COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

No. SJC - 12471

COMMITTEE FOR PUBLIC COUNSEL SERVICES & OTHERS,

-v.-

ATTORNEY GENERAL OF MASSACHUSETTS & OTHERS

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

AMICI CURIAE BRIEF OF THE INNOCENCE PROJECT, INC. AND THE NEW ENGLAND INNOCENCE PROJECT IN SUPPORT OF PETITIONERS

Radha Natarajan
(BBO #658052)
NEW ENGLAND INNOCENCE PROJECT
120 Tremont Street # 735
Boston, MA 02108
(617) 557-6584
rnatarajan@
newenglandinnocence.org

Douglas I. Koff
(NY #2667616)*
SCHULTE ROTH & ZABEL LLP
919 Third Avenue
New York, NY 10022
(212) 756-2000
douglas.koff@srz.com

Adam S. Hoffinger
(DC #431711)*
Nicholas A. Dingeldein
(DC #1028304)*
SCHULTE ROTH & ZABEL LLP
1152 Fifteenth Street, N.W.,
Suite 850
Washington, D.C.
(202) 729-7470
adam.hoffinger@srz.com

* Motion for admission
pro hac vice forthcoming

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INTRODUCTION AND SUMMARY OF ARGUMENT

Before the Court in this matter is an unprecedented record of government misconduct, mismanagement, and fraud. Never before has this Court been required to grapple with the ramifications of such sweeping malfeasance by an array of public employees, whose misconduct has collectively tainted tens of thousands of criminal cases. *See infra* 5-18.

Compounding the harm is the fact that significant, avoidable delays have prevented thousands of individuals from receiving justice. It is only now—more than four years after litigation into Sonja Farak's conduct began—that the Commonwealth's attorneys have finally conceded that the Attorney General Office's (AGO) investigation was tainted by "egregious" prosecutorial misconduct. As a result of this misconduct, and the AGO's failure to notify this Court about it, this Court had a wholly inaccurate record before it during earlier phases of the litigation. Thus, more than *four years* after Farak's malfeasance first came to light, the focus is finally where it should have been from the start: on meaningful remedies commensurate with the harm caused.

Amici's experience can provide perspective on how these remedies can be crafted to prevent wrongful convictions and ensure due process going forward. To put an end to this dark chapter of Massachusetts history—and ensure it is not repeated—this Court should not hesitate to vacate and dismiss with prejudice all of the cases with evidence tested at the Amherst laboratory during the time period in which Sonja Farak is known to have engaged in serious misconduct. This is needed for two reasons: (1) to provide meaningful deterrence, particularly given the proven limitations of other avenues of relief, and (2) the existing record—incomplete due in large part to the AGO's failure to conduct a timely or meaningful investigation—provides troubling evidence that the taint from Farak's unchecked misconduct may well have extended to the lab as a whole. *See infra* 18-30.

In addition to dismissals with prejudice, standing *Bridgeman*, *Cotto*, and *Brady* orders are necessary to effectuate corrective and preventative action in future cases of misconduct. Although the AGO has conceded that the request for such orders are "appropriate" as a general matter, the details are critical to ensure their effectiveness. In this

brief, *amici* offer our perspective as to the essential elements of "Brady" orders in particular, including the one adopted statewide earlier this year by chief judges in New York. In addition to supporting the other standing orders and monetary sanctions urged by Petitioners, *amici* urge this Court to follow New York's lead in adopting a truly robust and effective substantive order in a manner consistent with existing Massachusetts discovery procedures and timeframes. *See infra* 30-47.

INTERESTS OF THE AMICI

The Innocence Project, Inc. ("IP") is a 501(c)(3) national legal services and criminal justice reform organization based in New York. Founded twenty-five years ago by Barry Scheck and Peter Neufeld, the IP's attorneys pioneered the litigation model that has, to date, led to the exoneration of 356 wrongly convicted persons in the United States through post-conviction DNA testing. The IP's attorneys have served as lead or co-counsel for more than 200 exonerated individuals nationwide.

The IP regularly consults with courts, legislators, and the scientific community to improve the reliability of forensic science, and ensure that

the system has effective mechanisms in place to redress systemic errors as they occur. Given that a majority of the post-conviction DNA exonerations to date have involved the misapplication or misuse of forensic science—either at trial or in proceedings that led an innocent person to plead guilty—the IP has a strong interest in ensuring that criminal convictions are premised upon accurate forensic work, and that the courts afford appropriate relief to those whose cases were affected by laboratory error or misconduct.

The IP also has taken a leading role in redressing wrongful convictions involving serious prosecutorial error and misconduct nationwide, both to remedy the harms caused and to deter future misconduct. As described in greater detail *infra*, the IP conceptualized and, along with the Legal Aid Society of New York, led a successful campaign to have New York State's high court adopt a "standing *Brady* order" for all criminal courts statewide, to prevent prosecutorial misconduct and empower courts to directly sanction it when it occurs. In addition, the IP served as lead counsel in the proceedings that led to the 2011 exoneration of Michael Morton of Texas,

and the subsequent criminal prosecution and disbarment of Ken Anderson, the former prosecutor (and then judge) whose suppression of *Brady* material caused Mr. Morton to wrongfully serve twenty-five years in prison; Mr. Anderson remains, to this day, the *only* former prosecutor in the United States who has ever been convicted of criminal charges for conduct leading to a wrongful conviction.

The **New England Innocence Project (NEIP)** is a charitable trust and 501(c)(3) tax-exempt organization that provides pro bono legal services to identify, investigate, and exonerate persons who have been wrongly convicted and imprisoned in New England states. NEIP also seeks to raise public awareness of the prevalence, causes, and costs of wrongful convictions and advocates for legal reforms that will reduce the risk they occur and will hasten the identification and release of innocent prisoners.

ARGUMENT

I. The Fair Administration of Justice Requires the Dismissal With Prejudice of All Indictments Tainted by Government Misconduct in This Case, Which Includes Not Just Those Cases Mooted by the Commonwealth's Recent Concession, but Other Cases Tested at the Amherst Lab During Farak's Tenure.

Farak's longstanding and unchecked misconduct at the Amherst Lab, the prosecutorial misconduct of Kaczmarek and Foster, and the subsequent failures of the AGO to timely and adequately investigate the grievous harm caused by Farak at the Amherst Lab, collectively require an extraordinary remedy for all impacted defendants - not merely those whose cases included a drug certificate signed by Farak. The record also requires that this Court enter sufficient prophylactic measures to ensure such conduct is not repeated.

For these reasons, dismissal with prejudice of the indictments of all "Farak defendants" should be defined as *all* defendants whose convictions are predicated on drug certificates from the Amherst Lab during the time that Farak was abusing drugs and tampering with evidence at the lab. Such action is the only remedy proportionate to the damage caused by this widespread pattern of official misconduct. It is

also the only remedy that sufficiently acknowledges not only the taint from Kaczmarek and Foster's "fraud upon the court," but the separate harm caused by the AGO's failure to take any appropriate remedial action for years after Farak's arrest.

