COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

NO. SJC-12471

COMMITTEE FOR PUBLIC COUNSEL SERVICES & OTHERS,

Petitioners,

v.

ATTORNEY GENERAL OF MASSACHUSETTS & OTHERS,

Respondents.

ON RESERVATION AND REPORT FROM
THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

BRIEF OF LEGAL ETHICS AND CRIMINAL JUSTICE SCHOLARS AND THE DKT LIBERTY PROJECT AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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ISSUE PRESENTED

Amici curiae file this brief primarily to address the third question reported by Associate Justice Gaziano's Reservation & Report to the full Supreme Judicial Court, namely: Whether the record in this case supports the Court's adoption of additional prophylactic measures to address future cases involving widespread prosecutorial misconduct, and whether the Court should adopt such measures in this case.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are scholars who work in the field of legal ethics and criminal justice, as well as a non-profit organization that seeks to combat government overreach in all its forms, including combatting prosecutorial overreach. Collectively, *amici* share an interest in this case because the record here dramatically illustrates the need for courts to take both remedial and prophylactic measures to address prosecutorial misconduct by holding accountable not only individual prosecutors, but also the offices in which they work.

The DKT Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. The Liberty Project is committed to defending privacy, guarding against government

overreach, and protecting every American's right and responsibility to function as an autonomous and independent individual. The Liberty Project espouses vigilance of government overreach of all kinds, but especially prosecutorial overreach. The Liberty Project has filed several briefs as *amicus curiae* with state and federal courts and with the United States Supreme Court on issues involving constitutional rights and civil liberties.

Joining the Liberty Project as *amici* are eighteen scholars of legal ethics and criminal justice whose work focuses on the criminal justice system, prosecutorial ethics, prosecutorial misconduct, and wrongful convictions. These scholars have a strong interest in fully informing the Court about the existing scholarly assessment of efforts to hold prosecutors accountable for misconduct. These *amici* are:[1]

Lara Bazelon, Associate Professor of Law and Director of the Criminal & Juvenile Justice Clinic and the Racial Justice Clinic, University of San Francisco School of Law;

[1] Academic affiliations are listed for identification purposes only.

Joshua Dressler, Distinguished University Professor Emeritus and the Frank R. Strong Chair in Law, Ohio State University Moritz College of Law;

Keith A. Findley, Associate Professor of Law, University of Wisconsin Law School;

Lawrence J. Fox, George W. and Sadella D. Crawford Visiting Lecturer in Law, Yale Law School;

Bennett L. Gershman, Professor of Law, Elisabeth Haub School of Law at Pace University;

Cynthia Godsoe, Associate Professor of Law, Brooklyn Law School;

Lissa Griffin, Professor of Law, Elisabeth Haub School of Law at Pace University;

Peter A. Joy, Henry Hitchcock Professor of Law and Director, Criminal Justice Clinic, Washington University in St. Louis;

Corinna Lain, S. D. Roberts & Sandra Moore Professor of Law, University of Richmond School of Law;

Richard Leo, Hamill Family Professor of Law and Social Psychology and Dean's Circle Scholar, University of San Francisco School of Law;

Lisa G. Lerman, Professor of Law Emerita, the Catholic University of America;

Jacqueline McMurtrie, Professor of Law and Founder, Innocence Project Northwest, University of Washington School of Law;

Daniel Medwed, Professor of Law and Criminal Justice, Northeastern University;

L. Song Richardson, Dean and Professor of Law, University of California Irvine School of Law;

Abbe Smith, Professor of Law and Director, Criminal Defense and Prisoner Advocacy Clinic, Georgetown University Law Center;

John Strait, Emeritus Professor of Law and Professional Ethics Counsel, Seattle University School of Law;

Ronald S. Sullivan, Jr., Clinical Professor of Law and Director, Criminal Justice Institute, Harvard Law School; and

Ellen Yaroshefsky, Howard Lichtenstein Professor of Legal Ethics and Director of the Monroe Freedman Institute for the Study of Legal Ethics, the Maurice A. Deane School of Law at Hofstra University.

SUMMARY OF ARGUMENT

When prosecutorial misconduct comes to light -- such as the misconduct that occurred in this case -- individual prosecutors and the offices in which they work must be held accountable. This serves the purpose of not only punishing the bad actors, but also deterring future bad actors. Here Petitioners seek, among other remedial and prophylactic remedies, imposition of monetary sanctions against the Attorney General's Office ("AGO") for prosecutorial misconduct that Superior Court Judge Richard Carey found "tampered with the fair administration of justice," and constituted "a fraud upon the court." Add. 86.[2] The AGO does not dispute those findings. This Court has the authority to impose monetary sanctions against the AGO, and such sanctions are warranted in this case.

Prosecutors wield immense power in the criminal justice system. Yet when they abuse or misuse that power, they seldom face any consequences. The existing methods for holding prosecutors accountable for misconduct do little to deter bad acts. Sanctions and disciplinary actions are rarely imposed, and the

[2] Citations to Add. refer to Petitioners' Record Addendum.

reversal of convictions on the basis of misconduct -- which is unusual -- is not a fully effective deterrent. Prosecutors doubtless prefer not to be reversed, but they can simply move on to their next case. These concerns about a lack of deterrence are particularly acute with respect to *Brady* violations. By their very nature, prosecutors' failures to disclose material, exculpatory evidence are unlikely to come to light. In the *Brady* context, therefore, deterrence is all the more critical.

To effectively deter prosecutorial misconduct, courts must hold not only individual prosecutors accountable for their bad acts, but also the institutions that employ them. Prosecutors themselves have recognized that with respect to corporate misconduct, an entity-based method of enforcement is critical to an effective deterrent regime. As in the corporate context, holding prosecutor's offices accountable for their bad actors will create incentives to impose effective programs to monitor and detect misconduct, and to develop practices to prevent such misconduct in the first place. Holding institutional actors accountable through the imposition of monetary

sanctions could meaningfully deter misconduct in a way that existing methods have not.

The facts of this case provide a particularly stark example of the need for institutional accountability. Although, as detailed in Petitioners' brief, Assistant Attorneys General Anne Kaczmarek and Kris Foster were the primary bad actors, the AGO bears significant responsibility for their misconduct. Because of the AGO's complete disregard of its duty of candor, this Court did not have all of the relevant facts before it when it decided *Commonwealth v. Cotto*, 471 Mass. 97 (2015) and *Commonwealth v. Ware*, 471 Mass. 85 (2015). As Judge Carey determined, the AGO's violations of both its *Brady* obligations and its duty of candor severely prejudiced defendants, "tampered with the fair administration of justice," and constituted "a fraud upon the court." Add. 86.

