

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Suffolk, ss.

No. SJ-2017-

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

v.

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

PETITION SEEKING RELIEF PURSUANT TO G.L. c. 211, § 3, and c. 231A, § 1

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Justice, Herschelle Reaves, and Nicole Westcott*

Dated: September 20, 2017

ISSUE PRESENTED

The Commonwealth has admitted that, for nearly a decade, former state chemist Sonja Farak engaged in egregious government misconduct at the Amherst drug lab. Following Farak's arrest in January 2013, her misconduct was compounded by even more egregious prosecutorial misconduct on the part of the Attorney General's Office which, as the Superior Court (Carey, J.) found, purposefully withheld exculpatory evidence about the timing and scope of Farak's drug abuse, misled defense counsel about that evidence, and committed a fraud on the court in order to minimize the scope of the scandal. The Commonwealth has declined to appeal from these findings.

Although it has been more than four years since Farak's arrest, the Commonwealth has shirked its obligations to identify the wrongfully convicted defendants, to notify those defendants of the egregious government misconduct that tainted their cases, and to provide them with meaningful opportunities for post-conviction relief. And although it has been almost three years since senior officials in the Attorney General's Office were informed that Assistant Attorneys General had misled defense counsel, deceived the Superior Court, and failed to correct the record before this Court, the Commonwealth has not righted these wrongs.

Therefore, the issue presented is:

To remedy these injustices, restore integrity to the justice system, and prevent future prosecutorial misconduct, should this Court dismiss with prejudice all of the convictions tainted by the Commonwealth's misconduct, and order the Commonwealth to comply with its legal and ethical obligations to respond to this lab scandal and any future systemic crises?

INTRODUCTION

In January 2013, state chemist Sonja Farak was arrested for evidence tampering and drug offenses. In the fall of 2013, the Superior Court (Kinder, J.) held an evidentiary hearing to determine the timing and scope of Farak's misconduct. To prepare for this hearing, defense counsel made "diligent discovery efforts" to obtain the key evidence in the Commonwealth's possession. The Attorney General's Office (AGO) blocked those efforts, however, by falsely representing to defense counsel and the Superior Court that it had disclosed all relevant, exculpatory evidence and that Farak's misconduct had not started until the summer of 2012. In fact, the AGO possessed, but had withheld from defense counsel, mental health worksheets proving that Farak's misconduct began much earlier.

In December 2016, the Superior Court (Carey, J.) scheduled another evidentiary hearing on the timing and scope of Farak's misconduct and the reasons for the AGO's failure to disclose exculpatory evidence, including the mental health worksheets that documented Farak's drug abuse. Following a six-day hearing, which included seventeen witnesses and 286 exhibits, the Superior Court found:

Despite the drug lab defendants' diligent discovery efforts, [Assistant Attorneys General] Kaczmarek and Foster managed to withhold the mental health worksheets through deception. They tampered with the fair administration of justice by deceiving [the court] and engaging 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. Kaczmarek's and Foster's misconduct improperly influenced and distorted [the court's] fact finding and legal conclusions and it unfairly hampered the defendants' presentation of defenses. *Their conduct constitutes a fraud upon the court.*

Mem. of Decision & Order at 69, *Commonwealth v. Cotto*, No. 2007-770 (Hampden County Super. Ct. June 26, 2017) (emphasis added) [hereinafter "2017 *Cotto* Order"].

This level of prosecutorial misconduct is unprecedented. To leave "no doubt that such conduct will not be tolerated in our criminal justice system," *Commonwealth v. Manning*, 373 Mass. 438, 445 (1977), this Court should dismiss with prejudice the wrongful convictions of all

Farak Defendants.¹ Indeed, this Court’s decisions concerning the Hinton drug lab scandal compel that remedy.

In January 2017, after years of litigation, this Court established “a new protocol” for cases affected by the egregious misconduct of another former state chemist, Annie Dookhan. *Bridgeman v. Dist. Attorney for the Suffolk Dist.*, 476 Mass. 298, 300 (2017) (“*Bridgeman I*”). That protocol yielded the dismissal with prejudice of an estimated 21,839 wrongful convictions. *See* Amended Declaratory Judgment, *Bridgeman v. Dist. Atty. for the Suffolk Dist.*, SJ-2014-005 (June 1, 2017). But this Court did not simply dismiss *all* convictions tainted by Dookhan’s misconduct. Citing “the absence of any evidence of misconduct by a prosecutor or investigator,” the Court stated that the “very strong medicine” of dismissal with prejudice “should be prescribed only when the government misconduct is so intentional and so egregious that a new trial is not an adequate remedy.” *Bridgeman II*, 476 Mass. at 322-323.

That strong medicine is needed here. The Amherst drug lab crisis represents a complete collapse of the criminal justice system. It cannot be blamed on a sole “bad apple,” because Farak’s misconduct was just the beginning. Farak’s misconduct was compounded by the AGO’s discovery violations, because Assistant Attorneys General (AAGs) intentionally suppressed evidence about Farak’s drug abuse and deliberately deceived the Superior Court and defense lawyers. That misconduct was then compounded by the inexcusable failure of the AGO and the District Attorney’s Offices (DAOs) to identify the Farak Defendants, whose rights have been thoroughly and repeatedly violated, and to notify them of their post-conviction rights. As explained below, since Farak’s arrest more than four years ago, prosecutors have:

- withheld exculpatory evidence about Farak’s misconduct;

¹ This petition uses the term “Farak Defendants” to include anyone with a nonfrivolous ground for bringing a post-conviction claim arising from the misconduct at the Amherst lab. At the very least, this group would include individuals with adverse dispositions in criminal cases where Farak signed the drug certificate. *See* Argument, Part III, *infra*.

- made false statements to defense counsel about that evidence;
- committed a fraud on the Superior Court, which caused both the Superior Court and the Supreme Judicial Court to misapprehend the timing and scope of Farak's misconduct;
- continuously failed, beginning in at least November 2014, to alert the Superior Court or this Court to material false statements that the Commonwealth's counsel made to the Superior Court;
- blocked efforts by Farak Defendants to obtain post-conviction relief; and
- disregarded their obligations to identify Farak Defendants, notify them, and remedy the scandal, which persists today.

Far worse than the Hinton scandal, the Amherst scandal combines a lab crisis with prosecutorial misconduct of unparalleled scope and irremediable consequence. This latest systemic lapse in the justice system demands a most emphatic response. For the reasons stated below, which petitioners are prepared to brief to the full bench, all Farak cases should be vacated and dismissed with prejudice. In addition, prosecutors should be ordered to fulfill their discovery and notice obligations with respect to defendants with potentially tainted convictions, both in this scandal and others. If the Court does not deliver this strong remedy, a scandal that began with mistaken notions about one bad apple² could end with a justice system that is rotten to its core.

