

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY
NO. SJ-2014-0005

KEVIN BRIDGEMAN, ET AL.,

Petitioners

v.

DISTRICT ATTORNEY FOR THE SUFFOLK DISTRICT, ET AL.,

Respondents.

AFFIDAVIT OF LUKE RYAN

I, Luke Ryan, state as follows:

1. I am an attorney licensed to practice law in the Commonwealth of Massachusetts.

2. I am submitting this affidavit to provide the Court with information about the Amherst Drug Lab scandal, and the response to that scandal by the Office of the Attorney General ("OAG").

3. As counsel for defendants accused of drug crimes, I have been involved in litigation related to misconduct by Sonja Farak, a former chemist at the Amherst Lab.

4. Farak was arrested on January 19, 2013, and prosecuted by the OAG.

5. I first learned of her misconduct on January 20, 2013, when I read press accounts of her arrest. In these accounts, public officials were reported as claiming that Farak's misconduct was limited in scope and did not affect fairness to defendants.

6. Despite those claims, I sought to learn more about Farak's misconduct because I knew that my clients' liberty might depend on its scope.

7. For example, when Farak was arrested in January 2013, my client Rolando Penate was facing drug charges involving substances allegedly tested by Sonja Farak in 2011. So it was crucial to learn whether Farak had committed misconduct in 2011.

8. Within days of her arrest, I began trying to obtain information about the scope of Farak's misconduct.

9. If the OAG had appropriately responded to my requests, it would have disclosed evidence it seized in January 2013, which indicated that Farak had used drugs at work on the very day - December 22, 2011 - that she claimed to have tested a sample in Mr. Penate's case.

10. But the OAG did not disclose this evidence.

11. Instead, for over a year, the OAG denied my requests and failed to fully investigate Farak's misconduct.

12. In court, the OAG insisted that Farak's misconduct was limited to several months before her arrest, even as it withheld evidence that the misconduct began much earlier.

13. The OAG dismissed my requests as a "fishing expedition" and characterized the records I sought as "irrelevant," while incorrectly informing the court that complete records had been turned over.

14. The OAG's obstructionism lasted from roughly January 2013 until July 2014, when a court finally granted me access to documents that had been withheld.

15. A review of those documents quickly revealed that Farak's misconduct had spanned at least 13 months, and follow-up on that discovery established misconduct dating back eight years.

16. But by that time, Mr. Penate had lost a motion to dismiss and had been incarcerated. Countless other defendants across the Commonwealth were also delayed or denied access to justice.

17. This affidavit describes what happened.

I. My clients

18. Over the last six years, I have represented defendants charged with drug crimes in the following Superior Court cases:

- Commonwealth v. Rafael Rodriguez, 1079CR01081;
- Commonwealth v. Rolando Penate, 1279CR00083;
- Commonwealth v. Wayne Burston, 1380CR00113;
- Commonwealth v. Lizardo Vega, 0979CR00097, 0579CR00699; and
- Commonwealth v. Jermaine Watt, 0979CR01068, 0979CR01069.

19. The Penate case was pending when the Farak scandal broke in January 2013. Farak had reportedly tested the substances at issue in that case on December 22, 2011 and January 9, 2012. Ex. 1.

20. The Rodriguez case had been resolved by way of a plea on September 9, 2011. I had represented Mr. Rodriguez in Superior Court, and Farak had reportedly tested the substance at issue in his case.

21. I became involved in the Burston case in April 2014, five months after samples he allegedly distributed were submitted to the Amherst Drug Lab and a warrant was issued for his arrest.

22. The Vega and Watt cases, which involved substances purportedly tested by Farak, had been resolved by guilty pleas before Farak's arrest. I was not plea counsel in either of these cases and did not begin representing either defendant until many months after Farak's arrest.

23. This affidavit relies on my experiences representing these clients; discovery furnished by the Hampden County District Attorney's office, including police reports and grand jury minutes pertaining to Farak's prosecution; 810 e-mail threads sent and/or received by OAG representatives between August 13, 2012 and July 8, 2015; transcripts of hearings that took place on September 9, 2013 and October 2, 2013; pleadings filed by the AGO related to these proceedings; and e-mails I sent to, or received from, OAG representatives in 2013 and 2014.

II. The State Police and the Attorney General's Office obtain evidence that Farak's drug use was not limited to just a few months

24. On January 19, 2013, Farak was arrested and her car was searched by three State Police investigators: Captain Robert Irwin, Sergeant Joseph Ballou, and Trooper Randy Thomas.

25. Five days later, on January 24, Sergeant Ballou heard from Assistant District Attorney Diane Dillon about a case from 2005 in which Farak had tested a cocaine sample, and the sample ended up "light by 4 grams." Ex. 2.

26. Sergeant Ballou relayed this information to AAG Anne Kaczmarek, the Commonwealth's lead prosecutor in the case against Farak.

27. AAG Kaczmarek responded: "Please don't let this get more complicated than we thought." Ex. 2.

28. Around that same time, in a search warrant return filed on January 23 and a police report dated January 24, Trooper Thomas generally described the papers seized from the search of Farak's car on January 19 as "lab paperwork." Exs. 3, 4.

29. But, in fact, the seized papers included significant evidence of drug use by Farak.

30. On the afternoon of February 14, 2013, Sergeant Ballou sent an e-mail with four attachments to Captain Irwin, AAG Kaczmarek, and AAG John Verner. Ex. 5.

31. The subject of Ballou's e-mail was "FARAK admissions," and the text read:

Anne,

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.

Joe

32. Sergeant Ballou's e-mail attached several documents, including a "ServiceNet Diary Card." See Ex. 5.

33. This ServiceNet Diary Card contained admissions of drug use by Farak in 2011.

34. ServiceNet is a behavioral health agency that, among other things, offers outpatient substance abuse services in Hampshire County.

35. The top of the card had the following handwritten dates:

ServiceNet Diary Card							
Name: _____				Week of: _____			
Observe and Describe Emotions: Today I felt (0-5):	<u>12-26</u> --Mon	<u>12-20</u> --Tues	<u>12-21</u> Wed	<u>12-22</u> --Thurs	<u>12-23</u> ----Fri	<u>12-24</u> --Sat	<u>12-25</u> --Sun

36. The days and dates on this card, which was seized in January 2013, do not match December 2012.

37. Instead, they match December 2011.

38. The ServiceNet Card also referenced a New England Patriots football game on December 24.

39. A review of the Patriots' schedule makes clear that the referenced game was played on December 24, 2011.

40. According to this ServiceNet card, Farak consumed marijuana on Monday and some other drug(s) on Thursday, December 22, and Friday, December 23.

41. With respect to that Thursday, Farak stated: "tried to resist using @ work, but ended up failing (I know I should have called, but had thoughts about the last time I called)". Ex. 5.

42. According to State Police Captains Paul J. L'Italien and James F. Coughlin - who were later asked to investigate allegations of prosecutorial misconduct in connection with the Farak case - Captain Irwin later admitted during an interview in December 2015 that, although "paperwork seized from the vehicle that was associated with Farak's admitted drug use," a decision was made to characterize it as "lab paperwork" on the theory that it might be privileged under the Health Insurance Portability and Accountability Act. Ex. 6.

III. The Attorney General's Office withholds evidence of Farak's drug use from District Attorneys

43. Ten days after Farak's arrest, AAG Kaczmarek acknowledged in an e-mail to a colleague that it was "a little embarrassing how little quality control they had" at the Amherst lab. Ex. 7.

44. Nevertheless, less than one month later, on February 26, 2013, AAG Kaczmarek wrote to Audrey Mark, then Senior Counsel at the Office of the Inspector General, and urged her not to investigate the Amherst lab. In an e-mail entitled "amherst lab," AAG Kaczmarek stated, "Audrey, when they ask you to [do] this audit- say no. (actually [it's] very different than JP. A professional lab)." Ex. 8.

45. Farak's admissions of drug use were referenced several weeks later in a "Prosecution Memo" that AAG Kaczmarek sent to AAG Dean Mazzone, the Chief of OAG's Enterprise and Major Crimes Division, on March 25, 2013. Ex. 9.

46. The Prosecution Memo stated (at page five) that "Items of note 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.'"

47. The Prosecution Memo acknowledged (at footnote seven) that "case law suggests that the paperwork is not privileged."

48. A subsequent version of the Prosecution Memo, signed by AAG Mazzone and Deputy Attorney General Shelia Calkins, was attached to the report prepared by investigators L'Italien and Coughlin. Ex. 10.

49. Handwritten edits on page five of a subsequent draft of the Prosecution Memo stated that the mental health worksheets had "NOT [been] turned over to DAs offices yet" (emphasis in original). Ex. 10.

50. On or about March 27, 2013, AAG Verner sent a letter to Suffolk County District Attorney Daniel F. Conley, enclosing certain discovery materials. Ex. 11.

51. AAG Verner's letter explained that these materials were being provided "[p]ursuant to this Office's obligation to provide potentially exculpatory information to the District Attorneys"

52. The ServiceNet Diary Card that Ballou had attached to his e-mail dated February 14, 2013, and the other "mental health worksheets" referenced in the Prosecution Memo were not disclosed to DA Conley.

53. AAG Verner made identical disclosures to the other ten District Attorneys.

54. Following Farak's indictment on April 1, 2013, the OAG made supplemental disclosures to the eleven District Attorneys that included minutes from the grand jury that indicted Farak.

55. These grand jury minutes included testimony from Farak's supervisor that "you could see a definite decline in [Farak's] work output" in the "three or four months" before her arrest.

56. These minutes also included testimony by Sergeant Ballou that when he first met Farak during the previous summer (in connection with the Dookhan investigation), he found Farak to be "somewhat pretty," at least in contrast to her more recent "drawn and pale" appearance.

57. Once again, the OAG's disclosures did not include the ServiceNet Diary Card or other mental health worksheets referenced in the OAG's Prosecution Memo.

58. Subsequently, on August 16, 2013, Hampden County First Assistant District Attorney Frank Flannery sent AAG Kaczmarek an e-mail explaining that Superior Court Judge C. Jeffrey Kinder "ha[d] ordered

an evidentiary hearing for 9/9 . . . to define the scope, to the extent possible, of Farak's misconduct." Ex. 12.

59. My client, Rafael Rodriguez, was one of fifteen post-conviction defendants whose cases were involved in this evidentiary hearing.

60. On August 28, 2013, AAG Kaczmarek received an e-mail from a Sudbury Drug Lab chemist named Kimberly Dunlap about two samples from Berkshire County that "were originally analyzed by Ms. Farak." In her "reanalysis," Dunlap said that "both cases came back with only a trace amount of cocaine." Ex. 13.

61. AAG Kaczmarek forwarded Dunlap's e-mail to Sharon Salem, the Amherst lab's evidence officer, along with a request for discovery from the underlying case. Salem responded with an e-mail stating that the data "[did] not look good for Farak." Ex. 13.

62. AAG Kaczmarek did not provide this information, or the discovery she subsequently received from Salem, to ADA Flannery.

63. Instead, ADA Flannery heard about this exculpatory evidence during a phone call with Salem on the afternoon of Friday, September 6, 2013.

64. ADA Flannery then told Salem to bring the packet she prepared for AAG Kaczmarek to the hearing scheduled for September 9, 2013, and alerted defense counsel to the existence of what he described as "an important piece of discovery for this hearing."

IV. The OAG incorrectly tells the Superior Court (and me) that Farak's misconduct spanned roughly four months, and that my attempt to prove otherwise was a "fishing expedition"

65. On July 15, 2013, I filed a motion to dismiss pending drug charges against Rolando Penate based on Farak's egregious misconduct.

66. In response, Judge Mary-Lou Rup calendared an evidentiary hearing to determine whether there was misconduct at the Amherst Lab "between November 2011 and January 2012."

67. This period was crucial because Farak had claimed to have tested drug samples in Mr. Penate's case during this time, including on December 22, 2011.

68. Also on December 22, 2011, according to the ServiceNet Card, Farak "tried to resist using @ work but ended up failing."

69. On August 23, 2013, I served AAG Kaczmarek, as the prosecutor primarily responsible for

prosecuting Farak, with a subpoena to testify at this evidentiary hearing.

70. On September 6, 2013, I served the OAG with a Rule 17(a)(2) motion for production of documentary evidence. Ex. 14.

71. Among other things, this motion sought "Copies of any and all inter- and/or intra-office correspondence from January 18, 2013 to the present pertaining to the scope of evidence tampering and/or deficiencies at the Amherst Drug Laboratory."

72. Of course, I did not know about the ServiceNet Card when I served the OAG with my subpoena and motion, because the Card had not been disclosed to me.

73. The day I issued the subpoena to AAG Kaczmarek, Susanne Reardon, the Deputy Chief of the OAG's Appeals Division, referenced the subpoena in an e-mail to AAGs Verner, Kaczmarek, Mazzone, and Randall Ravitz, the Chief of the Appeals Division. She stated: "I think we need to decide how much we want to try to protect and if we should move to quash due to the pending investigation." Ex. 15.

74. On October 1, 2013, the OAG did move to quash my subpoena, without disclosing the ServiceNet Card. Ex. 16.

75. The OAG's motion to quash, together with an accompanying memorandum of law, were submitted by AAG Kris Foster. Ex. 16.

76. AAG Foster's motion and memorandum nowhere acknowledged that the OAG possessed evidence that Farak had used drugs on the very day she allegedly tested drugs in Mr. Penate's case.

77. To the contrary, AAG Foster asserted that Farak's misconduct had begun roughly **four months** before her January 2013 arrest, and that my subpoena represented a **fishing expedition**.

78. Specifically, Foster wrote:

The drugs in the defendant's case were seized in October and November of 2011. It appears that the defendant is going to argue that Farak may have tampered with the drugs in his case, by attempting to elicit from AAG Kaczmarek that the allegations against Farak date back much further than **the roughly four months before Farak's arrest that the AGO alleges. This is merely a fishing expedition.** There is nothing to indicate that the allegations against Farak date back to the time she tested the drugs in the defendant's case.

(Emphasis added.)

79. On October 1, 2013, after being served with a copy of AAG Foster's motion to quash, I served AAG Foster with a Rule 17(a)(2) motion to inspect physical evidence, which focused on the contents of Farak's car. Ex. 17.

80. AAG Foster then filed an opposition to my motion of September 6, 2013, in which Foster stated that I was "merely engaging in a 'fishing expedition' for anything that might possibly help [Mr. Penate]." Ex. 18.

81. When AAG Foster filed this pleading, the OAG still had not disclosed the evidence of Farak's drug use that had been flagged by Sergeant Ballou's February 2013 e-mail to the OAG and in the OAG's Prosecution Memo.

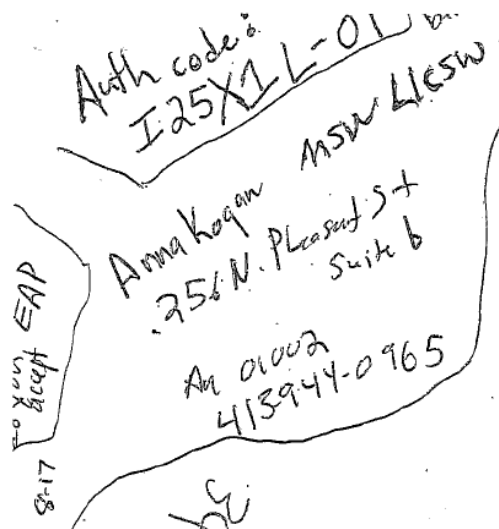
V. The OAG continues to oppose my efforts to obtain items seized from Farak's car

82. On August 29, 2013, I sent an e-mail with an attached discovery motion to AAG Foster on behalf of my client Rafael Rodriguez. Ex. 19.

83. Among other things, this motion sought evidence suggesting that a third party had knowledge of Farak's alleged malfeasance prior to her arrest.

84. Although I did not know it at the time, such evidence existed. The OAG possessed the ServiceNet Card, which suggested that Farak was in touch with a counseling service about drug use extending further back than the four-month period claimed by the OAG.

85. The OAG also possessed a piece of scrap paper recovered from Farak's car that contained these handwritten notes:



The image shows a piece of scrap paper with handwritten notes. At the top, it says "Auth code: I25X1 L-01". Below that, it says "Anna Kogan MSW 415W". In the center, it says "75 N. Pleasant St Suite 6". At the bottom, it says "An 01002 413944-0965". On the left side, there is a vertical line with the text "EAP" and "8-17" written next to it. At the bottom center, there is a signature that appears to be "LC".

Ex. 20.

86. EAP is short for Employee Assistance Program, which assists employees with personal and/or work-related problems that may impact their job performance, health, or well-being.

87. These notes suggested that Farak was in touch with a clinician who was aware of Farak's evidence tampering prior to her arrest.

88. My cover e-mail to AAG Foster also requested to inspect items seized in the Farak investigation, including the items seized from Farak's car.

89. AAG Foster refused this request, asserting that "because of the ongoing investigation, I cannot give you access to the main evidence room."

90. When AAG Foster later filed an opposition to my discovery motion in the Penate case, she argued, incorrectly, that "there is no reason to believe that a third party had knowledge of Farak's alleged malfeasance prior to her arrest." See Ex. 18.

91. Separately, on August 30, 2013, defense attorney Jared Olanoff served State Police Sergeant Ballou with a subpoena *duces tecum* seeking "a copy of all documents and photographs pertaining to the investigation of Sonja J. Farak and the Amherst drug laboratory." Ex. 21.

92. On September 4, 2013, AAG Ravitz sent an e-mail to AAGs Foster, Verner, Kaczmarek, Mazzone, and Reardon, which expressed the view that the OAG could move to quash the subpoena in order to avoid the disclosure of information despite its relevance to determining the timing and scope of Farak's misconduct —

the very subject that I, other defense attorneys, and the trial court were trying to learn about. Ex. 22.

93. Specifically, Ravitz wrote that there was "still a rationale for moving to quash, or limit, the scope of the [Sergeant Ballou] subpoena" since a "defense attorney could still try to elicit information of the type that we think shouldn't be revealed under the guise of fleshing out information concerning 'the timing and scope of Ms. Farak's alleged criminal conduct' and the other categories."

94. AAG Foster subsequently moved to quash attorney Olanoff's subpoena to Sergeant Ballou. Foster's memorandum argued the Court should relieve "the obligation of the AGO to produce" certain information, including "[i]nformation concerning the health or medical or psychological treatment of individuals." Ex. 23.

95. Judge Kinder held the consolidated hearing for post-conviction defendants on September 9, 2013.

96. At the outset of the hearing, Judge Kinder denied the motion to quash attorney Olanoff's subpoena to Sergeant Ballou and ordered AAG Foster to submit copies of any documents she believed should be protected for an *in camera* review. Ex. 24.

97. When the hearing got underway, Sergeant Ballou testified in response to my questioning, in the presence of Judge Kinder and AAG Foster, that "everything in [his] case file ha[d] been turned over."

98. Sergeant Ballou also testified, in the presence of Judge Kinder and AAG Foster, that he believed "everything pertaining to the Farak investigation ha[d] been turned over."

99. In fact, evidence of Farak's pre-2012 drug use, including the ServiceNet Card – reflecting drug use by Farak on the very day she allegedly tested Mr. Penate's drug sample – still had not been disclosed.

100. Although the ServiceNet Card had been part of Sergeant Ballou's February 2013 e-mail to AAG Kaczmarek, entitled "FARAK admissions," neither Sergeant Ballou nor AAG Foster had told me that such admissions existed.

101. At the conclusion of the consolidated evidentiary hearing, I informed Judge Kinder that the OAG had refused to permit an inspection of the physical evidence seized from Farak.

102. Judge Kinder encouraged the parties to "work through some agreement about viewing, physically, the evidence" and placed the onus on the defense to file a motion if no such agreement could be reached.

103. The next morning, AAG Foster wrote to AAGs Verner, Kaczmarek, Reardon, Ravitz, and Mazzone to report that her motion to quash attorney Olanoff's subpoena to Sergeant Ballou "was flat out rejected," and that OAG would have until September 18th to turn over anything they thought should not be disclosed to the judge for *in camera* review. Ex. 25.

104. AAG Verner responded by posing one question to AAG Kaczmarek and another to AAG Foster: "Anne," he wrote, "can you get a sense from [Sergeant Ballou] what is in his file? Emails etc? Kris, did the judge say his 'file' or did he indicate [Sergeant Ballou] had to search his emails etc?" Ex. 25.

105. AAG Kaczmarek acknowledged in an email to AAG Verner what Sergeant Ballou's files included:

[Sergeant Ballou] has all his reports and all reports generated in the case. All photos and videos taken in the case. His search warrants and returns. Copies of the paperwork seized from her car regarding new[s] articles and **her mental health worksheets.**

(Emphasis added.) Ex. 25.

106. Later that same day, I sent AAG Foster the following one-sentence e-mail about inspecting the evidence retrieved from Farak's car: "Could you let me

know whether we are going to be able to work something out or whether I should file a motion?" Ex. 26.

107. The next day, I sent AAG Foster another e-mail asking if there had been "any decision as to whether I'll be permitted to view the evidence seized from Ms. Farak's car." Ex. 26.

108. I sent yet another follow-up e-mail to AAG Foster on September 16, 2013. Ex. 26.

109. AAG Foster forwarded this e-mail to AAG Kaczmarek with a request for her "thoughts." Ex. 26.

110. On that same day, AAG Foster sent Judge Kinder a letter asserting, incorrectly, that **"every document in [Sergeant Ballou's] possession ha[d] already been disclosed."** (emphasis added). Ex. 27.

111. Specifically, AAG Foster's letter stated:

On September 9, 2013, pursuant to a subpoena issued by defense counsel, you ordered the Attorney General's Office to produce all documents in Sergeant Joseph Ballou's possession that the Attorney General's Office believes to be privileged by September 18, 2013, to be reviewed by your Honor in camera. After reviewing Sergeant Ballou's file, every document in his possession has already been disclosed. This includes grand jury minutes and exhibits, and police reports. Therefore, there is nothing for the Attorney General's Office to produce for your review on September 18, 2013.

Please do not hesitate to contact me should you require anything further.

Sincerely,

Kris C. Foster
Assistant Attorney General

112. AAG Foster's letter to Judge Kinder was not accurate. As AAG Kaczmarek had written just six days before this letter to Judge Kinder, the ServiceNet Diary Card and other "mental health worksheets" possessed by Sergeant Ballou – reflecting drug use on the same day Farak allegedly tested drugs in Mr. Penate's case – still had not been turned over.

113. Indeed, AAG Foster's letter of September 16, 2013, made the remarkable claim that every document in Sergeant Ballou's file had been disclosed, even though AAG Foster herself had just argued in her motion to quash the subpoena that the court should relieve "the obligation of the AGO to produce" certain information, including "[i]nformation concerning the health or medical or psychological treatment of individuals." Ex. 23.

114. On September 17, 2013, Foster sent me an e-mail stating: "Our position is that viewing the seized

evidence is irrelevant to any case other than Farak's." Ex. 26.

115. On October 2, 2013, Foster and I appeared before Judge Kinder to argue the motion to inspect the evidence seized from Farak's car and the Rule 17(a)(2) motion for OAG correspondence. Ex. 28.

116. During this hearing, Foster continued to characterize the undisclosed items in Farak's car as "just irrelevant evidence."

117. Of course, it was not irrelevant evidence. As Sergeant Ballou had acknowledged in his February 2013 e-mail, and as OAG attorneys had acknowledged in their Prosecution Memo, it contained evidence of Farak's drug use.

VI. The OAG does not pursue Farak's offer to describe her drug use, and the Superior Court decides cases based on incorrect information.

118. On the morning of the October 2, 2013, hearing before Judge Kinder, Farak's defense attorney Elaine Pourinski e-mailed AAG Kaczmarek to ask why she had not responded to a previous e-mail regarding a proffer agreement. Ex. 29.

119. AAG Kaczmarek forwarded attorney Pourinski's e-mail to AAG Verner, stating that Farak was willing to "do a proffer regarding the scope of her drug use

in exchange for state and federal immunity against future charges." The e-mail included the (seemingly sarcastic) remark that "[t]he DAs in Western MA would love this" (emphasis added). Ex. 29.

120. On October 2, 2013, AAG Verner e-mailed AAG Kaczmarek to say that he would pass along attorney Pourinski's overture to First Assistant Edward Bedrosian, Jr. Ex. 29.

121. To my knowledge, the OAG did not accept Farak's offer to explain the scope of her drug use in exchange for immunity. But neither did the OAG indict Farak for crimes other than those known to the OAG on the date of her arrest in 2013.

122. Presumably based on AAG Foster's representations in relation to the hearing on October 2, 2013, Judge Kinder denied my motion to inspect the OAG's evidence. Ex. 30.

123. On October 30, 2013, Judge Kinder decided Commonwealth v. Cotto. This was the first of a series of post-conviction rulings "conclud[ing] that [Farak] removed controlled substances from samples that she was charged with testing" and that she "was doing so in the summer of 2012." Ex. 31.

124. Under these rulings, relief was denied to my clients, Mr. Penate and Mr. Rodriguez, and to other defendants.

125. For example, Judge Kinder denied Mr. Penate's motion to dismiss on November 4, 2013, ruling that Farak's misconduct, "while deplorable, postdate[d] the testing in this case." Ex. 32.

126. Mr. Penate was subsequently convicted at trial, on December 13, 2013, of a single count of distributing a Class A substance as a subsequent offender. Ex. 33.

127. He received a sentence of not less than five and not more than seven years in state prison. He remains incarcerated to this day.

VII. Under court order, the OAG finally permits all the evidence of Farak's drug use to be inspected

128. On January 6, 2014, Farak pled guilty to the charges against her.

129. On June 23, 2014, I sent AAG Foster an e-mail on behalf of my client Wayne Burston asking whether, in light of the end of the Farak investigation, I would be permitted to "view the evidence seized from, among other places, her car." Ex. 34.

130. AAG Foster did not respond.

131. On July 21, 2014, I filed another motion to inspect on behalf of Mr. Burston. Ex. 35.

132. This motion was allowed.

133. On October 30, 2014, I went to the OAG at One Ashburton Place with a private investigator and reviewed three banker's boxes of materials under the supervision of a state trooper.

134. During this inspection I discovered dozens of pages related to Farak's treatment for drug addiction, including the aforementioned ServiceNet Diary Card. More than 14 months had passed since I first subpoenaed AAG Kaczmarek in order to seek evidence of pre-2012 drug use by Farak; more than a year had passed since Judge Kinder first held a hearing on the timing and scope of Farak's misconduct.

135. Two days later, on November 1, 2014, I sent AAG Patrick Devlin a letter alerting him to my discovery. Ex. 36.

136. Twelve days later, on or about November 13, 2014, AAG Verner sent Northwestern District Attorney David E. Sullivan a letter providing 289 pages of previously-undisclosed materials relating to Farak,

including the ServiceNet Card and other "mental health worksheets" seized from Farak's car. Ex. 37.

137. AAG Verner acknowledged these materials contained "potentially exculpatory information" that his office had an "obligation" to disclose.

138. AAG Verner's letter did not mention, however, that his office had been in possession of this exculpatory information for 22 months.

VIII. Ongoing proceedings relating to the OAG's handling of Farak matters

139. On February 20, 2015, in response to motions filed by attorneys Rebecca Jacobstein, Glynnis MacVeety, and me, Judge Kinder ordered Anna Kogan, Servicenet, Inc., and the Hampden County Sheriff to produce records related to the treatment of Ms. Farak. Ex. 38.

140. In March 2015, Attorneys Jacobstein, MacVeety, and I signed protective orders and reviewed the records furnished by these third parties. These records revealed drug use by Ms. Farak at the Amherst Drug Lab dating back to 2004 or 2005.

141. On April 8, 2015, this Court issued its opinion in the Cotto case, which called for a fuller investigation of Farak's misconduct.

142. In response to the Cotto opinion, the OAG finally investigated Farak and, on April 1, 2016, completed a report describing significant misconduct starting in late 2004 or early 2005, and lasting until Farak's arrest in January 2013.

143. At a hearing on June 6, 2016, Berkshire District Attorney David Capeless, the President of the Massachusetts District Attorneys Association, stated that all eleven District Attorneys agreed that Farak defendants were entitled to the same conclusive presumption of misconduct furnished to Dookhan defendants in this Court's Scott decision.

144. Once outstanding discovery is provided, it is anticipated that a week-long evidentiary hearing addressing issues related to misconduct on the part of the OAG will take place later this fall.

145. The OAG's protracted refusal to produce exculpatory evidence - or even acknowledge its existence - kept crucial information from defense attorneys about the scope of Farak's misconduct.

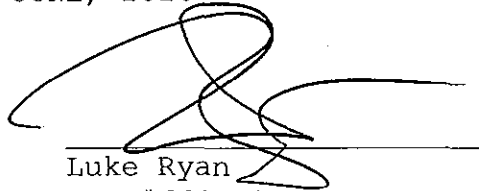
146. The OAG's actions caused Judge Kinder to adopt a mistaken cut-off date for Farak's misconduct and to decide defendants' rule 30 motions based on a misapprehension of the facts.

147. The OAG's actions also led this Court to decide Cotto based on an incomplete record.

148. Mr. Rodriguez was one of several post-conviction defendants who: (i) won a motion to stay his sentence shortly after Farak's arrest; and (ii) was forced to return to state prison when he later lost his Rule 30 motion.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS

29th DAY OF JUNE, 2016

A handwritten signature in black ink, appearing to be 'Luke Ryan', written over a horizontal line.

Luke Ryan

BBO #664999

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Exhibits to Affidavit of Luke Ryan
June 29, 2016
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EXHIBIT 1



DEVAL L. PATRICK
Governor

TIMOTHY P. MURRAY
Lieutenant Governor

JUDYANN BIGBY, M.D., Secretary

JOHN AUERBACH, Commissioner

The Commonwealth of Massachusetts
Executive Office of Health and Human Services
Department of Public Health
State Laboratory Institute
Amherst, MA 01003
413-545-2601

DATE RECEIVED: 10/25/2011
DATE ANALYZED: 12/22/2011

NO. A11-04063

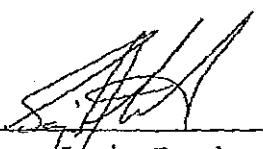
I hereby certify that the Powder
Contained in 2 glassine bags MARKED: A11-04063
Submitted by Detective Kevin Burnham of the Springfield Police

Has been examined with the following results:
The powder was found to contain:
Heroin, (diacetylmorphine) as defined in Chapter 94 C, Controlled Substance
Act, Section 31, Class A.
2 items were received and 1 was selected and analyzed.

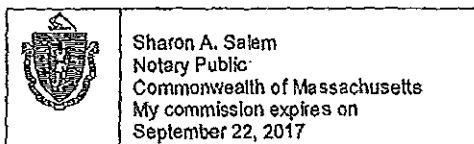
NET WEIGHT: 0.03 grams (analyzed item only)


DEFENDANT: Rolando Penate

ASSISTANT ANALYST


Sonja Farak

On this Tuesday, December 27, 2011, before me, the undersigned notary public, personally appeared the above signed subscriber, having proved to me through Department of Public Health documentation to be the person whose name is signed on this certificate and to be an assistant analyst of the Department of Public Health, and who swore to me that the contents of this document are truthful and accurate to the best of his/her knowledge and belief.




Sharon A. Salem, NOTARY PUBLIC
My commission expires on September 22, 2017

Chapter 111, Section 13 of the General Laws
This certificate shall be sworn to before a Justice of the Peace or Notary Public, and the jurat shall contain a statement that the subscriber is the analyst or assistant analyst of the department. When properly executed, it shall be prima facie evidence of the composition, quality, and the net weight of the narcotic or other drug, poison, medicine, or chemical analyzed, and the court shall take judicial notice of the signature of the analyst or assistant analyst, and of the fact that he/she is such.



DEVAL L. PATRICK
Governor

TIMOTHY P. MURRAY
Lieutenant Governor

JUDYANN BIGBY, M.D., Secretary

JOHN AUERBACH, Commissioner

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State Laboratory Institute
Amherst, MA 01003
413-545-2601

DATE RECEIVED: 11/16/2011

DATE ANALYZED: 01/09/2012

NO. A11-04280

I hereby certify that the Powder

Contained in 3 glassine bags

MARKED: A11-04280

Submitted by Detective Kevin Burnham of the Springfield Police

Has been examined with the following results:

The powder was found to contain:

Heroin, (diacetylmorphine) as defined in Chapter 94 C, Controlled Substance Act, Section 31, Class A.

3 items were received and 1 was selected and analyzed.

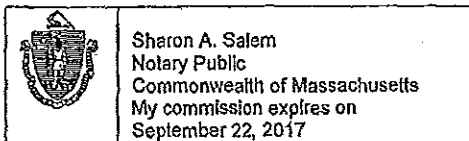
NET WEIGHT: 0.02 grams (analyzed item only)

DEFENDANT: Rolando Penate, etal

ASSISTANT ANALYST

Senja Farak

On this Monday, January 09, 2012, before me, the undersigned notary public, personally appeared the above signed subscriber, having proved to me through Department of Public Health documentation to be the person whose name is signed on this certificate and to be an assistant analyst of the Department of Public Health, and who swore to me that the contents of this document are truthful and accurate to the best of his/her knowledge and belief.



Sharon A. Salem, NOTARY PUBLIC
My commission expires on September 22, 2017

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Amherst, MA 01003
413-545-2601

DATE RECEIVED: 11/16/2011
DATE ANALYZED: 01/09/2012

NO. A11-04281


I hereby certify that the Powder
Contained in 1 glassine bag MARKED: A11-04281
Submitted by Detective Kevin Burnham of the Springfield Police

Has been examined with the following results:
The powder was found to contain:
Heroin, (diacetylmorphine) as defined in Chapter 94 C, Controlled Substance
Act, Section 31, Class A.

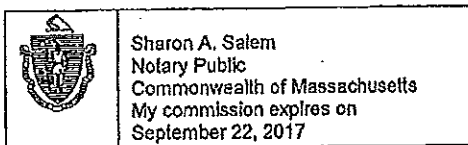
NET WEIGHT: 0.02 grams

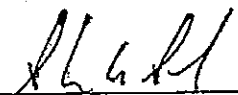
DEFENDANT: Rolando Penate, etal

ASSISTANT ANALYST


Sonya Farak

On this Monday, January 09, 2012, before me, the undersigned notary public, personally appeared the above signed subscriber, having proved to me through Department of Public Health documentation to be the person whose name is signed on this certificate and to be an assistant analyst of the Department of Public Health, and who swore to me that the contents of this document are truthful and accurate to the best of his/her knowledge and belief.




Sharon A. Salem, NOTARY PUBLIC
My commission expires on September 22, 2017

Chapter 111, Section 13 of the General Laws

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Amherst, MA 01003
413-545-2601

DATE RECEIVED: 11/16/2011

DATE ANALYZED: 01/09/2012

NO. A11-04282

I hereby certify that the Powder
Contained in 10 glassine bags

MARKED: A11-04282

Submitted by Detective Kevin Burnham of the Springfield Police

Has been examined with the following results:

The powder was found to contain:


Heroin, (diacetylmorphine) as defined in Chapter 94 C; Controlled Substance
Act, Section 31, Class A.

10 items were received and 1 was selected and analyzed.

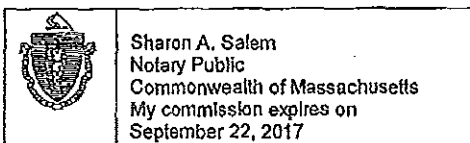
NET WEIGHT: 0.02 grams (analyzed item only)


DEFENDANT: Rolando Penate, etal

ASSISTANT ANALYST


Sonja Farak

On this Monday, January 09, 2012, before me, the undersigned notary public, personally appeared the above signed subscriber, having proved to me through Department of Public Health documentation to be the person whose name is signed on this certificate and to be an assistant analyst of the Department of Public Health, and who swore to me that the contents of this document are truthful and accurate to the best of his/her knowledge and belief.




Sharon A. Salem, NOTARY PUBLIC
My commission expires on September 22, 2017

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413-545-2601

DATE RECEIVED: 11/16/2011
~~DATE ANALYZED~~: 01/09/2012

NO. A11-04283

I hereby certify that the Powder
Contained in 13 glassine bags MARKED: A11-04283
Submitted by Detective Kevin Burnham of the Springfield Police

Has been examined with the following results:

The powder was found to contain:


Heroin, (diacetylmorphine) as defined in Chapter 94 C, Controlled Substance Act, Section 31, Class A.

The identification of the contents of the 13 glassine bags was determined by analysis of a representative sample of 3 glassine bags. The net weight of the 13 glassine bags was derived from the average weight of the sampled glassine bags.

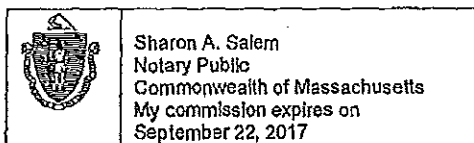
NET WEIGHT: 0.37 grams


DEFENDANT: Rolando Penate, etal

ASSISTANT ANALYST


Sonja Farak

On this Monday, January 09, 2012, before me, the undersigned notary public, personally appeared the above signed subscriber, having proved to me through Department of Public Health documentation to be the person whose name is signed on this certificate and to be an assistant analyst of the Department of Public Health, and who swore to me that the contents of this document are truthful and accurate to the best of his/her knowledge and belief.




Sharon A. Salem, NOTARY PUBLIC
My commission expires on September 22, 2017

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413-545-2601

DATE RECEIVED: 11/16/2011

DATE ANALYZED: 01/09/2012

NO. A11-04284

I hereby certify that the White Powder

Contained in 1 plastic packet

MARKED: A11-04284

Submitted by Detective Kevin Burnham of the Springfield Police

Has been examined with the following results:

The white powder was found to contain:

Cocaine, a derivative of Coca leaves, as defined in Chapter 94 C, Controlled Substance Act, Section 31, Class B.

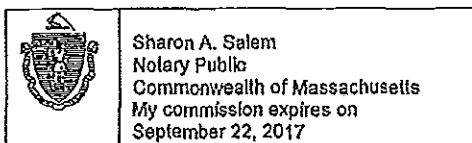
NET WEIGHT: 0.10 grams

DEFENDANT: Rolando Penate, et al

ASSISTANT ANALYST

Sonya Farak

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Sharon A. Salem, NOTARY PUBLIC
My commission expires on September 22, 2017

Chapter 111, Section 13 of the General Laws

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Amherst, MA 01003
413-545-2601

DATE RECEIVED: 11/16/2011

DATE ANALYZED: 01/09/2012

NO. A11-04285

I hereby certify that the White Powder

Contained in 1 plastic packet

MARKED: A11-04285

Submitted by Detective Kevin Burnham of the Springfield Police

Has been examined with the following results:

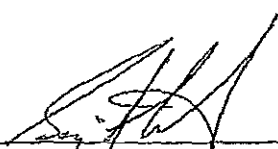
The white powder was found to contain:

Cocaine, a derivative of Coca leaves, as defined in Chapter 94 C, Controlled Substance Act, Section 31, Class B.

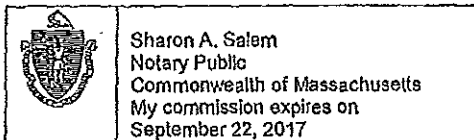
NET WEIGHT: 0.10 grams

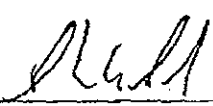
DEFENDANT: Rolando Penate, etal

ASSISTANT ANALYST


Sonja Farak

On this Monday, January 09, 2012, before me, the undersigned notary public, personally appeared the above signed subscriber, having proved to me through Department of Public Health documentation to be the person whose name is signed on this certificate and to be an assistant analyst of the Department of Public Health, and who swore to me that the contents of this document are truthful and accurate to the best of his/her knowledge and belief.




Sharon A. Salem, NOTARY PUBLIC
My commission expires on September 22, 2017

Chapter 111, Section 13 of the General Laws

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DEVAL L. PATRICK
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JOHN AUERBACH, Commissioner

The Commonwealth of Massachusetts
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Department of Public Health
State Laboratory Institute
Amherst, MA 01003
413-545-2601

DATE RECEIVED: 11/16/2011

DATE ANALYZED: 01/09/2012

NO. A11-04286

I hereby certify that the White Powder
Contained in 9 plastic packets
Submitted by Detective Kevin Burnham of the Springfield Police

MARKED: A11-04286

Has been examined with the following results:

The white powder was found to contain:

Cocaine, a derivative of Coca leaves, as defined in Chapter 94 C, Controlled
Substance Act, Section 31, Class B.

