COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT
CRIM. A. NO. 2007-770

COMMONWEALTH

vs.

ERICK COTTO

and related cases[1]

MEMORANDUM OF DECISION AND ORDER

1. Introduction

These Hampden County "drug lab" cases are before the Court[2] on defense motions following the issuance of investigative reports into the scope of misconduct of Amherst drug lab chemist Sonja Farak and into allegations of prosecutorial withholding of exculpatory evidence. The defendants, who all seek post-conviction relief, now move to lift impoundment and non-dissemination orders covering some of the investigative evidence and they have moved for discovery. For the reasons set forth below, the motions are *allowed* in part and *denied* in part.

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[1] *Commonwealth* v. *Glenda Liz Aponte,* Crim. A. No. 2012-226; *Commonwealth* v. *Omar Brown,* Crim. A. No. 05-1159; *Commonwealth* v. *Fiori Liquori,* Crim. A. No. 12-624; *Commonwealth v. Rolando Penate,* Crim. A. No. 12-83; *Commonwealth v. Bryant Ware,* Crim. A. Nos. 2007-1072, 2009-1072 & 2010-253; *Commonwealth v. Jermaine Watt,* Crim. A. Nos. 2009-1068 & 2009-1069; *Commonwealth* v. *Lizardo Lee Vega,* Crim. A. No. 2009-0007. The Court has been informed that the defendant in *Commonwealth* v. *Rafael Rodriguez,* Crim. A. No. 2010-1181, who had motions pending, has recently passed away.

[2] On December 7, 2015, the Superior Court Chief Justice Judith Fabricant specially assigned this judge to hear "cases arising from the conduct of Sonja Farak as described in *Commonwealth* v. *Cotto,* 471 Mass. 97 (2015), for all purposes."

2. Background

The defendants were convicted of drug offenses between 2005 and 2013 and all claim that they are entitled to orders vacating their convictions due to government misconduct. All of these defendants contend that their convictions were tainted because the substances in their cases were tested by Sonja Farak, a former chemist at the Department of Public Health's State Laboratory Institute in Amherst (the Amherst drug lab), who was convicted of tampering with evidence.[3] These defendants also complain that the Commonwealth withheld from them exculpatory evidence relating to the scope of Farak's misconduct at that lab. Finally, some of the defendants argue that the validity of their convictions is further compromised by the alleged misconduct of the evidence officer of the Springfield Police Department, Kevin Burnham, who was recently indicted on charges of theft of seized drug money evidence and who purportedly failed to seal evidence of substances he submitted to the Amherst drug lab for testing.

As defense counsel sought from the Commonwealth evidence concerning Farak's drug tampering in order to assess its impact on each of these cases, the Supreme Judicial Court mandated a thorough, expeditious investigation into the timing and scope of Farak's misconduct. See *Commonwealth* v. *Cotto*, 471 Mass. 97, 115 (2015). The *Cotto* court described the Commonwealth's investigation thus far into the timing and scope of Farak's misconduct as "cursory at best" and emphasized that

> "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

[3]In January of 2013, Farak was charged by criminal complaint with two counts of tampering with evidence, unlawful possession of cocaine and unlawful possession of heroin. Three months later, she was indicted for evidence tampering, theft of a controlled substance, and unlawful possession of cocaine. She pled guilty to those charges on January 6, 2014.

> 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 [April 8, 2015], 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."

Id. at 111, 115.

Two investigations ensued and recently concluded. The Court describes the course of each of these investigations in turn.

a. Investigation into Timing and Scope of Farak's Misconduct

The first investigation focused on the timing and scope of Farak's misconduct and was launched by the Attorney General's Office, which appointed Assistant Attorney General Thomas Caldwell (AAG Caldwell) for that task. AAG Caldwell convened two grand juries and called as witnesses Farak, who testified subject to an immunity agreement, and other chemists, some of whom also testified subject to cooperation agreements. On November 5, 2015, AAG Caldwell filed with this Court an interim report, entitled The Commonwealth's Response to June 1, 2015, Scheduling Order, on the status of his investigation. That interim report states:

> "(1) Ms. Farak began using controlled substances regularly in the last quarter of 2004; (2) Ms. Farak was under the influence of controlled substances during a vast majority of her working hours from the last quarter of 2004 to her removal from the lab on January 18, 2013; (3) Ms. Farak began stealing from police submitted samples in the last quarter of 2009 until her removal from the lab on January 18, 2013. She began regularly taking from samples in the first quarter of 2011. The majority of samples tampered with were powder and base cocaine. In addition, there was evidence of tampering with hallucinogens, specifically lysergic acid diethylamide (LSD). There has been no evidence found at this point that there was any tampering that included heroin or opioids."

Although AAG Caldwell's interim report has been impounded and subject to a non-dissemination order, its substance was made public without any objections in this Court's rulings on some of the

defendants' post-conviction motions.

