COMMONWEALTH OF MASSACHUSETTS

Appeals Court No. 2017-P-1287.

SUFFOLK COUNTY.

COMMONWEALTH OF MASSACHUSETTS
Appellee,

v.

JUSTINO ESCOBAR,
Appellant.

Brief of Appellant,
Justino Escobar.

Respectfully submitted
for Justino Escobar,

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October 13, 2017

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Issue Presented

Chemist Sonja Farak functioned as an extraordinarily bad actor as to both the Amherst and Hinton drug laboratories. By means of one of chemist Farak's several forms of malfeasance - her poly-substance intake at work, such bad actor compromised the integrity of the evidence upon which rest thousands of convictions. In contrast to the constitutional imperative made clear by the Supreme Judicial Court and despite the passage of what is now years, there has been no investigation directed toward defining such chemist's impairment of the integrity of the evidence of the Hinton laboratory.

Following an investigation, on March 4, 2014, the Inspector General issued a report in which the principal stated conclusion was that chemist Annie Dookhan had been the sole bad actor at the Hinton laboratory. Necessarily implicit in that stated conclusion was the premise the Inspector General's investigation had been directed toward determining whether there had been bad actors at work at the Hinton laboratory, and had found none.

As established by review of the content of that report, however, the Inspector General had not actually investigated whether, besides Ms. Dookhan, there had been any other bad actors relative to the Hinton laboratory. Had there been such an investigation, it readily could have identified the impairment of the integrity of the evidence by chemist Farak (the Inspector General's report indicates that such official did not even realize that chemist Farak had worked at the Hinton laboratory).

As made clear by the Supreme Judicial Court, the Commonwealth had a constitutional duty to identify and disclose the nature and extent of the impairment of its evidence by the bad actors at the state laboratories. The primary consequence of the Inspector General's misleading report was foreseeable; there was universal reliance upon the proposition that chemist Dookhan had been the sole bad actor at the Hinton laboratory - and that there were no others.

The malfeasance of chemist Dookhan was characterized by an incredibly high number of reported testing results. The chemist who tested the substance attributed to Mr. Escobar reported testing results comparable in number to those of Ms. Dookhan.

Notwithstanding the fact that the report of such comparable number of results establishes the reasonable possibility of comparable conduct and - despite the Commonwealth's duty to investigate, learn and disclose - there has been no investigation directed toward determining whether such chemist, or any other chemist at the Hinton laboratory besides Ms. Dookhan, functioned as a bad actor.

Following the multi-year - and ongoing - breach of the constitutional right to exculpatory evidence of Mr. Escobar and the thousands similarly situated, and particularly given the foreseeably misleading effect of the report of the agent of the Commonwealth charged with conducting the investigation of the Hinton laboratory, should the Commonwealth now begin a profoundly belated investigation or is dismissal - perhaps in the context of an order similar to that in *Bridgeman II*[1] - the more appropriate course?

[1] *Bridgeman v. District Attorney for the Suffolk District* [*Bridgeman II*], 476 Mass. 298 (2017).

Statement of the Case[2]

On January 27, 2009, a Suffolk County Grand Jury returned an indictment charging Mr. Escobar with Trafficking in Cocaine, over 200 grams. R.A. 4, 14. On December 3, 2009, pursuant to a plea agreement with the Commonwealth, Mr. Escobar entered a plea of guilty to so much of the indictment as charged Trafficking in Cocaine, over 14 grams, and the Commonwealth entered a partial nolle prosequi to the balance of the indictment. R.A. 6, 15. Mr. Escobar was sentenced to a term of 8 to 12 years imprisonment. R.A. 6.

On July 20, 2015, Mr. Escobar filed both a Motion for a New Trial and a Motion for Leave to Conduct Post-Conviction Discovery. R.A. 7. On August 6, 2015, Mr. Escobar submitted correspondence to the court requesting a hearing on the Motion for Leave to Conduct Post-Conviction Discovery. R.A. 163. On August 11, 2015, the Superior Court (Locke, RAJ) ordered the Commonwealth "to file a response or opposition within (60) sixty days." R.A. 8.

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[2] The Record Appendix will be cited as "R.A. [page number];" the transcript of the August 17, 2017, hearing will be cited as "Tr. 8-17-17/[page number];" the transcript of the December 3, 2009, hearing concerning Mr. Escobar's change of plea will be cited as "Tr. 12-3-09/[page number];" and the Addendum will be cited as "Add. [page number]."

Following the expiration of those sixty days - and with no opposition or response being filed by the Commonwealth, on October 14, 2015, Mr. Escobar submitted correspondence to the court again requesting a hearing on the Motion for Leave to Conduct Post-Conviction Discovery. R.A. 164. On November 3, 2015, with there being still no response by the Commonwealth to the Superior Court's Order of August 11, 2015, Mr. Escobar submitted correspondence to the court requesting that his Motion for New Trial be allowed as unopposed. R.A. 165.

On November 16, 2015, Mr. Escobar filed a Motion to Vacate and for the Sanction of Dismissal (the motion to dismiss). R.A. 167. On November 23, 2015, the Superior Court (Locke, RAJ) ordered the Commonwealth "to file a response or opposition" to the motion to dismiss within 30 days or the "motion for new trial shall be deemed 'unopposed.'" R.A. 8. On November 25, 2015, the Commonwealth filed an assented-to motion for an additional thirty days in which to respond to Mr. Escobar's Motion for Leave to Conduct Post-Conviction Discovery. R.A. 8-9. On November 30, 2015, such motion was "allowed with assent of defendant" (Locke, RAJ). R.A. 9.

On February 10, 2016, with there being still no compliance by the Commonwealth with the Superior Court orders of August 11, 2015, and (despite the additional time) November 23, 2015, Mr. Escobar submitted correspondence to the court which included a request that the court consider allowing the July 20, 2015, Motion for Leave to Conduct Post-Conviction Discovery. R.A. 175. On February 16, 2016, with there still being no compliance by the Commonwealth with the foregoing Superior Court orders, Mr. Escobar submitted correspondence to the court requesting that his Motion for New Trial be allowed as unopposed. R.A. 176.

On April 18, 2016, with there still being no compliance by the Commonwealth with the foregoing Superior Court orders, Mr. Escobar filed a Motion for Enforcement of this Court's Order [of November 23, 2015]. R.A. 10.

On May 25, 2016, Mr. Escobar filed a Supplemental Memorandum in Support of Unopposed Motions. R.A. 10. On that day, the Commonwealth filed an Opposition to the Defendant's Motions for New Trial and for Post-Conviction Discovery. R.A. 10. Mr. Escobar would file a Memorandum in Reply to the Commonwealth's Opposition on June 8, 2016. R.A. 10.

On June 28, 2016, the Superior Court (Roach, RAJ) stayed proceedings pending the Supreme Judicial Court's decision in *Bridgeman v. District Attorney for Suffolk County* [*Bridgeman II*]. R.A. 10. Following the issuance of the Supreme Judicial Court's decision in *Bridgeman II*, on February 10, 2017, Mr. Escobar filed Defendant's Memorandum Regarding *Bridgeman II* (R.A. 10) and requested a hearing on his Motion for Leave to Conduct Post-Conviction Discovery.

On May 11, 2017, Mr. Escobar filed a Memorandum Regarding the Commonwealth's Violation of Its Duties to Investigate and Learn (R.A. 10) and requested a hearing on his Motion for Leave to Conduct Post-Conviction Discovery. On May 23, 2017, the Superior Court (Roach, RAJ) denied Mr. Escobar's request for a hearing without prejudice, and noted that the court was not hearing *Bridgeman* cases absent a specific motion explaining how the case "fits into the *Bridgeman* protocol and why it is ripe for review." R.A. 11. On June 1, 2017, Mr. Escobar filed such a motion. R.A. 11.

On June 6, 2017, Mr. Escobar filed a Motion for a *Cotto* Order (R.A. 264), and requested that such motion be scheduled for a hearing together with the Motion

for Leave to Conduct Post-Conviction Discovery.[3] Mr. Escobar filed supplemental memoranda in support of his Motion for a *Cotto* Order on June 9, 2017, and July 3, 2017. R.A. 11.

On June 16, 2017, the Superior Court (Roach, RAJ) denied Mr. Escobar's Motion for a Hearing, without prejudice. R.A. 11. The court would subsequently conduct a hearing, doing so on August 17, 2017. Tr. 8-17-17/1. That hearing concerned the Motion for a New Trial; the Motion for Leave to Conduct Post-Conviction Discovery; the motion to dismiss; and the Motion for a *Cotto* Order. R.A. 12-13.

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[3] The motion for a *Cotto* Order sought an order similar to that issued by the Supreme Judicial Court in *Commonwealth v. Cotto*, 471 Mass. 97, 115 (2015), where, following consideration of the Commonwealth's failure to investigate Ms. Farak's conduct at the Amherst laboratory, the Court ordered the following:

> It is imperative that the Commonwealth thoroughly investigate the timing and scope of Farak's misconduct at the Amherst drug lab in order to remove the cloud that has been cast over the integrity of the work performed at that facility, which has serious implications for the entire criminal justice system. Within one month of the issuance of this opinion, the Commonwealth shall notify the judge below whether it intends to undertake such an investigation. If so, the investigation shall begin promptly and shall be completed in an expeditious manner.

Cotto, 471 Mass. at 115.

The court (Roach, RAJ) would thereafter deny the Motion for a *Cotto* Order and the motion to dismiss. R.A. 401-02. On August 21, 2017, Mr. Escobar filed a Notice of Appeal in such regard. R.A. 403.

On August 25, 2017, the court (Roach, RAJ) allowed the Motion for Leave to Conduct Post-Conviction Discovery, in part (requiring the disclosure of some materials concerning chemist Della Saunders), but denied such part of that motion as would have provided for an investigation. R.A. 404. On September 22, 2017, Mr. Escobar filed a Notice of Appeal in such regard. R.A. 412. On September 25, 2017, the Commonwealth filed a Notice of Appeal. R.A. 413.

On October 5, 2017, Mr. Escobar moved to consolidate the appeals that allowed those Notices of Appeal.

Statement of Facts

Ms. Farak's Malfeasance.

Drug laboratory chemist Sonja Farak engaged in three known forms of malfeasance: systematic theft of narcotics, tampering with her co-worker's evidence, and testing while impaired. R.A. 291. There has been no investigation directed toward identifying the extent to which any such form impaired the integrity of the evidence relative to the Hinton laboratory.

In proceedings that stemmed from Ms. Farak's impairment of the integrity of the Commonwealth's evidence at its Amherst laboratory, Hampden Superior Court Judge Richard J. Carey conducted hearings regarding prosecutorial misconduct related to the Commonwealth's willful failure to disclose exculpatory evidence and to its failure to investigate the extent to Ms. Farak's malfeasance at the Amherst laboratory. R.A. 273. That court made findings consistent with Ms. Farak having engaged in at least one form of malfeasance relative to Hinton laboratory evidence.[4]

[4] One of the constitutionally unacceptable results of the Commonwealth's willful failure to investigate Ms. Farak's conduct at the Hinton laboratory is that defendants must piece together the evidentiary picture from scraps of evidence found in other matters.

With respect to Ms. Farak's work at the Hinton facility and as found by the Hampden Superior Court,

> From January of 2002 until May of 2003, Farak worked for DPH where she conducted testing to detect HIV. During that 16 month period, she continued and perhaps increased her consumption of alcohol and recreational drugs, including MDMA and marijuana, and she first tried methamphetamine.

R.A. 281.[5]

As the Hampden Superior Court further found,

> In August of 2004, Farak transferred to the Amherst lab. By early 2005, she was stealing and consuming methamphetamine standards from the lab every morning. Between 2005-2009, that consumption grew to several times per day. I credit her testimony that, aside from a few days or a week of sobriety during that four year period, she was under the influence of methamphetamine (and, at times, other controlled substances) at the lab nearly every day, all day and that when she did not take methamphetamine, she experienced severe lethargy, irritability, and the inability to focus and be productive, to the point where she would call in sick from work.

R.A. 281-82.

There is no indication whatsoever that Ms. Farak changed her path from the time she engaged in poly-substance intake while conducting HIV testing to the

[5] As a direct result of the Commonwealth's failure to undertake an investigation as to Ms. Farak's conduct at the Hinton laboratory, none of the thousands who relied upon the HIV test results such chemist reported (including crime victims) know those results may be unreliable. *Compare* the statutory rights of victims recognized by G.L. c. 258B, §§ 3(e) and (u) of the Massachusetts Victim Bill of Rights. Add. 63-67.

time she engaged in poly-substance intake at the Amherst laboratory (Ms. Farak tested alleged narcotic samples at the Hinton laboratory between those two times). The Hampden Superior Court found that "precisely when Farak began stealing and consuming police-submitted samples at the Amherst lab, the full panoply of drugs she took and used, and the extent to which she was impaired at work, all remain unknown." R.A. 282 n.15.

The Hampden Superior Court also found that, in 2010, the notes of one of Ms. Farak's care providers included mention that, "when abusing stimulants, she has had perceptual disturbances in the past, including paranoia and auditory hallucinations." R.A. 284.

In light of the foregoing, the Hampden Superior Court would conclude that "from 2004 until January 18, 2013, while working at the Amherst lab, Farak was, on almost a daily basis, under the influence of narcotics, and at other times was suffering the effects of withdrawal." R.A. 291. As noted, in 2004, Ms. Farak had worked at the Hinton laboratory - testing alleged narcotics - immediately before transferring to the Amherst laboratory.

Moreover, as found by the Hampden Superior Court, as a result of her poly-substance intake, "[i]n 2010, Farak performed all of her lab work while under the influence of narcotics." R.A. 284.

Ms. Farak's poly-substance intake worsened further in 2011. As found by the Hampden Superior Court:

> In 2011, Farak's use of cocaine ramped up, as she used lab standards, police-submitted power cocaine, and she began to smoke rocks of cocaine. The latter practice quickly led to her becoming very heavily addicted.

R.A. 285.

As to the effect of Ms. Farak's poly-substance intake on the reliability of her reported test results, the Hampden Superior Court would conclude that "Farak's drug use impaired her ability to test and analyze controlled substances and to check the equipment and instruments used to analyze suspected drugs on occasions which cannot be identified." R.A. 291.

Thus, Ms. Farak's poly-substance drug intake at work rendered her test results unreliable.

Notably, throughout the time that Ms. Farak worked at the Amherst laboratory, she tested Hinton laboratory samples. R.A. 398-400. There has been no

investigation as to the extent to which Ms. Farak impaired the integrity of the Commonwealth's evidence in that regard.

Given that Ms. Farak evidently engaged in much the same course of conduct - particularly poly-substance abuse - at both the Hinton and Amherst laboratories, it would seem that she readily qualified as a second bad actor of the Hinton laboratory. Such conclusion would apply both to the time at which she worked at the Hinton laboratory and to the time at which she worked at the Amherst laboratory and tested samples from the Hinton laboratory.

Following its investigation as to the Hinton laboratory, the Inspector General would announce the conclusion that Annie Dookhan had been the sole bad actor at such facility. There was universal reliance throughout the Commonwealth on that stated conclusion. R.A. 170-74.

Remarkably, the Inspector General does not seem to have realized that Ms. Farak had worked at the Hinton laboratory. Footnote 14 of page 10 of the Inspector General's March 4, 2014, report references the criminal charges brought against Ms. Farak concerning her malfeasance at the Amherst laboratory,

but mentions nothing of such chemist having worked at the Hinton laboratory. R.A. 38-39.