The Court has already ordered the dismissal of more than 8,000 convictions as a consequence of the misconduct committed by former state chemist Sonja Farak at the Amherst drug lab. But this Court has not ordered -- and no prosecutor has agreed to -- any remedy expressly tied to the misconduct committed by the AGO. Additional remedies are necessary both to remediate the

AGO's past misconduct and to deter and prevent future misconduct. *Amici* support Petitioners' request for additional prophylactic remedies and, in particular, support the request for monetary sanctions. This Court has the authority by rule, statute, and under its inherent powers, to impose such sanctions, and the Court should exercise that authority here.

ARGUMENT

I. To Prevent Prosecutorial Misconduct, Prosecutors And The Offices That Employ Them Must Be Held Accountable For Their Bad Acts.

Prosecutors wield immense power. There can be "little doubt that prosecutors are the most powerful and influential actors in the American criminal justice system." Bidish Sarma, *Using Deterrence Theory to Promote Prosecutorial Accountability*, 21 Lewis & Clark L. Rev. 573, 579 (2017). And while the vast majority of prosecutors perform their jobs ethically, when prosecutorial misconduct occurs, it has devastating consequences both for individual defendants and for the rule of law. Misconduct undermines the fairness of the criminal justice system and the substantive outcomes the system produces. *Id.* For that reason, *amici* have devoted significant time and resources to studying the need for remedies that can both punish past

prosecutorial misconduct and prevent future misconduct. In this regard, the academic literature shows that it is critical that courts hold not only individual prosecutors, but also prosecutorial offices, accountable for their actions.

A. Existing Methods Of Accountability Do Not Adequately Deter Misconduct.

The literature on prosecutorial misconduct makes abundantly clear that the prevailing methods for holding prosecutors accountable for misconduct have proven inadequate. In general, policing misconduct through review of individual criminal cases is ineffectual. In that context, courts focus only on whether the conduct had a prejudicial effect on the defendant's specific prosecution. Reversals are uncommon; therefore the unlikelihood of a conviction being overturned provides no deterrent effect. Sarma, *supra*, at 584-85; *see also* Daniel S. Medwed, Brady*'s Bunch of Flaws*, 67 Wash. & Lee L. Rev. 1533, 1540 (2010) (discussing studies finding dramatically low levels of reversal in *Brady* cases).

Similarly, criminal liability against prosecutors for misconduct is rarely, if ever, invoked. Sarma, *supra*, at 585-86. And case law has erected nearly insurmountable hurdles, including prosecutorial

immunity, to victims' ability to hold prosecutors civilly liable for misconduct. *See, e.g.*, Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 Notre Dame L. Rev. 51, 59 (2016). Discipline internal to prosecutor's offices, as of yet, has also been inadequate to deter misconduct. Where internal disciplinary systems exist, they "offer very little transparency," and the evidence that has been gathered "suggests they function poorly and fail to hold prosecutors to account." Sarma, *supra*, at 593.

Studies have concluded over and again that disciplinary authorities such as bar organizations rarely hold prosecutors accountable for misconduct. *See id.* at 590-91. One recent study by the Innocence Project of 660 cases involving prosecutorial misconduct found that in only *a single case* was a prosecutor disciplined. Innocence Project, *Prosecutorial Oversight: A National Dialogue in the Wake of* Connick v. Thompson 12 (March 2016).[3] An earlier study of misconduct over eleven years in California found that only six attorneys were disciplined in 707 cases of appellate-court-determined misconduct during that period. *See* Kathleen M. Ridolfi

[3] https://www.innocenceproject.org/wp-content/uploads/2016/04/IP-Prosecutorial-Oversight-Report_09.pdf.

& Maurice Possley, N. Cal. Innocence Project, Santa Clara Univ. Sch. of Law, *Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009* 3 (Oct. 2010).

As a result, "the methods created to promote prosecutorial accountability have, to date, failed" and "[m]eaningful accountability may best be described as rare." Sarma, *supra*, at 577, 595. Put more bluntly: "[t]here are currently no effective deterrents for prosecutorial misconduct." Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 Cardozo L. Rev. 2089, 2093 (2010). Absent some fear that there will be consequences for bad actions, prosecutorial offices have no incentive to attempt to establish policies and procedures to prevent, detect, and punish misconduct. And prosecutors who engage in misconduct have no incentive to change. Indeed, if anything, prosecutors otherwise inclined to engage in misconduct are incentivized to continue because such conduct can help secure convictions and thereby increase a prosecutor's conviction rate, which is often key to promotion.

B. Because *Brady* Violations Are Difficult To Detect, Deterring Those Violations Is Particularly Critical.

In this case, the initial misconduct involved an egregious violation of a prosecutor's duties to disclose exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963). Accountability for prosecutors found to have engaged in *Brady* violations such as those at issue here is especially anemic. A lack of enforcement and the infrequency of disciplinary charges or sanctions leaves prosecutors with "few incentives outside of their sense of professional responsibility for taking care to comply with *Brady*." Barkow, *supra*, at 2093.

But deterrence of prosecutorial misconduct is *particularly* critical with respect to prosecutors' *Brady* obligations. *Brady* is self-policing. This means that threshold determinations about the materiality or exculpatory nature of evidence is left entirely in prosecutors' hands. *See* Sara Gurwitch, *When Self-Policing Does Not Work: A Proposal for Policing Prosecutors in Their Obligations to Provide Exculpatory Evidence to the Defense*, 50 Santa Clara L. Rev. 303, 306-07 (2010). Accordingly, "[m]ost violations never come to light." Barkow, *supra*, at 2090. Cases arise only where a defendant, deprived of knowledge of

exculpatory evidence, is "nevertheless able by some other means (often highly fortuitous) to discover its existence." Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 Okla. City U. L. Rev. 833, 869 (1997).

The level of known *Brady* violations, therefore, merely "hint[s] at a larger problem because the vast majority of suspect disclosure choices occur in the inner sanctuaries of prosecutorial offices and never see the light of day." Medwed, *supra*, at 1540. For every known case of misconduct, there is "reason to suspect that there are many more in which the prosecutor's refusal to disclose the exculpatory evidence was never discovered by the defendant or his attorney." Weeks, *supra*, at 869.