On April 1, 2016, AAG Caldwell filed his report, captioned Investigative Report Pursuant to *Commonwealth* v. *Cotto*, 471 Mass. 97 (2015). This 53 page report details the investigative evidence uncovered to date and alerts the Court that a supplemental report may be forthcoming concerning recently received documents provided by the Department of Public Health (DPH) pursuant to a court order. AAG Caldwell's April 1st report does not draw conclusions or assess the credibility of the witnesses. The report has been impounded but disclosed to defense counsel subject to a non-dissemination order.

Based on evidence obtained by AAG Caldwell from grand jury testimony given by Farak, other lab chemists, and a Massachusetts State Police Officer, the report describes the progression of Farak's addiction and use of drugs obtained from the Amherst lab between 2004 and the time of her arrest, and the many flaws at the lab, including the absence of necessary protocols and security system before July of 2012, the use of standards manufactured by Hanchett, and use of visual categorization of suspected Class E substances.

b. Investigation into Alleged Prosecutorial Withholding of Exculpatory Evidence

The second investigation prompted by *Cotto* addressed claims by "drug lab" defendants that the Commonwealth had withheld from them exculpatory evidence about the extent of Farak's misconduct. The Commonwealth took the position that Farak's drug tampering impacted defendants whose drug certificates Farak had signed in the latter part of 2012, whereas many defendants sought information showing that Farak tampered with drug lab substances earlier. At the crux of the second investigation is the belated disclosure to defense counsel of evidence,

primarily mental health records, seized in January 2013 from Farak's vehicle. Police who prepared the return on the search warrant on Farak's vehicle listed Farak's mental health treatment records as "assorted lab paperwork." Those records included ServiceNet diary cards with handwritten notes by Farak, "Emotional Regulation" worksheets, some bearing handwritten notes, a Distress Tolerance Worksheet, and various other sheets regarding therapy. These materials shed light on Farak's long struggle with addiction and her drug tampering at the Amherst drug lab.

In 2013, defense counsel Luke Ryan moved for a court order to access evidence seized from Farak's vehicle, and at that time only knew that police had seized what was described as "assorted lab paperwork." In 2013, the Commonwealth successfully objected to Attorney Ryan's discovery motion on the grounds that the evidence should be safeguarded during the pendency of Farak's prosecution to bar chain of custody issues. In the fall of 2014, following Farak's conviction, Attorney Ryan was allowed to inspect the evidence and for the first time saw the mental health care records which were exculpatory.

The second investigation commenced on June 15, 2015, when the Attorney General's Office (AGO) appointed Retired Superior Court Justice Peter A. Velis as a Special Assistant Attorney General (SAAG Velis). Additionally, on August 6, 2015, Northwestern District Attorney David E. Sullivan appointed Retired District Court Justice Thomas T. Merrigan as Special Assistant District Attorney (SADA Merrigan) for the Northwestern District "in the matter of the investigation and prosecution of the conduct of the Massachusetts Attorney General Office relating to the case of *Commonwealth* v. *Sonja Farak* . . . ." (See letter dated March 31, 2016, from SAAG Velis to this Court). SAAG Velis and SADA Merrigan decided to work together

and requested their own investigators.

Two Massachusetts State Police Officers, Lt. Detective Captain Paul J. L'Italien and Capt. James F. Coughlin (the troopers), were assigned to conduct the investigation for SAAG Velis and SADA Merrigan and to prepare a report. The troopers began their work on August 24, 2015. They interviewed prosecutors and police officers and reviewed and described the evidence seized from Farak's vehicle as well as correspondence related to Farak's mental health records[4] and defense counsel's discovery requests.

On January 7, 2016, the troopers submitted their 15 page report to SAAG Velis and SADA Merrigan. The troopers reported that they had found no evidence of prosecutorial misconduct or obstruction of justice, principally based upon the following three conclusions.

a. The troopers described as most significant an email dated February 14, 2013, to

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[4]Relevant excerpts of that correspondence include the following.

On February 14, 2013, Sergeant Ballou wrote to lead Farak prosecutor AAG Anne Kaczmarek, AAG Robert Irwin and AAG John Verner an email with the subject line "Farak Admissions." "Here are those forms with the admissions of drug use I was talking about. There are also news articles with handwritten comments about other officials being caught with drugs. All of these were found in her car inside of the lab manila envelopes." The email lists as its attachments Articles and Notes, Emotional Regulation Worksheet, and Positive Morphine Test.

On March 13, 2013, AAG Kaczmarek wrote to Maj. James Connolly of the Massachusetts State Police Forensic and Technology Center,"I think [Farak] had been using heavily for at least 4-5 months before the arrest."