9 items were received and 1 was selected and analyzed.

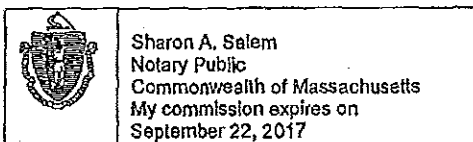
NET WEIGHT: 0.11 grams (analyzed item only)

DEFENDANT: Rolando Penate, etal

ASSISTANT ANALYST

Sonja Farak

On this Monday, January 09, 2012, before me, the undersigned notary public, personally appeared the above signed subscriber, having proved to me through Department of Public Health documentation to be the person whose name is signed on this certificate and to be an assistant analyst of the Department of Public Health, and who swore to me that the contents of this document are truthful and accurate to the best of his/her knowledge and belief.



Sharon A. Salem, NOTARY PUBLIC
My commission expires on September 22, 2017

Chapter 111, Section 13 of the General Laws

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JOHN AUERBACH, Commissioner

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State Laboratory Institute
Amherst, MA 01003
413-545-2601

DATE RECEIVED: 11/16/2011

DATE ANALYZED: 01/09/2012

NO. A11-04287

I hereby certify that the Powder
Contained in 2 glassine bags MARKED: A11-04287
Submitted by Detective Kevin Burnham of the Springfield Police

Has been examined with the following results:

The powder was found to contain:

Heroin, (diacetylmorphine) as defined in Chapter 94 C, Controlled Substance
Act, Section 31, Class A.

2 items were received and 1 was selected and analyzed.

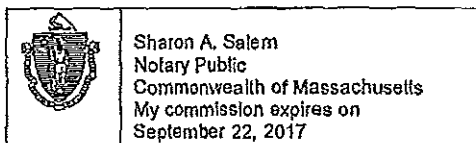
NET WEIGHT: 0.02 grams (analyzed item only)

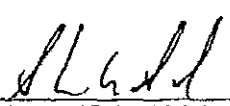
DEFENDANT: Rolando Penate, etal

ASSISTANT ANALYST


Sonja Farak

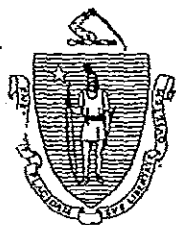
On this Monday, January 09, 2012, before me, the undersigned notary public, personally appeared the above signed subscriber, having proved to me through Department of Public Health documentation to be the person whose name is signed on this certificate and to be an assistant analyst of the Department of Public Health, and who swore to me that the contents of this document are truthful and accurate to the best of his/her knowledge and belief.




Sharon A. Salem, NOTARY PUBLIC
My commission expires on September 22, 2017

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Amherst, MA 01003
413-545-2601

DATE RECEIVED: 11/16/2011

DATE ANALYZED: 01/09/2012

NO. A11-04288

I hereby certify that the Powder

Contained in 10 glassine bags

MARKED: A11-04288

Submitted by Detective Kevin Burnham of the Springfield Police

Has been examined with the following results:

The powder was found to contain:

Heroin, (diacetylmorphine) as defined in Chapter 94 C, Controlled Substance Act, Section 31, Class A.

10 items were received and 1 was selected and analyzed.

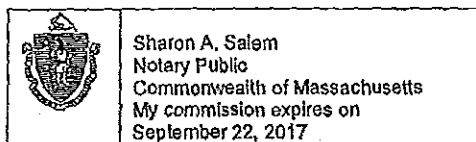
NET WEIGHT: 0.01 grams (analyzed item only)

DEFENDANT: Rolando Penate, etal

ASSISTANT ANALYST

Sonja Farak

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Sharon A. Salem, NOTARY PUBLIC
My commission expires on September 22, 2017

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Amherst, MA 01003
413-545-2601

DATE RECEIVED: 11/16/2011

DATE ANALYZED: 01/09/2012

NO. A11-04289

I hereby certify that the White Powder

Contained in 1 plastic bag

MARKED: A11-04289

Submitted by Detective Kevin Burnham of the Springfield Police

Has been examined with the following results:

The white powder was found to contain;

Cocaine, a derivative of Coca leaves, as defined in Chapter 94 C, Controlled Substance Act, Section 31, Class B.

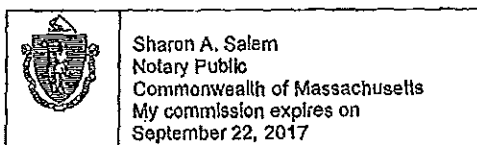
NET WEIGHT: 0.57 grams

DEFENDANT: Rolando Penate, etal

ASSISTANT ANALYST

Sorja Farak

On this Monday, January 09, 2012, before me, the undersigned notary public, personally appeared the above signed subscriber, having proved to me through Department of Public Health documentation to be the person whose name is signed on this certificate and to be an assistant analyst of the Department of Public Health, and who swore to me that the contents of this document are truthful and accurate to the best of his/her knowledge and belief.



Sharon A. Salem, NOTARY PUBLIC
My commission expires on September 22, 2017

Chapter 111, Section 13 of the General Laws

This certificate shall be sworn to before a Justice of the Peace or Notary Public, and the jurat shall contain a statement that the subscriber is the analyst or assistant analyst of the department. When properly executed, it shall be prima facie evidence of the composition, quality, and the net weight of the narcotic or other drug, poison, medicine, or chemical analyzed, and the court shall take judicial notice of the signature of the analyst or assistant analyst, and of the fact that he/she is such.



DEVAL L. PATRICK
Governor

TIMOTHY P. MURRAY
Lieutenant Governor

JUDYANN BIGBY, M.D., Secretary

JOHN AUERBACH, Commissioner

The Commonwealth of Massachusetts
Executive Office of Health and Human Services
Department of Public Health
State Laboratory Institute
Amherst, MA 01003
413-545-2601

DATE RECEIVED: 11/16/2011

DATE ANALYZED: 01/09/2012

NO. A11-04290

I hereby certify that the White Powder

Contained in 1 paper fold

MARKED: A11-04290

Submitted by Detective Kevin Burnham of the Springfield Police

Has been examined with the following results:

The white powder was found to contain:

Cocaine, a derivative of Coca leaves, as defined in Chapter 94 C, Controlled Substance Act, Section 31, Class B.

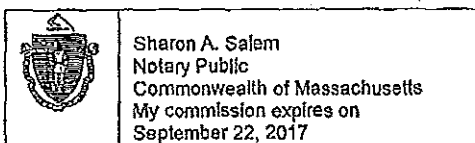
NET WEIGHT: 0.09 grams

DEFENDANT: Rolando Penate, et al

ASSISTANT ANALYST

Sonja Farak

On this Monday, January 09, 2012, before me, the undersigned notary public, personally appeared the above signed subscriber, having proved to me through Department of Public Health documentation to be the person whose name is signed on this certificate and to be an assistant analyst of the Department of Public Health, and who swore to me that the contents of this document are truthful and accurate to the best of his/her knowledge and belief.



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EXHIBIT 2

From: Kaczmarek, Anne (AGO)
Sent: Thursday, January 24, 2013 9:47 AM
To: Ballou, Joseph (AGO)
Subject: RE: Call from Hampden DAs Office

Please don't let this get more complicated than we thought. If she were suffering from back injury- maybe she took some oxys?

-----Original Message-----

From: Ballou, Joseph (AGO)
Sent: Thursday, January 24, 2013 9:16 AM
To: Kaczmarek, Anne (AGO)
Subject: FW: Call from Hampden DAs Office

Just talked to ADA Dillon about her cocaine case that was light by 4 grams. Sonja Farak tested it back in 2005 and the defendant has already served his sentence. The ADA thinks the difference in wait could be accounted for because of the weight of packaging, the drying of the product, and any inaccuracy in the police scale. The Defendant has won a new trial on another issue, but we have some time before the next hearing.

Joe

-----Original Message-----

From: Ballou, Joseph (AGO)
Sent: Wednesday, January 23, 2013 4:41 PM
To: Kaczmarek, Anne (AGO)
Cc: Irwin, Robert (AGO)
Subject: FW: Call from Hampden DAs Office

Anne,

We just got back from talking to the ADA. Turns out it is just one drug sample (2 defendants). The Springfield Police report shows 51 Oxycodone pills were seized on March 16, 2012. Sonja Farak conducted the analysis on May 8, 2012, but now there are 61 pills. The cert shows no controlled substances found. The police officer thinks the pills look different than the ones he seized. Unfortunately, he did not describe the pills in his report.

The codefendants are not held, and their next court date is January 31st. They were also charged with possession of cocaine and a firearm. The cocaine was also analyzed by Farak on the same date and seems normal. The reports, analysis, and search warrant are attached.

I have the numbers for the Springfield officers and can interview them later. I'm hoping it's not too pressing since no one is held.

While I was there, she told me another ADA has a cocaine case that was light by 4 grams (102 grams when weighed by the police w/packaging and yet certified as 98 grams by Farak). She was upset because they missed the 100 gram threshold. 4 grams seems like a lot for packaging. But how accurate was the police scale, etc?

I'm a little skeptical because neither of these cases seem to fit the scheme that we think Farak was perpetrating. In our cases, she was certifying the drugs correctly, then stealing/replacing drugs. They also go back a lot further than the cases we are looking at. Still, it warrants investigation of course.

Joe

-----Original Message-----

From: Ballou, Joseph (AGO)
Sent: Wednesday, January 23, 2013 1:21 PM
To: Kaczmarek, Anne (AGO)
Subject: Re: Call from Hampden DAs Office

I'm hoping

----- Original Message -----

From: Kaczmarek, Anne (AGO)
Sent: Wednesday, January 23, 2013 01:19 PM
To: Ballou, Joseph (AGO); Irwin, Robert (AGO); Verner, John (AGO)
Subject: RE: Call from Hampden DAs Office

Is there a slim possibility that in a previously written report by the submitting officer, that he described the pills?

From: Ballou, Joseph (AGO)
Sent: Wednesday, January 23, 2013 12:37 PM
To: Irwin, Robert (AGO); Verner, John (AGO)
Cc: Kaczmarek, Anne (AGO)
Subject: RE: Call from Hampden DAs Office

I have an appointment with the ADA for 2:30. She said the Springfield Officer told her last Tuesday he submitted 51 Oxy tablets to the lab. It came back negative for controlled substance. He said he examined the bag and found that it now contains 61 tablets and that they are not the same tablets he submitted.

I'll get all of this in writing.

Joe

-----Original Message-----

From: Irwin, Robert (AGO)
Sent: Wednesday, January 23, 2013 10:39 AM
To: Verner, John (AGO)
Cc: Ballou, Joseph (AGO); Kaczmarek, Anne (AGO)
Subject: Re: Call from Hampden DAs Office

Agree. Joe make sure you document everything.

Sent from my iPhone

On Jan 23, 2013, at 10:37 AM, "Verner, John (AGO)" <John.Verner@MassMail.State.MA.US> wrote:

> Yes

>

> -----Original Message-----

> From: Ballou, Joseph (AGO)

> Sent: Wednesday, January 23, 2013 10:35 AM

> To: Verner, John (AGO); Kaczmarek, Anne (AGO)
 > Cc: Irwin, Robert (AGO)
 > Subject: RE: Call from Hampden DAs Office
 >
 > I can call the ADA and get more info if that's alright with everyone.
 >
 > Joe
 >
 > -----Original Message-----
 > From: Verner, John (AGO)
 > Sent: Wednesday, January 23, 2013 10:33 AM
 > To: Kaczmarek, Anne (AGO); Ballou, Joseph (AGO)
 > Cc: Irwin, Robert (AGO)
 > Subject: RE: Call from Hampden DAs Office
 >
 > I think we should look into it.
 >
 > -----Original Message-----
 > From: Kaczmarek, Anne (AGO)
 > Sent: Wednesday, January 23, 2013 10:30 AM
 > To: Ballou, Joseph (AGO)
 > Cc: Verner, John (AGO); Irwin, Robert (AGO)
 > Subject: RE: Call from Hampden DAs Office
 >
 > I think this is the tip of the iceberg. I think your idea of statements & seizing evidence is good. We might also want to start with Springfield PD to see if they can start an inventory of their drug evidence - whether Farak was chemist or not.
 > Bobby/John: thoughts?
 >
 > _____
 > From: Ballou, Joseph (AGO)
 > Sent: Wednesday, January 23, 2013 10:23 AM
 > To: Kaczmarek, Anne (AGO)
 > Cc: Verner, John (AGO); Irwin, Robert (AGO)
 > Subject: Call from Hampden DAs Office
 >
 > Anne,
 >
 > I got a message from Hampden ADA Karen Southerland (413) 505-5684 regarding a Sonja Farak drug case she has with 2 codefendant's. Springfield Police told her that one of the drug samples appears to have been tampered with, and one of the samples contains fewer pills than originally seized. I haven't called Ms. Southerland back yet.
 >
 > I'm inclined to go seize the evidence and take statements, but I'm also concerned that this may be the first of many such calls.
 >
 > Joe
 >
 >

EXHIBIT 3

RETURN OF OFFICER SERVING SEARCH WARRANT

A search warrant must be executed as soon as reasonably possible after its issuance, and in any case may not be validly executed more than 7 days after its issuance. The executing officer must file his or her return with the court named in the warrant within 7 days after the warrant is issued. G.L. c. 276, §3A.

This search warrant was issued on January 19, 2013, and I have executed it as follows:

The following is an inventory of the property taken pursuant to this search warrant:

- 1 1 manila envelope "A08-02990 + 0289" containing evidence bag & unknown paper
- 2 1 envelope "For Jim Hanchett"
- 3 1 Zip lock baggie containing multiple white capsules
- 4 Assorted lab paperwork
- 5 Assorted lab paperwork
- 6 Envelope "A11-03020 -> A1103022, 2-29-12 SFD V. Dimitry Bogo" containing lab paperwork
- 7 2 manila envelopes "A12-01204" and "A11-04545 -> A11-04546"
- 8 Assorted lab paperwork
- 9 1 Zip lock bag containing white powder substance
- 10 1 Zip lock bag containing assorted pills
- 11 1 Envelope "A11-01848-01849" "To Joseph Wentworth Northampton District ADA Michael Russo" containing assorted lab paperwork & positive morphine test
- 12 1 Manila envelope "A10-04462" "To do" containing paperwork and multiple clear plastic bags (some cut open).

A TRUE COPY

William P. Nafel

Attest

Clerk/Magistrate

- 13 1 large Manila mailing envelope with Hinton State Lab return address containing 3 clear plastic bags (all cut open) & 1 knife
- 14 1 Manila mailing envelope labeled 'return to sender' contains assorted lab paper work
- 15 1 Manila envelope "A09-01405" containing assorted lab paperwork
- 16 1 CVS pill bottle containing numerous orange pills & 1 CVS empty pill bottle labeled "Sonja Farak"
- 17 1 Clear glass beaker
- 18 Metal mesh, 1 metal rod, clear plastic baggie containing dark colored substance, wax paper containing white chunk substance, and 1 clear, knotted, plastic baggie containing white chunk substance (That bag was inside of 2 outer baggies.)
- 19 1 CVS pill bottle labeled "Sonja Farak" "IC LAMOTRIGINE 150 MG," 1 CVS pill bottle labeled "Sonja Farak" "IC ESCITALOPRAM 20 MG"
- 20 1 MA DOT Certificate of Registration for MA Reg 80WJ06, 2002 Volkswagen Golf, Black to Sonja Farak

2002 Volkswagen Golf, Black, MA Reg 80WJ06, owned by Sonja Farak

This inventory was made in the presence of: Trooper Randy Thomas

I swear that this inventory is a true and detailed account of all the property taken by me on this search warrant.

SIGNATURE OF PERSON MAKING SEARCH x <u><i>[Signature]</i> #2935</u>	DATE AND TIME OF SEARCH (BEGAN) January 19, 2013 0323 Hrs	SWORN AND SUBSCRIBED TO BEFORE x <u><i>[Signature]</i></u>
PRINTED NAME OF PERSON MAKING SEARCH Randy Thomas	TITLE OF PERSON MAKE SEARCH Trooper Massachusetts State Police	Signature of Justice, Clerk-Magistrate or Assistant Clerk DATE SWORN AND SUBSCRIBED TO 1-23-13 <u><i>[Signature]</i></u> CLERK MAGISTRATE WILLIAM M P NABELE JR

A TRUE COPY

[Signature]

EXHIBIT 4



*The Commonwealth of Massachusetts
Massachusetts State Police
Office of the Attorney General - West
1350 Main Street, Fourth Floor
Springfield, Massachusetts 01103*

January 24, 2013

To: Detective Lieutenant Robert M. Irwin
SPDU AG, Commanding

From: Trooper Randy Thomas #2935
SPDU AG West

Subject: 13-034-4804-1003
Search warrant execution
Vehicle of Sonja FARAK

1. On 01-19-13 at 0323 hours, a search warrant was executed on a vehicle owned by Sonja FARAK of 37 Laurel Park in Northampton. The search was of a 2002 Volkswagen Golf, color black, VIN: 9BWGK61J524069609, and bearing MA registration 80WJ06 registered to Sonja J. FARAK. The search was conducted at the State Police Barracks in Northampton at 555 North King St. in Northampton where the vehicle had been secured the previous day. The search was conducted by Detective Lieutenant Robert Irwin, Sergeant Joseph Ballou and I, Trooper Randy Thomas, all assigned to the State Police Detective Unit of the Attorney General's Office. Trooper Christopher Dolan from the State Police Crime Scene Services Section photographed the vehicle and evidence before and during the search.

2. The search commenced at 0323 hours. The following items were found in the vehicle and were secured and seized into evidence:

- 1 1 manila envelope "A08-02990 + 0289" containing evidence bag & unknown paper
- 2 1 envelope "For Jim Hanchett"
- 3 1 Zip lock baggie containing (34) white capsules
- 4 Assorted lab paperwork
- 5 Assorted lab paperwork

BUREAU OF INVESTIGATIVE SERVICE
MASS. STATE POLICE
Year/Dist/Crime/Case
13-034-4804-1003
Serial # 001
Captain _____ Supervisor 80

13-034-4804-1003

Search warrant execution

Vehicle of Sonja FARAK

- 6 Envelope "A11-03020 -> A1103022, 2-29-12 SFD V. Dimitry Bogo" containing lab paperwork
- 7 2 manila envelopes "A12-01204" and "A11-04545 -> A11-04546"
- 8 Assorted lab paperwork
- 9 1 Zip lock bag containing white powder substance
- 10 1 Zip lock bag containing (10) assorted pills
- 11 1 Envelope "A11-01848-01849" "To Joseph Wentworth Northampton District ADA Michael Russo" containing assorted lab paperwork & positive morphine test
- 12 1 Manila envelope "A10-04462" "To do" containing paperwork and multiple clear plastic bags (some cut open).
- 13 1 large Manila mailing envelope with Hinton State Lab return address containing 3 clear plastic bags (all cut open) & 1 knife
- 14 1 Manila mailing envelope labeled 'return to sender' contains assorted lab paper work
- 15 1 Manila envelope "A09-01405" containing assorted lab paperwork
- 16 1 CVS pill bottle containing (19) orange pills & 1 CVS empty pill bottle labeled " Sonja Farak"
- 17 1 Clear glass beaker
- 18 Metal mesh, 1 metal rod, clear plastic baggie containing dark colored substance, wax paper containing white chunk substance, and 1 clear, knotted, plastic baggie containing white chunk substance (That bag was inside of 2 outer baggies.)
- 19 1 CVS pill bottle labeled "Sonja Farak" "IC LAMOTRIGINE 150 MG" containing (41.5) white pills & 1 CVS pill bottle labeled "Sonja Farak" "IC ESCITALOPRAM 20 MG" containing (55) white pills

13-034-4804-1003

Search warrant execution

Vehicle of Sonja FARAK

20 1 MA DOT Certificate of Registration for MA Reg 80WJ06, 2002
Volkswagen Golf, Black to Sonja Farak

3. The search of the vehicle was completed at 0456 hours. A copy of the search warrant was left in the vehicle.

4. The car was re-secured at the Northampton Barracks and the evidence was transported by Sergeant Ballou and Trooper Thomas to the Attorney General's Office at 1350 Main St. 4th Floor in Springfield where it was secured.

Respectfully submitted,

 # 2935

Randy Thomas
Trooper, Massachusetts State Police
Office of the Attorney General

EXHIBIT 5

From: Ballou, Joseph (AGO)
Sent: Thursday, February 14, 2013 3:31 PM
To: Kaczmarek, Anne (AGO)
Cc: Irwin, Robert (AGO); Verner, John (AGO)
Subject: FARAK Admissions
Attachments: Aritcles and Notes.pdf; Emotion Regulation Homework.pdf; Positive Morphine Test.pdf; Emotion Regulation Worksheet.pdf

Anne,

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.

Joe

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Capeless Statement on Steroid Probe

Staff Reports,

06:51PM / Tuesday, March 29, 2011

Like 0 0

Important 0 Interesting 0 Funny 0 Awesome 0 Infuriating 0 Ridiculous 0



DA David F. Capeless

PITTSFIELD, Mass. — The articles, rumors and blogs about the investigation into the use of steroids by local law enforcement officers has prompted the district attorney to address the ongoing investigation through a statement released on Tuesday afternoon.

District Attorney David F. Capeless revealed the name of the state trooper implicated in the probe, Daniel Gale, and confirmed that Pittsfield Police Officer David Kirchner was removed as a member of the Berkshire County Drug Task Force.

Indications that the investigation was undertaken by authorities outside the county were confirmed in Capeless' statement. The district attorney says the allegations of steroid use were brought to his attention after a "local police department was contacted by a federal agency." Capeless does not state which police department or which agency (the U.S. Postal Service has told

local media that there is an investigation but not into who or what).

The probe was first revealed by postings on the discussion site Topix and on a blog run by former county resident GM Heller and Daniel Valenti's PlanetValenti.com.

The Berkshire Eagle

has followed up with two articles that revealed Kirchner's involvement and that of a than unnamed state trooper from the Russell barracks in Hampden County.

Capeless said he had decided to make the following limited public statement about the investigation:

"Over the past week, the public has been exposed to rumors, in addition to hard information, regarding steroids and their sale and use here in Berkshire County. Ordinarily, it is the firm policy of my office not to confirm ongoing investigations, much less to divulge their specifics, in order to maintain the integrity and effectiveness of our investigative efforts. However, exceptions need to be made when either public safety or public confidence is being jeopardized by a lack of information.

"In this case, I have decided to make a limited public statement, divulging only that information necessary to adequately explain the circumstances, since there remains an ongoing criminal investigation.

"Several weeks ago, a local police department was contacted by a federal agency to alert them that an investigation into the importation of steroids had uncovered deliveries into their town. A joint investigation was undertaken which resulted in the seizure of steroids and the execution of a search warrant. An examination of recovered materials revealed that two law enforcement officers, Pittsfield Police Officer David Kirchner (a member of the Berkshire County Drug Task Force) and state police Sergeant Daniel Gale (then assigned to the Russell barracks in Hampden County), had apparently been the recipients of steroid deliveries. So far, no information has been uncovered which would indicate involvement in anything other than personal use of steroids by these two, or that any other officers were involved.

"When the information about the two officers was discovered, the local investigating officer, a member of the Berkshire County Drug Task Force, notified his supervisors in the Task Force, who immediately notified me. Since Kirchner was, at the time, a member of the Task Force, it was agreed that we would seek assistance from outside the county in continuing the investigation. State police investigators normally assigned to other units in other jurisdictions were dispatched and are presently engaged in furthering that investigation. Colonel Marian McGovern, the head of the State Police, and Pittsfield Police Chief Michael Wynn were informed of the situation, and each has initiated administrative proceedings while the criminal investigation is underway. Kirchner was immediately removed from the Task Force.

"I take very seriously any allegation that a law enforcement officer has breached the public trust by engaging in criminal activity, and I take just as seriously the reputation of all of the rest of us in law enforcement who honor that trust and continue to guard the public with integrity. No arrests have been made and any decision regarding criminal charges relating to these circumstances will be made with a very clear eye towards those two principles but only upon completion of the ongoing investigation."

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And Kirchner seemed like such a good guy - I do feel bad for his 5 yo. daughter. (Thank god I'm not a law enforcement officer)

P.S. Most of the cases he's been a part of have been dismissed for exactly this reason.



Pittsfield pharmacist Nicole Bombardier sentenced to 3 years for stealing 200+ OxyContin pills intended for prescriptions

Published: Tuesday, October 25, 2011, 6:08 PM Updated: Tuesday, October 25, 2011, 11:23 PM



By **Patrick Johnson, The Republican**

SPRINGFIELD - A former Pittsfield pharmacist was sentenced to three years in prison Monday and ordered to pay \$15,500 in fines and restitution after she pleaded guilty to stealing oxycodone tablets from her employer.

Nicole Bombardier, 31, of Cheshire, pleaded guilty to a single count of tampering with consumer products in March of last year.

The prosecution charged that between May and September of 2008, Bombardier, a pharmacist at Price Chopper in Pittsfield, stole at least 239 OxyContin tablets from the store's inventory. She replaced the stolen pills with other medications for the treatment of high blood pressure.

At least one person who had a prescription for OxyContin filled at the pharmacy unknowingly received blood-pressure medication, and as a result ended up in the hospital twice for what was described as a serious bodily injury.

Judge **Michael A. Ponsor** ordered Bombardier to serve three years in prison and then serve two years of supervised release. She was also fined \$12,500, and ordered to pay \$3,000 in restitution to the pharmacy and to the customer that was hospitalized from switched medication.

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State won't charge ex-drug lab tech Deborah Madden

January 1, 2011

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November 20, 2010

S.F. POLICE DEPARTMENT

Feds indict former SFPD drug-lab technician

December 02, 2011 | Henry K. Lee, Chronicle Staff Writer

A former civilian technician at the San Francisco Police Department's crime laboratory was indicted by a federal grand jury Thursday on charges she skimmed cocaine from the lab.

Deborah Madden, 61, of San Mateo was charged with a felony count of acquiring a controlled substance by subterfuge in the indictment handed up by a grand jury in San Francisco.

Madden obtained cocaine by "misrepresentation, fraud, forgery, deception and subterfuge" from October to December 2009, the indictment said.

Madden is to be arraigned in U.S. District Court in San Francisco on Wednesday.

Her attorney, Paul DeMeester said, "The first question that comes to mind is, where is the federal jurisdiction? In other words, what is the federal crime? The Constitution limits the power of the federal government. This is reaching."

Recommend

0

0



Former longtime San Francisco lab technician Deborah Madden appears for her arraignment for drug possession in a South San Francisco, Calif., courtroom, Monday, April 5, 2010. The San Francisco police crime lab was shut March 9, 2010 amid allegations in December that Madden stole cocaine evidence. Madden was in court on Monday on an unrelated charge to the lab scandal.

Credit: Paul Sakuma

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The federal case comes nearly a year after state prosecutors said there was insufficient evidence to show that Madden was stealing drugs she was supposed to be testing.

The allegations rocked the Police Department and led to the closure of its drug lab and prosecutors' dismissal of hundreds of drug cases.

Madden left the department in late 2009 just as lab supervisors began to suspect she was stealing drugs. In June, she pleaded guilty to an unrelated felony cocaine possession charge in San Mateo County.

E-mail Henry K. Lee at hlee@sfgchronicle.com.

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EMOTION REGULATION Worksheet
OBSERVE AND DESCRIBE EMOTIONS

DIRECTIONS: Write as much as you can about each as soon after "event" as possible. Write on back for more room.

Vulnerability Factors: What made me more vulnerable? - tired this morning (though enough sleep)
- urges to use before hand

Emotion Name(s): Shame

Intensity: (0-10) $6\frac{1}{2}$

Prompting Event: For my emotion (what, who where, when?)

told Jim earlier in week I put DEA application in, but I didn't
(figured I would later/soon) - Today found out I need his signature on it -
he knows/will know I lied

Interpretations: What are my Thoughts, Judgments, Beliefs, Assumptions, Appraisals of the situation?

- He will know I lied - judge me
- wondering if I can ~~see~~ have boss over him sign it
- have to wait until at least tomorrow to tell / face him = build up anxiety

Face and Body Changes: What am I feeling in my face and body?

- restlessness in hands/arms
- slight headache - head going in circles how to "fix" situation

Body Language: What is my facial expression, body posture and gestures?

- clenched jaw
- slouched a bit
- passing around a little

Action Urge: What do I feel like doing or saying?

- Asking Becky who she had sign it
- Use (have 12 urgeful samples to analyze out of next 13)
- make up lie

What I Did or Said:

- call Anna - commit to not using
- asked Becky - she thinks Jim signed her stuff

After Effects: What is my state of mind, other emotions, actions or thoughts?

Function of Emotions: Communicate?, Organize?, Give Information?

- Motivate / tell me to get my act in gear (both here and in life) = take charge, don't procrastinate

TB

- instant gratification

- feel better about myself
- don't lose phase coaching
- better for health
- don't get caught
- no "crash" afterward
- focus energy on work
- and TB

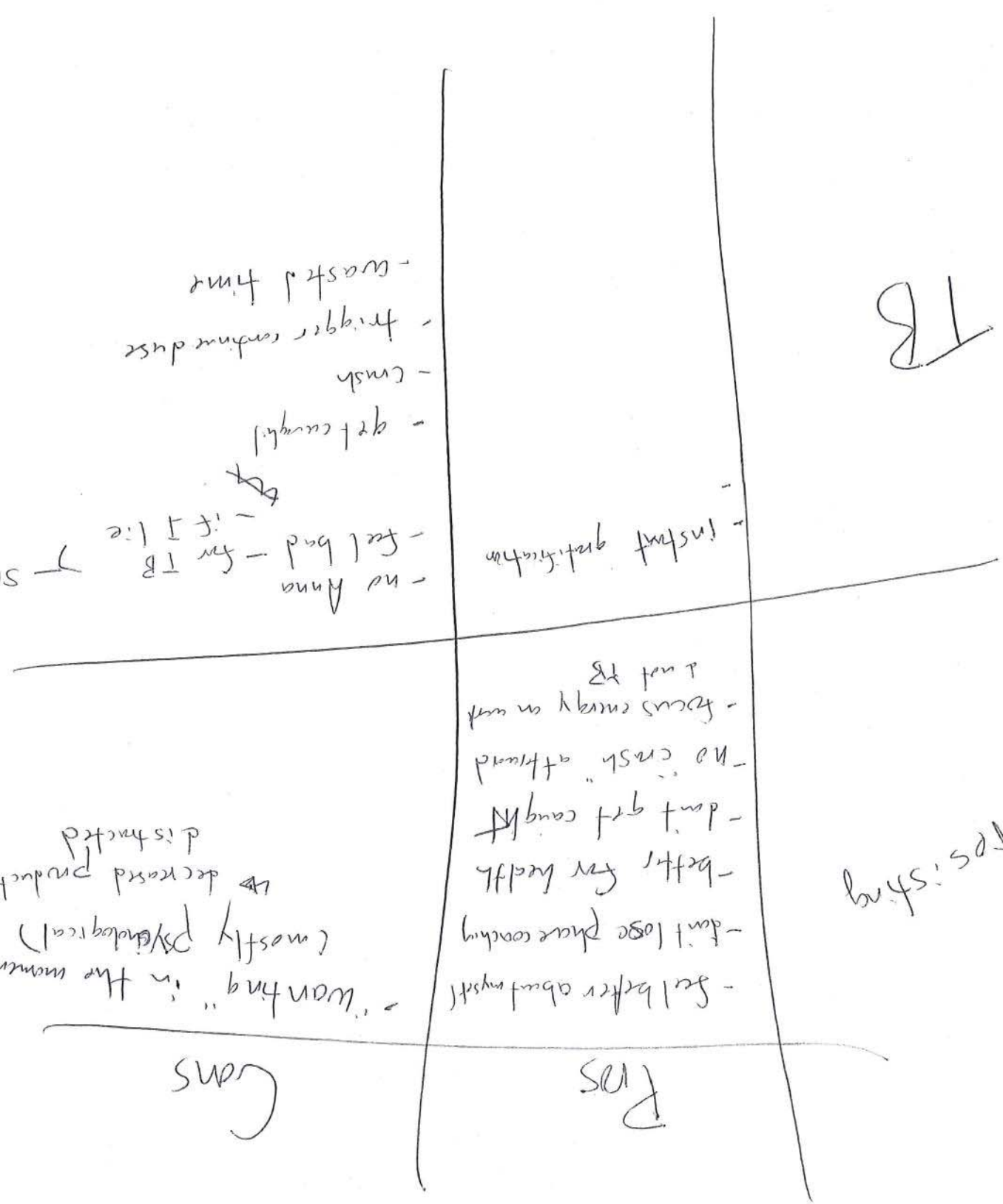
Pos: Shing

Pos

Cons

- "wanting" in the moment
(mostly psychological)
- decreased productivity if
distracted

- no Anna
- feel bad - for TB
- if I lie
- get caught
- crush
- trigger confidence
- wasted time



	Tues
sad	2 1/2
frustrated/anger	3 1/2 / 2 1/2
anxious	2 1/2
pleasant emotion	1
shame	3 1/2
kill	1
hurt	2
all days	0 / 4
outburst	4 yes, (transient treatment)
avoid	5 yes

Tues	Wed	Th	F	S	S	M
2 1/2	2 1/2 / 1 1/2	2 1/2	1 1/2	2	1	

u2 glasses do on page 1
- 1 channel, 1 wheel

Tues: work, cable guy, Tx; home (more relaxed than when I left - argument w/ Nikki RE Smur & TU) - offered to let X-Files; try to do DBT homework; bed early - let her watch

F.P.	x
UMA	x
S&S	x
DEAR MAN	
wave	x
OA	x
Value	x
Accpt	x
capn	x
sub	x
suft	x

Activ	x
Contrib	x
PR	x
Thresh	x
relax	x
O+B	x
RA	x
T+m	x
will	x

41135099 AREA/ROUTE/STOP: XXXXXXXX
 WORK CONNECTION/HOLYOKE
 DRS BOMBARDIER & ADAMO
 575 BEECH ST
 HOLYOKE, MA 01040



PARTICIPANT NAME 012482642		PARTICIPANT ID KYLE MICHAEL WILLIAM		ROOM NO.	AGE	SEX	PHYSICIAN
PAGE 1	REQUISITION NO 4464330	ACCESSION NO. 2060584	LAB REF. #	COLLECTION DATE & TIME 01262011 09:00AM	LOG-IN-DATE 01282011	FAX DATE 01292011	& TIME 12:08AM

REMARKS: Client Site Location:
 REASON FOR TEST: POST ACCIDENT
 DONOR ID VERIFIED: PHOTO I.D.

REPORT STATUS	FINAL	TEST	RESULT		UNITS	REFERENCE RANGE	SITE CODE
			IN RANGE	OUT OF RANGE			
EMPLOYER WESTFIELD OTHER ID NP DONOR PHONE 313-5157 REPORT FOR:							
		WORK CONNECTION/HOLYOKE DRS BOMBARDIER & ADAMO 575 BEECH ST HOLYOKE, MA 01040		41135099			
*** POSITIVE/ABNORMAL REPORT ***							
Tests Ordered: 45190N (SAP 10-50+MDMA/6AM/T)							
Integrity Checks							
		CREATININE	121.4 mg/dL	>= 20 mg/dL			
		pH	5.9	4.5-8.9			
		OXIDIZING ADULTERANTS	Negative				
Substance Abuse Panel							
				Initial Test Level	MS Confirm Test Level		
		AMPHETAMINES	Negative	500 ng/mL	250 ng/mL		
		BARBITURATES	Negative	300 ng/mL	200 ng/mL		
		BENZODIAZEPINES	Negative	300 ng/mL	200 ng/mL		
		COCAINE METABOLITES	Negative	150 ng/mL	100 ng/mL		
		MARIJUANA METABOLITES	Negative	50 ng/mL	15 ng/mL		
		METHADONE	Negative	300 ng/mL	200 ng/mL		
		METHAQUALONE	Negative	300 ng/mL	200 ng/mL		
		MDA-ANALOGUES	Negative	500 ng/mL	250 ng/mL		
		OPIATES		2000 ng/mL			
		CODEINE	Negative		2000 ng/mL		
		MORPHINE	POSITIVE		2000 ng/mL		
		6-MONOACETYLMORPHINE	Negative	10 ng/mL	10 ng/mL		
		PHENCYCLIDINE	Negative	25 ng/mL	25 ng/mL		
		PROPOXYPHENE	Negative	300 ng/mL	200 ng/mL		
Quantitative Results							
		MORPHINE	7102 ng/mL				
>> REPORT CONTINUED ON NEXT PAGE <<							

EMOTION REGULATION Worksheet
OBSERVE AND DESCRIBE EMOTIONS

DIRECTIONS: Write as much as you can about each as soon after "event" as possible. Write on back for more room.

Vulnerability Factors: What made me more vulnerable?

Last night w/ Molly
Shawn (+ Becky) ~~not~~ taking today off.

Emotion Name(s): (Pre-) Shame

Intensity: (0-10) 7

Prompting Event: For my emotion (what, who where, when?)

got 'good' sample @ work & having urges to use
(& knowing that I will be the only one here after lunch)

Interpretations: What are my Thoughts, Judgments, Beliefs, Assumptions, Appraisals of the situation?

I'm a bad person for having urges
" " " " " not wanting to try to stop them
It doesn't matter - I won't get caught

I know I should
call Anna, but I
don't want to.

Know I'll feel worse when/if I use

I can lie on my homework

Face and Body Changes: What am I feeling in my face and body?

hungry (??)
head is ~~be~~ running 100m/h
little tightness across shoulder

Body Language: What is my facial expression, body posture and gestures?

can't sit still - hands to ~~my~~ head temples
clenched jaw

Action Urge: What do I feel like doing or saying?

hurry up & prepare fuse (my mind says to get it out of way, but
→ give-in and go w/ urge I don't think that will be the end of it)

What I Did or Said:

After Effects: What is my state of mind, other emotions, actions or thoughts?

Function of Emotions: Communicate?, Organize?, Give Information?

ServiceNet Diary Card

Name: _____

Week of: _____

Observe and Describe Emotions: Today I felt (0-5):	12-26 ---Mon	12-27 --Tues	12-28 Wed	12-29 --Thurs	12-30 ---Fri	12-31 --Sat	12-31 --Sun
sadness	3 1/2	2 1/2	2 1/2	3	3	2 1/2	
frustration/anger	4 1/2 4 1/2	4 1/3 1/2	4 1/2	4 1/3	3 1/2	4 1/4	
anxiety	2 1/2	2	2 1/2		3	2	
"pleasant" emotion	1	2	1 1/2		2 1/2	1	
shame	3	2	3 1/2	4	4	3	
Target Behaviors: Today I felt an urge to (0-5):							
Kill myself	0	0	0			2	
Injure myself	0	0	1			3	
Drink or take drugs	3 3 1/2 ^{2 ciders 2 shots} _{yes}	1 1/2 1 1/2 _{yes}	1 1/2 1 1/2 _{yes}	1 1/2 1 1/2 _{yes}	1 1/2 1 1/2 _{yes}	4 1/2 4 1/2 _{yes}	2 1/2 2 1/2 _{yes}
Binge, purge or not eat	3 3 1/2 _{yes}	1 1/2 1 1/2 _{yes}	1 1/2 1 1/2 _{yes}	1 1/2 1 1/2 _{yes}	1 1/2 1 1/2 _{yes}	4 1/2 4 1/2 _{yes}	2 1/2 2 1/2 _{yes}
outburst	5 yes	4 yes	3 1/2 little		2	5 yes	
avoid	5 yes	4 yes	4 1/2 yes			3	

Write "Yes" in the box next to the number if you acted on an urge.

What did you do today?

