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November 30, 2017

VIA FEDEX #8115 6614 2495

Clerk Maura S. Doyle
Supreme Judicial Court for Suffolk County
John Adams Courthouse, First Floor
One Pemberton Square – Suite 1300
Boston, Massachusetts 02108-1707

Re: Committee for Public Counsel Services, et. al. v. Attorney General of Massachusetts, et. al.
SJ-2017-0347

Dear Mrs. Doyle:

Please find enclosed for filing the Response of the District Attorneys to Petition Seeking Relief Pursuant to G.L. c. 211, § 3, and G.L. c. 231A, § 1, in the above-referenced matter.

The enclosed has been served on this date via electronic mail and first class mail, postage pre-paid, to the petitioners' counsel of record, as listed in the attached certificate of service.

Should you have any questions, please feel free to contact me at (413) 505-5908.

Very truly yours,

Bethany C. Lynch
Assistant District Attorney
BBO # 637623

BCL
Enclosures

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Suffolk, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
SJ-2017-347

COMMITTEE FOR PUBLIC COUNSEL SERVICES, HAMPDEN COUNTY LAWYERS FOR JUSTICE, INC., HERSCHELLE REAVES, and NICOLE WESTCOTT,
Petitioners,

v.

ATTORNEY GENERAL OF MASSACHUSETTS, DISTRICT ATTORNEY FOR BERKSHIRE COUNTY, DISTRICT ATTORNEY FOR BRISTOL COUNTY, DISTRICT ATTORNEY FOR THE CAPE AND THE ISLANDS, DISTRICT ATTORNEY FOR ESSEX COUNTY, DISTRICT ATTORNEY FOR HAMPDEN COUNTY, DISTRICT ATTORNEY FOR MIDDLESEX COUNTY, DISTRICT ATTORNEY FOR NORFOLK COUNTY, DISTRICT ATTORNEY FOR THE NORTHWESTERN DISTRICT, DISTRICT ATTORNEY FOR PLYMOUTH COUNTY, DISTRICT ATTORNEY FOR SUFFOLK COUNTY, and DISTRICT ATTORNEY FOR WORCESTER COUNTY,
Respondents.

RESPONSE OF THE DISTRICT ATTORNEYS TO PETITION SEEKING RELIEF PURSUANT TO G.L. c. 211, § 3 AND G.L. c. 231A, § 1[1]

The matter before the Court arises from the uncontested egregious misconduct of Sonja Farak, a former chemist at the Amherst Drug Laboratory, during her employment from August 2004 to January 2013. Farak was

[1] This joint response is filed on behalf of the District Attorney's offices of Berkshire, the Cape and the Islands, Essex, Hampden, Middlesex, Norfolk, Northwestern, Plymouth, Suffolk, and Worcester Counties.

arrested by the Massachusetts State Police and prosecuted by the Office of the Attorney General. After a lengthy evidentiary hearing on remand from the Supreme Judicial Court, Judge Richard J. Carey found that the failure by two assistant attorneys general to turn over exculpatory evidence to defendants who sought post-conviction discovery between January 19, 2013, and November 1, 2014, constituted prosecutorial misconduct which warranted remedial action for certain-defined defendants.

The questions before the Court are:

1) what is the appropriate remedy for defendants impacted by Farak's misconduct; and

2) whether any additional remedy is warranted based on the finding of prosecutorial misconduct.

In response to the first question, the district attorneys agree that "Farak defendants" are entitled to notice and relief and submit that the protocol outlined in Bridgeman v. District Attorney for Suffolk District, 476 Mass. 298 (2017) is an appropriate model.

In response to the second question, the district attorneys submit that the Court should affirmatively adopt Judge Carey's finding that defendants who meet the three criteria: "(1) Farak signed their drug certificates; (2) they moved unsuccessfully for post-

conviction relief and/or discovery between January 19, 2013, and November 1, 2014; and (3) their motions were denied on the basis of the contaminated evidentiary record established before Judge Kinder[,]" are entitled to dismissal with prejudice on [their Farak-based] convictions. Cotto Memorandum of Decision and Order (June 2017) 77.