Nowhere in such footnote - or in that report - is there any consideration as to the effect of any form of Ms. Farak's malfeasance on the integrity of the evidence at the Hinton laboratory (Ms. Farak is not mentioned anywhere else in the Inspector Generals March 4, 2014, report, and is not mentioned at all in the February 2, 2016, supplement to that report). R.A. 21-149, 233-63.

Moreover, neither such report contains any indication that the Inspector General realized that Ms. Farak continued to test Hinton laboratory samples after her move to the Amherst laboratory.

As discussed elsewhere in this brief, Mr. Escobar would suggest that the Inspector General's stated conclusion as to Ms. Dookhan having been the sole bad actor at the Hinton laboratory was unrelated to such official's investigation and - as evidenced by the relevant report, and despite that stated conclusion - the Inspector General's investigation had not actually been directed towards determining whether any of the other chemists at the Hinton laboratory had functioned as bad actors.

The Allegations against Mr. Escobar.

The Commonwealth's case was that, on November 8, 2008, Boston Police officers conducted a random registry of motor vehicles inquiry concerning a vehicle that was traveling on Harvard Street in Boston. Tr. 12-3-09/15. As a result of that inquiry, the officers were told that the vehicle's registration had expired. Tr. 12-3-09/15. The officers pulled the vehicle over, and Mr. Escobar was found to be its driver. Tr. 12-3-09/15. One Marlanie Cordiero was a passenger in the vehicle. Tr. 12-3-09/15. The police decided to tow the vehicle. Tr. 12-3-09/15. An inventory search was then conducted. Tr. 12-3-09/15.

The Commonwealth's evidence was that, during that search, the police noticed an "open drug hide" in the back passenger side of the front seat. Tr. 12-3-09/16. According to such evidence, the officers then discovered more than 14 grams of what was believed to be cocaine inside that seat. Tr. 12-3-09/16. According to the Commonwealth's certificate of analysis, on December 15, 2008, Hinton laboratory chemists Della Saunders and Kate Corbett analyzed the substance that had been found and determined it to contain 252.18 grams of cocaine.

Since Ms. Dookhan's dry-labbing malfeasance was characterized by her report of extraordinarily high number of test results, a thorough investigation as to whether any other chemists at the Hinton laboratory also qualified as bad actors would have involved consideration of the number of results reported by other chemists. Ms. Saunders reported the second highest number of test results - second only to Ms. Dookhan - in each year from 2005 through 2009. R.A 157-60. In 2007, Ms. Saunders nearly reported more test results (6,188) than did Ms. Dookhan (6,302). R.A. 159. Remarkably, in the time Ms. Farak, Ms. Dookhan and Ms. Saunders worked together (the first seven months of 2004), Ms. Farak would report 5,847 results, Ms. Dookhan would report 4,427 results, and Ms. Saunders would report 4,260 results. R.A 157. (The next highest number of reported results during that time was by chemist Xiu Ying Gao, who reported 2,486 results. R.A. 157). In that time, Ms. Farak and Ms. Dookhan would together report 10,274 results - which was 37% of the 27,677 total number of results reported at the Hinton laboratory. R.A. 157.

Also during that time, Ms. Saunders, Ms. Farak and Ms. Dookhan would together report 14,535 results - which was 52% of the total number of results reported at the Hinton laboratory. R.A. 157. Notwithstanding the foregoing, the Inspector General does not seem to have realized that Ms. Farak had worked at the Hinton laboratory.

Summary of the Argument

I. The Commonwealth had a constitutional duty to investigate, learn of, and disclose the extent to which the multiple bad actors operating in its drug laboratories had impaired the integrity of its evidence. The Commonwealth breached that duty, with Mr. Escobar and thousands of defendants thereby being deprived of exculpatory evidence (pages 24-26).

II. Chemist Sonja Farak functioned as an extraordinarily bad actor relative to both the Hinton and Amherst laboratories. That the Commonwealth has never conducted an investigation directed toward determining the nature and extent of her compromise of the integrity of the evidence of the Hinton laboratory serves to prove Mr. Escobar's essential contention - that there has been no investigation as to whether any

chemists besides chemist Dookhan functioned as bad actors at that facility (pages 26-29).

III. The Inspector General did not investigate whether there had been any bad actors at work at the Hinton laboratory (besides Ms. Dookhan). Such official's stated conclusion that Ms. Dookhan had been the sole bad actor at the facility foreseeably created universal reliance upon the proposition that there had been such an investigation (pages 30-34).

IV. As a result of the universal reliance upon the Inspector General's misleading stated conclusion, there was no investigation as to the conduct of other bad actors at the Hinton laboratory. That circumstance resulted in the breach of the right of thousands to exculpatory evidence (pages 35-37).

V. Should a loss-of-evidence analysis be applied to the Commonwealth's breach of its constitutional duty to provide exculpatory evidence, it would indicate that dismissal is appropriate (pages 38-42).

VI. Merely repeating that the Commonwealth had a duty to investigate would suggest that a breach of such duty - as here - has no consequence. Dismissal is appropriate to restore and preserve confidence in our system of criminal justice (pages 42-51).

Argument

I. The Commonwealth's breach of its constitutional duties.

When the Commonwealth discovered that multiple drug laboratory chemists may have compromised the integrity of its evidence, it had a constitutional duty to conduct a thorough investigation to determine the nature and extent of their malfeasance, and its effect on pending cases and on cases in which defendants already had been convicted of crimes involving controlled substances that such chemists had analyzed. *See Commonwealth v. Ware*, 471 Mass. 85, 95 (2015) ("[w]hen personnel at the Amherst drug lab notified the State police in January, 2013, that Farak may have compromised the evidence in two drug cases, the Commonwealth had a duty to conduct a thorough investigation to determine the nature and extent of her misconduct, and its effect both on pending cases and on cases in which defendants already had been convicted of crimes involving controlled substances that Farak had analyzed").

By failing to conduct an investigation directed toward the extent to which Sonja Farak and other

chemists engaged in malfeasance relative to the Hinton laboratory, the Commonwealth breached that duty.

Given that an investigation constitutes merely an attempt to learn, upon the discovery of the malfeasance of multiple chemists, the Commonwealth also had a higher duty; to learn of the extent to which the integrity of its evidence had been compromised. *Cotto*, 471 Mass. at 112 ("[t]he Commonwealth's obligation to conduct an investigation is premised on a prosecutor's 'duty to learn of and disclose to a defendant any exculpatory evidence that is 'held by agents of the prosecution team,'' who include chemists working in State drug laboratories") (*quoting Ware*, 471 Mass. at 95, *quoting Commonwealth v. Beal*, 429 Mass. 530, 532 (1999)).

As a proximate result of the failure to investigate, such higher duty was also breached. Consequently, despite the passage of years and notwithstanding the Commonwealth's duty to investigate, learn and disclose (and the above-quoted articulation of that duty by the Supreme Judicial Court, now years ago), our Commonwealth generally and criminal defendants particularly still do not know the

nature and extent to which the integrity of the evidence has been impaired.

As articulated by the Supreme Judicial Court, the Commonwealth's duty to learn of and disclose the nature and extent of the impairment of its evidence in this regard is grounded on the constitutional obligation to disclose exculpatory evidence. *Cotto*, 471 Mass. at 112. As a foreseeable result of the breach of such duty, Mr. Escobar and every similarly situated defendant has been deprived of such exculpatory evidence.

II. That there has been no investigation as to Ms. Farak's conduct at the Hinton laboratory serves to prove Mr. Escobar's central thesis: that the Commonwealth failed to investigate whether any Hinton laboratory chemists - besides Ms. Dookhan - functioned as bad actors.

As described previously, Ms. Farak's poly-substance intake rendered her reported results unreliable. *See, e.g.,* R.A. 280-81 ("[b]ecause on almost a daily basis Farak abused narcotics in 2005 to 2009 while she was working, there is no assurance that she was able to perform chemical analysis accurately or to detect when the equipment for testing drugs needed adjustments to work properly").

Moreover, such chemist's poly-substance intake had been underway while she worked at the Hinton laboratory. R.A. 281. Consequently, there was at least a reasonable possibility that, because of such malfeasance, Ms. Farak's reported testing results while working at the Hinton laboratory should be regarded as unreliable.

Furthermore, there is a certainty that the results concerning Hinton laboratory samples Ms. Farak reported while such chemist was working at the Amherst laboratory - and testing while impaired - should be deemed unreliable. In essence - and as a result of her testing while impaired, there was no assurance that Ms. Farak could make the "needed adjustments" to the testing equipment so as to obtain accurate results. R.A. 284-85. Therefore, the results of tests of Hinton laboratory samples conducted by Ms. Farak while she was at the Amherst laboratory were unreliable.

Such conclusion finds further support in the fact that Ms. Farak's impairment worsened in 2010 ("[i]n 2010, Farak performed all of her lab work while under the influence of narcotics") and worsened further in 2011 ("[i]n 2011, Farak's use of cocaine ramped up, as

she used lab standards, police-submitted power cocaine, and she began to smoke rocks of cocaine"). R.A. 284-85. Throughout that time, Ms. Farak was testing Hinton laboratory samples. R.A. 398-400.

Since chemist Farak tested thousands of Hinton laboratory samples, given the Commonwealth's failure to investigate, learn and disclose, there would seem to be thousands of defendants who do not know their convictions are grounded on unreliable evidence. *See* R.A. 291 ("Farak's drug use impaired her ability to test and analyze controlled substances and to check the equipment and instruments used to analyze suspected drugs on occasions which cannot be identified"). Furthermore, since the Commonwealth stymied - by delay and opposition - all of the defense efforts to secure such an investigation, there is no end in sight to this corrosive blight upon the integrity of our criminal justice system. *Compare Bridgeman II*, 476 Mass. at 334-35 (Hines, J., *dissenting*) ("[t]he only fitting end to this blight on the integrity of our criminal justice system is vacatur and dismissal with prejudice of the convictions of all relevant Dookhan defendants").

Even more to the point, the foregoing establishes that Ms. Dookhan was not the sole bad actor at the Hinton laboratory; a chemist who for years engaged in testing while impaired cannot but be considered to have been a bad actor. Every conviction in every case in which such chemist impaired the integrity of the evidence is, at an absolute minimum, under a corrosive cloud of suspicion.

In essence, that an extraordinarily bad actor had, for years, impaired the integrity of the evidence of the Hinton laboratory, yet was not identified by the Inspector General, serves to establish the propositions at the core of Mr. Escobar's argument: despite its stated conclusion, the Inspector General did not investigate whether Ms. Dookhan had been the sole bad actor at the Hinton laboratory and, hence, that the Commonwealth remains in breach of its constitutional duty to investigate, learn and disclose. *Ware*, 471 Mass. at 95; *Cotto*, 471 Mass. at 112.

III. The Inspector General's misconduct.

The Inspector General was entrusted with the responsibility of investigating the extent to which the integrity of the Commonwealth's evidence at that lab had been compromised. The Inspector General's March 4, 2014, report both detailed the investigation conducted and set forth the conclusion Annie Dookhan had been the "sole bad actor" at the Hinton laboratory. R.A 141. The Inspector General issued a press release with that report that served to emphasize such stated conclusion. R.A. 150 ("[t]he comprehensive review found that, other than Dookhan, no chemist intentionally falsified his or her test results, . . .").

The foregoing led to universal reliance - including the reliance of the Department of Public Health (R.A. 170), of the Suffolk County District Attorney's Office (R.A. 171-72); and of the Office of the Attorney General (R.A. 173-74) - on the dual premises that the Inspector General had conducted a "comprehensive review" directed toward determining whether bad actors other than Ms. Dookhan had been at work at the Hinton laboratory and that such analysis had established that there were none. R.A. 150.

Examination of the Inspector General's report, however, establishes that it did not conduct an investigation as to whether there were any other bad actors at the Hinton lab; absent from such report is mention of any investigation in that regard. Instead, there is description only as to the following:

- The emergence of the drug lab crisis (R.A. 33-39);
- The fact that the Hinton drug lab had been under the control of the Department of Public Health (R.A 41);
- The lack of resources at the drug lab (R.A. 43-45);
- The lack of accreditation of the lab (R.A. 47-48);
- The lack of oversight at the lab (R.A. 49);
- The lack of training at the lab (R.A. 55-58);
- The lack of protocols at the lab (R.A. 59-61);
- The inconsistent testing practices at the lab (R.A. 63-69);
- The ineffective quality control measures at the lab (R.A. 71-75);
- The lack of heightened security at the lab (R.A. 77-80);
- Chain-of-custody concerns at the lab (R.A. 81-89);
- The malfeasance of Ms. Dookhan (R.A. 91-101);

- Ms. Dookhan's breach of May, 2011 (R.A. 103-106);
- The failure to disclose Ms. Dookhan's malfeasance (R.A. 107-109);
- The failure of management that allowed for Ms. Dookhan's malfeasance (R.A. 111-113);
- Sampling issues in drug trafficking cases (R.A. 115-133); and,
- Sample retesting by the Office of the Inspector General (R.A. 135-140).

The key to Mr. Escobar's argument is what is not on that exhaustive list: description as to any inquiry concerning whether others, besides Ms. Dookhan, engaged in behavior similar to her malfeasance. Granting the eminently reasonable proposition that, had there been investigation to such effect, it would have been detailed in the report, the absence of such detail establishes that there was no such inquiry.

The essential problem in that regard is that analyses as to lack of resources, lack of oversight, inadequate protocols and the other matters mentioned in the foregoing list do not constitute consideration as to whether other chemists engaged in malfeasance similar to that of Ms. Dookhan. Not having found evidence as to Ms. Farak's evidence malfeasance or that of any other bad actors while considering such

matters as lack of training could not support a conclusion as to how many bad actors worked at the Hinton laboratory, yet a finding to such effect was set forth as the primary conclusion by the Inspector General.

The Inspector General wrote that "the OIG found no evidence that any other chemist at the Drug Lab committed any malfeasance with respect to testing evidence or knowingly aided Dookhan in committed her malfeasance." R.A. 142. That the Inspector General found no such evidence - including no evidence relative to Ms. Farak - may be seen as a result of its having not looked for any.

In effect, the Commonwealth was required to investigate the extent to which its evidence had been impaired by any such actors, not simply report what it might have happened upon while looking into something else.

As noted, the reliance upon the Inspector General's principal stated and misleading conclusion, upon which was - foreseeably - universal.

In that regard, the Suffolk Superior Court acquired a rudimentary understanding of Mr. Escobar's argument relative to the motion to dismiss only long after announcing its decision to disregard such part of that argument as concerned Ms. Farak.[6] Particularly given that context, the Suffolk Superior Court's denial of the motion to dismiss comprised an abuse of discretion. *See Commonwealth v. Washington W.*, 462 Mass. 204, 213-18 (2012) (*applying* that standard to review concerning a Superior Court's decision concerning a motion to dismiss).

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[6] The Suffolk Superior Court announced that decision relatively early in the proceeding. Tr. 8-17-17/25; Tr. 8-17-17/34. *See also* R.A. 407. Substantially later, the following discussion took place:

> MR. McKENNA: And the motion from November of 2015 essentially is based on *Cronk*, alleging that the filing of the -- creation of a report upon which the entire system has relied created the same sort of misconduct that Judge Carey would find sufficient to warrant dismissal based on *Cronk*.
>
> THE COURT: You're saying the IG committed misconduct?
>
> MR. McKENNA: Yes, Your Honor.
>
> THE COURT: Okay, that is a different argument.
>
> MR. McKENNA: That's the argument in the November, 2015 motion.