Not just the size, but also the scope of the problem is likely understated. Courts and disciplinary authorities have little visibility into internal office practices. As a result, when violations become known, courts are unlikely to be able to assess whether those violations are systemic within that office. *See* Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 Harv. L. Rev. 2049,

2088 (2016) ("[W]hile the recurring or systemic nature of *Brady* violations within a given office can significantly impact the deterrent remedies a court might wish to impose, judges are often unaware of the extent to which systemic problems exist." (footnote omitted)).

C. To Effectively Deter Prosecutorial Misconduct, The Institutions That Employ Prosecutors Must Equally Be Held Accountable.

The ineffectiveness of existing remedies for prosecutorial misconduct requires courts to be proactive if they hope to meaningfully deter misconduct. To be sure, the dismissal of more than 8,000 convictions is a very meaningful action. But it is not an action directed at the individual Assistant Attorneys General or the AGO who participated in perpetrating a fraud upon the Court and tampering with the fair administration of justice. The convictions that were vacated were not even obtained by the AGO's office, but rather by individual district attorneys' offices. Thus, to date, the AGO has entirely escaped any consequences for its role in these events.

A growing consensus of scholars have concluded that institutional actors such as the AGO must bear responsibility for prosecutorial misconduct, and must shoulder the burden of policing it. A narrow conception

of prosecutorial misconduct that focuses only on individual prosecutors and individual cases "ignores the possibility that the office is blameworthy in failing to train, supervise, and establish internal processes and systems to prevent unintentional error." *See* Green & Yaroshefsky, *supra*, at 59; *see also id.* at 66 ("Increasingly, credence is given to the idea that . . . prosecutors' institutions, not just deviant individuals, deserve some of the blame."); Innocence Project, *supra*, at 8 (noting that experts have advocated "for a more systemic approach for reviewing errors" which "concentrates on understanding the organizational factors that contribute to errors"); Sarma, *supra*, at 620 (explaining that "given immunity and indemnification," civil liability "should focus on holding entire offices accountable rather than deterring particular individual wrongdoers").

Holding an institutional actor accountable for the misconduct of its agents in order to encourage compliance is not a novel concept. Prosecutors themselves have effectively used that model to deter corporate wrongdoing. Prosecutors learned that a "model that focused solely on individual liability and addressed particular violations after-the-fact proved

inadequate in deterring corporate crime." Barkow, *supra*, at 2090. Thus, there has been a rise in charging decisions against corporate entities rather than just individual actors in the context of corporate malfeasance. A similar entity-based focus could prove critical to improving compliance with ethical norms throughout a prosecutor's office. *Id.* at 2106; *cf.* Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. Pa. L. Rev. 959, 980 (2009) (emphasizing the benefits of an effort modeled on "corporate governance," in which top managers "feel external pressures" which they then "translate . . . into internal rules and incentives").

The primary benefit of holding the prosecutor's office, as an institution, accountable is that it creates incentives for the institutional entity to implement systematic reforms. Similar incentives are absent when courts focus narrowly on a single instance of misconduct. Although existing proposals for internal reform are "often challenged on the basis that, absent a mechanism of outside enforcement, prosecutors will lack an incentive to undertake meaningful change," Samuel J. Levine, *The Potential Utility of Disciplinary Regulation as a Remedy for Abuses of Prosecutorial*

Discretion, 12 Duke J. Const. L. & Pub. Pol'y 1, 8 (2017), court-imposed sanctions could change that reality.

Thus, the virtue of institutional sanctions is not limited to punishment of past misconduct alone. Sanctions would give prosecutor's offices a meaningful incentive to put in place adequate monitoring programs that could lead to the detection of *Brady* violations that might otherwise go undiscovered. Barkow, *supra*, at 2106. Offices can also be spurred to put in place entity-wide practices that *prevent* such practices in the first place, such as *Brady* compliance training programs. *Cf.* Bibas, *supra*, at 963 ("Simply commanding ethical, consistent behavior is far less effective than creating an environment that hires for, inculcates, expects, and rewards ethics and consistency."). Indeed, the built-in organizational hierarchy and culture of prosecutor's offices make them particularly susceptible to these efforts: "[I]f high-level officials within a prosecutor's office seek to change the norms within it, line prosecutors are likely to be highly susceptible to making the shift." Barkow, *supra*, at 2106.

In sum, holding institutional actors accountable for their misconduct, and the misconduct of prosecutors

who work for them, is likely to meaningfully deter misconduct in a way that existing methods have not.

II. In This Case, Sanctions Are Clearly Warranted Against The Attorney General's Office As An Institution.

The facts of this case provide a particularly strong justification for institutional accountability. The misconduct here was not confined to two particular prosecutors, but also was the result of an institutional failure in which the AGO violated its ethical obligations to this Court.

A. The Office's Misconduct Extended Beyond Two Specific Prosecutors, And Included A Failure Before This Court To Correct False Statements.

Former state chemist Sonja Farak was arrested in January 2013 and charged with tampering with evidence, drug theft, and drug possession. Since 2004, while working at the Amherst state drug lab, Farak had used narcotics almost daily, had tampered with the lab's "standards" (pure drug forms used as comparators to test drug samples), and had consumed drug samples police provided for testing, replacing them with counterfeit substances and tampering with the drug's recorded weights to conceal her misconduct. Farak's conduct undermined the integrity of thousands of criminal cases in the Commonwealth -- not only those in which she

directly tested drug samples, but all of those processed at the Amherst lab while she worked there.

Petitioners' brief describes in detail the misconduct of Farak, the AGO, and the district attorneys who prosecuted individual defendants affected by Farak's actions. Pet'rs Br. at 5-21. *Amici* focus here specifically on the AGO's conduct, to explain why holding the AGO accountable, as an institution, is critical.

During Farak's prosecution, led by Assistant Attorney General Anne Kaczmarek, the AGO agreed to turn over to district attorneys any evidence that might exculpate defendants affected by Farak's conduct, so that the district attorneys could disclose it to defendants. Several defendants seeking post-conviction relief also directly subpoenaed the AGO for relevant evidence. Assistant Attorney General Kris Foster was assigned to respond to those subpoenas.

Although the AGO initially had assumed that Farak's misconduct began only shortly before her arrest in January 2013, they soon discovered what the parties refer to as "mental health worksheets," which were recovered from Farak's vehicle. Those worksheets contained diary cards and other therapy-related

documents in which Farak had documented, among other things, her theft and use of drugs, including police-submitted drug samples. Critically, the documents suggested Farak's misconduct began much earlier than the AGO presumed. Accordingly, these documents constituted critical exculpatory evidence about the extent of Farak's misconduct and correspondingly the number of cases that were tainted by that misconduct. Defendants were constitutionally entitled to this information and, had the AGO timely disclosed it, many defendants "would have obtained discovery to support their claims for relief and would not have spent as much time incarcerated." Add. 84, 87.

