

**COMMONWEALTH OF MASSACHUSETTS**

**Supreme Judicial Court**

**No. SJC - 12471**

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**COMMITTEE FOR PUBLIC COUNSEL SERVICES & OTHERS,**

**V.**

**ATTORNEY GENERAL OF MASSACHUSETTS**

**& OTHERS**

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

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**BRIEF OF *AMICUS CURIAE*,**

**THE BOSTON BAR ASSOCIATION**

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BOSTON BAR ASSOCIATION**

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## **INTEREST OF AMICUS CURIAE**

The Boston Bar Association ("BBA") was founded in 1761 by John Adams and other Boston lawyers and is the nation's oldest bar association. The BBA's mission is to facilitate access to justice, advance the highest standards of excellence for the legal profession, and serve the community at large. From its early beginnings, the BBA has served as a resource for the judicial, legislative, and executive branches of government. Its members include lawyers from all areas of practice, including present and former prosecutors, criminal defense lawyers, and public defenders, as well as former judges.

The BBA respectfully submits this brief pursuant to Mass. R. App. P. 17 to address only the third question in the reservation and report:

Whether, as the petitioners request, the record in this case supports the court's adoption of additional prophylactic measures to address future cases involving widespread prosecutorial misconduct, and whether the court would adopt any such measures in this case.

Additional prophylactic measures are appropriate. The interest here asserted by the BBA as amicus is to facilitate access to justice for all defendants in criminal cases and to ensure the timely, fair and efficient administration of justice by reducing the risk of widespread prosecutorial misconduct. Whether it be the use of falsified forensic scientific results and testimony to produce tens of thousands of convictions that violated due process, improper and unreliable forensic laboratory processes that were allowed to continue without any means of discovery, or the conviction of factually innocent persons, the BBA has responded by studying and identifying steps to both remedy and prevent such misconduct in the future.

- Two years ago, the BBA argued that this Court should exercise its powers of general superintendence to "mitigate the impact of the Commonwealth's 'egregious' misconduct and . . . reaffirm the commitment of the judicial system to due process and fairness." Amicus Brief in *Bridgeman v. District Attorney for the Suffolk Dist.*, 476 Mass. 298 (2017) (*Bridgeman II*) at 15-16.

- Four years ago, a BBA Task Force recommended an independent auditing function be established to which all forensic services employees could confidentially report concerns about internal operations or coworkers' performance, with "the authority to conduct full and complete investigations of any concerns." Report of the Boston Bar Association Drug Lab Crisis Task Force at 11 (February 2014) (available at <http://www.bostonbar.org/docs/default-document-library/bba-drug-lab-crisis-task-force-report.pdf>).
- Nearly a decade ago, a BBA Task Force identified "failure of police or prosecutors to produce exculpatory evidence" and "poor defense counsel performance" as two of the four leading causes of wrongful convictions in the Commonwealth, recommended a series of best practices to address both, proposed a statutory mechanism for post-conviction access and testing by inmates claiming factual innocence, which became Mass. Gen. L. Ch. 278A, and proposed broadening the membership of the state's Forensic Sciences Advisory Board to include, among others, scientists, which was



subsequently done in Mass. Gen. L. Ch. 6, § 184.

Getting It Right: Improving the Accuracy and Reliability of the Criminal Justice System in Massachusetts (December 2009) at 14, and Appendices A-D (available at [http://www.bostonbar.org/prs/reports/BBAGetting\\_It\\_Right\\_12-16-09.pdf](http://www.bostonbar.org/prs/reports/BBAGetting_It_Right_12-16-09.pdf)).

Repeated, intentional misconduct in criminal prosecutions will not and cannot be prevented solely through a focus on individuals and individual prosecutions. The Commonwealth's recent experience with governmental misconduct shows it is never simply one "bad apple."

- Five years ago, the Office of the Inspector General concluded that although Annie Dookhan "was the sole bad actor" in malfeasance and tampering at the Hinton Lab, "the most glaring factor that led to the Dookhan crisis was the failure of management," that the Commissioner overseeing the lab "failed to respond appropriately," that the lab lacked formal and uniform protocols, provided insufficient training to its chemists, failed to disclose potentially exculpatory evidence, lacked effective quality

controls, did not always use valid statistical approaches and lacked heightened security.<sup>1</sup>