² See Elizabeth Roman, *Amherst state crime lab remains closed, chemist Sonja Farak arrested for allegedly tampering with evidence*, MassLive, Jan. 21, 2013 (“On its face, the allegations against this chemist [Farak] do not implicate the reliability of testing done [in the Amherst lab] or fairness to defendants.” (Stmt. of Atty. Gen. Martha Coakley)), at http://www.masslive.com/news/index.ssf/2013/01/hampden_district_attorney_davi.html.

FACTUAL BACKGROUND³

The story of the Amherst drug lab crisis begins with Farak, who engaged in egregious government misconduct for the entirety of her almost ten-year tenure, compromising the reliability of drug evidence in thousands of criminal cases. But it does not end there.

Since January 2013, the scandal has metastasized due to the intentional misconduct of the AGO, which withheld exculpatory evidence from defense counsel and misled the Superior Court (and, indirectly, this Court) about the timing and scope of Farak's misconduct. It has also been exacerbated by the inexcusable neglect of the DAOs, which have failed to identify and notify the victims of Farak's misconduct. As a result, almost five years after Farak's arrest, thousands of Farak Defendants still have no prospect for meaningful post-conviction relief. Instead, they continue to suffer the harsh collateral consequences of their wrongful convictions.

I. Farak's Egregious Government Misconduct

The Commonwealth has appropriately conceded that "Farak committed egregious government misconduct in all cases in which she signed drug lab certificates at the Amherst lab." 2017 *Cotto* Order at 66. Moreover, that misconduct has been the subject of extensive findings by the Superior Court, *see, e.g., id.* at 10-22, 66-67, and the parties in the consolidated cases before Judge Carey stipulated to 520 facts in their Joint Proposed Findings of Fact. Accordingly, this petition simply summarizes certain details.

On January 18, 2013, the Amherst lab's supervisor found packaging from missing drug samples at Farak's workstation and contacted the Massachusetts State Police (MSP), which immediately closed the lab. On January 19, 2013, officers arrested Farak after a search of her car

³ The factual assertions in this petition rely on (1) affidavits submitted herewith; (2) concessions by the Commonwealth in court filings; and (3) Judge Carey's findings in *Commonwealth v. Cotto*, HDCR2007-00770, which the Commonwealth has not appealed. For this Court's convenience, petitioners will submit, as part of the record, a CD containing the reproducible evidence before Judge Carey. Petitioners respectfully request that the parties be permitted to supplement the record before the case is briefed and argued to the full Court.

revealed evidence that, in addition to tampering with samples, she had also stolen and consumed drugs. On April 1, 2013, a state-wide grand jury returned indictments against Farak for tampering with evidence, stealing drugs, and possession. On January 6, 2014, Farak pleaded guilty and received a sentence of two and one-half years in the house of correction (eighteen months to be served and the balance suspended for five years).

The timing and scope of Farak's misconduct was extensive. On an almost daily basis from August 2004 until January 18, 2013, while working at the Amherst lab, Farak was under the influence of methamphetamine, amphetamine, phentermine, ketamine, MDMA, MDEA, LSD, cocaine, or other narcotics (or suffering withdrawal from those substances). *See id.* at 21. "Farak's use of narcotics while at the lab caused her, at unknown times, to experience hallucinations and other visual distortions, to experience what she described as 'ridiculously intense cravings,' to feel like her mind was racing, and to take frequent breaks from work to use drugs." *Id.* By 2009 (and possibly earlier), Farak regularly stole and consumed police-submitted samples of cocaine, some of which had been analyzed by other chemists. *See id.* She replaced samples with counterfeit substances and altered the weights recorded in the lab's computer system. *See id.*

At present, there is no dispute that by tampering with evidence, stealing samples, and abusing drugs while working in the Amherst lab, Farak impaired her ability to analyze samples, maintain the lab's equipment, and testify in court. Nor is there now any dispute that Farak tainted the evidence in all cases in which she served as the chemist. But following Farak's arrest, the timing and scope of Farak's misconduct was in dispute, and the AGO deliberately suppressed the evidence that would have exposed its true breadth.

II. The AGO's Egregious Prosecutorial Misconduct and Fraud on the Court

Judge Carey found that attorneys from the AGO repeatedly misled defense counsel about Farak's misconduct; asserted frivolous privilege claims to withhold relevant, exculpatory evidence from defendants; deceived Judge Kinder at the first hearing in Hampden Superior Court; and even testified falsely before Judge Carey himself. *See 2017 Cotto Order at 68-70.*

A. The AGO's Deliberate Withholding of Exculpatory Evidence

As the agency investigating and prosecuting Farak, the AGO was responsible for “the disclosure of evidence which could be used by drug lab defendants whose convictions were placed in question by Farak’s misconduct.” 2017 *Cotto* Order at 23. From the outset, “a major question” for the AGO was “the scope of [Farak’s] misconduct and how many drug lab convictions it may have undermined.” *Id.* at 33-34. But the AGO failed to conduct an investigation to answer this question,⁴ and AAG Anne Kaczmarek, the lead prosecutor in the Farak case, “encourage[ed] OIG Senior Counsel Audrey Mark to decline any request to investigate the Amherst lab.” *Id.* at 70 n.37. Meanwhile, the AGO “assumed” that Farak’s misconduct was limited to late 2012. *Id.* at 34.

The AGO’s dismissive view of Farak’s misconduct was not based on any actual investigation, and worse yet, it was “at odds with the evidence uncovered” by the MSP, and known to the AGO, at an “early juncture.” *Id.* In January 2013, the MSP searched Farak’s car and found “mental health worksheets” in which Farak admitted, in her own handwriting, that she had used drugs and stolen police-submitted samples at work; documented that Farak had sought counseling for her drug addiction; and supported inferences that Farak had been stealing and abusing drugs since at least 2011 (not 2012, as the AGO claimed). *Id.* at 29. In February 2013, MSP Sergeant Joseph Ballou called AAG Kaczmarek to bring the worksheets to her attention. *Id.* at 37. On February 14, 2013, in an email (reproduced below) entitled “Farak Admissions,” Ballou sent the worksheets to AAG Kaczmarek and AAG John Verner, chief of the Criminal Bureau:

⁴ “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” until after this Court issued its opinions in *Cotto* and *Commonwealth v. Ware*, 471 Mass. 85 (2015), in April 2015. 2017 *Cotto* Order at 71-72. In response to this Court’s opinions, the AGO assigned AAG Thomas Caldwell to conduct an investigation into Farak’s misconduct, and he submitted a report to the Superior Court in April 2016.

From: Ballou, Joseph (AGO)
Sent: Thursday, February 14, 2013 3:31 PM
To: Kaczmarek, Anne (AGO)
Cc: Irwin, Robert (AGO); Verner, John (AGO)
Subject: FARAK Admissions
Attachments: Aritcles and Notes.pdf; Emotion Regulation Homework.pdf; Positive Morphine Test.pdf; Emotion Regulation Worksheet.pdf

Anne,

Here are those forms with the admissions of drug use I was talking about. There are also news articles with handwritten comments about other officials being caught with drugs. All of these were found in her car inside of the lab manila envelopes.