Monday: go home - expect to have relaxing day w/ Nikki, but went downhill fast; bed by 6pm

Tuesday: yell @ Nikki (about everything) - get mad about computer/recipe for cheesecake (broken spatula), so blow it off
bed early - hopefully up early tomorrow

Wednesday: leave work 10:30 to get X-mas stuff done (definitely moments throughout day where I thought I sounded stupid or did something stupid; DBT group = "Throw the shit to the curb")

Thursday: tried to resist using @ work, but ended up failing (I know I should have called, but had thoughts about how I felt last time I called); neighbors B-day; up to midnight wrapping presents.

Friday: go to NY in afternoon. @ work use w/art debating doing it - My thought about it: identity issue (i.e. wavering back & forth about whether I want to use).

Saturday: home from NY - mad about missing part of Pats game (out of 3 reasons, 2 are Nikki's, but main one is not) - had 2 ciders during game when mad, but decided not to drink 3rd

Sunday: papers; X-mas in RI

Nikki drinkin' way harder from RI

Notes:

Wed: Kpt thinking that ^{most} ~~over~~
things I said to others
sounded stupid, or the "where
the hell did that come from"
Feeling @work, @doggy
day care, a little @ DBT group)

SKILLS	M	T	W	Th	F	Sa	Su
Formal Practice M		X	X	X	X	X	X
One Mindful Activity	X	X	X	X	X	X	
Stops & Stickers				X	X		
DEAR MAN IE			X	X			
GIVE							
FAST							
Observe & Describe ER							
Feel Emotion as a Wave	X	X	X	X		X	
Mindfulness of Body Sensations					X	X	
Opposite Action	X	X	X	X	X		X
Problem Solving	X	X	X			X	X
Values		X	X	X		X	
Accumulate Positives	X	X	X	X	X	X	X
Build Mastery			X	X		X	X
Cope Ahead	X	X	X	X	X	X	
Treat Physical Illness	X				X		
Balanced Eating			X			X	X
Avoid Mood-Altering Substances	X	X	X				
Balanced Sleep	X	X	X	X	X	X	
Exercise							X
Avoid Avoiding			X	X	X	X	
Activities DT			X	X		X	X
Contributions		X				X	
Comparisons	X		X	X	X		
Opposite Emotions							
Pushing Away	X		X	X		X	
Thoughts		X					
Sensations							
Self Soothe (the five senses)		X	X		X		
Temperature							
Intense Exercise							
Progressive Relaxation <i>Paul</i>					X		
Imagery							
Meaning					X		
Prayer							
Relaxation		X	X				
One Thing in the Moment		X		X			X
Brief Vacation					X		
Encouragement	X		X	X			
Pros & Cons							X
Observe the Breath		X					
Half-Smile	X		X				
Awareness				X			X
Radical Acceptance	X	X	X	X	X	X	X
Turning the Mind		X	X	X	X	X	X
Willingness	X	X	X	X	X	X	X

EXHIBIT 6



CHARLES D. BAKER
GOVERNOR

KARYN E. POLITO
LIEUTENANT GOVERNOR

DANIEL BENNETT
SECRETARY

COLONEL RICHARD D. McKEON
SUPERINTENDENT

The Commonwealth of Massachusetts

Department of State Police

Division of Investigative Services

Forensic Services Group

124 Acton Street

Maynard, MA 01754

January 7, 2016

To: Judge Peter Velis, Special Assistant Attorney General
Office of the Attorney General

Judge Thomas Merrigan, Special Assistant District Attorney
Office of the Northwest District Attorney

From: Detective Captain Paul J. L'Italien #1317
Forensic and Technology Center
Massachusetts State Police

Captain James F. Coughlin #1818
Division of Standards and Training
Massachusetts State Police

Subject: Investigation of the Attorney Luke Ryan affidavit

STATEMENT OF FACTS:

1. On August 14, 2015 Detective Captain Paul L'Italien and Captain James Coughlin were assigned by Lieutenant Colonel Dermot Quinn to provide investigative support to the Office of the Attorney General and the Office of the Northwest District Attorney. The nature of this support would be to assist Judge Peter Velis and Judge Thomas Merrigan who were conducting an investigation involving an allegation of misconduct by sworn members and prosecutors assigned to the Office of the Attorney General. The complaint had been lodged by Attorneys Luke Ryan and Rebecca Jakobstein and surrounded the arrest and prosecution of Sonya Farak.
2. Sonya Farak is a former drug chemist who worked at the Amherst Drug Lab. On February 19, 2013 Farak was arrested and charged with Theft of a Controlled Substance from an Authorized Dispensary (4 counts), Tampering with Evidence (4 counts), and Possession of a Class B Substance (2 counts). On January 6, 2014 Farak

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plead guilty to the charges and was sentenced to two-and-a-half years in the House of Correction, with 18 months to serve.

3. On August 24, 2015 at 3:00 p.m. Captain Coughlin and I attended a meeting at the Office of the Northwest District Attorney's in Northampton. At this meeting we met for the first time with Judge Velis and Judge Merrigan. During the meeting we were provided with an overview of allegations that had been made against various members of the state police and prosecutors assigned to the Office of the Attorney General. The allegations were made in writing by Attorney Luke Ryan and Attorney Rebecca Jakobstein. The roll that we were to assume would be to assist with the investigation surrounding allegations of prosecutorial misconduct and/or obstruction of justice committed by these officials. During this meeting we were also informed that there would be an independent review of the Sonya Farak wrongdoings and how far reaching these wrongdoings were. It was determined that Captain Coughlin and I would not be involved in the Farak wrongdoing investigation.

4. On September 1, 2015 at 9:00 a.m. Captain Coughlin and I met with Judge Merrigan at the State Police Bourne barracks. The purpose of this meeting was to review the complaint lodged by Attorney Ryan et al as well as reviewing all information that Judge Merrigan had pertaining to the Farak case.

5. The first item reviewed in this meeting was Attorney Ryan's affidavit, hereinto referred to as the "Ryan affidavit". The "Ryan affidavit" is seventeen pages in length and a copy is attached hereto as **Exhibit #1**.

6. The "Ryan affidavit" begins with a list of "things to do". This to do list has eleven directives and includes the review of servers, e-mails, electronic evidence, digital equipment, the issuance of subpoena's to communication providers and the conducting of interviews with various state police officers and members of the attorney general's staff. From there the affidavit outlines a step by step approach which the Ryan group believes should be followed. There are accusations and commentary of "undisclosed photographs", the "suppression of exculpatory evidence" and a "cover-up". (Page 5). The affidavit goes on to name several state police officials and staff members of the attorney general's office and speculates what they must have done to suppress evidence. There are also accusations of untruthfulness (page 9) and further speculation of what these officials may or may not say when confronted with the accusations being made in the affidavit. The affidavit makes reference to "the politicians" (page 13) and even has a "postscript" section (page 16). It should be noted that the "Ryan affidavit" does not mention or even infer that the group has an unnamed source of information providing them with facts behind their accusations.

7. The chief concern of the "Ryan affidavit" involves a "Servicenet Diary Card" and an "Emotional Regulation Worksheet" that were discovered during the execution of a search warrant on Sonya Farak's vehicle. The affidavit refers to these items as "treatment records law enforcement took extraordinary measures to conceal" (page 5). The affidavit also references the "misrepresentation of drug treatment records

as assorted lab paperwork" (page 4). "Assorted lab paperwork" was used to describe items 4, 5, and 8 of the return associated with the search warrant of Farak's vehicle as well as a report written by Trooper Randy Thomas. (A copy of the search warrant for Farak's vehicle, the search warrant return and the associated list of evidence are attached hereto as Exhibit #2).

8. There are also questions of whether or not there was an independent investigation being conducted under the direction of Major James Connolly at the crime lab. The "Ryan affidavit" makes reference to a statement made by Sergeant Joseph Ballou about an "independent investigation". (page 9)

9. At the conclusion of the meeting with Judge Merrigan it was decided that the first steps to be taken in our investigation involved the following;

- Obtain all of the photographs and video associated with the arrest of Sonya Farak including the search of her vehicle and the photographs taken inside the Amherst Drug Lab.
- Determine whether or not there was an independent investigation lead by Major James Connolly as mentioned in the "Ryan affidavit".
- Request e-mails from the Attorney General's office in which Sonya Farak and/or the Amherst Lab are a part of the e-mail text.

10. During the course of the investigation a search was conducted in the State Police Crime Laboratory Information System (LIMS) for all documentation evidence associated with the Sonya Farak investigation. The case number associated with the Farak case was found to be 13-01679. A copy of the "Case jacket" associated with this investigation is attached hereto as Exhibit #3.

11. Submission #1 of case #13-01679 was submitted by Detective Lieutenant Robin Fabry of Crime Scene Services. On January 18, 2013 D/Lt. Fabry took photographs and collected twenty one (21) pieces of evidence from Room #236 at the Amherst Lab. D/Lt. Fabry wrote a report which indicates that the evidence was turned over to Trooper Geraldine Bresnahan of the Northwest District Attorney's office. A copy of D/Lt. Fabry's report, handwritten evidence collection sheets, a contact sheet of photographs and a compact disc (CD) containing said photographs are attached hereto as Exhibit #4.

12. Submission #2 of case #13-01679 was submitted by Trooper Christopher Dolan of Crime Scene Services. On January 19, 2013 Trooper Dolan took photographs of Sonya Farak's vehicle and the search thereof at the State Police barracks in Northampton. Trooper Dolan took seventy one (71) photographs. The "Ryan affidavit" indicates that Trooper Dolan "*must be regarded as a witness to the cover up*" (page 5). A review of the metadata associated with the photographs taken by Trooper Dolan revealed that they were taken on January 19, 2013 between 3:07 a.m. and 4:59 a.m.

The metadata identifies the photographs as DSC_4949 through DSC_5023. It should be noted that the numbers DSC_4954, DSC_4967, DSC_4984, DSC_4985 and not in the sequential list of images.

13. A close inspection of the photographs taken by Trooper Dolan compared to the items listed on the evidence sheet associated with Trooper Thomas' search warrant return reveals the following;

- Images DSC_4949 through DSC_4975 are overall photographs of the exterior and interior of the vehicle
- Item #1 corresponds with images DSC_4976, DSC_4977, DSC_4978
- Item #2 corresponds with image DSC_4981
- Item #3 corresponds with image DSC_4988
- Items #4 & #5 & #8 correspond with images DSC_4968, DSC_4969, DSC_4970, DSC_4989, DSC_4990, DSC_4991, DSC_4992
- Item #6 corresponds with images DSC_4994, DSC_4995
- Item #7 corresponds with images DSC_4973, DSC_4974, DSC_4975
- Item #9 corresponds with image DSC_4998
- Item #10 corresponds with image DSC_4996
- Item #11 corresponds with image DSC_4987
- Item #12 corresponds with image DSC_5003
- Item #13 corresponds with images DSC_5005, DSC_5006, DSC_5007
- Item #14 corresponds with image DSC_5010
- Item #15 corresponds with image DSC_5001
- Item #16 corresponds with images DSC_5008, DSC_5009, DSC_5012
- Item #17 corresponds with images DSC_5013, DSC_5014, DSC_5015, DSC_5016
- Item #18 corresponds with image DSC_5021
- Item #19 corresponds with images DSC_5013, DSC_5014, DSC_5015
- Item #20 corresponds with image DSC_5020

14. A copy of Trooper Dolan's report, a contact sheet of the vehicle search photographs and a CD containing said photographs are attached hereto as Exhibit #5. It should be noted there is a clerical error on Trooper Dolan's report. His report indicates that the photographs were taken on January 18, 2013 when in fact the case jacket and metadata indicate they were taken on January 19, 2013.

15. Submission #3 of case #13-01679 was submitted by Trooper Christopher Baran, formerly of Crime Scene Services. On February 14, 2013 Trooper Baran took a video recording of the labs at the Morrill building (#611 North Pleasant Street, Amherst, Mass). A CD containing a copy of the video is attached hereto as Exhibit #6.

16. Submission #4 of case #13-01679 was submitted by Trooper Laura Cary of Crime Scene Services. On February 14, 2013 Trooper Cary took photographs of the labs at the Morrill building (#611 North Pleasant Street, Amherst, Mass). A contact

sheet of photographs and a CD containing said photographs are attached hereto as **Exhibit #7**.

17. On September 8, 2015 at 9:30 a.m. Captain Coughlin and I met with Judge Velis and Judge Merrigan at the Northwest District Attorney's office in Northampton. This meeting was in reference to items #4, #5 and #8 of the evidence associated with the vehicle search. These items were labeled "assorted lab paperwork". It was determined that we would review all of the recovered evidence associated with the search of Farak's vehicle.

18. On September 8, 2015 at 2:00 p.m. Captain Coughlin and I went to the Office of the Attorney General at #1 Ashburton Place in Boston. There we coordinated with Attorney Thomas Caldwell and were provided with the evidence associated with the Farak investigation. Captain Coughlin and I worked in a private office and were provided with a copy of a Department Case Report for case #13-034-4804-1003. This case report listed all of the evidence collected during the course of the Farak investigation. It should be noted that all of the narcotics related evidence was listed as being in the possession of the State Police Crime lab. (A copy of Case Report #13-034-4804-1003 is attached hereto as **Exhibit #8**).

19. Captain Coughlin and I carefully inspected all of the items that were described as "Assorted lab paperwork" (items #4, #5, #6). It should be noted that items #8, #11, #14 and #15 also had the words "assorted lab paperwork" or "lab paperwork" included in the description of the evidence.

20. The evidence labeled item #4 contained forty two (42) sheets of paper, some of which were two sided. These sheets of paper included MOSES (Union) information, Farak work e-mails, fiscal year information, court dates, Droid phone information and an empty Department of Public Health (DPH) envelope. Each of these items were copied and are attached hereto as **Exhibit #9**.

21. The evidence labeled item #5 contained thirteen (13) sheets of paper. These sheets of paper included travel authorization paperwork and information pertaining to a Drug Enforcement Administration (DEA) Forensic Chemist seminar. The seminar paperwork included general information about the course as well as hotel and restaurant information. There is also an e-mail dated January 17, 2012 which verified enrollment in the seminar. Each of these items were copied and are attached hereto as **Exhibit #10**.

22. Item #6 contains material referred to in the "Ryan affidavit". There are two (2) ServiceNet Dairy Card's which have handwritten notes. There are two papers (each two sided) with the heading "The Four Responses". These sheets do not have any writing on them. There are three sheets of handwritten notes as well as a graph with the top heading "skills" This "skills" sheet also has handwritten notes on it. There is an "Emotional Regulation Worksheet" with handwritten notes. There is a "Nascar.com superstore" payment receipt. There are six (6) data file graphs, a blank DPH letterhead

sheet and a blank piece of paper. Each of these items were copied and are attached hereto as **Exhibit #11**.

23. Item #8 contains ten (10) sheets of paper, some of which were two sided. These include various sheets with a list of cases and trial dates. There are two data file graphs, a sequence table, a summons to Holyoke Court, sheets with handwritten notes and scribble on them. Each of these items were copied and are attached hereto as **Exhibit #12**.

24. Item #11 contains material referred to in the "Ryan affidavit". There were two (2) "emotional regulation worksheets", one of which was written on. There were seven (7) sheets of paper with various handwritten notes. There was a sheet entitled "Guidelines for skills training" and two (2) entitled "The path to clear mind". There were two (2) sheets entitled "DBT-S States of Mind". There were three (3) ServiceNet Diary Cards with no writing. There are ten (10) worksheets entitled "DBT Behavioral Chain analysis" with no writing. There is a "Distress tolerance worksheet" and various other sheets regarding behavior therapy and muscle relaxation techniques. There were also copies of news stories and an NFL Football schedule. Each of these items were copied and are attached hereto as **Exhibit #13**.

25. Item #14 contained "Date analyzed" index cards, data graphs, handwritten notes, lined note sheets, and five (5) blank cards with punched holes. Each of these items were copied and are attached hereto as **Exhibit #14**.

26. Item #15 contained five (5) pages of real estate information in the town of Greenfield. There were four (4) sheets with various shapes on them. There was a UMASS directory and campus map, a concert hall seating chart, and a state employee payroll search from the Boston Herald. There were five (5) lab graphs and a sequence table with sample names. Each of these items were copied and are attached hereto as **Exhibit #15**.

27. On September 23, 2015 at 12:10 p.m. I had a preliminary meeting with Major James Connolly (retired) at Suffolk University in Boston. Major Connolly is currently employed as a Captain for the campus police department. During this meeting Major Connolly provided an overview of the timeframe when the Department of Public Health (Hinton Lab) came under the jurisdiction of the State Police Crime Lab. The jurisdictional change occurred in July of 2012. In addition to the Hinton Lab, the Department of Public Health Amherst Lab also came under the jurisdiction of the State Police Crime Lab. Major Connolly indicated that the Annie Dookham investigation began shortly after the jurisdictional change and that the investigation was being conducted by the Attorney General's Office. It was not until October 10, 2012 that a Quality Assurance (QA) Audit was conducted at the Amherst Lab. This audit included a review of QA systems, lab security and access, evidence security and accountability. A copy of the Audit report is attached hereto as **Exhibit #16**.

28. Major Connolly indicated that he first became aware of the Sonya Farak case on January 18, 2013. He stated that he received a phone call from James Hanchett who was the supervisor in charge at the Amherst lab and was informed that there was missing drug evidence. Major Connolly stated that he traveled to Amherst on the same day and was present when photographs were taken by D/Lt. Fabry. He stated that the criminal investigation was ongoing between the Attorney General's Office and the Office of the Northwest District Attorney's. He indicated that there was coordination between all of the investigative groups but there was not an independent criminal investigation being led by him. Major Connolly indicated that he would collect everything he had in his possession and would provide me an opportunity to review his files and make copies.

29. On October 15, 2015 I met with Attorney Thomas Caldwell at the Office of the Attorney General in Boston. The purpose of this meeting was to receive the e-mails that had been requested as a part of this investigation. The e-mails were saved to a CD and were encrypted. There were a total of eight hundred and ten (810) e-mails pertaining to Sonya Farak and/or the Amherst drug lab. The earliest e-mail was from August 13, 2012 and the last e-mail was dated July 8, 2015. The encrypted CD is attached hereto as **Exhibit #17**.

30. Beginning on October 19, 2015 and over the next several days Captain Coughlin and I each reviewed all of the 810 e-mails received from the Office of the Attorney General. To illustrate the content of the e-mails we built an Excel spreadsheet which depicted a numerical value, the name of the person who sent the e-mail, the subject line of the e-mail, the date received and a brief comment which summarized the content of each e-mail. It should be noted that the term "thread" is frequently utilized in the comment section of this spreadsheet. "Thread" refers to an e-mail message that includes a running list of all the succeeding replies starting with the original email. It should also be noted that various e-mails are on the spreadsheet more than once because the same e-mail was addressed to various different persons. The first referenced e-mail in the spreadsheet is from July 8, 2015 and is given the number one (1). E-mail number eight hundred and ten (810) was from August 13, 2012. (A copy of said spreadsheet is attached hereto as **Exhibit #18**).

31. The review of the e-mails revealed nothing that would indicate a "cover-up" as asserted in the Ryan affidavit. There are various e-mails which have been printed and are attached hereto with the spreadsheet. E-mail #45 is attached hereto and illustrates a discovery request that began with Attorney Glenn Rooney, a staff counsel with the Massachusetts State Police. The last thread of the e-mail is from Sergeant Joseph Ballou on March 2, 2015 in which he is informing Captain Robert Irwin (State Police Detective Unit Commander) of the case number and the custody location of evidence in the investigation.

32. E-mail #71 is an e-mail in which various attorneys from the Office of the Attorney General correspond relative to a motion by Attorney Luke Ryan to inspect all evidence for a chain of custody issue. Included in the e-mail thread is Attorney Randall

E. Ravitz, the chief of the attorney general's appeals division. Attorney Ryan's motion was an attachment to the e-mail. Both the e-mail thread (#71) and attachment are printed and attached hereto with the e-mail spreadsheet.

33. E-mail #165 was originated from Mr. William Hebard, the manager of the UMASS drug of abuse laboratory in Worcester. The UMASS laboratory had been re-analyzing cases that Sonya Farak had worked on while employed at the Amherst Lab. The e-mail identifies a discrepancy in a case. The thread includes the State Police Crime Lab, Attorney Anne Kaczmarek (lead prosecutor in the Farak investigation), Captain Robert Irwin and Attorney John Verner, the chief of the criminal bureau for the Attorney General's office. The e-mail thread (#165) has been printed and is attached hereto with the e-mail spreadsheet.

34. E-mail #213 is between Attorney Sean Farrell, Deputy Chief Legal Counsel of the State Police and Attorney Kaczmarek. The topic of the e-mail is Comm. v. Penante and references an unnamed attorney that is described as rude, aggressive and who has misrepresented the Attorney General's office. The e-mail thread (#213) has been printed and is attached hereto with the e-mail spreadsheet.

35. E-mail #223 is an e-mail between Attorney Ravitz (Chief of Appeals) and Attorney Kris Foster who is an assistant attorney general also assigned to the appeals division of the criminal bureau. The e-mail originated on September 11, 2013 from Attorney Ryan with a motion to inspect the Amherst lab. The general discussion of the e-mail between the appeals attorneys is that it is their opinion that the request outlined in the motion is too broad. The e-mail thread (#223) has been printed and is attached hereto with the e-mail spreadsheet.

36. E-mail #224 is an e-mail between Sergeant Ballou and Attorney Kaczmarek regarding a "Farak hearing". The e-mail thread begins on September 10, 2013 and within the text of the e-mail is a discussion about bringing the Farak file to Boston to ensure everything is accounted for, particular photographs of evidence. The e-mail thread (#224) has been printed and is attached hereto with the e-mail spreadsheet.

37. E-mail #229 is an e-mail between Attorney Kaczmarek, Attorney Foster and Attorney Verner. The central topic of the e-mail is a hearing in which an unnamed defense counsel had a motion hearing before Judge Kinder requesting to have complete access to Sergeant Ballou's file. The discussion includes providing the judge with a memo explaining why the Attorney General's office believes something in the file should be considered "privileged". The e-mail thread (#229) has been printed and is attached hereto with the e-mail spreadsheet.

38. E-mail #255 is an e-mail originated on August 29, 2013 from Attorney Luke Ryan to Attorney Kris Foster. Attorney Ryan indicates in the e-mail that he is representing Rafael Rodriguez who had been indicted based on a drug analysis conducted by Sonya Farak. Attorney Ryan indicates that he plans to appear in a

courtroom before Judge Kinder and request a hearing on the matter. He goes on to say that he would like to be able to tell the judge that he had been in contact with a representative from the Attorney General's office to coordinate dates and times for a hearing. Attorney Ryan then asks if Attorney Foster would be willing to be the representative. It should be noted that this e-mail is referenced on page twelve (12) of the "Ryan Affidavit". E-mail #255 has been printed and is attached hereto with the e-mail spreadsheet.

39. E-mail #299 is an e-mail between Attorney Kaczmarek and Attorney Elaine Pourinski who was the defense attorney for Sonya Farak. The central topic of the e-mail is that Farak is requesting to have some personal belongings that had been seized returned to her. A portion of thread between Attorney Kaczmarek and Attorney Pourinski makes reference to "proposed redactions" involving the redaction of her mental issue. A later thread within this e-mail is from Attorney Kaczmarek to Sergeant Ballou inquiring about Farak's personal belongings. The e-mail thread (#299) has been printed and is attached hereto with the e-mail spreadsheet.

40. E-mail #437 is an e-mail between Attorney Kaczmarek and Sharon Salem of the State Police Crime Lab. Ms. Salem sends the e-mail on April 5, 2013 and the central topic is that drug samples are being moved from the Amherst lab to the State Police crime lab in Sudbury. Attorney Kaczmarek does indicate that she would like crack samples visually examined based on what Farak had been using to substitute the narcotics she had illegally taken. The e-mail thread (#437) has been printed and is attached hereto with the e-mail spreadsheet.

41. E-mail #559 is an e-mail between Major James Connolly and Attorney Kaczmarek. Major Connolly originated the e-mail on March 19, 2013 inquiring about the status of the grand jury. Attorney Kaczmarek provides an update to Major Connolly to include information that there may be more compromised samples based on information that Farak had been using heavily for 4-5 months before her arrest. The e-mail thread (#559) has been printed and is attached hereto with the e-mail spreadsheet.

42. E-mail #618 is the most significant finding of the e-mail audit. It is an e-mail from Sergeant Ballou to Attorney Kaczmarek with a carbon copy of the e-mail being sent to Captain Irwin and Attorney Verner. The e-mail was sent on February 14, 2013 with the subject line "Farak admissions". The e-mail reads as follows;

"Anne",

"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"

"Joe"

There were also four attachments to the e-mail. The attachments were entitled "Articles and Notes", "Emotional Regulation Homework", "Positive Morphine Test" and "Emotion Regulation Worksheet". A copy of the e-mail (#618) and all four attachments have been printed and are attached hereto with the e-mail spreadsheet.

44. E-mail #671 was sent by Attorney Lee Hettinger, an assistant attorney general from Springfield. It was sent on January 29, 2013 to Attorney Kaczmarek and Attorney Verner. The central topic of the e-mail was that Hampden was receiving pressure from a judge to identify cases handled by Farak. A prosecutor had been assigned by Hampden to gather information about pending cases in Hampden. This e-mail (#671) has been printed and is attached hereto with the e-mail spreadsheet.

45. E-mail #723 was sent by Sergeant Ballou on January 23, 2013 to Attorney Kaczmarek with a carbon copy to Captain Irwin and Attorney Verner. The central topic of the e-mail was that the Springfield police department had a drug case that had been analyzed by Sonya Farak and the drug samples appeared to have been tampered with. A copy of the e-mail (#723) has been printed and is attached hereto with the e-mail spreadsheet.

46. E-mail #763 was sent by Attorney Kaczmarek on January 21, 2013 and had an attachment requesting a statewide grand jury. The attachment was addressed to "The Honorable Barbara J. Rouse" and was from Attorney General Martha Coakley. A copy of the e-mail (#763) and the attachment have been printed and are attached hereto with the e-mail spreadsheet.

47. On October 22, 2015 at 9:30 a.m. Captain Coughlin and I attended a meeting at the office of the Northwest District Attorney. Judge Velis and Judge Merrigan were present as were several defense attorneys who had an interest in the Sonya Farak wrongdoings and how she affected various defendants. Present during this meeting were Attorney Luke Ryan and Attorney Rebecca Jakobstein. Attorneys Ryan and Jakobstein were the authors that had signed the "Ryan affidavit".

48. During the meeting each attorney had an opportunity to speak. Attorney Ryan went over the timeframe and judicial steps he took to gain access to the evidence associated with Sonya Farak. He indicated that he obtained a court order to view the Farak evidence during July of 2014. He also indicated that he went to the Attorney General's office in Boston with an investigator to review and photograph the evidence. This process occurred on October 30, 2014 under the authority of the court order and was supervised by a state trooper. Judge Merrigan asked if any court orders to view the evidence had been violated and no information relative to a violation of a court order was mentioned by Attorney Ryan. During the meeting Judge Merrigan referenced the "Ryan affidavit" and specifically asked the defense attorneys if there was "evidence beneath the evidence". Nobody from the group of defense attorneys added any new information that would add merit to the information contained in the "Ryan affidavit".

49. On November 13, 2015 I received a packet from Assistant Attorney General Thomas Caldwell. This packet contained a copy of a "prosecution memo" regarding the Sonya Farak investigation. Attorney Caldwell had informed me that this type of memo is utilized as a standard practice in the criminal bureau of the Attorney General's office. The names of the attorneys (Verner and Kaczmarek), defendant (Farak), defense attorney (Pourinski) and lead investigator (Ballou) are listed on the first page of the memo. There is not a formal date on the memo but there are two handwritten dates of "3/27/13" and "3/28/13". The memo is thirteen (13) pages in length and has handwritten notes throughout. A portion of page five (5) makes reference to "*mental health worksheets describing how Farak feels when she uses illegal substances and the temptation of working with urge-ful samples*". This is footnoted with the number seven (7). At the bottom of page five (5) is a key to the footnotes for the page and number seven (7) indicates "*these worksheets were not submitted to the grand jury out of abundance of caution in order to protect possibly privileged information. Case law suggests, however, that the paperwork is not privileged*". A copy of the prosecution memo is attached hereto as Exhibit #19.

50. On November 25, 2015 I met with Major Connolly at Suffolk University. Major Connolly provided me with a three ring binder which had copies of everything he possessed as it relates to the Farak investigation. This three ring binder included copies of the state police detective reports for the Farak investigation. There was a report which made recommendations for new security procedures to the drug labs in Sudbury and Amherst. There were MOSES (Union) correspondences relative to Farak's work status pending the criminal proceedings against her. There was a report written by Major Connolly entitled "Amherst Drug Laboratory". This report outlines the case backlog for narcotic cases within the Crime lab system and how the lab would proceed with continuing to provide drug analysis services for the Commonwealth. Finally, there is an evidence inventory report form which outlines an audit conducted at the Amherst drug laboratory on January 19, 2013. As indicated above, Major Connolly did not conduct an independent criminal investigation, but an administrative investigation focusing on how to continue providing services to the Commonwealth. Copies of the Amherst Drug laboratory report and the evidence inventory report are attached hereto as Exhibit #20.

51. On December 4, 2015 at 9:30 a.m. Detective Captain Robert Irwin was interviewed at State Police General Headquarters in Framingham. Detective Captain Irwin is a thirty (30) year veteran of the Massachusetts State Police. Detective Captain Irwin was assigned to the Office of the Attorney General from August of 2006 until July of 2015 when he was promoted from Captain to Detective Captain. He was the designated officer in charge of the state police detective unit from March of 2009 until July of 2015. It should be noted that he was the lead investigator in the Chemist Annie Dookham investigation which began in 2012. Prior to his assignment at the Office of the Attorney General he was assigned to the Essex County District Attorney's office for thirteen (13) years.

52. During the interview, Detective Captain Irwin provided a summary of how his unit became involved in the Sonya Farak investigation. He indicated that on January 18, 2013 he was advised of the ongoing investigation at the Amherst lab and that he traveled there on the same day. He indicated that there was an ongoing collaboration between the Northwest District Attorney's office, the Attorney General's office and members of the lab (Crime Scene Services). He stated that during the early morning hours of January 19, 2013 he was present when a search warrant was executed on Sonya Farak's vehicle in a garage at State Police Northampton.

53. Due to the time of the search warrant execution it would have been poor practice to thoroughly inspect each piece of paper found in the vehicle. The investigative team was lacking manpower and mistakes could have been made with the labeling and handling of evidence. It was better practice to review the evidence and paperwork more thoroughly at a later time at a better facility for that purpose. Detective Captain Irwin was asked specifically about the labeling of items 4, 5 and 8 as "assorted lab paperwork". He stated that this was a generic and acceptable term to classify numerous papers that appeared to have evidentiary value.

54. Detective Captain Irwin indicated that he did become aware of the paperwork seized from the vehicle that was associated with Farak's admitted drug use. He stated that there was concern that this information may be privileged due to the HIPAA Act (Health Insurance Portability and Accountability Act). He went on to say that the "return" of the search warrant had to be completed within seven days and a determination of the HIPAA concern had not been reached. Therefore, the wording "assorted lab paperwork" remained on the evidence sheets and return.

55. During the interview I asked Detective Captain Irwin if he remembered an e-mail sent by Sergeant Ballou on February 14, 2013 (#618). He stated that he does remember the e-mail being sent and that the timeframe of the e-mail would have been leading up to grand jury proceedings and that Sergeant Ballou was inquiring whether or not the items would be introduced at the grand jury.

57. Detective Captain Irwin indicated that the chief of the criminal division at that time was Attorney John Verner. The directive from the criminal division was that the investigation was to focus on Farak's wrongdoings associated with her arrest. The systematic wrongdoing in the lab was not a focus of the investigation. He noted that during the Dookham investigation his focus was on her wrongdoing. An investigation surrounding the systematic failures of the Jamaica Plain lab was undertaken by the office of the inspector general. The interview with Detective Captain Irwin concluded at approximately 11:00 a.m.

58. On December 9, 2015 at 1:00 p.m. Captain Coughlin and I interviewed Attorney Anne Kaczmarek at the Office of the Attorney General in Boston. Attorney Kaczmarek was the lead prosecutor for both the Annie Dookham criminal investigation and the Sonya Farak criminal investigation. Attorney Kaczmarek stated that she worked as an assistant attorney general (AAG) from 2005 to July of 2014. From 2005-

2008 she was assigned as an SNI (Safe Neighborhood Initiative) AAG at the Suffolk County District Attorney's office. From 2008-July 2014 she was an AAG assigned to the criminal bureau of the Attorney General's office. Prior to working for the Attorney General's office she was a Suffolk County prosecutor from 2000-2004. Attorney Kaczmarek is currently an assistant clerk magistrate at Suffolk Superior Court.

59. Attorney Kaczmarek first explained how the Annie Dookham criminal investigation was conducted independently from the systematic failures of the Department of Public Health lab in Jamaica Plain. There had been a directive from Governor Deval Patrick that the focus of the Attorney General's office would be Dookham's criminal wrongdoings and the systematic failures of the lab would be independently investigated by the Inspector General. This directive was for the purpose of avoiding any possible confusion or conflicts which may have been created by one agency conducting both investigations. Attorney Kaczmarek stated that the Farak investigation was to be conducted in the same manner that Dookham was. Although Attorney Kaczmarek was never specifically told so, she was under the impression that the Inspector General would investigate the systematic failures in Amherst.

60. Attorney Kaczmarek indicated that as the Farak investigation was ongoing there would be periodic "discovery dumps" that would be sent to the district attorney's offices that had cases affected by the Farak wrongdoings. She indicated that these offices would then handle individual discovery requests for the cases that had been prosecuted in their jurisdiction. She said that her directive was to complete the Farak grand jury investigation by the end of the sitting period for the grand jury and that Farak was indicted in December of 2013.

61. She was asked about the e-mail sent by Sergeant Ballou on February 14, 2013 containing the "assorted lab paperwork" and Farak's admission of drug use. She stated that there had been ongoing dialogue with Attorney Vernor and others whether these items were privileged documents. Due to the uncertainty of whether the items were privileged there was a strategic decision to not enter the items into the grand jury. Had Farak gone to trial they would have been introduced. She indicated that Farak's defense attorney (Elaine Pourinski) was aware of the existence of these items and that discovery certificates had been sent to Attorney Pourinski which outlined all of the evidence that could have been introduced at trial.

62. Attorney Kaczmarek was asked about her receiving a subpoena to appear in court regarding a motion filed by Attorney Luke Ryan. She stated that she did receive the subpoenas but as was the practice in the attorney general's office she forwarded them to the appeals division and they were handled at that level. She indicated that the subpoenas for her appearance were later quashed. In closing Attorney Kaczmarek adamantly denied any wrongdoing or prosecutorial misconduct pertaining to any of her duties associated with the Soyna Farak investigation. The interview concluded at approximately 2:00 p.m.

63. On December 9, 2015 at 2:30 p.m. Captain Coughlin and I met with Attorney Thomas Caldwell. The purpose of this meeting was to obtain the discovery certificates for the Farak investigation. Attorney Caldwell provided us with said discovery certificate and it is attached hereto as **Exhibit #21**.

64. After receiving the discovery certificates efforts were made to reach Attorney Pourinski to verify that she did in fact receive the discovery certificate and was aware of the Farak admissions of drug use. On December 14, 2015 Captain Coughlin and I visited the office of Attorney Pourinski (Add: 13 Old South Street, Suite C, Northampton, Mass). There was nobody at the office and we left a telephone message requesting that Attorney Pourinski contact us. As of this writing neither investigator has been contacted by Attorney Pourinski.

CONCLUSIONS:

a. **We find no merit in any of the allegations of prosecutorial misconduct or obstruction of justice made in the "Ryan affidavit".**

b. Regarding the allegations made against Trooper Christopher Dolan. Based on the review of the photographs and metadata associated with the photographs taken by Trooper Dolan on January 19, 2013 there is no evidence of undisclosed photographs or suppression of exculpatory evidence as asserted on page five (5) of the Ryan affidavit. Furthermore, the e-mail audit found no e-mails sent to or by Trooper Dolan as it relates to the Farak investigation.

c. Regarding the allegations made against Detective Captain Robert Irwin. Based on the interview of Detective Captain Irwin and his investigation into the Dookham matter, the Farak investigation was conducted in a consistent manner. Investigators of the state police detective unit focused on the criminal wrongdoings of Sonya Farak and were not charged with undertaking an investigation surrounding the systematic failures of the Amherst drug lab. As indicated in the body of this report, the systematic failures of the Hinton lab were investigated by the Office of the Inspector General.

d. Regarding the allegations made against Sergeant Joseph Ballou. Page ten (10) of the Ryan affidavit specifically states "*If/when Ballou recognizes that it's in his best interest to cooperate, he may be willing and able to share how and when the initial choice to conceal the treatment records were made*". As indicated in paragraph forty two (42) of this report, the e-mail sent by Sergeant Ballou on February 14, 2013 to Attorney Kaczmarek (including carbon copies to Attorney Verner and Captain Irwin) was the most significant finding of the e-mail audit. It is our collective opinion that e-mail (#618) dispels the unprofessional, unfounded and negligent allegations within the "Ryan Affidavit" (pages 6-10) which accuses Sergeant Ballou of serious wrongdoings.

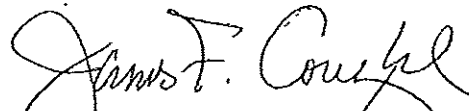
e. Regarding the allegations made against Attorney Kris Foster. Attorney Foster was a member of the Attorney General's appeals division. Various e-mails in the audit revealed that there was ongoing dialogue between members of the Attorney General's office and they were not in agreement with Attorney Ryan's assertion that he should have access to the Farak evidence. On page twelve (12) of the Ryan affidavit there is an assertion by Attorney Ryan that Attorney Foster "*refused a defense request to inspect the physical evidence in an e-mail dated August 29, 2013*". This referenced e-mail (marked #255) was reviewed during the audit. The e-mail was sent by Attorney Ryan to Attorney Foster and illustrates a very assertive approach being taken by him. The e-mail outlines his strategy to address Judge Kinder without a hearing and he requests to use her name as his point of contact at the Office of the Attorney General. We could not find an e-mail within the body of the audit in which Attorney Foster refuses Attorney Ryan's request to review the Farak evidence.

f. Regarding the allegations made against Attorney Anne Kaczmarek. Like Detective Captain Irwin, she was involved in the Annie Dookham investigation in which the systematic failures of the Hinton lab were investigated by the Office of the Inspector General. During her interview Attorney Kaczmarek provided an overview of that investigation and how the Farak investigation was to be handled in the same manner. As indicated above, the e-mail audit revealed an ongoing dialogue in which the Attorney General's office did not agree with Attorney Ryan's position that he should have access to the Farak evidence. The Attorney General's office argued his position through the legal system and once an order was made by the court, Attorney Ryan was in fact given access to the evidence. 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 Office of the Attorney General was in the 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.

Respectfully Submitted,



Detective Captain Paul L'Italien #1317
Massachusetts State Police



Captain James Coughlin #0818
Massachusetts State Police

EXHIBIT 7

From: Kaczmarek, Anne (AGO)
Sent: Tuesday, January 29, 2013 12:52 PM
To: Verner, John (AGO)
Subject: FW: Public Records Request from Herald
Attachments: Amherst Drug Lab Tech Audit 2012-with remediations.pdf; Amherst Drug Lab Inventory June 27 2012.pdf; Amherst Drug Lab Safety Report.pdf

I am ok with this. It's a little embarrassing how little quality control they had- but I guess that is water under the bridge.

From: Halpin, Michael (POL)
Sent: Tuesday, January 29, 2013 10:14 AM
To: Verner, John (AGO); Kaczmarek, Anne (AGO)
Cc: Ryan, Elisabeth (EPS); Gabriel, Jane (EPS); Procopio, David (POL); Connolly, James, Major (POL)
Subject: Public Records Request from Herald

As you discussed with Major Connolly, we received a public records request seeking the attached material. I will review more carefully and see if redactions are necessary, but believe the material is not (unless it is somehow connected to the open investigations) entirely exempt from disclosure. I have copied EOPSS as well. I will prepare a response, but please let me know if there are concerns about releasing the material (or any parts of it) at this time. Thank you.