In a draft prosecution memoranda dated late March 2013, AAGs Kaczmarek and Verner wrote that items recovered from Farak's vehicle included "mental health worksheets describing how Farak feels when she uses illegal substances and the temptation of working with 'urge-ful samples.'" The same memoranda states that the Commonwealth will present evidence against Farak that "Farak's admissions on her 'emotional worksheets' recovered from her car detail her struggle with substance abuse." The AAGs wrote, "Based upon her 'writings' and the samples we know were tampered with, limiting inquiry to crack cocaine cases is reasonable (at this time)" and that "[w]e are also hoping that [Farak], once indicted, will detail how long she has been abusing drugs and how many cases are affected."

On July 3, 2013, AAG Kaczmarek sent an email to Farak's attorney stating that "Here are my proposed redactions. I think only [Farak's] mention of her mental issue should be redacted. Her other illnesses and medication go to the credibility of her testimony."

On September 10, 2013, AAG Kaczmarek wrote to AAGs Verner, Foster, and others that Sergeant Ballou had all of his reports, search warrants and returns, and "[c]opies of the paperwork seized from her car regarding new[s] articles and her mental health worksheets."

prosecutors from Sergeant Joseph Ballou, who wrote, "Here are those forms with the admission of drug use I was talking about. There are also news articles with handwritten comments about other officials being caught with drugs. All of these were found in her car inside of the lab manila envelope." Based on that email, without further comment, the troopers wrote, "It is our collective opinion that e-mail . . . dispels the unprofessional, unfounded and negligent allegations within the 'Ryan Affidavit' (pages 6-10) which accuses Sergeant Ballou of serious wrongdoings."

b. With respect to alleged misconduct by AAG Kris Foster, the troopers quoted Attorney Ryan's affidavit that AAG Foster had "refused a defense request to inspect the physical evidence in an e-mail dated August 29, 2013." The troopers reported that they were unable to find an e-mail in which AAG Foster refused Attorney Ryan's request to review the Farak evidence.

c. The troopers also concluded that there was no misconduct by lead Farak prosecutor AAG Anne Kaczmarek, who did not allow "drug lab" defense counsel to inspect Farak's mental health records. The troopers reasoned that "As it relates to the allegation of concealing the treatment records and admission of drug use, there was a concern that these items may have been privileged. The strategy taken by the [AGO] was in the [sic] abundance of caution to not introduce these items into the grand jury. The evidence was, however, disclosed to Farak's defense counsel and would have been introduced if there had been a criminal trial.

On March 31, 2016, SAAG Velis sent the troopers' report to this Court. SAAG Velis's cover letter outlines the nature and procedural course of the investigation, entailing communications with defense counsel, the troopers' review of documents and their interview of assistant attorney generals and Massachusetts State Police officers. The last page of SAAG's letter summarily concludes:

"After our [SAAG Velis's and SADA Merrigan's] thorough review of the investigative activities and their [the troopers'] recommendations, we agree that there is no evidence of prosecutorial misconduct or obstruction of justice by the Assistant Attorney Generals and MSP officers in matters related to the Farak case."

On April 26, 2016, the Court heard motions from "drug lab" defendants concerning the continued impoundment and non-dissemination orders and many more motions for discovery.[5]

3. Discussion

a. Motions Regarding Impoundment, Non-Dissemination and Ex Parte Motions

(1) AAG Caldwell's Interim Report

Cotto, Liquori, Penate, and Watt move to lift the non-dissemination order covering AAG Caldwell's interim report dated November 5, 2015. There is no objection nor any reason to maintain the non-dissemination order, where the substance of that report has already been disseminated through court rulings addressing some defendants' motions to stay the execution of their sentences.

[5]Farak has filed several requests that the Court not permit additional dissemination of records containing her medical or mental health information. Among them is the Objection by Sonja Farak to the Disclosure of Privileged Records in the Possession of Amherst Medical Associates and Dr. Barry Federman. Farak argues that these medical records provide a detailed history of Farak's struggle with drug dependence and that they are cumulative of Farak's grand jury testimony which the parties already possess. Farak asserts that their release would be unnecessary and a further invasion of her privacy.

Farak's counsel received actual notice of the hearing on April 26, 2016, but did not appear. The Court has carefully considered Farak's privacy concerns and the defendants' counterarguments. Evidence of Farak's medical and mental health which sheds light on the timing and scope of her addiction will likely be exculpatory evidence for many defendants, even some who are not currently part of the "drug lab" cases. It is not clear that the medical and mental health records are cumulative of other records possessed by the defendants. In this unique situation, Farak's privacy concerns must give way to the defendants' legitimate need for exculpatory evidence. The scope of the privacy invasion will be mitigated to the extent possible by a protective order.

(2) Grand Jury Minutes

The same defendants move to vacate non-dissemination orders entered in September 2015 governing Hampshire County Grand Jury minutes, and in February 2016 covering Suffolk County Grand Jury minutes. Counsel currently have access to those minutes but have not been allowed to disseminate information about them. They argue that the grand jury minutes support their clients' requests for additional discovery of third-party records and that such information needs to be brought to the Court's attention for consideration of the discovery motions.