Joe

The AGO recognized that the worksheets were “significant and exculpatory.” *Id.* at 41. In late March 2013, in preparation for the grand jury presentation in Farak’s case, AAG Kaczmarek drafted a prosecution memo listing these mental health worksheets as items of note and acknowledging case law suggesting that the worksheets were *not* privileged. *Id.* at 38-39. AAG Verner made a notation on this memo: “Paperwork not turned over to DA’s Office yet.” *Id.* at 39.

This paperwork was not turned over to defendants, either. In an attempt to learn what the MSP had found in Farak’s car, several Farak Defendants pursued exculpatory evidence “through multiple avenues.” *Id.* at 44. These efforts yielded an evidentiary hearing on September 9, 2013, before Judge Kinder, at which the AGO did not produce Ballou’s file and instead argued for a protective order. *Id.* at 50. Judge Kinder asked AAG Kris Foster if she had “actually personally reviewed the file” to determine whether a protective order was justified. *Id.* She had not.⁵ *Id.* Consequently, Judge Kinder required AAG Foster to produce for *in camera* inspection any documents from Ballou’s file that the AGO sought to protect. *Id.* at 51-52.

⁵ The AGO assigned AAG Kaczmarek to investigate and prosecute Farak and AAG Foster to respond to discovery requests by Farak Defendants. They were supervised by senior AGO attorneys.

AAG Foster emailed five AGO colleagues about Judge Kinder’s order, including AAG Kaczmarek, who informed the group that Ballou’s file included Farak’s “mental health worksheets.” *Id.* at 53. Yet Foster did not produce the worksheets to Judge Kinder. Nor did she review the file. *Id.* at 47. Instead, in September 2013, AAG Foster wrote Judge Kinder a letter (reproduced below) falsely asserting that, “after reviewing” the file, “every document” possessed by Ballou “has been disclosed.” *Id.* at 54.

September 16, 2013

Honorable Jeffrey Kinder
Hampden County Superior Court
Hall of Justice
P.O. Box 559
Springfield, MA 01102-0559

RE: *Commonwealth v. Jermaine Watt, et al*, HDCR2009-01068, evidentiary hearing

Dear Judge Kinder:

On September 9, 2013, pursuant to a subpoena issued by defense counsel, you ordered the Attorney General’s Office to produce all documents in Sergeant Joseph Ballou’s possession that the Attorney General’s Office believes to be privileged by September 18, 2013, to be reviewed by your Honor in camera. After reviewing Sergeant Ballou’s file, every document in his possession has already been disclosed. This includes grand jury minutes and exhibits, and police reports. Therefore, there is nothing for the Attorney General’s Office to produce for your review on September 18, 2013.

Please do not hesitate to contact me should you require anything further.

Sincerely,


Kris C. Foster
Assistant Attorney General
(617) 963-2833

cc: Jared Olanoff, Esq. (via electronic mail)

Judge Carey found that this letter was “intended to, and did,” give Judge Kinder “the false impression that Foster had personally reviewed Ballou’s file.” *Id.* This misrepresentation was not inadvertent; Judge Carey found that the AGO “withh[e]ld the mental health worksheets through deception,” *id.* at 69, and “intentional misrepresentations to the court,” for the purpose of “conceal[ing] the extent of [Farak’s] underlying misconduct.” *Id.* at 77. For example, Judge Carey found that the AGO asserted “groundless” privilege claims, despite AAG “Kaczmarek’s notation in her prosecution memo that case law suggested the mental health worksheets were not privileged.” *Id.* at 69. Judge Carey observed that if the AGO had actually believed the worksheets were privileged, it “should have given [them] to Judge Kinder, as ordered, in September 2013 for

in camera review. . . . Instead, the AGO deceived Judge Kinder into believing that there were no privileged documents for him to review on the ruse that the AGO had turned over all of the documents.” *Id.* at 68-69.

Likewise, citing *numerous* other actions by AAGs Kaczmarek and Foster,⁶ Judge Carey concluded that the AGO had “tampered with the fair administration of justice” and thus “interfere[d] with the court’s ability impartially to adjudicate discovery in the drug lab cases and to learn the scope of Farak’s misconduct.” *Id.* at 69. This conduct, Judge Carey concluded, “constitute[d] a fraud on the court.” *Id.* at 69, citing *Rockdale Mgmt. Co. v. Shawmut Bank, N.A.*, 418 Mass. 596, 598 (1994).

But for the zealous efforts of defense counsel, the AGO might have gotten away with it. After filing several discovery motions (to which the AGO did not assent), Attorney Luke Ryan was finally granted leave, on July 31, 2014, to examine the evidence seized from Farak’s car in January 2013. *See id.* at 62. Attorney Ryan inspected the evidence on October 30, 2014, and found the mental health worksheets as well as numerous other previously undisclosed documents. *See id.*

B. The Impact of the AGO’s Misconduct on Farak Defendants

Two days after Attorney Ryan found the mental health worksheets that the AAGs had withheld, he sent a letter to the AGO explaining (correctly in Judge Carey’s view) “that ‘[i]t would be difficult to overstate the significance of these documents.’” *Id.* at 62-63. In response, on November 13, 2014, the AGO finally released to the DAOs – nearly two years after Farak’s arrest and one year after Judge Kinder’s rulings – almost 300 pages of previously undisclosed discovery from Farak’s car. *Id.*

⁶ See, e.g., *id.* at 56-57 (noting the AGO’s “patently false” assertion – to Judge Kinder and defense counsel – that evidence seized from the car was “irrelevant” to prosecutions of Farak Defendants); *id.* at 57 (finding that AAGs Foster and Kaczmarek “piled misrepresentation upon misrepresentation to shield the mental health worksheets from disclosure”); *id.* at 60 (finding that AGO failed to “squarely or honestly” address a discovery request about any third-party’s knowledge of Farak’s misconduct, which would have included Farak’s counseling service); *id.* at 69 (finding that misrepresentations by AAGs Foster and Kaczmarek “did not stop in 2013”).

Despite taking this belated action to address its prior *nondisclosures*, the AGO took no action whatsoever to correct its prior *false statements*. A few weeks after the AGO received Attorney Ryan’s letter, this Court heard argument in two cases arising from Judge Kinder’s findings, which were made in reliance on the AGO’s false statements: *Commonwealth v. Cotto*, SJC-11761, and *Commonwealth v. Ware*, SJC-11709. Yet no one on behalf of the Commonwealth informed this Court (or Judge Kinder) that the AGO had made false statements and that the scope of Farak’s misconduct was far greater than previously represented.

The AGO’s uncorrected false statements influenced this Court’s opinions. In *Cotto* and *Ware*, this Court did not disturb Judge Kinder’s finding that Farak’s misconduct began in the summer of 2012, concluded its scope was not “comparable to the enormity of Dookhan’s misconduct at the Hinton drug lab,” and declined to provide a “conclusive presumption of egregious misconduct” for Farak Defendants. *Cotto*, 471 Mass. at 111; *Ware*, 471 Mass. at 93 (“Given the very limited nature of the State police investigation into Farak’s activities at the drug lab, the precise time frame and scope of her misconduct are unknown.”). It is now clear, *as the AGO then knew*, that the record before this Court was incomplete and inaccurate due to the AAGs’ deliberate deceptions which concealed the true scope of Farak’s misconduct.