Tr. 8-17-17/52-53.

IV. The willfully misleading conduct of the Inspector General has caused a multi-year breach of the constitutional rights of many and, consequently, warrants the sanction of dismissal.

The Inspector General could not but have anticipated the reliance on the stated conclusion that Ms. Dookhan had been the sole bad actor at the Hinton laboratory. R.A. 141. The prominence given to that stated conclusion in both the March 4, 2014, report and the accompanying press release establishes that such reliance was invited. R.A. 150.

As a foreseeable result of the Inspector General's conduct, years have passed with no investigation as to the conduct of other bad actors at the Hinton laboratory. The Commonwealth has sought to justify the lack of investigation by inventing a prerequisite - contending that its duty to investigate applies only where there already is evidence that a particular chemist engaged in criminal conduct. *See, e.g.*, Tr. 8-17-17/19-20, 26, 28. In that regard, not only was there plenty of evidence of criminal misconduct by Ms. Farak, but also it would be nonsensical to require what would be found by an investigation be in hand for there to be an investigation. Neither *Cotto* nor *Ware* contemplate

such requirement; rather, the relevant duty applies not upon proof of criminal activity, but where there is evidence that a chemist "may have compromised the evidence." *Cotto*, 471 Mass. at 112; *Ware*, 471 Mass. at 95. In essence, the duty to learn and disclose is founded on the constitutional obligation to provide exculpatory evidence, and such obligation is not restricted to evidence of criminal activity; non-criminal malfeasance by a bad actor working in a drug laboratory is not exempt from disclosure. *Cotto*, 471 Mass. at 112.

The Inspector General's deliberate conduct served to minimize the understanding of the nature and extent of the problems at the Hinton laboratory, and so of the nature and extent to which the integrity of the Commonwealth's evidence had been compromised. Such result was, of course, the opposite of the task with which the Inspector General had been entrusted. Upon finding that agents of the Commonwealth had engaged in egregious prosecutorial misconduct, the intent of which was "to conceal the extent of underlying misconduct by another government actor, Farak" the Hampden Superior Court imposed dismissal grounded on presumptive prejudice. R.A. 347.

The same remedy for deliberate actions with the same intent is applicable here. Given the scale of the foreseeable result of the action taken with that intent - thousands not knowing their convictions were subject to dismissal, the most severe sanction is appropriate. In effect, the Inspector General's egregiously and willfully misleading stated conclusion as to there being only one bad actor at the Hinton laboratory breached Mr. Escobar's constitutional right to exculpatory evidence, and such right of all similarly situated.

In essence, given the willfulness and magnitude of the Commonwealth's egregious prosecutorial misconduct, together with the concomitant wholesale breach of defendants' constitutional Due Process rights, the circumstances here render appropriate the result considered in such cases as *Commonwealth v. Cronk*, 396 Mass. 194, 198-99 (1985) - and imposed by the Hampden Superior Court (R.A. 347): dismissal grounded on presumptive prejudice. *See Commonwealth v. Lewin*, 405 Mass. 566, 579 (1989).

V. Dismissal is also warranted under a lost-evidence analysis.

The Commonwealth's breach of its duty to investigate, learn and disclose has caused each concerned defendant to have lost the use of the exculpatory evidence that would have been obtained. Where, as here, the Commonwealth has caused the loss of evidence, "[t]*he defendant is therefore entitled to relief for the Commonwealth's failure to preserve the [lost evidence] if he establishes a 'reasonable possibility, based on concrete evidence rather than a fertile imagination,' that access to the [evidence] would have produced evidence favorable to his cause.*" *Commonwealth v. Williams*, 455 Mass. 706, 714, 718 (2010) (italics in original) (*quoting Commonwealth v. Neal*, 392 Mass. 1, 12 (1984), *quoting State v. Michener*, 25 Or. App. 523, 532 (1976)).

The fact that Ms. Saunders' number of reported results were comparable to the exceptionally-high, fraudulently inflated numbers reported by Ms. Dookhan indicates a reasonable possibility that she engaged in comparable conduct. Since evidence that Ms. Saunders engaged in conduct comparable to Ms. Dookhan would indicate that Mr. Escobar's conviction should be

vacated, such evidence would have been "favorable to his cause." *Williams*, 455 Mass. at 714. Thus, the evidence would meet Mr. Escobar's threshold burden.

The question could then arise as to the degree of the Commonwealth's culpability, the materiality of the evidence, and the prejudice to the defendant. *Williams*, 455 Mass. at 714. Those factors establish that Mr. Escobar would be entitled to relief.

With respect to the Commonwealth's culpability, now - years after the Supreme Judicial Court held that the duty to investigate, learn and disclose applied relative to chemists' misconduct in the drug laboratories scandal, the Commonwealth not only failed to investigate, but it opposed both any order that it investigate and any order that it provide notice as to whether it would investigate.

In *Commonwealth v. Sasville*, the prosecutor's grossly negligent conduct, which bordered on bad faith, was deemed sufficient to support a finding of culpability. *Commonwealth v. Sasville*, 35 Mass. App. Ct. 15, 22-29 (1993). Here, the Inspector General's conduct was several orders of magnitude beyond that deemed sufficient in *Sasville*, and the Commonwealth is fully culpable for the loss of evidence.

Evidence that constituted a revelation that Ms. Saunders had engaged in conduct comparable to one of the extraordinarily bad actors at the Hinton laboratory would establish that Mr. Escobar was entitled to a conclusive presumption of egregious government misconduct. *See Commonwealth v. Scott*, 467 Mass. 336, 352 (2014) ("as a result of the revelation of Dookhan's misconduct, and where the defendant proffers a drug certificate from the defendant's case signed by Dookhan on the line labeled 'Assistant Analyst,' the defendant is entitled to a conclusive presumption that egregious government misconduct occurred in the defendant's case"). Thus, such evidence would be wholly material to his case.

The prejudice caused by the loss of evidence has been illustrated by such cases as *Commonwealth v. Ubeira-Gonzalez* - depicting precisely how the lack of evidence mattered. *Commonwealth v. Ubeira-Gonzalez*, 87 Mass. App. Ct. 37 (2015). In that matter, the record closed and the argument took place (on October 2, 2014) at a time when the Attorney General's Office still held critical exculpatory evidence undisclosed. *Ubeira-Gonzalez*, 87 Mass. App. Ct. at 37; R.A. 332-33.

Without the withheld exculpatory evidence, the Appeals Court knew only of that part of Ms. Farak's malfeasance which concerned her theft of narcotics. *Ubeira-Gonzalez*, 87 Mass. App. Ct. at 43. In turn - and without any information as to Ms. Farak's poly-substance intake, the Appeals Court had no reason to conclude that, at the time Ms. Farak tested the samples attributed to the defendant (2009), her reported results were unreliable and, consequently, held the defendant's claim failed because he had not carried his burden of proof. *Ubeira-Gonzalez*, 87 Mass. at 38, 44. The Commonwealth's breach of its duty to investigate, learn and disclose caused the same prejudice here. *See Ubeira-Gonzalez*, 87 Mass. at 44.

Moreover, where the loss of evidence is a consequence of recklessness or bad faith by the government, the defendant may be entitled to a remedy even without meeting the foregoing test. *Williams*, 455 Mass. at 718-19. Here, the Commonwealth enduring failure to conduct any investigation readily may be deemed to embody a reckless approach to constitutional obligation, or bad faith.

Here, acting on behalf of the government, the Inspector General failed to investigate, yet acted to cause universal reliance on the proposition that it had - with the foreseeable result that the constitutional rights of thousands would be violated. In that context, the bad faith requirement is met, leaving only the question or remedy - with dismissal being the appropriate remedy.

VI. Dismissal is appropriate.

As noted, in *Ware*, the Supreme Judicial Court spoke of the Commonwealth's duty to investigate. *Ware*, 417 Mass. at 95. In *Cotto*, that Court referenced that duty, wrote of the Commonwealth's duty to learn and disclose - and made clear that honoring those duties was a constitutional imperative. *Cotto*, 471 Mass. at 112, 115. Here - in response to such teachings, the Commonwealth failed to investigate the conduct of Ms. Farak at the Hinton laboratory, failed to investigate the conduct of any potential other bad actors at the Hinton laboratory, opposed any order that it conduct any such investigation - and even opposed any order that it submit notice as to whether it will conduct any such investigation.

Consequently, the pace towards learning of the extent to which Ms. Farak compromised the integrity of the Commonwealth's evidence at the Hinton laboratory has been slower than glacial; at least glaciers move. *See Bridgeman II*, 476 Mass. at 333 (Lenk, J., concurring, with whom Budd, J., joins) ("[m]indful of this, I share the dissenting Justice's frustration with the unacceptably glacial systemic response to date and join in her view that extraordinary measures are now in order"). Here, though years have elapsed, no such investigation is even on the horizon.[7]

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[7] The Suffolk County District Attorney's Office is not alone in such approach to the constitutional obligations of an American prosecutor, as indicated by Judge Carey's observation as to a position taken by the Office of the Attorney General:

> The AGO offers patently baseless defenses for its withholding of exculpatory evidence. Most recently and surprisingly, in 2017, the AGO denies having had any legal obligation to turn over the mental health worksheets to district attorneys because the AGO had not prosecuted the drug lab defendants. That position is at odds with fundamental principles of fairness. "[T]he duties of a prosecutor to administer justice fairly, and particularly concerning requested or obviously exculpatory evidence, go beyond winning convictions." *Commonwealth v. Ware*, 471 Mass. at 95, *quoting Commonwealth v. Tucceri*, 412 Mass. 401, 408 (1992).

R.A. 334.

Moreover, the Commonwealth's approach to part of the problem is that explicitly rejected by the Supreme Judicial Court in *Bridgeman II*. Speaking of cases in which the integrity of the evidence was impaired by having been tested by Ms. Farak while at the Amherst laboratory, the Commonwealth noted that "[t]hose are toxic, and if someone brings me a Sonja Farak Amherst drug certificate on a Suffolk County case, at least in Suffolk County speaking for what we're doing here, because our numbers are relatively low, that person will assent to a motion to vacate and will get a nolle pros." Tr. 8-17-17/32.

In doing so, the Commonwealth would seem to both acknowledge the existence of matters in which convictions should be dismissed and to make clear that it will do nothing to provide information to those concerned. *Contrast Berger v. United States*, 295 U.S. 78, 88 (1935) (*noting* that the special role of the American prosecutor is not that of the representative of an ordinary party to a controversy, "'but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution

is not that it shall win a case, but that justice shall be done'").

In *Bridgeman II*, the Court could not have been more clear; those in that circumstance must be notified and informed - waiting for them to appear in court is constitutionally unacceptable. *See, e.g.*, *Bridgeman II*, 476 Mass. at 315 ("[a]s applied here, prosecutors had a responsibility timely and effectively to disclose Dookhan's misconduct to all affected defendants because Dookhan might erroneously have found substances that were not controlled substances to be a controlled substance, or to be a certain weight, creating the risk that a defendant may have been found guilty of a drug crime he or she did not commit").

Despite that teaching by the Supreme Judicial Court, there has been no such notice to those who need be informed and no investigation as to who would need to be informed (and filing *nolle prosequis* as cases appear would seem to insure that there will not be an investigation). *Compare Bridgeman II*, 476 Mass. 320-21 (*describing* "serious and pervasive collateral consequences that arise from a drug conviction").

An order from this court could cause an investigation to begin at some point in the future - years late, or the court could speak to the next time the Commonwealth might disregard teaching after teaching by the Supreme Judicial Court, and order dismissal.

Given the passage of years - and even the passage now of years since the decisions in *Cotto* and *Ware*, should the court merely speak again of the duty to investigate, learn and disclose - and the constitutional imperative that duty embodies, doing so would establish that willful breach in that regard may be undertaken without appreciable consequence.

Moreover, in response to a mere re-articulation of the duty, the question would arise as to who should undertake the investigation. Should the Office of the Attorney General do so, we could expect to obtain a result similar to that concerning the investigation of Ms. Farak's conduct at the Amherst laboratory. Conducted only because of the holding in *Cotto* that an investigation was constitutionally imperative, the Caldwell investigation grievously failed to qualify as thorough.

Rather, such inquiry was grounded on an unproductive and unfortunate approach to investigation in which the investigators chose not to draw conclusions from the evidence. Such approach was delineated in the report:

> 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.

R.A. 228 n. 43.

As a result of deliberately failing to draw conclusions from the evidence found, the Attorney General failed to follow that evidence. For example, when evidence emerged that Ms. Farak had altered data in the Amherst laboratory's computer system to further her malfeasance, the Attorney General did not conduct a forensic analysis of that system or otherwise seek to determine the extent to which the integrity thereof had been compromised. R.A. 195-96. Similarly, when evidence emerged that Ms. Farak had impaired the integrity of the evidence assigned to her co-workers, the investigators made no effort to determine the extent of that impairment - except for asking Ms. Farak to tell them what she had done. R.A. 192-93.

(Given that, as part of Ms. Farak's systematic theft of narcotics, she would replace what she stole with counterfeit substances - and that such counterfeit substances would remain identifiable within those samples indefinitely - determining the extent of that impairment would have been feasible).[8]

The adoption of such approach to investigation establishes both that the constitutionally mandated *thorough* investigation as to the nature and extent of Ms. Farak's impairment of the evidence at the Amherst laboratory still has not taken place and that the Attorney General should not be entrusted with conducting an investigation of Ms. Farak's conduct at the Hinton laboratory.

[8] The Hampden Superior Court's orders of dismissal did not extend to the convictions in three matters in which the defense argument was based on the proposition that all convictions should be dismissed in cases in which Ms. Farak had had unsupervised access to the evidence, including particularly that of her co-workers. R.A. 372-83, 389-91. This Court is respectfully invited to take judicial notice that, on June 26, 2017, Notices of Appeal were filed in those matters: *Commonwealth v. Ware*, HDCR2007-01072; *Commonwealth v. Aponte*, HDCR2012-00226; and *Commonwealth v. Brown*, HDCR2005-01159. On July 27, 2017, the Commonwealth responded by filing *nolle prosequis* in each such case, thereby precluding appellate consideration of such defendants' argument.

Years ago, Mr. Escobar filed a motion for leave to conduct post-conviction discovery as to the chemist who tested the substance attributed to him. R.A. 19. As detailed in the Statement of the Case, those years have passed in no small part because of the repeated failure of the Commonwealth to comply with a series of court orders.[9] While Mr. Escobar would still be willing to undertake such inquiry, such passage of years itself would provide yet another basis for the conclusion that dismissal has become more appropriate than investigation.

The primary basis for dismissal, however, concerns the ongoing deprivation of the right to exculpatory evidence of Mr. Escobar and thousands of others, which constitutional deprivation was caused by the Inspector General's misleading report.

[9] Had the Suffolk County District Attorney's Office complied with the Suffolk Superior Court's August 11, 2015, order that it file such an opposition or response within 60 days (R.A. 8), this matter could have been litigated in that court in 2015, not 2017; had the prosecution complied with the November 30, 2015, order (R.A. 9) that granted an additional 30 days to respond, this matter still could have been litigated well before the *Bridgeman II* stay went into effect on June 28, 2016. R.A. 10.