As noted in the AGO's brief to this Court, whether this Court should vacate and dismiss with prejudice the remaining "third letter" defendants (Question 1 reported by the Single Justice) is an issue that now appears to be moot because—more than four years after Farak was arrested and the *Cotto* litigation began—the District Attorneys (DAs) have finally agreed they cannot stand behind or re-prosecute *any* of the convictions they obtained based upon Farak's work. But the principles that would have empowered this Court to vacate and dismiss the "Third Letter" cases over the District Attorney's Office's (DAO) and AGO's objection apply with equal force to those that the Commonwealth continues to oppose.

A. Dismissal with prejudice is an appropriate remedy for egregious prosecutorial misconduct.

"Dismissal with prejudice is appropriate in cases of egregious prosecutorial misconduct." *Commonwealth v. Hernandez*, 421 Mass. 272, 277 (1995).

Under normal circumstances, a prosecutor's failure to disclose exculpatory evidence to a defendant will result in a dismissal of the indictment with prejudice only where the harm to a defendant's opportunity to obtain a fair trial is irremediable. *See Commonwealth v. Cronk*, 396 Mass. 194, 198 (1985). However, in the face of "egregious, deliberate, and intentional" prosecutorial misconduct, "prophylactic considerations may assume paramount importance and the drastic remedy of dismissal of charges may become an appropriate remedy." *See id.* at 198-199 (internal quotation marks omitted). As such, the "dismissal of criminal charges" for a failure to disclose exculpatory evidence must rest on "findings that the [failed] disclosure was due to deliberate and egregious action by the prosecutor *or* unintentional conduct resulting in irremediable harm to the defendant." *See id.* at 199 (emphasis added).

The test is intentionally disjunctive, in that it is intended to serve systemic ends of justice separate and apart from rectifying the harm done to an individual defendant. *See Commonwealth v. Jackson*, 391 Mass. 749, 754 (1984) ("The purpose of [dismissal with prejudice] was not to rectify harm done to the

defendant, because there had been none; the point was to discourage government agents from such deliberate and insidious attempts to subvert the defendant's right to a fair trial.") (construing *Commonwealth v. Manning*, 373 Mass. 438 (1977)). "[W]here the prosecutor's conduct is otherwise so egregious that dismissal is warranted to deter similar future misconduct[,]" a showing of specific and irremediable prejudice is not required. *See Commonwealth v. Merry*, 453 Mass. 653, 666 (2009).

The disjunctive nature of the test is also inherently logical: a finding of egregious prosecutorial misconduct must be a sufficient basis for dismissal with prejudice, regardless of any actual harm to the defendant, as a finding of irremediable harm requires dismissal with prejudice even absent misconduct. *Cf. Commonwealth v. Lam Hue To*, 391 Mass. 301, 314 (1984) ("[Dismissal with prejudice] would be appropriate where failure to comply with discovery procedures results in irremediable harm to a defendant.").

B. Kaczmarek and Foster engaged in egregious prosecutorial misconduct.

More than four years since the commencement of the *Cotto* litigation - in which the Commonwealth strenuously opposed any relief whatsoever for virtually all of the impacted defendants, even those whose samples were tested by Farak herself - there is, finally, no dispute that the AGO's handling of the Farak scandal was tainted by egregious prosecutorial misconduct. *See Commonwealth v. Cotto*, Indictment No. 2007770, 2017 WL 4124972, at *39 (Sup. Ct. Mass. June 26, 2017); *see also* Record Appendix at 291 (Commonwealth declined to dispute *Cotto*'s finding that Kaczmarek and Foster committed egregious misconduct).

Now, after years of adamantly maintaining that none of its attorneys did anything remotely improper in their handling of the Farak investigation (besides making what the AGO earlier insisted were merely "unintentional mistakes"), the AGO no longer denies that Kaczmarek and Foster "tampered with the fair administration of justice by deceiving Judge Kinder and engag[ed] in a pattern calculated to interfere with the court's ability impartially to adjudicate discovery in the drug lab cases and to learn the scope

of Farak's misconduct." *See Cotto*, 2017 WL 4124972 at *34 (emphasis added). Nor does the AGO any longer dispute that its former attorneys engaged in "conduct [that] constitutes a fraud upon the court." *Id.*

This is an extraordinary concession. Courts do not make such findings lightly. *See, e.g., Comm'r of Prob. v. Adams*, 65 Mass. App. Ct. 725, 729-730 (2006) ("Fraud on the court implies corrupt conduct and embraces only that species of fraud which does, or attempts to, defile the court itself.") (internal citations omitted). Nor are they quick to find egregious prosecutorial misconduct. Case after case in the Commonwealth notes prosecutorial misconduct - even deliberate prosecutorial misconduct - and declines to classify it as egregious. *See, e.g., Commonwealth v. Lewin*, 405 Mass. 566, 585-87 (1989)(holding that a "[k]nowingly false application for the search warrant" was "reprehensible," but not "egregious"); *Lam Hue To*, 391 Mass. at 311-312(finding that "prosecutorial misconduct" of the "general prosecutorial ineptitude" variety "differs" from the prosecutorial misconduct which requires dismissal); *Commonwealth v. Light*, 394 Mass. 112, 115 (1985) ("Further, measuring the misconduct here against the

misconduct shown in other cases we have decided in recent years, we conclude that it was not so egregious as to require dismissal of the complaint."); *Commonwealth v. Teixeira*, 76 Mass. App. Ct. 101, 108 (2010) ("So far as we can determine, the third and final trigger (prosecutorial conduct so egregious dismissal necessary to deter future misconduct) has never been pulled.").[1]

C. This Court should send a strong message about the consequences of egregious prosecutorial misconduct by vacating and dismissing with prejudice a broader class of "Farak" cases than those in which the DAOs and AGO have belatedly agreed to relief.

Dismissal of all the indictments that may reasonably be seen as tainted by Farak's, Foster's and Kaczmarek's egregious prosecutorial misconduct—and the AGO's failure to concede or take adequate steps to remedy it until years after the fact—is necessary to restore public confidence in the system. That is

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[1] Despite the fact that the Commonwealth has rarely "pulled the trigger" on prosecutorial misconduct, according to the National Registry of Exonerations, there have been 38 reported exonerations since 1990 in Massachusetts that involved "official misconduct" where that terms is defined as "[p]olice, prosecutors, or other government officials significantly abus[ing] their authority or the judicial process in a manner that contributed to the exoneree's conviction." National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/about.aspx.

because the extraordinary remedy of dismissal, beyond the cases that the DAOs have finally (and belatedly) conceded should be overturned, is the only method likely to deter future misconduct of a similarly egregious nature.