Michael B. Halpin
Chief Legal Counsel
Massachusetts State Police
470 Worcester Road
Framingham, MA 01702
Tel: (508) 820-2303
Fax: (508) 820-2649

From: Connolly, James, Major (POL)
Sent: Friday, January 25, 2013 3:47 PM
To: Procopio, David (POL); Halpin, Michael (POL)
Cc: Sullivan, Kristen (POL)
Subject: FW:

Please discuss and share with the AGO's before disseminating.

Let me know if you need anything else.

From: Sullivan, Kristen (POL)
Sent: Friday, January 25, 2013 3:41 PM
To: Connolly, James, Major (POL)
Subject:

Hello Major

Attached is the Amherst Drug Lab QA and Technical Audit conducted in October of 2012.

Kristen

EXHIBIT 8

From: Kaczmarek, Anne (AGO)
Sent: Tuesday, February 26, 2013 11:10 AM
To: markau@maoig.net
Subject: amherst lab

Audrey- when they ask you to so this audit- say no. (actually its very different than JP. A professional lab)

Impact of drug lab arrest unclear

By DAN CROWLEY Staff Writer

NORTHAMPTON — Though more than a dozen people have had drug charges dismissed in Hampden County following the arrest of a former chemist for the state's Amherst crime lab, that has so far not led to the dismissal of charges against defendants in Hampshire and Franklin counties.

Both Northwestern District Attorney David E. Sullivan and Hampden District Attorney Mark G. Mastroianni said last month that alleged evidence tampering in the lab by chemist Sonja J. Farak would likely impact the disposition of cases in the region and could affect some past convictions.

Farak, 35, of Northampton, pleaded innocent to two counts of tampering with evidence and cocaine and heroin possession charges in Eastern Hampshire District Court in Belchertown. Authorities say the drugs involved were evidence samples in the lab. Farak was released on \$5,000 bail last month and remains under a curfew. Her next court date is scheduled for April 12.

Authorities in the Northwestern District Attorney's office said this week they could provide no information on the status of the investigation into Farak's alleged wrongdoing in the lab. In a statement to the Gazette, Assistant District Attorney Jeremy Bucci said the case is being handled by the state Attorney General's Office and Sullivan's office is awaiting the results of that investigation.

"We are also awaiting word on whether Amherst will be the subject of an investigation by the inspector general," he said, referring to the crime lab on the University of Massachusetts campus. "Until those questions are answered, we really cannot comment on this."

Full audit

In late January, Sullivan said he had requested a full audit of all drug evidence at the Amherst lab.

Last week, Mastroianni confirmed that drug charges against 14 people in Hampden County had been dismissed and cases against four others were compromised because of Farak's involvement with handling drug evidence in those cases, according to a report in The Republican newspaper of Springfield.

The Amherst lab is where drugs seized by local and state police from central and western Massachusetts are stored and analyzed.

Attorney General Martha Coakley is prosecuting the case against Farak, whose arrest in January prompted a temporary shutdown of the Amherst lab, located at the Morrill Science Center complex at UMass.

State police had assumed control of the lab along with the William A. Hinton State Laboratory Institute in Jamaica Plain last July after it was revealed that another chemist, Annie Dookhan, 35, of Franklin, was allegedly faking test results.

The case against Dookhan has thrown thousands of criminal cases into question and as of last month had led to the release of nearly 200 people convicted of crimes based on Dookhan's work.

EXHIBIT 9

From: Kaczmarek, Anne (AGO)
Sent: Monday, March 25, 2013 3:40 PM
To: Mazzone, Dean (AGO) (Dean.Mazzone@MassMail.State.MA.US)
Subject: farak pros memo
Attachments: pros memo.docx

Could you have Emily scan your edits? I will be out tomorrow but hopefully able to make corrections.

Anne K. Kaczmarek
Assistant Attorney General
Enterprise & Major Crimes Unit
617-727-2200 x 2677

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**ENTERPRISE & MAJOR CRIMES DIVISION
CRIMINAL BUREAU**

PROSECUTION MEMO¹

APPROVALS:

DEAN MAZZONE
DIVISION CHIEF
DATE:

JOHN VERNER
CRIM BUREAU CHIEF
DATE:

ED BEDROSIAN
FIRST ASSISTANT
DATE:

AAG: John Verner
Anne Kaczmarek

DATE:

DEFENDANT(S): Sonja Farak

DEFENSE ATTORNEY: Elaine Pourinski

FILE NO.:

REFERRING AGENCY: MSP

COURT: Hampshire

LEAD INVESTIGATOR: MSP Sgt. Joseph Ballou

CHARGES:

Ch. 268 §13E: Tampering with Evidence (4 counts)

Ch. 94C §34: Possession of Class B (cocaine)

Ch. 94C §37: Theft of Controlled Substances from Dispensary

¹ All information contained in this memorandum was prepared in aid of litigation. This memorandum consists of the thoughts and impressions of Assistant Attorney General Anne Kaczmarek, and no part of this memorandum was reviewed or adopted by any witness in this case. The contents of this memorandum are intended solely for use within the Massachusetts Office of the Attorney General.

APPLICABLE SENTENCE & FINE RANGE:

Ch. 268 §13E: <u>Tampering with Evidence</u>	10 years max
Ch. 94C §34: <u>Possession of Class B (cocaine)</u>	1 year HOC
Ch. 94C §37: <u>Theft of Controlled Substances from Dispensary</u>	10 years max

FACTS

On January 17, 2013, the evidence officer, Sharon Salem, discovered that two drug samples from Springfield PD were missing from the Amherst Drug Lab's evidence safe. When the submitting agency brings drugs to the lab to be tested, all of the submitted samples from that agency on that date are organized into a batch. The drug samples are not returned to the submitting agency until all of the samples in the batch are tested. Salem testified in the GJ that she normally collects all the drug certificates for a batch, double checks them with the drug samples, and then assembles the batch to be picked up. Ms. Salem's duties as evidence officer require her to assemble all drug samples which have been analyzed to be returned to the submitting agency.

The missing samples were from two different Springfield cases, numbers A12-04791 and A12-04793. A12-04791 had been assigned to chemist, Sonja Farak. Farak has tested the sample on January 4, 2013. Salem had a certificate of analysis for the sample but no drugs. When Salem realized that A12-04791 was missing, she looked through the rest of the Springfield batch to see if it had gotten misplaced. At that time, she discovered that A12-04793 was also missing. This sample was also assigned to Farak for testing but the certificate of analysis had not been generated yet. Salem looked through other batches in the evidence safe before going home for the day.

The next morning, Salem arrived at work around 8:30 and told her supervisor, Jim Hanchett, about the missing samples. Farak had been at the lab earlier in the morning but had left around 8am to go to Springfield District Court to testify in a trial. Also present at the lab was the other chemist, Rebecca Pontes. Hanchett and Salem began looking in other places in the lab, including the temporary safe where Pontes and Farak would store the samples they were still processing. Hanchett also checked the mass/spec data to confirm that Farak had completed the analyses of both of the missing samples. He found that she, in fact, had tested both samples and they were both positive for cocaine.

Hanchett finally moved to Farak's workstation to look for the samples. As he pulled open the first cabinet, Hanchett discovered a white plastic bin with a plastic bag of cocaine, chunks of waxy-like substance in a saucer, and white chunks in another saucer. Also in the bin was a pestle and drug paraphernalia.² Hanchett continued to look through Farak's workstation for the missing samples. Hanchett pulled out a manila envelope from her workstation and found the packaging for the two missing samples. The samples were properly labeled with the appropriate sample number, but the heat-sealed packaging had been sliced open and the contents in the bags looked strange. While visually inspecting the bags, Hanchett noted that sample A12-04791 appeared to be a half and half mix of two different substances while A12-04793 did not appear to be cocaine at all.

Hanchett called Major Connolly of the State Police to alert him of the problem and the Amherst drug lab was immediately shut down. When Major Connolly and his team arrived at the lab, Hanchett was instructed to perform a preliminary drug analysis on the two drug samples

² Two crack pipes were found in Farak's workstation and, while it is not completely abnormal for crack pipes to be in the lab, they are usually secured as evidence for a case.

and the baggie of cocaine found in the plastic bin. Hanchett performed the crystalline test on the substances. The plastic baggie did appear microscopically to be cocaine.³ Hanchett performed a complete analysis of samples A12-04791 and A12-04793. He testified in the grand jury that he compared his mass/spec results to Farak's results and they were two different substances. Farak's analysis did not contain any significant impurities and was cocaine in free base form. Hanchett analyzed the counterfeit-looking portion of A12-04791. He found that it was not cocaine and was unable to identify the substance. The sample was also missing two grams from Farak's net weight. When he analyzed A12-04793, he found that it was not cocaine either.

The state police also found an empty K-pack bag in Farak's area in the temporary safe. The sample number printed on the K-pack bag is A12-04973 and had been assigned to Farak for testing. The sample had been described as being white chunks suspected to be crack cocaine and had a gross weight of 13.6 grams.⁴ There is no evidence that Farak had begun to test the sample. The empty K-pack bag was sent to Sudbury for analysis and the residue tested positive for crack cocaine.

While conducting an audit of the evidence safe to determine if more samples were missing, it was discovered that sample number A13-000156 was also missing. This sample had just recently been submitted by the Holyoke Police Department on January 11, 2013. The sample had been suspected crack cocaine and had a gross weight of 28.5 grams. The sample bag for A13-000156 was found empty in Farak's workstation. It appears that Farak took the sample out of a larger Holyoke batch that had been submitted only a week prior to the closure of the lab.

³ Sudbury lab also tested the sample and confirmed that the plastic bag contained crack cocaine and weighed 11.73 grams.

⁴Gross weight includes the crack cocaine and its original packaging.

Investigators tracked down Farak at the Springfield District Court. She was waiting outside of a courtroom to testify. She was taken to the district attorney's office and interviewed in one of their conference rooms. During the interview, Farak stated that there should not be any controlled substances at her workstation. After several more questions regarding whether investigators would find unsecured controlled substances at her workstation, Farak asked for her MOSES representative to be present.

Investigators located Farak's vehicle⁵ in the parking lot and secured it, pending a search warrant. A visual inspection of the vehicle revealed a very messy interior with many manila envelopes from the Amherst lab strewn about. These are same manila envelopes which are used to contain drug samples. A search warrant of the car was authorized and conducted in the early morning hours of January 18, 2013. Items of note recovered from the vehicle were manila envelopes with sample numbers⁶; news article involving an indicted chemist out in San Francisco; and, mental health worksheets describing how Farak feels when she uses illegal substances and the temptation of working with "urge-ful samples".⁷ Recovered from the driver's door map pocket was a "works" kit: a large plastic bag which contained a plastic bag of crack cocaine, a smaller crack rock wrapped in weigh paper⁸, a lab spatula, copper mesh, and a bag of burnt copper mesh.⁹

⁵ Farak is the registered owner of a 2002 black Volkswagen Gulf.

⁶ All the corresponding samples have been sent to Sudbury to be re-tested. At this time, it is believed that she had discovery she prepared for court in the envelopes, and is unrelated to the tampered samples. The samples are older and have been long sent back to the submitting agencies. They are being re-tested as a precaution.

⁷ These worksheets were not submitted in the grand jury due to an abundance of caution to avoid privilege information. Case law suggests that the paperwork is not privileged.

⁸ Weigh paper is specific paper used in the drug laboratories to hold drugs while they are being analyzed to avoid contamination.

⁹ Timothy Woods from the Sudbury lab testified that the copper mesh is used as a filter when smoking crack cocaine so that the crack embers are not inhaled. The burnt copper mesh was field tested on the incident date and was believed at that time to be heroin. Mr. Woods also testified that the burnt copper may react with the field test and

The State Police also found a green tote bag shoved in the back of Farak's workstation in a crawl space. After securing a search warrant for that bag, the bag was searched on January 25, 2013. The items in the tote bag appeared to be the items that Farak used to make counterfeit crack cocaine and possibly to add weight to tampered samples. There was a bottle of baking soda, baking powder, Dove soap and a razor blade, soy wax candle, oven baked clay, lab dishes, a plastic bag with cocaine¹⁰ residue, a plastic bag containing a rock of crack cocaine, and 9 K-pack¹¹ bags sliced open¹².

Chemist Tim Woods had an opportunity to review the items taken from the tote bag while he was at the grand jury. Some of the items submitted to the Sudbury drug lab were unidentifiable until Mr. Woods was able to compare what was found in the tote bag. For instance, sample A12-04973 which no longer tested positive for cocaine, is believed to be oven baked clay based upon similar consistency. A12-04791 was a different consistency and believed to be that of the soy candle as both are malleable and wax-like.

In an attempt to narrow the time frame of Farak's substance abuse and corresponding evidence tampering, Farak's wife was subpoenaed into the grand jury.¹³ Nikki Michelle Lee has significant emotional and physical problems. She brought in documentation from her doctor stating that she is bi-polar, has an anxiety disorder, and suffers from severe migraines. As a result of a head injury, Lee has limited short term memory. Aware of her limitations as a witness, Lee still testified in the grand jury in order to "lock in" her testimony. She testified that

that the carbon present would cause a "false" positive for heroin. Farak was charged in district court with possession of class A: heroin.

¹⁰ All of the cocaine recovered in Farak's belongings is in free base (crack) form.

¹¹ K-pack bags are used at the Amherst lab to seal the drug samples after they are tested.

¹² These were K-pack bags did not have sample numbers assigned to them.

¹³ Farak and Lee were married in 2005 in Massachusetts. Lee provided the marriage certificate.

she had only seen Farak use cocaine once in 2000. When asked if Farak's personality had changed recently, her wife stated that Farak seemed to leave the house more often when they argued. Lee believed it was so Farak could "cool" down from the fight but, in hindsight, wondered if something else could be happening. She stated that she never observed any drugs in the house and that Farak had very few friends. Lee rarely drove in Farak's vehicle, preferring to drive in her own truck because of back problems. On the night that Farak was arrested, Farak called her wife and stated "I'm getting into trouble. It's better that you are not here", referring to the fact that Lee was at her parent's home in New York state.

The Amherst lab had only four employees. Because of this small number and increased court time, all employees had access to the drug safe. The safe could be opened by either a card scanner or a key. Farak used a key so there is no digital record of when she accessed the safe. Jim Hanchett was the supervisor; Sharon Salem was the evidence officer; and, Rebecca Pontes and Farak were Chemist II. Hanchett testified in the grand jury that Farak's productivity had declined in the last 4-5 months prior to her arrest. In fact, around September or October 2012, Hanchett approached Farak to discuss the fact that her analysis numbers had declined by half. Hanchett testified that Farak explained she had a lot of court time but Hanchett did not believe it. He asked her to start focusing on testing. He also noticed that Farak was missing frequently from the lab- she would be gone for 15 minutes at a time. At first Hanchett believed she was simply using the restroom; however, he testified to one incident that contradicted this theory. He recalled that a prosecutor called the lab looking for Farak and she was not in the lab. Hanchett sent Salem to the ladies' room. Salem checked two different bathrooms on different floors but Farak was not there. After that incident, Hanchett believed that Farak was taking walks outside even though he did not confront her about this.

CHARGING

Ch. 268 §13E: Tampering with Evidence
(10 year max)

Ch. 94C §34: Possession of Class B (cocaine)
1 year HOC

Ch. 94C §37: Theft of Controlled Substances from Dispensary
10 years max

ELEMENTS

Ch. 268 §13E: Tampering with Evidence

In order to prove the defendant guilty of this offense, the Commonwealth must prove two elements beyond a reasonable doubt:

First Element:	Whoever alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so;
Second Element:	with the intent to impair the record, document or object's integrity or availability for use in an official proceeding, whether or not the proceeding is pending at that time.

For purposes of this statute it is not necessary to prove that the evidence would be admissible at trial or free from privilege. For purposes of this investigation an official proceeding is either a proceeding in court or a grand jury. In order to prove the elements of this indictment the Commonwealth will present the evidence of Farak's destruction of the four samples: A12-04791; A12-04793; A12-04973; and A13-00156. We will present the mass/spec data that was generated from Farak's analyses of A12-04791 and A12-04793 and compare that to

the Sudbury analyses. The comparison will show that the samples were no longer the same chemical composition and that Farak had exchanged counterfeit substances for the crack cocaine. The evidence of the clay, wax, and soap recovered with her workstation will support the indictment by allowing the inference that Farak stole the crack cocaine from the sample and exchanged it with the counterfeit material.

For the two remaining samples A12-04973 and A13-00156, the Commonwealth will present evidence from the submitting agency regarding the sample when it was first submitted to the lab as well as the description of the gross weight when the samples were received in the lab. Now that the samples are gone, destroyed, and the empty bags are in Farak's possession, the inference that Farak used the cocaine for personal use, coupled with all the other evidence, is strong.

G.L. c. 94C § 34: Possession of Controlled Substances

In order to substantiate the possession charges against the defendant, the Commonwealth must prove the following:

1. The drug involved was a Class B controlled substance;
2. The defendant had possession or control of the controlled substance;
3. The defendant possessed the substance knowingly or intentionally.

The Commonwealth will present evidence that Farak had in her possession crack cocaine both in her car and in her workstation. During her brief interview with State Police, Farak stated that there should not be unsecured control substances at her workstation. Her statement acknowledges that the plastic bag of unmarked crack cocaine and a cocaine "rock" wrapped in

weigh paper is against lab protocol so she forfeits an argument that the cocaine was present for analysis reasons. The plastic bag in her desk had a total weight of 11.7 grams.

During the search warrant for Farak's vehicle, a large plastic bag containing a plastic bag of crack cocaine and drug paraphernalia was recovered. Farak was seen sitting in the drivers' seat while the vehicle was parked at the courthouse and the cocaine was found in the drivers' side map pocket. The plastic bag of cocaine weighed 5.6 grams and there was also a separate crack rock wrapped in weigh paper. Additionally, there was a lab spatula, cooper mesh, and burnt copper mesh in the bag.

All of the crack cocaine recovered during the investigation totaled 17.63 grams, just shy of trafficking weight. Based on all of the evidence recovered thus far, there is no reason to believe that Farak is selling, distributing, or sharing the cocaine with anyone else. Although the total amount missing and recovered might suggest a "possession with intent" indictment, there are no indicia of distribution to support this charge. Also, Farak's admissions on her "emotional worksheets" recovered from her car detail her struggle with substance abuse.

Ch. 94C §37: Theft of Controlled Substances from Dispensary

In order to substantiate the possession charges against the defendant, the Commonwealth must prove the following:

1. Whoever steals a controlled substance;
2. From a registered manufacturer, wholesale druggist, pharmacy or other person authorized to dispense or possess any controlled substance.

This charge is often associated with narcotics stolen from pharmacies; there are no cases on point involving drug depositories in the Commonwealth. To prove this indictment the

Commonwealth would show that the defendant took, with the intent to permanently deprive, the crack cocaine from the drug lab. The drug lab is authorized by the state to have possession of the narcotics while the drugs are being analyzed under MGL 94C §47A and the statute is implemented by the State Police by General Order INV-11 “Controlled Substance- Storage and Handling”. It is clear that the forensic drug labs have the authority to possess the narcotics for analysis purposes. However, chemists are not allowed to transport the narcotics outside of the lab; a member of law enforcement must transport the narcotics to and from the lab and court. This policy reinforces the Commonwealth’s argument that the authority of the lab to possess the narcotics is limited to testing and storage.

The evidence presented would show that Farak, in her duties as a chemist, had access to all of the drugs in the lab. With regard to the four compromised drug samples, we can prove she took the crack cocaine that was submitted to the lab. For samples A12-04791 and A12-04793 we have Farak’s analysis for both samples, and can contrast the re-test of those samples to prove she removed the crack cocaine and added counterfeit substances. Both sample bags were found sliced open in her workstation. For samples A12-04973 and A13-00156, the Commonwealth would show that the bags were submitted with suspected crack cocaine and the bags were found sliced open and empty in her work areas. An inference can be made based on the totality of the circumstances.

ISSUES

I do not foresee any suppression issues. The search warrant for the defendant’s motor vehicle was based upon the facts that were known at the lab regarding the four tampered samples and a visual inspection of her car. Numerous manila envelopes were observed scattered about

the interior and those are same manila envelopes that are used at the lab to hold drug samples. Additionally, Farak was seen in her vehicle shortly before she was interviewed by the police and she was the last occupant seen in the motor vehicle. This fact eliminates the argument that the drugs were in her car without her knowledge. The second search warrant for the tote bag recovered at her workstation is also valid. That affidavit set forth probable cause based on the evidence found at her workstation and from her car.

Farak's interview prior to arrest was non-custodial. She was asked to go to a conference room at the district attorney's office. After only several minutes of questioning regarding lab protocol, Farak asked for the interview to stop and requested her MOSES representative. Farak was allowed to end to the interview, which was recorded, and she was driven home.

The most significant issue that is outstanding is the scope of Farak's drug abuse. We are charging her with the tampering of the four known cases but there is likely more. I believe that we should indict the known cases now in order to remove the case from district court. A review of all crack cocaine cases from July 1, 2012 until January 18, 2013 has been requested. There were 271 crack cocaine submissions in that 6 month time frame, 86 of those samples are still at the Amherst lab, and 16 have been analyzed. Based upon her "writings" and the samples we know were tampered with, limiting inquiry to crack cocaine cases is reasonable.

This case is unlike the Dookhan case in many ways but most significantly is that this was not a breakdown of quality control and managerial oversight. Farak was allowed access to all of the drugs as a function of the small amount of employees. When her productivity drastically changed, her supervisor addressed the issue. I believe that the impact of Farak's malfeasance can be limited to drug submissions of crack cocaine, and then furthered narrowed by re-testing. We are also hoping that the defendant, once indicted, will detail how long she has been abusing

drugs and how many cases are affected. Farak would expect some consideration in sentencing for that information .

EXHIBIT 10

Privileged and Confidential Attorney Work Product: Do Not Disclose to Third Parties

ENTERPRISE & MAJOR CRIMES DIVISION
CRIMINAL BUREAU

PROSECUTION MEMO¹

APPROVALS:

3/27/13
DEAN MAZZONE
DIVISION CHIEF
DATE:

JOHN VERNER
CRIM BUREAU CHIEF
DATE:

ED BEDROSIAN
FIRST ASSISTANT
DATE:

SHEILA CALIC
Dep AG
3/28/13

AAG: John Verner
Anne Kaczmarek

DATE:

DEFENDANT(S): Sonja Farak

DEFENSE ATTORNEY: Elaine Pourinski

FILE NO.:

REFERRING AGENCY: MSP

COURT: Hampshire

LEAD INVESTIGATOR: MSP Sgt. Joseph Ballou

CHARGES:

Ch. 268 §13E: Tampering with Evidence (4 counts)

Ch. 94C §34: Possession of Class B (cocaine)

Ch. 94C §37: Theft of Controlled Substances from Dispensary

→ 2 counts, right?
- can
- desk

¹ All information contained in this memorandum was prepared in aid of litigation. This memorandum consists of the thoughts and impressions of Assistant Attorney General Anne Kaczmarek; and no part of this memorandum was reviewed or adopted by any witness in this case. The contents of this memorandum are intended solely for use within the Massachusetts Office of the Attorney General.

APPLICABLE SENTENCE & FINE RANGE:

Ch. 268 §13E: <u>Tampering with Evidence</u>	10 years max
Ch. 94C §34: <u>Possession of Class B (cocaine)</u>	1 year HOC
Ch. 94C §37: <u>Theft of Controlled Substances from Dispensary</u>	10 years max

FACTS

On January 17, 2013 evidence officer, Sharon Salem, discovered that two drug samples from Springfield PD were missing from the Amherst Drug Lab's evidence safe. When the submitting agency brings drugs to the lab to be tested, all of the submitted samples from that agency on that date are organized into a batch. The drug samples are not returned to the submitting agency until all of the samples in the batch are tested. Salem testified in the GJ that she normally collects all the drug certificates for a batch, double checks them with the drug samples, and then assembles the batch to be picked up. Ms. Salem's duties as evidence officer require her to assemble all drug samples which have been analyzed in order to return them to the submitting agency.

The missing samples were from two different Springfield cases, numbers A12-04791 and A12-04793. A12-04791 had been assigned to chemist, Sonja Farak. Farak had tested the sample on January 4, 2013. Salem had a certificate of analysis for the sample but no drugs. When Salem realized that A12-04791 was missing, she looked through the rest of the Springfield batch to see if it had gotten misplaced. At that time, she discovered that A12-04793 was also missing. ^{2d} This sample was also assigned to Farak for testing but the certificate of analysis had not been generated yet. Salem looked through other batches in the evidence safe before going home for the day.

*but missing
? a.o.p.
testing
2*

The next morning, Salem arrived at work around 8:30 and told her supervisor, Jim Hanchett, about the missing samples. Farak had been at the lab earlier in the morning but had left around 8am to go to Springfield District Court to testify in a trial. Also present at the lab was the other chemist, Rebecca Pontes. Hanchett and Salem began looking in other places in the lab, including the temporary safe where Pontes and Farak would store the samples they were still processing. Hanchett also checked the mass/spec data to confirm that Farak had completed the analyses of both of the missing samples. He found that Farak, in fact, had tested both samples and they were both positive for cocaine. *Impact to our theory of her as a user*

Hanchett finally moved to Farak's workstation to look for the samples. As he pulled open the first cabinet, Hanchett discovered a white plastic bin with a plastic bag of cocaine, chunks of waxy-like substance in a saucer, and white chunks in another saucer. Also in the bin was a pestle and drug paraphernalia.² Hanchett continued to look through Farak's workstation for the missing samples. Hanchett pulled out a manila envelope from her workstation and found the packaging for the two missing samples. The samples were properly labeled with the appropriate sample number, but the heat-sealed packaging had been sliced open and the contents in the bags looked strange. While visually inspecting the bags, Hanchett noted that sample A12-04791 appeared to be a half and half mix of two different substances while A12-04793 did not appear to be cocaine at all.

Hanchett called Major Connolly of the State Police to alert him of the problem and the Amherst drug lab was immediately shut down. When Major Connolly and his team arrived at the lab, Hanchett was instructed to perform a preliminary drug analysis on the two drug samples

² Two crack pipes were found in Farak's workstation and, while it is not completely abnormal for crack pipes to be in the lab, they are usually secured as evidence for a case.

and the baggie of cocaine found in the plastic bin. Hanchett performed the crystalline test on the substances. The plastic baggie ^{→ not the 2 samples} did appear microscopically to be cocaine.³ Hanchett performed a complete analysis of samples A12-04791 and A12-04793. He testified in the grand jury that he compared his mass/spec results to Farak's results and they were two different substances.

Farak's analysis did not contain any significant impurities and was cocaine in free base form.

Hanchett analyzed the counterfeit-looking portion of A12-04791. He found that it was not cocaine and was unable to identify the substance. The sample was also missing two grams from Farak's net weight. When he analyzed A12-04793, he found that it was not cocaine either.

The state police also found an empty K-pack bag in Farak's area in the temporary safe.

The sample number printed on the K-pack bag is A12-04973 and had been assigned to Farak for testing. The sample had been described as being white chunks suspected to be crack cocaine and had a gross weight of 13.6 grams.⁴ There is no evidence that Farak had begun to test the sample.

The empty K-pack bag was sent to Sudbury for analysis and the residue tested positive for crack cocaine.

While conducting an audit of the evidence safe to determine if more samples were missing, it was discovered that sample number A13-000156 was also missing. This sample had just recently been submitted by the Holyoke Police Department on January 11, 2013. The sample had been suspected crack cocaine and had a gross weight of 28.5 grams. The sample bag for A13-000156 was found empty in Farak's workstation. It appears that Farak took the sample out of a larger Holyoke batch that had been submitted only a week prior to the closure of the lab.

³ The Sudbury lab also tested the sample and confirmed that the plastic bag contained crack cocaine and weighed 11.73 grams.

⁴ Gross weight includes the crack cocaine and its original packaging.

her MS/GC was cocaine
4 his MS/GC on the sample was GC
→ she switched in counterfeit

TAMPER X2
Theft

K-pack is
a heat seal bag
fact that submitted
right
inside
all the
no code
was in
bag.

TAMPER (3)

Tamper
(4)

what sum
Call 3)

Is that?

the
tamper
chain
has
here

Theft

Investigators tracked down Farak at the Springfield District Court. She was waiting outside of a courtroom to testify. She was taken to the district attorney's office and interviewed in one of their conference rooms. During the interview, Farak stated that there should not be any controlled substances at her workstation. After several more questions regarding whether investigators would find unsecured controlled substances at her workstation, Farak asked for her

MOSES representative to be present.

Visual done
⑥ Lot prior to tow. Tow done prior to our involvement.
Investigators located Farak's vehicle⁵ in the parking lot and secured it, pending a search warrant. A visual inspection of the vehicle revealed a very messy interior with many manila envelopes from the Amherst lab strewn about. These are the same manila envelopes which are used to hold drug samples. A search warrant of the car was authorized and conducted in the early morning hours of January 18, 2013. Items of note recovered from the vehicle were manila envelopes with sample numbers⁶; news article involving an indicted chemist out in San Francisco; and, mental health worksheets describing how Farak feels when she uses illegal substances and the temptation of working with "urge-ful samples".⁷ Recovered from the driver's door map pocket was a "works" kit: a large plastic bag which contained a plastic bag of crack cocaine, a smaller crack rock wrapped in weigh paper⁸, a lab spatula, copper mesh, and a bag of burnt copper mesh.⁹

⁵ Farak is the registered owner of a 2002 black Volkswagen Gulf.

⁶ All the corresponding samples have been sent to Sudbury to be re-tested. At this time, it is believed that had discovery that she had prepared for court in the envelopes, and that these samples are unrelated to the tampered samples. The samples are older and have been long sent back to the submitting agencies. They are being re-tested as a precaution.

⁷ These worksheets were not submitted to the grand jury out of an abundance of caution in order to protect possibly privileged information. Case law suggests, however, that the paperwork is not privileged.

⁸ Weigh paper is specific paper used in the drug laboratories to hold drugs while they are being analyzed in order to avoid contamination.

⁹ Timothy Woods from the Sudbury lab testified that the copper mesh is used as a filter when smoking crack cocaine so that the crack embers are not inhaled. The burnt copper mesh was field tested on the incident date and was

→ this
+ paper
NOT turned over
to DA's office yet.

The State Police also found a green tote bag shoved in the back of Farak's workstation in a crawl space. After securing a search warrant for that bag, the bag was searched on January 25, 2013. The items in the tote bag appeared to be the items that Farak used to make counterfeit crack cocaine and possibly to add weight to tampered samples. There was a bottle of baking soda, baking powder, Dove soap and a razor blade, soy wax candle, oven baked clay, lab dishes, a plastic bag with cocaine¹⁰ residue, a plastic bag containing a rock of crack cocaine, and 9 K-pack¹¹ bags that were sliced open¹².

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believed at that time to be heroin. Mr. Woods also testified that the burnt copper may react with the field test and that the carbon present would cause a "false" positive for heroin. Farak was charged in district court with possession of class A: heroin.

¹⁰ All of the cocaine recovered in Farak's belongings is in free base (crack) form.

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¹² These were K-pack bags did not have sample numbers assigned to them.

¹³ Farak and Lee were married in 2005 in Massachusetts. Lee provided the marriage certificate.

No mention priv. for GS but there is for trial.
First w/ us, we used her as one investigation w/ to lab.

Can Woods
testify to
this?
trial
maybe
not

Answer-
Let's
explore
further
test

compare
false etc
in 04973
w/ c
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she had only seen Farak use cocaine once in 2000. When asked if Farak's personality had changed recently, her wife stated that Farak seemed to leave the house more often when they argued. Lee believed it was so Farak could "cool" down from the fight but, in hindsight, wondered if something else could be happening. She stated that she never observed any drugs in the house and that Farak had very few friends. Lee rarely drove in Farak's vehicle, preferring to drive in her own truck because of back problems. On the night that Farak was arrested, Farak called her wife and stated "I'm getting into trouble. It's better that you are not here", referring to the fact that Lee was at her parent's home in New York state.

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as opposed
to Doctor
Pontes
signs of
drug u
addict

CHARGING

Ch. 268 §13E: Tampering with Evidence
(10 year max)

Ch. 94C §34: Possession of Class B (cocaine)
1 year HOC

Ch. 94C §37: Theft of Controlled Substances from Dispensary
10 years max

ELEMENTS

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although this evidence is admissible

For purposes of this statute it is not necessary to prove that the evidence would be admissible at trial or free from privilege. For purposes of this investigation an official proceeding is either a proceeding in court or a grand jury. In order to prove the elements of this indictment the Commonwealth will present the circumstantial evidence of Farak's destruction of the four samples: A12-04791; A12-04793; A12-04973; and A13-00156. First, we will present the mass/spec data that was generated from Farak's analyses of A12-04791 and A12-04793 and

The bags w/ counterfeit substance no one would have known.

compare that to the Sudbury analyses. The comparison will show that the samples were no longer the same chemical composition and that Farak must have exchanged counterfeit substances for the crack cocaine. Next the evidence of the clay, wax, and soap recovered with from the workstation supports the inference that Farak stole the crack cocaine from the sample and exchanged it with the counterfeit material. For the two remaining samples A12-04973 and A13-00156, the Commonwealth will present evidence from the submitting agency regarding the composition of the sample when it was first submitted to the lab as well as the description of the gross weight when the samples were received in the lab. With the samples gone or destroyed, and the empty bags in Farak's possession, the inference that Farak used the cocaine for personal use, coupled with all the other evidence, is strong.

G.L. c. 94C § 34: Possession of Controlled Substances

→ Anne, 2 cnts?

In order to substantiate the possession charges against the defendant, the Commonwealth must prove the following:

1. The drug involved was a Class B controlled substance;
2. The defendant had possession or control of the controlled substance;
3. The defendant possessed the substance knowingly or intentionally.

The Commonwealth will present evidence that Farak had in her possession crack cocaine, both in her car and in her workstation. During her brief interview with State Police, Farak stated that there should not be unsecured control substances at her workstation. Her statement acknowledges that the plastic bag of unmarked crack cocaine and a cocaine "rock" wrapped in weigh paper is against lab protocol so that substantially undercuts the argument that the cocaine was present for analysis reasons. The plastic bag in her desk had a total weight of 11.7 grams.

And besides, license so an affirmative defense. The given a she can win that

During the execution of the search warrant for Farak's vehicle, a large plastic bag containing a plastic bag of crack cocaine and drug paraphernalia was recovered. Farak was seen sitting in the drivers' seat while the vehicle was parked at the courthouse and the cocaine was found in the drivers' side map pocket. The plastic bag of cocaine weighed 5.6 grams and there was also a separate crack rock wrapped in weigh paper. Additionally, there was a lab spatula, cooper mesh, and burnt copper mesh in the bag.

Agued
All of the crack cocaine recovered during the investigation totaled 17.63 grams, just shy of trafficking weight. Based on all of the evidence recovered thus far, there is no reason to believe that Farak is selling, distributing, or sharing the cocaine with anyone else. Although the total amount missing and recovered might suggest a "possession with intent" indictment, there are no indicia of distribution to support this charge. Also, Farak's admissions on her "emotional worksheets" recovered from her car detail her struggle with substance abuse.

Ch. 94C §37: Theft of Controlled Substances from Dispensary

In order to substantiate the possession charges against the defendant, the Commonwealth must prove the following:

1. Whoever steals a controlled substance;
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This charge is often associated with narcotics stolen from pharmacies; there are no cases on point involving drug depositories in the Commonwealth. To prove this indictment the Commonwealth must show that the defendant took, with the intent to permanently deprive, the crack cocaine from the drug lab. The drug lab is authorized by the state to have possession of

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The evidence presented would show that Farak, in her duties as a chemist, had access to all of the drugs in the lab. With regard to the four compromised drug samples, we can prove she took the crack cocaine that was submitted to the lab. For samples A12-04791 and A12-04793 we have Farak's analysis for both samples, and can contrast the re-test of those samples to prove she removed the crack cocaine and added counterfeit substances. Both sample bags were found sliced open in her workstation. For samples A12-04973 and A13-00156, the Commonwealth would show that the bags were submitted with suspected crack cocaine and the bags were found sliced open and empty in her work areas. An inference can be made based on the totality of the circumstances.

plus crack pipe, admission of usage in paperwork etc...

Potential ISSUES

I do not foresee any suppression issues. The search warrant for the defendant's motor vehicle was based upon the facts that were known at the lab regarding the four tampered samples and a plain view inspection of her car. Numerous manila envelopes were observed scattered about the interior and those are same type of manila envelopes used at the lab to hold drug samples. Additionally, Farak was seen in her vehicle shortly before she was interviewed by the

Plain view while lawfully outside car

police and she was the last occupant seen in the motor vehicle. This fact eliminates the argument that the drugs were in her car without her knowledge. The second search warrant for the tote bag recovered at her workstation should also be upheld. That affidavit set forth probable cause based on the evidence found at her workstation and from her car.

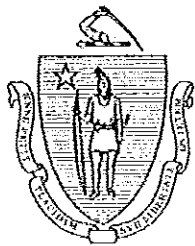
Farak's interview prior to arrest was non-custodial. She was asked to go to a conference room at the district attorney's office. After only several minutes of questioning regarding lab protocol, Farak asked for the interview to stop and requested her MOSES representative. Farak was allowed to end the interview, which was recorded, and she was driven home.

Agreed
The most significant issue that is outstanding is the scope of Farak's drug abuse. We are charging her with the tampering of the four known cases but there is likely more. I believe that we should indict the known cases now in order to remove the case from district court. A review of all crack cocaine cases from July 1, 2012 until January 18, 2013 has been requested. There were 271 crack cocaine submissions in that 6 month time frame, 86 of those samples are still at the Amherst lab, and 16 have been analyzed. Based upon her "writings" and the samples we know were tampered with, limiting inquiry to crack cocaine cases is reasonable. *(at this time)*

This case is unlike the Dookhan case in many ways. Most significantly, there was not a breakdown of quality control and managerial oversight. Farak was allowed access to all of the drugs as a function of the small amount of employees. When her productivity drastically changed, her supervisor addressed the issue. I believe that the impact of Farak's malfeasance is most likely limited to drug submissions of crack cocaine, and the tainted samples can be easily identified by re-testing. We are also hoping that the defendant, once indicted, will detail how long she has been abusing drugs and how many cases are affected. Farak would expect some consideration in sentencing for that information.

still a probl w/ QC

EXHIBIT 11



MARTHA COAKLEY
ATTORNEY GENERAL

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

(617) 727-2200
www.mass.gov/ago

March 27, 2013

District Attorney Daniel F. Conley
Suffolk District Attorney's Office
One Bulfinch Place
Boston, MA 02114

Re: Sonja Farak investigation/Amherst lab

Dear District Attorney Conley:

This Office is investigating Sonja Farak, a chemist who conducted analysis of suspected narcotic samples out of the Amherst drug laboratory. Ms. Farak is currently charged in Belchertown District Court with two counts of tampering with evidence, one count of possession of a Class A substance and one count of possession of a Class B substance. During our investigation, this Office has produced or otherwise come into possession of information, documents and reports. Pursuant to this Office's obligation to provide potentially exculpatory information to the District Attorneys as well as information necessary to your Offices' determination about how to proceed with cases in which related narcotics evidence was tested at the Amherst laboratory, please find the below listed materials:

- 1) Massachusetts State Police report by Sergeant Joseph F. Ballou regarding the investigation (9 pages);
- 2) Massachusetts State Police report by Trooper Randy Thomas regarding the search of Farak's motor vehicle (3 pages);
- 3) Massachusetts State Police report by Sergeant Joseph F. Ballou regarding the search of Farak's tote bag (3 pages);
- 4) Massachusetts State Police report by Sergeant Joseph F. Ballou regarding the interview of Walter Sadlowski (3 pages);
- 5) Massachusetts State Police report by Sergeant Joseph F. Ballou regarding the photographs and video taken of the Amherst lab on February 14, 2013 (3 pages);
- 6) Massachusetts State Police report by Trooper Geraldine Bresnahan regarding interviews of James Hanchett and Sharon Salem (3 pages);
- 7) Transcript of interview with Sonja Farak on January 18, 2013 (29 pages);
- 8) Transcript of interview with James Hanchett on January 18, 2013 (50 pages);
- 9) Transcript of interview with Rebecca Pontes on January 18, 2013 (46 pages);



- 10) Transcript of telephone interview with Sharon Salem on January 18, 2013 (26 pages);
- 11) Evidence Report Form (1 page);
- 12) Evidence Recovery Log with photos (9 pages);
- 13) Evidence Log (13 pages);
- 14) 2012 Technical Audit Report (6 pages);
- 15) Massachusetts State Police report regarding drug locker inventory on June 27, 2012 (2 pages);
- 16) Massachusetts State Police Safety Assessment Report dated August 7, 2012 (4 pages)

Please do not hesitate to contact me at (617) 963-2489 with any questions or concerns.