In 2015, the Supreme Judicial Court wrote of the imperative that the Commonwealth "remove the cloud that has been cast over the integrity of the work performed at that facility, which has serious implications for the entire criminal justice system." *Cotto*, 471 Mass. at 115. The Commonwealth willful failures here have allowed that corrosive cloud to remain, and contrast with the principle that compliance with the rulebook is not merely optional.[10]

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[10] *See* the (unpublished) May 19, 2016, Memorandum Opinion and Order (Hanen, J.) from *State of Texas v. United States*, CIVIL NO. B-14-254, Dist. Ct. S.D. Texas, *S.C.*, 809 F.3d 134, 146 (5th Cir. 2015), and 579 U.S. ___ (2016), at Add. 68 ("[a]n exchange between two characters from a recent popular film exemplifies what this case is, and has been about:

> FBI Agent Hoffman: Don't go Boy Scout on me. We don't have a rulebook here.
>
> Attorney James Donovan: You're Agent Hoffman, yeah?
>
> FBI Agent Hoffman: Yeah.
>
> Attorney James Donovan: German extraction?
>
> FBI Agent Hoffman: Yeah, so?
>
> Attorney James Donovan: My name's Donovan, Irish, both sides, mother and father. I'm Irish, you're German, but <u>what makes us both Americans? Just one thing . . . the rulebook</u>. <u>We call it the Constitution and we agree to the rules and that's what makes us Americans</u>. It's all that makes us Americans, so don't tell me there's no rulebook ...

Whether it be the Constitution or statutory law, this entire case, at least in this Court, has been about allegiance to the rulebook") (*quoting* Bridge of Spies (DreamWorks 2015) (emphasis added by court) Screenplay by Matt Charman, Ethan Coen and Joel Coen).

The claim that the disregard of the teaching of the Supreme Judicial Court has corroded confidence in the integrity of our system of criminal justice is not mere rhetoric, but rather is supported by the observation of the Suffolk Superior Court herein:

> Trial judges are now faced with the undeniable reality that, twice over the past five years, the courts of Massachusetts have been asked to rely on representations by the Commonwealth that the tip of an obvious iceberg is not so menacing as it may seem, and that nothing more sinister lies underneath. Twice this premise has been proven wrong, at the cost of due process to criminal defendants. In short, Dookhan and Farak were each responsible for potentially thousands of unfair criminal proceedings, and thus occasions of injustice, despite repeated assurances that their misconduct was isolated and contained. *I frankly do not see why any trial judge or any defendant should be willing to rely purely on such government assurances yet again.*

R.A. 405 (underlining in original, italics added).

That those such as Judge Roach - who have worked diligently at the ground level in this matter - have lost confidence in the government's assurances is not trifling, but rather has serious implications and illustrates the cost of permitting a corrosive cloud to remain - indefinitely - over the integrity of the work performed at our Commonwealth's drug testing facilities. *See Cotto*, 471 Mass. at 115. *Compare, Bridgeman II*, 476 Mass. at 333-34 (Lenk, J., concurring, with whom Budd, J., joins) ("[r]ecognizing

what Dr. Martin Luther King, Jr., once called "the fierce urgency of now," we must act swiftly and surely to staunch the damage and to make things as right as we can").

By establishing that there are lines which must not be crossed, the sanction of dismissal would serve both to stanch the damage and to restore and preserve that lost confidence. *See Commonwealth v. Baran*, 74 Mass. App. Ct. 256, 302 (2009) ("[p]reserving public confidence in the integrity of our system of justice must be our paramount concern notwithstanding the costs our decision today might occasion").

Even should it be followed by a belated investigation, a mere reminder as to what the Commonwealth should do could not have the same effect - and confidence in our system must be restored.

Conclusion

Dismissal is appropriate to deter the recurrence of constitutional breach by the government. *See Bridgeman II*, 476 Mass. at 317 ("[t]his alternative principle is narrowly applied; "the only reason to dismiss criminal charges because of nonprejudicial but egregious police misconduct would be to create a climate adverse to repetition of that misconduct that

would not otherwise exist'") (*quoting Lewin*, 405 Mass. at 578). Dismissal here would help create a climate adverse to repetition of misleading conduct upon which relies the entire framework relative to the Hinton part of the drug laboratories scandal (as noted by the Commonwealth (Tr. 8-17-17/32) "the Inspector General's report is what we rely on for Hinton," and (Tr. 8-17-17) "[t]he entire framework is based on the IG's report."

Moreover, a primary concern is not merely the possibility of that the Commonwealth may, at some point in the future, again engage in the breach. Rather, the circumstance is markedly worse; the breach is ongoing now.

Thus, there is not simply a possibility of recurrence, but rather Commonwealth's failure to do what the rulebook plainly requires - to investigate, learn and disclose - is prejudicing thousands now. Such fact, together with the fact that such situation was the wholly foreseeable result of the Inspector General's misleading report, warrants dismissal.

Addressing the circumstances in the Dookhan matter - where, as here, years passed and thousands of convictions still stood upon tainted evidence, the

Supreme Judicial Court concluded that the Commonwealth should identify the cases in which it "could produce evidence at a retrial, independent of Dookhan's signed drug certificate or testimony, sufficient to permit a rational jury to find beyond a reasonable doubt that the substance at issue was the controlled substance alleged in the complaint or indictment," and dismiss with prejudice the remaining Dookhan cases. *Bridgeman II*, 476 Mass. at 327-32.

Should the Court not deem dismissal to be the proper course, a comparable order here would be appropriate.

Respectfully submitted
for Justino Escobar,

/s/ James P. McKenna

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October 13, 2017

COMMONWEALTH OF MASSACHUSETTS

Appeals Court No. 2017-P-1286.

SUFFOLK COUNTY.

COMMONWEALTH OF MASSACHUSETTS
Appellee,

v.

JUSTINO ESCOBAR,
Appellant.

Addendum.

Respectfully submitted
for Justine Escobar,

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October 13, 2017

Addendum

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

SUFFOLK SUPERIOR COURT
No. SUCR2009-10059.

COMMONWEALTH)
)
v.)
)
JUSTINO ESCOBAR)

MR. ESCOBAR'S MOTION TO VACATE AND FOR THE SANCTION OF DISMISSAL.

Now comes Justino Escobar and, pursuant to Rule 30(b) of the Massachusetts Rules of Criminal Procedure, respectfully submits a motion to vacate his conviction and for the sanction of dismissal. Mr. Escobar respectfully incorporates herein by reference several pending motions: his July 20, 2015, Motion for a New Trial; his July 20, 2015, Motion for Leave to Conduct Post-Conviction Discovery; and, his October 5, 2015, Motion to Preserve Prospective Evidence, together with the exhibits filed with those motions.

As detailed in the accompanying memorandum, pursuant to this motion Mr. Escobar seeks to have his conviction in the above-captioned matter vacated and the underlying charge dismissed because of the egregious prosecutorial misconduct of the Massachusetts Inspector General. Following an investigation, on March 4, 2014, such official issued a report and press release which, in principal part, set forth the conclusion that Ms. Annie Dookhan had been the "sole bad actor" at the Drug Laboratory at the William B. Hinton State Laboratory Institute (the Hinton laboratory). Necessarily implicit in that stated conclusion was the proposition that the Inspector General had conducted an analysis as to whether there had been other bad actors at that laboratory.

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

SUFFOLK SUPERIOR COURT
No. SUCR2009-10059.

COMMONWEALTH)
)
v.)
)
JUSTINO ESCOBAR)

MR. ESCOBAR'S MOTION FOR A *COTTO* ORDER.

Now comes Justino Escobar and respectfully submits a motion for an Order consistent with the Supreme Judicial Court's holding in *Commonwealth v. Cotto*, 471 Mass. 97, 115 (2015), which order would require the Commonwealth to disclose within thirty days whether it will conduct an investigation as to whether any chemists at the Hinton laboratory - besides Ms. Dookhan and Ms. Farak - engaged in malfeasance which impaired the integrity of the Commonwealth's evidence.

Such an investigation is imperative to remove the cloud that has been cast over the integrity of the work performed at that facility, which has serious implications for the entire criminal justice system.

Following hearing motion DENIED. The Cotto case does not establish a general Rule for the issuance of investigative orders in other cases, particularly orders as broad in scope as this motion suggests. To the extent defendant's motion for new trial is ultimately deemed by the court to have any merit, a more tailored and narrow order may be appropriate but those issues have not yet been determined, having just been taken under advisement today.

Respectfully submitted
for Justino Escobar,

2017 JUN -8 AM 11:18

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June 6, 2017

Agnes, J.
8/17/2017

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
DOCKET NO. SUCR 2009-10059

COMMONWEALTH

v.

JUSTINO ESCOBAR

RULING AND ORDER ON DEFENDANT'S MOTION FOR POST-CONVICTION DISCOVERY

Defendant Justino Escobar plead guilty in December, 2009 to trafficking in cocaine with a net weight in excess of fourteen grams. He was sentenced to 8-12 years in state prison. The plea represented a charge concession on the part of the Commonwealth. The drug samples involved in Defendant's case were analyzed in December, 2008, at the William A. Hinton State Laboratory Institute. The certificate of drug analysis (for 252.18 grams of cocaine) is signed by Della Saunders and Kate Corbett.

Mr. Escobar began seeking to challenge his plea in the summer of 2015. His first Motion for New Trial (Docket, Paper 32) and Motion for Leave to Conduct Post-Conviction Discovery (Paper 33) were filed in July, 2015. Multiple motions seeking different remedies have followed, but until recently were not heard. Beginning in June, 2016, the case was stayed along with many others due to the Bridgeman proceedings before the SJC. Once the stay ended and new (or renewed) pleadings were filed on both sides, the court granted defendant's motion for non-evidentiary hearing. A hearing was held on August 17, 2017. Certain motions heard that day have already been ruled on by margin endorsement.

The discovery motion requires a bit more explanation. Defendant's various pleadings on this subject present a moving target, in that he has sought different discovery for different reasons at different times. The allegations and my reasoning with respect to a fair order are outlined below. Defendant's Motion for Leave to Conduct Post-Conviction Discovery (Paper 33) is **ALLOWED TO THE LIMITED EXTENT OUTLINED BELOW, and OTHERWISE DENIED.**

The Dookhan Allegations and the Inspector General Report

In March, 2014, the Massachusetts Inspector General issued a report entitled "Investigation of the Drug Laboratory at the William A. Hinton State Laboratory Institute, 2001-2012." (IG Report). The IG's investigation was triggered by widespread concern over the actions of Hinton drug analyst Annie Dookhan. Dookhan resigned from her job in early 2012; was arrested in September, 2012; and pleaded guilty in November, 2013, to twenty-seven counts including obstruction of justice and tampering with evidence. The IG Report documented wholesale misconduct by Dookhan which included: "dry labbing; contaminating samples; removing samples from the evidence locker without following proper procedures; postdating entries in the log book; and forging others' initials." "Dookhan also had an unusually high productivity level in the lab. She reported test results on samples at rates consistently much higher than any other chemist in the lab." According to the SJC, an internal Hinton Lab report stated that "'Dookhan's consistently high testing volumes should have been a clear indication that a more thorough analysis and review of her work was needed.'" Commonwealth v. Scott, 467 Mass. 336, 339-340 (2014).

The IG Report concluded that, notwithstanding widespread deficiencies in training, protocols, chemist oversight, and security, "Dookhan was the sole bad actor at the Drug Lab.

Though many of the chemists worked alongside Dookhan for years, the OIG found no evidence that any other chemist at the Drug lab committed any malfeasance with respect to testing evidence or knowingly aided Dookhan in committing her malfeasance." IG's report at page 1, Executive Summary. That said, reportedly thousands of individual defendants have waited years to see any resolution of their challenges to Dookhan's work. Bridgeman II, 476 Mass. 298 (2017).

The Farak Allegations and the Attorney General Reports

Sonja Farak worked as a chemist at the Amherst drug lab from August 2004 until its closure on January 18, 2013. Farak transferred to Amherst from the Hinton Lab, where she had worked from 2002 to 2004.[1] At the hearing before me, counsel for Defendant emphasized that Farak continued to test drug samples from Hinton for several years after arriving at Amherst.[2] Counsel for the Commonwealth emphasized in rebuttal that these individual samples were shipped directly to Amherst from Hinton, are identifiable by control number, and have no connection to the sample tested in 2008 in Mr. Escobar's case.

On January 6, 2014, Farak plead guilty to tampering with evidence at, and stealing cocaine from, the Amherst facility. In its 2015 decision prior to a full investigation by the Commonwealth, the SJC opined that "it appears from the record that Farak was tampering with evidence at the Amherst drug lab in order to support her own cocaine habit," and ruled that the Commonwealth had a duty to "thoroughly investigate the timing and scope of Farak's misconduct at the Amherst drug lab." Commonwealth v. Cotto, 471 Mass. 97, 109, 115 (2015).

---

1 Only approximately one half of this time was in the drug portion of the lab.

2 As I understand it, Farak was not singled out to receive these samples. The Amherst lab was participating in a program to assist the Hinton lab with overflow work, and any available Amherst chemists were assigned to these samples as part of their job.

The Commonwealth ultimately responded to Cotto in two ways. An Assistant Attorney General issued, on April 1, 2016, a document entitled "Investigative Report Pursuant to Commonwealth v. Cotto," 471 Mass. 97 (2105), also known as the Caldwell Report. Two Special Assistants Attorney General oversaw an investigation resulting in a second report. Following these investigations, it has become apparent that the scope of Farak's compromising of our criminal justice system rivals that of Dookhan. See Bridgeman II, 476 Mass. at 313 n. 17 ("[T]he full scope of Farak's misconduct has yet to be determined."); Commonwealth v. Scott, 467 Mass. at 341-342 ("her [Dookhan's] wrongdoing has had an enormous impact on the criminal justice system in Massachusetts."); Commonwealth v. Charles, 466 Mass. 63, 65 & 89.

This Case

There is no allegation that Dookhan or Farak signed Mr. Escobar's certification, or that either of them supervised the analyst who did. There is no evidence on this record that Dookhan or Farak had anything to do with Mr. Escobar's drug sample in 2008. The fact that Farak worked at Hinton five years earlier is irrelevant. Thus, Dookhan and Farak are both personally irrelevant to this case. Not so, however, the examples they have set and some of the lessons learned.

The potentially troubling piece of information in this case is that Della Saunders, the chemist who did analyze the drugs seized from Mr. Escobar, was identified by certain data included in the IG Report as having drug testing productivity numbers to rival Dookhan's during portions of the 2002-2012 time period reviewed. The core argument in both Defendant's motion for new trial and his motion for discovery is, thus: "the fact that another chemist reported a comparable number of results supports the conclusion that such other chemist engaged in comparable conduct." Paper 33 at page 1.

The Rule 30 Standard As Applied to this Case

The Commonwealth is of course quite correct that Rule 30 generally requires specific -- not speculative or conclusory -- allegations that new evidence would have aided a defense. Cotto, 471 Mass. at 113-114 ("wholly speculative" nature of the allegations of Farak's misconduct at that time). Both sides engaged in rampant speculation at the hearing before me about why Ms. Saunders' production numbers might have been high. The Commonwealth maintains that it is the Defendant's burden to make a sufficiently adequate showing warranting an evidentiary hearing for new trial. Opposition at page 6.[3] But there is no denying that in Scott, and then again in Cotto, the SJC embroidered on the usual Rule 30 protocol, in an effort to ensure fairness to drug defendants in the Commonwealth in the face of extraordinary circumstances.

In Scott, the Court established that drug defendants whose cases bore a Dookhan certification as primary or secondary chemist presumptively met the first prong of a two-prong standard for new trial. 467 Mass. at 354. In Cotto the court acknowledged the difficulty of a defendant's bearing this production burden absent a more full-scale investigation by the Commonwealth of lab activities: "[T]he systemic nature of Dookhan's misconduct only came to light following a thorough investigation of the Hinton drug lab. . . . The burden of ascertaining whether Farak's misconduct at the Amherst drug lab has created a problem of systemic proportions is not one that should be shouldered by defendants in drug cases." 471 Mass. at 111-112.