Unfortunately, as *amici*'s clients and other wrongly convicted individuals know all too well, a judicial finding of prosecutorial misconduct alone almost never results in meaningful (or any) individual sanctions for the prosecutor involved. As a result, there is little to no deterrent effect from a finding of prosecutorial misconduct alone, other than an optional "do-over" for the State should it elect to retry the defendant. For example, between January 1997 and September 2009, California prosecutors were found by courts to have violated *Brady* or committed other misconduct in 707 reported cases, and yet there were only *six* disciplinary actions taken against prosecutors as a result of their conduct in criminal cases.[2] Similarly, a 2011 review of reported judicial

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[2] *See* Ridolfi, Possley, *Preventable Error: A Report on Prosecutorial Misconduct in California, 1997-2009*, Northern California Innocence Project Publications. Book 2, Oct. 2010, at 2-3, https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi

decisions issued between 2004-2008 in five large states (Arizona, California, New York, Pennsylvania, and Texas) identified 660 criminal cases where courts made findings of prosecutorial misconduct, and in 133 of those cases, the misconduct was so significant that it led to reversal of the defendants' conviction - yet *only one prosecutor* from these 660 cases was disciplined as a result.[3]

Indeed, the inadequacy of the bar discipline process as a timely, meaningful deterrent to egregious misconduct is vividly illustrated by this case. In July 2017, within weeks of Judge Carey's ruling, Innocence Project (NY) Senior Staff Attorney Nina Morrison and Northeastern Law Professor Daniel Medwed filed lengthy bar complaints against Kaczmarek and Foster with the Massachusetts Board of Bar Overseers. They included a detailed recitation of the misconduct committed; legal authority in Massachusetts and elsewhere supporting the imposition of sanctions; and

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?referer=https://www.google.com/&httpsredir=1&article=1001&context=ncippubs.

[3] *See, e.g.*, Innocence Project, *Prosecutorial Oversight: A National Dialogue in the Wake of* Connick v. Thompson, Mar. 2016, at 12, https://www.innocenceproject.org/wp-content/uploads/2016/04/IP-Prosecutorial-Oversight-Report_09.pdf .

an electronic copy of the most relevant excerpts from the extensive record. Judge Carey's findings received national media attention,[4] and even the filing of the bar complaints themselves received prominent local coverage.[5] Yet ten months after Judge Carey's blistering findings of "egregious misconduct" and "fraud upon the Court" - findings that the AGO itself *does not challenge* - and nine months after these bar complaints were filed, the Board of Bar Overseers

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[4] *See* Jackman, *Prosecutors slammed for 'lack of moral compass,' withholding evidence in widening Mass. drug lab scandal*, Wash. Post, Oct. 4, 2017, https://www.washingtonpost.com/news/true-crime/wp/2017/10/04/prosecutors-slammed-for-lack-of-moral-compass-withholding-evidence-in-widening-mass-drug-lab-scandal/?noredirect=on&utm_term=.7e05fe8555ab; *see also* Solotaroff, *And Justice for None: Inside Biggest Law Enforcement Scandal in Massachusetts History*, Rolling Stone, January 3, 2018, https://www.rollingstone.com/culture/news/did-falsified-drug-tests-lead-to-wrongful-convictions-w514801.

[5] *See, e.g.*, Musgrave, *Misconduct complaints filed against former state prosecutors*, Boston Globe, July 21, 2017, https://www.bostonglobe.com/metro/2017/07/21/misconduct-complaints-filed-against-former-state-prosecutors/7Z0nswU64coUDTrNgkDzSP/story.html; Becker, *Innocence Project Calls For Probe Into 2 Former State Prosecutors In Amherst Drug Lab Scandal*, WBUR, July 21, 2017, http://www.wbur.org/news/2017/07/21/innocence-project-foster-kaczamarek-drug-lab; *Bar counsel must take careful look at 'Farak' case*, Mass. Lawyers Weekly, Aug. 3, 2017, http://masslawyersweekly.com/2017/08/03/bar-counsel-must-take-careful-look-at-farak-case/.

(BBO) has not disciplined or taken any other action against either attorney. As far as *amici* are aware, the BBO's investigation is ongoing, but it is proceeding (per S.J.C. Rule 4:01, § 20, as amended, 438 Mass. 1301 (2002)) behind closed doors, and with no resolution in sight. In the meantime, both Foster and Kaczmarek are not only licensed to practice law, but are still employed by the Commonwealth in positions of considerable trust and responsibility.[6]

Thus, the record belies the AGO's claim (Br. of the Attorney Gen. at 29) that Foster and Kaczmarek "have faced, and continue to face, severe negative consequences . . . [which] serve as significant deterrents against future misconduct." This is not to say that Foster and Kaczmarek are not entitled to due process before the BBO regarding their licenses to practice law; they certainly are. But this history underscores how attenuated and limited the bar disciplinary process is as a sanction for - and deterrent to - truly egregious misconduct. For if former prosecutors whose misconduct tainted tens of thousands of cases, and against whom a judge issued 127 pages of well-reasoned (and unchallenged) findings

[6] *See* Jackman, *supra* note 4.

of fraud and abuse of power, are still licensed to practice law *and* remain on the government payroll nearly four years after their misdeeds came to light, the public can have little confidence that the justice system takes its responsibility to sanction and prevent such misconduct seriously. This makes it all the more imperative that this Court take bold and decisive action within the scope of its own jurisdiction.

That deterrent effect could well be achieved, in part, if this Court orders significant numbers of Amherst Lab convictions to be vacated and dismissed with prejudice. Such action would place actual professional pressure on prosecutors as well as political pressure on prosecutor's offices to avoid engaging in behavior so egregious as to elicit that remedy or, if such behavior was discovered, immediately disclose and cure it.[7] Of course, for prosecutors to respect that risk as sufficiently real to achieve the desired deterrent effect, the judicial

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[7] *Cf.* Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. Rev. 125, 134-136 (2004) (explaining the impact conviction rates have on individual prosecutors and offices).

system must actually be willing to impose effective sanctions.

Moreover, there is no question that this Court has the authority to adopt such a remedy here. Commonwealth courts have "repeatedly held that courts have the inherent power to revoke judgments obtained by fraud on the court." *Adams*, 65 Mass. App. Ct. at 729-730. In the face of such fraud, the powers of the court are sweeping. *See id.* at 731 ("When courts invoke their inherent authority to fashion remedies to respond to fraud on the court, lack of statutory authorization is immaterial.") (internal quotation marks and punctuation omitted). This broad authority is necessary to "protect the integrity of the courts." *See id.*

II. The Prosecutorial Misconduct in This Case Has Tainted the Indictments of All the Amherst Laboratory Defendants

In addition to the powerful deterrent rationale discussed above, there is a substantial reason for this Court to lack confidence in the *reliability* of the reported drug test results in cases beyond Farak's own workstation and the convictions that resulted from those tests. In other words, the "cloud" created by the actions of the AGO is not limited only to those

defendants for whom a drug certificate was signed by Farak. Rather, due in large part to the Commonwealth's failure to mount a timely and adequate investigation into the scope of Farak's misconduct - and the disturbing findings that resulted from even the limited audit that was conducted years after the fact - that cloud has spread to cover the entire Amherst Laboratory during the period in question.

A. The Attorney General's Office failed to adequately investigate Farak's misconduct, exacerbating the egregious misconduct of Farak, Kaczmarek, and Foster.