Inexplicably, the AGO did not turn those worksheets over to either the district attorneys or defense counsel. Add. 56-59. Instead, through Foster, the AGO expressly misrepresented to Judge C. Jeffrey Kinder, who oversaw the discovery process during defendants' post-conviction motions in the *Cotto* and *Ware* cases, that all non-privileged exculpatory evidence had been turned over to defendants. Indeed, the AGO vigorously opposed defense counsel's subpoenas for evidence relating to Farak's prosecution.

Much of the resistance was the product of Kaczmarek's direction, and she "was accorded and exerted significant control over the Farak matters, including discovery." Add. 64. Kaczmarek's supervisors knew about the worksheets and expected them to be turned over, but failed to review Kaczmarek's determinations about their relevance and disclosure. Add. 55-56. Kaczmarek abused her supervisors' trust to "circumscribe the scope of [the] investigation into Farak's misconduct" and "intentionally gave" her co-workers, district attorneys, and "likely her supervisors" the "misimpression that everything" had been turned over. Add. 59, 64. Assistant Attorney General Foster then expressly represented to Judge Kinder that "every document" responsive to the subpoenas "ha[d] been disclosed." Add. 71. That was false.

As a direct result of the AGO's failure to disclose the mental health worksheets -- a failure jointly attributable to the actions and omissions of the assigned prosecutors and their supervisors -- Judge Kinder made a factual finding that Farak's misconduct did not begin until July 2012. Consequently, the court denied the motions for post-conviction relief of defendants who pled guilty before that time.

This egregious *Brady* violation was compounded by the AGO's omissions and misrepresentations in late 2014 while the *Cotto* and *Ware* cases were on appeal in this Court (notably, after Kaczmarek had left the AGO's office). Add. 79. A central question at issue in both of those cases was when Farak's misconduct began. That question was crucial to the defendants' ability to show that "the egregious misconduct by Farak antedated the entry of [their] guilty plea[s] and occurred in [their] own case[s]." *Cotto*, 471 Mass. at 110.

In late 2014, while the *Cotto* and *Ware* cases were on appeal to this Court, defense attorney Luke Ryan discovered the worksheets, and raised them with the AGO. Add. 79. This prompted the AGO to alert the district attorneys of the "not previously turned over" evidence. Add. 80. And yet, on appeal in this Court, the Commonwealth continued to defend Judge Kinder's finding that Farak's misconduct did not begin until July 2012. Although the AGO was not counsel for the Commonwealth in those cases, Judge Kinder's finding was based on the representations the AGO made in response to the subpoenas. The AGO failed to inform either Judge Kinder or this Court of the newly disclosed evidence. Worse still, the AGO failed to inform this Court that the very

factual findings the Commonwealth was urging this Court to uphold about the start date of Farak's misconduct were wrong.

The AGO's failure to correct its prior statements violated Massachusetts Rule of Professional Conduct 3.3. *See* Mass. R. Prof. C. 3.3(a)(1) ("A lawyer shall not knowingly . . . fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."); Mass. R. Prof. C. 3.3(c) (explaining that duty continues through the conclusion of the proceeding, including all appeals). The AGO's brief in this case offers no defense or justification for failing to inform Judge Kinder or this Court that Assistant Attorney General Foster had misinformed the Court that the AGO had turned everything over. The AGO does not even mention that failure.

As a consequence of the AGO's failure, this Court affirmed Judge Kinder's denial of the defendants' motions for post-conviction relief. In both *Cotto* and *Ware*, this Court concluded that Judge Kinder's factual findings were not an abuse of discretion. *See Cotto*, 471 Mass. at 111 & n.13 (accepting 2012 date and finding that the court "did not abuse his discretion in making this determination"); *Ware*, 471 Mass. at 94-95 (noting

that "[n]othing has been presented to suggest" that Farak's misconduct extended prior to perhaps the fall of 2011).

Fortunately, this Court also called for the Commonwealth to conduct a more thorough investigation into Farak's misconduct. The Court stressed that there existed serious questions about whether the full scope of Farak's misconduct was known. *E.g.*, *Cotto*, 471 at 111-12; *see id.* at 112 ("The burden of ascertaining whether Farak's misconduct . . . has created a problem of systemic proportions is not one that should be shouldered by defendants in drug cases."). It is difficult to conclude that the AGO's failure to fulfill its duty to correct its prior false statements was not material to this Court's evaluation of Cotto's and Ware's appeals.

B. The Office's Misconduct Impeded The Fair Administration Of Justice And Had Dramatic Consequences For Defendants.

The AGO's misconduct prevented the superior court and this Court from fairly adjudicating the defendants' post-conviction motions in the *Cotto* and *Ware* cases, and more generally, from learning the full scope of the misconduct at the Amherst drug lab. That misconduct had real consequences not only for the individual defendants

in the *Cotto* and *Ware* cases, but also for every individual who was convicted based on evidence from the Amherst drug lab during the relevant period, including by delaying defendants from obtaining relief from their convictions.

As Judge Carey correctly found, Foster's and Kaczmarek's misconduct "tampered with the fair administration of justice." Add. 86. "[T]hrough deception" they "engag[ed] in a pattern calculated to interfere with the court's ability impartially to adjudicate discovery . . . and to learn the scope of Farak's misconduct." Add. 86. The conduct "deceiv[ed] Judge Kinder" and constituted "a fraud upon the court." Add. 86.

That misconduct was devastating to the individual defendants seeking relief. It "improperly influenced and distorted Judge Kinder's fact finding and legal conclusions." Add. 86. Indeed, Judge Kinder's conclusion that the misconduct at the drug lab began no earlier than June 2012 was a *direct result* of the AGO's withholding of evidence and repeated false representations to the court that all evidence had been turned over to the defense. *See* Add. 78 ("Judge Kinder found, understandably, on the basis of the

misrepresentations made by Foster and the limited evidence before him, that Farak's misconduct began in July 2012.").