The AGO’s reluctance to confess its prior misconduct continued for years. As late as 2017, the AGO defended its flagrant discovery violations, denying it had “any legal obligation to turn over the mental health worksheets to district attorneys because the AGO had not prosecuted the drug lab defendants.” 2017 *Cotto* Order at 68. Judge Carey found that excuse to be “patently baseless” and “at odds with fundamental principles of fairness,” *id.*, because, as this Court has repeatedly made clear, “the duties of a prosecutor to administer justice fairly, and particularly concerning requested or obviously exculpatory evidence, go beyond winning convictions.” *Id.*, quoting *Ware*, 471 Mass. at 95, quoting *Commonwealth v. Tucceri*, 412 Mass. 401, 408 (1992). Judge Carey also found that, during the hearing in December 2016, AAG Kaczmarek attempted to deceive him, too, “feigning that she forgot about the mental health worksheets and erroneously assumed that they had been turned over,” and he refused to credit that testimony. *Id.* at 69.

In sum, Judge Carey found that the impact of the AGO’s misconduct on Farak Defendants was both concrete and “systemic.” *Id.* at 70. As Judge Carey stated, “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.” *Id.* at 61 (emphasis added). Had the AGO complied with its obligation to disclose exculpatory evidence and dealt candidly with Judge Kinder, Farak Defendants “*would have obtained discovery* to support their claims for [post-conviction] relief *and would not have spent as much time incarcerated.*” *Id.* at 70 (emphasis added).

Likewise, Judge Carey ruled out innocent explanations for this tragic outcome:

Kaczmarek knew that the mental health worksheets were exculpatory admissions by Farak, that the drug lab defendants were entitled to them, that the AGO had not turned them over to the drug lab defendants, and that it had no intention of doing so.

* * *

Foster’s denial in December 2016 of having made any mistakes underscores her lack of a moral compass. As attorneys, officers of the court, and agents of the Commonwealth of Massachusetts, Kaczmarek’s and Foster’s conduct is reprehensible and magnified by the fact that it was not limited to an isolated incident, but a series of calculated misrepresentations.

Id. at 69-70. Judge Carey concluded that, with respect to certain Farak Defendants, “the deliberate misconduct was so egregious that presumptive prejudice arises, so that dismissal with prejudice is the appropriate prophylactic remedy.” *Id.* at 77.

III. The Commonwealth’s Failure to Identify and Notify Defendants

The AGO’s egregious misconduct is not the only reason why the Amherst drug lab scandal has persisted for years – and why thousands of Farak Defendants, who have received no post-conviction relief whatsoever, continue to suffer the collateral consequences of their wrongful convictions. These injustices remain because the AGO and the DAOs have also ignored their “obligation to timely and effectively notify the defendant[s] of egregious misconduct affecting the defendant[s]’ criminal case[s].” *Bridgeman II*, 476 Mass. at 315.

At no time since the Farak scandal began has anyone on behalf of the Commonwealth disclosed a comprehensive list of affected defendants, let alone notified those defendants. Prosecutors did not do so in January 2013, after Farak was arrested.⁷ Nor did they do so in November 2014, when the AGO finally turned over the exculpatory evidence of Farak's misconduct to the DAOs. Not even in August 2016, when the DAOs acknowledged that Farak's misconduct affected all of her cases, did they offer a complete list of impacted defendants.

Outside groups have encouraged the Commonwealth, without success, to meet its legal obligations. After *Cotto* and *Ware*, CPCS, the ACLU of Massachusetts, the Massachusetts Association of Criminal Defense Lawyers, and the Massachusetts Bar Association had discussions with the AGO, and Deputy Attorney General Colin Owyang offered to contact the District Attorneys – who had not, at that time, acknowledged any obligation to address the Amherst lab scandal – to discuss how to identify and notify all Farak Defendants. *See* 9/18/17 Segal Aff. ¶ 4 & Ex. 1. It is not known if DAG Owyang ever reached out to the DAOs, or, if he did, whether he received any response. *See id.* ¶¶ 5-6.

In January 2017, CPCS and the ACLU of Massachusetts sent letters to all eleven DAOs asking if, how, and when they intended to notify Farak Defendants who may have been convicted on the basis of tainted evidence. *See* 9/18/17 Gioia Aff. ¶ 14 & Ex. 4. Despite brief discussions between CPCS, the ACLU of Massachusetts, and the Massachusetts District Attorneys Association, the DAOs have not taken any systematic steps to provide all Farak Defendants meaningful post-conviction relief. *Id.* ¶¶ 15-19.

⁷ At this time, the Commonwealth did identify and notify some defendants who were incarcerated based on a Farak certificate. *See* 9/18/17 Gioia Aff. ¶¶ 5-6, 8-10.

IV. Petitioners

The Committee for Public Counsel Services (CPCS) was created by G. L. c. 211D, §§ 1 *et seq.*, “to plan, oversee, and coordinate the delivery of criminal . . . legal services by salaried public counsel, bar advocate and other assigned counsel programs and private attorneys serving on a per case basis.” CPCS must provide representation to Farak Defendants in every county of the Commonwealth and, as such, “has a compelling interest in advocating for uniform practices and solutions that will ensure consistent treatment for all of those defendants.” *Bridgeman v. Dist. Atty. for the Suffolk Dist.*, 471 Mass. 465, 486 (2015) (*Bridgeman I*). The issues raised in this petition are directly connected to CPCS’s ability to provide representation for Farak Defendants. CPCS also has a strong interest in ensuring the integrity of the criminal justice system in order to safeguard the constitutional rights of its present and future clients.

Petitioner Hampden County Lawyers for Justice (HCLJ) is a private organization of bar advocates in Hampden County. *See* 9/18/17 Hoose Aff. ¶ 2. HCLJ’s member attorneys frequently litigate criminal cases on behalf of indigent defendants charged with drug crimes, including cases assigned to HCLJ member attorneys by CPCS. *Id.* ¶¶ 4, 8. HCLJ’s member attorneys therefore have an acute interest, on behalf of their clients and themselves, in the fair resolution of the Farak scandal and the remediation of the prosecutorial misconduct that has arisen from it. *Id.* ¶¶ 4-5, 8; *see also* 9/18/17 Ryan Aff. ¶¶ 2, 8-29.

Petitioner Herschelle Reaves, a longtime resident of the Springfield area, has been in recovery from addiction since 2014. *See* 9/17/17 Reaves Aff. ¶¶ 1, 5-6. She works two jobs, is a single mother, and is a community activist whose advocacy addresses unfairness in the justice system. *Id.* ¶¶ 2-4, 7-10. Ms. Reaves was convicted in 2008 of a drug possession offense for which Farak is believed to have signed the drug certificate. *Id.* ¶¶ 9, 11. Yet the Commonwealth did not inform Ms. Reaves of Farak’s misconduct in 2008, when the misconduct occurred, or in 2013, when Farak was arrested, or at any time since then. *Id.* ¶¶ 12-16.