[3] This argument is true as far as it goes, in keeping with Commonwealth v. Shuman, 445 Mass. 268, 278 (2005)(seriousness of claim presented, and adequacy of defendant's factual showing).

In short, it is not surprising that Mr. Escobar "produces no actual evidence in support of his claim that Della Saunders engaged in malfeasance as a chemist employed at the Hinton Lab." Commonwealth's Opposition (Paper 45), at page 6. As far as the court is aware, investigation of the Hinton lab essentially ended with the IG report, which mentions chemist Saunders exactly twice.

The Commonwealth points out that in Cotto, the SJC was faced with criminal charges, yet still declined to apply the Scott presumption, due to the insufficiency of Scott's evidence of misconduct touching his case. 471 Mass at 110. But this argument is unpersuasive under all of the current circumstances. Trial judges are now faced with the undeniable reality that, twice over the past five years, the courts of Massachusetts have been asked to rely on representations by the Commonwealth that the tip of an obvious iceberg is not so menacing as it may seem, and that nothing more sinister lies underneath. Twice this premise has been proven wrong, at the cost of due process to criminal defendants. In short, Dookhan and Farak were each responsible for potentially thousands of unfair criminal proceedings, and thus occasions of injustice, despite repeated assurances that their misconduct was isolated and contained. I frankly do not see why any trial judge or any defendant should be willing to rely purely on such government assurances yet again.

On the other hand I cannot agree with the defense position that the Cotto decision provides for a general investigative order of a lab or a chemist any time a chemist's work is challenged. Nor should the existence of two extraordinarily "bad actors" automatically create suspicions about, and cast aspersions upon, other hard-working and law-abiding chemists. If chemist Saunders were not associated with what arguably would appear to be very high testing numbers, I would likely have denied Defendant's Motion for New Trial without further hearing

or discovery. Similarly, to the extent any source of expertise on the Hinton Lab had documented some follow-up investigation of Saunders and her numbers, Defendant's discovery motion would be significantly weaker.

As this record currently stands, however, I am aware of only the following very limited factual material on Saunders: She worked at the Hinton Lab in 2008 as Senior Chemist III and team leader; she volunteered to supervise the room Dookhan worked in, but that offer was not accepted by her supervisor; and during the period 2005-2008 it would appear that Saunders' productivity with respect to drug testing was higher than many other chemists, though not quite so as high as Dookhan's.

That said, I do not purport to know how to interpret, without more,[4] the so-called "pivot table" of drug testing data presented in Defendant's papers. And I am constrained to add that the limited material about Saunders is presented against the backdrop of (apparently uncontested) findings of significant training, protocol, chemist oversight, and security deficits at the Hinton lab during this period of time, including late 2008 when the drugs in this case were tested.

Conclusion

For all of these reasons, I cannot rule fairly on Defendant's Motion for New Trial without certain limited discovery about chemist Saunders and her work. **Defendant's Motion for New Trial (Paper 32) will not be taken under advisement until this discovery is completed.**

Defendant's Motion for Leave to Conduct Post-Conviction Discovery is ALLOWED as Follows, and Otherwise DENIED:

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[4] I have also reviewed in this regard the Affidavit of Nathan Tamulis, dated 6/21/16 which sets forth his work on behalf of CPCS with Hinton lab database information on drug sample work by the chemists. But this affidavit appears to be focused primarily on the work of Farak (and Dookhan), which I have ruled is immaterial to Mr. Escobar's claim. While I appreciate Mr. Tamulis appears to be stating that the referenced database may be used to analyze the work of other chemists, I have located no such analysis of Saunders' work in this file.

The Commonwealth shall produce to the Defendant within 60 days, by no later than October 27, 2017, the following information on chemist Della C. Saunders for the period 2002-2009, unless otherwise stated:

- **Those non-privileged portions of her personnel file from the Hinton lab which shall indicate her dates of employment; job titles and responsibilities; training attended or conducted; supervisors; performance reviews; complaints and commendations; hours worked; and compensation received.**
- **Any notes, transcripts, or other documentation of interviews of Saunders conducted during the period 2002 to present, by any person or entity engaged in an investigation of the Hinton or Amherst labs;**
- **A list of court cases in which Saunders testified as certifying chemist in the Commonwealth during the years 2005-2008;**
- **Available data on the numbers and types of drug tests performed by Saunders at the Hinton lab for any purpose for the years 2005-2008.**

To the extent any of this material has already been produced to the Defendant through some other mechanism or source, it need not be re-produced.

The parties to appear for a status conference in Courtroom 906 on a date in November, 2017 to be scheduled with the Session Clerk.

SO ORDERED.

Dated: August 25, 2017

Robert J.

G.L. Chapter 258, Section 3. To provide victims a meaningful role in the criminal justice system, victims and witnesses of crime, or in the event the victim is deceased, the family members of the victim, shall be afforded the following basic and fundamental rights, to the greatest extent possible and subject to appropriation and to available resources, with priority for services to be provided to victims of crimes against the person and crimes where physical injury to a person results:

(a) for victims, to be informed by the prosecutor about the victim's rights in the criminal process, including but not limited to the rights provided under this chapter. At the beginning of the criminal justice process, the prosecutor shall provide an explanation to the victim of how a case progresses through the criminal justice system, what the victim's role is in the process, what the system may expect from the victim, why the system requires this, and, if the victim requests, the prosecutor shall periodically apprise the victim of significant developments in the case;

(b) for victims and family members, to be present at all court proceedings related to the offense committed against the victim, unless the victim or family member is to testify and the court determines that the person's testimony would be materially affected by hearing other testimony at trial and orders the person to be excluded from the courtroom during certain other testimony;

(c) for victims and witnesses, to be notified by the prosecutor, in a timely manner, when a court proceeding to which they have been summoned will not go on as scheduled, provided that such changes are known in advance. In order to notify victims and witnesses, a form shall be provided to them by the prosecutor for the purpose of maintaining a current telephone number and address. The victim or witness shall thereafter maintain with the prosecutor a current telephone number and address;

(d) for victims and witnesses, to be provided with information by the prosecutor as to the level of protection available and to receive protection from the local law enforcement agencies from harm and threats of harm arising out of their cooperation with law enforcement and prosecution efforts;

(e) for victims, to be informed by the prosecutor of financial assistance and other social services available to victims, including information relative to applying for such assistance or services;

(f) for victims and witnesses, to a prompt disposition of the case in which they are involved as a victim or a witness;

(g) for victims, to confer with the prosecutor before the commencement of the trial, before any hearing on motions by the defense to obtain psychiatric or other confidential records, and before the filing of a nolle prosequi or other act by the commonwealth terminating the prosecution or before the submission of the commonwealth's proposed sentence recommendation to the court. The prosecutor shall inform the court of the victim's position, if known, regarding the prosecutor's sentence recommendation. The right of the victim to confer with the prosecutor does not include the authority to direct the prosecution of the case;

(h) for victims and witnesses, to be informed of the right to request confidentiality in the criminal justice system. Upon the court's approval of such request, no law enforcement agency, prosecutor, defense counsel, or parole, probation or corrections official may disclose or state in open court, except among themselves, the residential address, telephone number, or place of employment or school of the victim, a victim's family member, or a witness, except as otherwise ordered by the court. The court may enter such other orders or conditions to maintain limited disclosure of the information as it deems appropriate to protect the privacy and safety of victims, victims' family members and witnesses;

(i) for victims, family members and witnesses to be provided, by the court as provided in section 17 of chapter 211B, with a secure waiting area or room which is separate from the waiting area of the defendant or the defendant's family, friends, attorneys or witnesses and separate from the district attorney's office; provided, however, that the court shall designate a waiting area at each courthouse; and provided further, that designation of those areas shall be made in accordance with the implementation plan developed by the task force.

(j) for victims and witnesses, to be informed by the court and the prosecutor of procedures to be followed in order to apply for and receive any witness fee to which they are entitled;

(k) for victims and witnesses, to be provided, where appropriate, with employer and creditor intercession services by the prosecutor to seek employer cooperation in minimizing employees' loss of pay and other benefits resulting from their participation in the criminal justice process, and to seek consideration from creditors if the victim is unable, temporarily, to continue payments;

(l) for victims or witnesses who have received a subpoena to testify, to be free from discharge or penalty or threat of discharge or penalty by his employer by reason of his attendance as a witness at a criminal proceeding. A victim or witness who notifies his employer of his subpoena to appear as a witness prior to his attendance, shall not on account of his absence from employment by reason of such witness service be subject to discharge or penalty by his employer. Any employer or agent of said employer who discharges or disciplines or continues to threaten to discharge or discipline a victim or witness because that victim or witness is subpoenaed to attend court for the purpose of giving testimony may be subject to the sanctions stated in section fourteen A of chapter two hundred and sixty-eight;

(m) for victims and witnesses, to be informed of the right to submit to or decline an interview by defense counsel or anyone acting on the defendant's behalf, except when responding to lawful process, and, if the victim or witness decides to submit to an interview, the right to impose reasonable conditions on the conduct of the interview;

(n) for victims, to confer with the probation officer prior to the filing of the full presentence report. If the victim is not available or declines to confer, the probation officer shall record that information in the report. If the probation officer is not able to confer with the victim or the victim declines to confer, the probation officer shall note in the full presentence report the reason why the probation officer did not make contact with the victim;

(o) for victims, to request that restitution be an element of the final disposition of a case and to obtain assistance from the prosecutor in the documentation of the victim's losses. If restitution is ordered as part of a case disposition, the victim has the right to receive from the probation department a copy of the schedule of restitution payments and the name and telephone number of the probation officer or other official who is responsible for supervising the defendant's payments. If the offender seeks to modify the restitution order, the offender's supervising probation officer shall provide notice to the victim and the victim shall have the right to be heard at any hearing relative to the proposed modification.

(p) for victims, to be heard through an oral and written victim impact statement at sentencing or the disposition of the case against the defendant about the effects of the crime on the victim and as to a recommended sentence, pursuant to section four B of chapter two hundred and seventy-nine, and to be heard at any other time deemed appropriate by the court. The victim also has a right to submit the victim impact statement to the parole board for inclusion in its records regarding the perpetrator of the crime;

(q) for victims, to be informed by the prosecutor of the final disposition of the case, including, where applicable, an explanation of the type of sentence imposed by the court and a copy of the court order setting forth the conditions of probation or other supervised or unsupervised release within thirty days of establishing the conditions, with the name and telephone number of the probation officer, if any, assigned to the defendant;

(r) for victims, to have any personal property that was stolen or taken for evidentiary purposes, except contraband, property subject to evidentiary analysis, and property the ownership of which is disputed, returned by the court, the prosecutor or law enforcement agencies within ten days of its taking or recovery if it is not needed for law enforcement or prosecution purposes or as expeditiously as possible when said property is no longer needed for law enforcement or prosecution purposes;

(s) for victims, to be informed by the parole board of information regarding the defendant's parole eligibility and status in the criminal justice system;

(t) for victims, to be informed in advance by the appropriate custodial authority whenever the defendant receives a temporary, provisional or final release from custody, whenever a defendant is moved from a secure facility to a less-secure facility, and whenever the defendant escapes from custody. The victim shall be informed by the prosecutor about notification rights and the certification process required to access the criminal offender record information files. Persons requesting such notice must provide the appropriate authority with current information as to their address and telephone number;

(u) for victims, to be informed that the victim may have a right to pursue a civil action for damages relating to the crime, regardless of whether the court has ordered the defendant to make restitution to the victim.

(v) for one family member of a victim of a homicide, which the matter before the court is related, to possess in the courtroom a photograph, that is not of itself of an inflammatory nature, of the deceased victim that is not larger than eight by ten inches; provided, however, that at no time may the photograph be exposed or in anyway displayed in the presence of any member of the jury, or the jury pool from which a jury is to be selected in a particular matter; provided, further, that nothing in this section shall preclude the admission into evidence of a photograph that the court deems relevant and material.

(w) Where the victim or witness is an employee of the department of youth services, no law enforcement agency, prosecutor, defense counsel or parole, probation or corrections official shall disclose or state the residential address, telephone number or place of employment or school of the victim, a victim's family member or a witness, except as otherwise ordered by the court. The court may enter such other orders or conditions to maintain limited disclosure of the information as it deems appropriate to protect the privacy and safety of victims, victims' family members and witnesses.

There shall be conspicuously posted in all courthouses and police stations a summary of the rights afforded under this section. The victim and witness assistance board, pursuant to section 4, shall devise and provide posters to satisfy this requirement to court officials and police station personnel, and, upon request and at the discretion of the office and board, to any other institution or organization to post and maintain in space accessible to the general public. The board shall develop such posters in a variety of languages as determined by the Massachusetts office for victim assistance. Upon request, the board will respond, to the extent possible, to any requests for additional language translations of such posters.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

STATE OF TEXAS, ET AL., Plaintiffs,	§ § §	
V.	§	CIVIL NO. B-14-254
UNITED STATES OF AMERICA, ET AL., Defendants.	§ § §	

MEMORANDUM OPINION AND ORDER

An exchange between two characters from a recent popular film exemplifies what this case is, and has been, about:

> FBI Agent Hoffman: Don't go Boy Scout on me. We don't have a rulebook here.
>
> Attorney James Donovan: You're Agent Hoffman, yeah?
>
> FBI Agent Hoffman: Yeah.
>
> Attorney James Donovan: German extraction?
>
> FBI Agent Hoffman: Yeah, so?
>
> Attorney James Donovan: My name's Donovan, Irish, both sides, mother and father. I'm Irish, you're German, but what makes us both Americans? Just one thing . . . the rulebook.
>
> We call it the Constitution and we agree to the rules and that's what makes us Americans. It's all that makes us Americans, so don't tell me there's no rulebook . . . .[1]

Whether it be the Constitution or statutory law, this entire case, at least in this Court, has been about allegiance to the rulebook. In its prior orders concerning the actual subject matter of this case, the Court never reached the relative merits or lack thereof of the Defendants' 2014 Department of

[1] BRIDGE OF SPIES (DreamWorks 2015) (emphasis added). Screenplay by Matt Charman, Ethan Coen and Joel Coen.

Homeland Security ("DHS") Directive. The question addressed by this Court was whether the Government had to play by the rules. This Court held that it did. The Fifth Circuit has now also held that the Government must play by the rules, and, of course, that decision is now before the Supreme Court. It was no surprise to this Court, or quite frankly to any experienced legal observer, that this question would ultimately reach the Supreme Court. Consequently, the resolution of whether the Executive Branch can ignore and/or act contrary to existing law or whether it must play by the rulebook now rests entirely with that Court.

What remains before this Court is the question of whether the Government's lawyers must play by the rules. In other words, the propriety of the Defendants' actions now lies with the Supreme Court, but the question of how to deal with the conduct, or misconduct, of their counsel rests with this Court.