This misconduct "unfairly hampered the defendants' presentation of defenses." Add. 86. Without the evidence withheld by the AGO's office, defendants lacked a means to demonstrate that the issues at the Amherst drug lab pre-dated the entry of their guilty pleas. "Had the AGO made timely disclosures of the mental health worksheets," Judge Carey found, "many of the defendants . . . would have obtained discovery to support their claims for relief and would not have spent as much time incarcerated." Add. 87. Here, "through deception" the AGO was able to withhold exculpatory evidence notwithstanding defense counsel's "diligent discovery efforts." Add. 86. Unfortunately, as *amici* demonstrated above, this reality is true of too many *Brady* violations, and the reason why many will never come to light.

Despite the AGO's effort to argue otherwise, *see, e.g.*, Resp. Br. 13-14, 46, the misconduct was not limited to Foster and Kaczmarek alone. The actions of the AGO's agents should be attributed to the organization. Kaczmarek's supervisors, in particular, failed to

adequately oversee her decisions and representations about the requested material. In addition, neither Foster nor Kaczmarek was involved in the AGO's failure to fulfill its duty of candor and inform Judge Kinder and this Court about the AGO's prior misstatements while *Cotto* and *Ware* were under consideration. And perhaps most important, in 2017, notably *after* both Foster and Kaczmarek had departed the office, the AGO continued to argue before Judge Carey that it had no obligation to turn over this critical evidence. Judge Carey correctly found that the excuses the AGO asserted for that withholding in 2017 were "patently baseless." Add. 85. As Judge Carey held, the AGO's continued denial of any obligation to disclose critical exculpatory evidence was "at odds with the fundamental principles of fairness" and "contradicts" other AGO officials' previous acknowledgement of that duty. Add. 85.

III. This Court Has The Authority To Assess Monetary Sanctions Against The Attorney General's Office.

It is rare for a court to directly characterize prosecutors' conduct as constituting a "fraud upon the court" or as "tamper[ing] with the fair administration of justice." Add. 86. As these findings reflect, this case presents a particularly egregious example of

prosecutorial misconduct. To adequately punish this past misconduct, and to effectively deter future misconduct, prophylactic remedies are essential.

Amici support Petitioners' request that all Amherst lab defendants' convictions be dismissed, and that standing orders be entered. Pet'rs Br. 45-59. While those remedies are necessary, as *amici* have already explained, judicial case review and similar orders have not proven *sufficient* to prevent misconduct. This Court also has the authority to order monetary sanctions against the AGO as a prophylactic remedy. *Amici* submit that such sanctions are warranted in this case.

A. Monetary Sanctions Are An Appropriate Prophylactic Remedy.

When this Court considers "fashioning a remedy for deliberate and intentional violations of constitutional rights," it has explained that "[p]rophylactic considerations assume paramount importance." *Commonwealth v. Manning*, 373 Mass. 438, 444 (1977). This Court has expressed an acute concern when misconduct is of a type that only comes to light in situations -- like the one at issue in this case -- where "the importunings of government agents are unsuccessful." *Id.* When misconduct is hard to detect, there exists "a grave

danger that the courts themselves may become the instrumentality" through which misconduct is realized. *Id.* That danger was realized here. Judge Kinder made factual findings based on the AGO's misrepresentations, Add. 78, 86, and this Court similarly affirmed the denial of Cotto's and Ware's motions for post-conviction relief under the misimpression that no other evidence existed.

Prophylactic remedies are therefore necessary. Monetary sanctions, which would both punish the AGO's office for its misconduct in this case and incentivize the AGO's office to put in place meaningful controls to monitor, detect, and disclose future misconduct, should feature prominently in those remedies. Under the civil and criminal rules and by statute, as well as under its inherent constitutional powers, this Court has authority to impose monetary sanctions.

First, Massachusetts Rule of Civil Procedure 11 is applicable to defendants' efforts to seek civil discovery from the AGO. Assistant Attorney General Foster had an "affirmative obligation" to satisfy herself that a "good ground" supported her responses to Judge Kinder's discovery orders. *Van Christo Advert., Inc. v. M/A-COM/LCS*, 426 Mass. 410, 414-15 (1998); *see* Mass. R. Civ. P. 11. Not having personally reviewed the

underlying documents, Foster had no grounds for representing to Judge Kinder that all non-privileged evidence had been turned over. Her "intentionally vague" statements that the files had been reviewed "was intended to, and did, give Judge Kinder the false impression that [she] had personally reviewed" the relevant documents. Add. 71. Rule 11 "does not excuse an attorney's 'wilful ignorance' of facts and law which would have been known had the attorney simply not consciously disregarded them." *Van Christo*, 426 Mass. at 416-17; *id.* at 416 ("Good faith includes, among other things, an absence of design to defraud or to seek an unconscionable advantage."). The Court may impose sanctions for this conduct.

Second, Rule 48 of the criminal rules also permits the imposition of "appropriate" sanctions, including "costs or a fine," whenever counsel willfully violates court orders. Mass. R. Crim. P. 48. The AGO acknowledges that "this Court has left open the possibility that prophylactic fines could be permissible to address prosecutorial misconduct under Mass. R. Crim. P. 48." Resp. Br. 45-46. Such fines should be imposed in this case. As Petitioners explain in detail, the prosecutors here repeatedly failed to comply with Judge

Kinder's discovery orders and instead misrepresented that all non-privileged discovery had been turned over. Pet'rs Br. 51-52; *see also* Add. 86 ("Foster's letter essentially violated Judge Kinder's order."). Although this Court did not find fines appropriate in *Commonwealth v. Carney*, 458 Mass. 418 (2010), or *Commonwealth v. Frith*, 458 Mass. 434 (2010), cited by the AGO, Resp. Br., 45-46, the need for remedial and prophylactic measures in those cases was not as clear as it is here -- where the misconduct was the result of an institutional failure by the AGO, and not just the acts of rogue prosecutors.

Further, the Court has statutory authority to "correct and prevent errors and abuses" where "no other remedy is expressly provided." G. L. c. 211, § 3.

Even if these statutory and rule-based sources of authority were not enough, this Court has the inherent power to impose monetary sanctions. "[I]mplicit in the constitutional grant of judicial power," is this Court's ability to take action "necessary" to exercise that judicial power. *O'Coin's, Inc. v. Treasurer of Worcester Cty.*, 362 Mass. 507, 510 (1972) (internal quotation marks omitted). That authority supplies "inherent power to do whatever may be done under the

general principles of jurisprudence to insure to the citizen a fair trial, whenever his life, liberty, property or character is at stake." *Beit v. Probate & Family Ct. Dep't*, 385 Mass. 854, 859 (1982) (quoting *Crocker v. Justices of the Super. Ct.*, 208 Mass. 162, 179 (1911)). In particular, courts have any "inherent powers" necessary to "secure the full and effective administration of justice." *Id.* (quoting *O'Coins*, 362 Mass. at 514). This includes the power to order sanctions in appropriate circumstances.[4] *Id.* at 860.