Petitioner Nicole Westcott is a resident of Granby who suffers from addiction but has been sober for nearly four years. *See* 9/18/17 Westcott Aff. ¶¶ 1, 3-4. She works for ServiceNet, a

company that provides services to people suffering from addiction and also volunteers her time to help people suffering from that disease. *Id.* ¶¶ 2-3. Ms. Westcott has sustained at least three adverse dispositions in drug possession cases in which Farak is believed to have signed the drug certificates. *Id.* ¶¶ 11-12, 15-17, 20-23. Yet, as in the case of Ms. Reaves, the Commonwealth has not informed Ms. Westcott that egregious government conduct occurred in her cases. *Id.* ¶¶ 14, 19, 24-26. Meanwhile, Ms. Westcott’s criminal history has haunted her by impeding her efforts to secure housing, advance her career, and move on with her life. *Id.* ¶¶ 6-9.

ARGUMENT

The AGO’s deliberate misrepresentations to the Superior Court constituted a fraud on the court that, on its own, requires dismissal with prejudice. Farak’s blatant misconduct in the Amherst drug lab, the AGO’s intentional discovery violations, and the DAOs’ deliberate neglect of Farak Defendants’ due process rights, taken together, also require dismissal with prejudice. To remedy ongoing injustices to Farak Defendants, restore integrity to the justice system, and prevent future prosecutorial misconduct, this Court should vacate and dismiss with prejudice all convictions tainted by the Commonwealth’s misconduct. Further, this Court should issue orders to ensure the Commonwealth’s compliance with its constitutional obligations to disclose exculpatory evidence to defendants, including defendants who have been wrongfully convicted based on tainted evidence, and its duties to identify and to notify the victims of prosecutorial misconduct.

As it did for the Hinton scandal, this Court should exercise its superintendence power under G. L. c. 211, § 3, to address the Amherst scandal. *See Commonwealth v. Scott*, 467 Mass. 336, 352 (2014).⁸ Not only does the efficient administration of justice require a prompt remedy for

⁸ Because the government misconduct in the Hinton scandal was widespread and systemic, this Court “found it necessary to exercise [the Court’s] general superintendence power to ameliorate its damaging effects.” *Bridgeman I*, 471 Mass. at 474. This Court also found it appropriate to review Hinton lab claims under G. L. c. 211, § 3, because the decision would impact the timely administration of justice for thousands of defendants. *Id.* This reasoning is equally applicable in the Amherst lab context.

all Farak Defendants, but the Commonwealth has taken actions that have decreased the likelihood of resolution through case-by-case adjudication such that these cases may evade appellate review. The Commonwealth did not appeal Judge Carey’s ruling allowing motions to dismiss. Some defendants whose motions were denied by Judge Carey filed notices of appeal, but the Commonwealth then dropped their cases.⁹ Since the Commonwealth has failed to identify and notify Farak Defendants, they cannot be expected to bring cases forward. “Where, as here, a systemic issue affecting the proper administration of the judiciary has been presented, resolution of the issue by this court is appropriate and ‘should not await some fortuitous opportunity of report or ordinary appeal.’” *Simmons v. Clerk-Magistrate of the Boston Div. of the Housing Court Dep’t*, 448 Mass. 57, 61 (2006), quoting *A Juvenile v. Commonwealth* (No. 1), 380 Mass. 552, 556 (1980).

I. This Court Should Vacate and Dismiss with Prejudice All Wrongful Convictions of Farak Defendants.

In this case, the Commonwealth has (1) deliberately blocked the post-conviction rights of Farak Defendants by committing a fraud on the court and failing to notify Farak Defendants of government misconduct in their cases; and (2) intentionally withheld exculpatory evidence from Farak Defendants and, in doing so, caused them irreparable prejudice. This Court’s decision in *Bridgeman II* dictates that dismissals with prejudice are warranted for all Farak Defendants as a prophylactic remedy or, in the alternative, because the misconduct irremediably harmed all Farak Defendants.

A. The Commonwealth’s Egregious Prosecutorial Misconduct Warrants Dismissals with Prejudice.

Dismissal with prejudice is “a remedy of last resort” that is warranted when prosecutors engage in misconduct that is “egregious, deliberate, and intentional, or that results in a violation of

⁹ The appendix to this petition contains examples of nolle prosequi notices filed by the Commonwealth with respect to Farak Defendants who noticed appeals from Judge Carey’s June 2017 order.

constitutional rights.” *Commonwealth v. Cronk*, 396 Mass. 194, 198-199 (1985); *Bridgeman II*, 476 Mass. at 322. Courts also have the inherent authority to dismiss a case upon a finding of fraud on the court. *See Rockdale Mgmt. Co.*, 418 Mass. at 598-599.¹⁰ Here, the Commonwealth – specifically, Farak and the AGO – engaged in egregious misconduct, made misrepresentations to the court, and, as a result, violated the constitutional rights of Farak Defendants, including their rights to exculpatory evidence and fair trials. The AGO and the DAOs then exacerbated that prosecutorial misconduct by shirking their obligations to identify and notify the affected defendants and, also, to remedy the Amherst drug lab scandal. To deter the Commonwealth from withholding discovery and ignoring their duties to address systemic crises, dismissals with prejudice are required.

1. *The Misconduct of Farak and the AGO Warrants Dismissal with Prejudice for All Farak Defendants.*

When prosecutorial misconduct is deliberate, “prophylactic considerations” rather than demonstrable prejudice “assume paramount importance,” *Cronk*, 396 Mass. at 199, because the “deliberate undermining of constitutional rights must not be countenanced,” *Commonwealth v. Manning*, 373 Mass. 438, 444 (1977); *see Commonwealth v. Light*, 394 Mass. 112, 116 (1984) (Liacos, J., dissenting) (explaining that, in *Manning*, the purpose of dismissing the criminal case with prejudice was “to discourage government agents from such deliberate and insidious attempts to subvert the defendant’s right to a fair trial”). Prophylactic considerations are especially important when a prosecutor turns a court into an unwitting instrument of injustice:

[O]nly when the importunings of government agents are unsuccessful will the matter come to the attention of the courts and there is, in turn, a grave danger that the courts themselves may become the instrumentality through which government agents may effectuate [violations of] constitutional rights.

¹⁰ In exceptional circumstances, such as those present here, a court may also exercise its inherent powers to dismiss cases, both to protect the integrity of the process and to send an appropriate message. *See Commissioner of Probation v. Adams*, 65 Mass. App. Ct. 725, 731 (2006).