Grand jury proceedings are secret. See Mass. R. Crim. P. 5 (d) ("Secrecy of Proceedings and Disclosures. . . . A person performing an official function in relation to the grand jury may not disclose matters occurring before the grand jury except in the performance of his or her official duties or when specifically directed to do so by the court. No obligation of secrecy may be imposed upon any person except in accordance with law"). The policy reasons for grand jury secrecy are: (a) protecting individuals from the notoriety associated with a grand jury investigation unless probable cause is found against them and an indictment is returned; (b) shielding the grand jury from outside influences which could distort their investigatory or accusatory functions; (c) protecting witnesses from improper influence; (d) encouraging the full disclosure of information to the grand jury; and (e) facilitating the freedom of the grand jury's deliberations. See Reporter's Notes to Mass. R. Crim. P. 5. Disclosure of minutes of the grand jury proceedings relating to Farak, who has already been convicted, would not undermine any of these policy reasons for grand jury secrecy.

Judges have discretion to limit the disclosure of grand jury minutes to defendants in order to protect persons mentioned, for other reasons of security, or on grounds of irrelevance.

Commonwealth v. *Dew*, 443 Mass. 620, 628 (2005) (where grand jury testimony irrelevant and unrelated to murder at issue, and disclosure would have adversely affected that investigation, impoundment of grand jury minutes was not improper). The grand jury minutes at issue here are relevant and the non-dissemination order is not needed to protect the grand jury witnesses or for other security reasons. The Commonwealth has not voiced a specific concern that the release of these grand jury minutes might compromise any criminal proceeding. Moreover, the *Cotto* court recognized that a cloud has been cast over the integrity of the work performed at the Amherst drug lab, creating serious implications for the entire criminal justice system. There is a probability that numerous other defendants other than those presently before the Court may have, based upon the grand jury minutes and the reports recently issued, a basis for bringing motions for post-conviction relief. In light of the need for more information and disclosures about Farak's misconduct, the motions to vacate the non-dissemination orders are allowed.

(3) Motions to Vacate Non-Dissemination and Impoundment Orders to AAG Caldwell's Report, Letter filed by SAAG Velis With Attached Documents, Farak's Emails, and Farak's Personnel File

Cotto and Watt move for an order allowing the unimpoundment and dissemination of exculpatory evidence which they categorize into four groups. First, there is no objection to disclosure of AAG Caldwell's report except insofar as it describes the grand jury's minutes, on which I have already decided to vacate the non-dissemination order.

The defendants next seek the release of SAAG Velis's filing, consisting of his letter, the troopers' report, and the attachments to the report. At the motion hearing on April 26, 2016, SAAG Velis did not object to the disclosure of those materials. Upon careful consideration of

SAAG Velis's filing and the parties' arguments, I conclude that SAAG Velis's letter and the troopers' report should be released. The attachments to the troopers' report, however, contain some of Farak's medical and mental health records. To the extent that those records have not been previously disclosed, they are now released subject to a protective order due to their sensitive nature.

With respect to Farak's personnel file, defense counsel seeks only the performance reviews, not any medical or mental health information. There is no objection to disclosure of the performance reviews.

Finally, defense counsel seek the unimpoundment and dissemination of Farak's approximately 10,000 emails for the period of 2009 to 2013 which defense counsel received but have not disseminated due to the AGO's earlier claim, not repeated at the hearing, that these emails are CORI-protected. The voluminous and potentially sensitive nature of these emails sought to be unimpounded and disseminated merits further and careful consideration and review of them. Therefore, the Court takes no action with the request to unimpound and disseminate Farak's emails.

b. Discovery Motions

(1) Burnham Misconduct

(a) Motions for Discovery Regarding Misconduct of Springfield Evidence Officer Kevin Burnham

Cotto, Watt and Vega have moved for discovery concerning former Springfield Evidence Officer Kevin Burnham, and specifically the results from the city audit of the evidence room in

2014, and results from the audit conducted by a private forensic accounting firm into the missing funds. There is no objection to these motions nor other reason to deny them.

(b) Motion for Disclosure of Chain of Custody

Brown has moved for discovery of whether the evidence seized in connection with his case was at any point entrusted to Burnham. There was no opposition to this motion, and the evidence sought is relevant to Brown's motion for post-conviction relief. The motion is allowed.

(2) Numbers of Samples Tested Per Month at Amherst Drug lab

In their Motions for Discovery Regarding Farak's Misconduct Pursuant to Mass. R. Crim. P. 30(c)(4), the defendants Cotto, Liquori, Penate and Watt had initially sought discovery of four groups of information: (1) results of the search of Farak's work emails, (2) the number of samples tested per chemist per month and year at the Amherst lab from 2004 to January of 2013; (3) the percentage of samples which tested as negative by chemist per month and per year during Farak's employment at the lab, and (4) Farak's application to attend a DEA seminar in March of 2012.