B. Monetary Sanctions Against The Attorney General's Office, As An Institution, Are Justified.

There is no doubt that the AGO's conduct at issue here thwarted the "full and effective administration of justice." *Beit*, 385 Mass. at 859. Indeed, Judge Carey directly concluded that the Assistant Attorneys General,

[4] The more specific grants of authority codified in statute or rule do not displace the Court's inherent power. *See* Mass. R. Crim. P. 48 reporter's note ("This rule is intended to supplement rather than supplant the provisions of prior law relative to the power of the courts to regulate the conduct of attorneys who practice therein and to discipline those whose actions fall short of accepted standards."); *see also O'Coin's*, 362 Mass. at 513-14 (explaining that despite the legislature's ability to "enact legislation which declares or augments the inherent powers of the judiciary," inherent powers emanate from the Constitution and exist "regardless of any statute").

acting on behalf of the AGO, "tampered with the fair administration of justice." Add. at 86. Their pattern of conduct was "calculated" to inhibit the court's ability to determine the full scope of the misconduct at the Amherst lab. *Id.* It "constitutes a fraud upon the court." *Id.* And it led to this Court's decisions in *Cotto* and *Ware* upholding Judge Kinder's findings on the basis of the AGO's misrepresentations.

The Court should directly sanction the AGO for this conduct. The AGO's failures to turn over exculpatory *Brady* material and to correct its prior false statements with this Court were institutional ones -- a fact that, on its own, warrants sanctions. *See supra* at 18-24. Perhaps more important, however, is the fact that existing consequences for prosecutorial misconduct have proven ineffective. Absent a fear of adverse consequences, prosecutors who engage in misconduct have no incentive to change their behavior. Holding an institutional actor directly accountable can change that.

Strikingly, none of the remedies the AGO endorses in its brief are aimed at remedying the AGO's *own* misconduct. While the reversal of 8,000 convictions is a powerful remedy for defendants, it is unlikely to deter

prosecutors in the AGO's office. Indeed, no one in the AGO's office will see his or her conviction rate diminish at all since the reversals are of convictions secured by district attorneys, not the AGO. And these reversals can, and likely will, be attributed to Farak's misconduct, not the AGO's. The refunds required under *Nelson v. Colorado*, 137 S. Ct. 1249 (2017), for certain fines, fees, and restitution also have nothing to do with the AGO's misconduct, but simply follow as a matter of law from the convictions' vacatur.

The AGO argues that additional remedies are unnecessary in light of certain actions the AGO has voluntarily taken to implement new training and other internal measures since 2015. The AGO's representations about the content of its training are vague and, as *amici* explained above, visibility into such training programs is difficult. Nor have the training programs independently implemented by prosecutors been shown to be successful to date. *See supra* at 10. Moreover, there is particular reason to suspect that the AGO's training has been insufficient: although the AGO states that the new training began in 2015, the AGO continued to argue before Judge Carey through 2017 that no misconduct had even occurred, and that Foster's and Kaczmarek's actions

amounted to little more than unintentional mistakes. *See, e.g.*, Add. 85 (concluding AGO's arguments in 2017 were "patently baseless"). In light of the AGO's arguments, *amici* remain concerned that the measures the AGO has voluntarily implemented to date are inadequate.

The AGO has the authority and influence to effectively deter prosecutorial misconduct among its attorneys, if properly incentivized. Monetary sanctions are necessary to spur credible reform when other incentives have proven inadequate. Cf. Fred O. Smith, Jr., *Awakening the People's Giant: Sovereign Immunity and the Constitution's Republican Commitment*, 80 Fordham L. Rev. 1941, 1972 (2012) ("Monetary incentives -- and their close cousin, monetary sanctions -- against governments, can meaningfully motivate state actors to obey the law when other potential motivators fail.").

If this Court were to impose monetary sanctions against the AGO, it would not be alone. Other courts have imposed sanctions on both individual prosecutors as well as their offices for prosecutorial misconduct, where warranted. For example, a federal district court in Illinois imposed sanctions against both an individual prosecutor and the Cook County State's Attorneys' Office, pursuant to federal statute and the court's

inherent authority in *Martinez v. City of Chicago*. *See* No. 09 C 5938, 2014 WL 6613421, at *5-6 (N.D. Ill. Nov. 20, 2014) (unpublished), *aff'd* 823 F.3d 1050 (7th Cir. 2016). In that case, although prosecutors had prolonged discovery by "recklessly adher[ing] to the position" that certain documents plaintiffs sought "did not exist," they eventually produced one thousand responsive documents. *Id.* at *7. The court imposed sanctions directly on the prosecutor's office, even while it noted that the office "can only act through its agents," faulting the office for "obstructing the plaintiffs' and the court's attempts to understand the true state of affairs." *Id.* Similarly, in *State v. Meza*, the court imposed sanctions for law enforcement agency misconduct directly on the Maricopa County Attorney's Office in Arizona because, when the agency "is recalcitrant, withholds discovery, and misrepresents the existence and availability of information subject to discovery," its conduct "is *the State*'s conduct." 50 P.3d 407, 416 (Ariz. Ct. App. 2002).

Moreover, in other contexts, courts can and often do hold institutional actors responsible for the bad acts of their agents. As just one example, federal courts have statutory power to sanction attorneys for

excessive litigation costs imposed by unreasonable and vexatious litigation tactics -- a provision that courts have held was primarily motivated to deter such conduct. *See United States v. Int'l Bd. of Teamsters*, 948 F.2d 1338, 1345 (2d Cir. 1991); 28 U.S.C. § 1927. A number of federal courts have sanctioned *law firms*, in addition to the firm's individual lawyers, for discovery misconduct. *See, e.g.*, *Enmon v. Prospect Capital Corp.*, 675 F.3d 138, 147-48 (2d Cir. 2012) (citing cases).