Upon initial discovery of Farak's misconduct, the AGO undertook essentially no investigation into the scope or duration of her drug abuse and tampering. *See Cotto*, 2017 WL 4124972, at *36 ("There is no evidence that a comprehensive, adequate, or even reasonable investigation by any office or agent of the Commonwealth had been attempted, concluded, or disclosed prior to issuance of the Caldwell Report [in 2016]."). This first failure was a clear violation of the AGO's obligations: "[W]here 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 v. Dist. Attorney for the Suffolk Dist.*, 476 Mass. 298, 315 (2017).

Rather than uphold its obligations, it appears that the AGO actually attempted to *stifle* investigation into Farak's misconduct. *See, e.g.*, *Cotto*, 2017 WL 4124972, at *17-18 (describing Kaczmarek's attempts to prevent Sergeant Joseph Ballou from further investigating Farak's tampering with oxycodone pills and Kaczmarek's attempt to prevent the Office of the Inspector General from opening an investigation into the Amherst lab by urging Senior Counsel Audrey Mark to "say no" if asked to participate in an audit).

Even when subsequently ordered by the court to engage in a meaningful investigation of the scope of Farak's misconduct, the AGO failed to do so. The Investigative Report Pursuant to *Commonwealth v. Cotto*, 471 Mass. 97 (2015), ("*Cotto* Report") was not released by the AGO until more than two years after Farak's misconduct had been discovered, was not an independent investigation, and did not meaningfully assess the impact of Farak's misconduct on the Amherst lab.

Indeed, the *Cotto* Report engaged in essentially the same type of cursory "investigation" that had previously been criticized by this Court in *Commonwealth v. Ware*. *Compare Commonwealth v. Ware*, 471 Mass. 85, 96 (2015) ("As far as can be gleaned from the record, the Commonwealth never conducted a thorough investigation of the Amherst drug lab. The State police spent a few days looking for missing evidence, searching Farak's vehicle, interviewing her colleagues, conducting an inventory of the facility, and searching a tote bag that had been seized from Farak's work station."), *with Cotto* Report at 3-5 (describing the nature of the post-*Cotto* investigation, which appears to have been solely comprised of the testimony of Farak, a handful of her former colleagues, and Annie Dookhan). The *Cotto* Report is, in some ways, *less* thorough than the initial - and itself deficient - investigation in that it consists *entirely* of "interviewing [Farak's] colleagues" (*Ware*, 471 Mass. at 96) and Farak herself, and contains no reference to any actual independent investigation. Unlike the initial State police investigation, which at least attempted a cursory review for "missing evidence," the *Cotto* Report does

not indicate that the AGO attempted in any way to objectively determine the scope of Farak's misconduct and its effects on the Amherst lab through any means other than simply asking Farak and her co-workers - all of whom have a vested interest in minimizing the impact of Farak's misconduct - what they recalled years later about lab procedures and Farak's access to evidence and standards. The absence of any attempt to review samples not tested by Farak but which were processed by the Amherst lab is especially egregious given the fact that even Anne Kaczmarek initially (and privately) opined during the *initial investigation* that such steps were necessary to begin to assess the scope of the damage Farak had caused: "*I think this is the tip of the iceberg* . . . [Y]our idea of statements and seizing evidence is good. We might also want to start with Springfield PD to see if they can start an inventory of their drug evidence—*whether Farak was the chemist or not.*" *See Cotto*, 2017 WL 4124972, at *16 (emphasis added).

But since the AGO delayed its investigation for years, it is now impossible to know what auditors might have determined with a truly thorough, and timely, review. The AGO's decision to pursue a path

of resistance and litigation rather than fact-finding and remedies has irreparably tainted the integrity of the process.

B. The Commonwealth's failure to conduct a meaningful investigation into the Amherst Lab is inexplicable.

The Commonwealth's failure to meaningfully investigate broader misconduct and the taint from Farak's misconduct at the Amherst Lab is particularly glaring when contrasted with the Dookhan (Jamaica Plain) audit that had just preceded it. While both scandals were issues of *systemic* drug certification misconduct, and occurred only within a few years of one another, the manners used to "investigate" the two matters differed wildly - with the AGO's assigned investigator apparently failing to follow even the most basic methodology used in the Dookhan audit.

The Inspector General's investigation into the Jamaica Plain laboratory involved extensive electronic discovery; independent forensic science experts; embedding investigators into the Hinton Laboratory; an inventory of all the equipment, instruments, supplies, books, and documents within the lab; a review of over 200,000 documents; numerous third-party document

requests and summonses; and both formal and field interviews of dozens of individuals.[8]

Conversely, the *Cotto* Report into the Amherst Lab (aka "Caldwell Report") authored by the AGO was based on a far more limited "investigation." It involved only the testimony of five people and an interview of Annie Dookhan.[9] The principal source concerning the breadth of Farak's misconduct was Farak herself.[10] This, despite the fact that a court involved in the Dookhan scandal had already told the Commonwealth "it is unlikely that [Dookhan's] testimony, even if truthful, could resolve the question whether she engaged in misconduct in a particular case." *Commonwealth v. Scott*, 467 Mass. 336, 352 (2014). And Farak's testimony is arguably even *less* reliable than Dookhan's. While they both have severely damaged credibility given their history of dishonesty and a desire to minimize the impact of their crimes, there

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[8] Office of the Inspector General for the Commonwealth of Massachusetts, Investigation of the Drug Laboratory at the William A. Hinton State Laboratory Institute 2002-2012 ("Investigation of the William A Hinton State Laboratory Institute"), 7-11 (March 4, 2014), *http://www.mass.gov/ig/publications/reports-and-recommendations/2014/investigation-of-the-drug-laboratory-at-the-william-a-hinton-state-laboratory-institute-2002-2012.pdf*.

[9] *Cotto* Report at 1.

[10] *See generally id.*

is no allegation that Dookhan spent years severely addicted to mind-altering substances. Farak's co-workers, three of whom testified as part of the AGO's investigation (and one of whom was himself engaged in the practice of manufacturing secondary drug standards in the lab), are of limited assistance in illuminating the impact of her conduct - as none of them apparently had any idea she was doing anything wrong until the final months of her eight-year tampering spree.[11]

There is no indication that the Farak investigation involved any independent experts whatsoever. In fact, the closest thing to an "independent expert" involved in the *Cotto* Report (*i.e.*, a scientist from outside the Amherst Lab) actually appears to be Annie Dookhan.

The Inspector General in the Dookhan matter was able to conclude that Dookhan was a "sole bad actor" who had not tampered with the samples assigned to

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[11] *See Cotto* Report at 22-23 (testimony of lab supervisor James Hanchett: "Hanchett never noticed anything different about Farak until the last few months"); at 36-37 (testimony of chemist Sharon Salem: "Salem testified that she did not notice any problems with Farak until the last few months that Farak worked in the lab"); at 42-43 (testimony of chemist Rebecca Pontes: "Pontes maintained that she did not find anything unusual about Farak's demeanor or physical appearance").

other chemists in the lab because the investigation had, in part, engaged in the re-testing of at least some samples.[12] That testing was undertaken with the assistance of an independent, out-of-state laboratory.[13]

The AGO's investigation in the Farak scandal does not appear to have involved any drug testing at all – much less tests conducted by an independent laboratory. Rather, it simply accepts Farak's testimony at face value.[14] As such, not only did the AGO *discourage* the Inspector General from conducting a lab audit, but it failed to even *attempt to replicate* the procedures undertaken by the Inspector General in the previous case.