To that end, this Court neither takes joy nor finds satisfaction in the issuance of this Order. To the contrary, this Court is disappointed that it has to address the subject of lawyer behavior when it has many more pressing matters on its docket. It is, at best, a distraction, and there is nothing "best" about the conduct in this case. The United States Department of Justice ("DOJ" or "Justice Department") has now admitted making statements that clearly did not match the facts. It has admitted that the lawyers who made these statements had knowledge of the truth when they made these misstatements. The DOJ's only explanation has been that its lawyers either "lost focus" or that the "fact[s] receded in memory or awareness." [Doc. No. 242 at 18].[2] These misrepresentations were made on multiple occasions starting with the very first hearing this Court held. This Court would be remiss if it left such unseemly and unprofessional conduct unaddressed.[3]

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[2] To explain its conduct, the Government has filed an unredacted brief and a redacted brief with only the latter being produced to the Plaintiff States. [Doc. Nos. 242 & 243]. This Court, by necessity, will cite the unredacted brief [Doc. No. 242] as that is the brief that contains the Government's explanations. It will not unseal the unredacted brief and will only quote here those segments pertinent to this opinion.

[3] Judges on the Ninth Circuit have described a court's duty to address misconduct:

> When a public official behaves with such casual disregard for his constitutional obligations and the rights of the accused, it erodes the public's trust in our justice system, and chips away at the foundational

As the parties know, this Court has been deliberating for quite some time about the proper way to address the series of misrepresentations made by the attorneys from the Justice Department to the Plaintiff States and to this Court. This Court in at least one prior order has detailed the multiple times attorneys for the Government misrepresented the actions being taken (or, according to their representations, not being taken) by their clients. *See, e.g.*, Doc. No. 226. These misrepresentations will be discussed in more detail below; but suffice it to say the Government's attorneys effectively misled the Plaintiff States into foregoing a request for a temporary restraining order or an earlier injunction hearing. Further, these misrepresentations may have caused more damage in the intervening time period and may cause additional damage in the future. Counsel's misrepresentations also misdirected the Court as to the timeline involved in the implementation of the 2014 DHS Directive, which included the amendments to the Deferred Action for Childhood Arrivals ("DACA") program.

I. The Timing of this Order

Initially, this Court had decided to postpone ruling on this matter until after a final ruling on the merits since the injunction it entered was interlocutory, and the Court could not reasonably foresee a fact scenario in which the case would not ultimately be remanded for further proceedings. Subsequent events have changed the landscape in this regard. Usually, the legal issues in a case narrow on appeal until a case reaches the highest rung on the appellate ladder, at which point that court (be it a Court of Appeals or the Supreme Court) has one or two overriding issues that it must resolve. In addressing the request for a temporary injunction, this Court ruled, as is the custom and tradition in American jurisprudence, on the narrowest issue that would resolve the existing controversy: the procedural issue

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> premises of the rule of law. When such transgressions are acknowledged yet forgiven by the courts, we endorse and invite their repetition.

United States v. Olsen, 737 F.3d 625, 632 (9th Cir. 2013) (Kozinski, J., dissenting from denial of petition for rehearing en banc). Four judges joined this dissent.

concerning the Administrative Procedure Act ("APA"). This Court anticipated that the two issues on appeal would be this Court's ruling on standing and the procedural APA issue, with only the former possibly being case-determinative.

This case, however, has not followed the normal progression. Instead of the issues narrowing on appeal, they have expanded. The Fifth Circuit expanded the holding by not only affirming on the APA procedural violation, but also by ruling that the Plaintiff States have established a substantial likelihood of success on the merits of their claim that Defendants' actions violated substantive APA standards as well. *Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2015). The Supreme Court has apparently expanded the scope of review even further. It has not only granted review of the Fifth Circuit's judgment, but has also asked the parties to brief the constitutional issues.[4] *United States v. Texas*, 136 S. Ct. 906 (2016) (No. 15-674). Consequently, one now has reason to speculate that the Supreme Court could rule in a way that would negate the need for a remand to this Court. That being the case, the most efficacious path for this Court to follow is to proceed to rule upon what may be the only remaining issue.

II. The Misconduct Involving the Implementation of the 2014 DHS Directive

This Court has previously described the events that occurred in this case in its April 7, 2015, order. [Doc. No. 226]. In summary, this Court and opposing counsel were misled both in writing and in open court on multiple occasions as to when the Defendants would begin to implement the Secretary's 2014 DHS Directive establishing the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program and amending the DACA program. Opposing counsel and this Court were assured that no action would be taken implementing the 2014 DHS Directive until February 18,

[4] This Court has not been the only observer to note this expansion on appeal. "A rather unusual aspect of the case was that, although the lower courts had not decided a constitutional question the states had raised, the Justices added that question on their own." Lyle Denniston, *Immigration Policy: Review and Decision This Term*, SCOTUSBLOG (Jan. 19, 2016 9:50 AM), http://scotusblog.com/2016/01/immigration-policy-review-and-decision-this-term.

2015. Counsel for the Government made these assurances on the record on December 19, 2014, and in open court on January 15, 2015. Similar misrepresentations were made in pleadings filed on January 14, 2015, [Doc. No. 90 at 3] and even after the injunction issued, on February 23, 2015. [Doc. No. 150]. For example, on February 23, 2015, the Government lawyers wrote that: "DHS was to begin accepting requests for modified DACA on February 18, 2015."[5] [Doc. No. 150 at 7]. This representation was made despite the fact that in actuality the DHS had already granted or renewed over 100,000 modified DACA applications using the 2014 DHS Directive.

At the time of the Court's April 2015 order, the Government had not filed its brief explaining its conduct to the Court. Prior to reviewing that brief, the Court entertained a variety of possible explanations concerning the conduct of the Government lawyers. These included the more innocuous possibilities that the DOJ lawyers lacked knowledge or that they made an innocent mistake that led to the misrepresentations.

Now, however, having studied the Government's filings in this case, its admissions make one conclusion indisputably clear: the Justice Department lawyers knew the true facts and misrepresented those facts to the citizens of the 26 Plaintiff States, their lawyers and this Court on multiple occasions.[6]

A. The Government's Explanation

The Government claims that the reason its lawyers were not candid with the Court was that they either "lost focus on the fact" or that somehow "the fact receded in memory or awareness." [Doc. No. 242 at 18]. The Government's brief admits that its lawyers, including the lawyers who appeared in this Court, knew that the Defendants were granting three-year DACA renewals using the three-year period

[5] This date matches the Government's earlier representation that "U.S. Citizenship and Immigration Services (USCIS) does not intend to entertain requests for deferred action under the challenged policy until February 18, 2015 and even after it starts accepting requests, it will not be in a position to make any final decisions on those requests *at least* until March 4, 2015." [Doc. No. 90 at 3] (emphasis in the original). In reality, by March 3, 2015, over 100,000 requests had been granted.

[6] "As of early December 2014, the attorneys who appeared before this Court (and many other attorneys at both the DOJ and DHS) had been informed that DHS was providing three-year deferrals to new and renewal applicants. . . ." [Doc. No. 242 at 8]. Three-year deferrals could only have been granted using the 2014 DHS Directive. *See* the Government's brief quoted *infra* p. 7.

created by the 2014 DHS Directive at issue in this case. Yet the Government's lawyers chose not to tell the Plaintiff States or the Court. In fact, the Justice Department knew that DHS was implementing the three-year renewal portion of the 2014 DHS Directive weeks before its attorneys told this Court for the very first time that no such action was being taken. Apparently, lawyers, somewhere in the halls of the Justice Department whose identities are unknown to this Court, decided unilaterally that the conduct of the DHS in granting three-year DACA renewals using the 2014 DHS Directive was immaterial and irrelevant to this lawsuit and that the DOJ could therefore just ignore it. [Doc. No. 242 at 17]. Then, for whatever reason, the Justice Department trial lawyers appearing in this Court chose not to tell the truth about this DHS activity. The first decision was certainly unsupportable, but the subsequent decision to hide it from the Court was unethical.

Such conduct is certainly not worthy of any department whose name includes the word "Justice."[7] Suffice it to say, the citizens of all fifty states, their counsel, the affected aliens and the judiciary all deserve better.

B. The Misrepresentations by the Government's Attorneys

The Government has admitted to the Court in multiple places that both DHS and DOJ personnel knew since November of 2014 that three-year DACA renewals were being granted. It was impossible to grant a three-year deferral using the 2012 DACA criteria. The Government admits the only way these three-year deferrals could be granted was pursuant to the 2014 DHS Directive—the very subject of the States' injunction lawsuit:

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[7] Just recently, the Sixth Circuit expressed a similar conclusion. It wrote:

> In closing, we echo the district court's observations about this case. The lawyers in the Department of Justice have a long and storied tradition of defending the nation's interests and enforcing its laws—all of them, not just selective ones—in a manner worthy of the Department's name. The conduct of the IRS's attorneys in the district court [like the attorneys representing the DHS in this Court] falls outside that tradition. We expect that the IRS will do better going forward. And we order that the IRS comply with the district court's discovery orders of April 1 and June 16, 2015—without redactions, and without further delay.

In re United States, No. 15-3793, 2016 WL 1105077, at *11 (6th Cir. Mar. 22, 2016) (emphasis added). The district court had earlier written that it questioned "whether or not the Department of Justice is doing justice." *Id.* at *5.

> The Government does not dispute, and indeed has never disputed, that the three-year deferrals were pursuant to the 2014 Deferred Action Guidance. Likewise, there is no dispute that the Government also understood the change from two- to three-year grants of deferred action to be a contested issue in the case.

[Doc. No. 242 at 15 n.2] (citation omitted).

1. The December 2014 Misrepresentation

From day one, the Plaintiffs sought to enjoin the entire 2014 DHS Directive. [Doc. Nos. 1 & 5]. The injunction proposed by the Plaintiff States sought to prevent the implementation of "the DHS Directive of November 20, 2014." [Doc. No. 5-1]. This by definition included the three-year DACA deferrals. It is important to remember that the Plaintiff States initially requested that a hearing on the merits of their motion be held before December 31, 2014. [Doc. No. 5 at 12]. The Plaintiff States agreed to a later hearing date as a result of the Government's representations made in a conference call with the Court on December 19, 2014. During that call, counsel for the Plaintiff States agreed to a January hearing date, but only did so after being assured by the Government that nothing would happen between the December 19th call and the hearing date. Out of an abundance of caution, counsel had the following exchange:

> **PLAINTIFF STATES' COUNSEL:** . . . [W]e have been operating under the assumption . . . that we absolutely protected our interests in this and that there won't be any curve balls or surprises about, you know, deferred action documents being issued, you know, tomorrow or on the first of the year . . . [W]e have filed in our pleadings and have pointed out, that, you know, the United States has hired a thousand employees in the initial large processing center and that there are, you know, there is a potential for I think for prejudice or at least changing the calculus on the preliminary injunction inquiry if the state of the playing field changes between now and the 9th of January.
>
> **THE COURT**: . . . [D]o you anticipate that happening?
>
> **COUNSEL FOR THE GOVERNMENT**: No, I do not, your Honor. The agency was directed to begin accepting requests for deferred action I believe beginning sometime in -- by mid-February but even after that we wouldn't anticipate any decisions on those for some time thereafter. So there -- I really would not expect anything between now and the date of the hearing.

[Doc. No. 184 at 10–11] (emphasis added). Clearly, counsel for the Plaintiff States was concerned about any intervening implementation of the 2014 DHS Directive that might occur before the injunction hearing. The Government has now conceded that, at the very time counsel told the Court and opposing counsel that no action was taking place, over 100,000 three-year deferred action renewals were being processed using the 2014 DHS Directive.

The response by a DOJ lawyer, who the Government concedes knew that the DHS was already issuing three-year extensions pursuant to the 2014 DHS directive, was:

"I really would not expect anything between now and the date of the hearing."

[Doc. No. 184 at 11] (emphasis added). How the Government can categorize the granting of over 100,000 applications as not being "anything" is beyond comprehension. Even if one did not think the increase in DACA time limits was at issue, a position completely unjustifiable under the circumstances, the duty of candor to the Court would certainly require that one mention the fact that the DHS was going forward with that part of the 2014 DHS Directive.

This was not a curve ball thrown by the Government; this was a spitball which neither the Plaintiff States nor the Court would learn of until March 3, 2015.

2. The January 2015 Misrepresentations

One misrepresentation could be understandably a mistake, but the exchange between Counsel and the Court in the January hearing puts to rest any doubt regarding misconduct. On this occasion, the Court was worried about what impact a delay in the briefing schedule requested by the Government might cause.

> **THE COURT**: I'm a little concerned about how much time you asked for. If I give you until the 28th [of January, 2015], can you work with that?
>
> **COUNSEL FOR THE GOVERNMENT:** Let me confer with my co-counsel, but I believe so.

Your Honor, in part we're just discussing about the need to respond to some of the voluminous factual material. If we could have until the 30th, that Friday, that would be preferable.

THE COURT: Okay. And . . . I guess to preempt Mr. Oldham [Counsel for the Plaintiff States] when I ask him does he have any problem with that, he's going to want to know what's happening when?

COUNSEL FOR THE GOVERNMENT: And we set this -- we did file yesterday afternoon, Your Honor.

THE COURT: I can't find it.

COUNSEL FOR THE GOVERNMENT: My apologies.

THE COURT: No, no. It's here. I just buried it with all my paper.

COUNSEL FOR THE GOVERNMENT: In that document [Motion for Extension of Time, Doc. No. 90] we reiterated that no applications for the revised DACA -- this is not even DAPA -- revised DACA would be accepted until the 18th of February, and that no action would be taken on any of those applications until March the 4th.

THE COURT: And nothing is happening on DAPA?

COUNSEL FOR THE GOVERNMENT: So the memorandum said that DAPA should be implemented no sooner than mid[-]May, so DACA is really the first -- the revised DACA is the first deadline.

THE COURT: Okay. Then you can have until the 30th.

COUNSEL FOR THE GOVERNMENT: Okay. Thank you.

THE COURT: Wait, wait. You're being flagged.

COUNSEL FOR THE GOVERNMENT: Oh, sorry. Just to be clear, I meant no later than. So the memorandum provides that by mid[-]May, DAPA will be stood up.

THE COURT: Okay.

COUNSEL FOR THE GOVERNMENT: But the main -- the driver here would be --

THE COURT: But as far as you know, nothing is going to happen in the next three weeks?

COUNSEL FOR THE GOVERNMENT: No, Your Honor.

THE COURT: Okay. On either.

COUNSEL FOR THE GOVERNMENT: In terms of accepting applications or granting any up or down applications.

THE COURT: Okay.

COUNSEL FOR THE GOVERNMENT: For revised DACA, just to be totally clear.

[Doc. No. 106 at 133–34] (emphasis added).

Twice counsel for the Government (who, according to the Government's brief, knew that the DHS was already granting renewals using revised DACA) told this Court that the Government would not begin to implement the revised DACA (which includes the three-year extensions) until mid-February. She, in fact, confirmed to this Court that nothing was going to happen.

Certainly no one can claim this even approaches candor to the Court. This was not a casual exchange between counsel. This exchange was prompted by the Government's own request for additional time. It was responsive to a direct inquiry by the Court, which was concerned that its order would, regardless of which side it ultimately favored, be issued in a timely and fair fashion.

The reason this Court is certain that there could have been no misinterpretation as to whether the increase to a three-year renewal period was at issue is that it raised that very topic just before the above-quoted exchange.

COUNSEL FOR THE GOVERNMENT: And just to be clear on that last point, . . . there's one directive that the plaintiffs are challenging in the complaint, and that both is directed toward the DAPA program, but also is a[n] expansion or revision of the DACA program. So to the extent that there's a revision or expansion of the group that would be eligible to apply for that, we do understand the plaintiffs to be challenging that.

THE COURT: The increase in years?

COUNSEL FOR THE STATES: Your Honor --

COUNSEL FOR THE GOVERNMENT: They ask to have you direct and enjoin, and that directive would allow the revisions to the DACA program that we described in our brief.

[*Id.* at 91] (emphasis added).

The brief referred to by counsel described the 2014 DHS Directive as "revis[ing] three aspects of DACA . . . . Second, it extended the period of DACA from two to three years." [Doc. No. 38 at 29] (emphasis added). Again, there is no doubt that counsel knew the increase in years for a DACA term was a matter of contention. This Court directly raised the issue. The Government admits that the lawyer making these statements knew at the time of this hearing that the DHS was already granting these three-year extensions (which it also admits are only authorized by the 2014 DHS Directive) instead of the two-year renewals authorized in 2012. Not only did counsel fail to tell the Court that the DHS was already granting relief using the 2014 DHS Directive, she told the Court that nothing would happen with regard to revised DACA until mid-February of 2015.

3. The Lack of Candor After the Injunction

If those two instances on the record were not enough, a later incident occurred when again there could be no doubt that the proposed revisions to DACA were at issue. This Court issued its injunction on February 16, 2015. That order enjoined the Government from implementing:

> . . . any and all aspects or phases of the expansions (including any and all changes) to the Deferred Action for Childhood Arrivals ("DACA") program as outlined in the DAPA Memorandum pending a trial on the merits or until a further order of this Court, the Fifth Circuit Court of Appeals or the United States Supreme Court.

[Doc. No. 144 at 2]. This clearly enjoined the three-year renewals created by the 2014 DHS Directive. Those are the same renewals that the Government's trial counsel, according to the Government's brief, knew had been occurring since early December of 2014. Despite this knowledge, counsel did not alert

the Court to this ongoing activity until March 3, 2015—some two weeks later. This should have been done immediately—especially given the bad faith representations counsel had already made.

To the contrary, what counsel did borders on the incredible. Instead of informing the Court that its clients had already been implementing the three-year renewals pursuant to the 2014 DHS Directive since late-November 2014, the Government filed a motion on February 23, 2015, to stay the Court's ruling and in that motion stated:

"DHS was to begin accepting requests for modified DACA on February 18, 2015."

[Doc. No. 150 at 7]. Again no mention was made that the DHS had already been granting three-year extensions under modified DACA for three months. Regardless of how one spins the facts prior to the injunction, no one after the injunction could conceivably think that the three-year extensions were not a matter of contention and were not now enjoined. Yet counsel, who knew of the DHS activity, were not only silent, but their motion was certainly calculated to give the impression that nothing was happening or had happened pursuant to the 2014 DHS Directive—when, in fact, by that time over 100,000 applications had already been granted. In the Motion to Stay, counsel also wrote:

> Moreover, the Court's assertion that its Order does not affect the status quo is at odds with the Court's recognition that DHS had already begun preparing to effectuate the Deferred Action Guidance. *See* Op. at 76. The Court issued its injunction one business day before USCIS [U.S. Citizenship and Immigration Services] was scheduled to begin accepting requests for deferred action under the modified DACA guidelines. USCIS had spent the prior 90 days—the time period established by the Guidance for implementation—preparing to receive such requests. The injunction sets back substantial preparatory work that has already been undertaken.

[Doc. No. 150 at 17] (emphasis added).[8]

[8] There is actually a fourth misrepresentation that the Government made. On January 14, 2015, when requesting an extension of time, the Government claimed that "Plaintiffs will not be prejudiced by [a] two-week extension . . . because U.S. Citizenship and Immigration Services (USCIS) does not intend to entertain requests for deferred action under the challenged policy until February 18, 2015, and even after it starts accepting requests, it will not be in a position to make any final decisions on those requests *at least* until March 4, 2015." [Doc. No. 90 at 3] (emphasis in the original). This Court finds that both of these misrepresentations in pleadings [Doc. Nos. 90 & 150] clearly breach Federal Rule of Civil Procedure 11(b). In sum, counsel twice in hearings and twice in pleadings knowingly made representations to the Court that they knew were not true.

"[P]reparing to" do something and actually doing it are obviously two different things. What counsel did not say was that, despite the fact that the Government was scheduled "to begin accepting requests for deferred action under the modified DACA guidelines," it had already granted relief using the modified DACA guidelines over 100,000 times. At this point, even the most calculating attorney would conclude that he or she would have to tell the Court the complete truth.

C. No *De Minimis* Rule Applies to the Truth

In its own defense, the Government has claimed it did not know before February 27, 2015, that the number of individuals that had been granted three-year deferrals between November 24, 2014, and the date of the injunction exceeded 100,000. It claims that it notified the Court very quickly after it realized that the number exceeded 100,000. [Doc. Nos. 242 & 243]. This may be true, but knowing the exact number is beside the point. The Government's attorneys knew since late-November of 2014 that the DHS was issuing three-year deferrals under the 2014 DHS Directive. Whether it was one person or one hundred thousand persons, the magnitude does not change a lawyer's ethical obligations. The duties of a Government lawyer, and in fact of any lawyer, are threefold: (1) tell the truth; (2) do not mislead the Court; and (3) do not allow the Court to be misled. *See* MODEL RULES OF PROF'L CONDUCT r. 3.3 cmts. 2 & 3 (AM. BAR ASS'N 2013). The Government's lawyers failed on all three fronts. The actions of the DHS should have been brought to the attention of the opposing counsel and the Court as early as December 19, 2014. The failure of counsel to do that constituted more than mere inadvertent omissions—it was intentionally deceptive. There is no *de minimis* rule that applies to a lawyer's ethical obligation to tell the truth.

III. The Rulebook

The rules that apply to this case are both succinct and clear. There is no gray area or even grounds for debate. Attorney conduct in the Southern District of Texas is controlled by Appendix A of its local rules. Appendix A is entitled "Rules of Discipline." Rule 1 is as follows:

> Rule 1. *Standards of Conduct.*
>
> A. Lawyers who practice before this court are required to act as mature and responsible professionals, and the minimum standard of practice shall be the Texas Disciplinary Rules of Professional Conduct.
>
> B. Violation of the Texas Disciplinary Rules of Professional Conduct shall be grounds for disciplinary action, but the court is not limited by that code.

S.D. Tex. Local Court Rules App. A.

Thus, this District has adopted the Texas Disciplinary Rules of Professional Conduct ("Texas Disciplinary Rules") as its minimum ethical standards. The Court also notes that courts in the Fifth Circuit are not limited to their respective state codes. Indeed, the Fifth Circuit, in an appeal emanating from a Southern District of Texas case, broadened the ethical standards applicable to all lawyers practicing in the Fifth Circuit. *In re Dresser Industries, Inc.*, 972 F.2d 540, 543–44 (5th Cir. 1992). In that case, which concerned disqualification of counsel, the Court held that for courts in the Fifth Circuit compliance with the local (Texas) disciplinary rules was not in and of itself sufficient. It stated that the conduct of lawyers practicing in this Circuit should certainly include compliance with the applicable state disciplinary rules, but courts should also look at ethical rules "announced by the national profession in the light of the public interest and the litigants' rights." *Id.* at 543. In short order, the Circuit reaffirmed that approach in *In re American Airlines, Inc.*, 972 F.2d 605 (5th Cir. 1992). Regardless of whether state or national standards apply or how many authorities one consults, the result here would be the same. An attorney owes a duty of candor and honesty to the court, and at the very least a duty not to misrepresent the facts to a judge or opposing counsel. The pertinent Texas ethical rules are as follows:

Rule 3.03. Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act;

(3) in an ex parte proceeding, fail to disclose to the tribunal an unprivileged fact which the lawyer reasonably believes should be known by that entity for it to make an informed decision;

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

(5) offer or use evidence that the lawyer knows to be false.

(b) If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts.

(c) The duties stated in paragraphs (a) and (b) continue until remedial legal measures are no longer reasonably possible.[9]

Tex. Disciplinary Rules Prof'l Conduct R. 3.03 (emphasis added).

Candor is required by all rules of ethics that could possibly apply here. One definition of "candor" describes it as being "[t]he quality of being open, honest and sincere." *Candor*, BLACK'S LAW DICTIONARY (10th ed. 2014). The "duty of candor" under which lawyers operate is a bit broader. It is a "duty to disclose material facts; esp[ecially], a lawyer's duty not to allow a tribunal to be misled by false statements, either of law or of fact, that a lawyer knows to be false." *Duty*, BLACK'S LAW DICTIONARY (10th ed. 2014). Most authors would also include that it is a lawyer's duty not only to be honest but also not to mislead or allow a court to be misled by half-truths or statements which, while technically honest,

[9] Note the obligation placed on counsel to take remedial action.

are calculated to mislead. MODEL RULES OF PROF'L CONDUCT r. 3.3 cmts. 2 & 3 (AM. BAR ASS'N 2013).

Of course, that was not the case here. Counsel in this case violated virtually every interpretation of candor. The failure of counsel to inform the counsel for the Plaintiff States and the Court of the DHS activity—activity the Justice Department admittedly knew about—was clearly unethical and clearly misled both counsel for the Plaintiff States and the Court.

> **Rule 4.01. Truthfulness in Statements to Others**
>
> In the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person; or
>
> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.

Tex. Disciplinary Rules Prof'l Conduct R. 4.01 (emphasis added).

> **RULE 8.04. Misconduct**
>
> (a) A lawyer shall not:
>
> (1) violate these rules, knowingly assist or induce another to do so, or do so through the acts of another, whether or not such violation occurred in the course of a client-lawyer relationship;
>
> (2) commit a serious crime or commit any other criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
>
> (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
>
> * * *

Id. R. 8.04 (emphasis added). These are the applicable rules that are incorporated by reference as the controlling rules of the Southern District of Texas.

Further, compliance with these rules has been mandated by federal law since 1998 when Congress enacted the so-called "McDade Amendment." That law reads in pertinent part:

> § 530B. Ethical standards for attorneys for the Government
>
> (a) An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.
>
> (b) The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section.[10]
>
> * * *

28 U.S.C. § 530B (emphasis added). Counsel's conduct in this case was not only unethical, but a failure to comply with federal law.

National standards, to the extent those are represented by the Model Rules of Professional Conduct promulgated by the American Bar Association ("ABA"), do not suggest any contrary result in this case. The applicable ABA rules track those found in the Texas Disciplinary Rules of Professional Conduct.

> **Rule 3.3 Candor Toward The Tribunal**
>
> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
>
> * * *

MODEL RULES OF PROF'L CONDUCT r. 3.3 (AM. BAR ASS'N 2013) (emphasis added).

[10] While this amendment has received criticism from various commentators, virtually none of the criticism has been directed at a lawyer's duty to be honest with the Court and opposing counsel. *See, e.g.*, Bradley T. Tennis, *Uniform Ethical Regulation of Federal Prosecutors*, 120 YALE L.J. 144 (2010); Paula J. Casey, *Regulating Federal Prosecutors: Why McDade Should Be Repealed*, 19 GA. ST. U. L. REV. 395 (2002).

> **Rule 4.1 Truthfulness In Statements To Others**
>
> In the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person; . . .
>
> * * *

Id. r. 4.1 (emphasis added).

> **Rule 8.4 Misconduct**
>
> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
>
> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
>
> (d) engage in conduct that is prejudicial to the administration of justice;
>
> * * *

Id. r. 8.4 (emphasis added).

IV. The Government's Conduct Violates the Rulebook

This Court has found no authority to support the concept that it is ever ethical and appropriate conduct to mislead a court and opposing counsel; nor has the Government provided any authority to that effect. That being the case, the Court finds no need for a comprehensive dissertation on the duty of candor and honesty because counsel in this case failed miserably at both. The Government's lawyers in this case clearly violated their ethical duties.

To say that the Government acted contrary to its multiple assurances to this Court is, at best, an understatement. The Government knowingly acted contrary to its representations to this Court on over 100,000 occasions.[11] This Court finds that the misrepresentations detailed above: (1) were false; (2) were made in bad faith; and (3) misled both the Court and the Plaintiff States.

Both the Court and the attorneys representing the Plaintiff States relied upon February 18, 2015, (the implementation day for the 2014 DHS Directive specified by the Government attorneys) as the controlling date. The Court issued the temporary injunction on February 16, 2015. The timing of this ruling was clearly made based upon the representations that no action would be taken by Defendants until February 18, 2015. If Plaintiffs' counsel had known that the Government was surreptitiously acting, the Plaintiff States could have, and would have according to their representations, sought a temporary restraining order pursuant to Federal Rule of Civil Procedure 65(b) much earlier in the process. Their clear intent until the Government misrepresented the facts during the December 19, 2014, conference call was to obtain a hearing before year's end. Due to the Government's wrongful misstatements, the Plaintiff States never got that opportunity. The misrepresentations of the Government's attorneys were material and directly caused the Plaintiff States to forgo a valuable legal right to seek more immediate relief.

V. The Appropriate Remedy for the Inappropriate Conduct

A. <u>What This Court Will Not Do</u>

Since there is no doubt that misconduct has occurred and since there is for the first time a possibility that this case will not be remanded, the Court will take this opportunity to dispose of the only impediment to the Supreme Court issuing a complete and final judgment in this matter. The misconduct

[11] The figure quoted at the March 19, 2015, hearing was 108,081. [Doc. No. 203 at 25]. This figure does not include the approximately 2,000 times the Government admitted it actually violated this Court's injunction. [Doc. No. 247 at 1].

in this case was intentional, serious and material. In fact, it is hard to imagine a more serious, more calculated plan of unethical conduct. There were over 100,000 instances of conduct contrary to counsel's representations; such a sizable omission cannot be classified as immaterial.

The most immediate remedy that must be considered for misconduct so blatant and with adverse consequences of such magnitude is the striking of the party's pleadings. While perhaps an appropriate sanction, as this Court has expressed in prior proceedings and opinions (and despite the overwhelming grounds to do so), it will not strike the Government's pleadings. In a different situation, this Court might very well have taken that action. This egregious conduct merits it. While this Court has that power (both pursuant to the Rules and under its inherent power), the fact that a federal court might have a power does not mean that court should necessarily exercise it. The national importance of the outcome of this litigation outweighs the benefits to be gained by implementing the ultimate sanction. The citizens of this country and those non-citizens who may be affected by the 2014 DHS Directive deserve an answer and should not be deprived of that answer due to the misconduct of counsel. Further, the Supreme Court has decided to weigh in on these matters. Striking the Government's pleadings would not only be unfair to the litigants, but also unfair, and perhaps even disrespectful, to the Supreme Court as it would deprive that Court of the ability to thrash out the legal issues in this case. Regardless of how unprofessional the DOJ's conduct may have been, this Court will not strike the Government's pleadings.

The second remedy that is most frequently implemented in cases of attorney misconduct is to award the aggrieved parties the attorneys' fees and costs that may have resulted due to the misconduct. The Supreme Court and Fifth Circuit have consistently recognized the applicability of this form of sanction.

> Courts have inherent power to sanction a party that has engaged in bad-faith conduct and can invoke that power to award attorney's fees. *Chambers v. Nasco, Inc.*, 501 U.S. 32, 45 (1991). "In *Chambers*, the Supreme Court held that a district court may sanction

> parties for conduct that occurs in portions of the court proceeding that are not part of the trial itself." *FDIC v. Maxxam, Inc.*, 523 F.3d 566, 590–91 (5th Cir. 2008).

In re Skyport Global Communication, Inc., No. 15-20246, 2016 WL 1042526, at *1 (5th Cir. Mar. 14, 2016).

This Court finds, however, that this remedy is also inappropriate in this case. The taxpayers of the 26 Plaintiff States are already paying the attorneys' fees, expenses and costs for the Plaintiff States. The taxpayers of all 50 states (including the 26 Plaintiff States) are paying the attorneys' fees, expenses and costs of the Government. Thus, the taxpayers of a majority of the states are already paying for the fees and expenses of the plaintiffs and a large portion of those of the defendants, while those of the remaining 24 states are only paying their share of the costs of the defense.

The Government's counsel told this Court that if it sanctions the misconduct of the Government's attorneys in a monetary fashion, those sanctions would be paid by the taxpayers of the United States. Thus, the taxpayers of the 26 Plaintiff States, who have been wronged by the misconduct, would have to pay for: (1) the original fees, expenses and costs of their own attorneys; (2) a large percentage of the original fees, expenses and costs of opposing counsel; (3) the fees, expenses and costs of their own counsel caused by the misconduct; (4) a large percentage of the fees, expenses and costs of the opposing side caused by the misconduct; plus (5) a substantial portion of whatever sanction amount this Court would levy. Stated another way, the Court would be imposing more costs on the aggrieved parties, and the Justice Department, which is actually responsible for this mess, would go unscathed. There would be no corrective effect and no motivation for the Government's lawyers to act more appropriately in the future. Since the taxpayers would foot the bill for any fines, fining counsel would not make the Plaintiff States whole, serve as a deterrent to any future misconduct, or act as a punishment

for any past transgressions. Therefore, this Court will not impose monetary sanctions on the defense counsel.[12]

B. The Appropriate Remedy

There is no doubt, however, that because the Government's counsel breached the most basic ethical tenets, the Plaintiff States have been damaged and have given up a valuable legal right. Moreover, counsel for the Government should not be rewarded for their past misconduct. There is certainly no indication that counsel will not repeat this conduct.[13] They knowingly continued to hide this conduct for months and only admitted it once they realized the number of violations exceeded 100,000. Clearly, there seems to be a lack of knowledge about or adherence to the duties of professional responsibility in the halls of the Justice Department. In addition to the loss of their opportunity to seek a temporary restraining order or an earlier injunction hearing date, there remains a distinct possibility that the Plaintiff States are being damaged and/or will suffer future damages due to these misrepresentations. All of these factors demand that this Court take some level of action.

This Court hereby orders the Government to file a list of each of the individuals in each of the Plaintiff States given benefits (and whose benefits have not been withdrawn) under the 2014 DHS

[12] One could argue that the Court should order the sanction only be paid by the taxpayers of the 24 non-plaintiff states. This would not be warranted either as those taxpayers committed no wrong. Furthermore, this solution would no doubt create an accounting nightmare for the Treasury Department.

[13] Indeed, the conduct of the Justice Department in other aspects of this case has been anything but laudable. For example, counsel did not act appropriately when it later came to light that their clients were actually violating the injunction. The regrettable conduct of the prior counsel involved in the misrepresentations at issue here was exacerbated by the dilatory manner in which their replacements from the Justice Department and their clients tried to evade their duty to correct the actions the Defendants took in violation of this Court's injunction. The Government admitted it violated this Court's injunction in over 2,000 instances. [Doc. No. 247 at 1]. Six weeks later, the Government admitted it had not fixed the violations. [Doc. No. 275]. Rather than acting responsibly, professionally and promptly, counsel did not implement effective corrective measures until this Court ordered their clients to actually appear in Court to explain their inaction. [Doc. No. 281]. While this latter conduct is related to the Government's violations of this Court's injunction (violations to which the Government has admitted), it was not directly related to the misrepresentations referred to in this Order. Nevertheless, it is not without importance, as this misconduct and the failure of the Justice Department to insist that its clients immediately seek to remedy their violations of this Court's injunction are indicative of the unprofessional manner in which the attorneys for the Government have approached this case. Ultimately, it took action by this Court to finally force counsel to act as responsible members of the Bar. It goes without saying, or at least it should go without saying, that it is the duty of all attorneys to act professionally whether ordered to by a court or not.

Directive contrary to its lawyers' multiple representations. These are the individuals granted benefits during the period (November 20, 2014–March 3, 2015) in which the attorneys for the Justice Department promised that no benefits were being conferred. This list should include all personal identifiers and locators including names, addresses, "A" file numbers and all available contact information, together with the date the three-year renewal or approval was granted. This list shall be separated by individual Plaintiff State. It should be filed in a sealed fashion. The Court, on a showing of good cause (such as a showing by a state of actual or imminent damage that could be minimized or prevented by release of the information to one of the Plaintiff States), may release the list or a portion thereof to the proper authorities in that particular state. Obviously, this list, once filed, will remain sealed until a further order of this Court.

Notwithstanding the foregoing, the Court will not entertain any requests concerning the release of this sealed information to any state until the Supreme Court has issued its decision on the issues currently before it. The Justice Department has until June 10, 2016, to make this filing.

The Court next turns to the topic of candor. Candor in court is such a self-evident concept that it is almost too mundane to discuss in an opinion. Indeed, when one addresses the need for honesty in court, it is hard not to speak in platitudes. It is such a truism that all Americans, if not individuals worldwide, are familiar with the requirement. This concept is so pervasive that it can be seen in almost any aspect of society. One example that easily comes to mind is that drawn from the beloved movie *Miracle on 34th Street* when the young child of the assistant district attorney is called to the witness stand:

> Mr. Gailey: (Attorney for Mr. Kringle) Will Thomas Mara please take the stand?
>
> Thomas Mara Sr.: (Assistant District Attorney) Who, me?

Mr. Gailey:	Thomas Mara Jr.
	(Spectators Murmuring)
Tommy Mara Jr.:	Hello, Daddy.
Mr. Gailey:	Here you are, Tommy.
The Judge:	Tommy, you know the difference between telling the truth and telling a lie, don't you?
Tommy Mara Jr.:	Gosh, everybody knows you shouldn't tell a lie, especially in court.
	(Spectators Chuckling)
The Judge:	Proceed, Mr. Gailey.[14]

The need to tell the truth, especially in court, was obvious to a fictional young Tommy Mara Jr. in 1947, yet there are certain attorneys in the Justice Department who apparently have not received that message, or more likely have just decided they are above such trivial concepts. Regardless of the motivation behind the conduct, multiple misrepresentations over a period of months both in pleadings and in open court cannot be ignored—especially when, as here, they were made knowingly and had the effect of depriving the millions of individuals represented by the Plaintiff States of a valuable remedy.

While this Court does not hold the Department of Justice attorneys to a higher standard than it would attorneys practicing elsewhere, it would hope that the Justice Department, itself, would seek to maintain the highest ethical standards. The Justice Department purports to represent all Americans—not just those who are in favor of whatever actions the Department is seeking to prosecute or defend. The end result never justifies misconduct. That is the stance the Justice Department takes daily in thousands of its other cases, and it is no less applicable here.

Therefore, this Court, in an effort to ensure that all Justice Department attorneys who appear in the courts of the Plaintiff States that have been harmed by this misconduct are aware of and comply with

[14] MIRACLE ON 34TH STREET (20th Century Fox 1947) (emphasis added). Screenplay by George Seaton.

their ethical duties, hereby orders that any attorney employed at the Justice Department in Washington, D.C. who appears, or seeks to appear, in a court (state or federal) in any of the 26 Plaintiff States annually attend a legal ethics course.[15] It shall be taught by at least one recognized ethics expert who is unaffiliated with the Justice Department. At a minimum, this course (or courses) shall total at least three hours of ethics training per year. The subject matter shall include a discussion of the ethical codes of conduct (which will include candor to the court and truthfulness to third parties) applicable in that jurisdiction. The format of this continuing education shall be left to the independent expert lecturer. Self-study or online study will not comply with this Order, but attendance at a recognized, independently sponsored program shall suffice.

Despite the fact that 26 different jurisdictions are involved, this ethics requirement should not be a task that places too great of a burden on the Department. First of all, the vast majority, if not all, of the 26 states in question have adopted a version of the ABA Model Rules of Professional Conduct ("ABA Model Rules"). Consequently, compliance with the Order should not be too cumbersome.[16] Further, this Court's Order is requiring no more than what the Justice Department should have been, but obviously is not effectively, doing already. This Order will merely ensure compliance with the legal standards already placed upon Justice Department attorneys by 28 U.S.C. § 530B(a). For example, the ethical standards of Texas and the Southern District of Texas were clearly violated in this proceeding. Education as to ethical standards should be a crucial part of the Justice Department's continuing legal education, even if it were not included as part of this Order.

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[15] The Plaintiff States include: the State of Alabama, the State of Arizona, the State of Arkansas, the State of Florida, the State of Georgia, the State of Idaho, the State of Indiana, the State of Kansas, the State of Louisiana, the State of Maine, the State of Michigan, the State of Mississippi, the State of Montana, the State of Nebraska, the State of Nevada, the State of North Carolina, the State of North Dakota, the State of Ohio, the State of Oklahoma, the State of South Carolina, the State of South Dakota, the State of Tennessee, the State of Texas, the State of Utah, the State of West Virginia and the State of Wisconsin.

[16] For example, as quoted above, the Texas Disciplinary Rules and the ABA Model Rules are almost identical. With regard to the duty of candor, this will no doubt be true for most states as this Court has not found any code of conduct that specifically allows counsel to misrepresent the facts to a court.

The Attorney General of the United States shall appoint a person within the Department to ensure compliance with this Order. That person shall annually file one report with this Court including a list of the Justice Department attorneys stationed in Washington, D.C. who have appeared in any court in the Plaintiff States with a certification (including the name of the lawyer, the court in which the individual appeared, the date of the appearance and the time and location of the ethics program attended) that each has attended the above-ordered ethical training course. That certification shall be filed in this cause during the last two weeks of each calendar year it covers. The initial report shall be filed no later than December 31, 2016. This Order shall remain in force for a period of five years (the last report being due December 31, 2021).

The decision of the lawyers who apparently determined that these three-year renewals under the 2014 DHS Directive were not covered by the Plaintiff States' pleadings was clearly unreasonable. The conduct of the lawyers who then covered up this decision was even worse. Therefore, the Attorney General is hereby ordered to report to this Court in sixty (60) days with a comprehensive plan to prevent this unethical conduct from ever occurring again. Specifically, this report should include what steps the Attorney General is taking to ensure that the lawyers of the Justice Department will not, despite what court documents may portend or what a court may order, unilaterally decide what is "material" and "relevant" in a lawsuit and then misrepresent that decision to a Court. Stated differently, the Attorney General is also hereby ordered to report what steps she is taking to ensure that, if Justice Department lawyers make such an internal decision without approval from the applicable court, the Justice Department trial lawyers tell the truth—the entire truth—about those decisions to the court and opposing counsel.[17]

[17] While denying misconduct, the Government concedes that "[k]nowing misrepresentations to a court would strike at the heart of the Judiciary's confidence in DOJ and its mission, not just in this litigation but in other matters. . . ." [Doc. No. 242 at 27]. Obviously, this Court agrees that unethical conduct undermines the DOJ's mission.

Finally, whatever it is that the Department of Justice Office of Professional Responsibility has been doing, it has not been effective. The Office of Professional Responsibility purports to have as its mission, according to the Department of Justice's website, the duty to ensure that Department of Justice attorneys "perform their duties in accordance with the high professional standards expected of the Nation's principal law enforcement agency." *Office of Professional Responsibility*, DEP'T OF JUSTICE, https://www.justice.gov/opr (last visited May 17, 2016). Its lawyers in this case did not meet the most basic expectations.[18] The Attorney General is hereby ordered to inform this Court within sixty (60) days of what steps she is taking to ensure that the Office of Professional Responsibility effectively polices the conduct of the Justice Department lawyers and appropriately disciplines those whose actions fall below the standards that the American people rightfully expect from their Department of Justice.

VI. Conclusion

This Order is tailored to give the 26 Plaintiff States some avenue for relief from the possibility of any damage that may result from the misconduct of the Defendants' lawyers and to prevent future harm to any Plaintiff State due to the Government's misrepresentations. The Court also enters this Order to deter and prevent future misconduct by Justice Department lawyers by ordering an appropriately tailored continuing legal education program, which will not only serve to educate the uninitiated, but more importantly will remind all trial lawyers that their honest and ethical participation is a necessity for the proper administration of justice. It also compels the Attorney General, or her designee, to take the necessary steps to ensure that DOJ attorneys act honestly in the future.

[18] Other courts have noticed these problems as well. Just in the last six months, both the Fifth Circuit and the Sixth Circuit have questioned the conduct of those employed by the Department of Justice. *United States v. Bowen*, 799 F.3d 336 (5th Cir. 2015); *In re United States*, No. 15-3793, 2016 WL 1105077 (6th Cir. Mar. 22, 2016). The Fifth Circuit went further and suggested that not only was there misleading conduct, but the conduct was followed by an inadequate investigation and a cover-up. These are just two of an ever-growing number of opinions that demonstrate the lack of ethical awareness and/or compliance by some at the Department of Justice.

The Court does not have the power to disbar the counsel in this case, but it does have the power to revoke the *pro hac vice* status of out-of-state lawyers who act unethically in court. By a separate sealed order that it is simultaneously issuing, that is being done.

The Court notes that to its knowledge none of the acts cited in this or prior orders were committed by attorneys from the United States Attorney's Office in the Southern District of Texas. To date, without exception, these attorneys have acted and continue to act, in this Court's experience, with honor, professionalism and forthrightness. Further, while the misconduct involved at least two or more attorneys from the Justice Department, to this Court's knowledge, no acts occurred during the tenure of the current Attorney General. The Court cannot help but hope that the new Attorney General, being a former United States Attorney, would also believe strongly that it is the duty of DOJ attorneys to act honestly in all of their dealings with a court, with opposing counsel and with the American people.

All motions for discovery, motions for different sanctions, or requests for further relief (including those made in Doc. Nos. 183 and 188) relating to the misrepresentations of counsel in this case, other than those instituted by this Order, are hereby denied. Further, all remaining motions filed by any party are denied.

Signed this 19th day of May, 2016.

Andrew S. Hanen
United States District Judge

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

APPEALS COURT
No. 2017-P-1287.

COMMONWEALTH)
)
v.)
)
JUSTINO ESCOBAR)

CERTIFICATION OF COMPLIANCE.

Now comes appellate counsel for Mr. Escobar and, pursuant to Mass. R. A. P. 16(k), respectfully certifies that the foregoing brief conforms to the Massachusetts Rule of Appellate Procedure, particularly Rules 16(a)(6), 16(e), 16(f), 16(h), 18 and 20.

Respectfully certified,
for Justino Escobar,

/s/ James P. McKenna

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October 13, 2017

COMMONWEALTH OF MASSACHUSETTS

Appeals Court No. 2017-P-1287.

SUFFOLK COUNTY.

COMMONWEALTH OF MASSACHUSETTS
Appellee,

v.

JUSTINO ESCOBAR,
Appellant.

Brief of Appellant,
Justino Escobar.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

APPEALS COURT
No. 2017-P-1287.

COMMONWEALTH)
)
v.) CERTIFICATE OF SERVICE.
)
JUSTINO ESCOBAR)

Now comes James P. McKenna, appellate counsel for Mr. Escobar, and respectfully certifies that Assistant District Attorney John P. Zanini, Esquire, counsel for the Appellee, the Commonwealth, has registered for efileMA, and so will receive a copy of the attached Brief and Record Appendix by means of that electronic system (via https://efilema.tylerhost.net/ofsweb) this Thirteenth day of October, 2017.

Respectfully signed under the pains and penalties of perjury this Thirteenth day of October, 2017,

/s/ James P. McKenna

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October 13, 2017