Manning, 373 Mass. at 444

That is precisely what happened here. The AGO misled defendants and committed a fraud on Judge Kinder, thereby transforming the Superior Court into an instrument for unjustly denying discovery and remedies to wrongfully convicted people. The Commonwealth cannot be excused with a proverbial slap-on-the-wrist, nor should it be given a do-over. *See Light*, 394 Mass. at 117 (recognizing that, in extreme cases, sending a defendant “back to begin all over again” would be neither “just” nor “equitable”) (Liacos, J., dissenting). Dismissal with prejudice sends the appropriate message that this Court will not tolerate such outrageous misconduct.

Moreover, other aspects of the Commonwealth’s behavior implicate many, if not all, of the factors that this Court has recognized justify dismissal with prejudice. As Judge Carey found, the Amherst drug lab scandal involves intentional, extensive, and egregious misconduct by the AGO and Farak, not simply “inept and ‘bungling’ performance” by the prosecution team. *Commonwealth v. Lam Hue To*, 391 Mass. 301, 311 (1984). Further, the AGO did not engage in tactics that were merely “ill-advised” or even unethical, *Commonwealth v. Jackson*, 391 Mass. 749, 754-755 (1984); it committed a fraud on the court to conceal an outrageous lab scandal, preserve the finality of wrongful convictions, and prevent the vindication of constitutional rights. That misconduct, along with Farak’s misconduct, was “entwined in proof of the charges” against Farak Defendants. *Commonwealth v. Lewin*, 405 Mass. 566, 587 (1989).

Finally, far from a “single incident” in a single case with a single defendant, the prosecutorial misconduct at issue here was multifaceted and has tainted thousands of drug convictions. *Commonwealth v. Cinelli*, 389 Mass. 197, 210 (1983). For example, not only did the AGO fail to undertake any investigation until “long after” Farak’s conviction in violation of its duty to learn of and disclose exculpatory evidence, AAG “Kaczmarek improperly discouraged such an investigation” by the Inspector General’s Office. 2017 *Cotto* Order at 36, 37; *see Cotto*, 471 Mass. at 112; *Ware*, 471 Mass. at 95. The AGO’s misconduct has reverberated among literally *thousands* of unresolved cases tainted by Farak’s misconduct.

The Commonwealth’s misconduct in this case — particularly the AGO’s deliberate deceptions which Judge Carey condemned as “reprehensible” — violated the due process rights of Farak Defendants, deliberately blocked defendants’ post-conviction rights,¹¹ and, more broadly, undercut “the constitutional rights of us all by undermining the integrity of our system of constitutional protections and by making a mockery of [the prosecutors’] oaths to tell the truth.” *Lewin*, 405 Mass. at 586. As Chief Justice Liacos warned in *Lewin*, if this Court “ignor[es] the realities of the meaning of a fair trial,” “recit[es] indignant, but toothless rhetoric” about prosecutorial misconduct, yet withholds “the ultimate sanction of dismissal with prejudice,” this Court “fails ‘to discourage governments from such deliberate and insidious attempts to subvert the defendant’s right to a fair trial.’” *Id.* at 588-589 (Liacos, C.J., dissenting), quoting *Jackson*, 391 Mass. at 754. It is only by dismissing with prejudice the wrongful convictions of the Farak Defendants that this Court can “create a climate” that is “adverse to repetition of [such] misconduct.” *Id.* at 587.

2. *The Commonwealth’s Failure to Identify and Notify Defendants, or Otherwise Rectify Its Fraud on the Court, Also Justifies Dismissals with Prejudice.*

The Commonwealth’s inexcusable neglect of its obligations to remedy the consequences of Farak’s and the AGO’s misconduct also warrants this Court’s strongest response. In the specific context of the Commonwealth’s lab scandals, this Court has ruled that “the government bears the burden of taking reasonable steps to remedy that misconduct.” *Bridgeman II*, 476 Mass. at 315. “Those reasonable steps include the obligation to timely and effectively notify the defendant of egregious misconduct affecting the defendant’s criminal case.” *Id.*; see also *Ware*, 471 Mass. at 95 (holding the Commonwealth has duty to disclose exculpatory evidence held by prosecution team);

¹¹ See *Commonwealth v. Libby*, 411 Mass. 177, 178 (1991) (delayed appeal may rise to level of constitutional error where state agents deliberately blocked defendant’s appellate rights); *Petition of Williams*, 378 Mass. 623, 625 (1979) (recognizing that “deliberate blocking” may violate due process); *Commonwealth v. Lee*, 394 Mass. 209, 221 (1985) (explaining that “deliberate blocking” entails “intentional or deliberate misconduct by the prosecutor”).

Cotto, 471 Mass. at 112 (referencing “prosecutor’s duty to learn of and disclose to a defendant any exculpatory evidence that is held by agents of the prosecution team”). The Commonwealth’s failure to take these “reasonable steps,” *Bridgeman II*, 476 Mass. at 315, constitutes a “deliberate blocking” of post-conviction rights that violates the due process rights of Farak Defendants. *Bridgeman I*, 471 Mass. at 479, quoting *Commonwealth v. Swenson*, 368 Mass. 268, 279-280 (1975). *See also* n.11, *supra*.

Even as this Court was reaffirming these fundamental rules, the Commonwealth was willfully breaking them. After Judge Kinder found, in October 2013, that Farak committed egregious government misconduct starting in July 2012, the DAOs did not identify or notify the defendants whose cases fell within that period. After Attorney Ryan alerted the AGO, in November 2014, to evidence in the AGO’s possession demonstrating that Farak’s misconduct was occurring in 2011, no one identified or notified the impacted defendants whose cases fell within this larger timeframe. After several organizations urged the AGO, in September 2015, to work with the DAOs to identify and notify defendants, their request went unfulfilled. And even after all eleven district attorneys conceded, in August 2016, that Farak’s misconduct warranted a conclusive presumption of misconduct back to August 2004, no identifications were made and no notices went out.

When the government commits misconduct in a criminal case, as both Farak and the AGO have done here, it must identify and notify the defendants. But we still do not know who all the Farak defendants are, and the impacted defendants have never been told that they are unnecessarily bearing the burdens of unjust convictions and that they are entitled to seek post-conviction relief (for indigent defendants, with the assistance of appointed counsel).

Worse, when the government learns that it has made — intentionally or not — false statements to a court, as the AGO did to Judge Kinder, it must notify *the court*. *See* Mass. R. Prof. C. 3.3(a)(1) (requiring an attorney “to correct a false statement of material fact or law previously made to the tribunal by the lawyer”); *id.* 3.3(a)(3) (stating, if an attorney offers “material evidence” and comes to know of its falsity, the attorney must “take reasonable remedial measures”). Here,

upon receipt of Attorney Ryan's letter in November 2014, the AGO must have known that Judge Kinder's findings were induced by AAG Foster's false statements. Yet neither the AGO nor the DAOs went to the Superior Court or this Court, where *Cotto* and *Ware* were pending, to correct the record regarding Farak's misconduct.¹²

In consequence, this Court relied on an erroneous account of the documents recovered from Farak's car. *See Cotto*, 471 Mass. at 101; *Ware*, 471 Mass. at 87-88. And this Court upheld, as not an abuse of discretion, Judge Kinder's findings about the scope of Farak's misconduct, which in turn were induced by AAG Foster's falsehoods. *See Cotto*, 471 Mass. at 101 n.7, 108, 111 n.13. When *Cotto* and *Ware* were published in April 2015, no one on behalf of the Commonwealth alerted this Court that its opinion rested on what the AGO would later call "unintentional mistakes."¹³ Again, no notices went out. And this time, the highest court in the Commonwealth became another unwitting instrument of the AGO's misconduct.