Federal Rule of Civil Procedure 11 likewise *requires* that, "[a]bsent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee." Fed. R. Civ. P. 11(c)(1). Because Rule 11's purpose is "to deter rather than to compensate," the Rules Committee reasoned that "it is appropriate that the law firm ordinarily be viewed as jointly responsible under established principles of agency." *Id.* advisory committee's note to 1993 amendment. And holding a law firm -- the institutional actor -- responsible for sanctions creates "strong incentives for internal monitoring," and is likely to result in "greater monitoring" and "improved pre-filing inquiries and fewer

baseless claims." *Calloway v. Marvel Entm't Grp.*, 854 F.2d 1452, 1480 (2d Cir. 1988).[5]

An Attorney General's office should hold no special immunity from sanctions imposed on other institutional officers of the court. And courts in the Commonwealth regularly find fines, penalties, and sanctions available for far less serious violations than the misconduct that took place in this case. *See, e.g.*, *Beit*, 385 Mass. at 860 (explaining that "an attorney who fails to appear for a scheduled trial without having obtained a timely continuance is subject to sanctions"); *Clark v. Clark*, 47 Mass. App. Ct. 737, 744 (1999) (affirming availability of sanctions for counsel's behavior during trial -- which included walking out of court and making disparaging comments about opposing counsel and the

[5] *Calloway* was reversed by the Supreme Court, based on the Court's conclusion that the text of the then-existing Rule did not reach law firms. *See Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 124-26 (1989). However, the Rules Advisory Committee explicitly rejected the Supreme Court's reasoning in 1993 by clarifying that the rule should reach firms as well as individual attorneys. *See* Fed. R. Civ. P. 11 advisory committee's note to 1993 amendment (citing *Pavelic* and stating that the law firm provision "is designed to remove the restrictions of the former rule"). The Committee's emphasis on deterrence as the Rule's primary goal suggests that the Committee endorsed *Calloway*'s conclusion that holding law firms accountable furthers deterrence.

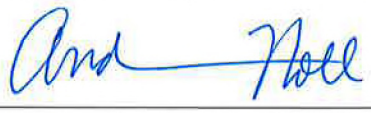
court -- but finding amount imposed too high); *United Mortg. Servicing, LLC v. Long*, 58 Mass. App. Ct. 1111, 2003 WL 21804848 (2003) (unpublished table decision) (upholding imposition of sanctions on attorney for filing improper request for default judgment).

Ultimately, the misconduct the AGO exhibited in this case is very serious and warrants imposing sanctions on the AGO as an institution. Such sanctions could take the form of a restitution fund for victims or such other form as the Court may determine appropriate in these circumstances.

CONCLUSION

The Court should grant Petitioners' request for monetary sanctions against the Attorney General's Office, both to punish the office for its misconduct in this case and to deter such misconduct from being repeated in future cases.

Respectfully Submitted,



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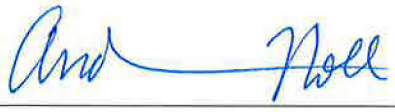
April 23, 2018

MASSACHUSETTS RULE OF APPELLATE PROCEDURE 16(K) CERTIFICATION

I hereby certify that this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs, including, but not limited to, those rules set forth in Rules 16-20.



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CERTIFICATE OF SERVICE

I certify that on this 23rd day of April, 2018, I caused true and accurate copies of the foregoing brief to be filed conditionally in the office of the Clerk of the Supreme Judicial Court, and served one (1) true and accurate copy via e-mail and two (2) true and accurate copies via first-class mail upon the following counsel of record:

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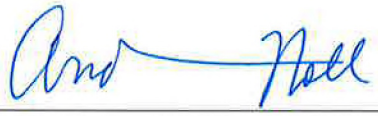

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ADDENDUM

28 U.S.C. § 1927

§ 1927. Counsel's liability for excessive costs

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Massachusetts General Laws, Chapter 211

§ 3. Superintendence of inferior courts; power to issue writs and process

The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue all writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws.

In addition to the foregoing, the justices of the supreme judicial court shall also have general superintendence of the administration of all courts of inferior jurisdiction, including, without limitation, the prompt hearing and disposition of matters pending therein, and the functions set forth in section 3C; and it may issue such writs, summonses and other processes and such orders, directions and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration; provided, however, that general superintendence shall not include the authority to supersede any general or special law unless the supreme judicial court, acting under its original or appellate jurisdiction finds such law to be

unconstitutional in any case or controversy. Nothing herein contained shall affect existing law governing the selection of officers of the courts, or limit the existing authority of the officers thereof to appoint administrative personnel.

Federal Rules of Civil Procedure

Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name--or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified,

are reasonably based on belief or a lack of information.

(c) Sanctions.

(1) In General. If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) Motion for Sanctions. A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) On the Court's Initiative. On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) Nature of a Sanction. A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) Limitations on Monetary Sanctions. The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) Requirements for an Order. An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) Inapplicability to Discovery. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

ADVISORY COMMITTEE NOTES

* * *

1993 Amendment

* * *

Subdivisions (b) and (c). These subdivisions restate the provisions requiring attorneys and pro se litigants to conduct a reasonable inquiry into the law and facts before signing pleadings, written motions, and other documents, and prescribing sanctions for violation of these obligations. The revision in part expands the responsibilities of litigants to the court, while providing greater constraints and flexibility in dealing with infractions of the rule. The rule continues to require litigants to "stop-and-think" before initially making legal or factual contentions. It also, however, emphasizes the duty of candor by subjecting litigants to potential sanctions for insisting upon a position after it is no longer tenable and by generally providing protection against sanctions if they withdraw or correct contentions after a potential violation is called to their attention.

* * *

Since the purpose of Rule 11 sanctions is to deter rather than to compensate, the rule provides that, if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty. However, under unusual circumstances, particularly for (b)(1) violations, deterrence may be ineffective unless the sanction not

only requires the person violating the rule to make a monetary payment, but also directs that some or all of this payment be made to those injured by the violation. Accordingly, the rule authorizes the court, if requested in a motion and if so warranted, to award attorney's fees to another party. Any such award to another party, however, should not exceed the expenses and attorneys' fees for the services directly and unavoidably caused by the violation of the certification requirement. If, for example, a wholly unsupportable count were included in a multi-count complaint or counterclaim for the purpose of needlessly increasing the cost of litigation to an impecunious adversary, any award of expenses should be limited to those directly caused by inclusion of the improper count, and not those resulting from the filing of the complaint or answer itself. The award should not provide compensation for services that could have been avoided by an earlier disclosure of evidence or an earlier challenge to the groundless claims or defenses. Moreover, partial reimbursement of fees may constitute a sufficient deterrent with respect to violations by persons having modest financial resources. In cases brought under statutes providing for fees to be awarded to prevailing parties, the court should not employ cost-shifting under this rule in a manner that would be inconsistent with the standards that govern the statutory award of fees, such as stated in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

