

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT

Suffolk, ss.

No. SJ-2017-0347

COMMITTEE FOR PUBLIC COUNSEL SERVICES, et al.,  
Petitioners,

v.

ATTORNEY GENERAL OF MASSACHUSETTS, et al.,  
Respondents.

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PETITIONERS' REQUEST FOR RESERVATION AND REPORT  
AND FOR FURTHER SINGLE JUSTICE PROCEEDINGS

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At a hearing on October 31, 2017, the Single Justice recognized that Petitioners consider this case to be “*Bridgeman plus*.” That is right. In *Bridgeman II*, the Full Court pointed to “the absence of any evidence of misconduct by a prosecutor” as a reason to stop short of ordering dismissals with prejudice. *Bridgeman v. Dist. Attorney for the Suffolk Dist.*, 476 Mass. 298, 322 (2017). Here, in contrast, Petitioners allege misconduct by prosecutors, and have therefore requested more relief than was ordered in *Bridgeman II*. Last week, the Attorney General’s Office accepted for purposes of this case that two former assistant attorneys general committed “prejudicial prosecutorial misconduct” affecting Farak Defendants. AG Response at 3-4. Consequently, it is now *undisputed* that this case contains “*Bridgeman plus*” facts.

But Respondents oppose “*Bridgeman plus*” relief. Despite the AGO’s concession, and despite the other misconduct alleged in the petition, Respondents have not yet agreed to the dismissal of all Farak cases, or to any other remedy sought by Petitioners. Accordingly, Petitioners respectfully request that this Court (1) reserve and report two key legal questions; and (2) schedule single justice proceedings to finalize case lists and deliver aspects of agreed-upon relief to Farak Defendants while the reported questions are considered by the Full Court.

## Discussion

### I. Key questions of law should be reserved and reported to the Full Court.

In *Bridgeman*, the Single Justice twice reserved and reported legal questions to the Full Court. In this case, there is now a clear dispute on two questions: (1) which cases comprise the relevant Farak convictions and whether all of them must be vacated and dismissed with prejudice; and (2) whether this Court should issue additional relief to remedy or sanction the egregious prosecutorial misconduct that occurred in this case, and to deter similar misconduct in the future. Petitioners ask that these questions be reserved and reported.

#### A. There are sharp disagreements among the parties.

Petitioners have asked the Court to “vacate and dismiss with prejudice all convictions tainted by the Commonwealth’s misconduct,” without requiring individualized showings of prejudice, and without allowing prosecutors to maintain any convictions. Pet. 15, 16-23. Petitioners have also requested orders, declaratory relief, and other relief addressed to the Commonwealth’s mishandling of Farak convictions, as well as its handling of other potentially wrongful convictions going forward. *Id.* at 23-35, 27. As grounds for these requests, petitioners have pointed to both Farak’s misconduct and, generally speaking, three kinds of prosecutorial misconduct. First, former assistant attorneys general Foster and Kaczmarek have been found to have committed egregious misconduct, including withholding evidence and deceiving a court. Second, the Commonwealth failed to comprehensively notify affected defendants. Third, the Commonwealth failed to inform courts of the AGO’s false statements. *Id.* at 16-21.

The AGO and the DAOs oppose the relief that Petitioners have requested, while at the same time making several significant concessions and alternative proposals. To their credit, several DAOs have agreed to the dismissal of many convictions involving alleged drug samples in which Farak signed the certificate of analysis while working at the Amherst Lab, and some have agreed to the

dismissal of all such convictions.<sup>1</sup> It also appears limited notice was undertaken in at least two counties before the petition was filed in September 2017.<sup>2</sup> The AGO has not stipulated to the dismissal of any wrongful convictions, and it has narrowly conceded one type of prosecutorial misconduct—namely, Judge Carey’s findings concerning former AAGs Foster and Kaczmarek—but *only* “for purposes of this litigation.” AG Response at 2-4.