That these two scandals, so similar in scope and manner and so close in time, should be investigated in such divergent ways defies explanation. When the manner in which the Amherst lab investigation was conducted is viewed in conjunction with the egregious

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[12] *See* Investigation of the William A. Hinton State Laboratory Institute, *supra* note 8, at 2-3, 113-14.
[13] *See id.* at 3.
[14] *See Cotto* Report at 54 n.43 ("The AGO has provided the facts gleaned from its investigation without evaluation, without any determination about the credibility of any of the witnesses, and without the drawing of any conclusions.").

misconduct of Foster and Kaczmarek during the critical initial months of the Sonja Farak investigation, this Court has compelling grounds to reject the AGO's position that the harm from Farak's unchecked addiction was effectively limited to her own workstation.

C. The limited "investigation" the Attorney General's Office *did* conduct itself indicates serious problems with the integrity of the Amherst Laboratory as a whole.

While the *Cotto* Report was the culmination of a deficient investigation into Farak's misconduct that failed to meaningfully analyze its potential impact on other samples tested in the Amherst Laboratory, even the limited record from that review *does* reveal significant mismanagement that raises serious questions about the reliability of its reported test results during this period - all of which a true investigation and lab audit would have exposed.

First, the security and control procedures at the Amherst lab were "non-existent."[15] In addition to the generally "deplorable" state of the labs equipment, the security system did not keep track of which employees were entering or exiting the facility or at

[15] *See Cotto* Report at 30.

what times they were doing so, there were no cameras in the lab, and every chemist had access to all workstations, the drug vault, work stations safes, and the computer inventory.[16] In essence, there was no ability to monitor what any employee of the laboratory was doing unless another employee was literally watching them. Indeed, and according to her own testimony, the supervision and security at the Amherst laboratory was so deficient that Farak managed to manufacture large batches of crack cocaine in the laboratory for her own consumption on multiple occasions with her co-workers and supervisor none the wiser.[17] Farak likewise admitted to manipulating the computer inventory of the lab - another action of which her co-workers were seemingly unaware.[18]

Second, the Amherst lab was admittedly manufacturing secondary standards to use as controls for testing substances seized by the police.[19] Absent any demonstration of the fitness or purity of these manufactured substances for each instance in which they were made, there is no way to evaluate their

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[16] *See Cotto* Report at 30.
[17] *See id.* at 16-17.
[18] *See id.* at 17.
[19] *See id.* at 26-28.

validity as testing controls after the fact. Instead, and for an unknown number of cases, an unknown number of defendants must rely on Lab Supervisor James Hanchett's ability to manufacture narcotics and take his word for it that they are scientifically valid standards. The use of standards of uncertain quality is especially problematic in conjunction with the fact that the lab was not regularly cleaning the testing machines with "blanks" (solvents used to remove residues from prior samples) after every test.[20] How often to use blanks was "largely left to the discretion of the individual chemist" rather than requiring that it be done after every test - as the Massachusetts State Police required when they assumed control of the lab.[21]

These obvious shortcomings in chain of custody, security, reliability, and scientific accuracy - coupled with the paucity of investigation from the AGO, the active cover up by two Assistant Attorneys General, and the unreliable trustworthiness and mental state of Farak leave little doubt that additional - and likely now unknowable - number of defendants were

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[20] *See Cotto* Report at 29.
[21] *See id.*

the victims of compromised drug testing taking place at the Amherst Lab during this time period.

"[W]here 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*, 476 Mass. at 315. Whatever else the AGO's response to both Farak's egregious misconduct and to Kaczmarek's and Foster's egregious prosecutorial misconduct, it was far from reasonable. Now, years after the fact, it is impossible for defendants to make up for the AGO's shortcomings and bear a burden that was never theirs to carry from the outset. The only way to fully cleanse the symptoms of this conduct is the "strong medicine" of dismissal with prejudice.

III. This Court Should Adopt a Series of Standing Orders, In Particular, a Statewide *Brady* Order for All Criminal Trial And Post-Conviction Courts

This Court has the authority to issue standing orders of the type requested by the Petitioners. Those orders, specifically a standing *Brady* order, would assist in educating prosecutors and placing them on notice of their obligations, deterring future misconduct, and ensuring that courts are empowered to

appropriately sanction such conduct if it should occur.

Notably, the AGO does *not* oppose this aspect of the relief sought. And it has conceded (in general terms) that the statewide New York *Brady* order is an "appropriate model" for a statewide rule in Massachusetts. Br. of the Attorney Gen. at 44. However, to ensure that these orders have their intended impact - and do not inadvertently compromise existing provisions mandating the disclosure of exculpatory evidence in the Massachusetts Rules - *amici* respectfully urge this Court to incorporate essential elements necessary to correct and prevent wrongful convictions.

A. The Court has authority to issue standing orders in the interests of justice and the administration of the lower courts, particularly in response to egregious misconduct.

In addition to its powers to "correct and prevent errors and abuses" in the lower courts, this Court also has the "general superintendence of the administration of all courts of inferior jurisdiction . . . and it may issue . . . such orders, directions, and rules as may be necessary or desirable for the furtherance of justice." G. L. c. 211, § 3. This

Court has also recognized that its "inherent powers" encompass "certain ancillary functions, such as rule-making and judicial administration, which are essential if the courts are to carry out their constitutional mandate." *Police Comm'r of Boston v. Mun. Court of Dorchester Dist.*, 374 Mass. 640, 665 (1978); *see also Commonwealth v. Bastarache*, 382 Mass. 86, 102 (1986).

The Court's power to protect and carry out its constitutional mandate is especially important, and broad, when it is responding to a fraud upon the court itself. *See Adams*, 65 Mass. App. Ct. at 731 ("When courts invoke their inherent authority to fashion remedies to respond to fraud on the court, lack of statutory authorization is immaterial.").

B. The "egregious" and "systemic" prosecutorial misconduct in this case demonstrates the difficulty in ensuring *Brady* compliance and the need for direct judicial oversight.

The very essence of Kaczmarek's and Foster's "fraud upon the court" was a repeated and deliberate disregard of their *Brady* obligations and their willingness to actively mislead the court with respect to their compliance.

