

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-12471

COMMITTEE FOR PUBLIC COUNSEL
SERVICES, *et al.*,

Petitioners,

v.

ATTORNEY GENERAL, *et al.*,

Respondents.

ATTORNEY GENERAL'S MOTION TO SUPPLEMENT THE RECORD

Respondent Attorney General hereby respectfully moves for leave to supplement the record in this case with the Affidavit of First Assistant Attorney General Mary B. Strother, attached hereto as Exhibit A. As grounds therefor, the Attorney General states as follows:

1. This case is before the Court on a Reservation and Report from the county court (Gaziano, J.). *See* Dkt. # 84, No. 2017-SJ-347 (“Res. & Rpt.”).

2. One of the three reported questions in this case asks the parties to address “[w]hether, as the petitioners request, the record in this case supports the court’s adoption of additional prophylactic remedies to address future cases involving widespread prosecutorial misconduct, and whether the court would adopt any such measures in this case.” Res. & Rpt. at 3 (question 3).

3. The Attorney General respectfully submits that the Court’s consideration of this question will be aided by knowing what prophylactic measures the Attorney General’s Office (“AGO”) has already implemented and what measures it plans to implement within the AGO itself in response to the events at issue in this case.

4. The parties hereto were not asked to, and did not, file a Statement of Undisputed Facts in this proceeding; proceedings before the Single Justice have been focused on identifying over 8,000 convictions that the parties agree should be dismissed under the *Bridgeman* protocol. Rather, much of the factual basis of this case comes from Justice Carey's findings in *Cotto*. See Res. & Rpt. at 3 (noting that the record before this Court shall include Justice Carey's June 26, 2017 order). The question of forward-looking prophylactic measures was not squarely presented in that proceeding, and therefore there is at present no developed factual record on that question.

5. As the First Assistant Attorney General, the affiant oversees all AGO operations, including training and other internal measures to ensure that AGO staff are aware of, and comply with, disclosure obligations and other legal and ethical duties.

6. While recognizing that supplementing the record before this Court is unusual, the Attorney General believes that the circumstances of this case, including its arising on a reservation and report of a question concerning forward-looking prophylactic measures, warrant allowing a limited supplementation of the record before this Court to describe the measures already taken.

WHEREFORE, the Attorney General respectfully requests that this Court allow this motion to supplement the record with the attached Affidavit of First Assistant Attorney General Mary B. Strother.

Respectfully submitted,

MAURA HEALEY
ATTORNEY GENERAL




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Dated: April 12, 2018

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on April 12, 2018, I served an electronic copy of this motion via email, and a paper copy via first-class mail, on the counsel of record listed below.



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Exhibit A

*Committee for Public Counsel Services & Others v. Attorney General & Others,
No. SJC-12471*

Affidavit of First Assistant Attorney General Mary B. Strother

COMMONWEALTH OF MASSACHUSETTS
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AFFIDAVIT OF FIRST ASSISTANT ATTORNEY GENERAL MARY B. STROTHER

I, Mary B. Strother, am the First Assistant Attorney General at the Massachusetts Attorney General's Office (AGO). I have held this position since January 2017. On oath, I depose and say that the following is true to the best of my knowledge, information and belief:

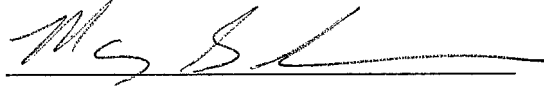
1. As the First Assistant Attorney General, I oversee all AGO operations, including training and other internal measures to ensure that AGO staff are aware of, and comply with, disclosure obligations and other legal and ethical duties. Prior to joining the AGO, I was Special Counsel and Deputy General Counsel at the law firm of Wilmer Cutler Pickering Hale and Dorr LLP. From at least 2008-2016, I also was a member of the firm's Ethics Committee. From 2010-2015, I was a member of the Massachusetts Board of Bar Overseers, where I served as Chairperson from 2014-15.
2. The AGO takes extremely seriously the findings of Judge Carey in *Commonwealth v. Cotto*, Hampden Super. Ct. No. 0779CR00770 (June 26, 2017). In particular, focusing on conduct that took place in 2013, Judge Carey found that two former Assistant Attorneys General committed egregious misconduct by withholding exculpatory evidence about the scope of Sonja Farak's misconduct. After taking office, Attorney General Healey made clear that the misconduct by the two Assistant Attorneys General was beneath the high standards that she has set for members of her office.
3. The AGO has reviewed its existing policies and procedures to determine ways in which they can be improved to prevent the misconduct that occurred here from happening again. The AGO has taken steps to improve: its decision-making and supervisory processes where the disclosure of exculpatory information is at issue; its ways of ensuring that Assistant Attorneys General are aware of their legal and ethical obligations; and its own

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

4. In response to the withholding of exculpatory documents by two Assistant Attorneys General, the new administration in the AGO, acting through its new Criminal Bureau Chief (Kimberly West), implemented a new policy regarding the disclosure of exculpatory information to criminal defendants.
5. It continues to be the general policy of the AGO that an Assistant Attorney General should make a timely disclosure to the defense in a criminal case of all exculpatory evidence or information of which he or she is aware. Under the new policy, in the rare circumstance when an Assistant Attorney General determines that exculpatory material should be withheld, he or she must consult with his or her Division Chief. If the Division Chief concurs with the line Assistant Attorney General, the Division Chief must notify the Chief of the Criminal Bureau. The Chief of the Criminal Bureau will make the final determination whether exculpatory material must be disclosed. No exculpatory material may be withheld without the approval of the Bureau Chief.
6. The AGO has, since 2006, had a mandatory internal continuing education requirement for Assistant Attorneys General, which is currently administered by its AG Institute, under the supervision of the AGO General Counsel. The AGO regularly offers trainings, seminars, and other programs on a wide variety of topics, including those relevant to prosecutors.
7. After the misconduct at issue here came to light, the new administration in the AGO specifically offered trainings on prosecutorial ethics and criminal discovery. In July 2015, the AGO held an ethics training that was mandatory for all Assistant Attorneys General hired in the prior year and open to all others. It was presented by the Chief Legal Counsel, the then-Deputy General Counsel, and an Assistant Attorney General, on subjects including attorney candor, fairness, disclosure and discovery. In October 2015, the AGO held a program that was mandatory for all attorneys handling criminal matters in the AGO. It was presented by the General Counsel and Senior Trial Counsel, and covered ethical issues faced by prosecutors in discovery. In July 2016, there was a mandatory program for attorneys in the Criminal Bureau on the Rules of Professional Conduct, with a particular emphasis on the 2016 revision to Rule 3.8. In August 2017, the AGO held an ethics training on discovery in complex criminal cases, which was presented by the Center for Ethics and Public Integrity branch of the National Attorneys General Training and Research Institute.
8. The office also intends to hold a special office-wide training on prosecutorial ethics, including the obligation to disclose material exculpatory evidence after conviction under revised Rule 3.8(i), in the coming months. That training will be mandatory for all prosecutors in the AGO and will be open to all prosecutors in District Attorneys' Offices in Massachusetts.

9. The AGO's General Counsel and I regularly consider and respond to ethics questions and concerns raised by attorneys and staff at the AGO. AGO policies and procedures clearly set forth the expectation that all attorneys will strictly adhere to the Rules of Professional Conduct. At new employee orientation, AGO staff are directed and encouraged to consult with the General Counsel on any matter that touches on ethics or the Rules of Professional Conduct. Advice provided to AGO staff by the General Counsel and myself is considered confidential and protected by the attorney-client privilege.
10. To increase the number of resources available to staff members seeking guidance on ethical issues, the AGO will create an internal ethics committee, composed of members from across the office, which will sit regularly to discuss questions and concerns on ethics issues that arise both within the AGO and outside the AGO that are of general interest and instruction to the AGO. An Assistant Attorney General will be able to approach any member of the committee with an issue for the committee's consideration. An Assistant Attorney General will be encouraged but not required to also confer with his or her supervisor, pursuant to Massachusetts Rule of Professional Conduct 5.2. The AGO ethics committee also will continue the AGO's review of current policies and procedures to ensure that they reflect the highest ethical standards.
11. Under the AGO's internal continuing legal education (CLE) requirement, all Assistant Attorneys General must complete twelve hours of CLE each year. Numerous ethics CLE options have been, and continue to be, available to Assistant Attorneys General.
12. The AGO recognizes that specific ethics CLE programs should be more than just available or even encouraged; they should be required. The AGO therefore has instituted a new mandate that at least two of the required twelve hours consist of CLE on ethics topics, as determined by the Director of the AG Institute.
13. The AGO has been, and remains, committed to ensuring that potentially wrongful convictions do not stand. It has agreed to co-chair with the Massachusetts Bar Association a Working Group on Conviction Integrity Programs, which will include representatives from District Attorneys' Offices, the defense bar, civil rights organizations, and other key stakeholders.

Signed under the pains and penalties of perjury this 12^m day of April, 2018.

A handwritten signature in cursive script, appearing to read 'M B Strother', written over a horizontal line.

First Assistant Attorney General Mary B. Strother