Sincerely,

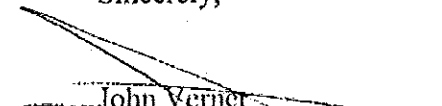

John Verner
Chief of the Criminal Bureau
Attorney General's Office

EXHIBIT 12

From: Flannery, Frank (WES)
Sent: Friday, August 16, 2013 10:09 AM
To: Kaczmarek, Anne (AGO)
Subject: Farak hearing and discovery

Hello Anne,

A couple of things: First, Judge Kinder has ordered an evidentiary hearing for 9/9. The purpose of the hearing, according to his order, is to define the scope, to the extent possible, of Farak's misconduct. I expect that the evidence admitted in this hearing will include the testimony of some of the investigators and chemists involved in your investigation along with the discovery you have provided. Having an extensive evidentiary hearing in one court concerning evidence that relates to a pending criminal case in another is, to say the least, unusual and so I want to keep you in the loop in case you have any questions or concerns.

Second, I've had numerous requests for the photos that were taken during the search of Farak's vehicle. I spoke to Sgt. Ballou who tells me he can provide those photos to me directly but I want to make sure I have your permission first. Also, I have all the GJ minutes but I don't believe I have the exhibits, although they may all be included in the other discovery you provided. If you have them in one place and it wouldn't be too much trouble, could you send them to me?

Thanks,

Frank Flannery

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EXHIBIT 13

From: Salem, Sharon (POL)
Sent: Wednesday, August 28, 2013 11:29 AM
To: Kaczmarek, Anne (AGO)
Cc: Sullivan, Kristen (POL); Juhascik, Matthew (POL); Brooks, Nancy (POL)
Subject: RE: Reanalysis Cases from Amherst

Anne,

I will send you the Amherst discovery packet for this case. Looking at the data, it does not look good for Farak. The "re-testing" discovery packet from Sudbury will be handled by Sudbury-not me. I will forward your request to them.

As far as I know, this case was resubmitted for analysis at the request of the defense attorney on behalf of his client. The ADA on this case is Richard Locke in Berkshire County.

-Sharon

Sharon Salem
Forensic Services Group
Massachusetts State Police
Springfield, MA 01104
413-205-1805
413-205-1811 (fax)

The preceding email message (including any attachments) contains information that may be confidential, may be protected by the attorney-client or other applicable privileges, or may constitute non-public information. It is intended to be conveyed only to the designated recipient(s) named above. If you are not an intended recipient of this message, please notify the sender by replying to this message and then delete all copies of it from your computer system. Any use, dissemination, distribution, or reproduction of this message by unintended recipients is not authorized and may be unlawful.

From: Kaczmarek, Anne (AGO)
Sent: Wednesday, August 28, 2013 10:00 AM
To: Salem, Sharon (POL)
Subject: FW: Reanalysis Cases from Amherst

Hi Sharon-

Can I get discovery packs for the Farak cases that were retested?

A1202997A, A12-02997B, and A12-02902.

Also were these samples just in the safe and randomly retested or specifically retested? IF you know.

Thanks, Anne

From: Dunlap, Kimberly (POL)
Sent: Wednesday, August 28, 2013 9:40 AM
To: Kaczmarek, Anne (AGO)
Subject: Reanalysis Cases from Amherst

Good Morning Ms. Kaczmarek,

I recently analyzed state police crime laboratory cases 13-158377 and 13-158839. Both cases were originally analyzed by Ms. Farak. In my reanalysis both cases came back with only a trace amount of cocaine. I have attached copies of the certificate of analysis for both cases. If you have any additional questions please contact me.

Thank you very much for your time!

Kim

Kimberly Dunlap
MASSACHUSETTS STATE POLICE CRIME LABORATORY
59 HORSE POND ROAD
SUDBURY, MA 01776
PHONE 508-358-3145
FAX 508-358-3224

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EXHIBIT 14

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

TRIAL COURT OF THE
COMMONWEALTH
SUPERIOR COURT DEPT.
INDICTMENT NO. 12-083

Commonwealth

v.

ROLANDO PENATE

**DEFENDANT'S MOTION TO COMPEL PRODUCTION OF DOCUMENTARY
EVIDENCE PURSUANT TO MASS. R. CRIM. 17(a)(2)**

Now comes the defendant and respectfully requests that this Honorable Court issue an order pursuant to Rules 13 and 17(a)(2) of the Massachusetts Rules of Criminal Procedure, and following the protocol established by *Commonwealth v. Lampron*, 441 Mass. 265 (2004), directing the Massachusetts Attorney General's Office, the Massachusetts State Police, the Executive Office of Public Safety and Security, and/or the Department of Public Health to provide undersigned counsel with the following documentation:

1. Copies of all police reports related to each packet of suspected narcotic evidence found in the possession of Sonja Farak ("Farak") at the time of her arrest. This includes, but is not limited to, evidence seized from her workstation and safe at the Amherst Laboratory, from her vehicle, and as a result of the search of her home.
2. Copies of drug certificates and chain of custody reports for each packet of suspected narcotic evidence found in Farak's possession at the time of her arrest.

3. A copy of Farak's personnel file, including, but not limited to, her employment application(s) for the position of chemist, as well as the results of any psychosocial evaluations, drug testing, and/or background checks;¹
4. Results of any and all searches of computers to which Farak had access, including but not limited to copies of e-mails sent and received by Farak from January 1, 2010 to January 19, 2013;
5. Results of any and all searches of cellular telephones to which Sonja Farak had access, including but not limited to text messages sent and received by Ms. Farak from January 1, 2010 to January 19, 2013;
6. Copies of performance evaluations and/or documentation reflecting the performance of Farak, Rebecca Pontes, and/or Sharon Salem at the Amherst Drug Laboratory from January 1, 2005 – January 18, 2013.
7. Copies of any and all inter- and/or intra-office correspondence from January 18, 2013 to the present pertaining to the scope of evidence tampering and/or deficiencies at the Amherst Drug Laboratory.
8. To the extent not covered by Request No. 8, copies of any and all correspondence from January 18, 2013 to the present to and/or from District Attorney's offices in the four Western Counties pertaining to the scope of evidence tampering and/or deficiencies at the Amherst Drug Laboratory.
9. Any and all evidence suggesting that Farak may have had an accomplice in the evidence tampering she allegedly engaged in at the Amherst Drug Laboratory.

¹ This request includes materials generated in conjunction with Farak's work in the Hinton Drug Laboratory where she began her career as a chemist prior to transferring to the Amherst Laboratory in 2004.

10. To the extent not covered by Request No. 10, any and all evidence suggesting that a third party may have been aware of Farak's evidence tampering at the Amherst Drug Laboratory prior to Farak's arrest in January, 2013; and
11. The results of any handwriting analysis conducted by law enforcement of the handwritten notes found on news accounts recovered by the Massachusetts State Police during a search of Farak's car.

* * * * *

As his reasons for this Motion, the Defendant assigns as follows:

1. The documents are sought for production in good faith;
2. The subject materials are relevant to material issues at trial and are therefore evidentiary in nature;
3. The defense cannot fully and competently prepare for trial of this case in the absence of such evidence;
4. The subject materials cannot be produced other than by a summons issued by this Court;
5. The Defendant is constitutionally entitled to inspection of the materials under Article XII and M.G.L.A. c. 263, § 5; and
6. *Lampron, supra*, permits the requests made herein.

The Court is referred to the Affidavit of Counsel and Memorandum of Law, filed herewith, for further reasons in support of this Motion.

The defendant respectfully requests a hearing on this motion on Thursday, September 19, 2013.

Respectfully Submitted,
ROLANDO PENATE,

By 

His Attorney

LUKE RYAN

BBO#664999

SASSON, TURNBULL, RYAN & HOOSE

100 Main Street, 3rd Floor

Northampton, MA01060

(413) 586-4800

(fax) (413) 582-6419

EXHIBIT 15

From: Reardon, Susanne (AGO)
Sent: Friday, August 23, 2013 12:58 PM
To: Verner, John (AGO)
Cc: Kaczmarek, Anne (AGO); Mazzone, Dean (AGO); Ravitz, Randall (AGO)
Subject: New Farak subpoena

John- I spoke with Beth Lux out in Springfield to help us out with the subpoena to Anne Kaczmarek. Beth talked to the ADA and discovered that Sonya Farak was the testing and confirmatory chemist in the case. In light of that I think we need to decide how much we want to try to protect and if we should move to quash due to the pending investigation. The case is on for a motion to suppress hearing next Tuesday 8/27 but Anne is not available that day.

Susanne Reardon
Deputy Chief
Appeals Division
(617) 963-2832
Office of Attorney General
Martha Coakley

EXHIBIT 16

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT

Hampden, ss.

COMMONWEALTH

v.

ROLANDO PENATE

No. HDCR2012-00083

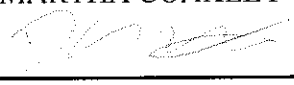
MOTION TO QUASH SUBPOENA FOR AAG ANNE KACZMAREK

The Massachusetts Attorney General's Office (AGO), hereby moves to quash the subpoena requiring AAG Anne Kaczmarek to appear at an evidentiary hearing in the above-entitled matter. As grounds therefor, the AGO states that the defendant seeks information on matters that are either confidential, privileged and exempt from disclosure, or cumulative of information of which the defendant already has possession. In support of this motion, the AGO has attached a memorandum of law.

WHEREFORE, for the foregoing reasons, the AGO requests that this Court quash the subpoena.

Respectfully submitted
For the Attorney General,

MARTHA COAKLEY

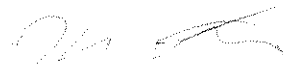

Kris C. Foster
Assistant Attorney General
Criminal Bureau
One Ashburton Place

Dated: October 1, 2013

Boston, Massachusetts 02108
(617) 727-2200, ext. 2833
BBO # 672376

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the Motion to Quash Subpoena upon the defendant and his counsel in hand on this date.



Kris C. Foster
Assistant Attorney General

Date: October 1, 2013

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT

Hampden, ss.

_____)	
COMMONWEALTH)	
)	
v.)	No. HDCR2012-00083
)	
ROLANDO PENATE)	
)	
_____)	

**MEMORANDUM OF LAW IN SUPPORT OF ATTORNEY
GENERAL'S MOTION TO QUASH SUMMONS SERVED ON
ASSISTANT ATTORNEY GENERAL ANNE KACZMAREK**

This memorandum of law is submitted by the Massachusetts Attorney General's Office (AGO), in support of its motion to quash the summons served on Assistant Attorney General Anne Kaczmarek in the above-captioned matter. This Court should quash the summons because the testimony and documents sought relate to the AGO's ongoing criminal investigation of Sonja Farak. As argued below, such information is privileged or otherwise protected from disclosure and no exception or waiver applies. In the alternative, the AGO requests that this Court enter an appropriate protective order to prevent the unwarranted disclosure of privileged or otherwise protected information.

BACKGROUND

On February 1, 2012, a Hampden County grand jury returned indictments against the defendant, Rolando Penate, charging him with three counts of possession with intent to distribute a class A substance, in violation of G.L. c. 94C, § 32A(d), as a subsequent offense, G.L. c. 94C,

§ 32(b), and with related school zone violations, G.L. c. 94C, § 32J; two counts of unlawful possession of a firearm, in violation of G.L. c. 269, § 10(h); and use of a firearm while committing a felony, in violation of G.L. c. 265, § 18B.

The drugs in the defendant's case appear to have been tested by Sonja Farak. Farak is currently charged with four counts of evidence tampering, four counts of larceny of drugs and two count of possession of cocaine allegedly arising out of her work at the University of Massachusetts Amherst drug laboratory in her capacity as a chemist. AAG Anne Kaczmarek is assigned to prosecute the Commonwealth's case against Farak.

On August 22, 2013, AAG Kaczmarek was served with a subpoena compelling her testimony on August 27, 2013, and the production of documents related to her investigation of Farak. On August 27, the Court rescheduled the evidentiary hearing in this case to September 23, 2013, with a hearing on, *inter alia*, the subpoena issued for AAG Kaczmarek's testimony and production of documents, scheduled for September 19, 2013.

ARGUMENT

The defendant is seeking documents and testimony from AAG Kaczmarek. As an initial matter, several of the documents the defendant is seeking from AAG Kaczmarek are not in her care, custody or control. This includes (1) evidence of an accomplice or third party knowledge; and (2) handwriting analysis. Furthermore, the defendant already has possession of copies of the news accounts with handwritten notes recovered from Farak's car.¹ The remaining documents the defendant is requesting, in addition to AAG Kaczmarek's testimony, should be quashed for the following reasons.

¹ Additionally, the defendant likely has already reviewed the grand jury minutes, exhibits, and police reports, which document the access to the Amherst evidence locker.

I. This Court should quash the summons because documents and information regarding the ongoing criminal investigation of Sonja Farak are privileged and otherwise protected from disclosure.

Courts have found information maintained by law enforcement regarding an ongoing criminal investigation to be privileged and not subject to disclosure. *See Kattar v. Doe*, CIV. A. 86-2206-MC, 1987 WL 11146 (D. Mass. Jan. 27, 1987) (granting in part a motion to quash subpoenas for a deposition that would require disclosure of information related to an active investigation and a deposition that would require disclosure of information protected by the law enforcement investigatory privilege); *see also Puerto Rico v. United States*, 490 F.3d 50, 64 (1st Cir. 2007), *cert. denied*, 552 U.S. 1295 (2008) (recognizing a privilege for “law enforcement techniques and procedures”). “The purpose of this privilege is to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation.” *In re Dept. of Investigation*, 856 F.2d 481, 483-84 (2d Cir. 1988).

Similar principles can be found in various areas of Massachusetts law. As an example, the public records laws exempt from disclosure “investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials, the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.” M.G.L. c. 4, § 7, cl. 26(f). This exemption recognizes that the disclosure of certain investigatory materials “could so detract from effective law enforcement to such a degree as to operate in derogation, and not in support of, the public interest.” *Bougas v. Chief of Police of Lexington*, 371 Mass. 59, 61-63 (1976) (holding that police reports and letters from citizens to police were exempt from disclosure). Even if not directly applicable here, the exemption “provides guidance as to public policy considerations.”

Sheriff of Bristol County v. Labor Relations Comm'n, 62 Mass. App. Ct. 665, 671 (2004); see also *Babets v. Secretary of Executive Office of Human Servs.*, 403 Mass. 230, 237 n.8 (1988) (finding that terms of public records law may offer some evidence of Legislature's attitude on issues of evidentiary privileges); *Puerto Rico*, 490 F.3d at 63 (noting that the law enforcement exemption in the federal Freedom of Information Act provides guidance in determining the scope of the investigative privilege). There are other examples. See, e.g., *In re Enforcement of a Subpoena*, 463 Mass. 162, 177 n.8 (2012) (listing "impounded filings regarding ongoing criminal investigations" as a type of document that "at least temporarily" can be shielded from public); *The Massachusetts Guide to Evidence*, Art. V, § 515 ("Unless otherwise required by law, information given to governmental authorities in order to secure the enforcement of the law is subject to disclosure only within the discretion of the governmental authority.").

The law enforcement investigative privilege is a qualified privilege, which is "subject to balancing the [government's] interest in preserving the confidentiality of sensitive law enforcement techniques against the requesting party's interest in disclosure." *Puerto Rico*, 490 F.3d at 64. To override the strong public interest in maintaining the confidentiality of information related to an active criminal investigation, a party must generally show a compelling need for the information that is sufficient to overcome the privilege. See *Gomez v. City of Nashua*, 126 F.R.D. 432, 436 (D.N.H. 1989) (granting motion to quash deposition of an assistant attorney general based on the law enforcement investigative privilege, the deliberative process privilege, and the principle that absent a compelling need, the time and energy of public officials ought to be preserved for public business); see also *Ass'n for Reduction of Violence v. Hall*, 734 F.2d 63, 66 (1st Cir. 1984) (a party seeking discovery of privileged material "must make a

threshold showing of need, amounting to more than 'mere speculation'") (quoting *Socialist Workers Party v. Attorney General*, 565 F.2d 19, 23 (2d Cir. 1977)).

Here, the interests of the requesting party include his rights under the U.S. Constitution and the Massachusetts Declaration of Rights to present a complete defense and to utilize compulsory process to secure the presence of witnesses on his behalf. See, e.g., *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (federal Constitution "guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'") (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)); *Washington v. Texas*, 388 U.S. 14 (1967) ("The right to offer testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense.").

However, the constitutional right of a defendant to present a complete defense "is not unlimited, but rather is subject to reasonable restrictions." *United States v. Scheffer*, 523 U.S. 303, 308 (1998); see also *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (finding right to present relevant testimony "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process"). "As a result, state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Scheffer*, 523 U.S. at 308 (quoting *Rock v. Arkansas*, 483 U.S. 44, 56 (1987)).

In determining whether to quash the instant summons, therefore, this Court must weigh the interests of the defendant in presenting documents and testimony from AAG Anne Kaczmarek against the interests of the public and the Attorney General in maintaining the confidentiality of information regarding an ongoing criminal investigation. To the extent the

defendant asserts a constitutional right to elicit from AAG Anne Kaczmarek privileged information regarding the Farak investigation, the defendant “must at least make some plausible showing of how [the evidence] would [be] both material and favorable to his defense.” *U.S. v. Valenzuela-Bernal*, 458 U.S. 858 (1982). The defendant has not done so here.

Here, AAG Anne Kaczmarek does not have first-hand knowledge of the facts and events described in the documents requested by the defendant. Therefore, any information she possibly has would consist largely of inadmissible hearsay. To the extent the defendant is able to demonstrate an exception to the hearsay rule for certain proffered testimony, he must demonstrate a necessity for offering that testimony through AAG Anne Kaczmarek that outweighs the concerns underlying the investigative privilege. He cannot do so. Testimony by a witness far removed from events at issue where the witness at most has indirect second-hand knowledge cannot suffice. In addition, to the extent any such testimony or production of documents is permitted, the AGO requests that the Court define clear limits in advance to avoid any unwarranted disclosure of privileged information regarding the ongoing criminal investigation of Sonja Farak

II. The AGO did not waive any privilege by the district attorney or AGO releasing selected information to defense counsel or to the public.

Defense counsel may not obtain AAG Kaczmarek’s testimony or compel her to produce documents based upon a theory that the AGO has waived any claim of privilege by releasing certain information to defense counsel or to the public. This argument has been soundly rejected by courts. *See Puerto Rico*, 490 F.3d at 66 (holding that federal government did not waive law enforcement privilege by disclosing some information about an investigation in a “detailed, two hundred page report”). As the First Circuit observed in *Puerto Rico v. United States*, “[c]ourts have held in the context of executive privilege that ‘release of a document only waives these

privileges for the document or information specifically released, and not for related materials.” *Id.* (quoting *In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997)). “This limited approach to waiver serves important interests in open government by ‘ensur[ing] that agencies do not forego voluntarily disclosing some privileged material out of the fear that by doing so they are exposing other, more sensitive documents.’” *Id.* Here, by voluntarily disclosing some information about the investigation to defense counsel and to the public, the AGO did not waive its privilege with respect to any documents or information beyond those reports. To hold otherwise would be to chill law enforcement officials from releasing any information to the public while an investigation is ongoing. “It would be illogical to punish [the AGO and other law enforcement agencies] for [their] voluntary disclosure of these materials by also forcing them to disclose other information that [they] have deemed privileged.” *Id.* at 67. Accordingly, the subpoena served upon AAG Kaczmarek should be quashed.

III. The defendant seeks testimony and documents that either could be obtained from other sources or is irrelevant, and that would needlessly cause a prosecutor’s time and resources to be diverted away from important public duties.

The testimony the defendant apparently seeks from AAG Anne Kaczmarek either could be obtained from other sources or is irrelevant. The drugs in the defendant’s case were seized in October and November of 2011. It appears that the defendant is going to argue that Farak may have tampered with the drugs in his case, by attempting to elicit from AAG Kaczmarek that the allegations against Farak date back much further than the roughly four months before Farak’s arrest that the AGO alleges. This is merely a fishing expedition. There is nothing to indicate that the allegations against Farak date back to the time she tested the drugs in the defendant’s case. Therefore, her testimony would be irrelevant and unhelpful to the Court.

Quashing the subpoena would be especially warranted considering that compliance would cause AAG Kaczmarek's time and resources to be diverted away from important public duties. Indeed, one court that confronted this same combination of circumstances when a prosecutor was subpoenaed to provide deposition testimony – that is, the facts that the party could obtain evidence from other sources, that the prosecutor's thinking was not relevant, and that the prosecutor's time would be diverted away from public service – reasoned as follows:

Although the information gathered by the [prosecutor's office] is relevant to plaintiff's action, the information may be obtained by less onerous means than taking the deposition of [the prosecutor]. Documentary evidence in the investigative file would reveal the information uncovered. Plaintiff may also depose any witnesses to the incident to discover their recollection of the events in question. Plaintiff states he is most interested in [one witness's] statement to the [prosecutor's office] because it formed the basis of the decision not to prosecute. But again, the [prosecutor's] decision whether to prosecute is not relevant to the instant action; it is [the witness's] recollection of events which is important. Plaintiff may discover this information by deposing [the witness]. Courts generally refuse to compel the deposition of a government witness if the plaintiff may obtain discovery by an alternative and less burdensome method to the government.

The [prosecutor's office] performs numerous investigations into purported criminal conduct as a part of its public function. Subjecting employees of that office to deposition absent the showing of a compelling need would violate public policy concerns that the time and resources of that office be conserved for the public business. Plaintiff has not established such a compelling need in this case.

Gomez v. City of Nashua, 126 F.R.D. 432, 434-36 (D.N.H. 1989) (additionally finding the federal deliberative process privilege relevant, which privilege is based on the policy that “the time and energies of public officials be conserved for the public's business to as great an extent as may be consistent with the ends of justice in particular cases [and a] failure to place reasonable limits upon private litigants' access to responsible governmental officials as sources of routine pretrial discovery would result in a severe disruption of the government's primary

function” (quoting *Community Fed. Savings & Loan Ass’n v. Federal Home Loan Bank*, 96 F.R.D. 619, 621 (D.D.C. 1983)); see also *Church of Scientology v. IRS*, 138 F.R.D. 9, 12-13 (D. Mass. 1990) (Bowler, Mag. J.) (discussing rule generally precluding depositions of high government officials, which is based on “[t]he rationale . . . that such officials must be free to conduct their jobs without the constant interference of the discovery process,” and which may be overcome only “upon a showing that the information to be gained from such a deposition is not available through any other source”). These realities justify quashing the subpoena here.

IV. AAG Kaczmarek would be protected from testifying as to her work product or any communications made to secure the enforcement of law under recognized legal doctrines.

Added to the above, certain lines of questioning would not be allowable should the defendant attempt to pursue them. First, AAG Kaczmarek would be protected from having to testify or producing documents regarding her thought processes in litigating any action, under the attorney work product doctrine. See, e.g., *Commonwealth v. Paszko*, 391 Mass. 164, 187-88 (1984) (noting that core of work product doctrine is protection of attorney mental processes); *Commonwealth v. Lewinski*, 367 Mass. 889, 902 (1975) (recognizing that defendant would not be entitled to access work product of prosecutor within documents); *Hickman v. Taylor*, 329 U.S. 495, 509-14 (1947) (explaining that doctrine in part protects against “inquiries into” “mental impressions of an attorney,” “personal beliefs,” and other “intangible” matters, in part due to the chilling effect on attorney work that could be produced by the mere fear of disclosure); *Commonwealth v. Bing Sial Liang*, 434 Mass. 131, 137-38 (2001), citing *Hickman v. Taylor*, 329 U.S. 495, 511 (1947) (“Proper preparation of a . . . case demands that prosecutors assemble information, sift what they consider to be the relevant from the irrelevant facts, prepare their legal theories and plan their strategy without undue and needless interference. . . . This work is

reflected . . . in interviews, statements, memoranda, correspondence, briefs, mental impressions, and personal beliefs”).

Second, AAG Kaczmarek would be shielded from having to testify or producing documents regarding communications made by citizens to secure the enforcement of law, under an absolute privilege held by the government. It has long been accepted in the Commonwealth that:

“It is the duty of every citizen to communicate to his government any information which he has of the commission of an offense against its laws. To encourage him in performing this duty without fear of consequences, the law holds such information to be among the secrets of state, and leaves the question how far and under what circumstances the names of the informers and the channel of communication shall be suffered to be known, to the absolute discretion of the government, to be exercised according to its views of what the interests of the public require. Courts of justice therefore will not compel or allow the discovery of such information, either by the subordinate officer to whom it is given, by the informer himself or by any other person, without the permission of the government. The evidence is excluded, not for the protection of the witness or the party in the particular case, but upon general grounds of public policy, because of the confidential nature of such communications.”

Attorney Gen. v. Tufts, 239 Mass. 458, 490-91 (1921) (quoting *Worthington v. Scribner*, 109 Mass. 487, 488-89 (1872) (involving communications made to Treasury officer, and collecting cases involving communications made to various types of governmental officials)); *see also* *District Attorney v. Flatley*, 419 Mass. 507, 510 (1995) (noting absolute nature of privilege and fact that “[n]o subsequent Massachusetts decision modifies or abrogates either *Tufts* or *Worthington*”).²

² This common-law privilege has been “modified” by the Massachusetts Legislature’s enactment of the Public Records Law, M.G.L. c. 66, § 10, “to the extent that if the information qualifies as a public record, the public is entitled to have access to it unless it falls within one of the exemptions provided by [M.G.L. c. 4, § 7, cl. 26].” *Rafuse v. Stryker*, 61 Mass. App. Ct. 595, 596-97 (2004). The Public Records Law obviously does not apply here, where live testimony is sought, and where there are privacy exceptions to the public records law.

Third, AAG Kaczmarek should be protected from having to testify as to any ongoing investigations or sensitive law enforcement techniques, as described *supra*, should the defendant pursue such matters.

As a result of the above principles, the defendant's ability to obtain evidence from AAG Kaczmarek would be limited, making her compelled testimony and production of documents all the more unwarranted.

V. If AAG Kaczmarek is required to appear in the instant matter, the AGO anticipates that its investigative team will soon be inundated with such requests.

Due to the claims against Sonja Farak and her alleged misconduct, the AGO anticipates that this is among the first of many summonses of this type that may be directed to members of its investigative team. It is simply not feasible for AAG Kaczmarek to perform her investigative duties and also provide testimony and documentation in each case where Farak or the Amherst drug laboratory is at issue. Under the extraordinary circumstances of this case, this Court should take into account the extreme burden that would be placed on AAG Kaczmarek if this Court were to rule that defense counsel in this and other similar cases may require her appearance to testify and produce documents regarding the ongoing criminal investigation of Sonja Farak.

VI. As an alternative to quashing the subpoena, this Court should restrict its scope.

In the event that this Court declines to quash the subpoena, it should restrict its scope by relieving the obligation of the AGO to produce the following types of information:

1. Information concerning the criminal history of those other than the individual referenced in the subpoena;
2. Information concerning the criminal history of any individual prior to the incidents giving rise to the criminal matter at issue in the responsive documents and testimony;
3. Information concerning the health or medical or psychological treatment of individuals;

4. Information that could lead to identity theft or similar conduct, such as dates of birth, Social Security numbers; telephone numbers; precise addresses; and names of relatives.
5. Legal work product;
6. Documents that could allow the identities of complainants to be learned;
7. Disclosure of confidential investigative techniques;
8. Emails responsive to the subpoena, but not already contained in the case files specifically listed therein.³

CONCLUSION

For the foregoing reasons, the motion of the AGO should be allowed, and the subpoena should be quashed or modified as described herein.

Respectfully Submitted

MARTHA COAKLEY
ATTORNEY GENERAL




Kris C. Foster (BBO #672376)
Assistant Attorney General
Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200, ext. 2833

Date: October 1, 2013

³ The AGO reserves the right to raise other arguments and objections that become apparent to the extent that it further locates and reviews documents responsive to the Subpoena.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the Attorney General's Motion to Quash Subpoena issued to Assistant Attorney General Anne Kaczmarek upon the defendant and his counsel via electronic mail and first-class mail on this date.

A handwritten signature in dark ink, appearing to read "Kris C. Foster", is written over a horizontal line.

Kris C. Foster
Assistant Attorney General

Date: October 1, 2013

EXHIBIT 17

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

**TRIAL COURT OF THE
COMMONWEALTH
SUPERIOR COURT DEPT.
INDICTMENT NO. 12-083**

Commonwealth

v.

ROLANDO PENATE

DEFENDANT'S MOTION TO INSPECT PHYSICAL EVIDENCE

Now comes the defendant in the above-entitled action and respectfully requests that this Honorable Court issue an order, pursuant to Mass. R. Crim. P. 17(a)(2), *Commonwealth v. Lampron*, 441 Mass. 265 (2004), and *Commonwealth v. Matis*, 446 Mass. 632 (2006), compelling the Attorney General's Office and/or the Massachusetts State Police to permit undersigned counsel, an investigator and/or expert to conduct an inspection/examination of physical evidence recovered during searches conducted in the course of the investigation and prosecution of Sonja Farak. (*See* Ex. A, Report of Trooper Randy Thomas re: Search Warrant Execution of Farak vehicle (Jan. 24, 2013; Ex. B, Report of Sgt. Joseph Ballou re: Search Warrant Execution of Tote Bag Recovered from Amherst Lab (Feb. 15, 2013); Ex. C, Report of Sgt. Joseph Ballou re: Visit to the Amherst Laboratory (Feb. 15, 2013); Ex. D, Office of the Attorney General Department Case Report (Jan. 29, 2013).)

The Supreme Judicial Court (SJC) has made clear that Rule 17(a)(2) governs these circumstances,

as it provides for the summoning of documentary evidence and other “objects” from third parties for use at trial, and permits the judge to order that they be produced prior to trial for purposes of inspection. Such inspection can include inspection by experts who may be called as witnesses to testify at trial regarding the import or significance of the objects.

Matís, 446 Mass. at 634.

The defendant states that disgraced chemist Sonja Farak originally analyzed the alleged cocaine and heroin he is charged with distributing and possessing with the intent to distribute. Recently furnished discovery reveals that, following Farak’s arrest and indictment, the Commonwealth had these substances “re-tested” at the State Police Crime Laboratory in Sudbury.

The defendant states that, in order to effectively defend his case at trial, and at pretrial motions – where he has sought dismissal and will likely seek to exclude the results of any “re-testing” should his motion to dismiss be denied – his counsel requires a full understanding of the items seized by law enforcement in the course of its investigation. Such an understanding can only be achieved by means of a personal inspection of the evidence.

Police reports generated as a result of the search of Farak’s car indicate that it contained lab materials related to cases dating back to 2008, as well as plastic bags containing substances believed to be narcotics. While pictures were taken during the execution of the warrant, neither the quantity nor quality of these photographs is sufficient to resolve what the evidence in Farak’s car means in terms of the timing and scope of her criminal conduct and the timing and scope of the deficiencies at the

laboratory where she was employed. These are among the very issues the evidentiary hearing in this case has been scheduled to resolve.¹

During a recent evidentiary hearing in parallel post-conviction proceedings, Sgt. Joseph Ballou was questioned extensively regarding the physical evidence in the possession of law enforcement. (*See* Ex. E, Transcript of Testimony of Joseph Ballou (Sept. 9, 2013).) While the defendants in these proceedings have argued that such evidence suggests that Farak was engaged in evidence tampering years before her arrest, the Hampden County District Attorney's office has adopted the position taken by the Attorney General's office that the physical evidence in its possession only supports an inference that her misconduct began in the fall of 2012. To date, defendants like Mr. Penate have been forced to accept representations concerning the nature of this critical evidence from an agency that has consistently turned a blind eye toward anything suggesting that the target of its prosecution committed other crimes with which she has not been charged.²

¹ On July 23, 2013, following the argument of counsel, the Honorable Mary-Lou Rup issued an order finding that

[A]n evidentiary hearing must be conducted on the following issues: (1) if Ms. Farak and/or the Amherst drug lab engaged in egregious misconduct in the handling, storage, and analysis of suspected narcotics during the time period between November 2011 and January 2012, when the Amherst drug lab had custody and control of the alleged controlled substances related to the defendant's case; (2) if such misconduct has substantially prejudiced the defendant or irreparably harmed his right to a fair trial; or (3) if such egregious misconduct was deliberate and intentional, warranting a prophylactic sanction of dismissal.

(Mem. on Def.'s Mot. to Dismiss 2 (July 23, 2013).)

² For example, on May 10, 2013, Sgt. Ballou conducted an interview with Springfield Police Officer Gregory Bigda. According to Officer Bigda, at some point in early 2012, he seized 51 pills suspected of being oxycodone. These 51 pills were submitted to the

Following the presentation of evidence at aforementioned post-conviction proceeding, undersigned counsel made an oral motion for the relief sought by this written motion. When the Attorney General's office objected, the Honorable Jeffrey Kinder directed the parties to confer with an eye towards reaching an agreement. Ultimately, discussions with the Attorney General's office concluded on September 17, 2013, when an Assistant Attorney General conveyed the position of her office that "viewing the seized evidence is irrelevant to any case other than Farak's." (Ex. F, E-mail correspondence between AAG Kris Foster and Attorney Luke Ryan.)

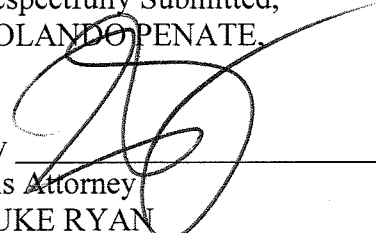
Based on the foregoing, the defendant respectfully requests that this Honorable Court allow this motion and issue an order permitting counsel for the defendant (including an investigator and/or expert) to:

1. Access the location where the physical evidence pertaining to the prosecution of Sonja Farak is currently being stored and, while under the supervision of the State Police, conduct a visual inspection of said physical evidence;
2. Take photographs, video recordings, measurements, notes, and/or drawings of said physical evidence; and
3. Make available to other defense attorneys handling cases involving the Amherst laboratory the results of the inspection, including access to any

Amherst Laboratory for analysis on March 8, 2012. On May 8, 2012, Farak analyzed the pills and certified that the 61 pills submitted for analysis did contain any narcotics or illegal drugs. When asked whether these facts raised concerns regarding the possibility that Farak tampered with additional evidence, Ballou stated that they did. However, neither he nor anyone else involved in the Farak investigation made any effort to determine how many pills were logged into evidence when Springfield Police relinquished custody of them to the Amherst lab.

photographs, video recordings, measurements, notes, and/or drawings made during the inspection.

Respectfully Submitted,
ROLANDO PENATE.

By 
His Attorney
LUKE RYAN
BBO#664999
SASSON, TURNBULL, RYAN & HOOSE
100 Main Street, 3rd Floor
Northampton, MA 01060
(413) 586-4800
(fax) (413) 582-6419



*The Commonwealth of Massachusetts
Massachusetts State Police
Office of the Attorney General - West
1350 Main Street, Fourth Floor
Springfield, Massachusetts 01103*

January 24, 2013

To: Detective Lieutenant Robert M. Irwin
SPDU AG, Commanding

From: Trooper Randy Thomas #2935
SPDU AG West

Subject: 13-034-4804-1003
Search warrant execution
Vehicle of Sonja FARAK

1. On 01-19-13 at 0323 hours, a search warrant was executed on a vehicle owned by Sonja FARAK of 37 Laurel Park in Northampton. The search was of a 2002 Volkswagen Golf, color black, VIN: 9BWGK61J524069609, and bearing MA registration 80WJ06 registered to Sonja J. FARAK. The search was conducted at the State Police Barracks in Northampton at 555 North King St. in Northampton where the vehicle had been secured the previous day. The search was conducted by Detective Lieutenant Robert Irwin, Sergeant Joseph Ballou and I, Trooper Randy Thomas, all assigned to the State Police Detective Unit of the Attorney General's Office. Trooper Christopher Dolan from the State Police Crime Scene Services Section photographed the vehicle and evidence before and during the search.

2. The search commenced at 0323 hours. The following items were found in the vehicle and were secured and seized into evidence:

- 1 1 manila envelope "A08-02990 + 0289" containing evidence bag & unknown paper
- 2 1 envelope "For Jim Hanchett"
- 3 1 Zip lock baggie containing (34) white capsules
- 4 Assorted lab paperwork
- 5 Assorted lab paperwork

BUREAU OF INVESTIGATIVE SERVICE
MASS. STATE POLICE
Year/Dist/Crime/Case
13-034-4804-1003
Serial # 001

Captain

Supervisor

EXHIBIT 18

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT

Hampden, ss.

COMMONWEALTH

v.

ROLANDO PENATE

No. HDCR2012-00083

OPPOSITION TO THE DEFENDANT'S RULE 17(a)(2) MOTION FOR PRODUCTION

The Attorney General's Office ("AGO") respectfully opposes the defendant's motion to compel production of documentary evidence pursuant to Mass. R. Crim. P. 17(a)(2). As reasons therefor, many of the documents requested are not in the Attorney General's care, custody, or control. Additionally, several of the documents the defendant is seeking are privileged and not subject to discovery. Therefore, the Attorney General's office requests that this Court deny the defendant's motion for production of documents.

BACKGROUND

On February 1, 2012, a Hampden County grand jury returned indictments against the defendant, Rolando Penate, charging him with three counts of possession with intent to distribute a class A substance, in violation of G.L. c. 94C, § 32A(d), as a subsequent offense, G.L. c. 94C, § 32(b), and with related school zone violations, G.L. c. 94C, § 32J; two counts of unlawful possession of a firearm, in violation of G.L. c. 269, § 10(h); and use of a firearm while committing a felony, in violation of G.L. c. 265, § 18B.

The drugs in the defendant's case appear to have been tested by Sonja Farak. Farak is currently charged with four counts of evidence tampering, four counts of larceny of drugs and two counts of possession of cocaine allegedly arising out of her work at the University of Massachusetts Amherst drug laboratory in her capacity as a chemist. AAG Anne Kaczmarek is assigned to prosecute the Commonwealth's case against Farak.

On August 22, 2013, Sergeant Joseph Ballou of the Massachusetts State Police assigned to the AGO and Assistant Attorney General Anne Kaczmarek were served with subpoenas compelling their testimony on August 27, 2013, and the production of documents related to their investigation of Farak. On August 27, the Court rescheduled the evidentiary hearing in this case to September 23, 2013, with a hearing on the subpoenas and production of documents scheduled for September 19, 2013.

On September 6, 2013, the defendant served undersigned counsel with a Rule 17(a)(2) motion for production of documentary evidence. He has requested a hearing on this motion on September 19, 2013.

ARGUMENT

- I. THE COURT SHOULD DENY THE DEFENDANT'S MOTION FOR PRODUCTION OF DOCUMENTS BECAUSE SEVERAL OF THE DOCUMENTS ARE NOT IN THE ATTORNEY GENERAL'S CARE, CUSTODY, OR CONTROL, OR ARE OTHERWISE PRIVILEGED.