Kaczmarek's and Foster's conduct, while hopefully unique in scope and impact, is not unique in kind. The National Registry of Exonerations calculates that "official misconduct" was a factor in roughly half of the nearly 2,200 reported exonerations since 1989.[22] Only perjury was more common.[23] Prosecutorial misconduct has been described as "rampant,"[24] "pervasive,"[25] and "epidemic."[26] *Brady* violations, specifically, are "the most recurring and pervasive of all constitutional procedural violations."[27]

Despite this,

> [T]here is no mechanism in place to ensure that a criminal defendant receives information in the exclusive possession of the government that negates guilt,

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[22] *See* National Registry of Exonerations, *% Exonerations by Contributing Factor*, https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx (last visited, April 20, 2018).

[23] *Id.*

[24] N.Y. Times Editorial Board, *Rampant Prosecutorial Misconduct*, N. Y. Times, Jan. 4, 2014, https://www.nytimes.com/2014/01/05/opinion/sunday/rampant-prosecutorial-misconduct.html.

[25] Gershman, Prosecutorial Misconduct, Preface (West Pub Co., 2d ed. 2008) (describing specifically the non-disclosure of exculpatory evidence).

[26] *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, J., dissenting) ("There is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it.").

[27] Gershman, *Litigating* Brady v. Maryland: *Games Prosecutors Play*, 57 Case W. Res. L. Rev. 531, 533 (2007).

> undermines the strength of the government's case, or reduces the sentence that could be imposed. Whenever a prosecutor wants to do so, she can suppress this favorable information and prevent the court and the defense from ever learning of its existence.[28]

And this is exactly what Kaczmarek and Foster attempted - and *succeeded* in doing - for a substantial length of time and despite specific requests by defense attorneys which were actually litigated before the courts.

The fundamental weakness Kaczmarek and Foster exploited is that "trial judges traditionally rely on prosecutors to self-regulate their *Brady* disclosure duty . . . [a] level of detachment and passivity by trial judges [that] has proven ineffective in implementing the *Brady* mandate."[29] *See also United States v. Jones*, 686 F.Supp.2d 147, 149 (D. Mass. 2010) (expressing skepticism that additional training for prosecutors would curb *Brady* violations in the absence of judicial action).

It is important to note that the majority of cases involving non-disclosure of *Brady* material do

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[28] Jones, *Here Comes the Judge: A Model For Judicial Oversight and Regulation of the* Brady *Disclosure Duty*, 46 Hofstra L. Rev. 87, 87 (2017).
[29] *See id.* at 89.

not involve egregious, intentional misconduct of the kind perpetrated by Foster and Kaczmarek. Obtaining large-scale data on the prevalence and causation of *Brady* violations is difficult—in large part because, by their very nature, they tend to stay hidden unless and until they are unearthed by "chance discover[ies]" during subsequent litigation.[30] But *amici* concur with the assessment of many courts and commentators that "prosecutors' violations of their disclosure obligations are most often the result of negligence, cognitive bias, or mistakes."[31] Further, what we do know about failures in the discovery process indicates serious *systemic*, not just individual, failures to make *Brady* compliance a priority:

> High caseloads and under-funding, notably in large urban jurisdictions, create an environment with insufficient documentation of witness statements, failure to follow up on police evidence, and lack of attention to items of evidentiary value. Police agencies may not comply with the most diligent prosecutor in producing information. Discretion may be driven less by carefully

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[30] *See* Keenan et. al., *The Myth of Prosecutorial Accountability After* Connick v. Thompson: *Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 Yale L.J. Online 203, 210 (2011).

[31] Yaroshefsky, *Why Do Brady Violations Happen? Cognitive Bias and Beyond*, (May 2013), https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1971&context=faculty_scholarship.

> considered ethical judgments than by time constraints preventing careful file review. [A recent survey of prosecutors' offices] rarely found formal or informal retrospective reviews of disclosure decisions, such as spot-checking case files to determine compliance with disclosure requirements, random audits of entire case files, or evaluation of the reasons for disclosure failures where courts determined that there were *Brady* violations.[32]

Thus, rather than simply relying on individual prosecutors to understand and prioritize their constitutional obligations, courts can and should take a more active role in the protection of the constitutional rights of defendants by issuing standing *Brady* orders.

C. Properly constructed and applied standing *Brady* orders provide both prophylactic benefits and deter prosecutorial misconduct.

Standing *Brady* orders, properly constructed and applied, provide both prophylactic and deterrent effects.

First, the entry of a standing *Brady* order – which is then individually issued to prosecutors, under the specific case caption, at the outset of

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[32] *Id.* at 4-5; *see also* Findley, *Tunnel Vision* (May 11, 2010), *in Conviction of the Innocent: Lessons From Psychological Research*, B. Cutler, ed., APA Press, 2010, Univ. of Wisconsin Legal Studies Research Paper No. 1116, https://ssrn.com/abstract=1604658.

every criminal action or post-conviction proceeding - serves to prevent unintentional discovery violations from prosecutors. This is because such orders put prosecutors on notice of the nature and existence of their constitutional obligations on a regular basis. The language of the order - specifically a detailed definition of "favorable evidence" - serves to prevent any "good faith" omissions of such evidence by informing prosecutors of the breadth of evidence that might be favorable to a defendant.

Similarly, the issuance of a standing *Brady* order demonstrates to prosecutors that the courts take the discovery obligations of prosecutors seriously. These orders send a powerful message to both prosecutors and the community that a culture of resistance to *Brady* obligations is incompatible with the fair administration of justice.[33] This message will incentivize prosecutors to learn, understand, and adhere to their constitutional obligations.

Standing *Brady* orders also have a *deterrent* effect by arming courts with the ability to

[33] *See Olsen*, 737 F.3d at 631 ("Some prosecutors don't care about *Brady* because the courts don't *make* them care.").

practically and immediately sanction prosecutors who engage in egregious misconduct.

Absent an order, the power of the court to address *Brady* violations is limited in that the measures imposed are generally remedial rather than punitive in nature and do nothing more than require the prosecutor to satisfy an obligation he already had and failed to fulfill (if compliance is even possible at the juncture when the violation is discovered). Remedial regimes do not create deterrence and may, perversely, exacerbate a culture of resistance. Where the only penalty for deliberately withholding exculpatory information is the provision of that information, unscrupulous prosecutors will be tempted to at least *attempt* to withhold that information since there is a chance her misconduct will go undiscovered and a tactical advantage will have been secured. *Cf. Manning*, 373 Mass. at 444 ("The specific misconduct present in this case is particularly troublesome because only when the [misconduct] of the government agents [is]unsuccessful will the matter come to the attention of the courts.").