I. Areas of Agreement

A. Definition of "Farak Defendants"

The District Attorneys agree that it is appropriate to identify and notify "Farak defendants" of Farak's misconduct and its impact on his or her case, and to follow the protocol implemented in Bridgeman II for case-by-case adjudication. "Farak defendants" are defendants who pleaded guilty to a drug charge, admitted to sufficient facts to warrant a finding of guilty, or who were found guilty of a drug charge in a case in which Farak signed a drug certificate, Farak signed a drug certificate in their case as an analyst between August 2004 and January 2013 while she was employed at the Department of Public Health Amherst Laboratory.[2] See

[2] Consistent with Bridgeman II and Commonwealth v. Ruffin, 475 Mass. 1003 (2016), the "Farak defendants" "entitled to the conclusive presumption of egregious government misconduct are those who pleaded guilty to a

Commonwealth v. Cotto, 0779CR00770, Memorandum of Decision and Order (June 2017) 66, 79-80 & n. 40. The petitioners agree that their "petition focuses on the Farak Defendants whose adverse dispositions are associated with drug certificates signed by Farak." (Petition at 26).

B. Remedy for Farak Misconduct: Bridgeman II Protocol

To carry out a Bridgeman II-protocol, the district attorneys propose as follows:

In the first phase, the district attorneys will complete the identification of "Farak defendants" and an individualized review of the Farak defendants' cases. When the identification and review is complete, each district attorney will file three letters with the county clerk.

- The first letter ("Letter 1") will identify Ruffin defendants, that is, those defendants who pleaded guilty, admitted to sufficient facts, or were found guilty after trial before Farak signed the drug certification in their case. Bridgeman II, 476 Mass. at 327.

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drug charge, admitted to sufficient facts, or were found guilty after trial after [Farak] signed a drug certificate in their case." Bridgeman II, 476 Mass. at 306.

- The second letter ("Letter 2") will identify all of the drug convictions that the district attorney will move to vacate and dismiss with prejudice after individualized review. Consistent with Bridgeman II, this letter shall include convictions that the district attorney has identified to vacate and dismiss with prejudice "regardless of whether the case could be successfully reprosecuted if a new trial were ordered, and the convictions that the district attorney could not successfully reprosecute if a new trial were ordered." Bridgeman II, 476 Mass. at 327. Also consistent with Bridgeman II, where a defendant pleaded guilty to multiple charges at a plea hearing or was convicted at trial of multiple counts, the vacatur of a drug conviction with prejudice because Farak was the analyst relative to that conviction will not affect any nondrug convictions or any drug convictions where Farak was not the chemist or analyst. Bridgeman II, 476 Mass. at 328 n. 26.
- The third letter ("Letter 3") will identify all drug convictions that the district attorney will not move to vacate and dismiss with prejudice and

will "certify that, if a new trial were allowed, the district attorney could produce evidence at a retrial, independent of [Farak's] signed drug certificate or testimony, sufficient to permit a rational jury to find beyond a reasonable doubt that the substance at issue was the controlled substance alleged in the complaint or indictment." Bridgeman II, 476 Mass. at 328.

In the second phase, the district attorneys will effectuate notice to Letter 2 and Letter 3 defendants consistent with the notice procedure implemented in Bridgeman II. Under the direction of the Single Justice, and in collaboration with the petitioners, the parties will send an approved notice to Letter 2 and Letter 3 defendants modeled on the notice and methods of service developed in Bridgeman II. See http://www.mass.gov/courts/drug-lab-cases.html (last accessed November 6, 2017).

In the third phase, "CPCS shall identify in writing to the single justice all [Letter 3] cases, if any, "where CPCS [or Hampden County Lawyers for Justice] received an order for the assignment of counsel, but was unable within sixty days of the order to assign counsel despite CPCS's [or Hampden County Lawyers for Justice's]

best efforts." Bridgeman II, 476 Mass. at 331. In any such cases, whether dismissal is appropriate will be made following the procedures and standards outlined in Bridgeman II. 476 Mass. at 331-332.

The district attorneys agree with the petitioners that there should be a uniform procedure for the vacatur and dismissal of Farak convictions.[3] For those cases in which the district attorneys have completed the individualized review and placed a conviction on the Letter 2 list of cases to be vacated and dismissed with prejudice, said lists will be filed by a date set by the Single Justice with the county court, with copies for trial court administration and the Probation Department. ("In particular, after conferring with the petitioners, respondents should identify any cases where there is agreement to vacate convictions with prejudice, accompanied by a stipulation of the parties to that effect." Order, Gaziano, J., November 2, 2017). The parties agree that individualized notice may/will take place at a later date when the district attorneys have completed the identification and individualized review of Letter 2 cases.