Production of documents in custody of a nonparty is governed by Mass. R. Crim. P. 17(a)(2), and the issuance of a summons under the rule "is reserved to the sound discretion of the judge." *Commonwealth v. Mitchell*, 444 Mass. 786, 790-791 (2005). Because Rule 17 is not to be invoked merely as a discovery tool, but rather for evidentiary materials that are likely to be admissible at trial, the defendant must make a factual showing that: "(1) the documents are evidentiary and relevant; (2) they are not otherwise procurable reasonably in advance of trial by

exercise of due diligence; (3) [he] cannot properly prepare for trial without such production and inspection in advance of trial, and the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) application is made in good faith and not intended as a general fishing expedition.” *Commonwealth v. Dwyer*, 448 Mass. 122, 140-141 (2006) (citing *Commonwealth v. Lampron*, 441 Mass. 265, 269 (2004)). “Potential relevance and conclusory statements regarding relevance are insufficient.” *Lampron*, 441 Mass. at 269.

Rule 17(a)(2) “is not to be used as a means to explore the *availability of potential evidence . . .*.” *Commonwealth v. Daniels*, 76 Mass. App. Ct. 1118 (2010) (quoting *Commonwealth v. Mitchell*, 444 Mass. 786, 791 (2005)) (emphasis added in *Daniels*). Here, the defendant failed to show that the documents in question will actually contain the evidence he seeks, as opposed to what he anticipates will be contained in the documents. That is not sufficient. See *Commonwealth v. Bishop*, 416 Mass. 169, 179-180 (1993); *Commonwealth v. Villalobos*, 09-P-1429, 2012 Mass. App. Unpub. LEXIS 470, *9, *review denied*, 462 Mass. 1107 (2012) (defendant “had no actual information about what might be in the school records”). Contrast *Commonwealth v. Lam*, 444 Mass. 224, 232 (2005) (the complainant’s middle school records relating to her sexual abuse allegation could be summonsed because the complainant admitted that she disclosed the sexual abuse to the school counselors).

The defendant claims that these documents and correspondence *may* uncover inadequate supervision of Farak without providing any support for that claim. Likewise, he insists that these documents and correspondence *may* uncover evidence that Farak was allegedly stealing drugs long before the time revealed in the grand jury minutes, without any evidence to support that claim. He contends that these documents would *possibly* permit him to impeach the test results of the drugs, tested by Farak, in his case. “Generalizations and unsubstantiated statements” are

not enough to procure a pretrial inspection of the requested documents. *Bourgeois*, 68 Mass. App. Ct. at 436. He is merely engaging in a “fishing expedition” for anything that might possibly help him. This is an inappropriate use of a Rule 17 summons. *Dwyer*, 448 Mass. at 145 (Rule 17[a] [2] is not a discovery tool; the defendant required to show relevance, admissibility, necessity and specificity to guard against a mere fishing expedition for possibly relevant information).

For these reasons, the Court should deny the defendant’s motion. *See, e.g., Villalobos*, 2012 Mass. App. Unpub. LEXIS 470, at *9 (that the complainant attended school for adolescents with PTSD and self-injurious behavior, and that she may have been raped by someone other than defendant, was not sufficient to conclude that school records would contain disclosure of sexual abuse); *Commonwealth v. Daniels*, 08-P-1808, 2010 Mass. App. Unpub. LEXIS 280, at *5-6 (Mass. App. March 16, 2010) (complainant’s admitted use of drugs at time of attack not sufficient to permit inspection of her health records).

In any event, the documents that the defendant is seeking are not discoverable. Each of the eleven requests is described in turn below.

1. *Copies of police reports related to each of the packets of narcotics in Farak’s possession when arrested.* These documents are not in the care, custody, or control of the AGO.
2. *Copies of drug certificates, and chain of custody reports related to each of the packets of narcotics in Farak’s possession when arrested.* These documents are not in the care, custody, or control of the AGO.
3. *Farak’s personnel file.* These documents are not in the care, custody, or control of the AGO.
4. *Farak’s computer.* The AGO did not search any computers to which Farak had access; therefore, the AGO does not have care, custody, or control of any such documents.

5. *Farak's cellular telephone.* The AGO did not search any cellular telephones to which Farak had access; therefore, there AGO does not have care, custody, or control of any such documents.

6. *Copies of performance evaluations.* The AGO does not have care, custody, or control over any evaluations or documents reflecting the performance of Farak, Rebecca Pontes, or Sharon Salem. A State Police audit was conducted, which was turned over to the District Attorney's office. Moreover, the defendant provides no explanation as to why these various documents may support his motion for new trial. The defendant must make a prima facie showing that these documents would assist in him in getting a new trial. Where he does not make *any* argument, speculative or not, as to why these documents would assist him, he has not met his burden.

7. *Inter- and intra- office correspondence at the AGO.* As an initial matter, the defendant provides no explanation as to why these various forms of correspondence may assist him in impeaching the drug test results in his case. Where he does not make *any* argument, speculative or not, as to why these documents would assist him, he has not met his burden. Regardless, it is unclear what exactly the defendant is requesting. If he is seeking correspondence not involving the AGO, then the AGO is not in possession of such correspondence. If this request is for correspondence internal to the AGO, then it is not discoverable. These communications would be protected because they would constitute legal work product. *See, e.g., Commonwealth v. Paszko*, 391 Mass. 164, 187-88 (1984) (noting that core of work product doctrine is protection of attorney mental processes); *Commonwealth v. Lewinski*, 367 Mass. 889, 902 (1975) (recognizing that defendant would not be entitled to access work product of prosecutor within documents); *Hickman v. Taylor*, 329 U.S. 495, 509-14 (1947) (explaining that doctrine in part protects against "inquiries into" "mental impressions of an attorney," "personal beliefs," and other "intangible" matters, in part due to the chilling effect on attorney work that could be produced by the mere

fear of disclosure); *Commonwealth v. Bing Sial Liang*, 434 Mass. 131, 137-38 (2001), *citing Hickman*, 329 U.S. at 511 (finding that victim-witness advocate working with prosecution may be protected by work product doctrine, and explaining, “Proper preparation of a . . . case demands that prosecutors assemble information, sift what they consider to be the relevant from the irrelevant facts, prepare their legal theories and plan their strategy without undue and needless interference. . . . This work is reflected . . . in interviews, statements, memoranda, correspondence, briefs, mental impressions, and personal beliefs”).

Furthermore, these communications are part of an ongoing criminal investigation. Courts have found information maintained by law enforcement regarding an ongoing criminal investigation to be privileged and not subject to disclosure. *See Kattar v. Doe*, CIV. A. 86-2206-MC, 1987 WL 11146 (D. Mass. Jan. 27, 1987) (granting in part a motion to quash subpoenas for a deposition that would require disclosure of information related to an active investigation and a deposition that would require disclosure of information protected by the law enforcement investigatory privilege); *see also Puerto Rico v. United States*, 490 F.3d 50, 64 (1st Cir. 2007), *cert. denied*, 552 U.S. 1295 (2008) (recognizing a privilege for “law enforcement techniques and procedures”). “The purpose of this privilege is to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation.” *In re Dept. of Investigation*, 856 F.2d 481, 483-84 (2d Cir. 1988).

The law enforcement investigative privilege is a qualified privilege, which is “subject to balancing the [government’s] interest in preserving the confidentiality of sensitive law enforcement techniques against the requesting party’s interest in disclosure.” *Puerto Rico*, 490

F.3d at 64. To override the strong public interest in maintaining the confidentiality of information related to an active criminal investigation, a party must generally show a compelling need for the information that is sufficient to overcome the privilege. *See Gomez v. City of Nashua*, 126 F.R.D. 432, 436 (D.N.H. 1989) (granting motion to quash deposition of an assistant attorney general based on the law enforcement investigative privilege, the deliberative process privilege, and the principle that absent a compelling need, the time and energy of public officials ought to be preserved for public business); *see also Ass'n for Reduction of Violence v. Hall*, 734 F.2d 63, 66 (1st Cir. 1984) (a party seeking discovery of privileged material "must make a threshold showing of need, amounting to more than 'mere speculation'") (quoting *Socialist Workers Party v. Attorney General*, 565 F.2d 19, 23 (2d Cir. 1977)).

Similar principles can be found in various areas of Massachusetts law. As an example, the public records laws exempt from disclosure "investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials, the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest." M.G.L. c. 4, § 7, cl. 26(f). This exemption recognizes that the disclosure of certain investigatory materials "could so detract from effective law enforcement to such a degree as to operate in derogation, and not in support of, the public interest." *Bougas v. Chief of Police of Lexington*, 371 Mass. 59, 61-63 (1976) (holding that police reports and letters from citizens to police were exempt from disclosure). Even if not directly applicable here, the exemption "provides guidance as to public policy considerations." *Sheriff of Bristol County v. Labor Relations Comm'n*, 62 Mass. App. Ct. 665, 671 (2004); *see also Babets v. Secretary of Executive Office of Human Servs.*, 403 Mass. 230, 237 n.8 (1988) (finding that terms of public records law may offer some evidence of Legislature's attitude on

issues of evidentiary privileges); *see also Puerto Rico*, 490 F.3d at 63 (noting that the law enforcement exemption in the federal Freedom of Information Act provides guidance in determining the scope of the investigative privilege). There are other examples. *See, e.g., In re Enforcement of a Subpoena*, 463 Mass. 162, 177 n.8 (2012) (listing “impounded filings regarding ongoing criminal investigations” as among types of document that “at least temporarily” can be shielded from public); Mass. G. Evid. § 515 (“Unless otherwise required by law, information given to governmental authorities in order to secure the enforcement of the law is subject to disclosure only within the discretion of the governmental authority.”).

The defendant has failed to make a showing that this correspondence would in any way impeach the drug test results in his case. In contrast, where this is an ongoing investigation, *see Rafuse v. Stryker*, 61 Mass. App. Ct. 585, 600 (2004), the release of much of this information could compromise the prosecution of Farak. *Id.* Therefore, much of the information is still confidential, and should remain as such. *See id.*; *see also Globe Newspaper v. Police Comm’r of Boston*, 419 Mass. at 862.

8. *AGO correspondence with District Attorneys’ offices.* For the same reasons as in #7, *supra*, any such correspondence is not discoverable.

9. *Accomplice evidence.* The AGO has turned over all grand jury minutes, exhibits, and police reports in its possession to the District Attorney’s office. Based on these records, to which the defendant has access, there is no reason to believe that an accomplice was involved.

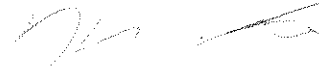
10. *Third party knowledge.* The AGO has turned over all grand jury minutes, exhibits, and police reports in its possession to the District Attorney’s office. Based on these records, to which the defendant has access, there is no reason to believe that a third party had knowledge of Farak’s alleged malfeasance prior to her arrest.

11. *Handwriting analysis.* No such documents exist as the AGO did not perform any handwriting analysis.

For the above-stated reasons, the defendant's Rule 17(a)(2) motion for production of documents addressed to the Attorney General's Office should be denied.

Respectfully Submitted,

MARTHA COAKLEY
ATTORNEY GENERAL



Kris C. Foster (BBO #672376)
Assistant Attorney General
Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200, ext. 2833

Date: October 1, 2013

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the Attorney General's opposition to the motion for production of documents upon the defendant and his counsel via electronic and first-class mail on this date.



Kris C. Foster
Assistant Attorney General

Date: October 1, 2013

EXHIBIT 19

Luke Ryan

From: Foster, Kris (AGO) <kris.foster@state.ma.us>
Sent: Friday, August 30, 2013 10:05 AM
To: Luke Ryan
Subject: RE: Farak Hearing

Hi Luke,

I just wanted to let you know that I got your email. Just from looking at your email and motion quickly, I will be opposing the discovery motion. I'm also not sure yet if a hearing will even be warranted on the discovery motion, seeing that the judge could deny (or allow) it on the papers. So as of this time I don't believe a hearing is warranted. Also, because of the ongoing investigation, I cannot give you access to the main evidence room. Of course, I'll be able to respond more fully after I take a better look at this, but I wanted to let you know my initial thoughts.

Kris C. Foster
Assistant Attorney General
Appeals Division, Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 963-2833

-----Original Message-----

From: Luke Ryan [<mailto:LRyan@strhlaw.com>]
Sent: Thursday, August 29, 2013 8:29 PM
To: Foster, Kris (AGO)
Cc: Flannery, Frank (WES)
Subject: Farak Hearing

Dear Kris,

I am writing tonight in my capacity as defense counsel for a second criminal defendant who has an upcoming evidentiary as a result of the allegations of misconduct on the part of Ms. Farak. This defendant's name is Rafael Rodriguez.

He was charged in Hampden County Indictment Number 10-1181, with possessing a class B substance with the intent to distribute and received a 4-5 year state prison sentence back in 2011. When the allegations against Ms. Farak came to light, he moved to withdraw his guilty plea and an evidentiary hearing for him and fourteen other post-conviction defendants has been scheduled for Sept. 9th.

Earlier today, I filed the attached pleadings which, as you will see, seek some of the discovery items that were contained on the Ex. As in the subpoenas duces tecum I served on Anne Kaczmarek and Joseph Ballou in conjunction with the Penate dismissal hearing.

Prior to me filing these pleadings, First Assistant Frank Flannery told me that he would pass them along to any law enforcement third party record holders so it is possible that they may have already reached you or a representative of your office. (I have attempted to cc: Frank on this email using what I presume to be his address. I have not previously communicated with Frank via email so it is possible that it will bounce back to me.)

Unfortunately, it does not look like hearing can be scheduled on 9/4 - the date I requested in the motion - or any other day next week. Judge Kinder, the judge assigned to the Farak postconviction cases, was out of the office today and won't be returning to court until Tuesday when he is scheduled to begin a week long homicide trial.

My plan, per his clerk's suggestion, is to simply show up in Courtroom #2 at the beginning of next week and attempt to address the court during a break in the homicide trial. Assuming I am able to pull off this conversation, it will obviously not constitute a hearing on the discovery motion. Rather, the most I can hope for is that it will give the Court a chance to devise a plan for such a hearing.

When I show up next week, I would like to be able to tell the judge that I have been in contact with a representative of your office and could coordinate dates/times for a hearing with that person upon leaving the judge's presence. Are you willing to be that person? If not, would you be kind enough to point in the direction of that person?

On a related note, it has become clear to me that in order to prepare effectively for the hearing on 9/9, I will need to inspect the 60 items seized during the course of the Farak investigation referenced in a Case Information report Sgt. Ballou generated on 1/29/13. (See Farak Discovery Pages 3076-3088.) According to Sgt. Ballou's report, these items are stored in the main evidence room at "Western SP." Would it be possible for you or someone else in your office to assist me in making arrangements to go to this location sometime next week?

Thank you in advance for your attention to these requests.

Sincerely,

Luke

Luke Ryan
Sasson, Turnbull, Ryan & Hoose
100 Main Street
Northampton, MA 01060
413.586.4800
www.strhlaw.com

CONFIDENTIALITY NOTICE: This transmission is intended only for the use of the recipient(s) named above. If you are not the intended recipient, or a person responsible for delivering it to the intended recipient, you are hereby notified that any disclosure, copying, distribution or use of any of this information contained in this transmission is STRICTLY PROHIBITED. If you have received this transmission in error, please notify me immediately by reply email and destroy the original transmission in its entirety without saving it in any manner.

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

**TRIAL COURT OF THE
COMMONWEALTH
SUPERIOR COURT DEPT.
INDICTMENT NO. 10-1181**

Commonwealth

v.

RAFAEL RODRIGUEZ

**DEFENDANT'S AMENDED MOTION TO COMPEL DISCOVERY PURSUANT TO
MASS. R. CRIM. P. 30(c)(4)**

Now comes the defendant and respectfully requests that this Honorable Court order the Hampden County District Attorney's Office, the Attorney General's Office, the Massachusetts State Police and/or Department of Public Health to provide undersigned counsel with the following documentation:

1. Copies of all police reports related to each packet of suspected narcotic evidence found in the possession of Sonja Farak ("Farak") at the time of her arrest. This includes, but is not limited to, evidence seized from her workstation and safe at the Amherst Laboratory, from her vehicle, and as a result of the search of her home.
2. Copies of drug certificates and chain of custody reports for each packet of suspected narcotic evidence found in Farak's possession at the time of her arrest.

3. A copy of Farak's personnel file, including, but not limited to, her employment application(s) for the position of chemist, as well as the results of any psychosocial evaluations, drug testing, and/or background checks;¹
4. As it pertains to the field tests allegedly conducted in this case:
 - a. *Identity of Field Tester(s)*: Names of any and all law enforcement officers who field tested the substances purportedly possessed by the defendant;
 - b. *Field Testing Academy Training*: A summary of the training received by such officer(s) at the Police Academy with regard to field testing substances believed to contain cocaine;
 - c. *Field Testing Training Beyond Academy*: A summary of any further training received by such officer(s) with regard to field testing substances believed to contain cocaine;
 - d. *Color-blindness*: Whether such officer(s) is/are color blind;
 - e. *Field Testing Products*: The name(s), type(s), brand(s), make(s) and/or model(s) of any field testing products or kits utilized in this case;
 - f. *Field Testing False-Positive Rate*: The false-positive rate for any field testing products or kits utilized in this case;
 - g. *Field Testing User's Manual*: A copy of the user's manual(s) for any field testing products or kits utilized in this case;
 - h. *Field Testing Process*: A summary of the process by which substances were field tested in this case;
 - i. *Field Testing Kit Storage*: A description of the manner in which the field test products or kits were stored prior to application;
 - j. *Field Testing Temperatures*: The temperature(s) at application of the field tests in question.

¹ This request includes materials generated in conjunction with Farak's work in the Hinton Drug Laboratory where she began her career as a chemist prior to transferring to the Amherst Laboratory in 2004.

5. Results of any and all searches of computers to which Farak had access, including but not limited to copies of e-mails sent and received by Farak from January 1, 2010 to January 19, 2013;
6. Results of any and all searches of cellular telephones to which Sonja Farak had access, including but not limited to text messages sent and received by Ms. Farak from January 1, 2010 to January 19, 2013;
7. Copies of performance evaluations and/or documentation reflecting the performance of Farak, Rebecca Pontes, and/or Sharon Salem at the Amherst Drug Laboratory from January 1, 2005 – January 18, 2013.
8. Copies of any and all inter- and/or intra-office correspondence from January 18, 2013 to the present pertaining to the scope of evidence tampering and/or deficiencies at the Amherst Drug Laboratory.
9. To the extent not covered by Request No. 8, copies of any and all correspondence from January 18, 2013 to the present to and/or from District Attorney's offices in the four Western Counties pertaining to the scope of evidence tampering and/or deficiencies at the Amherst Drug Laboratory.
10. Any and all evidence suggesting that Farak may have had an accomplice in the evidence tampering she allegedly engaged in at the Amherst Drug Laboratory.
11. To the extent not covered by Request No. 10, any and all evidence suggesting that a third party may have been aware of Farak's evidence tampering at the Amherst Drug Laboratory prior to Farak's arrest in January, 2013; and

12. The results of any handwriting analysis conducted by law enforcement of the handwritten notes found on news accounts recovered by the Massachusetts State Police during a search of Farak's car.

* * * * *

As reasons therefore, it is stated that: (i) the defendant has established a prima facie case for the relief; (ii) the discovery requested is reasonably likely to uncover evidence that might warrant granting a new trial; (iii) the documents in question are sought for production in good faith; (iv) defense counsel cannot fully and competently prepare for the upcoming evidentiary in the absence of such evidence; and (v) the subject materials cannot be produced other than by a summons issued by this Court.

The Court is referred to the Affidavit of Counsel and Memorandum of Law in Support of this Motion, filed herewith, for further reasons and argument in support of this Motion. The defendant respectfully requests a hearing on this Motion on Wednesday, September 4, 2013.

Respectfully Submitted,
RAFAEL RODRIGUEZ,

By _____
His Attorney
LUKE RYAN
BBO#664999
SASSON, TURNBULL, RYAN & HOOSE
100 Main Street, 3rd Floor
Northampton, MA01060
(413) 586-4800
(fax) (413) 582-6419

EXHIBIT 20

CDH: 5-20

EXHIBIT 21

Commonwealth of Massachusetts
Subpoena

HAMPDEN, ss.

To: Sergeant Joseph F. Ballou
Massachusetts State Police
Office of the Attorney General - West
1350 Main Street, Fourth Floor
Springfield, MA 01103

You are hereby commanded, in the name of the Commonwealth of Massachusetts, to appear before the Hampden County Superior Court, holden at 50 State Street in Springfield, in the County of Hampden, on the 9th day of September, in the year 2013, at 9:00 A.M., and from day to day thereafter, until the action hereinafter named is heard by said Court, to give evidence of what you know relating to an action then and there to be heard and tried between the Commonwealth of Massachusetts v. Jermaine Watt, indictment number HDCR2009-01068.

You are further commanded to bring with you a copy of all documents and photographs pertaining to the investigation of Sonja J. Farak and the Amherst drug laboratory.

Please contact Attorney Jared Olano at (413) 355-5277, regarding any questions.

Hereof fail not, as your failure to appear as required will subject you to such pains and penalties as the law provides.

Dated at Springfield, Massachusetts, the 30th day of August, in the year 2013.

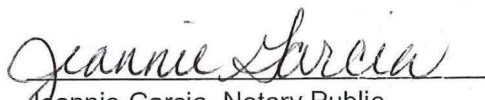

Jeannie Garcia, Notary Public
My commission expires: 5/2/2014

EXHIBIT 22

From: Ravitz, Randall (AGO)
Sent: Wednesday, September 04, 2013 11:57 AM
To: Foster, Kris (AGO); Verner, John (AGO); Kaczmarek, Anne (AGO)
Cc: Reardon, Susanne (AGO); Mazzone, Dean (AGO)
Subject: RE: Farak Subpoena

My take on the "Order Regarding Drug Lab Evidentiary Hearing" that was circulated is that there's still a rationale for moving to quash, or limit, the scope of the subpoena -- which I understand to remain outstanding even after Judge Kinder's ruling on the motion for discovery. A defense attorney could still try to elicit information of the type that we think shouldn't be revealed under the guise of fleshing out information concerning "the timing and scope of Ms. Farak's alleged criminal conduct" and the other categories. Thoughts?

Randall E. Ravitz
Chief, Appeals Division
Criminal Bureau
Office of Attorney General Martha Coakley One Ashburton Place Boston, MA 02108
Phone: (617) 963-2852
Fax: (617) 573-5358
E-mail: randall.ravitz@state.ma.us
Website: www.mass.gov/ago

-----Original Message-----

From: Foster, Kris (AGO)
Sent: Wednesday, September 04, 2013 11:30 AM
To: Ravitz, Randall (AGO); Verner, John (AGO); Kaczmarek, Anne (AGO)
Cc: Reardon, Susanne (AGO); Mazzone, Dean (AGO)
Subject: RE: Farak Subpoena

FYI, Luke Ryan informed me that the Rule 30 discovery motion in Comm v. Rafael Rodriguez was denied by Judge Kinder today. He's going to forward me the order when he gets it, and then I'll pass them on to you.

Kris C. Foster
Assistant Attorney General
Appeals Division, Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 963-2833

-----Original Message-----

From: Ravitz, Randall (AGO)
Sent: Wednesday, September 04, 2013 10:58 AM
To: Verner, John (AGO); Kaczmarek, Anne (AGO)
Cc: Reardon, Susanne (AGO); Mazzone, Dean (AGO); Foster, Kris (AGO)
Subject: RE: Farak Subpoena

I'm looping Kris Foster into this exchange.

Randall E. Ravitz
Chief, Appeals Division

Criminal Bureau
Office of Attorney General Martha Coakley One Ashburton Place Boston, MA 02108
Phone: (617) 963-2852
Fax: (617) 573-5358
E-mail: randall.ravitz@state.ma.us
Website: www.mass.gov/ago

-----Original Message-----

From: Verner, John (AGO)
Sent: Wednesday, September 04, 2013 10:19 AM
To: Kaczmarek, Anne (AGO)
Cc: Ravitz, Randall (AGO); Reardon, Susanne (AGO); Mazzone, Dean (AGO)
Subject: Re: Farak Subpoena

We are objecting to that. Please.

On Sep 4, 2013, at 10:15 AM, "Kaczmarek, Anne (AGO)" <Anne.Kaczmarek@MassMail.State.MA.US> wrote:

> I spoke with Frank Flannery- the 1st assistant out in Hamden County. HE explained that Judge Kinder (motion judge for this Farak mess) has just empanelled a murder trial so he is unsure of whether the motion will be heard on Monday but he will keep me posted.

> The defense attorneys are also looking to review all the evidence in our criminal case against Farak. I am firmly opposed. You can see on Ballou's subpoena that they request he bring all the evidence with him.

>

> Thanks, Anne

>

> -----Original Message-----

> From: Verner, John (AGO)
> Sent: Tuesday, September 03, 2013 9:05 AM
> To: Kaczmarek, Anne (AGO); Ravitz, Randall (AGO); Reardon, Susanne
> (AGO)
> Cc: Scafati, Meghan (AGO)
> Subject: RE: Farak Subpoena

>

> Lets talk. Meghan, can you grab everyone here for 10 minutes later today?

>

> -----Original Message-----

> From: Kaczmarek, Anne (AGO)
> Sent: Tuesday, September 03, 2013 9:01 AM
> To: Verner, John (AGO); Ravitz, Randall (AGO); Reardon, Susanne (AGO)
> Subject: RE: Farak Subpoena

>

> I told that the judge wants to come to the bottom of the issues mentioned below making it unlikely he will allow a motion to quash. As long as the judge has set up the scope of the motion & I am confident that Ballou will be pretty unhelpful in what the judge is trying to do- do we just let Ballou go?

>

> From: Verner, John (AGO)
> Sent: Tuesday, September 03, 2013 8:59 AM
> To: Kaczmarek, Anne (AGO); Ravitz, Randall (AGO); Reardon, Susanne
> (AGO)
> Subject: RE: Farak Subpoena

>

> Or intellectually do we think he is a real fact witness?

>

> -----Original Message-----

> From: Kaczmarek, Anne (AGO)
> Sent: Tuesday, September 03, 2013 8:42 AM
> To: Ravitz, Randall (AGO); Reardon, Susanne (AGO)
> Cc: Verner, John (AGO)
> Subject: FW: Farak Subpoena
>
> Randy,
> This is the subpoena we were expecting. I have a copy of the order that the judge issued in regards to the scope of the motion which is helpful.
> Sgt. Ballou will not be very helpful in the motion. Specifically, the court is trying to determine the scope of Farak's malfeasance and whether the sample numbers found in the car were tampered with as well. The other amherst chemists can answer these questions the best.
> Anne
> _____
> From: Ballou, Joseph (AGO)
> Sent: Friday, August 30, 2013 2:19 PM
> To: Kaczmarek, Anne (AGO)
> Cc: Irwin, Robert (AGO)
> Subject: Farak Subpoena
>
> Anne,
>
> I just got a subpoena from Defense Attorney Jared Olanoff to appear in Hampden Superior Court on Monday, September 9th. This is the same date that ADA Frank Flannery warned me about. Next week is a short week, so we don't have a lot of prep time. I'm off on Thursday afternoon and Friday next week for a minor medical issue.
>
> Joe

EXHIBIT 23

UNITED STATES DISTRICT COURT
SUPERIOR COURT

_____)	
COMMONWEALTH)	
)	
Plaintiff,)	
)	
v.)	No. HDCR2009-01068
)	
JERMAINE WATT)	
_____)	

ATTORNEY GENERAL'S OFFICE
MOTION TO QUASH THE SUBPOENA

Now comes the Attorney General's Office and hereby moves to quash the subpoena requiring Sergeant Joseph Ballou to appear at an evidentiary hearing in the above-entitled matter and produce and permit inspection and copying of certain specified documents including, but not limited to all notes, memoranda, logs and records concerning the investigation of chemist Sonja Farak. As grounds therefor, the Attorney General's Office states that the defendant seeks documentation on matters that are either privileged and exempt from disclosure or cumulative of information of which the defendant already has possession. In support of this motion, the Attorney General's Office has attached a memorandum of law.

WHEREFORE, for the foregoing reasons, the Attorney General's Office requests that this Court quash the subpoena. In the alternative, the Attorney General's Office requests this Court to enter an appropriate protective order in its behalf.

Respectfully submitted
For the Attorney General,

MARTHA COAKLEY

Kris C. Foster
Assistant Attorney General
Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200, ext. 2833
BBO # 672376

Dated: September 6, 2013

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the Attorney General's Motion to Quash Subpoena issued to Sergeant Joseph Ballou upon the defendant and his counsel via electronic mail on this date.

Kris C. Foster
Assistant Attorney General

Date: September 6, 2013

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT

Hampden, ss.

_____)	
COMMONWEALTH)	
)	
v.)	No. HDCR2009-01068
)	
JERMAINE WATT)	
)	
_____)	

**MEMORANDUM OF LAW IN SUPPORT OF ATTORNEY
GENERAL'S MOTION TO QUASH SUMMONS SERVED ON
SERGEANT JOSEPH F. BALLOU**

This memorandum of law is submitted by the Massachusetts Attorney General's Office (AGO), in support of its motion to quash the summons served on Sergeant Joseph Ballou in the above-captioned matter. This Court should quash the summons because the testimony sought relates to the ongoing criminal investigation of Sonja Farak. As argued below, such information is privileged or otherwise protected from disclosure and no exception or waiver applies. In the alternative, the AGO requests that this Court enter an appropriate protective order to prevent the unwarranted disclosure of privileged or otherwise protected information.

BACKGROUND

On February 1, 2009, a Hampden County grand jury returned an indictment against the defendant, Jermaine Watt, charging him with distribution of a class B substance, subsequent offense, in violation of G.L. c. 94C, § 32A(d). The defendant pled not guilty on December 22, 2009.

On September 22, 2010, the defendant pled guilty to the lesser included offense of distribution of a class B substance, in violation of G.L. c. 94C, § 32A(a). The Court sentenced him to three to five years in prison on April 14, 2011.

The drugs in the defendant's case appear to have been tested by Sonja Farak. Farak is currently charged with four counts of evidence tampering, four counts of larceny of drugs and two count of possession of cocaine allegedly arising out of her work at the University of Massachusetts Amherst drug laboratory in her capacity as a chemist. Sergeant Joseph Ballou, a state trooper working at the Attorney General's office, is the main investigator in the Commonwealth's case against Farak.

As a result of the investigation into Farak becoming public, the defendant filed a motion to stay his sentence on February 15, 2013, which was allowed by the Honorable Jeffrey Kinder on March 27, 2013. The defendant filed a motion to withdraw his guilty plea on April 24, 2013, which the Hampden County District Attorney opposed on June 7, 2013. On July 25, 2013, Judge Kinder ordered an evidentiary hearing for September 9, 2013, for thirteen defendants who are seeking to withdraw their guilty pleas. That same day, Judge Kinder limited the scope of the evidentiary hearing to: "(1) the timing and scope of Ms. Farak's alleged criminal conduct; and (2) the timing and scope of the conduct underlying the negative findings in the October 10, 2012, MSP Quality Assurance Audit at the Amherst Drug Laboratory; and how the alleged criminal conduct and audit findings might relate to the testing performed in these cases."

On August 30, 2013, Sergeant Ballou was served with a subpoena compelling him to testify on September 9, 2013, and the production of "all documents and photographs pertaining to the investigation of Sonja J. Farak and the Amherst drug laboratory." The subpoena is attached as Exhibit A.

ARGUMENT

While Judge Kinder limited the scope of the evidentiary hearing, the defendant has subpoenaed Sergeant Ballou to bring with him to the hearing “a copy of *all* documents and photographs pertaining to the investigation of Sonja J. Farak and the Amherst drug laboratory” (emphasis added). Based on the open-ended nature of the defendant’s subpoena, the defendant is seeking irrelevant material, most of which is privileged or otherwise protected.

I. The AGO Did Not Waive Any Privilege By The District Attorney or AGO Releasing Selected Information to Defense Counsel or to the Public.

Defense counsel may not obtain Sergeant Ballou’s testimony based upon a theory that the AGO has waived any claim of privilege by releasing certain information to defense counsel or to the public. This argument has been soundly rejected by courts. *See Puerto Rico*, 490 F.3d at 66 (holding that federal government did not waive law enforcement privilege by disclosing some information about an investigation in a “detailed, two hundred page report”). As the First Circuit observed in *Puerto Rico v. United States*, “[c]ourts have held in the context of executive privilege that ‘release of a document only waives these privileges for the document or information specifically released, and not for related materials.’” *Id.* (quoting *In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997)). “This limited approach to waiver serves important interests in open government by ‘ensur[ing] that agencies do not forego voluntarily disclosing some privileged material out of the fear that by doing so they are exposing other, more sensitive documents.’” *Id.* Here, by voluntarily disclosing some information about the investigation to defense counsel and to the public, the AGO did not waive its privilege with respect to any documents or information beyond those reports. To hold otherwise would be to chill law enforcement officials from releasing any information to the public while an investigation is ongoing. “It would be illogical to punish [the AGO and other law enforcement agencies] for

[their] voluntary disclosure of these materials by also forcing them to disclose other information that [they] have deemed privileged.” *Id.* at 67. Accordingly, the subpoena served upon Sergeant Ballou should be quashed.

II. The Court should quash the subpoena because the request for “all documents and photographs” is unreasonable and irrelevant in light of the narrow scope of the evidentiary hearing.

The defendant’s request for “all documents and photographs pertaining to the investigation of Sonja J. Farak and the Amherst drug laboratory” is unreasonable and overly burdensome, particularly in light of the narrow scope of the September 9, 2013, evidentiary hearing. *See* Mass.R.Civ.P. 45(b), 365 Mass. 809 (1974) (a court may quash or modify a subpoena duces tecum “if it is unreasonable or oppressive”).

Since the scope of the evidentiary hearing is limited to the timing and scope of Farak’s alleged criminal conduct and the negative findings in the MSP Quality Assurance Audit, a large portion of “all documents and photographs” pertaining to the Farak investigation will undoubtedly be irrelevant to this hearing. *See Hull Mun. Lighting Plant v. Massachusetts Mun. Wholesale Elec. Co.*, 414 Mass. 609, 616-17 (1993) (“It is within [the SJC’s] power to vacate any subpoena which it determines is unreasonable, oppressive, irrelevant, or improper”) (citing Mass.R.Civ.P. 45(b); *Roche v. Massachusetts Bay Transp. Auth.*, 400 Mass. 217, 222 (1987)); *accord Matter of Pappas*, 358 Mass. 604, 612 (1971) (subpoenas duces tecum “are subject to supervision by the presiding judge to prevent oppressive, unnecessary, irrelevant, and other improper inquiry and investigation.”). Indeed, “[i]f [a subpoena] is unreasonable, it *must* be quashed or modified.” *Fin. Comm’n of City of Boston v. McGrath*, 343 Mass. 754, 765 (1962) (emphasis added). Since the defendant has made the broadest request he can in seeking documents, his subpoena should be quashed for being overly broad and seeking irrelevant documents.

III. This Court should quash the subpoena because documents and information regarding the ongoing criminal investigation of Sonja Farak are privileged and otherwise protected from disclosure.

Courts have found information maintained by law enforcement regarding an ongoing criminal investigation to be privileged and not subject to disclosure. *See Kattar v. Doe*, CIV. A. 86-2206-MC, 1987 WL 11146 (D. Mass. Jan. 27, 1987) (granting in part a motion to quash subpoenas for a deposition that would require disclosure of information related to an active investigation and a deposition that would require disclosure of information protected by the law enforcement investigatory privilege); *see also Puerto Rico v. United States*, 490 F.3d 50, 64 (1st Cir. 2007), *cert. denied*, 552 U.S. 1295 (2008) (recognizing a privilege for “law enforcement techniques and procedures”). “The purpose of this privilege is to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation.” *In re Dept. of Investigation*, 856 F.2d 481, 483-84 (2d Cir. 1988).

The law enforcement investigative privilege is a qualified privilege, which is “subject to balancing the [government’s] interest in preserving the confidentiality of sensitive law enforcement techniques against the requesting party’s interest in disclosure.” *Puerto Rico*, 490 F.3d at 64. To override the strong public interest in maintaining the confidentiality of information related to an active criminal investigation, a party must generally show a compelling need for the information that is sufficient to overcome the privilege. *See Gomez v. City of Nashua*, 126 F.R.D. 432, 436 (D.N.H. 1989) (granting motion to quash deposition of an assistant attorney general based on the law enforcement investigative privilege, the deliberative process privilege, and the principle that absent a compelling need, the time and energy of public officials

ought to be preserved for public business); *see also Ass'n for Reduction of Violence v. Hall*, 734 F.2d 63, 66 (1st Cir. 1984) (a party seeking discovery of privileged material “must make a threshold showing of need, amounting to more than ‘mere speculation’”) (quoting *Socialist Workers Party v. Attorney General*, 565 F.2d 19, 23 (2d Cir. 1977)).

Here, the defendant is seeking to introduce documents and testimony from Sergeant Ballou in support of his claim that his plea was not knowing and voluntary because he was unaware of Farak’s alleged misconduct. However, the proffered evidence—which is essentially evidence that could be used to impeach Farak or another witness from the crime laboratory at trial—does not shed light on the issue raised in the defendant’s motion to withdraw his guilty plea, which is whether, at the time of his plea, the defendant had the ability to plead guilty intelligently and voluntarily. Because the proffered evidence would do little to advance defendant’s claims, defendant fails to make a showing that there is a compelling need for this testimony.

In determining whether to quash the instant summons, therefore, this Court must weigh the minimal interest of the defendant in presenting documents and testimony from Sergeant Ballou against the interests of the public and the Attorney General in maintaining the confidentiality of information regarding an ongoing criminal investigation. To the extent the defendant asserts a constitutional right to elicit from Sergeant Ballou privileged information regarding the Farak investigation, the defendant “must at least make some plausible showing of how [the evidence] would [be] both material and favorable to his defense.” *U.S. v. Valenzuela-Bernal*, 458 U.S. 858 (1982).

Here, Sergeant Ballou does not have first-hand knowledge of the many of the facts and events described in the documents requested by the defendant. Therefore, his testimony would

consist largely of inadmissible hearsay. Furthermore, as this is an ongoing investigation, *see Rafuse v. Stryker*, 61 Mass. App. Ct. 585, 600 (2004), the release of much of this information could compromise the prosecution of Farak. *Id.* Therefore, much of the information is still confidential, *see id.*; *see also Globe Newspaper v. Police Comm'r of Boston*, 419 Mass. at 862.

To the extent the defendant is able to demonstrate an exception to the hearsay rule for certain proffered testimony, he must demonstrate a necessity for offering that testimony through Sergeant Ballou that outweighs the concerns underlying the investigative privilege. In addition, to the extent any such testimony is permitted, the AGO requests that the Court define clear limits in advance to avoid any unwarranted disclosure of privileged information regarding the ongoing criminal investigation of Sonja Farak

IV. Sergeant Ballou would be protected from producing documents or testifying as to his work product or any communications made to secure the enforcement of law under recognized legal doctrines.

Added to the above, certain lines of questioning would not be allowable should the defendant attempt to pursue them. First, Sergeant Ballou, working as an investigator for the AGO, would be protected from having to testify regarding his thought processes in anticipation for litigation. *See Mass. R. Civ. P. 26(b)(3); Hull Mun. Lighting Plant v. Mass. Mun. Wholesale Elec. Co.*, 414 Mass. 609, 615-616 (1993) (stating general rule that materials prepared in anticipation of litigation may be only discovered on a showing of substantial need by the party seeking the documents and a showing of that party's inability to obtain the substantial equivalent of the information elsewhere without undue hardship).

Likewise, Sergeant Ballou should not be made to produce documents containing the prosecuting AAG's work product under the attorney work product doctrine. *See, e.g., Commonwealth v. Paszko*, 391 Mass. 164, 187-88 (1984) (noting that core of work product

doctrine is protection of attorney mental processes); *Commonwealth v. Lewinski*, 367 Mass. 889, 902 (1975) (recognizing that defendant would not be entitled to access work product of prosecutor within documents); *Hickman v. Taylor*, 329 U.S. 495, 509-14 (1947) (explaining that doctrine in part protects against “inquiries into” “mental impressions of an attorney,” “personal beliefs,” and other “intangible” matters, in part due to the chilling effect on attorney work that could be produced by the mere fear of disclosure); *Commonwealth v. Bing Sial Liang*, 434 Mass. 131, 137-38 (2001), *citing Hickman v. Taylor*, 329 U.S. 495, 511 (1947) (“Proper preparation of a . . . case demands that prosecutors assemble information, sift what they consider to be the relevant from the irrelevant facts, prepare their legal theories and plan their strategy without undue and needless interference. . . . This work is reflected . . . in interviews, statements, memoranda, correspondence, briefs, mental impressions, and personal beliefs”).