The sanction should be imposed on the persons--whether attorneys, law firms, or parties--who have violated the rule or who may be determined to be responsible for the violation. The person signing, filing, submitting, or advocating a document has a nondelegable responsibility to the court, and in most situations is the person to be sanctioned for a violation. Absent exceptional circumstances, a law firm is to be held also responsible when, as a result of a motion under subdivision (c)(1)(A), one of its partners, associates, or employees is determined to have violated the rule. Since such a motion may be filed only if the offending paper is not withdrawn or corrected within 21 days after service of the motion, it is appropriate that the law firm ordinarily be viewed as jointly responsible under established principles of agency. This provision is designed to remove the restrictions of the former rule. *Cf. Pavelic & LeFlore v. Marvel Entertainment Group*, 493

U.S. 120 (1989) (1983 version of Rule 11 does not permit sanctions against law firm of attorney signing groundless complaint).

The revision permits the court to consider whether other attorneys in the firm, co-counsel, other law firms, or the party itself should be held accountable for their part in causing a violation. When appropriate, the court can make an additional inquiry in order to determine whether the sanction should be imposed on such persons, firms, or parties either in addition to or, in unusual circumstances, instead of the person actually making the presentation to the court. For example, such an inquiry may be appropriate in cases involving governmental agencies or other institutional parties that frequently impose substantial restrictions on the discretion of individual attorneys employed by it.

* * *

Massachusetts Rules of Civil Procedure

Rule 11. Appearances and Pleadings

(a) Signing. Every pleading of a party represented by an attorney shall be signed in his individual name by at least one attorney who is admitted to practice in this Commonwealth. The address of each attorney, telephone number, and e-mail address if any shall be stated. A party who is not represented by an attorney shall sign his pleadings and state his address, telephone number, and e-mail address if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney to a pleading constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is a good ground to support it; and that it is not interposed for delay. If a pleading is not signed, or is signed with intent to defeat the purpose of this Rule, it may be stricken and the action may proceed as though the pleading had not been filed. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

(b) Appearances.

(1) The filing of any pleading, motion, or other paper shall constitute an appearance by the attorney who signs it, unless the paper states otherwise.

(2) An appearance in a case may be made by filing a notice of appearance, containing the name, address, and telephone number of the attorney or person filing the notice.

(3) No appearance shall, of itself, constitute a general appearance.

(c) Withdrawals. An attorney may, without leave of court, withdraw from a case by filing written notice of withdrawal, together with proof of service on his client and all other parties, provided that (1) such notice is accompanied by the appearance of successor counsel; (2) no motions are then pending before the court; and (3) no trial date has been set. Under all other circumstances, leave of court, on motion and notice, must be obtained.

(d) Change of Appearance. In the event an attorney who has heretofore appeared, ceases to act, or a substitute attorney or additional attorney appears, or a party heretofore represented by attorney appears without attorney, or an attorney appears representing a heretofore unrepresented party, or a heretofore stated address or telephone number is changed, the party or attorney concerned shall notify the court and every other party (or his attorney, if the party is represented) in writing, and the clerk shall enter such cessation, appearance, or change on the docket forthwith. Until such notification the court, parties, and attorneys may rely on action by, and notice to, any attorney previously appearing (or party heretofore unrepresented), and on notice, at an address previously entered.

(e) Verification Generally. When a pleading is required to be verified, or when an affidavit is required or permitted to be filed, the pleading may be verified or the affidavit made by the party, or by a person having knowledge of the facts for and on behalf of such party.

Massachusetts Rules of Criminal Procedure

Rule 48. Sanctions

(Applicable to District Court and Superior Court)

A willful violation by counsel of the provisions of these rules or of an order issued pursuant to these rules shall subject counsel to such sanctions as the court shall deem appropriate, including citation for contempt or the imposition of costs or a fine.

Reporter's Notes

This rule is intended to supplement rather than supplant the provisions of prior law relative to the power of the courts to regulate the conduct of attorneys who practice therein and to discipline those whose actions fall short of accepted standards. The rule applies equally to attorneys and to defendants who appear pro se.

* * *

Massachusetts Rules of Professional Conduct

Rule 3.3 Candor Toward the Tribunal. (July 1, 2015)

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false, except as provided in Rule 3.3(e). If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in

a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding including all appeals, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(e) In a criminal case, defense counsel who knows that the defendant, the client, intends to testify falsely may not aid the client in constructing false testimony, and has a duty strongly to discourage the client from testifying falsely, advising that such a course is unlawful, will have substantial adverse consequences, and should not be followed.

(1) If a lawyer discovers this intention before accepting the representation of the client, the lawyer shall not accept the representation.

(2) If, in the course of representing a defendant prior to trial, the lawyer discovers this intention and is unable to persuade the client not to testify falsely, the lawyer shall seek to withdraw from the representation, requesting any required permission. Disclosure of privileged or prejudicial information shall be made only to the extent necessary to effect the withdrawal. If disclosure of privileged or prejudicial information is necessary, the lawyer shall make an application to withdraw ex parte to a judge other than the judge who will preside at the trial and shall seek to be heard in camera and have the record of the proceeding, except for an order granting leave to withdraw, impounded. If the lawyer is unable to obtain the required permission to

withdraw, the lawyer may not prevent the client from testifying.

(3) If a criminal trial has commenced and the lawyer discovers that the client intends to testify falsely at trial, the lawyer need not file a motion to withdraw from the case if the lawyer reasonably believes that seeking to withdraw will prejudice the client. If, during the client's testimony or after the client has testified, the lawyer knows that the client has testified falsely, the lawyer shall call upon the client to rectify the false testimony and, if the client refuses or is unable to do so, the lawyer shall not reveal the false testimony to the tribunal. In no event may the lawyer examine the client in such a manner as to elicit any testimony from the client the lawyer knows to be false, and the lawyer shall not argue the probative value of the false testimony in closing argument or in any other proceedings, including appeals.

NO. SJC-12471

COMMITTEE FOR PUBLIC COUNSEL SERVICES & OTHERS,

Petitioners,

v.

ATTORNEY GENERAL OF MASSACHUSETTS & OTHERS,

Respondents.

ON RESERVATION AND REPORT FROM THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

BRIEF OF LEGAL ETHICS AND CRIMINAL JUSTICE SCHOLARS AND THE DKT LIBERTY PROJECT AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS