

The Commonwealth of Massachusetts

OFFICE OF THE DISTRICT ATTORNEY  
FOR THE NORFOLK DISTRICT

MICHAEL W. MORRISSEY  
DISTRICT ATTORNEY

December 18, 2017

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Maura Sweeney Doyle, Clerk  
Supreme Judicial Court for Suffolk County  
John Adams Courthouse  
One Pemberton Square, Suite 1300  
Boston, MA 02108-1707

**Re: Committee for Public Counsel Services, et. al. v. Attorney General of  
Massachusetts, et. al.  
No. SJ-2017-0347**

Dear Ms. Doyle:

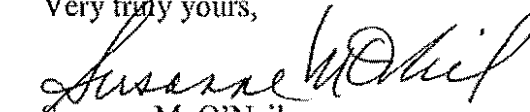
Please find enclosed for filing the following documents in the above-referenced matter:

1. The Joint Response of the District Attorneys to Petitioners' Request for Reservation and Report and to this Court's Interim Order of December 8, 2017, which the District Attorneys forwarded to this Court this day via electronic mail to [eric.wetzel@sjc.state.ma.us](mailto:eric.wetzel@sjc.state.ma.us) and
2. Certificate of Service.

The District Attorneys will send original signature pages under separate cover.

Please do not hesitate to contact me if you have any questions regarding these documents.

Very truly yours,

  
Susanne M. O'Neil  
Assistant District Attorney

Enclosures

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT

Suffolk, ss.

SUPREME JUDICIAL COURT  
FOR SUFFOLK COUNTY  
SJ-2017-347

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

v.

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

**JOINT RESPONSE OF THE DISTRICT ATTORNEYS TO PETITIONERS'**  
**REQUEST FOR RESERVATION AND REPORT AND TO THIS**  
**COURT'S INTERIM ORDER OF DECEMBER 8, 2017<sup>1</sup>**

On December 7, 2017, after the District Attorneys'  
Offices and the Attorney General's Office filed responses  
to this Court's November 30, 2017 order, the Petitioners  
filed a Request for Reservation and Report and Further  
Single Justice Proceedings. On December 8, this Court

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<sup>1</sup> This joint response is filed on behalf of the District  
Attorney's offices of Berkshire, the Cape and the Islands,  
Essex, Hampden, Middlesex, Norfolk, Northwestern, Plymouth,  
Suffolk and Worcester Counties. The Bristol District  
Attorney joins the Response as to Part II, B.

issued an Interim Order requesting from the District Attorneys "questions from the G. L. c. 211, § 3 petition that remain unanswered and that they propose should be submitted to the full court as part of the reservation and report." The District Attorneys (DAOs) submit the following response to both.

The petition seeks dismissal with prejudice of cases of "Farak defendants." "Farak defendants" are those who had a case in which Sonja Farak signed the drug certificate between August 2004 and January 2013 while she was employed at the Department of Public Health Amherst Laboratory (except for Ruffin defendants who pleaded or were found guilty before she signed the certificate of analysis<sup>2</sup>). All of the DAOs agree that Bridgeman II provides the appropriate framework to accomplish the goals of notice and resolution of these cases. To that end, each office has undertaken case-by-case review in accord with Bridgeman II and submitted or will submit lists of Farak-based

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<sup>2</sup> Commonwealth v. Ruffin, 475 Mass. 1003 (2016) (Dookhan defendants "entitled to a conclusive presumption of egregious government misconduct are those who pleaded guilty to a drug charge, admitted to sufficient facts, or were found guilty after trial after [Dookhan] signed a drug certificate in their case."). See Bridgeman II, 476 Mass. at 306.

convictions to be vacated and dismissed with prejudice.<sup>3</sup> After this extensive review, only two offices, Berkshire and Bristol, have non-Ruffin Farak cases that are not on the lists to be vacated and dismissed with prejudice and which each of those offices certifies can be re-tried with non-Farak tainted evidence if the defendant successfully moves for a new trial.<sup>4</sup> Further, the DAOs understand that the Attorney General's Office (AGO) has no cases. As such, the DAOs have and will be submitting lists comprising all but fewer than forty (40) of the Farak defendant convictions to be vacated and dismissed with prejudice.

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<sup>3</sup> To date, Cape and Islands, Essex, Norfolk, Northwest, and Suffolk have submitted lists. Middlesex has identified all cases in which Farak signed the certificate of analysis and has provided a working list of those cases to the Petitioners. The other offices are completing the review process. Some DOAs have exercised their discretion to vacate and dismiss with prejudice all Farak-related cases without determining whether Farak signed the certificate of analysis before or after a defendant's plea or trial; the other offices have identified Ruffin cases and have not included those cases on the lists for vacatur and dismissal.

<sup>4</sup> The Berkshire District Attorney's Office plans to certify the ability to re-prosecute 11 cases, i.e., assigning those cases to what has come to be known in Bridgeman II<sup>4</sup> parlance as "List 3 cases." In its response to the petition Bristol District Attorney's Office sought the dismissal with prejudice of 203 cases while maintaining adverse dispositions in 34 cases, involving 21 defendants. The Bristol DA continues to review its prosecutions and believes that it will have cases involving 20 or fewer defendants that it seeks to maintain.

Consequently, the DAOs' position is that it is unnecessary to report any questions to the Full Court.

**I. Misstatements By the Petitioners in their Request for Reservation and Report**

The Petitioners claim in their Request for Reservation and Report that the DAOs, in their Joint Response

have argued that Farak Defendants should be entitled to dismissal with prejudice only if they moved unsuccessfully for post-conviction relief between January 2013 and November 2014, when the misconduct of AAGs Foster and Kaczmarek was ongoing, and when Farak Defendants had not been comprehensively notified

Pet. Req. for Res. Report at 3. This is not the DAOs' position.

Rather, at page 2-3 of the Joint Response, the DAOs answer the two questions that are before the Court<sup>5</sup> as follows:

In response to the **first question**, the district attorneys agree that "Farak defendants" are entitled to notice and relief and submit that the protocol outlined in Bridgeman v. District Attorney for Suffolk District, 476 Mass. 298 (2017) is an appropriate model.

In response to the **second question**, the district attorneys submit that the Court should affirmatively adopt Judge Carey's finding that defendants who meet the three criteria: "(1) Farak signed their drug certificates; (2) they

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<sup>5</sup> The questions are: 1) what is the appropriate remedy for defendants affected by Farak's misconduct; and 2) whether any additional remedy is warranted based on the finding of prosecutorial misconduct. See Joint Response at p. 2.

moved unsuccessfully for post-conviction relief and/or discovery between January 19, 2013, and November 1, 2014; and (3) their motions were denied on the basis of the contaminated evidentiary record established before Judge Kinder[,]” are entitled to dismissal with prejudice on [their Farak-based] convictions. Cotto Memorandum of Decision and Order (June 2017) 77.

(emphasis added).

Page 3 of the Joint Response defines “Farak defendants” as those

who pleaded guilty to a drug charge, admitted to sufficient facts to warrant a finding of guilty, or who were found guilty of a drug charge in a case in which . . . Farak signed a drug certificate in their case as an analyst between August 2004 and January 2013 while she was employed at the Department of Public Health Amherst Laboratory.

Thus, the DAOs articulated **two** legal issues before this Court and **two separate positions** on these issues. They did not contend that the only defendants who are entitled to relief under the Bridgeman II protocol were those whose post-conviction motion was decided by Judge Kinder between January 19, 2013 and November 1, 2014 as the Petitioners assert.

The DAOs agree that all Farak defendants (as defined in the Joint Response) are entitled to relief pursuant to the Bridgeman II protocol. To this end, most of the DAOs

have already filed lists identifying their Farak cases that they agree may be dismissed with prejudice.

## **II. Questions to Be Reported**

The Petitioners ask this Court to report two questions to the Full Court, one focused on the cases of Farak defendants and one focused on prosecutorial misconduct. In view of the DAOs' agreement to dismiss the vast majority of Farak defendant cases, the only area of dispute is what effect, if any, the finding of the AAGs' misconduct is to have on those defendants. As such, no report is necessary as to the first question (regarding relief for Farak defendants); as for the second question, concerning misconduct, the DAOs' position is that no report is necessary as to this question, either. See pp. 6-8, below.

### **A. Relief for Farak defendants**

As the DAOs articulated in the Joint Response, the Bridgeman II protocol provides an instructive model for handling the cases of Farak defendants. Since at least February, 2017, the DAOs have suggested to CPCS that the Bridgeman II protocol should be followed for those defendants in whose cases Farak signed the drug certificate. As such, it is unnecessary for this Court to report any question concerning the proper relief for Farak defendants.

As for the misconduct issue, Justice Carey ruled that because of the AAGs' misconduct, any Farak defendant who "moved unsuccessfully for post-conviction relief and/or discovery between January 19, 2013, and November 1, 2014," based on the "contaminated evidentiary record before Judge Kinder" is entitled to dismissal with prejudice. The DAOs agree. In other words, they agree that those defendants who were actually affected by the AAGs' misconduct are entitled to dismissal.

The main areas of disagreement is whether the Full Court must address the question of whether the DAOs offices should be entitled to re prosecute any Farak defendant in light of a) any failure to take adequate steps to identify Farak cases and notify Farak defendants, which is addressed at pp. 8-10 of the Joint Response and in the affidavits filed by the DAOs and AGO; and b) the misconduct by the two AAGs, which is addressed in the Joint Response at pp. 11-15.

B. Question Regarding Petitioners' Request for a Nebulous Prophylactic Rule

The Petitioners have not established any widespread prosecutorial misconduct such that a question should be reported to the Full Court. There is no need for prophylactic rule based on the "misconduct [that occurred]



**in this case"** (Pet. Req. for Res. and Rep. at 4) (emphasis added). Indeed, the Washington Post article on which the petitioners rely in seeking such a rule "because weak discovery and notice practices by prosecutors are threatening to become an epidemic", see Pet. at 24, **does not even mention a Massachusetts case.**

To be sure, the AGO has indicated that it is not challenging the Judge Carey's finding of prosecutorial misconduct in this case for the AAGs' failure to disclose Farak's own mental health treatment notes. But this misconduct specifically affected only those defendants whose motions were denied on the basis of the "contaminated evidentiary record established before Judge Kinder" between January 2013 and August 2014 (hence the DAOs' position to the second question discussed at p. 4), or, at most, cases in which Farak signed the drug certificate. As such, the remedy for the misconduct involved here should be limited only to Farak defendants.

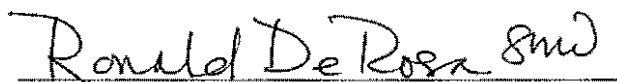
Throughout its history, the Supreme Judicial Court has addressed instances of prosecutorial misconduct. See, e.g., Commonwealth v. Washington W., 462 Mass. 204 (2016). The Commonwealth has identified no case, and the petitioners have identified no case, in which the Court has imposed a remedy *beyond the case under consideration*, for

such misconduct. And in no case has the Court ever suggested that a singular instance of prosecutorial misconduct might require the creation of some kind of prophylactic rule or standing order to guard against such misconduct in the future, beyond those that already exist in the law.

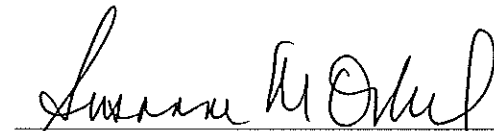
The criminal justice system is already designed with sufficient safeguards to guard against misconduct, ranging from case law, see, e.g., Brady v. Maryland, 373 U.S. 83 (1963), to rules of criminal procedure, such as Mass. R. Crim. P. 14 and 30. Additionally, attorneys are subject to a code of professional conduct and disciplinary proceedings. See Rules of Professional Conduct. Simply put, there is no need for this Court to report a question as to whether the Full Court needs to fashion a prophylactic rule or standing order for future cases.

Date: 12/18/17

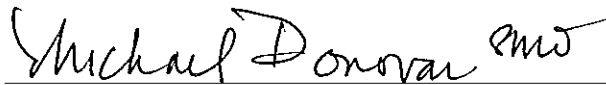
Respectfully submitted,  
THE COMMONWEALTH,

A handwritten signature in dark ink, reading "Ronald DeRosa" followed by a stylized monogram or initials "smw". The signature is written over a horizontal line.

Ronald DeRosa, BBO# 658915  
Assistant District Attorney  
Essex County  
District Attorney's Office  
Ten Federal Street  
Salem, MA 01970  
(978) 745-6610



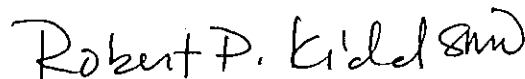
Susanne M. O'Neil, BBO# 1567769  
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Ian Leson, BBO# 685422  
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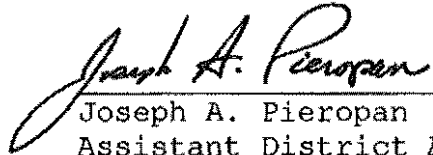


Robert P. Kidd, BBO# 552446  
Assistant District Attorney  
Bristol District  
Attorney's Office  
888 Purchase Street  
New Bedford, MA 02740  
(508) 997-0711

Date: 12/18/2017

Respectfully submitted,

THE COMMONWEALTH,

A handwritten signature in black ink, reading "Joseph A. Pieropan". The signature is written in a cursive style with a large, looping initial "J".

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Joseph A. Pieropan  
Assistant District Attorney  
BBO# 550420  
Berkshire County  
District Attorney's Office  
P.O. Box 1969 - 7 North Street  
Pittsfield, MA 01202-1969  
Tel. 413-443-5951  
joseph.a.pieropan@state.ma.us

Date: 12/18/2017

Respectfully submitted,

THE COMMONWEALTH,

*Gail M. McKenna (JAP)*

Gail M. McKenna

Assistant District Attorney

BBO# 557173

Plymouth County

District Attorney's Office

32 Belmont Street

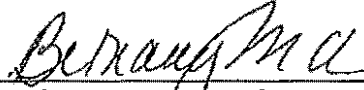
Brockton, MA 02303

Tel. 508-584-8120

Date: 12/18/17

Respectfully submitted,

THE COMMONWEALTH,

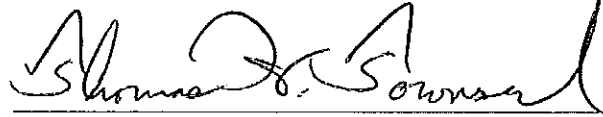
A handwritten signature in cursive script, appearing to read "Bethany C. Lynch", written over a horizontal line.

Bethany C. Lynch  
Assistant District Attorney  
BBO# 637623  
Hampden County  
District Attorney's Office  
50 State Street  
Springfield, MA 01103  
(413) 505-5908

Date: 12/18/17

Respectfully submitted,

THE COMMONWEALTH,

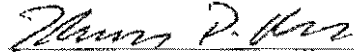
A handwritten signature in black ink, appearing to read "Thomas H. Townsend", written over a horizontal line.

Thomas H. Townsend  
Assistant District Attorney  
BBO# 636309  
Northwestern  
District Attorney's Office  
One Gleason Plaza  
Northampton, MA 01060  
(413) 586-9225

Date: 12/18/17

Respectfully submitted,

THE COMMONWEALTH,



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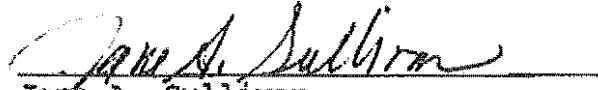
Thomas D. Ralph  
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Sara Concannon DeSimone  
Assistant District Attorney  
BBO# 636991  
Middlesex County  
District Attorney's Office  
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(781) 897-6830



Date: 12/18/17

Respectfully submitted,

THE COMMONWEALTH,

A handwritten signature in cursive script, reading "Jane A. Sullivan", is written over a horizontal line.

Jane A. Sullivan  
Assistant District Attorney  
BBO# 546498  
Worcester County  
District Attorney's Office  
225 Main Street, Room G-301  
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(508) 755-8601

**CERTIFICATE OF SERVICE**

I do hereby certify that I have, this day, served a copy of the JOINT RESPONSE OF THE DISTRICT ATTORNEYS TO PETITIONERS' REQUEST FOR RESERVATION AND REPORT AND TO THIS COURT'S INTERIM ORDER OF DECEMBER 8, 2017 by first class and electronic mail to:

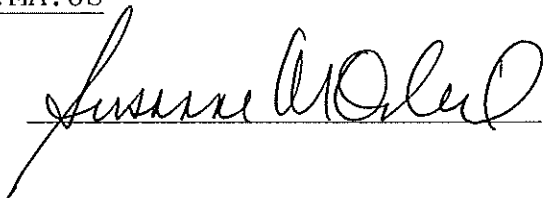
Rebecca A. Jacobstein  
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Dated: December 18, 2017

A handwritten signature in dark ink, appearing to read "Susan A. O'Leary", is written over a horizontal line.