At the motion hearing, counsel informed the Court that as to this motion, the defendants now only seek the second group of documents. AAG Caldwell's persistent good faith efforts to obtain those materials have been frustrated. It was agreed at the motion hearing that AAG Caldwell and Attorney Ryan will confer and propose a means, perhaps by a court order, by which these materials can most effectively be sought. Accordingly, the Court will take no action at this point and will await a further submission from the parties.

(3) Motions for Discovery Relating to Prosecutorial Misconduct

(a) Motion for Discovery Regarding Prosecutorial Misconduct Pursuant to Mass. R. Crim. P. 30(c)(4)

In their Motion for Discovery Regarding Prosecutorial Misconduct Pursuant to Mass. R. Crim. P. 30(c)(4) filed on June 29, 2015, the defendants Cotto and Watt had requested all internal emails, memoranda, and other communications regarding the Farak investigation and responses to requests for discovery and access to evidence seized from Farak's vehicle. Some of those materials are attached to the troopers' report in an encrypted CD which should be made available to defense counsel subject to a protective order to the extent that it contains medical or mental health information about Farak not already released.

The defendants seek all emails concerning Farak and to or from AAG Foster between September 2013 through the present and all emails relating to the defendant Rolando Penate within the same time frame. Defense counsel pointed out at the motion hearing that the 810 emails they have been able to access so far are incomplete,[6] and that the complete production of those communications is needed to support the defendants' argument of egregious prosecutorial misconduct in withholding exculpatory evidence.

At this time, the Court defers reaching a decision on the defendants' motions for discovery of additional internal emails and other communications of the AGO. Those emails which have already been disclosed will no longer be subject to any impoundment or non-dissemination order. However, in light of the AGO's submissions following the April 26, 2016, hearing, a hearing on the issue of the discovery of the AGO's emails is necessary to consider

[6]Attorney Jacobstein stated at the motion hearing that defense counsel are aware of the incomplete production because some of their own email communications with the Attorney General's staff and concerning Farak were not produced, despite representations by the AGO that all relevant documents had been turned over.

more closely the scope and breadth of such a possible discovery order. Accordingly, as to this and all motions for discovery of internal emails and communications within government offices, action is deferred pending a further hearing.

(b) Penate's Motion for Discovery Pursuant to Mass. R. Crim. P. 30(c)(4) Relating to Prosecutorial Misconduct Claims

In July 2015, Penate filed this motion for an order allowing discovery of all correspondence, emails and communications from January 19, 2013, to the present pertaining to: (1) communications to or from AAG Kris Foster relating to Farak and/or the Penate case; (2) communications to, from, or among the Attorney General's Office and the Western Massachusetts District Attorneys' offices regarding the scope of evidence tampering and/or deficiencies at the Amherst drug lab and/or the evidence seized from Farak's car; and (3) all documentation relating to the performance of Farak as a chemist.[7] The aim of this request is to gather evidence of what the prosecuting attorneys knew, when they knew it, and how many people informed defense counsel that exculpatory evidence--including the mental health records seized from Farak's car-- did not exist.

For the reasons just explained above, action is deferred on this motion as it seeks discovery of internal governmental emails, and a further hearing will be scheduled.

(c) Penate's Motion for Production of Discovery Information

On May 21, 2015, Penate moved for discovery of three types of documents: (1) any additional AGO and law enforcement investigation reports; (2) all therapy records of Farak with

[7]At the motion hearing, Penate's counsel did not press arguments for other documents initially sought in this motion, such as performance evaluations of AAG Foster.

provider Anna Kogan, related to her use and abuse of controlled substances dated between June 2010 to January of 2014; and (3) all records from ServiceNet from June 2010 to January of 2014.

Penate's attorney did not present an oral argument specifically on this motion at the hearing. Many of the documents sought are the subject of other discovery motions before the Court. Therefore, the motion is denied without prejudice. Should Penate seek particular discovery not already covered by this decision and order, he may file a written request for a hearing.

(d) Ware's Motions for an Order Requiring Production of Post-Conviction Discovery

In his motions filed on April 21, 2016, Ware seeks an order compelling the AGO to produce the following documents: (a) documents indicating when the AGO first learned that Farak's misconduct had been ongoing since 2004 or 2005, (b) communications, including emails, showing when the AGO first learned that Farak's misconduct had been well underway in 2011, (c) documents including communications between the AGO and any other governmental organization concerning why Farak's prosecution was limited to the four cases in which tampering was evident on January 18, 2013, and (d) documents in 2013 and 2014 between the AGO and other governmental organization(s) which relate to the Commonwealth's "choice not to conduct a thorough investigation" of Farak's misconduct. Ware states that he has obtained similar discovery from the Hampden District Attorney's Office but has not yet received documents from the AGO as ordered by Kinder, J. on October 19, 2015.