However, the presence of a standing *Brady* order shifts the calculus. The unscrupulous prosecutor

attempting to gain a tactical advantage must now consider that discovery of her misconduct will not simply result in providing the defendant with information she would have been required to anyway, but could result in personal and professional consequences *for the prosecutor herself* through a judicial finding of contempt. Like the notorious (and, ultimately, unsanctionable) violations by the U.S. Department of Justice in its prosecution of Sen. Ted Stevens,[34] this case illustrates the limitations of judicial power to sanction misconduct absent such an order. As the AGO noted in its brief, Judge Carey "severely reprimanded" Foster and Kaczmarek for their egregious misconduct (Br. of the Attorney Gen. at 30) - but a mere written condemnation of their actions in a judicial opinion issued four years after the fact

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[34] Sullivan, *How New York Courts Are Keeping Prosecutors in Line*, Wall Str. J., Nov. 17, 2017, https://www.wsj.com/articles/how-new-york-courts-are-keeping-prosecutors-in-line-1510953911 (explaining that the "deeply flawed" trial of Ted Stevens in which prosecutors "concealed numerous pieces of evidence that very likely could have resulted in Stevens's acquittal" and the subsequent finding by a special prosecutor that the Stevens prosecution had "committed deliberate and 'systemic' ethical violations by withholding critical evidence", led to Judge Sullivan adopting a standing *Brady* order in all subsequent criminal cases before his court).

was, unfortunately, all the action he was empowered to take.

Moreover, the existence of an *order* (as opposed to simply a "notice" or a "reminder" of the prosecutor's existing obligations) and the attendant sanctions for violating it, serves as a clear message to prosecutors and the community that discovery obligations are taken seriously in the Commonwealth. Had such an order been in place in this case, avoiding "an avalanche" of work may not have been a sufficient incentive for Anne Kaczmarek to violate the constitutional rights of thousands of people, and Kris Foster may well have thought twice about falsely and convincingly representing to the court that "every document" had been disclosed from a file she had not even reviewed.

D. The construction of standing *Brady* order.

Properly constructed, a standing *Brady* order places prosecutors on notice of their constitutional obligations and provides the court with an additional tool to hold prosecutors accountable in the event of egregious misconduct related to a prosecutor's failure to disclose exculpatory evidence. There are certain

critical elements that must be included to ensure the effectiveness of such orders.

First, a standing *Brady* order should **reference the applicable law and ethics rules** governing the disclosure of exculpatory evidence. Such reference should include, at minimum, (1) the prosecutor's constitutional obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), (2) any relevant Commonwealth law, and (3) the prosecutor's ethical obligations under the Massachusetts Rules of Professional Conduct.[35] The order should define what constitutes favorable evidence and specifically incorporate the requirement of Mass. R. Prof'l Cond. 3.8(d) to timely disclose "all evidence or information known to the prosecutor *that tends to negate the guilt of the accused or mitigates the offense*," rather than limit disclosures to what the prosecutor believes (often, incorrectly)[36]

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[35] *See, e.g.*, N.Y. State Justice Task Force, *Report on Attorney Responsibility in Criminal Cases* ("Justice Task Force Report on Attorney Responsibility"), 7-8, App. B (Feb. 2017), *http://www.nyjusticetaskforce.com/pdfs/2017JTF-AttorneyDisciplineReport.pdf; see also* Jones, supra note 28, 111-113).

[36] *See, e.g.*, Ridolfi, et al., *Material Indifference: How Courts Are Impeding Fair Disclosure in Criminal Cases* 20-23, 47-49 (2014) (explaining the difficulty

is "material" to the defense's case as that term is defined in the post-conviction context under *Brady*.[37]

Second, the order should detail "the full scope of the prosecutor's duty **to investigate and learn of favorable information among members of the prosecution team.**"[38] Although it has been settled law for decades that a prosecutor's *Brady* obligation includes an affirmative duty to seek out favorable information in the possession of other law enforcement agencies, including the police (*see Kyles v. Whitley*, 514 U.S. 419, 437 (1995)), prosecutors too often neglect this aspect of their duties or are poorly trained in the

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prosecutors face in assessing the materiality of information in relation to the "whole case" pre-trial, when the "whole case" - including the theory of defense - cannot be known until after the conclusion of the trial).

[37] With respect to the results of scientific testing, it should not be left to the prosecutor to determine whether there was anything exculpatory in the forensic analysis. Rather, mandatory disclosures should automatically include the scientific bases for an analyst's conclusions (bench notes, instrument readings, etc.) because forensic nonconformance is difficult—if not impossible—to detect by simply evaluating an analyst's conclusory statements in a final report or certification. In the wake of two significant forensic lab scandals and the prevalence of wrongful convictions tied to flawed forensic science, lawyers simply must have early and complete access to the underlying forensic evidence to ferret out unreliable conclusions.

[38] Jones, *supra* note 28, at 111-112.

scope of this obligation.[39] A court order specifically directing prosecutors to obtain and disclose such information also gives them a tool to assist in obtaining discovery from law enforcement agencies that may delay or resist compliance.

Third, an effective standing *Brady* order should **establish definite timelines** for the disclosure of favorable information, consistent with local rules that already establish such timelines where appropriate.[40] This will ensure that busy prosecutors make *Brady* a priority and provides benchmarks for defense counsel and the Court to inquire and make a record about the prosecution's *Brady* compliance.[41] The order should remind prosecutors **that their duty to disclose such information is also continuing.** Enforcement of predictable pre-trial deadlines is a critical component of an effective *Brady* regime—in part because even where defendants are seriously prejudiced by late disclosure of *Brady* material, it is

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[39] *See* Yaroshefsky, *supra* note 31.
[40] *See* Jones, *supra* note 28, at 112.
[41] *See* Kreag, *The* Brady *Colloquy*, 67 Stan. L. Rev. 47 (2014).

extraordinarily difficult to prevail on such claims in post-conviction.[42]

Fourth, because the overwhelming majority of criminal convictions are obtained by guilty pleas, the order should make clear that (consistent with Rule 3.8(d)), **the prosecutor is obligated to disclose favorable evidence before a guilty plea.** It is now well established that factually innocent people face enormous pressures to plead guilty to crimes they did not commit,[43] making it all the more critical that defendants are aware of all exculpatory evidence in the Commonwealth's possession before deciding whether or not to accept a plea offer.

Fifth, the standing *Brady* order should state that **intentional violations of the order may subject the prosecutors to sanctions**, including contempt of court.[44] While the first and second components of effective *Brady* orders serve primarily educational and

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[42] *See* Ridolfi, *supra* note 36, at 24-27.
[43] *See* Rakoff, *Why Innocent People Plead Guilty*, N.Y. Rev. of Books, Nov. 20 2014, http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/; *see generally* Innocence Project, Guilty Plea Problem, www.guiltypleaproblem.org (a source maintained by The Innocence Project highlighting the prevalence and impact of guilty pleas entered by innocent people).
[44] *See* Jones, *supra* note 28, at 112.

prophylactic roles, the existence of potential sanctions for ignoring them is the mechanism by which deterrence of deliberate misconduct is achieved. Indeed, it is the very presence of potential sanctions for violations that **make the requested relief an *order*** rather than a notice or reminder.[45]

E. With appropriate modifications for the differences in Massachusetts procedure, this Court should consider adoption of a standing *Brady* order similar to the new statewide court rule adopted by the chief judges of the New York state courts.