- Last year, the Executive Office of Public Safety and Security concluded that the State Police Crime Laboratory's Office of Alcohol Testing's "errors of judgment" in the failure to disclose hundreds of incomplete certifications for calibrations of breathalyzer machines were "enabled by a longstanding and insular institutional culture that was reflexively guarded, which frequently failed to seek out or take advantage of available legal resources, and which was inattentive to the legal obligations borne by those whose work facilitates criminal prosecutions."<sup>2</sup>
- In *Commonwealth v. Cotto*, No. 2007-770, (Hampden Super. Ct. June 26, 2015), Judge Carey concluded: "The nature and scope of governmental misconduct

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<sup>1</sup> Office of the Inspector General, *Investigation of the Drug Laboratory at the William A. Hinton State Laboratory Institute 2002 - 2012*, at 1, 113-17 (March 4, 2014) (available at <http://www.mass.gov/ig/publications/reports-and-recommendations/2014/investigation-of-the-drug-laboratory-at-the-william-a-hinton-state-laboratory-institute-2002-2012.pdf>).

<sup>2</sup> Executive Office of Public Safety and Security, *Discovery Practices at the Office of Alcohol Testing*, at 1 (October 16, 2017).

by [the two AAGs handling the case] in withholding evidence was severe" and was "perpetrated in part through intentional misrepresentations to the court and was pursued to conceal the extent of underlying misconduct by another government actor, Farak." Memorandum Of Decision And Order On Motions For Post-Conviction Relief (June 26, 2017), Pet. Add. 94.

While no one measure, protocol or training program will protect against the misconduct of every "bad apple," the BBA respectfully submits that it is now time for this Court to adopt prophylactic measures, including those proposed here, and thus to take additional and necessary steps to limit and prevent pre-conviction and post-conviction misconduct in the future.

**STATEMENT OF THE CASE AND THE FACTS**

For the purpose of the procedural history of this case, the BBA relies upon the Petitioners' statement of the case (5-6), and for the purpose of relevant factual background, the BBA relies upon Judge Carey's Memorandum of Decision and Order dated June 26, 2017 in *Cotto* (Pet. Add. 18-47).

## SUMMARY OF THE ARGUMENT

Repeated, intentional government misconduct in the criminal justice system *obstructs* justice, and prosecutions or convictions involving it are *wrongful*. Like the Petitioners and the Attorney General, the BBA believes that standing orders making permanent the *Bridgeman* protocol, the disclosure obligations for lawyer misconduct that may have tainted a case, and disclosure obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), are appropriate. Beyond that, however, this Court should make clear that the prosecutor's *primary* "responsibility [is that] of a minister of justice and not simply that of an advocate," S.J.C. Rule 3:07, Mass. R. Prof. Cond. 3.8 cmt. 1, by establishing through standing order, under its extraordinary power of superintendence, a mandatory reporting obligation for every prosecutor who has knowledge or credible information of misconduct by *anyone*, lawyer or non-lawyer, on the prosecution team. (*I, infra*).

Mandatory reporting promotes accountability and minimizes the scope of harm from misconduct. It creates a record through which recurring problems can be identified, and it enables supervisory action. Any

intentional misconduct by any non-lawyer agent of the prosecution team should be promptly reported to the supervisory prosecutor. Lawyer misconduct on the prosecution team, like repeated intentional misconduct by non-lawyers, poses a more severe and insidious problem because it can prevent discovery of other prosecutorial misconduct. It is the systemic deprivation of due process. Mandatory reporting of such lawyer misconduct, or of repeated intentional misconduct by non-lawyer agents of the prosecution team, is essential to minimize its occurrence and should be made to a statewide power of sufficient authority (such as the Chief Justice of the Trial Court or a specially designated judicial officer) as well as to the supervisory prosecutor. (II, *infra*). Such a report should also be made to the judge handling any case in which such lawyer misconduct or repeated intentional non-lawyer misconduct occurs, though this alone is insufficient as it will not necessarily ensure that any systemic aspects of the problem are recognized, and misconduct may occur before any case exists. Finally, all such reports, whether to a supervisor or to a central judicial

authority or judicial officer, should be in writing.  
(II, *infra*).

#### **ARGUMENT**

This Court should establish by standing order a mandatory obligation, on all prosecutors, ensuring the prompt, comprehensive and documented report of intentional misconduct that could taint any prosecution. This report should be made to a supervisory prosecutor if it involves non-lawyer misconduct by anyone on the prosecution team, and should also be made to a central judicial authority or judicial officer if it involves either repeated intentional misconduct by a non-lawyer on the prosecution team or lawyer misconduct by anyone on the prosecution team. Adoption of such a standing order will reduce the risk such misconduct poses to the administration of justice and will minimize the scope of future instances of prosecutorial misconduct.