Thus, there remains a substantial dispute about whether the Court should require wholesale dismissals of Farak-involved convictions and order other relief or sanctions. Some DAOs have stated that they intend to maintain some of the tainted convictions,<sup>3</sup> and all offices 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. DAOs Response at 2-3. For its part, the AGO has not stipulated to any dismissals, or indeed to any “*Bridgeman plus*” remedy for the AGO’s now-undisputed misconduct, which Judge Carey has described as a “fraud upon the court.” Pet. 2. Moreover, side-stepping the issue of prosecutorial

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<sup>1</sup> See, e.g., Stipulation Concerning Middlesex County (Nov. 30, 2017) (agreeing to the dismissal of all such cases); Stipulation Concerning Hampden County (Nov. 29, 2017) (agreeing to the dismissal of district court and juvenile cases); Stipulation Concerning Northwestern District (Nov. 29, 2017) (agreeing to the dismissal of all such cases, with the exception “convictions resulting from litigation following Farak’s arrest in January 2013”).

<sup>2</sup> See, e.g., Affidavit of First Assistant Jane A. Sullivan in Support of District Attorney for Worcester County’s Response to Petition at 4-5 ¶¶ 5-6 (Nov. 29, 2017) (referencing letters prepared for defendants); Affidavit of Assistant District Attorney Ian Leson in Support of District Attorney for Suffolk County’s Response to Petition at 7 ¶ 11 (Nov. 30, 2017) (discussing list of defendants provided to CPCS in August 2016).

<sup>3</sup> See, e.g., Affidavit of Assistant District Attorney Joseph A. Pieropan in Support of Berkshire District Attorney’s Response to Petition at 2-8 ¶¶ 5, 33 (Nov. 30, 2017) (asserting that the Berkshire DAO “is undertaking a case-by-case review of each defendant to determine which cases,” out of a total of 615, will be dismissed); Affidavit of the Hampden District Attorney’s Office in Support of Response of the District Attorneys to Petition at 17-18 ¶¶ 26-28 (Nov. 30, 2017) (referencing 754 superior court cases, as well as a process for deciding which convictions the Hampden DAO will not agree to dismiss).

misconduct altogether, the AGO has proposed a “*Bridgeman*-style process,” while acknowledging that “the question of any further remedy” should be reported to the Full Court “[a]s to any defendants that remain.” AG Response at 14. That proposal fails to take responsibility for the AGO’s undisputed misconduct—let alone the petition’s additional allegations of AGO misconduct—that distinguishes this case from *Bridgeman*, and the Farak scandal at Amherst from the Dookhan scandal at Hinton.

In short, with the exception of the DAOs’ stance on the presumably few defendants who moved for relief by November 2014, Respondents have not consented to the entry of any order, sanction, or other relief going beyond the relief ordered in *Bridgeman*, and they oppose the “*Bridgeman plus*” remedy Petitioners have sought in this case.

**B. The Full Court’s intervention is necessary to resolve the parties’ dispute.**

The Full Court should decide whether this case, which presents undisputed “*Bridgeman plus*” facts, warrants a “*Bridgeman plus*” remedy. In particular, the Full Court should establish whether all relevant Farak convictions must be vacated and dismissed with prejudice, which cases comprise the relevant Farak-involved convictions, and whether additional relief beyond dismissals is warranted as a remedy or sanction for the misconduct, as a prophylaxis against future misconduct, or as an exercise of the Court’s superintendence power.

To facilitate the resolution of these issues, petitioners propose that the Single Justice reserve and report the following questions:

1. *Which convictions arising from Sonja Farak’s work at the Amherst Lab, if any, should the Court vacate and dismiss with prejudice?*
2. *What other remedies, orders, or sanctions, if any, should the Court issue in response to the egregious prosecutorial misconduct that occurred in this case?*

## II. Single Justice hearings should proceed in parallel with Full Court proceedings.

In *Bridgeman*, the parties worked toward a remedy by attending regular working group meetings on matters that did not require the Full Court's instruction. Similar proceedings could occur here, in parallel with any proceedings in the Full Court. These proceedings could address numerous issues vital to delivering a remedy to the thousands of people whose rights and lives have been harmed by this scandal, including:

- a mechanism for assuring the completeness and accuracy of Farak case lists,<sup>4</sup>
- an agreed-upon and uniform format and deadline for producing case lists;
- a mechanism for providing relief to any individuals whose Farak cases are inadvertently not included on Respondents' lists;
- the form, content, and delivery of individualized notices;
- the form, content, and delivery of general notice via social or traditional media;
- the relative responsibility of the AGO and the DAOs for each task;
- deadlines for the AGO and DAOs to complete and fund these tasks; and
- the fate of conspiracy convictions, default judgments, sealed cases, and cases continued upon the payment of fines.