The Commonwealth would not be the first state to adopt such an order. In November 2017, the Chief Administrative Judge of the State of New York, with the input and approval of the Chief Judge of New York's highest court, issued an Administrative Order amending New York's court rules to require that all criminal court judges in New York State issue standing *Brady* orders in every case before them.[46] Unlike here, New York's order did not come in response to egregious prosecutorial misconduct in connection with a lab

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[45] *Cf.* Justice Task Force Report on Attorney Responsibility, *supra* note 35, at 7-8 (considering whether the form discovery document contemplated should be issued in the form of an order or a notice).

[46] *See* Justice Task Force Report on Attorney Responsibility, *supra* note 35, at Ex. B (Memorandum: Trial Court Orders to Prosecution and Defense); at Ex. C (Model Order).

scandal impacting thousands of cases.[47] Instead, it was the result of a series of individual *Brady* violations over many years in New York State (many involving *amici*'s own clients) that had led to wrongful convictions of the actually innocent.[48]

The Petitioner's reference that model order in their arguments, and the AGO has conceded that, generally, New York's order would be an "appropriate model." Br. of the Attorney General at 44. Similarly, individual judges in other jurisdictions have also advocated for the existence of, and entered, such orders.[49]

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[47] The original recommendation to adopt a standing *Brady* order and language of the Model Order were the result of study undertaken by New York's Unified Court System's Justice Task Force. *See* Justice Task Force Report on Attorney Responsibility, *supra* note 35, at 7-8.

[48] According the National Registry of Exonerations, there have been 244 reported exonerations in New York state courts since 1989. *See* National Registry of Exonerations. 156 of those exonerations involved official misconduct. *Id.*

[49] *See, e.g.*, Transcript of Record at 8-9, *United States v. Stevens*, 715 F.Supp.2d 1 (No. 08-231)(D.D.C. 2009)(Sullivan, J.); Standing Order, *United States v. Flynn*, Case No. 1:17-cr-00232, Doc. No. 10 (D.D.C. Dec. 12, 2017) (Sullivan, J.) (filed standing order from Judge Emmet Sullivan outlining the government's *Brady* obligations); Individual Rules of Practice Hon. Jed S. Rakoff at 10-12, http://www.nysd.uscourts.gov/cases/show.php?db=judge_info&id=1369

Importantly, however, *amici* note that New York State's discovery rules - in particular, the timing and scope of what is disclosed on a mandatory basis - differ considerably from the Commonwealth's.[50] Thus, while any new *Brady* rule adopted by this Court should include the essential *substantive* elements outlined above, this Court should make sure that any procedural mechanisms (such as time frames for compliance) be consistent with the mandates of Rule 14 of the Massachusetts Rules of Criminal Procedure and trial court standing orders.

IV. The Extraordinary Record in this Case, and the Actions of the AGO Throughout the *Cotto* Litigation, Specifically, Make the Imposition of Monetary Sanctions Appropriate

Amici agree with the Petitioners that this Court should impose appropriate monetary sanctions on the AGO as such sanctions are a critical element of achieving necessary deterrence. The grounds for such

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[50] *See, e.g.*, N.Y. State Justice Task Force, *Report of the New York State Justice Task Force of its Recommendations Regarding Criminal Discovery Reform* ("Justice Task Force Report on Criminal Discovery Reform") (July 2014), *http://www.nyjusticetaskforce.com/pdfs/Criminal-Discovery.pdf*; (explaining that New York "lag[ged] behind a majority of states in both the scope and the timing of pretrial disclosures" and recommending that defendants be "provide[d] earlier and more robust discovery").

sanctions are set forth by the Petitioners (Br. of the Petitioners at 49) and by other *amici* in this matter. *Amici* will not restate the arguments of other parties here, but respectfully note their strong concurrence with the reasoning and remedy sought.

CONCLUSION

The undisputedly "egregious" prosecutorial misconduct here, considered alongside the separately (and equally undisputed) egregious misconduct of Sonja Farak, as well as the AGO's failure to conduct an adequate or timely investigation of the Amherst Lab, makes appropriate the "strong medicine" withheld in *Bridgeman*. The Court should dismiss with prejudice all convictions obtained as a result of testing conducted at the Amherst Lab during the time that Farak's drug abuse and tampering was rampant, enter the standing orders requested by Petitioner, and impose appropriate monetary sanctions on the AGO.

Dated: April 23, 2018

Respectfully submitted,

Radha Natarajan

Radha Natarajan (BBO# 658052)
NEW ENGLAND INNOCENCE PROJECT
120 Tremont Street # 735
Boston, MA 02108
(617) 557-6584
rnatarajan@newenglandinnocence.org

Douglas I. Koff (NY #2667616)*
SCHULTE ROTH & ZABEL LLP
919 Third Avenue
New York, NY 10022
(212) 756-2000
douglas.koff@srz.com

Adam S. Hoffinger (DC #431711)*
Nicholas A. Dingeldein (DC #1028304)*
SCHULTE ROTH & ZABEL LLP
1152 Fifteenth Street, N.W., Suite 850
Washington, D.C.
(202) 729-7470
adam.hoffinger@srz.com

**Motion for admission pro hac vice forthcoming*

CERTIFICATE OF COMPLIANCE

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

4/23/2018
Date

Radha Natarajan
Radha Natarajan
(BBO# 658052)

CERTIFICATE OF SERVICE

I, Radha Natarajan, hereby certify that on April 23, 2018, a true copy of the foregoing was served by Federal Express, upon the counsel listed below.

Radha Natarajan

Radha Natarajan (BBO# 658052)

Rebecca A. Jacobstein
Committee for Public Counsel Services
44 Bromfield Street
Boston, MA 02108

Daniel N. Marx
Fick & Marx
100 Franklin Street, 7th Floor
Boston, MA 02110

Matthew Segal
American Civil Liberties Union of Massachusetts
211 Congress Street
Boston, MA 02110

Joseph A. Pieropan
Office of the District Attorney/Berkshire
7 North Street
P.O. Box 1969
Pittsfield, MA 01202-1969

Patrick O. Romberg
Office of the District Attorney/Bristol
888 Purchase Street
P.O. Box 973
New Bedford, MA 02740

Elizabeth Anne Sweeney
Office of the District Attorney/Barnstable
3231 Main Street
PO Box 455
Barnstable, MA 02630

Philip Mallard
Office of the District Attorney/Essex
Ten Federal Street
Salem, MA 01970

Bethany C. Lynch
Office of the District Attorney/Hampden
Hall of Justice
50 State Street
Springfield, MA 01103-0559

Thomas D. Ralph
Office of the District Attorney/Middlesex
30 Commonwealth Avenue
Woburn, MA 01801

Susanne M. O'Neil
Office of the District Attorney/Norfolk
45 Shawmut Avenue
Canton, MA 02021

Thomas H. Townsend
Office of the District Attorney/Hampshire
One Gleason Plaza
Northampton, MA 01060

Gail M. McKenna
Office of the District Attorney/Plymouth
116 Main Street
Brockton, MA 02301

Ian M. Leson
Office of the District Attorney/Suffolk
1 Bui finch Place
3rd Floor
Boston, MA 02114

Jane A. Sullivan
Office of the District Attorney/Worcester
225 Main Street
RoomG-301
Worcester, MA 01608