COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR THE COUNTY OF SUFFOLK

COMMITTEE FOR PUBLIC COUNSEL SERVICES, et al., Petitioners, v. ATTORNEY GENERAL OF MASSACHUSETTS, et al., Respondents.	No. SJ-2017-0347

ATTORNEY GENERAL'S MEMORANDUM IN RESPONSE TO THE PETITION FOR RELIEF PURSUANT TO G.L. c. 211, § 3, AND G.L. c. 231A, § 1

The Attorney General hereby submits this response to the petition for extraordinary relief that was filed by the petitioners, the Committee for Public Counsel Services (CPCS), the Hampden County Lawyers for Justice, Inc., Herschelle Reaves, and Nicole Westcott. *See* G.L. c. 211, § 3; G.L. c. 231A, § 1.

I. INTRODUCTION

Defendants who were convicted of drug offenses based upon evidence that was analyzed and certified by disgraced state chemist Sonja Farak deserve speedy relief from their tainted convictions. To that end, this Court has urged the petitioners and the respondents to identify all cases that they agree should be dismissed with prejudice. *See, e.g.,* 11/2/2017 Order, Dkt. No. 29. The Attorney General's Office ("AGO") strongly supports that approach and believes that the parties should work together, with the Court's guidance, to provide relief to as many defendants as possible, in the shortest time possible. This Court's 2017 *Bridgeman* decision—

fashioned under circumstances very similar to those here—provides a starting framework for the parties to accomplish that goal, and the parties should agree to implement immediately an analogous approach. On information and belief, the AGO understands that many, if not all, of the District Attorneys are preparing to do just that. Immediate implementation of a *Bridgeman*-style remedy will provide prompt relief to thousands of defendants and substantially narrow—if not moot altogether—the remaining issues in this litigation. To the extent that there remain relevant Farak defendants[1] as to whom agreement cannot be reached, this Court should report to the full court the question of any alternate remedy.

The AGO did not itself bring criminal charges against any of the Farak defendants. *See* AGO Exh. 1 at ¶¶ 5, 48-53. The AGO did, however, prosecute Sonja Farak herself, as discussed by the Superior Court in its recent decision regarding certain Farak defendants. *See* Memorandum of Decision and Order on Motions for Post-Conviction Relief, *Commonwealth v. Cotto*, No. 2007-770 (Hampden County Super. Ct. June 26, 2017) ("*Cotto*").[2] In *Cotto*, the Superior Court made factual findings about misconduct by Farak, and also found that two former

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[1] As used here, the term "Farak defendants" is intended to cover those defendants who are in the same position with respect to Sonja Farak as "Dookhan defendants" were with respect to Annie Dookhan, as defined by this Court in the *Bridgeman* litigation. *See Bridgeman v. District Attorney for the Suffolk District*, 476 Mass. 298, 306 n.8 (2017). Moreover—again corresponding to the *Bridgeman* litigation—the term "relevant Farak defendants," as used here, corresponds to all "Farak defendants" except those "with cases in which [Farak] signed the drug certificate after their guilty plea or admission to sufficient facts to warrant a guilty finding." *See id.*; *Commonwealth v. Ruffin*, 475 Mass. 1003 (2016). Based on the reasoning in *Bridgeman*, it is the AGO's view that the "relevant Farak defendants" constitute the group of defendants potentially entitled to relief in this litigation.

[2] The petitioners have reproduced the *Cotto* decision at Exhibit 1 to their petition. References to a page of the petition will be made as P. ____. References to a page of the appendix to the petition will be made as P.Appx. Exh.___ at ___. References to the exhibits contained on the separate CD that the petitioners' submitted with their petition will be made as P.CD Exh. ___ at ___. References to the appendix to the Attorney General's response to the petition will be made as AGO Exh. ___ at ___.

Assistant Attorneys General, Anne Kaczmarek and Kris Foster, committed prejudicial prosecutorial misconduct in handling the Farak investigation and litigation arising out of challenges to the prosecution and convictions of certain Farak defendants. *See* P.Appx.Ex. 1 at 77-78. The *Cotto* Court also found that the colleagues of Kaczmarek and Foster at the AGO were "committed and principled public servants." P.Appx.Ex. 1 at 124. The AGO did not appeal *Cotto*. While the AGO does not agree with all of the factual findings and legal conclusions in *Cotto*, it accepts the factual findings as true for purposes of this litigation.