At the motion hearing on April 26, 2016, counsel for Ware did not address this motion, despite the Court's invitation to all counsel to raise any issues not argued by the close of the

hearing. The Court takes such silence as a signal that Ware is satisfied that AAG Caldwell either has produced or will produce any remaining documents sought in compliance with other similar discovery orders. Because Ware seeks internal emails and communications, action on these motions is deferred pending a further hearing as explained above.

(e) Ware's and Brown's Motions for the Disclosure of All Exculpatory Evidence

Ware and Brown seek in this motion "each and every bit of exculpatory evidence in and accompanying" AAG Caldwell's April 1, 2016, report, and the March 31, 2016, letter and accompanying troopers' report, with exhibits, filed by SAAG Velis. As set forth above, those materials will all be released, subject to a protective order covering Farak's medical and mental health records, to the extent that those records have not already been disclosed.

(4) Aponte's First Motion for Leave to Conduct Post-Conviction Discovery of Email Records

On April 21, 2016, Aponte filed pursuant to Mass. R. Crim. P. 30(c)(4) a motion to conduct post-conviction discovery of all e-mail communications of the Amherst drug lab employees. Aponte proposed that if that request were deemed to be too broad, which it is, she would request to discover only the email communications between Farak and Annie Dookhan and between Farak and Kevin Burnham. This limited request will be allowed.

(5) Motions for Additional Discovery Pursuant to Mass. R. Crim. P. 30(c)(4)

Cotto and Watt moved on October 30, 2015, for an order that the Commonwealth produce: (a) drug certificates and drug lab discovery packets in connection with (i)

Commonwealth v. Cosme, identified by the defendants as a 2009 case; (ii) cases in which drugs submitted to the Amherst drug lab were purported to be acid, LSD, methampthetamine, MDMA, or ecstaSy; (iii) samples assigned to Hanchett from Pittsfield purportedly containing 24.5 grams of cocaine; (iv) samples assigned to Hanchett from Northampton purportedly containing 3.5 grams of cocaine; (v) samples assigned to Pontes from Springfield purportedly containing 73 or 74 grams of cocaine; (b) a list of samples in the possession of Farak, Pontes and Hanchett on January 9, 2012; (c) Farak's immunity agreement; and (d) notes relied upon by Farak in her grand jury testimony. These motions were not argued at the April 26, 2016, hearing.

It is unclear, absent any oral or written argument on the point, why Cotto and Watt seek documents relating to the *Cosme* case. Insofar as the motion seeks the notes relied upon by Farak during her grand jury testimony, it is denied. There is no objection to the production of Farak's immunity agreement. The other items sought by these defendants are relevant and should be produced.

(6) Motions for Discovery of Grand Jury Witnesses' Immunity Order and Cooperation Agreements

Cotto and Watt have moved for discovery of the order dated August 25, 2015, granting Farak immunity in connection with her grand jury testimony. There is no objection to these motions nor any reason not to allow them.

Cotto and Watt also have moved for discovery of any cooperation or proffer agreements signed by former Amherst drug lab staff members James Hanchett, Sharon Salem and Rebecca Pontes, all of whom recently testified before the grand jury. As with the Farak immunity

agreement, there is no objection to these motions or reason for denying them.

(7) Motions for the Discovery of Farak's Medical and Mental Health Information

(a) Evidence in Possession of Barry Federman, M.D.

According to defense counsel, Barry Federman, M.D., was Farak's psychiatrist. Cotto and Watt have moved for discovery of records pertaining to Federman's treatment of Farak relating to her use of controlled substances, prescriptions for stimulants, and evidence of liver problems resulting from the use of controlled substances between July of 2003 and January of 2014. As noted above, Farak, through her counsel, has filed objections to any further dissemination of her medical and mental health records. Farak's attorney received actual notice of the hearings on this and other motions.

The defendants have a right to exculpatory evidence, and Farak's medical and mental health information may well be relevant to shed light on the timing and extent to which her substance abuse impacted her work and judgment as a chemist at the Amherst drug lab. The requested information shall be produced subject to a protective order.

(b) Evidence in Possession of Amherst Medical Associates

On the same grounds, Cotto and Watt seek exactly the same documents from Amherst Medical Associates. The reasoning above pertains to these records as well, and the motions to obtain evidence from Amherst Medical Associates shall be allowed subject to a protective order.

(c) ServiceNet Records

Cotto and Watt have moved for a complete set of records of ServiceNet, Inc., on the

grounds that the Court (Kinder, J.) in February of 2015, allowed the defendants' motions for Mass. R. Crim. P. 17 subpoenas for those records. In response, ServiceNet sent defense counsel some, but not all, of the documents in its possession as required by the subpoenas. Defense counsel states that AAG Caldwell subpoenaed the missing records as part of a grand jury investigation.