[3] Uniformity will extend to the format of the lists filed by each office.

II. Areas of Disagreement

A. The District Attorneys Did Not Engage in Egregious Governmental Misconduct Such that a Global Remedy is Required.

The district attorneys disagree with the petitioners' claim that the district attorneys have failed to take adequate steps to identify the scope of Farak's misconduct and the defendants potentially impacted by that misconduct. The petitioners move this Court to find that the district attorneys engaged in egregious governmental misconduct in failing to distribute complete lists of affected Farak defendants in a timely manner (Petition at 1, 3, 5, 13, 17, 19, 24). In response to this extreme request, each district attorney's office, in accordance with the Court's October 31, 2017, order, has filed an affidavit in conjunction with this response detailing the steps taken by each district attorney to identify both the scope of Farak's misconduct and the affected defendants. The affidavits establish that prior to the September 20, 2017, filing of the Petition, the district attorneys worked with the AGO, through multiple investigations and hearings, to identify the scope of Farak's misconduct. On August 19, 2016, the district attorneys stipulated that Farak's actions constituted "egregious governmental misconduct," which

relieved the affected defendants from the burden of satisfying that prong of the Scott test in a post-conviction motion relative to their convictions. See Scott, 467 Mass. 336. On February 16, 2017, approximately one month after the issuance of the Bridgeman II decision,[4] the district attorneys also proposed to the American Civil Liberties Union and the Committee for Public Counsel Services that the Bridgeman II protocol be adopted and utilized to remedy the prejudice to the defendants caused by Farak's misconduct.

The Petition states, erroneously, that ". . . even after all eleven district attorneys conceded, in August 2016, that Farak's misconduct warranted a conclusive presumption of misconduct back to August 2004, no identifications were made and no notices went out." (Petition at 20.) The district attorneys have been engaged in the challenging, laborious, and time consuming process of identifying affected Farak defendants for some time. In some cases, complete or partial lists were provided to CPCS during the summer of 2016, over one year prior to the filing of the Petition. (See individual

[4] The Supreme Judicial Court issued its decision Bridgeman II, in which it established a formal multi-step protocol to remedy Annie Dookhan's misconduct in the Hinton lab, on January 18, 2017.

affidavits of the district attorneys.) This process has required each district attorney's office to search through multiple databases and case management systems to cross-reference criminal cases in each county with a list of Farak-tested samples maintained by the Amherst drug lab. The drug lab list provided by the AGO lacked much of the information necessary to link a drug analysis to an individual criminal charge, and, as such, a manual investigation of each Farak-tested sample was required. This investigation has involved hundreds of hours. During this investigation many of the prosecutors assigned to this task were simultaneously working on complying with the protocol set out by the SJC in Bridgeman II.

To date, each of the district attorneys have completed a list of affected Farak defendants from his or her county, as defined above, and are in the process of identifying which cases each office will agree to vacate and dismiss with prejudice, and which cases, if any, the district attorneys can certify could be re-prosecuted without the Farak drug analysis. The process of identifying and categorizing the affected defendants began long before the Petition was filed. It has been ongoing, and it continues to this day.

B. The Misconduct of Two Assistant Attorneys General Should Not Be Imputed to the District Attorneys Offices for the Purposes of Fashioning an Appropriate Remedy.

The district attorneys disagree that Judge Carey's findings of egregious government misconduct on the part of Sonja Farak and two assistant attorneys general warrant the extraordinary remedy of vacatur and dismissal with prejudice of all Farak cases regardless of whether the district attorney could, and would choose to, reprosecute the case if the defendant were to successfully move for a new trial. In the absence of any misconduct by the district attorneys, a stronger deterrent than a new trial is unnecessary to guard against repetition.

The defendants are seeking the extreme remedy of blanket dismissal of all Farak cases, regardless of the viability of reprosecution, in order to punish the district attorneys for the misconduct of employees of the AGO in withholding potentially exculpatory evidence from the Farak defendants. There is no allegation, or evidence to support a claim, that the district attorneys were at any time in possession of exculpatory documents, withheld such discovery from the Farak defendants, or

failed to share exculpatory evidence within their possession, custody or control.

The district attorneys in this case met their discovery obligations, and requested that the AGO provide any and all exculpatory information that it discovered in the course of its investigation and prosecution of Sonja Farak that might be exculpatory to defendants in cases where Farak was the chemist. The AGO assured the district attorneys and the court that all such information had been provided. See Cotto Memorandum of Decision and Order (June 2017), at 32, 33, 42, 47, 49, 54, 55, 60; Exhibits 165, 193, 212.[5] The district attorneys reasonably relied on the representations of the AGO.

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[5] Exhibit 165 at the Cotto evidentiary hearing was a letter from the AGO to the district attorneys listing potentially exculpatory evidence found in the AGO's Farak investigation and recognizing that the AGO had an obligation to provide such exculpatory evidence to the district attorneys.

Exhibit 193 was a letter from AAG Kris Foster to Judge Kinder wherein she represented that "[a]fter reviewing Sergeant Ballou's file, every document in his possession has been disclosed."

Exhibit 212 was an opposition, filed by AAG Foster, wherein she represented that, "[t]he AGO has turned over all grand jury minutes, exhibits and police reports in its possession to the District Attorney's Office. Based on these records to which the defendant has access, there is no reason to believe that a third-party had knowledge of Farak's alleged malfeasance prior to her arrest."

The district attorneys did not have custody or control over exculpatory evidence that was not provided to the Farak defendants, and the AGO was not involved in the prosecution of the underlying narcotics cases of the Farak defendants. See Mass. R. Crim. P. 14(a)(1)(A).[6] The Attorney General's office is a separate, independent governmental agency, over which the district attorneys have no control. As a result, the district attorneys bear none of the responsibility for withholding the materials from the affected defendants, and Judge Carey carefully assigned fault to the AGO and not to the local district attorneys. See Cotto Memorandum of Decision and Order, at 42, 43, 47, 53, 70, 123-124.

Dismissal with prejudice in order to deter future misconduct would be akin to an exclusionary rule which serves a deterrent purpose only if the remedy punishes the entity that committed the misconduct. Because the district attorneys did nothing wrong, no deterrent is

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[6] The Farak defendants in the Cotto case seemed to acknowledge that the district attorneys did not have custody or control of the evidence collected in the criminal case against Farak. The defendants in that case filed motions for discovery pursuant to Mass. R. Crim. P. 17(a)(2), which applies to third parties who possess documentary evidence. The district attorneys had no control over the documents in the possession of a third party, and as such, a Rule 17 request for discovery was appropriate.

necessary and dismissal is not warranted. Compare Commonwealth v. Wilkerson, 436 Mass. 137, 142 (2002) (where purpose of remedy is to deter future misconduct, such remedy unnecessary in the absence of evidence of misconduct by the agency suffering the remedy); Commonwealth v. Cryer, 426 Mass. 562, 569 (1998)(exclusion would serve no useful purpose where police in other jurisdiction erred and Massachusetts police conduct was proper).

While any misconduct of the assistant attorneys general was regrettable, the district attorneys should not be sanctioned for misconduct beyond its control. The district attorneys are tasked with prosecuting narcotics offenses within each district, and Article 30 of the Massachusetts Declaration of Rights grants the district attorneys discretion in prosecuting offenders. See Commonwealth v. Cheney, 440 Mass. 568, 574 (2003)("In the context of criminal prosecutions, the executive power affords prosecutors wide discretion in deciding whether to prosecute a particular defendant, and that discretion is exclusive to them"). To preclude reprosecution would violate the district attorneys' Article 30 rights as a sanction for conduct attributable to a separate agency. Both the trial court and the district attorneys relied

upon the representations of the AGO. Allowing the district attorney to reprosecute Farak cases would not violate the defendant's due process rights, since "the misconduct, serious as it was, did not result in 'irremediable harm to the defendant's opportunity to obtain a fair trial.'" Commonwealth v. Cronk, 396 Mass. 194, 198 (1985). Denying the district attorney the opportunity to reprosecute would be an extreme sanction, for conduct unconnected to the district attorney, and would allow the misconduct of a few to "dictate an abrupt retreat from the fundamentals of our criminal justice system." Bridgeman v. District Attorney for Suffolk District, 471 Mass. 465, 487 (2015).

C. The Interests of the Parties are Sufficiently Served by Bridgeman II. A Protocol to Define Future Obligations is Unnecessary, will not Forestall Future Litigation, and May Prove Overly Restrictive.

The District Attorneys position is that the Bridgeman II protocol neatly fits the Farak cases and urges this Court to apply the Bridgeman II protocol for these cases. The petitioners have requested that this Court establish a protocol to address situations such as this one that may arise in the future. Appropriately, through litigation in the Bridgeman case, this court has done just that -- set forth the law of the Commonwealth,

and established guidelines based on its rulings that are applicable to future cases. Bridgeman v. District Attorney for the Suffolk District, 476 Mass. 298 (2017) (Bridgeman II). The District Attorneys have followed the Bridgeman guidelines in addressing Farak's misconduct.

The District Attorneys efforts to proactively remediate the effects of Dookhan and Farak's misconduct outside the Bridgeman guidelines have been met by objections by the petitioners. Most recently, at a hearing before this Single Justice, the petitioners objected to dismissals of cases in ongoing hearings held in the District Court in the Northwest District aimed at resolving Farak-tainted cases.[7]

Here, the petitioners characterize the dismissal of cases -- the very remedy sought -- as objectionable. This broadly illustrates why a protocol, a one-size-fits-all to-do list, would ultimately prove unworkable. A protocol may well prove unduly restrictive to parties in a speculative future matter, the contours of which may be quite different than those here. Beyond the Bridgeman

[7] The defendants in those cases presumably were represented by counsel, either privately retained or appointed. It is unclear what standing the petitioners had to object to dismissal of those cases. In the event the District Court did not dismiss a case due to this global objection by petitioners, an appeal may well follow.

guidelines, as seen in this very case, parties will inevitably have differences, and will opt to litigate them despite the existence of a protocol.

The investigations of Farak and Dookhan were lengthy, individualized, and fact-intensive. See, e.g. Commonwealth v. Antone, 90 Mass. App. Ct. 810, 819 (2017) ("Knowledge of Dookhan's misconduct evolved over a number of months as the investigation progressed."). Their criminal acts differed, but the impact of those acts on the criminal justice system was comparable. As such, the interests of the parties in the Farak cases are sufficiently served by the application of the Bridgeman II protocol.

By no means, though, should the Bridgeman II protocol be adopted as an all-purpose solution for other, future, as yet undefined misconduct, or should *any* all-purpose solution be adopted for future misconduct. Our adjudicatory system permits parties to develop a record and advocate for a resolution, and authorizes the trial court to hear the respective positions of the litigants, weigh the options in view of the law, and rule in accordance with case law and statutory, and constitutional considerations, with due regard for the doctrine of separation of powers under art. 30.

Decisional law and *stare decicis* remain the preferred methods of guiding future actions by potential litigants. Doe v. Sex Offender Registry Board, 473 Mass. 297, 301-302 (2015).

There is no certainty that an anticipatory protocol will reduce the likelihood of litigation should another Dookhan/Farak-type crisis arise. Rather, an anticipatory protocol might be over- or under-restrictive, or might spawn additional litigation.

In conclusion, case law provides sufficient guidance to resolve the Farak cases. On the other hand, a predetermined protocol for future cases would be unlikely to forestall litigation, would itself likely become a source of litigation, and may well unduly restrict creative solutions for future problems. As such, the District Attorneys respectfully request that this portion of the petitioner's request for relief be denied.

Date: 11/30/17

Respectfully submitted,

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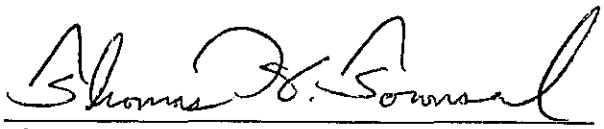

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CERTIFICATE OF SERVICE

I do hereby certify that I have, this day, served a copy of the Response of the District Attorneys to Petition Seeking Relief Pursuant To G.L. c. 211, § 3 and G. L. c. 231A, § 1 by first class and electronic mail to:

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Dated: 11/30/17

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