II. FACTUAL AND PROCEDURAL BACKGROUND

The background section below is drawn in part from the Superior Court's decision in *Cotto* and in part from the affidavit and report that the AGO is submitting with this memorandum of law. This section is not an exhaustive recitation of all of the facts and circumstances of this case.

In summary, the Superior Court entered the following findings or conclusions:

Sonja Farak initially was hired by the Commonwealth of Massachusetts in 2002 to conduct HIV testing. P.Appx.Exh. 1 at 11. At that time and over the next approximately sixteen months, she consumed alcohol, marijuana, and ecstasy. P.Appx.Exh. 1 at 11. She also tried methamphetamine. P.Appx.Exh. 1 at 11. In mid-2003, she transferred to the Hinton State Drug Laboratory in the Jamaica Plain section of Boston. P.Appx.Exh. 1 at 11. And in August of 2004, she transferred to the state drug laboratory in Amherst (the "Amherst lab"), where she worked until it closed on January 18, 2013. P.Appx.Exh. 1 at 4.

In late 2004 or early 2005, Farak began to consume some of the methamphetamine "standard" from the Amherst lab. P.Appx.Exh. 1 at 11. A "standard" is a known substance (i.e., drug) against which police-submitted evidence samples are compared for testing and

identification. P.Appx.Exh. 1 at 7. Over the next several years, Farak's drug use escalated sharply both in the types of drugs that she was consuming and in the frequency with which she was consuming them, and she began to consume police-submitted evidence samples in addition to drug standards.[3] P.Appx.Exh. 1 at 11-21.

Farak was arrested in January 2013, and former Assistant Attorney General Anne Kaczmarek was assigned to prosecute her. P.Appx.Exh. 1 at 29. State Police troopers assigned to the AGO executed a search warrant for Farak's car, and they seized certain evidence. P.Appx.Exh. 1 at 25. Some of the evidence showed that, in 2011, Farak had sought mental health treatment and had consumed, or had grappled with the urge to consume, drugs. P.Appx.Exh. 1 at 26-29.

The AGO did not disclose the 2011 mental health evidence to the grand jury or to the District Attorneys. P.Appx.Exh.1 at 39, 62-63. Nor was it disclosed to the defendants who, upon learning of Farak's misconduct, had moved to dismiss the indictments against them or for collateral relief under Mass. R. Crim. P. 30 in cases where she analyzed and certified the drug evidence. P.Appx.Exh. 1 at 2, 62-63. Former Assistant Attorney General Kris Foster was assigned to respond to certain discovery requests filed by defendants who had been affected by Farak's misconduct. P.Appx.Exh. 1 at 45. Both Kaczmarek and Foster engaged in certain acts that shielded the 2011 mental health and drug-use evidence from disclosure and constituted prejudicial prosecutorial misconduct. *E.g.*, P.Appx.Exh. 1 at 48, 50, 53, 57, 69-70. They thereby "hampered" the ability of the court and the affected defendants to learn the true scope of Farak's

[3] Eventually, on January 6, 2014, Farak pled guilty to four counts of tampering with evidence, four counts of stealing cocaine from the Amherst lab, and two counts of unlawful possession of cocaine; she was sentenced to a total of 2½ years in jail, with one year suspended and a five-year term of probation. P.CD Exh. 180 at 41, 44-45.

misconduct. P.Appx.Exh. 1 at 63, 69. And their conduct constituted "a fraud upon the court." P.Appx.Exh. at 69.

Because the 2011 mental health and drug-use evidence was not disclosed, a Superior Court judge found (on the basis of the only evidence then before him) that Farak's misconduct was limited to a period of approximately six months, from July of 2012 until January of 2013, and he denied relief in cases where Farak had tested the drug evidence on dates outside of that range. P.Appx.Exh. 1 at 2, 61. The 2011 mental health and drug-use evidence was ultimately disclosed in November of 2014, when a defense attorney obtained access to the evidence that had been seized from Farak's car, discovered the mental health records, and called his discovery to the attention of the AGO. P.Appx.Exh.1 at 39, 62-63.

* * *

In *Commonwealth v. Cotto*, the full Court directed the Commonwealth to conduct a thorough investigation into "the timing and scope of Farak's misconduct at the Amherst drug lab in order to remove the cloud that has been cast over the integrity of the work performed at that facility, which has serious implications for the entire criminal justice system." 471 Mass. 97, 115 (2015). The AGO agreed to undertake that investigation and assigned Assistant Attorney General Thomas Caldwell to conduct it. AGO Exh. 1, ¶ 3; AGO Exh. 2. Caldwell convened two grand juries, called several witness, and reviewed other evidence. AGO Exh. 1 at ¶ 3; AGO Exh. 2 at 1, 3-4 (summarizing the testimony of the grand jury witnesses). The Superior Court "commend[ed] what Caldwell . . . accomplished in a reasonable period." P.Appx.Exh. 1 at 66 n.36.

In addition to Caldwell's efforts, other officials in the AGO were taking steps to identify defendants who may have been affected by Farak's misconduct. To that end, in April 2015, Criminal Bureau Chief Kimberly West consulted with supervisory prosecutors in the AGO's Enterprise and Major Crimes Division and confirmed that all of the drugs in cases prosecuted by the AGO were analyzed by the State Police and not by the Department of Public Health. AGO Exh. 1 at ¶ 5. Subsequently, the AGO also searched its own internal case-management system, DAMION, and generated a list of all prosecutions that it had undertaken for violations of Chapter 94C of the General Laws. AGO Exh. 1 at ¶ 49. A staff member then compared the names on the DAMION-generated list to the names on spreadsheets that West had obtained from the State Police and the Executive Office of Public Safety and Security, containing records of criminal cases in which drug evidence had been tested at the Amherst lab. AGO Exh. 1 at ¶¶ 49-52. There did not appear to be any relevant matches between defendants that the AGO had prosecuted for drug offenses and those for whom Farak had served as the drug evidence analyst. AGO Exh. 1 at ¶¶ 49-52.

In addition, to assist the District Attorneys in their efforts to identify Farak defendants, West provided the State Police spreadsheets and other relevant data to the District Attorneys as they became available. AGO Exh. 1 at ¶¶ 10, 12-13, 15, 19, 44. West also convened several conference calls and sent several e-mails to members of the District Attorneys' Offices regarding: (1) the extent to which each office had cases affected by Farak's misconduct; (2) methods for identifying and notifying affected defendants; (3) whether each office had sufficient resources to identify potentially affected defendants; (4) whether local police departments were preserving drug samples; and (5) whether to grant Farak immunity in connection with Caldwell's investigation. AGO Exh. 1 at ¶¶ 9, 10-11, 14, 18, 20-21, 24, 27, 29-36. In light of the Hampden

County District Attorney's Office's disproportionately high number of affected cases, the AGO also provided staff support to that office to aid in the review of case files and the identification of Farak defendants. AGO Exh. 1 at ¶¶ 45-47.

III. THE *BRIDGEMAN* FRAMEWORK

This Court has held that "[t]he remedy for prosecutorial misconduct in a particular case should be tailored to the injury suffered." *Commonwealth v. Frith*, 458 Mass. 434, 443 (2010). Possible remedies for prosecutorial misconduct may include suppression of evidence, *see Commonwealth v. Jacobsen*, 419 Mass. 269, 277 (1995); curative jury instructions, *see Commonwealth v. Westerman*, 414 Mass. 688, 701 (1993); grant of a new trial, *see Commonwealth v. Lam Hue To*, 391 Mass. 301, 310 (1984); civil remedies, *see Commonwealth v. Hine*, 393 Mass. 564, 573 (1984); internal discipline, *see id.*; or dismissal of charges with prejudice, *see Commonwealth v. Fontaine*, 402 Mass. 491, 496–97 (1988). The appropriate remedy for prosecutorial misconduct, if any, is within a court's discretion. *See Westerman*, 414 Mass. at 701; *Commonwealth v. Collins*, 470 Mass. 255, 269 (2014).

This Court has addressed prosecutorial misconduct in a number of cases. For example, in *Commonwealth v. Mason*, the Court held that dismissal with prejudice was inappropriate where police "engaged in intentional, deliberate, and egregious misconduct" by withholding a defendant's bail information because the misconduct "did not present a substantial threat of prejudice sufficient to support dismissal." 453 Mass. 873, 878-79 (2009). In *Commonwealth v. Hernandez*, where the prosecutor refused to disclose a location where surveillance had occurred, the Court remanded for a determination of whether the misconduct "'caused such irreparable prejudice that the defendant could not receive a fair trial if the complaint were reinstated.'" 421 Mass. 272, 279-80 (1995) (citation omitted).

This Court has recently been confronted with misconduct that affected thousands of defendants—namely, the misconduct of Annie Dookhan, a chemist employed in the Hinton state forensic lab who was indicted on multiple counts of evidence tampering and obstruction of justice in connection with her handling of drug samples. *See, e.g., Commonwealth v. Scott*, 467 Mass. 336, 338-41 (2014). This Court ultimately determined that a comprehensive approach (as opposed to case-by-case litigation) was needed to remedy the harm that had been done to the state justice system. A number of the cases that led the Court to that groundbreaking approach are discussed here.

In *Scott*, this Court adopted the analysis of *Ferrara v. United States*, 456 F.3d 278, 290 (1st Cir. 2006), to evaluate a defendant's motion to withdraw a guilty plea based on Dookhan's misconduct. *See Scott*, 467 Mass. at 346. *Ferrara* held that a defendant moving to withdraw a guilty plea based on an assertion of newly discovered government misconduct must show, first, "that 'egregiously impermissible conduct ... by government agents ... antedated the entry of his plea,'" and second, "that 'the misconduct influenced his decision to plead guilty or, put another way, that it was material to that choice.'" *Id.* at 346 (quoting *Ferrara*, 456 F.3d at 290). In *Scott*, this Court held that the first *Ferrara* prong was necessarily satisfied in cases involving Dookhan's misconduct; thus, "where Dookhan signed the certificate of drug analysis as either the primary or secondary chemist in the defendant's case, the defendant is entitled to a conclusive presumption that Dookhan's misconduct occurred in his case, that it was egregious, and that it is attributable to the Commonwealth." *Scott*, 467 Mass. at 338. In establishing this conclusive presumption—which the Court noted was "*sui generis*," applying only to Doohkan cases—the Court cited "the due process rights of defendants, the integrity of the criminal justice system, the efficient administration of justice in responding to such potentially broad-ranging

misconduct, and the myriad public interests at stake." *Id.* at 352. The Court did not apply any presumption with respect to the second prong of *Ferrara*, and remanded for an individualized consideration of that prong. *Id.* at 358.

In *Commonwealth v. Francis*, 474 Mass. 816, 823 (2016), this Court extended the *Scott* presumption of egregious misconduct to Dookhan defendants seeking to vacate their convictions after a trial. This Court has declined to apply the *Scott* presumption "[w]here a drug certificate signed by Dookhan postdates the defendant's guilty plea.'" *See Commonwealth v. Ruffin*, 475 Mass. 1003, 1004 (2016) (emphasis omitted).

A little over a year after *Scott*, this Court decided *Bridgeman v. District Attorney for the Suffolk District*, 471 Mass. 465 (2015) ("*Bridgeman I*"), which addressed the claims of three Dookhan defendants who petitioned for relief under G.L. c. 211, § 3. Stating its intention to protect relevant Dookhan defendants from "wrongly … bear[ing] the burden of a systemic lapse … entirely attributable to the government," this Court held that a defendant granted a new trial based on Dookhan's misconduct could not "be charged with a more serious offense than that of which he or she initially was convicted under the terms of a plea agreement and, if convicted again, cannot be given a more severe sentence than that which originally was imposed." *Id.* at 476, 477. The *Bridgeman I* Court also allowed a motion to intervene filed by CPCS, concluding that CPCS had "a substantial and immediate interest in these proceedings given its current and future responsibility for providing representation to thousands of indigent Dookhan defendants…." *Id.* at 485-86. The Court declined CPCS's request, however, to implement a "global remedy" that would address the convictions of all Dookhan defendants, and remanded the case to a single justice for further proceedings consistent with the opinion. *Id.* at 486-87, 494.

Following *Bridgeman I*, in response to an order from the single justice, the district attorneys produced lists of names containing more than 20,000 Dookhan defendants and more than 24,000 cases where those defendants "had pleaded guilty to a drug charge, had admitted to sufficient facts to warrant a finding of guilty of a drug charge, or had been found guilty at trial of a drug charge where Dookhan had tested the alleged drugs as the primary or confirmatory chemist." *Bridgeman v. District Attorney for the Suffolk District*, 476 Mass. 298, 309 (2017) ("*Bridgeman II*").

In *Bridgeman II*, decided in January 2017, this Court revisited the possibility of a global remedy for relevant Dookhan defendants. The Court set forth "four relevant principles of our criminal justice system" to guide its consideration of this issue. First "where there is egregious misconduct attributable to the government in the investigation or prosecution of a criminal case, the government bears the burden of taking reasonable steps to remedy that misconduct." *Bridgeman II*, 476 Mass. at 315. Second, "under our criminal rules, relief from a conviction generally requires the defendant to file a motion for a new trial." *Id.* at 316. Third, "dismissal with prejudice 'is a remedy of last resort.'" *Id.* (citing *Commonwealth v. Cronk*, 396 Mass 194, 198 (1985)). Fourth, "where large numbers of persons have been wronged, the wrong must be remedied in a manner that is not only fair as a matter of justice, but also timely and practical." *Bridgeman II*, 476 Mass. at 317.

As to the third principle, *Bridgeman II* described the "[t]wo parallel legal principles" that, under this Court's precedent, govern consideration of whether dismissal with prejudice is appropriate based on prosecutorial misconduct. 476 Mass. at 316 (quoting *Cronk*, 396 Mass. at 198-99). First, a motion to dismiss with prejudice should be allowed "where there is 'a showing of irremediable harm to the defendant's opportunity to obtain a fair trial.'" *Bridgeman II*, 476

Mass. at 316 (quoting *Cronk*, 396 Mass. at 198). If a fair trial is possible despite the prosecution's misconduct, "[d]ismissal with prejudice is 'too drastic a remedy.'" *Bridgeman II*, 476 Mass. at 316 (quoting *Cronk*, 396 Mass. at 200). Second, "'prosecutorial misconduct that is egregious, deliberate, and intentional, or that results in a violation of constitutional rights may give rise to presumptive prejudice. In such instances prophylactic considerations may assume paramount importance and the 'drastic remedy' of dismissal of charges may become an appropriate remedy.'" *Bridgeman II*, 476 Mass. at 316-17 (quoting *Cronk*, 396 Mass. at 198-99). This second rule is "narrowly applied," when necessary "'to create a climate adverse to repetition of th[e] misconduct that would not otherwise exist.'" *Bridgeman II*, 476 Mass. at 317 (quoting *Commonwealth v. Lewin*, 405 Mass. 566, 587 (1989)).

Based on its four enunciated principles, the Court evaluated the parties' arguments regarding a potential global remedy. The Court disagreed with petitioners' assertion that global dismissal of the drug convictions of all relevant Dookhan defendants with prejudice was necessary. *Id.* at 322-23. Such a remedy, the Court concluded, would be inconsistent with *Scott* and *Francis*, which had granted defendants a conclusive presumption of egregious government misconduct but had not granted a corresponding conclusive presumption of prejudice. *Id.* at 322. Moreover, even where a defendant could demonstrate prejudice to his or her case, *Scott* and *Francis* provided for a new trial rather than dismissal of the conviction. *Id.* With respect to relevant Dookhan defendants, the Court concluded that in light of "the absence of any evidence of misconduct by a prosecutor or investigator," Dookhan's misconduct was not so extreme that dismissal with prejudice was necessary "to avoid the risk of repetition." *Id.* Global dismissal with prejudice of all relevant Dookhan defendant cases, the Court concluded, was not appropriate:

> A dismissal with prejudice for government misconduct is very strong medicine, and it should be prescribed only when the government misconduct is so intentional and so egregious that a new trial is not an adequate remedy. We did not prescribe this medicine in *Scott* and *Francis*, and we are not convinced that it is appropriate to do so now.

Id. at 322-23.

Although the Court rejected global dismissal with prejudice and maintained that case-by-case adjudication was "the fairest and best alternative," it concluded that such case-by-case adjudication "must be adapted" to be "both fair and workable" for the relevant Dookhan defendants and the District Attorneys. *Id.* at 326. To achieve this goal, the Court set forth a three-part protocol, *id.* at 327-32, involving (1) a first phrase in which district attorneys would reduce the number of relevant Dookhan defendants by "moving to vacate and dismiss with prejudice all drug cases the district attorneys would not or could not reprosecute if a new trial were ordered"; (2) a second phase in which notice would be approved by the single justice and provided to all defendants whose cases were not dismissed in phase one; and (3) a third phase in which CPCS would assign counsel to any indigent relevant Dookhan defendants who wished to explore moving to vacate their plea or for a new trial. *Id.* at 300-301.

In the first phase of the *Bridgeman* protocol, the Court ordered the District Attorneys to "commence an individualized review" of each Dookhan case, and—no later than 90 days after issuance of the opinion—to file three letters with the county clerk. *Id.* at 327. The first letter was to identify any so-called "*Ruffin*" defendants, who were not entitled to a presumption of egregious government misconduct because they pleaded guilty before Dookhan signed their drug certification. *Id.* The second letter was to identify drug convictions that the District Attorney wished "to vacate and dismiss with prejudice." *Id.* at 327-28. The third letter was to identify drug convictions that the District Attorney did not intend to so vacate. *Id.* at 328. Such

"substantial vetting of the relevant cases by the district attorneys," the Court concluded, would "allow our criminal justice system to focus its limited resources where they are most needed, and diminish the risk that the number of these cases will so overwhelm CPCS that the single justice will have to act to protect the relevant Dookhan defendants' right to counsel." *Id.* The Court remanded to the single justice for further action consistent with its opinion. *Id.* at 332.

IV. A COMPREHENSIVE REMEDY FOR FARAK DEFENDANTS

Bridgeman II set forth an innovative, workable protocol for providing relief to thousands of defendants as expeditiously as possible. According to press reports, the District Attorneys agreed to dismiss a large proportion of the convictions of relevant Dookhan defendants with prejudice following *Bridgeman II*. *See* Shawn Musgrave, *Prosecutors Will Drop Thousands of Cases in Dookhan Scandal*, Boston Globe (April 19, 2017) (reporting that prosecutors agreed to dismiss more than 20,000 Dookhan cases, and quoting an ACLU attorney's estimate that "95 percent of ... tainted drug convictions will be dismissed").

On information and belief, many if not all of the District Attorneys in this case are currently undertaking a *Bridgeman*-type effort to identify Farak cases for dismissal, following this Court's November 2 Order. Given this effort and in light of the Dookhan precedent, it is reasonable to expect that implementing an immediate *Bridgeman* remedy here will quickly and significantly narrow the scope of the issues before the full Court, or even moot any full Court review entirely. The AGO therefore believes that continuing this process, but ensuring that it moves forward on a tight timeline, is the best approach for ensuring the fastest relief to the largest number of Farak defendants. Such an approach will also clarify the extent of any need for a "*Bridgeman* plus" remedy, which can be addressed by the full Court, and will provide the Court with more precise information about the number and nature of any remaining cases.

V. CONCLUSION

The AGO strongly supports the parties' current efforts, consistent with this Court's November 2 Order, to agree on a set of Farak cases that may be dismissed with prejudice immediately. The Court should ensure that this *Bridgeman*-style process moves as quickly as possible to achieve dismissal of as many cases as possible. As to any defendants that remain, this Court should report the question of any further remedy to the full Court.

Respectfully submitted,

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Dated: November 30, 2017

CERTIFICATE OF SERVICE

I hereby certify that, on November 30, 2017, a true copy of the foregoing was served by electronic mail and by first-class mail, postage prepaid, upon:

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