While the BBA here supports a protocol for the prompt remedy of large scale misconduct cases and a permanent reminder to prosecutors of disclosure obligations, as do both Petitioners and the Attorney General, the BBA also supports mandatory reporting of intentional misconduct by anyone on the prosecution

team, regardless of whether it occurs in an identifiable pending case.<sup>3</sup>

Instances of repeated, intentional government misconduct undermine the integrity of the entire system of justice and destroy confidence and trust in its operations. While the obligation to rectify events of repeated government misconduct ultimately rests with the Commonwealth, the obligation to maintain the integrity of the system of justice ultimately resides with this Court

**I. AS IT HAS DONE BEFORE, THIS COURT SHOULD EXERCISE ITS EXTRAORDINARY POWER OF SUPERINTENDENCE TO ENSURE THE FUNDAMENTAL FAIRNESS AND ACCURACY OF THE CRIMINAL JUSTICE SYSTEM.**

The Court has exercised its extraordinary power to ensure the fair and effective operation of the criminal justice system, including taking actions that had direct and significant impact on police, prosecutors, sheriffs, and the Attorney General. It acted to "regulate the presentation of evidence in court proceedings" by mandating a cautionary jury instruction when the Commonwealth offers unrecorded statements of a criminal defendant made during custodial interrogation. *Commonwealth v.*

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<sup>3</sup> See footnote 5 for proposed standing order setting forth the obligations for mandatory reporting.



*DiGiambattista*, 442 Mass. 423, 445, 447-48 (2004). It acted to "discourage the Commonwealth from identifying a person as a likely participant in the crime under investigation, compelling his or her appearance and testimony at the grand jury without adequate warnings, and then using that testimony in a criminal trial" in order to "ameliorat[e] with an advisement of rights" the compulsion inherent in a grand jury summons.

*Commonwealth v. Woods*, 466 Mass. 707, 719-720 (2014). It responded to "the burden of a systemic lapse" in provision of counsel to indigent defendants by dismissal without prejudice of cases in which counsel was not appointed within forty-five days and release of those held without bail for whom counsel was not appointed within seven days. *Lavallee v. Justices in Hampden Super. Ct.*, 442 Mass. 228, 246 (2004).

Preventing widespread prosecutorial misconduct is no less important.

Preventing prosecutorial misconduct requires more than reiterating familiar tropes. The trial court found repeated, intentional instances of governmental misconduct on the part of two Assistant Attorneys General that was "severe," "for a prolonged period, in violation of many drug lab defendants' constitutional

rights, and "perpetrated in part through intentional misrepresentations to the court and was pursued to conceal the extent of underlying misconduct by another government actor, Farak." Pet. Add. 94.

These lawyers were directly supervised by six of the most senior lawyers in the Attorney General's Office. Pet. Add. 41. This was a case in which "any major decisions were with the consent of the Attorney General based on advice given to her, probably by [the First Assistant Attorney General, the Chief of the Criminal Bureau and the Assistant Attorney General directly responsible for the case]." Id. at 41. The lawyers "calling the shots" in the matter were these highly experienced lawyers and the Deputy Attorney General, who acknowledged that the matter was a "big deal" in the Attorney General's Office. Id. This occurred when government lawyers should have been acutely sensitive to repeated, intentional instances of governmental misconduct, as the Commonwealth's District Attorneys were then responding to just such a situation regarding the Hinton laboratory. *Commonwealth v. Scott*, 467 Mass. 336 (2014). Beyond "bad apples," prophylactic measures should address and include the much larger category of persons who may

not appreciate or promptly act with regard to their roles and responsibilities concerning misconduct by others.

**II. THIS COURT SHOULD ESTABLISH, BY STANDING ORDER, A MANDATORY REPORTING REQUIREMENT FOR ANY PROSECUTOR WHO HAS KNOWLEDGE OR CREDIBLE INFORMATION OF INTENTIONAL MISCONDUCT BY ANYONE ON THE PROSECUTION TEAM, WITHOUT REGARD TO MATERIALITY OR PREJUDICE IN ANY IDENTIFIABLE CASE.**

Prosecutors, directly and through those for whom they are responsible, control the introduction of information into the criminal justice system. For this reason, they should be required to report up to the supervisory prosecutor whenever they have knowledge or credible information of *any instance* of intentional misconduct by a non-lawyer that could taint any prosecution or conviction.<sup>4</sup> They should be required to report both up to a supervisory prosecutor and out to a central judicial authority or judicial officer *any instance* of repeated intentional misconduct by a non-lawyer, or *any instance* of lawyer misconduct, that could taint any prosecution or conviction. This obligation concerning misconduct of those on the

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<sup>4</sup> For similar language, see S.J.C Rule 3:09, Massachusetts Code of Judicial Conduct, Rule 2.15 which includes both reporting obligations (Rule 2.15 A and B) and the "knowledge of" and "credible information" standard (Rule 2.15 C and D.)

prosecution team should exist, regardless of whether any affected case has been brought or is pending and regardless of the seriousness of its impact on any case.