Although Farak has objected to the disclosure of the ServiceNet records, they are highly relevant to the defendants' motions for post-conviction relief, as they concern the timing and scope of Farak's drug addiction and abuse. The Court ruled over a year ago that the defendants are entitled to these records. It follows that the defendants' motions for a complete set of the ServiceNet records are allowed, subject to a protective order.

(8) Motions for Access to the Navigant Database for Information About Farak's Conduct in 2003-2004 at Hinton Lab

Cotto and Watt moved on April 22, 2016, for access to the Navigant Database, a searchable database compiled as part of the Office of the Inspector General's investigation into the misconduct which occurred at the Hinton lab in Jamaica Plain. Farak worked at that lab from approximately May of 2003 to August of 2004. The defendants seek from the Navigant database Farak's emails from that time, emails between the Hinton Lab analysts to Farak after August 2004, and information about an incident in March of 2004 when an analyst whom the defendants believe to be Farak misclassified a substance as cocaine when it actually was heroin.

At the hearing on these motions, AAG Caldwell replied that he does not have access to the Navigant database with respect to the Farak matter, and that the AGO is not in possession of the database. AAG Caldwell stated that he advises his office on how to get access to and allow

defense attorneys in the Dookhan/Hinton lab cases access to the Navigant database, such that counsel signs CORI waivers and that searches of the database are submitted to the Governor's Office. He stated that a similar system has not been set up in connection with the Amherst drug lab cases as funds are lacking.

AAG Caldwell will continue to seek a means by which he can access information about Farak in the Navigant database, including information relevant to her work at the Hinton lab in 2003-2004. AAG Caldwell will also confer with defense counsel and propose a means, perhaps by court order, through which the Navigant Database materials can most effectively be sought. Accordingly, the Court will take no action at this point and will await a further submission from the parties.

ORDER[8]

For all the foregoing reasons, it is hereby **ORDERED** that:

(1) the Motions to Vacate the Non-Dissemination Order Regarding the Commonwealth's Response to June 1, 2015, Scheduling Order filed by Cotto in 07-770 (#82), by Liquori in 12-624 (through a motion to join, # 107), by Penate in 12-83 (through a motion to join, #169), and by Watt in 09-1068 (#105) and in 09-1069 (#98) are **ALLOWED**;

(2) the Motions to Vacate the Non-Dissemination Orders (regarding the grand jury transcripts) filed by Cotto in 07-770 (filed as #68 and subsequently refiled by counsel and docketed as #83); by Liquori in 12-624 (through a motion to join, # 107), by Penate in 12-83 (through a motion to join, #169), and by Watt in 09-1068 (# 93 & #106) and in 09-1069 (docketed as #86 and subsequently refiled by counsel and docketed as # 99) are **ALLOWED**;

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[8]Other motions were filed but were not argued at the motion hearing despite counsel being invited to address all motions marked up for hearing. Among these are the Motions to Strike for Transparency and Reconsideration by Ware in 07-1072 (#71), 09-1072 (#67) and in 10-253 (#53), which made general requests.

Other defendants filed Motions to End Impoundment Orders asking the Court to end the "ongoing order of impoundment relative to exculpatory evidence." The motions, filed by Aponte in 12-226 (# 54), Brown in 05-1159 (#46) and Ware in 10-253 (# 50) do not identify any specific order, nor was any clarification regarding the subject of this motion offered during the hearing. It is likely that the intent of these motions have been articulated in other motions to lift impoundment and non-dissemination orders

The March 2, 2016, Motions for Discovery filed by Cotto in 07-770 (#83.1), and by Watt in 09-1068 (#106.1) and in 09-1069 (#97.1) were also not argued at the hearing. It is unclear whether all the matters raised by those motions have been resolved.

To the extent that any aspect of these and other motions which were scheduled for the April 26, 2016, have not been addressed in this decision and order, they are denied without prejudice. If counsel determines that a particular request is not covered by this decision and order, he or she may submit a written request for a hearing.

(3) the Motions to Vacate Non-Dissemination and Impoundment Orders to Allow for the Dissemination of Exculpatory Evidence by Cotto in 07-770 (# 99) and by Watt in 09-1068 (#124) and in 09-1069 (#114) are **ALLOWED** only as to (1) the performance reviews of Farak in her personnel file, (2) AAG Caldwell's report dated April 1, 2016, and (3) SAAG Velis's March 31, 2016, filing and the attached troopers' report with its attachments, except that all medical and mental health records not previously disclosed are subject to a protective order; the Court takes no action at this time on the defendants' motion insofar as it seeks the unimpoundment and dissemination of Farak's emails;