Petitioners look forward to working with the AGO and the DAOs on these and other important issues.

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<sup>4</sup> See Attorney General's Motion for Order to Permit Release of Information to the Petitioners at 1 n.1 (Nov. 13, 2017) (asserting that the Attorney General's Office "makes no representation as to the[] accuracy or completeness" of spreadsheets that the AGO has provided to the DAOs, which some DAOs have in turn used to identify Farak cases).

**Conclusion**

Petitioners respectfully request that this case be reserved and reported to the Full Court, and that the Single Justice schedule hearings or meetings, beginning as soon as practicable, on issues that do not require the Full Court's intervention.

Respectfully submitted,

COMMITTEE FOR PUBLIC  
COUNSEL SERVICES,

HAMPDEN COUNTY LAWYERS  
FOR JUSTICE, INC.,  
HERSCHELLE REAVES, and  
NICOLE WESTCOTT

By its attorneys,

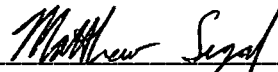
By their attorneys,



REBECCA A. JACOBSTEIN, BBO 651048  
BENJAMIN H. KEEHN, BBO 542006  
Committee for Public Counsel Services  
Public Defender Division  
44 Bromfield Street  
Boston, MA 02108  
(617) 910-5726  
rjacobstein@publiccounsel.net



DANIEL N. MARX, BBO 674523  
WILLIAM W. FICK, BBO 650562  
Fick & Marx LLP  
100 Franklin Street, 7th Floor  
Boston, MA 02110  
(857) 321-8360  
dmarx@fickmarx.com

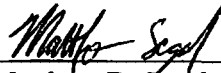


MATTHEW R. SEGAL, BBO 654489  
WILLIAM C. NEWMAN, BBO 370760  
CARLTON E. WILLIAMS, BBO 600973  
ACLU Foundation of Massachusetts, Inc.  
211 Congress Street  
Boston, MA 02110  
(617) 482-3170  
msegal@aclum.org

December 7, 2017

**CERTIFICATE OF SERVICE**

I hereby certify that on this 7th day of December, 2017, one true and complete copy of the foregoing document was sent via first-class mail, postage prepaid, to each Respondent listed below.

  
\_\_\_\_\_  
Matthew R. Segal

Maura Healey  
Thomas E. Bocian  
Anna E. Lumelsky  
Jessica V. Barnett  
Office of the Attorney General  
One Ashburton Place  
Boston, MA 02108-1518

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

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

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

Thomas M. Quinn  
Karen O'Sullivan  
Patrick O. Bomberg  
Shoshana Stern  
Office of the District Attorney/Bristol  
P.O. Box 973  
888 Purchase Street  
New Bedford, MA 02741

Timothy J. Cruz  
Gail M. McKenna  
Office of the District Attorney/Plymouth  
32 Belmont Street  
Brockton, MA 02303

Michael O'Keefe  
Brian S. Glenny  
Michael Donovan  
Elizabeth Anne Sweeney  
Office of the District Attorney/  
The Cape and the Islands  
P.O.Box 455  
3231 Main Street  
Barnstable, MA 02630

Daniel F. Conley  
John P. Zanini  
Ian M. Leson  
Zachary Hillman  
Office of the District Attorney/Suffolk  
One Bulfinch Place  
Boston, MA 02114

Jonathan W. Blodgett  
Elin H. Graydon  
Ronald DeRosa  
Office of the District Attorney/Essex  
Ten Federal Street  
Salem, MA 01970

Joseph D. Early, Jr.  
Jane A. Sullivan  
Office of the District Attorney/Worcester  
225 Main Street, Room G-301  
Worcester, MA 01608

Anthony D. Gulluni  
Katherine E. McMahon  
Deborah D. Ahlstrom  
Bethany C. Lynch  
Office of the District Attorney/Hampden  
Hall of Justice  
50 State Street  
Springfield, MA 01103

Marian T. Ryan  
Sara Concannon DeSimone  
Thomas D. Ralph  
Office of the District Attorney/Middlesex  
15 Commonwealth Avenue  
Woburn, MA 01801