**A. Mandatory Reporting Obligations Are Appropriate When Critical Interests Are At Stake And Non-Disclosure Can Have Catastrophic Consequences.**

"Mandatory reporting is . . . a consistent feature of the modern administrative State." *In re Grand Jury Investigation*, 437 Mass. 340, 355 (2002). While familiar in the criminal justice context from mandatory reporting of suspected child abuse or neglect, Mass. Gen. L. Ch. 119, § 51A, "[t]o protect the public weal, . . . mandatory reporting requirements [have been imposed] in a raft of legislation outside the area of abuse prevention." *In re Grand Jury Investigation*, 437 Mass. at 355 (citing Mass. Gen. L. Ch. 21I, § 10 (mandatory reporting by "large quantity toxics users"), Mass. Gen. L. Ch. 55 (mandatory reporting of financial information by candidates, political parties, and political action committees); Mass. Gen. L. Ch. 62C, § 8 (mandatory reporting to Commissioner of Revenue by entities doing business in Commonwealth); Mass. Gen. L. Ch. 94, §

307B (mandatory reporting by manufacturers of cigarette, snuff, and chewing tobacco)).

Mandatory reporting is used when the interests at stake are very high (here, ensuring due process and the integrity of the criminal justice system), the consequences of non-discovery could be catastrophic (or, as Judge Carey found, "a problem of systemic magnitude," Pet. Add. 38-39), or the observer may not be in a wholly independent or neutral position from which to determine the scope or impact of the activity. The incentive to minimize the duration or scope of misconduct and its impact when discovered, as was so graphically displayed here through two Assistant Attorneys General "deceiving [the court] and engaging in a pattern calculated to interfere with the court's ability to adjudicate discovery in the drug lab cases and to learn the scope of Farak's misconduct[,] " Pet. Add. 86, could exist in every case.

Lawyer misconduct must already be reported to the Board of Bar Overseers, Mass. R. Prof. Cond. 8.3(a), but many members of the prosecution team are not lawyers. Besides local and state police, this includes the Commonwealth's forensic laboratory employees,

*Commonwealth v. Martin*, 427 Mass. 816, 823-24 (1998), municipal forensic laboratory employees, *Commonwealth v. Gallarelli*, 399 Mass. 17, 20 n.4 (1987), the state medical examiner's employees, *Commonwealth v. Woodward*, 427 Mass. 659, 679 (1998), and even law enforcement agents outside the jurisdiction. *Commonwealth v. Manning*, 373 Mass. 438, 442 n.5 (1977) (federal agents who interfered with state criminal defendant's relationship with counsel are part of the prosecution team). Misconduct related to anything subject to mandatory discovery under Mass. R. Crim. P. 14(a)(1)(A) should be reported, regardless of whether it is "egregious government misconduct."

**B. The Reporting Obligation Should Apply Regardless Of Whether A Specific Case Is Identifiable Or Pending.**

Reporting of misconduct is equally if not more important before a conviction or even a charge is brought, as such early reporting can help prevent misconduct from expanding to create a system-wide crisis. The reporting obligation should not await a connection between the misconduct and any specific case, as misconduct may pre-date the institution of any case or, if systemic, it may be "that particularly insidious form of misconduct, which belies

reconstruction." *Commonwealth v. Scott*, 467 Mass. 336, 352 (2014).

**C. The Reporting Obligation Should Be Triggered By Credible Information Suggesting Misconduct By Anyone On The Prosecution Team And It Should Operate With A Minimum Of Discretion.**

The reporting obligation to a supervisory prosecutor should extend to intentional misconduct by anyone on the prosecution team, as that term is used in connection with the government's mandatory discovery obligations pursuant to Mass. R. Crim. P. 14(a)(1)(A) (those "under the prosecutor's direction and control, or . . . who have participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in the case").

The reporting obligation should operate with the absolute minimum of discretion and, consistent with the approach of Mass. R. Prof. Cond. 3.8 to the reporting of potentially exculpatory evidence, it should operate without regard to materiality. A prosecutor should make the disclosure of such intentional misconduct, as with any evidence that tends to negate guilt or mitigate punishment, "without

regard to its anticipated impact." S.J.C. Rule 3:07, Mass. R. Prof. Cond. 3.8(d) cmt. 3A.