(4) the Motions for Discovery Regarding the Misconduct of Springfield Evidence Officer Kevin Burnham by Cotto in 07-770 (docketed as #80 and as #86.1) and by Watt in 09-1068 (#104 and #112.1) and in 09-1069 (#96), and by Vega in 09-97 (#64) are **ALLOWED** only insofar as they concern the 2014 city audit and the report by the private forensic accounting firm;

(5) the Motion for Disclosure of Chain of Custody by Brown in 05-1159 (#43) is **ALLOWED**;

(6) the Motions for Discovery Regarding Farak's Misconduct Pursuant to Mass. R. Crim. P. 30(c)(4) filed by Cotto in 07-770 (#56), Liquori in 12-624 (#107), Penate in 12-83 (#169) and Watt in 09-1068 (#80) and in 09-1069 (#71) are deferred by agreement of the parties;

(7) no action is taken on the Motions for Discovery Regarding Prosecutorial Misconduct

Pursuant to Mass. R. Crim. P. 30(c)(4) filed by Watt in 09-1068 (#82) and in 09-1069 (#73), pending a further hearing;

(8) action on the Defendant's Motion for Discovery by Penate in 12-83 (#146) is deferred pending a further hearing;

(9) the Motion for Production of Discovery Information filed by Penate in 12-83 (#144) is **DENIED** without prejudice;

(10) action on the Motions for an Order Requiring Production of Post-Conviction Discovery by Ware in 07-1072 (#73), 09-1072 (#69), and in 10-253 (#55) is deferred pending a further hearing;

(11) the Motions for the Disclosure of All Exculpatory Evidence filed by Brown in 05-1159 (#50) and by Ware in 07-1072 (#72), in 09-1072 (#68) and in 10-253 (#54) are **ALLOWED** subject to protective orders insofar as the documents contain medical or mental health records not previously disclosed;

(12) Aponte's First Motion for Leave to Conduct Post-Conviction Discovery of Email Records (# 58) is **ALLOWED** only with respect to email communications between Farak and Dookhan and Farak and Burnham.

(13) Motions for Additional Discovery Pursuant to Mass. R. Crim. P. 30(c)(4) by Cotto in 07-770 (#69) and by Watt in 09-1068 (# 94) and 09-1069 (#85) are **ALLOWED** as to (a) drug certificates and drug lab discovery packets in connection with (i) cases in which drugs submitted to the Amherst drug lab were purported to be acid, LSD, methampthetamine, MDMA, or ecstacy; (ii) samples assigned to Hanchett from Pittsfield purportedly containing 24.5 grams of cocaine; (iii) samples assigned to Hanchett from Northampton purportedly containing 3.5 grams of cocaine; (iv) samples assigned to Pontes from Springfield purportedly containing 73 or 74 grams of cocaine; (b) a list of samples in the possession of Farak, Pontes and Hanchett on January 9, 2012; and (c) Farak's immunity agreement; and are otherwise **DENIED**;

(14) the Motions for Discovery of Immunity Order for Sonja Farak filed by Cotto in 07-770 (#85), by Liquori in 12-624 (through a motion to join, # 107), by Penate in 12-83 (through a motion to join, #169), and by Watt in 09-1068 (#108) and in 09-1069 (#101) are **ALLOWED**;

(15) the Motions for Discovery Regarding Cooperation or Proffer Agreements Signed by James Hanchett, Sharon Salem and Rebecca Pontes, filed by Cotto in 07-770 (#84), and by Watt in 09-1068 (#107) and in 09-1069 (#100) are **ALLOWED**;

(16) the Motions for Summons of Evidence in Possession of Dr. Barry Federman, Pursuant to Mass. R. Crim. P. 17(a)(2) filed by Cotto in 07-770 (#86), by Liquori in 12-624 (through a motion to join, # 107), by Penate in 12-83 (through a motion to join, #169), and by Watt in 09-1068 (#109) and in 09-1069 (#102). are **ALLOWED** subject to a protective order;

(17) the Motions for Summons of Evidence in Possession of Amherst Medical Associates, Pursuant to Mass. R. Crim. P. 17(a)(2) filed by Cotto in 07-770, by Liquori in 12-624 (through a motion to join, # 107), by Penate in 12-83 (through a motion to join, #169), and by Watt in 09-1068 (# 110) and in 09-1069 are **ALLOWED** subject to a protective order;

(18) the Motions for Missing ServiceNet Records filed by Cotto in 07-770 (# 98), and by Watt in 09-1068 (#123) and in 09-1069 (#113) are **ALLOWED** subject to a protective order; and

(19) action on the Motions for Access to the Navigant Database filed by Cotto in 07-770 (#97) and Watt in 09-1068 (# 122) and in 09-1069 (#112) is deferred pending a further report and/or proposal from AAG Caldwell and defense counsel, within 30 days of the entry of this Order, on the ability to provide access to the requested materials to defense counsel.

Richard J. Carey
Justice of the Superior Court

Dated: May 3, 2016