Second, Sergeant Ballou, would be shielded from having to testify regarding communications made by citizens to secure the enforcement of law, under an absolute privilege held by the government. It has long been accepted in the Commonwealth that:

“It is the duty of every citizen to communicate to his government any information which he has of the commission of an offense against its laws. To encourage him in performing this duty without fear of consequences, the law holds such information to be among the secrets of state, and leaves the question how far and under what circumstances the names of the informers and the channel of communication shall be suffered to be known, to the absolute discretion of the government, to be exercised according to its views of what the interests of the public require. Courts of justice therefore will not compel or allow the discovery of such information, either by the subordinate officer to whom it is given, by the informer himself or by any other person, without the permission of the government. The evidence is excluded, not for the protection of the witness or the party in the particular case, but upon general grounds of public policy, because of the confidential nature of such communications.”

Attorney Gen. v. Tufts, 239 Mass. 458, 490-91 (1921) (quoting *Worthington v. Scribner*, 109 Mass. 487, 488-89 (1872) (involving communications made to Treasury officer, and collecting

cases involving communications made to various types of governmental officials)); *see also* *District Attorney v. Flatley*, 419 Mass. 507, 510 (1995) (noting absolute nature of privilege and fact that “[n]o subsequent Massachusetts decision modifies or abrogates either *Tufts* or *Worthington*”).¹

As a result of the above principles, the defendant’s ability to obtain testimonial evidence from Sergeant Ballou would be limited, making his compelled testimony all the more unwarranted.

V. As an alternative to quashing the subpoena, this Court should restrict its scope.

While the scope of the evidentiary hearing has been limited, to the extent that the defendant is still pursuing the broad language of the subpoena issued for documents to Sergeant Ballou, in the event that this Court declines to quash the subpoena, it should restrict its scope by relieving the obligation of the AGO to produce the following types of information:

1. Information concerning the criminal history of those other than the individual referenced in the subpoena;
2. Information concerning the criminal history of any individual prior to the incidents giving rise to the criminal matter at issue in the responsive documents;
3. Information concerning the health or medical or psychological treatment of individuals;
4. Information that could lead to identity theft or similar conduct, such as dates of birth, Social Security numbers; telephone numbers; precise addresses; and names of relatives.
5. Legal work product;

¹ This common-law privilege has been “modified” by the Massachusetts Legislature’s enactment of the Public Records Law, M.G.L. c. 66, § 10, “to the extent that if the information qualifies as a public record, the public is entitled to have access to it unless it falls within one of the exemptions provided by [M.G.L. c. 4, § 7, cl. 26].” *Rafuse v. Stryker*, 61 Mass. App. Ct. 595, 596-97 (2004). The Public Records Law obviously does not apply here, where live testimony is sought.

6. Documents that could allow the identities of complainants to be learned;
7. Emails responsive to the subpoena, but not already contained in the case files specifically listed therein.²

CONCLUSION

For the foregoing reasons, the Attorney General's Office respectfully requests that this Court quash the summons served upon Sergeant Joseph Ballou in the above-captioned matter. In the alternative, the AGO requests that the Court issue an appropriate protective order to prevent the unwarranted disclosure of privileged or protected material.

Respectfully Submitted

MARTHA COAKLEY
ATTORNEY GENERAL

Kris C. Foster (BBO #672376)
Assistant Attorney General
Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200, ext. 2833

Date: September 6, 2013

² The AGO reserves the right to raise other arguments and objections that become apparent to the extent that it further locates and reviews documents responsive to the Subpoena.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the Attorney General's Motion to Quash Subpoena issued to Sergeant Joseph Ballou upon the defendant and his counsel via electronic mail on this date.

Kris C. Foster
Assistant Attorney General

Date: September 6, 2013

EXHIBIT 24

Volume: I
Pages: 1-249
Exhibits: A-CC

HAMPDEN, SS COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

COMMONWEALTH OF MASSACHUSETTS

vs. Docket Number:

Jose Garcia,	2006-0064
Erick Cotto, Jr.,	2007-0770
Jermaine Watt,	2009-1068
Jermaine Watt,	2009-1069
Alfred Andrews,	2010-1060
Rafael Rodriguez,	2010-1181
Emilio Martinez,	2010-1220
Omar Harris,	2010-1233
Hector J. Vargas,	2011-0290
Deon Charles,	2011-0461
Marie Vargas,	2011-0801
William Guzman,	2012-0055
Jorge Diaz,	2012-0365,
Kathleen Carter,	2010-0115,
Jose Torres,	2010-0554,
Nathan Berube,	2011-0355,

Defendants

HEARING TO VACATE GUILTY PLEA/DRUG LAB EVIDENTIARY
HEARING BEFORE THE HONORABLE C. JEFFREY KINDER

APPEARANCES: (see page two)

Hampden Superior Court
50 State Street
Springfield, Massachusetts
SEPTEMBER 9, 2013

ALICIA CAYODE KYLES
Official Court Stenographer
Registered Merit Reporter

APPEARANCES:

For the Commonwealth:
Hampden County District Attorney's Office
50 State Street, Springfield, MA 01102
By: FRANK E. FLANNERY, ASSISTANT DISTRICT ATTORNEY
KATHARINE JOHNSON, ASSISTANT DISTRICT ATTORNEY

For the Defendants:
ANDREW KLYMAN, ESQUIRE, COMMITTEE for PUBLIC COUNSEL SERVICES, representing Jose Garcia (2006-0064)
JARED OLANOFF, ESQUIRE, representing Erick Cotto, Jr., (2007-0770)
JARED OLANOFF, ESQUIRE, COMMITTEE for PUBLIC COUNSEL SERVICES, representing Jermaine Watt (2009-1068)
JARED OLANOFF, ESQUIRE, COMMITTEE for PUBLIC COUNSEL SERVICES, representing Jermaine Watt (2009-1069)
ANDREW KLYMAN, ESQUIRE, COMMITTEE for PUBLIC COUNSEL SERVICES representing Alfred Andrews (2010-1060)
LUKE RYAN, ESQUIRE, representing Rafael Rodriguez (2010-1181)
ANTHONY C. BONAVIDA, ESQUIRE, representing Emilio Martinez (2010-1220)
ROBERT F. HENNESSY, ESQUIRE, representing Omar Harris (2010-1233)
JOHNATHAN R. ELLIOTT, SR., ESQUIRE, COMMITTEE for PUBLIC COUNSEL SERVICES, representing Hector J. Vargas (2011-0290)
JANET E. GLENN, ESQUIRE, representing Deon Charles (2011-0461)
RICHARD J. RUBIN, ESQUIRE, COMMITTEE for PUBLIC COUNSEL SERVICES, representing Marie Vargas (2011-0801)
NICHOLAS J. RARING, ESQUIRE, representing William Guzman (2012-0055)
JOHNATHAN BULL, ESQUIRE, COMMITTEE for PUBLIC COUNSEL SERVICES, representing Jorge Diaz (2012-0365)
MATTHEW C. HARPER-NIXON, ESQUIRE, representing Kathleen Carter (2010-0115)
WILLIAM T. HARRINGTON, ESQUIRE, representing Jose Torres (2010-0554)
DENNIS M. TOOMEY, ESQUIRE, representing Nathan Berube (2011-0355)

Also present: KRIS FOSTER, ASSISTANT ATTORNEY GENERAL

I N D E X

Witness

Cathleen Morrison.....32 (Direct/Mr. Olanoff)

.....74 (Continued Direct/Mr. Ryan)

.....78 (Cross/Mr. Flannery)

.....90 (Redirect/Mr. Ryan)

.....93 (Continued Redirect/Mr. Hennessy)

Jeremy M. Miller.....96 (Direct/Mr. Olanoff)

Joseph Ballou.....118 (Direct/Mr. Olanoff)

.....145 (Continued Direct/Mr. Ryan)

.....151 (Cross/Mr. Flannery)

.....171 (Recross/Mr. Olanoff)

.....173 (Continued Recross/Mr. Ryan)

Sharon Salem.....180 (Direct/Mr. Ryan)

.....227 (Cross/Mr. Flannery)

.....236 (Redirect/Mr. Harrington)

.....241 (Continued Redirect/Mr. Olanoff)

EXHIBITS PAGE

Exhibits A-BB..premarked exhibits.....12

Exhibit CC.....drug certificate signed 4/15/10.....239

(The Court entered at 9:04 a.m.)

THE CLERK: Commonwealth vs. Jose Garcia, Indictment 06-64, Attorneys Flannery and Klyman.

(Pause)

THE COURT: It might be easier for me to take roll, Mr. Ginley.

THE CLERK: I can call all 15 of them if you want me to.

THE COURT: No.

Counsel, good morning again. I think the first order of business should be to take attendance and determine who is here both for the attorneys and counsel, so what I'd like to do is starting with Mr. Flannery and just making our way around the room, have you announce your presence, who it is you represent, whether they are present, and whether or not they are in custody.

Mr. Flannery.

MR. FLANNERY: Good morning. Thank you, Your Honor. Frank Flannery for the Commonwealth. With me is Katharine Johnson.

THE COURT: And you represent the Commonwealth in all 15 of this cases?

MR. FLANNERY: Yes, Your Honor.

MS. JOHNSON: Good morning, Your Honor.

THE COURT: Mr. Olanoff.

1 MR. OLANOFF: Good morning, Your Honor.
2 THE COURT: Good morning.
3 MR. OLANOFF: I represent Germain Watt, two cases, and
4 Eric Cotto.
5 Mr. Watt is presently held.
6 Mr. Cotto is expected. I just have not seen him yet.
7 THE COURT: Mr. Cotto is not yet present?
8 MR. OLANOFF: Yes.
9 THE COURT: Mr. Ryan, Good Morning.
10 MR. RYAN: Good morning, Your Honor.
11 I represent Rafael Rodriguez. Mr. Rodriguez is present
12 and for the record will be in need of the services of the
13 interpreter.
14 THE COURT: All right.
15 Is the interpreter not present?
16 COURT OFFICER: Yes, Your Honor.
17 THE FLOOR: She is here, Judge.
18 THE INTERPRETER: Yes, Your Honor.
19 THE COURT: All right.
20 It might be easiest for me, if we start on this side of
21 the room and work across from my right to left.
22 Good morning.
23 MR. HARPER-NIXON: Good morning, Your Honor. Matthew
24 Harper-Nixon on behalf of Kathleen Carter. She is present
25 and not currently held.

1 THE COURT: Thank you very much.
2 MR. TOOMEY: Good morning, Your Honor, Dennis Toomey on
3 behalf of Nathan Berube.
4 He is also present. He is not held.
5 THE COURT: Good morning.
6 MR. HENNESSEY: Good morning, Your Honor. Robert
7 Hennessey on behalf of Omar Harris who is also present. He
8 is not held.
9 THE COURT: Hold on just a minute.
10 THE CLERK: Not held?
11 THE COURT: Mr. Hennessy, you said Mr. Harris is not
12 held?
13 MR. HENNESSEY: He is not held.
14 THE COURT: Moving again closest to Mr. Hennessy,
15 counsel.
16 All right. Well, let's move to counsel who I know are
17 involved and are present.
18 Mr. Rubin, you would appear to be next.
19 Why don't you come forward and join us, Mr. Rubin.
20 MR. RUBIN: Richard Rubin, I represent Maria Vargas.
21 Ms. Vargas is present. She is not held.
22 THE COURT: Mr. Bonavita.
23 MR. BONAVIDA: Judge, I represent Emilio Martinez. He
24 is in the front row. He is here. He is not held and the
25 interpreter is needed for him.

1 THE COURT: All right.
2 I note that on my list Mr. Klyman represents two
3 defendants. Mr. Olanoff, what can you tell me about Mr.
4 Klyman's presence?
5 MR. OLANOFF: Your Honor, I have not yet seen him this
6 morning. I am not sure where he is.
7 THE COURT: All right. Mr. Elliott and Mr. Raring,
8 also your colleagues?
9 MR. OLANOFF: Same. I have not seen them.
10 THE COURT: Mr. Bull? Mr. Harrington? Ms. Glenn?
11 Well, I have to say this is a disappointing beginning.
12 COURT OFFICER: Excuse me.
13 (Off the record discussion between The Court and The
14 Court Officer.)
15 THE COURT: Mr. Raring, please come forward and join
16 us.
17 I have just taken attendance.
18 MR. RARING: I apologize. I was on the second floor.
19 THE COURT: Did you go downstairs?
20 MR. RARING: I did.
21 THE COURT: Did you see anybody else down there?
22 MR. RARING: No, I did not.
23 THE COURT: Please tell me who you represent and
24 whether or not they are here and whether or not they are
25 held.

1 MR. RARING: I represent William Guzman. He is
2 present.
3 THE COURT: Is he held or not?
4 MR. RARING: No, he's free.
5 THE COURT: All right. There are a couple of
6 preliminary and administrative matters to address without
7 doing -- without all counsel and all defendants present, but
8 before we go further, if there are any defendants in the
9 room whose attorney is not present, but you are here, if so
10 could you please stand.
11 (Pause)
12 THE COURT: All right. All right. Those of you that
13 are held are represented either by Mr. Klyman or Mr. Bull or
14 Mr. Elliott; is that correct?
15 A DEFENDANT (Indicating)
16 THE COURT: You may be seated.
17 Sir, who represents you, sir?
18 A DEFENDANT: Mr. Bull, sir.
19 THE COURT: Mr. Bull, all right.
20 Now, I may have proceeded too quickly. Are any of the
21 defendants who are held represented by someone other than
22 Mr. Elliott, Mr. Klyman, or Mr. Bull?
23 (Pause)
24 THE COURT: All right.
25 A DEFENDANT: Ms. Glenn.

1 COURT OFFICER: Stand up.

2 A DEFENDANT: Janet Glenn.

3 THE COURT: Thank you.

4 All right. What I would like to do, at the outset --

5 well, let me ask another question.

6 Are there attorneys representing witnesses present who

7 have anything pending before the Court, that is, is there

8 anyone here from the Attorney General's Office?

9 (Pause)

10 THE COURT: I understand, also that Ms. Elkins has

11 filed a motion, but is not present; is that correct,

12 Mr. Ryan?

13 MR. RYAN: That is correct, Your Honor.

14 THE COURT: Then, what I would like to do is just take

15 a moment and set the stage and give the other parties some

16 additional time to arrive, before we start the evidentiary

17 portion.

18 Let me just outline what are the parameters of today's

19 hearing. The defendants are before me, all of the

20 defendants are before me today have been convicted of

21 controlled substance offenses. In each case, Sonja Farak

22 was the analyst who tested the substances to prove that they

23 were in fact controlled. In light of the fact that

24 Ms. Farak has been indicted for tampering with evidence that

25 came into her possession while she was working as an

1 analyst, each of the defendants have filed a motion for a

2 new trial.

3 (Attorney Klyman entered.)

4 THE COURT: All of which have been assigned to me for

5 resolution.

6 In the exercise of my discretion, I have allowed this

7 evidentiary hearing, but I have narrowed the scope of the

8 hearing to address only, first, the timing and scope of

9 Ms. Farak's alleged criminal conduct and how it might relate

10 to her testing in the cases before me.

11 And two, the timing and scope of the negative findings

12 in the October 2012 administration audit of the Amherst

13 laboratory and how those negative findings might relate, if

14 at all, to Ms. Farak's testimony in these cases.

15 Understanding that an evidentiary hearing with 16

16 attorneys could be cumbersome at best and time consuming, I

17 ordered, as part of my procedural order, that Mr. Olanoff,

18 in large part, because he was one of the first to have filed

19 the motions, take the lead on behalf of defense counsel to

20 coordinate the preparation of agreed exhibits and submit

21 them to the Court; and to identify witnesses and propose an

22 order of proof and who would be conducting the examination

23 of those witnesses. And Mr. Olanoff, in conjunction with

24 the District Attorney's Office has, in fact, done that.

25 I have before me two binders. They are -- contain

1 Exhibits A through double B, which I understand to have been

2 discussed among you and are now offered for admission

3 without objection; is that correct, Mr. Olanoff?

4 MR. OLANOFF: Yes, I believe that's correct, subject to

5 Mr. Flannery.

6 THE COURT: Mr. Flannery.

7 MR. FLANNERY: Your Honor, for the most part there is

8 no objection. There's really no objection to anything

9 that -- in the first binder.

10 The second binder, I think, may contain some materials

11 that fall outside of the stated scope of this hearing. I

12 don't object to the form, but I think some of these exhibits

13 may require some explanation, at least the Court may need

14 some explanation as to how they relate to the issue

15 presented in this hearing.

16 THE COURT: Well, that's a slightly different issue

17 from their admissibility. Are you objecting to their

18 admissibility?

19 MR. FLANNERY: No, Your Honor.

20 THE COURT: Is there an objection from any other

21 defense counsel as to the admissibility of the proposed

22 documents, Exhibits A through double B?

23 (Pause)

24 THE COURT: There being no objection, they are

25 admitted.

1 (Whereupon the premarked Exhibits A - BB, were offered

2 and accepted by The Court.)

3 THE COURT: All right. That is the first order of

4 business.

5 The record should now reflect Mr. Klyman is present.

6 Mr. Klyman, you represent both Jose Garcia and Alfred

7 Andrews; is that correct?

8 MR. KLYMAN: That's correct, Your Honor.

9 I ask the Court's forgiveness for my being late.

10 THE COURT: Any sighting of Mr. Elliott or Mr. Bull

11 this morning?

12 MR. KLYMAN: I have not seen or heard from either one

13 of them.

14 THE COURT: Both of them have clients involved in this

15 hearing, I would ask you, before we begin the evidence, to

16 reach out to them so we can make certain that their clients

17 are represented here today.

18 MR. KLYMAN: I will do that, Your Honor.

19 THE COURT: Thank you.

20 And are both your clients held, Mr. Klyman?

21 MR. KLYMAN: They are.

22 THE COURT: There are a couple of additional

23 preliminary matters.

24 One is the Attorney General has filed a motion, moved

25 to quash the subpoena served on Sergeant Joseph Ballou or in

1 the alternative to order a protective order on certain
2 categories of information.
3 Mr. Flannery, what can you tell me about the Attorney
4 General's whereabouts?
5 MR. FLANNERY: Your Honor, I believe there is an
6 attorney from the Attorney General's Office here. As I was
7 leaving for this hearing, I was somewhat distracted with
8 some other issues, but I was informed that she was present.
9 Maybe she's waiting in our office, waiting for someone, I
10 guess, to tell her where to go.
11 If I could perhaps have Ms. Johnson check in our office
12 and see if she's there, to bring her in here?
13 THE COURT: Please, please do so.
14 I don't expect you to speak for the Attorney General, I
15 take it this issue has not yet been resolved?
16 MR. FLANNERY: No, Your Honor.
17 THE COURT: And do we otherwise have the witnesses
18 present the defendants wish to call, Mr. Olanoff?
19 MR. OLANOFF: I'm expecting the arrival of my
20 witnesses, as you can tell, they are sort of lined up
21 between Luke and me. Mine should be here momentarily. And
22 I believe the rest are in the District Attorney's Office.
23 THE COURT: Mr. Bull, can you come forward please.
24 MR. BULL: Yes, Your Honor.
25 THE COURT: Just as a reminder, we start the 9 o'clock

1 hearings at 9 o'clock.
2 MR. BULL: Yes, Your Honor.
3 THE COURT: Please tell me who you represent, whether
4 or not they are held and whether or not they are present.
5 MR. BULL: Yes, Your Honor.
6 I represent Mr. Jorge Diaz. He is here in the
7 audience.
8 THE COURT: Thank you. I'm going to ask you to remain.
9 Now, Mr. Ryan, what can you tell me about the motion
10 filed by Ms. Elkins which relates to one of the witnesses on
11 your list?
12 MR. RYAN: Your Honor, I can tell you I spoke with
13 Ms. Elkins and she has another matter. She will be headed
14 to court. She has filed a motion to quash a subpoena that
15 we served on Nikki Lee, the spouse of Sonja Farak. And I
16 understand that she will be -- Ms. Lee is, I think, number
17 four or five on the list of witnesses to be called and I do
18 expect Ms. Elkins to be here before she would be called as a
19 witness.
20 THE COURT: All right. Thank you.
21 (Pause)
22 THE COURT: Do we have the representative of the
23 Attorney General's Office present?
24 Please come forward.
25 Good morning.

1 MS. FOSTER: Good morning.
2 THE COURT: You are, Ms. Foster?
3 MS. FOSTER: I am, yes.
4 THE COURT: We have been addressing various
5 administrative matters, one of which is the motion you have
6 filed to quash the subpoena issued to Sergeant Ballou. I
7 have read your pleading carefully. I do not need to hear
8 additional argument on the motion to quash. I understand it
9 is in the alternative a motion for protective order as to
10 certain categories of documents. The motion to quash the
11 subpoena duces tecum and to quash -- the extent that your
12 motion seeks to quash a subpoena to Sergeant Ballou for his
13 appearance and testimony here today, it is denied.
14 With respect to the request for protective order. My
15 first question is, have you actually personally reviewed the
16 file to determine that there are categories of documents in
17 the file that fit the description of those that you wish to
18 be protected?
19 MS. FOSTER: I have been talking with AAG Kaczmarek who
20 has been doing the investigation for the Attorney General's
21 Office. She has indicated that several documents, emails,
22 correspondence, would be protected under work product
23 mostly.
24 THE COURT: But you don't know, having never even
25 looked at the file, what those documents are?

1 MS. FOSTER: I -- correct.
2 I do have from Attorney Olanoff, he indicated to me
3 that he isn't seeking any documents or photographs, that he
4 expected Sergeant Ballou to just show up with a refreshed
5 memory of the record.
6 THE COURT: Well, bear with me for just a minute.
7 There are seven subcategories, documents you wish to
8 have protected. I should note just as a preliminary matter
9 that an awful lot of information has been exchanged in this
10 case already.
11 MS. FOSTER: Correct.
12 THE COURT: By my count, there were at least three
13 exhibits which have now been admitted in evidence in this
14 hearing which are the reports of Sergeant Ballou.
15 The first category of information you seek to have
16 protected is information concerning the criminal history of
17 those other than the individual referenced in the subpoena.
18 Does the file contain such information?
19 MS. FOSTER: I believe it does. And I believe defense
20 counsel is looking for criminal records of, or at least
21 background checks and personnel records of other chemists.
22 THE COURT: Is that correct, Mr. Olanoff?
23 MR. OLANOFF: Let me -- yes.
24 When I spoke to the Attorney General on Friday
25 afternoon, I said that I just wanted to cross -- sorry,

1 examine Sergeant Ballou as to what we already knew, not go
2 into anything new. However, speaking with the District
3 Attorney, there are now additional cases that just came to
4 light over Friday, Saturday and Sunday that are -- well,
5 will be pertinent to this hearing.

6 THE COURT: When you say "additional cases" what
7 category of cases are you referring to?

8 MR. OLANOFF: I am referring to cases where Sonja Farak
9 tested the drugs and there is believed to be, at least by
10 the Attorney General's Office, misconduct with respect to
11 those cases.

12 THE COURT: And how will that information relate to the
13 criminal history of others beyond Ms. Farak?

14 What criminal histories of third parties would you be
15 seeking as part of that?

16 MR. OLANOFF: I don't know.

17 (Pause)

18 MR. RYAN: Your Honor, may I be heard on this?

19 THE COURT: You may.

20 MR. RYAN: Your Honor, with respect -- I would confess,
21 I'm a little confused by Item Number One. But I think what
22 the defendants are seeking to do in this hearing is
23 establish that Ms. Farak was engaged in misconduct that
24 preceded her arrest by many years. And what we're learning
25 at this stage is that there are other cases where the law

1 enforcement believes Ms. Farak was tampering with evidence
2 and I will let Mr. Flannery address some of this, but I
3 think that it goes to the very -- the first issue that this
4 Court has flagged as why we need an evidentiary hearing is
5 to determine the timing and scope of her misconduct.

6 So if we have cases from July 2012, for example, where
7 we're now hearing that there was a large submission of
8 evidence believed to be cocaine that Ms. Farak tested and
9 there was readings that indicated this was very pure quality
10 of cocaine, and have recently been retested and now they
11 have only remnants of cocaine, it's our position that this
12 would extend the period of time when Ms. Farak was engaged
13 in evidence tampering.

14 So I think it does implicate the first item of criminal
15 history of a third party.

16 THE COURT: Here's what I'm going to do, I'm not going
17 to get bogged down arguing about what's discoverable.

18 First of all, can I ask you whether or not the file is
19 present?

20 MS. FOSTER: I don't believe it is. I -- Attorney
21 Olanoff told me he actually wasn't seeking documents or
22 photographs, that he's only seeking Sergeant Ballou's
23 testimony.

24 THE COURT: It has been subpoenaed. So there is a
25 court order that it be present here today. I haven't yet

1 ruled on it. My advice to you is to get that file here.

2 What I'm going to do with respect to your request for
3 protective order is ask you to submit to me copies of all of
4 these documents that you believe fit into one of these
5 categories that should be protected. I will review it in
6 camera, and make a determination, after hearing from you,
7 both, all, if necessary, whether or not it needs to be
8 protected further.

9 But I must say I am a little bit disturbed that a court
10 order for the production of a file has not been produced
11 absent a determination by me as to whether it should or
12 should not be produced.

13 I'm also not going to let this matter slow down this
14 evidentiary hearing which has been scheduled for a month and
15 a half. I am a little bit disappointed to learn, on the
16 morning of the hearing, that the issues which seem to me
17 could have been fairly well anticipated by everyone are
18 filed the Friday before the Monday hearing.

19 Now, I'm prepared to begin taking evidence in this
20 case. Are there any other preliminary matters that anybody
21 wants to raise?

22 MR. RYAN: With respect to Rafael Rodriguez, he had
23 filed on August 29, motions to continue and a motion for
24 relief from prejudicial joinder, which the Court ruled on,
25 but he also filed a motion for discovery which the Attorney

1 General's Office filed a rejection to.

2 This particular category of evidence, with some of what
3 Mr. Rodriguez had sought, so what we've just been discussing
4 is not only relevant to the subpoena that Mr. Olanoff sent,
5 it is relative to a motion that I filed that I don't believe
6 the Court has yet ruled on with respect to discovery in the
7 possession of the Attorney General's Office. I guess I
8 would ask for, at least, a ruling on that motion before we
9 proceed.

10 THE COURT: Well, to the extent that the motion sought
11 the production of additional discovery before this hearing,
12 it is denied as untimely. I will take under advisement the
13 motion, for future purposes, as to whether or not additional
14 discovery should be forthcoming and whether or not it might
15 require the taking of additional evidence.

16 But for purposes of today's hearing, the motion is
17 denied on the procedural grounds that it was not timely
18 filed in my view.

19 And just to elaborate on that, let me repeat what I
20 said earlier, that is that, as you all know, the conduct
21 that gave rise to today's hearing, allegedly occurred in
22 January of 2013.

23 The motions for new trial were filed some time ago in
24 an effort to coordinate a single evidentiary hearing at
25 which multiple parties could be heard. I set a schedule for

1 the hearing a month and a half out so that the issues could
 2 be brought to -- ahead in a timely fashion. And I
 3 understand, of course, that this is an evolving
 4 investigation, but coordinating a hearing at which 15
 5 defense counsel can be present and be heard at which
 6 multiple witnesses can be presented is not an easy endeavor,
 7 and I am not going to delay the hearing simply because
 8 there's a request for additional discovery, especially in
 9 light of the fact that although it's difficult for me to
 10 tell with certainty, it certainly seems that the
 11 Commonwealth has had very close to an open file discovery
 12 policy, thus given the binders of exhibits before me.

13 Mr. Ryan.

14 MR. RYAN: Respectfully, that characterization, I think
 15 I just need to be heard briefly on that. I think --

16 THE COURT: Which characterization?

17 MR. RYAN: That there's been an open file.

18 I believe Mr. Flannery has acted in good faith in
 19 turning over everything that the Attorney General's Office
 20 has turned over to him. However, I would submit that there
 21 is a substantial amount of discovery that the Attorney
 22 General's Office possesses that they don't want to give
 23 Mr. Flannery, so Mr. Flannery is in a position of not giving
 24 to us.

25 The Attorney General's Office has prevented us from

1 examining newly-discovered evidence which serves as basis
 2 for the motion of new trial based on new evidence.

3 So I think -- some of what has occurred here is
 4 equivalent in civil litigation to a document dump. We
 5 received 2500 pages of manuals for microscopes at the lab;
 6 but we don't have police reports or drug receipts or
 7 critical discovery with respect to instances where there's a
 8 belief in evidence tampering on the part of Ms. Farak.

9 I don't blame Mr. Flannery. I think he has done what
 10 he could, but this is a situation where the party in charge
 11 of the discovery has erected road blocks that have prevented
 12 the defendants from having what the Court has referred to as
 13 access to an open file.

14 So for that reason, I don't think we are in a position
 15 to come here and really have any confidence that we know the
 16 fruits of the Attorney General's investigation.

17 THE COURT: All right. Thank you.

18 MS. FOSTER: If I may add, just very briefly?

19 THE COURT: You may.

20 MS. FOSTER: I addressed this in our opposition to the
 21 motion to, discovery motion. Many of the documents the
 22 defendant is seeking the AG's Office simply doesn't have.
 23 Drug certs from drugs that were found on Ms. Farak,
 24 handwriting analyses, things like that, they are just simply
 25 not in AG's possession -- I think the drug certs, things

1 like that, would be in the DA's possession.

2 THE COURT: Well, let me ask you this, do you concede
 3 that there are some documents in the possession of the
 4 Attorney General that have not been turned over to
 5 Mr. Flannery that are the subject of disagreement in that
 6 motion for discovery?

7 MS. FOSTER: In the motion for discovery, the only
 8 thing I believe that we would disagree with turning over
 9 would be inter and intra office correspondence, which I
 10 think would be work product, classify as work product.

11 THE COURT: So you are telling me the Attorney General
 12 and the State Police have turned over their entire file to
 13 Mr. Flannery, but for that?

14 MS. FOSTER: I apologize, Your Honor.

15 I don't believe so. I believe it's 12 items that
 16 Mr. Ryan is seeking, and in his Rule 30 motion, and out of
 17 that, most of it is just not in the possession of the
 18 Attorney General's Office -- cell phone records, the AG's
 19 office never got those, never sought them.

20 Computer records, never sought them.

21 This is just a different kind of case than the Annie
 22 Dukan case. So I don't believe the investigation was quite
 23 as broad, so the only thing we would have would be emails,
 24 correspondence -- that would be for the purposes of
 25 investigation and prosecution.

1 THE COURT: I understand, of course, that you can't
 2 turn over what you don't have, you're telling me that you
 3 have listed in your opposition all of those categories which
 4 the Attorney General is not in possession of?

5 MS. FOSTER: That Mr. Ryan is seeking for his Rule 30
 6 motion, he kept his Rule 30 motion fairly narrow. He didn't
 7 seek all documents. He specified what he was seeking.

8 I did lay out, where appropriate, which ones the AG
 9 does not have.

10 THE COURT: All right. I will, as I said, I am taking
 11 that motion under advisement. I will hear additional
 12 argument on that motion, if necessary, after today's
 13 hearing.

14 Mr. Olanoff, are we ready to proceed with the evidence?

15 MR. OLANOFF: Yes, Your Honor.

16 THE COURT: Mr. Flannery?

17 MR. FLANNERY: One point I think I want to make, it's
 18 been -- there's been reference made to it, but it was in the
 19 context of this motion to quash, and I think that it may
 20 have gotten lost, but there is some new discovery, very
 21 recent discovery, that I have learned about, didn't receive,
 22 but I learned about late Friday afternoon, and I contacted
 23 Mr. Olanoff because he's been -- acted as sort of a point
 24 person for all of the defendants.

25 And it is, I think, an important piece of discovery for

1 this hearing. I was told that there were a couple of cases,
 2 but one in particular Berkshire county case, had recently
 3 been submitted for retesting. The initial analysis had
 4 been -- signed by Sonja Farak. I believe it was July of
 5 2012. The sample tested positive for cocaine. When the
 6 sample was retested at the lab in Worcester, the chemist
 7 there noted that although after retest, the sample still
 8 tested positive for cocaine, that there seemed to be a very
 9 large discrepancy in terms of the amount of cocaine, not so
 10 much the weight, but the quality of that sample.
 11 It appeared from the original file, Ms. Farak's file,
 12 that there was a high percentage of cocaine when she tested
 13 that sample.
 14 When the sample was retested, the chemist found there
 15 to be just a trace of cocaine.
 16 This, I believe -- and this, I believe, is really what
 17 the chemists are supposed to be looking for when they retest
 18 these samples in order to determine whether there's been
 19 some tampering.
 20 So, unfortunately, the timing of that information was
 21 not good. I learned this from Sharon Salem who I was
 22 calling by way of cell phone who was off that day. I
 23 contacted AG's Office right away, but it was Friday
 24 afternoon. I didn't get a response and so I had Ms. Salem
 25 bring in that material this morning. I made copies and

1 explained to counsel what it means.
 2 I just wanted to alert the Court to that and I --
 3 THE COURT: So what I hear you saying, if I'm not
 4 mistaken, is that there is new and additional information
 5 that may well be helpful to defendants at this hearing that
 6 has been turned over for the first time only recently or not
 7 even yet?
 8 MR. FLANNERY: Not even yet.
 9 THE COURT: All right. So it may -- it may be, that in
 10 light of that and other matters before the Court that we
 11 cannot finish --
 12 MR. FLANNERY: Yes.
 13 THE COURT: -- the evidentiary portion of the hearing
 14 today, but we are nevertheless in a position to make some
 15 substantial headway?
 16 MR. FLANNERY: I believe so.
 17 THE COURT: I would like to do so as much as we can
 18 today with the understanding there may be other outstanding
 19 discovery issues to be addressed and resolved.
 20 MR. FLANNERY: I am not suggesting that we can't go
 21 forward, I think there is still a lot we can accomplish. I
 22 just wanted to alert the Court there may be, initially to
 23 it, we may have an issue or two we have to preserve for
 24 another day.
 25 THE COURT: Can you tell me again or tell me for the

1 first time, when was the testing in that Berkshire County
 2 case that you just referred to?
 3 MR. FLANNERY: I believe it happened late August, the
 4 date of the analysis is August 15 and August 21.
 5 THE COURT: That's the retest?
 6 MR. FLANNERY: That's the retest, 2013.
 7 THE COURT: Do you know when the original testing was?
 8 MR. FLANNERY: I don't have the original cert but I
 9 believe the notes, they were with Ms. Salem, that was
 10 July -- I don't know the exact date -- of 2012.
 11 THE COURT: All right. Let me make another general
 12 observation about the presentation of the evidence.
 13 I understand from your pleadings your competing
 14 positions and I think many, certainly not all, but many of
 15 the underlying facts there's no dispute about.
 16 And I understand the presentation of the evidence will
 17 require some background to put everything in context, but
 18 what will be most helpful to me, as the fact finder, would
 19 be evidence that the defendants wish to present that relates
 20 directly to those issues that I have identified, that is the
 21 timing and scope of the misconduct, whether identified by
 22 audit or criminal investigation, and how it might relate to
 23 the testing in this case. So what I'm hoping is that we
 24 won't spend a lot of time going over what already is
 25 understood about the underlying criminal investigation.

1 With that preamble, let me say a couple of other things
 2 about the process of -- I don't want to curtail any defense
 3 counsel's opportunity to ask questions of a witness.
 4 I'm hoping, of course, since I believe that your
 5 interests in presenting evidence in this case are similar,
 6 if not identical, that we can do so in a streamlined
 7 fashion. And that is why I have made an effort to identify
 8 counsel who can sort of take the lead in this. That is not
 9 to say that I'm going to prohibit any counsel from asking
 10 additional questions, but I also am not going to go through
 11 lawyer by lawyer and ask if you have any questions. So I'm
 12 going to ask you to bring it to my attention if you think
 13 there's some relevant information that has not been covered
 14 by the questioning counsel on direct.
 15 So my plan will be, for example, to allow Mr. Olanoff,
 16 or Mr. Ryan to conduct their direct examinations, then turn
 17 very briefly, I hope, to defense counsel and ask a general
 18 question of defense counsel if there are other questions
 19 that any of you wish to propose that have not been covered.
 20 And then I will turn to Mr. Flannery for his
 21 cross-examination, back to Mr. Olanoff or Mr. Ryan for
 22 redirect.
 23 With that understanding, Mr. Olanoff, you may call your
 24 first witness.
 25 MR. OLANOFF: Your Honor, before I do that, may I ask

1 on behalf of these defendants that given that this hearing
 2 will be lengthy, that they be cuffed in the front?
 3 I have already one or more are uncomfortable.
 4 THE COURT: All right. Ms. Guadalupe, given the number
 5 of defendants who are present, the number of people in the
 6 courtroom, does that raise a security concern with you?
 7 COURT OFFICER: Not at this point, Your Honor.
 8 THE COURT: All right. They may do so.
 9 MR. OLANOFF: Thank you, Your Honor.
 10 (Pause)
 11 MR. HARRINGTON: Your Honor, may I address the Court?
 12 I apologize my name is William Harrington. I represent
 13 the defendant Jose Torres.
 14 THE COURT: All right. The record will reflect
 15 Mr. Harrington is present, representing Mr. Torres.
 16 That brings me back to the first issue of taking
 17 attendance.
 18 I see I have a request from the journalist in the
 19 audience to use the jury box. You may do so. I'm going to
 20 ask you to remain in the corner of the jury box closest to
 21 the TV screen, sir.
 22 (Pause)
 23 THE COURT: Is Janet Glenn present?
 24 MS. GLENN: Yes, Your Honor. I was just going to
 25 announce myself. I apologize. I arrived late as well. I

1 represent Deon Charles.
 2 THE COURT: All right. The record will reflect you are
 3 present. Is Mr. Charles held or not?
 4 MS. GLENN: He is held, Your Honor.
 5 THE COURT: I believe all counsel are now present and
 6 all defendants are now present; is that correct?
 7 (Pause)
 8 THE COURT: Seeing no hands, hearing no voices --
 9 COURT OFFICER: Excuse me, Judge, we are still missing
 10 Attorney Elliott.
 11 THE COURT: All right. Mr. Elliott represents which
 12 defendant?
 13 Hector Vargas. Is Hector Vargas present?
 14 THE INTERPRETER: Yes, Your Honor.
 15 THE COURT: Mr. Vargas, you may be seated.
 16 Is Mr. Klyman in the courtroom?
 17 (Pause)
 18 THE COURT: Can I ask one of the Court Officers to see
 19 if you can locate Mr. Klyman, please.
 20 (Pause)
 21 THE COURT: If you have -- is that the order in which
 22 you intend call the witnesses as well?
 23 MR. OLANOFF: Yes, I may switch numbers two and three.
 24 THE COURT: All right. Mr. Klyman.
 25 MR. KLYMAN: I am trying to contact Mr. Elliott.