The Commonwealth's failure to notify defendants or to correct the record in the courts has violated due process, deliberately blocked defendant's post-conviction rights, and inordinately delayed *all* Farak-related proceedings. In the context of Dookhan's misconduct, a four-year delay was "unacceptably glacial." *Bridgeman II*, 476 Mass. at 333 (Lenk, J., concurring). Here, the response has been even slower, and the AGO and DAOs are to blame. They have, in effect, signaled that unless and until this Court orders them to act, they will not themselves meaningfully address the Amherst lab scandal. Given what has transpired over the past four and one-half years,

¹² *See, e.g.*, Br. of the Commonwealth at 38, *Cotto*, 471 Mass. 97 (filed Nov. 21, 2014) ("Because the judge did not abuse his sound discretion in finding that the defendant failed to meet his burden of showing that Farak's misconduct antedated his guilty plea, the judge properly denied the defendant's motion for a new trial and his ruling should be affirmed."); Br. of the Commonwealth at 17-18, *Ware*, 471 Mass. 85 (filed Aug. 8, 2014) (arguing "the defendant has not made an adequate showing that Ms. Farak's misconduct preceded his guilty plea" in February 2011).

¹³ Attorney General's Mem. in Opp. at 1, 2, 3, 11, 12, 19, 25, 35, 41, *Cotto*, No. 2007-770 (Hampden Super. Ct. filed Feb. 17, 2017).

the only just remedy that vindicates the rights of defendants and restores integrity to the justice system is dismissal with prejudice.

B. Dismissals with Prejudice Are Warranted Because Farak Defendants Have Been Irreparably Harmed by the Commonwealth’s Discovery Violations.

Dismissal with prejudice is appropriate where a prosecutor fails to disclose evidence the defendant is entitled to receive, the defendant is prejudiced by the non-disclosure, and the error cannot be remedied. *See Bridgeman II*, 476 Mass. at 316, citing *Cronk*, 396 Mass. at 198; *see also Lewin*, 405 Mass. at 579 (“indictment must be dismissed for prosecutorial misconduct upon a showing of irreparable harm to the defendant’s opportunity to obtain a fair trial”).

In this case, the deliberate suppression of exculpatory evidence by the AGO, for almost two years, caused irreparable harm to all Farak Defendants. Some defendants whose sentences were stayed pending the outcome of the evidentiary hearing before Judge Kinder went back to prison and had to serve more time, time they would not have had to serve had Judge Kinder been made privy to all of the evidence. *See, e.g.*, 9/18/17 Ryan Aff. ¶¶ 14-16. Other defendants never got out at all; some of those defendants served almost four more years in prison than they otherwise would have served if the AGO had been honest with them and with the court. *See* 9/18/17 Ryan Aff. ¶¶ 16-29; 9/11/17 Appleyard Aff. ¶¶ 7-18.

Delayed disclosure of the facts concerning Farak’s misconduct also irreparably prejudiced all Farak Defendants, because their criminal records have caused, and continue to impose, long-term collateral consequences, including barriers to housing and employment. *See Commonwealth v. Pon*, 469 Mass. 296, 315-316 (2014). As this Court recognized in *Bridgeman II*, individuals who are wrongfully convicted due to egregious misconduct in state drug labs have strong reasons to seek post-conviction relief, because their convictions have “serious and pervasive collateral consequences.” 476 Mass. at 320. Yet due to the AGO’s concealment of evidence, Farak Defendants have unnecessarily shouldered the burden of these collateral consequences. *See* 9/18/17 Westcott Aff. ¶¶ 6-9.

Moreover, the AGO's misconduct denied every Farak Defendant of his or her fundamental due process right to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Indeed, this Court has held that the dismissal of an indictment is appropriate where the failure to disclose exculpatory evidence in a timely manner results in prejudice. *See Commonwealth v. Washington W.*, 462 Mass. 204, 216-217 (2012) (holding dismissal with prejudice was the appropriate sanction for the Commonwealth's deliberate failure to disclose exculpatory evidence). In *Washington W.*, this Court held that dismissal with prejudice was the appropriate sanction because, even if the Commonwealth later provided the discovery, "[t]he opportunity eventually to present this claim would not cure the loss of the earlier opportunity to present it." *Id.* at 217.

Similarly, in this case, Judge Carey found that if the AGO had made "timely disclosures," Farak Defendants "would have obtained discovery to support their claims for [post-conviction] relief," and many of them "would not have spent as much time incarcerated." 2017 *Cotto* Order at 70. Instead, by intentionally concealing Farak's misconduct and improperly influencing the Superior Court's assessment of its scope, the AGO prejudiced all Farak Defendants by foreclosing, or at least significantly delaying, their opportunity to obtain discovery about the Amherst drug lab scandal and, based on that exculpatory evidence, to seek post-conviction relief from their wrongful convictions.

II. This Court Should Issue Orders Requiring the Commonwealth to Provide Meaningful Opportunities for Post-Conviction Relief, Including Identification and Notice, to all Farak Defendants and Other Wrongfully Convicted People in Massachusetts.

Any remedy must, of course, begin with identifying the affected individuals and notifying them about their rights, or, if dismissals are ordered, the disposition of their cases. This Court has already held that the Commonwealth must identify the victims of lab scandals because prosecutors have legal and ethical obligations to disclose "all evidence or information" known to the government that "tends to negate the guilt of the accused or mitigate the offense." *Bridgeman I*, 471 Mass. at 481, citing Mass. R. Prof. C. 3.8(d); *see also Cotto*, 471 Mass. at 112. Despite those

holdings, the AGO and the DAOs have declined to undertake these remedial tasks in response to the Amherst scandal. As this Court knows, the DAOs involved in the Hinton lab litigation took no comprehensive action until the ACLU of Massachusetts, CPCS, and pro bono counsel petitioned this Court on behalf of Dookhan Defendants. It appears that this Court's intervention is once again needed.

Accordingly, this Court should now issue an order providing, as a matter of state law, that whenever a prosecutor, or any other member of the prosecution team, becomes aware that government misconduct has tainted a past conviction (or convictions), the prosecutor must attempt in good-faith to provide "maximum," "effective," and "case-specific" notice to the victim(s) of such misconduct.¹⁴ This required notice should explain, among other things, the defendant's opportunity to seek post-conviction relief.

In this case, the Court should order the AGO and DAOs to identify and notify all Farak Defendants of the dismissal of their cases or of their post-conviction rights; to consult in good-faith with CPCS concerning the content and delivery of such notice; and to obtain approval of the Single Justice (to ensure that the DAOs do not send out an inadequate and confusing notice as they did for Dookhan Defendants, *see Bridgeman II*, 476 Mass. at 319-320), before notifying Farak Defendants.

