitted,

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Dated: 04/26/18

CERTIFICATE OF COMPLIANCE

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

4/26/18
Date

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No. SJC-12471

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