Comprehensive and documented accounting of misconduct should not depend on the prejudice caused by such misconduct (as is required for post-conviction relief based upon failure to disclose exculpatory evidence). Compare *Commonwealth v. Martin*, 427 Mass. 816, 823 (1998) (failure to disclose analyst's inconclusive results of confirmatory tests for presence of allegedly fatal LSD was prejudicial), with *Commonwealth v. Sullivan*, 478 Mass. 369, 382-85 (2017) (criminalist's failed proficiency tests were exculpatory but their nondisclosure, when he did not perform or testify about critical testing in the case, was not prejudicial), and *Commonwealth v. Campiti*, 41 Mass. App. Ct. 43, 65 (1996) (state trooper's embezzlement during defendant's prosecution did not merit new trial even if it would have had a bearing on his credibility in defendant's trial).



**D. Mandatory Reporting Should Be To A Central Judicial Authority Or Judicial Officer When Any Prosecutor Has Knowledge Or Credible Information Of Repeated Intentional Misconduct By A Non-Lawyer Agent Or Any Lawyer Misconduct, Without Regard To Materiality Or Prejudice In Any Identifiable Case.**

The discovery of misconduct that undermines the criminal justice system, either because of its scale or the responsible party involved, should be reported out from the prosecution to a central judicial authority or judicial officer with the authority to fully and promptly determine its scope and impact and to take appropriate actions depending on the misconduct involved. Whether repeated intentional misconduct by a non-lawyer agent of the prosecution team amounts to "egregious misconduct" may be a question of fact, see *Commonwealth v. Scott*, 467 Mass. 336, 347 n.6 (2014), but it should under all circumstances be reported to the central judicial authority or judicial officer. Similarly, any lawyer misconduct should be reported to the central judicial authority or judicial officer in addition to the supervisory prosecutor.

Each of the Commonwealth's recent experiences with systemic misconduct appropriately called for the designation of one or more judges to handle the

similar questions arising in multiple cases. Having one such office or judicial officer designated in advance to receive reports of such situations would both simplify and clarify the process, and expedite moving it outside the wholly adversarial context of a particular case (if one exists) to a framework overseen by a neutral judicial officer.

### **CONCLUSION**

The BBA believes the adoption of additional prophylactic measures to address future instances involving widespread prosecutorial misconduct is necessary and appropriate and that, in addition to the standing orders generally agreed to by Petitioners and the Attorney General, the Court should adopt a standing order imposing mandatory reporting obligations on prosecutors.<sup>5</sup> It is past the "time for

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<sup>5</sup> The BBA recognizes any standing order that imposes a mandatory reporting obligation on prosecution teams may, of necessity, require more complexity to address concerns of administration and efficiency. The proposed order below sets forth the core obligations which the BBA submits should be included.

#### Standing Order

WHEREAS intentional and systemic prosecutorial misconduct violates the Sixth Amendment of the United States Constitution and Article XII of the Declaration of Rights;

WHEREAS intentional and systemic prosecutorial misconduct can and does interfere with the fair

this Court to staunch the damage and to make things as right as we can." Bridgeman II, 476 Mass. at 333 (Lenk, J., concurring). It is time to prevent such damage in the future.

Respectfully submitted,  
  
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(Footnote 5 continued) administration of justice by the courts of this Commonwealth; and

WHEREAS a prosecutor's primary responsibility is that of a minister of justice and not simply that of an advocate;

Now therefore it is ORDERED:

Any lawyer in a prosecuting authority who has knowledge of, or receives credible information of, intentional misconduct by any non-lawyer agent of the prosecution team shall promptly and in writing inform the supervising prosecutor in the authority of such knowledge or information, without regard to its materiality or prejudice in any identifiable case.

Any lawyer in a prosecuting authority who has knowledge of, or receives credible information of, repeated intentional misconduct by any non-lawyer agent of the prosecution team, or any lawyer misconduct by any agent of the prosecution team, shall promptly and in writing inform the supervising prosecutor in the authority and the designated judicial entity of such knowledge or information, without regard to its materiality or prejudice in any identifiable case.

**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief complies, to the best of my knowledge and belief, with the Massachusetts Rules of Appellate Procedure, including those requirements set forth in Mass. R. App. P. 16(k).

April 23, 2018  
Date

Elizabeth A. Ritvo  
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**CERTIFICATE OF SERVICE**

I hereby certify that I have mailed, first class postage prepaid, two copies of this brief to each of the following counsel.

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