Further, the Court should issue a standing order that governs the conduct of prosecutors more broadly, because weak discovery and notice practices by prosecutors are threatening to become an epidemic.¹⁵ From catastrophic failures to properly safeguard evidence in police

¹⁴ See U.S. Dep't of Justice, Office of the Inspector General, *An Assessment of the 1996 Dep't of Justice Task Force Review of the FBI Laboratory* at 82-83 (July 2014).

¹⁵ See generally, Emily Bazelon, *She Was Convicted of Killing Her Mother. Prosecutors Withheld the Evidence That Would Have Freed Her.*, The New York Times Magazine, August 1, 2017, <https://www.nytimes.com/2017/08/01/magazine/she-was-convicted-of-killing-her-mother-prosecutors-withheld-the-evidence-that-would-have-freed-her.html>.

departments,¹⁶ to the recently revealed withholding of hundreds of pages of exculpatory evidence by the Office of Alcohol Testing in the breathalyzer test litigation,¹⁷ it is unclear that prosecutors are promptly and adequately notifying affected defendants of their rights. Instruction from this Court is necessary to ensure the proper administration of justice in these types of systemic cases going forward.

III. “Farak Defendants” Should Include All Individuals with Nonfrivolous Post-Conviction Claims.

All defendants who have sustained convictions for drug offenses, and who could bring nonfrivolous post-conviction claims that their convictions were tainted by misconduct at the Amherst lab, have been harmed by the Commonwealth’s misconduct and should, therefore, have their relevant convictions dismissed with prejudice. *See* Argument, Part I.B. *supra*. This Court could reasonably conclude that this group should include every defendant whose relevant drug samples were processed by the Amherst lab while Farak worked there.¹⁸ This petition, however,

¹⁶ *See, e.g.*, Daniel S. Medwed, *Here We Go Again? The Braintree Police Evidence Room Scandal*, WGHB, Sept. 21, 2016, <http://news.wgbh.org/2016/09/21/politics-government/here-we-go-again-braintree-police-evidence-room-scandal>; Stephanie Barry, *A look at the Springfield police evidence room scandal, and similar cases from around the country*, Masslive, Feb. 15, 2016, http://www.masslive.com/news/index.ssf/2016/02/police_evidence_room_scandals.html; Brian Dowling, *Key raises doubts on security of Framingham police evidence*, Boston Herald, Nov. 5, 2016, http://www.bostonherald.com/news/local_coverage/2016/11/key_raises_doubts_on_security_of_framingham_police_evidence; Fred Hanson, *Sullivan gives update on Braintree Police evidence scandal*, The Patriot Ledger, Oct. 5, 2016, <http://www.patriotledger.com/news/20161005/sullivan-gives-update-on-braintree-police-evidence-scandal>.

¹⁷ Maria Cramer, *State will investigate breathalyzer test results*, Boston Globe, Aug. 31, 2017, <https://www.bostonglobe.com/metro/2017/08/31/state-investigate-office-alcohol-testing/L3MiYyVv1AQCn6R7ZYegXM/story.html>.

¹⁸ All Amherst lab defendants have additional arguments that are not presented in this petition. For example, under Federal law, the bad-faith destruction or loss of evidence violates due process. *See Arizona v. Youngblood*, 488 U.S. 51, 57 (1988). And under Massachusetts law, which is more protective of criminal defendants in this regard, even the negligent failure to preserve evidence violates due process, if the “evidence is . . . so critical to the defense as to make a criminal trial fundamentally unfair.” *Commonwealth v. Henderson*, 411 Mass. 309, 310-11 (1991). Here, the

focuses on the Farak Defendants whose adverse dispositions are associated with drug certificates signed by Farak; they are unquestionably entitled to post-conviction relief.

Judge Carey ordered dismissals with prejudice for a narrower group of Farak Defendants, but that decision does not bind this Court. In Judge Carey's ruling, defendants entitled to dismissals with prejudice were those who met three requirements: (1) Farak signed their certificates of analysis; (2) they moved unsuccessfully for discovery or post-conviction relief between January 19, 2013, and November 1, 2014; and (3) their motions were denied on the basis of the contaminated evidentiary record established before Judge Kinder. 2017 *Cotto* Order at 77. This formulation is unduly narrow because the Commonwealth's prosecutorial misconduct and deliberate inaction prevented and deterred affected defendants from pressing post-conviction motions between 2013 and 2014.

To begin with, there was no systemic notice to Farak Defendants in 2013 or 2014, so they could not be uniformly expected to have been filing motions. And once Judge Kinder found — based on the AGO's misrepresentations — that Farak's misconduct spanned just a few months, defendants who did file motions were denied individual hearings. Moreover, defense attorneys appropriately advised other Farak Defendants not to press post-conviction motions at that time because Judge Kinder's findings would be applied to their cases. *See, e.g.*, 9/18/17 Ryan Aff. ¶¶ 8-29; 9/11/17 Appleyard Aff. ¶¶ 9-18. As such, the Commonwealth's failure to turn over exculpatory evidence, as well as its misrepresentations to the court and defense counsel, denied *all* Farak Defendants the opportunity to present this evidence, to their detriment.

The cases of petitioners Herschelle Reaves and Nicole Westcott illustrate this point. Both sustained adverse convictions in drug cases before the summer of 2012. They had no meaningful opportunity to move for post-conviction relief either when they were convicted for drug

Commonwealth's systematic failure to preserve critical drug evidence in the Amherst lab violated the due process rights of all Amherst lab defendants.

possession, or after Farak's arrest in 2013, because the Commonwealth never told them that Farak committed misconduct that affected their cases. Indeed, it has not done so to this day. *See* 9/17/17 Reaves Aff. ¶¶ 13-16; 9/18/17 Westcott Aff. ¶¶ 24-26.

Likewise, every Farak-related claim that has been filed, or will be filed, has been delayed *for years* by the unprecedented government misconduct in this case. Thus, the scope of this Court's remedy should not be limited in any way by whether defendants filed, pressed, or lost post-conviction motions. Putting that burden on Farak Defendants would be inconsistent with the fundamental principle that the Commonwealth must bear the burdens of remedying the Amherst lab crisis. *See Bridgeman II*, 476 Mass. at 324, citing *Lavallee v. Justices of the Hampden Superior Court*, 442 Mass. 228, 246 (2004).

CONCLUSION

This Court should exercise its authority under G.L. c. 211, § 3, and c. 231A, § 1, to reserve and report this case to the full Court to vacate and dismiss with prejudice the wrongful convictions of all Farak Defendants, and for the entry of appropriate declaratory and other relief.

Respectfully submitted,

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September 20, 2017

CERTIFICATE OF SERVICE

I certify that on September 20, 2017, I served a copy of this Petition and Appendix by mailing via the United States Post Office, First Class mail postage paid, to each person listed below.

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