1 THE COURT: Here's what I'm going to do.
 2 Mr. Vargas, Mr. Elliott is not present. However,
 3 Mr. Elliott works at the public defender's office, as you
 4 know. We have one, two, three, four, perhaps five members
 5 of the public defender's office present, all of their
 6 clients have the same interest in this hearing as you and
 7 Mr. Elliott.
 8 So I'm going to move forward with the hearing with the
 9 understanding that Mr. Olanoff, Mr. Klyman, Mr. Raring and
 10 Mr. Bull will advocate -- well, will be asking the same
 11 questions of the witnesses as Mr. Elliott would if he was
 12 here.
 13 Mr. Klyman, do you wish to be heard on that?
 14 MR. KLYMAN: No, Your Honor. The only thing I would
 15 ask, I am just going to call my office to have them contact
 16 him, so if I may just have a moment?
 17 THE COURT: All right. I will give you a moment, but
 18 we are about to call first witness.
 19 MR. KLYMAN: Thank you.
 20 THE COURT: Mr. Olanoff, you may call your first
 21 witness.
 22 MR. OLANOFF: Thank you, Your Honor.
 23 The defendants call Cathleen Morrison.
 24 THE CLERK: If you would raise your right hand, ma'am.
 25 (Cathleen Morrison, sworn)

1 THE CLERK: Step forward and be seated.
 2 THE COURT: Ms. Morrison, good morning.
 3 THE WITNESS: Good morning.
 4 THE COURT: Before we begin, let me just remind you to
 5 keep your voice up so I can hear you and make certain all of
 6 your answers are verbal and rather than by gesture. If you
 7 don't know a question, please let us know.
 8 If you do, please limit your question or your answer to
 9 the question posed. And, finally, we want to avoid having
 10 two people speak at once. So please wait until the question
 11 is complete before you begin your answers.
 12 You may proceed, Mr. Olanoff.
 13 MR. OLANOFF: Thank you, Your Honor.
 14 (Cathleen Morrison)
 15 **DIRECT EXAMINATION BY MR. OLANOFF:**
 16 Q. Good morning.
 17 A. Good morning.
 18 Q. Could you please state your full name.
 19 A. Sure. My name is Cathleen Morrison, M-O-R-R-I-S-O-N.
 20 Q. How are you employed?
 21 A. I'm a employed at the Massachusetts State Police
 22 Forensic Services Group in Maynard.
 23 Q. What does your job entail?
 24 A. I'm a Forensic Scientist V in the Quality Assurance
 25 Section.

1 Q. And what does that mean, what do you do?

2 A. So, as part of the Quality Assurance Section, our job

3 is to monitor things that are going on in Forensic Services

4 to make sure overall that everyone is following policies and

5 procedures.

6 Q. Do you work -- first of all, what is Quality Assurance?

7 A. Quality Assurance is a process where you ensure that

8 the procedures that are being done in the laboratory are

9 meeting the quality control specifications that you set

10 essentially.

11 Q. And do you also work in accreditation?

12 A. Yes, we do. Our lab is currently accredited by ASCLD

13 LAB, which is the American Society of Crime Lab Directory

14 Laboratory Accreditation Board. That's the agency. We have

15 standards that we are required to maintain to keep this

16 accreditation. Part of the Quality Assurance section job is

17 to ensure that the Forensic Services Group members are

18 continuing to meet those standards.

19 Q. How long have you held that position?

20 A. I've been in Quality Assurance for approximately two

21 years.

22 Q. Have you held any other jobs with the Massachusetts

23 State Police?

24 A. I have been at the Forensic Services Group for just

25 over 23 years in which capacity I have worked in

1 criminalistic unit, responded to crime scenes. I worked in

2 the drug laboratory and then I was technical leader over the

3 drug unit as well as over other sections of the laboratory.

4 Q. Is that both the labs in Maynard and Sudbury or?

5 A. That's correct. We started out in Boston, then we were

6 in Sudbury, and now we expanded and it includes Maynard as

7 well.

8 Q. Did you participate in the October 10, 2012 audit at

9 the Amherst lab?

10 A. I did.

11 Q. How did you get involved in that?

12 A. Well, part of the Quality Assurance Section's role is

13 to go out and perform periodic internal audits of all of the

14 laboratories to make sure, as I said, we are following our

15 standards. And we had recently, I think it was July 1,

16 acquired the Amherst drug laboratory as part of Forensic

17 Science Services Group.

18 So our purpose of going out to Amherst, at the

19 direction of the lab director, was to do what we call a

20 friendly audit, to see what we needed to do or what would be

21 needed to bring the Amherst laboratory under ASCLD LAB's

22 accreditation standards.

23 Q. Now, you mentioned July 1, 20-- what year was that?

24 A. 2012.

25 Q. Okay. And at that time, prior to July 1, who operated

1 that lab?

2 A. Department of Public Health.

3 Q. Okay. And so did you have any involvement with the

4 Amherst lab before July 1, 2012?

5 A. No.

6 Q. Okay. And the State Police took over that lab?

7 A. The Massachusetts State Police, yes.

8 Q. And do you know why that happened?

9 A. I don't.

10 Q. Okay. Now, was the Amherst lab an accredited lab?

11 A. They were not accredited.

12 Q. You mentioned it was a Department of Public Health lab.

13 Were there other Department of Public Health labs in

14 Massachusetts?

15 A. Department of Public Health has several laboratories.

16 I know there was one other drug laboratory one in Jamaica

17 Plain.

18 Q. So when you went out in October 10, 2012, is that the

19 first time you had been there?

20 A. No. I had been out, I believe it was in August as

21 well.

22 Q. Why did you go out in August?

23 A. In August because we had recently acquired them in

24 July 1, we wanted to, as part of Quality Assurance, go out

25 and at least see the facility, meet the staff that worked

1 there, introduce ourselves, and tell them a little bit about

2 Quality Assurance and what our purpose was with the

3 laboratory.

4 Q. And so is that basically what you did in August of

5 2012?

6 A. Yes.

7 Q. Basically a meet and greet, but did you do anything

8 else?

9 A. We did make notes of some of the things we saw in our

10 visit, but our intent was not to do a formal audit.

11 Q. Did you make any kind of observations back in August

12 2012?

13 A. I did.

14 Q. What kind?

15 THE WITNESS: Your Honor, may I refer to my notes?

16 THE COURT: You may, if it's necessary.

17 THE WITNESS: Some of the things we noticed back in

18 August, the laboratory did not have policy procedures on all

19 of the technical work they were doing. We noticed that

20 their instrument logs and their instrument calibrations were

21 a little bit different than what we were doing in our

22 laboratory in Sudbury.

23 We also had somebody come out and do a health and

24 safety audit to see what they were doing with their safety

25 regulations and their safety procedures in comparison to

1 ours, and to look at some of the case files and the evidence
 2 to see how they stored their evidence, where did they store
 3 it, et cetera.
 4 Q. (By Mr. Olanoff) Okay. And so the October 10, 2012
 5 report that we all have called the MSP Crime Lab Quality
 6 Assurance Audit, is that the audit that started in August,
 7 is that what you're telling us?
 8 A. No. August was simply -- it was, as you said a meet
 9 and greet, where we did take notes; but when we do an audit
 10 we have a process that we follow. We did not follow that
 11 process when we went in August.
 12 Q. So these are just your personal notes as to what
 13 happened?
 14 A. Yes.
 15 Q. Okay. And so was there anything glaringly wrong going
 16 on at the lab back at that meet and greet?
 17 A. No, there wasn't.
 18 Q. How involved did you get in looking in their day-to-day
 19 operations?
 20 A. We didn't get very involved back in August. It was
 21 fairly cursory. As I said, introduce ourselves, talk about
 22 the accreditation process, what we hope to do for the
 23 Amherst laboratory in terms of getting them accredited in
 24 terms of ASCLD LAB and to talk about what we did, that was
 25 essentially it.

1 Q. But Massachusetts State Police had never done an audit
 2 at the Amherst lab?
 3 A. That's correct.
 4 Q. Do you know the last time the lab had any kind of
 5 audit?
 6 A. I don't.
 7 Q. Are you aware of the -- whether the Department of
 8 Health did audits of their labs?
 9 A. I am not aware if they did.
 10 Q. Now, who was present on October 2012?
 11 A. In addition to myself there was Dr. Guy Vallaro, who
 12 was the lab director at the time; Nancy Brooks who was the
 13 Section Manager of the drug lab; and Albert Elian (phonetic)
 14 who was the technical leader at that time.
 15 Q. Who -- what about for staff at the lab?
 16 A. Jim Hanchett, Rebecca Pontes, Sharon Salem, and Sonja
 17 Farak.
 18 Q. Was there any law enforcement people there?
 19 A. No, there wasn't.
 20 Q. And was Sonja Farak there, did you mention?
 21 A. Yes, she was.
 22 Q. Now, back in October 2012, this was after the Annie
 23 Dookhan and Hinton lab case had broken, correct?
 24 A. That's correct.
 25 Q. And so did you have any involvement in that situation?

1 (Mr. Elliott entered.)
 2 Q. (By Mr. Olanoff) Did you happen to take a look at any
 3 evidence samples at the time?
 4 A. We didn't look at samples. We did look in the evidence
 5 room just to see how they stored their evidence and we
 6 noticed some of the outer packaging and how they sealed it,
 7 which is different from how we did it, but that was it.
 8 Q. Okay. So are you saying back in August of 2012 you did
 9 notice that they were not following protocols with respect
 10 to packaging samples, correct?
 11 A. I don't know what their protocols were. I just know
 12 they weren't doing it how we do it in Sudbury.
 13 Q. Did they have any written protocols back then?
 14 A. I believe that they may have had some. I didn't see
 15 any. And if -- I don't have them if they did.
 16 Q. You came back in October of 2012, why October?
 17 A. Generally, October, November, December is the time of
 18 the year that Quality Assurance does conduct its audits of
 19 all of the facilities, so it fell into that time range.
 20 Q. And is -- is this an audit that happens at all Mass.
 21 State Police labs?
 22 A. Yes. Once a year, at minimum, we are required to do
 23 internal audits and that's what we were doing.
 24 Q. And did you say it was an annual audit?
 25 A. Yes.

1 A. I did not.
 2 Q. Okay. And so the Massachusetts State Police didn't
 3 have any involvement in the Hinton lab at that time?
 4 A. The State Police did. I personally and the Quality
 5 Assurance Section had not conducted audits of that
 6 laboratory.
 7 Q. Were you privy to any of the information that, about
 8 what happened at that lab?
 9 A. I was -- just speculation. I wasn't involved in any
 10 particular audits or meetings, no.
 11 Q. Okay. So when you went to the Amherst lab, did you --
 12 did you have any particular focus on tampering and
 13 preventing tampering?
 14 A. No.
 15 Q. Okay. Now the date of the audit says October 10, was
 16 it just that day?
 17 A. That was the day we went out there. Generally, the
 18 audit process consists of, is we go out as a group and do an
 19 audit.
 20 We -- everybody will kind of spread out and focus on
 21 different areas of the laboratory and then, after the audit,
 22 we will sit down and summarize with the people who were
 23 there and what we found, and then at a later date convene as
 24 an audit team and prepare a report on our findings.
 25 Q. And did you do that in this case?

1 A. Yes.

2 Q. What was that later date that you prepared a report?

3 A. I don't know the date that we actually sat down. I

4 don't have that available.

5 Q. That's okay. That's this report, this Quality

6 Assurance Audit Report that we all --

7 A. That's correct.

8 Q. And so that wasn't drafted on October 10, right?

9 A. No.

10 Q. The report that we all have, that's Exhibit A, did you

11 participate in writing that report?

12 A. Yes, I did.

13 Q. And what exactly did you do?

14 A. So generally, as I said, when you have an audit team,

15 everyone will bring their findings. We will discuss --

16 everyone will discuss what they saw. Questions, sometimes

17 you go back and forth on whether or not something that you

18 might think might be an issue, speak with other people and

19 realize maybe it's not and then at the end, when everyone

20 comes to agreement on what the audit findings should be, one

21 person -- in this case, it was me -- will write the audit

22 report and then will send it to other people who were at the

23 audit to take a look at it and make sure I captured

24 everybody's information correctly.

25 Q. Now, the first few pages of this report, it's called

1 the audit worksheet. They are all numbered 1 through 20.

2 Are those standard questions for any kind of audit that you

3 do?

4 A. The standard questions for our laboratory, yes.

5 Q. Okay.

6 THE COURT: Mr. Olanoff, can you give me again, is that

7 Exhibit A?

8 MR. OLANOFF: Exhibit A.

9 THE COURT: Thank you.

10 Q. (By Mr. Olanoff) Now, when you went in and did the

11 audit, did you have any immediate concerns regarding the lab

12 and their practices?

13 A. No.

14 Q. How about after you did the audit?

15 A. So I'm going to step back. When I say "immediate" our

16 audit report does address something called "immediate

17 concerns". And if I can explain what that means. When we

18 were finished with the audit and we sat down and went over

19 our findings, we put things in order of what they thought

20 were immediately needed to be addressed in order to reach

21 our accreditation standards, what was not so immediate, and

22 what should be done in the long run, so --

23 Q. Okay. So were there immediate concerns?

24 A. Yes, there were.

25 Q. What were they?

1 Well, what was the biggest one that you had, in your

2 opinion?

3 A. We didn't rank them, and I don't want to speak for the

4 other people who was part of the audit team. We didn't rank

5 them in order. We just listed what all of the immediate

6 concerns were and how we hoped or what we thought needed to

7 be done to address them.

8 Q. So then, you write in the report that the chain of

9 custody was not documented fully, what does -- what is the

10 chain of custody?

11 A. The chain of custody tracks the location of the drugs

12 or any other item at any given time in terms of who takes

13 the item into their possession, where it goes, and when they

14 return it to its location. So in this case for chain of

15 custody, when we say "not documented" it was not documented

16 for short-term storage.

17 And what we meant by that was there was a drug vault

18 where drugs were stored in their main evidence vault. When

19 they took drugs to work on in the laboratory, in the

20 laboratory they had a safe, a short-term storage safe.

21 So, an analyst or examiner would take the drugs into

22 their possession and they would fill out the chain of

23 custody, but at the end of the day, if they were not

24 completed or they had not completed their examination and

25 they did not return it to the drug vault, the main drug

1 vault, they would put it in the short-term storage safe and

2 that location was not something that was documented.

3 Q. Well, you mentioned the safes. There was a main

4 evidence locker, correct?

5 A. Correct.

6 Q. And then there were two smaller temporary overnight

7 safes, correct?

8 A. I don't recall how many -- I only recall one. I'm not

9 sure.

10 Q. Okay. And so as you mention what would happen is

11 they -- no one would keep a record of what evidence was

12 being stored in those overnight safes, correct?

13 A. Well, it was -- it was -- a record was kept because it

14 would say it was in the analyst's possession or I'm not sure

15 if they call it analyst. Examiner is the word.

16 It was the -- it would say it was in their possession.

17 When they were completed with it, then the chain of custody

18 step, putting it back into the main drug vault would be

19 recorded.

20 Q. So what part was missing?

21 A. So this location, this short-term storage location was

22 not documented.

23 Q. And why would it be important to list that location on

24 the chain of custody?

25 A. Well, our laboratory lists every location where an item

1 goes, whether it be a person or a location or a shelf or a
 2 mailbox if it's a file. So we document every step of the
 3 chain of custody of an item. That's just how we do it.
 4 Q. Why? Why is that important?
 5 A. We think it's important to know where the item is,
 6 whether it be drugs or any other type of evidence at all
 7 times.
 8 Q. What are some of the dangers of not documenting where
 9 evidence is, temporarily or overnight?
 10 A. If you're looking for an item of evidence and you want
 11 to know where it is and it's not documented, you may not be
 12 able to locate it.
 13 Q. Now, did everyone in the lab have access to these
 14 overnight safes?
 15 A. All four analysts we were told had access to the safe.
 16 Q. And so would there be any record if an analyst who
 17 wasn't assigned to test the drugs came and took the drugs
 18 out? Would there be any record of that?
 19 A. No, there wouldn't.
 20 Q. And if they followed the State Police protocols and
 21 documented chain of custody, would that happen?
 22 A. If they filled out the chain of custody, yes.
 23 Q. If they filled out the chain of custody, would there be
 24 a record then of who touched the drugs every time?
 25 A. Yes.

1 Q. Okay. And would that have cut down on another
 2 chemist's ability to take the drugs out at that time?
 3 MR. FLANNERY: Objection.
 4 THE COURT: Basis of your objection?
 5 MR. FLANNERY: It's the form of the question.
 6 THE COURT: Overruled.
 7 THE WITNESS: Could you repeat the question?
 8 MR. OLANOFF: Sure.
 9 Q. (By Mr. Olanoff) By documenting chain of custody in
 10 short-term safes, would that have cut down on the ability of
 11 another chemist to take the drugs out and not have any
 12 record of where they are?
 13 A. I don't -- I don't know the answer to that question. I
 14 don't know what somebody would do, whether they sign chain
 15 of custody or not.
 16 Q. Now, also with these overnight safes, the evidence you
 17 mentioned as an immediate concern, wasn't sealed; is that
 18 true?
 19 A. That's correct.
 20 Q. Why -- what were they doing?
 21 THE WITNESS: May I refer to my notes?
 22 So, generally, in the short-term storage location where
 23 they put things temporarily, they may or may not have been
 24 sealed in that location.
 25 I don't know if they had a policy/procedure on what

1 they were supposed to do. In the main drug vault, the
 2 evidence was sealed. Some analysts initialed and dated the
 3 seal and some did not.
 4 Q. Okay. So even in the main evidence vault, some
 5 evidence was not sealed?
 6 A. No. Evidence was sealed. Some of the seals may or may
 7 not contain the initials of the submitting agency.
 8 Q. And why is it important to seal evidence in the
 9 short-term safes?
 10 A. Our laboratory or any laboratory would seal the
 11 evidence or -- I take that back.
 12 What our laboratory does is we seal and date and
 13 initial the seals so that it is very clear and apparent to
 14 us if someone were to open that seal that was not the
 15 analyst whose case it was.
 16 Q. How would you be able to tell if someone opened that
 17 and it wasn't their -- they aren't the analyst?
 18 A. If the analyst went to retrieve the evidence and they
 19 would recognize that it was not their handwritten initials
 20 on the seal, it would give an indication or it would be very
 21 clear that somebody had cut that seal or put their own
 22 initials on or tried to put someone's initials on.
 23 Q. So that would lead me to my next question. If the
 24 evidence isn't sealed, what are some of the dangers of
 25 having that evidence unsealed?

1 A. If the evidence is not sealed at all, some of the
 2 dangers are that items could fall out of the packaging and
 3 get misplaced.
 4 If items are sealed and not initialed or dated with
 5 somebody's initials, somebody could cut the seal and reseal
 6 it up and it may not be apparent.
 7 Q. And no one would ever know?
 8 A. Correct.
 9 Q. You mentioned sealing the evidence as part of State
 10 Police protocol. It's also to get accreditation, correct?
 11 A. That's correct.
 12 Q. To your knowledge, how long had the lab not been
 13 sealing its evidence in the short-term safes?
 14 A. I believe they were not sealing it until we discussed
 15 it at this audit in October.
 16 Q. So that would be the entire time DPH ran the lab,
 17 right?
 18 A. That's correct.
 19 Q. Same thing about not documenting the chain of custody;
 20 do you know how long that had been going on?
 21 A. It was going on prior to us getting there in October,
 22 so --
 23 Q. So, ostensibly through DPH control?
 24 A. That's correct.
 25 Q. Now, you also touched on labeling the evidence, as

1 well. So not only does it have to be sealed, but it has to
 2 be labeled. Why?
 3 A. We label the items of evidence with the laboratory
 4 number and the analyst's initials so we recognize this item
 5 as something we have seen and something we have tested.
 6 Q. And if -- you mentioned if the evidence isn't labeled
 7 with the chemist's initials, like you said, someone could
 8 get into and someone could enter the package, correct?
 9 A. The packaging -- the packaging is usually what was
 10 labeled, so I don't know if that would affect someone's
 11 ability to open the actual unsealed item.
 12 Q. Okay. And to the best of your knowledge, how long had
 13 the packaging not been labeled properly?
 14 A. I don't know. I don't think we addressed that, the
 15 labeling.
 16 Q. Okay. Now, moving forward, you mentioned there were
 17 some incoming weights of drug samples were not consistent
 18 with the weight when the analyst retrieved the drugs; is
 19 that true?
 20 A. So what we found -- our laboratory has -- so what we
 21 were doing was comparing what they did to what our
 22 laboratory was doing, Forensic Services Group in Maynard in
 23 terms of our accreditation standards.
 24 So with that in mind, we handled discrepancies in our
 25 evidence unit a certain way, whether they be drugs or some

1 other type of inventory discrepancy or chain of custody
 2 discrepancies we have procedures in place to discuss those.
 3 So we looked at how they would handle those similar
 4 situations, such as when drugs come into the laboratory in
 5 our Sudbury location we weigh the entire package to
 6 determine its incoming weight and then when an analyst
 7 retrieves it from the safe, we weigh the item again to make
 8 sure the weights are consistent. They were doing that in
 9 Amherst and they were doing that and recording the weight.
 10 In Sudbury, if the weight is not the same and it cannot
 11 be attributed to, weight, you know, moisture other types of
 12 variances then we would have a supervisor and/or the
 13 evidence technicians attempt to resolve the discrepancy.
 14 They were doing this similar process out in Amherst,
 15 but if they could not determine why there was a variance in
 16 the weight, then the incoming wait would be changed to the
 17 variant wait.
 18 Q. And so not only was it not documented, a supervisor was
 19 never notified, correct?
 20 A. A supervisor was notified, I believe, if there was an
 21 extensive or fairly significant weight change.
 22 Q. Okay. So just backing up, when the evidence comes into
 23 the lab it's weighed, correct?
 24 A. Correct.
 25 Q. And who would weigh that evidence?

1 A. I'm not sure who weighed it out in Amherst, it may have
 2 been Sharon Salem. I was not sure if it was her all the
 3 time.
 4 Q. She weighs the entire package and everything, correct?
 5 A. Correct.
 6 Q. And then when it's assigned to the chemist, the
 7 chemist, before they do anything, she also weighs the
 8 package, everything, correct?
 9 A. Correct.
 10 Q. And sometimes there's a discrepancy in those weights,
 11 correct?
 12 A. Correct.
 13 Q. What are some of the causes that you know for that
 14 discrepancy?
 15 A. Some of the causes may be, if it was a marijuana case
 16 and it was wet when it came in and there was some moisture
 17 that may cause the weight to vary a little bit. Sometimes
 18 the wind blowing -- if somebody is weighing, a slight breeze
 19 can shift it a little bit.
 20 Q. Is tampering another possibility why, a reason why
 21 weights may not be the same when it came in to when an
 22 analyst touched it?
 23 A. That's a possibility.
 24 Q. So what would happen in Amherst was if there was a
 25 discrepancy in the weight, the chemist herself would change

1 it in the computer, correct?
 2 A. No, if there was a discrepancy in the weight, then the
 3 chemist would bring it to, I believe, it was Sharon who was
 4 doing the -- handling the evidence, Sharon Salem. And they
 5 would discuss the incoming weights, the weight that the
 6 analyst had at this time. They would discuss the packaging
 7 and was the packaging sealed and were the right number of
 8 items there that were supposed to be there, and then if
 9 everything looked like it was in order, then they would
 10 change the weight in the computer.
 11 Q. So if cocaine came in at 10 grams and then it weighed
 12 at 6 grams when the analyst gets it, they would just sort it
 13 out with Sharon Salem?
 14 A. I don't know what they use specifically as a criteria
 15 when something was significant or not.
 16 Q. So you don't know how much would be significant to
 17 them, correct?
 18 A. That's correct.
 19 Q. But they kept no documentation of the discrepancy,
 20 correct?
 21 A. That's correct.
 22 Q. And why is it important to keep documentation of
 23 discrepancies?
 24 A. Well, we keep the documentation for a few reasons. One
 25 is to certainly document the fact that the weight is

1 different, and we need to make notation of that moving
2 forward to look for trends or patterns. Is it the same
3 evidence technician having a weight issue; and in which case
4 maybe we need to do some retraining or is it the same
5 analyst so we can detect a pattern that somebody seems to be
6 having a lot of weight discrepancies or is it an agency.

7 We look for trends so we can address them if we need
8 to.

9 Q. And what are some of the dangers of not doing that?

10 A. Some of the dangers of not doing it from a Quality
11 Assurance standpoint is you want to look for ways to improve
12 the process, if there is a way to improve it, and make sure
13 we're capturing accurate results, we would want to find out
14 the root cause of the issue and find out how to rectify it.

15 Q. Is that an area where tampering could easily happen?

16 A. Tampering could happen.

17 Q. If drugs came in at 10 grams and all of a sudden they
18 are 6, that, you know, ostensibly four of those grams could
19 have gone to the analyst and then they would just work it
20 out with Sharon Salem, correct?

21 A. That's correct.

22 Q. Now, you also had some immediate concerns regarding
23 caseworking. What is caseworking?

24 A. So some of our immediate concerns for caseworking was
25 their file system and they just filed different -- they

1 filed things differently than we did in our location and it
2 wasn't incorrect, it was just something that in order to do
3 things the way that we did, we would have had to change
4 their file system.

5 Q. Well, let me actually backup and forget caseworking,
6 but what about testing; were there issues that this lab had
7 with regard to testing the actual drugs?

8 A. They did things differently than we did in terms of
9 running standards and doing quality control.

10 Q. What is -- what are standards and quality control?

11 A. So quality control measures are put into place to
12 ensure that instruments and reagents of the testing that
13 you're doing is being done correctly.

14 And some of the -- we have standards in our drug
15 laboratory that we follow and their standards were not the
16 same.

17 Q. What is a standard?

18 A. Could you -- I'm not sure?

19 Q. You said the "standards were not the same".

20 A. When I say "standards" for example, once a week the
21 cocaine standard will be run at a low medium and high
22 concentration and that is something that their lab wasn't
23 doing.

24 Q. So a cocaine standard, do you actually use real cocaine
25 to test it, to test the actual -- the samples that come into

1 the lab?

2 A. We use pure cocaine, yes.

3 Q. You use pure cocaine, so that's the standard, right?

4 A. That's correct.

5 Q. So why is it important to test the pure cocaine that
6 you have?

7 A. So we test standards to ensure that our instruments and
8 our methods are working properly. So if we can -- if we
9 have pure cocaine, we will do all the testing on that pure
10 cocaine to ensure that we're getting the expected results
11 before we're going to try it on an actual sample.

12 Q. But they would get the pure cocaine in from a company
13 and they wouldn't test it, to see if it was actually pure
14 cocaine, right?

15 A. No, I believe they did. They did quality control
16 checks, they just weren't the same as what we did.

17 Q. Okay. And did they do them routinely?

18 A. They did them, I believe it was once a week they were
19 doing them, cocaine and heroin.

20 Q. And how often are you supposed to do it?

21 A. Every lab is different. Our laboratory runs them daily
22 and each day that somebody is working in the laboratory.

23 Q. And why would -- why do you do it daily as opposed to
24 weekly?

25 A. Just a standard we have set for ourselves. There is no

1 guideline under ASCLD that says you have to run it in
2 this -- you have to run it within 24 hours or you have to
3 run it within a week or a month. Your laboratory decides
4 what is the best practice for you and that's something we
5 decided to do.

6 Q. Okay. The same thing with heroin, they would get pure
7 heroin in from a company?

8 A. Yes.

9 Q. And to test against the drugs that were submitted to
10 the lab, correct?

11 A. Yes, I'm going to step back. I'm not sure where they
12 actually got their cocaine and heroin standards for. So
13 when we say "pure" I don't know if they -- where they got
14 them from, but in theory, yes.

15 Q. Well, did they keep any records of where they got these
16 drugs from?

17 A. They did not keep certificates of analysis, which would
18 indicate that.

19 Q. Is it possible they were using drugs that they just
20 assume were cocaine and heroin as standards?

21 A. I don't know.

22 Q. Why is it so important to have standards that you know
23 is cocaine and you know is heroin?

24 A. If you are running a standard, you want to know if you
25 have an unknown substance that you are trying to determine

1 what it is. You want to make sure what you are comparing it
2 to is a certified reference standard. That is your -- that
3 is your way of determining that what you have and you're
4 doing it a side by side or direct comparison of it.
5 Q. What's a reagent?
6 A. A reagent is generally a chemical or some other powder
7 sample, something that you're using as part of your process
8 to determine if your tests are working correctly.
9 Q. And why -- and so what did this lab, what was this lab
10 doing or not doing with its reagents?
11 A. So this laboratory -- one second, please.
12 So an example of reagent would be something called
13 Duquenois reagent, which is a reagent using color testing of
14 marijuana. So what our laboratory does in Sudbury, when
15 they make up their reagents they check them on a known
16 sample, whether it be marijuana, cocaine or heroin, to make
17 sure they are working correctly. And we do that when we
18 first make up the material and then we do it as we are
19 working on a case as well.
20 In the Amherst location they would test the reagents
21 when they first made them up, but they weren't doing them
22 periodically when they were working on casework.
23 Q. So a reagent is a substance, a chemical substance that
24 put with the drugs you are testing, the substance you're
25 testing, to -- to make a chemical reaction so you can get

1 some data on whether it's drugs or not?
2 A. That's correct.
3 Q. Okay. And so this lab didn't keep, didn't regularly
4 test its reagents, correct?
5 A. That's correct.
6 Q. Did it keep records of its reagents?
7 A. I believe they did not.
8 Q. Okay. And what were some of the dangers of not doing
9 that?
10 A. Some of the dangers of not checking or not documenting
11 your reagents is you want to look back and determine whether
12 a particular lot number or a time period was having issues
13 with the batch of reagents you made up.
14 You might not be able to get that information.
15 Q. This -- I think we mentioned it before. This lab
16 didn't have a Quality Assurance manual, correct?
17 A. That's correct.
18 Q. What is the Quality Assurance manual?
19 A. So the Quality Assurance manual is something our
20 laboratory uses as an overarching management document which
21 is, encompasses all aspects of the Forensic Services Group
22 in terms of the management system, the case file, the
23 technical component, staff, personnel QA records. And it's
24 the standards or the rules, if you want to say that, our
25 laboratories are required to follow working on cases.

1 Q. And had this lab had any training of any sort to your
2 knowledge?
3 A. Training for quality control or just training?
4 Q. Anything.
5 A. I don't know. I don't know what the -- at that time,
6 one of the things Quality Assurance does is keep the
7 training records of all staff members. We did not have
8 information on these four analysts at that time.
9 Q. Right, at the State Police lab, I would imagine that
10 chemists received regular training and regular, sort of
11 tests that they go -- their examined themselves?
12 A. The chemists in our -- the analysts in our laboratory
13 have a training program that they follow and then depending
14 on what discipline you work in there are regular proficiency
15 tests you take every year.
16 Q. And you -- are you aware if DPH ever had this lab do
17 those sorts of things regularly?
18 A. I am not sure if there are requirements. I don't
19 believe they have a training manual in place. I think they
20 did do proficiency testing.
21 Q. Why would you need a training manual at the lab?
22 A. So you want to ensure that you have a minimum -- so in
23 order to ensure someone is going to be working on a casework
24 has the proper training and experience to do the casework.
25 There are certain competency tests and required readings and

1 different things along the way to ensure they received the
2 proper training and you would document it so that everyone
3 is getting the training the same way.
4 Q. Did this lab have any documentation of training for its
5 chemists?
6 A. Not that we saw.
7 Q. Just going back quickly to the actual testing of the
8 drugs, what -- what are blanks?
9 THE INTERPRETER: I'm sorry, Mr. Olanoff. Can you
10 repeat that.
11 Q. (By Mr. Olanoff) What are blanks, blanks?
12 A. So blanks, generally as far as this audit goes,
13 referring to something on the GC-MS the gas
14 chromatograph/mass spectrometer. Blanks are something that
15 are used in between running samples to show there is no
16 carryover on your instrument.
17 For example, if you run cocaine, you run a blank in
18 between the next sample to show that it is clear and free of
19 any substance.
20 Q. And did this lab run blanks after testing each sample?
21 A. They did not.
22 Q. What are some of the dangers in not running blanks
23 after testing each sample?
24 A. It's possible that the -- depending on how concentrated
25 your sample was, that there may be something called

1 carryover where some of the sample may have stayed within
2 the instrument and carried over to the next sample.

3 Q. And so, if you were to put in a substance for the next
4 sample that is not drugs, it's something else, it could read
5 positive for drugs, if -- because of the carryover, correct?

6 A. It's possible. Generally there will be some
7 validations. They may be able to show, they may have been
8 that the concentrations that they ran have been shown not to
9 carryover to the next sample, but I'm not sure.

10 Q. I think you already touched on instrument logs. What
11 did this lab do or not do with instrument logs?

12 A. They did not keep up-to-date or current instrument
13 logs. They were performing quality control checks on the
14 instruments. That's what they told us, but we didn't see
15 any record of that or document indicating that.

16 Q. What do you keep in an instrument log?

17 A. What our laboratory does, every instrument has a
18 binder, whether it be a printed out binder, something that's
19 electronically stored, which keeps all of the information on
20 the instrument -- when you have done any maintenance on it,
21 when you ran quality control samples to ensure it's working
22 properly, when the instrument may have been out of service
23 for some reason or another, and who's performing these
24 quality control checks.

25 Q. And why is that -- why is it important to keep a record

1 of that?

2 A. We want to show them, you know, similar to what we are
3 talking about earlier, if there were trends or something
4 with -- something being wrong with an instrument, for
5 example, you know, is there a certain time of the day or
6 certain time of the year when the instrument is not working
7 properly, and we could attribute it to humidity in the room.

8 Is there a certain analyst, when running the quality
9 control checks, always seems to have problems with the
10 instrument; is there a time period when a seeing a lot of
11 carryover in our blanks and we do maintenance on the
12 instrument and then the carryover is gone.

13 So it is to identify trends when it may not be working
14 properly.

15 Q. So for example, if there's carryover on a blank from
16 testing the previous sample, there would be a record of
17 that; is that correct?

18 A. That is correct.

19 Q. Now, did you go back after October 10, 2012 to the lab?

20 A. I did not, no.

21 Q. So when there -- what are they called, "remediations"?

22 A. Remediations, yes.

23 Q. So when did you enter those remediations?

24 A. I'm not sure of the exact date. It was some time after
25 January where we spoke with staff members from the Amherst

1 laboratory to essentially follow-up on some of things we
2 talked about in the October audit.

3 Q. Did you do this over the phone?

4 A. No. They were located in Sudbury at that time.

5 Q. The Amherst people came up?

6 A. Yes, they did.

7 Q. And was the lab still in existence at that time?

8 A. The laboratory in Amherst was closed at that time.

9 Q. Okay. And so the laboratory -- it was closed because
10 of the Sonja Farak situation, correct?

11 A. That's correct.

12 Q. So then what happened is James Hanchett, Sharon Salem
13 and Rebecca Pontes are now in Sudbury, correct?

14 A. Correct.

15 Q. And they're now reporting to you, these -- their
16 updates and how things are going out at the Amherst lab,
17 whether they have implemented your suggestions, correct?

18 A. Correct.

19 Q. For the lab that was shut down indefinitely, right?

20 A. That's correct. Now remember, as I said, this is a
21 compilation of four people. This audit, including the
22 remediation, so Quality Assurance, Dr. Vallaro, Albert Elian
23 (phonetic) and Nancy Brooks were also involved with the
24 audit process. So some of the feedback that was into the
25 report would have been conversations that they had with

1 these chemists because they directly oversaw them. Quality
2 Assurance did not from October 10 until January.

3 Q. Okay. So did they ever mention -- they -- when you
4 asked Hanchett, Salem, and Pontes how things were going,
5 whether they implemented your suggestions, they didn't
6 mention anything about the fact that the lab had completely
7 lost four samples, correct?

8 A. Correct.

9 Q. They didn't mention the fact that drugs were being
10 stored at a work station for who knows how long, correct?

11 A. Correct.

12 Q. They didn't -- there's zero mention in here that one of
13 the chemists had been arrested for tampering with drugs that
14 had been submitted to the lab, correct?

15 A. That's not something we would put in a technical audit
16 report.

17 Q. Okay. Well, when it says that there's no sort of other
18 comment section under there where there could be a little
19 asterisk or footnote -- well, why even do -- why even
20 followup with a Quality Assurance if the lab is shut down?

21 A. To followup to ensure that at that moment in time -- I
22 don't know what the plan was or I certainly didn't know what
23 the plan was or is for the Amherst laboratory. So at that
24 time it was closed, but we would followup -- QA would
25 followup. I would have assumed it was going to open, so --

1 Q. Okay. When you do Quality Assurance, do you take a
2 look at the chain of command within the lab?
3 A. We look at, you know, if an analyst or we saw signs
4 that a supervisory chain, if that's what you mean, was
5 having some effect, either good or bad on something that was
6 going on, that is something we would know, yes.
7 Q. Okay. And did you take a close look at the supervisory
8 chain at the Amherst Lab for the audit?
9 A. I knew what the chain was.
10 Q. There's not really a section that talks about that on
11 the audit worksheet, right?
12 A. No, there isn't.
13 Q. But, to your knowledge, how would -- how would issues
14 be dealt with in the lab?
15 A. To my understanding Jim Hanchett was the forensic
16 scientist, at that time laboratory supervisor. Sharon was
17 the Chemist III and Sonja and Becky were Chemist IIs.
18 Q. And so how would the chemists be supervised, if at all?
19 A. I don't know the answer to that. And Jim was in the
20 laboratory. I don't know.
21 Q. Did anyone at the laboratory check the work of the
22 chemists after they tested a sample?
23 A. I believe Jim Hanchett was conducting technical reviews
24 on the casework, don't know if he looked at the evidence.
25 Q. Were those -- okay.

1 So what's a technical review?
2 A. Technical review is something where when an examiner
3 completes a case file, don't just send the report out
4 without somebody else checking the work. So, generally, you
5 will take your file and submit it to technical review.
6 There will be another qualified analyst who will review your
7 notes and your conclusions to make sure that it's -- the
8 supporting data is there.
9 Q. Okay. No one ever performed retesting of any of the
10 drugs, as sort of like an annual check or audit, right?
11 A. I don't know.
12 Q. That's not something that you would do, right?
13 A. That's correct.
14 Q. Okay. So if -- no one performed confirmatory testing
15 of any kind at this lab, correct?
16 A. One of the tests they did GC mass spectrometer is a
17 confirmatory testing.
18 Q. Okay. What is confirmatory testing?
19 A. Screening -- we have two types of testing, screening
20 and confirmatory. Screening gives you an indication drugs
21 may be present and confirmatory testing, essentially, is
22 confirming that the drug is there.
23 Q. So the same chemist who did the initial test would also
24 do the confirmatory test, correct?
25 A. That's correct.

1 Q. So if Sonja Farak thought there were drugs present in a
2 sample she would do the same confirmatory test, right?
3 A. She would continue the testing.
4 Q. Okay. For example, in other labs, one chemist does the
5 initial test, another chemist does the confirmatory test,
6 correct?
7 A. It's not what we do in our lab. I don't know, other
8 than Amherst, what other labs are doing.
9 Q. Okay. Do you think there would be some benefit,
10 though, if one -- if someone else checked the work of the
11 chemist?
12 MR. FLANNERY: Objection.
13 THE COURT: Sustained.
14 Q. (By Mr. Olanoff) Was anyone checking the work of these
15 chemists on a regular basis?
16 A. They were performing regular check reviews. I don't
17 know, when you say, checking the work, I'm not sure. I
18 don't know what you mean other than looking at -- so
19 technical review I would look at. If I was performing a
20 technical review, I would look at the data produced as well
21 as testing that case and look at it to see if the technical
22 information was supported. If the report says cocaine, is
23 the technical result in the case file to support that
24 conclusion.
25 Q. Okay. Would anyone look at the actual samples

1 themselves to see if they looked like -- for example,
2 something came in as crack cocaine, something that looked
3 like crack cocaine and after -- and then after testing it
4 looks like copper wire? I mean is anyone looking at that?
5 A. I don't know if they had a process in place for that.
6 Q. Okay. Now, at the Mass. State Police lab, how often
7 would there be supervision, how often would there be a
8 technical audit?
9 A. Technical audits are done, at a minimum, once a year.
10 All of the cases, we have 100 percent technical review, so.
11 Q. Okay. So --
12 A. And they have direct supervision.
13 Q. And you don't know how often there would be a technical
14 audit in Amherst, how often they were doing it in Amherst,
15 correct?
16 A. I don't know.
17 Q. So, theoretically, if someone wanted to -- if someone
18 had their technical audit in January, they then, for the
19 rest of the year until the next January, could then really
20 do whatever they wanted to do without being checked,
21 correct? Without having their work checked?
22 A. I think that would depend on the supervisor's role, you
23 know, in each individual location.
24 Q. Okay. In your opinion, did any of the problems that
25 you mentioned in this report, this audit, did any of those

1 allow there to be tampering of evidence in this case?

2 MR. FLANNERY: Objection.

3 THE COURT: Basis of your objection?

4 MR. FLANNERY: Form of the question. I think

5 ultimately it's up to the Court to make that determination.

6 THE COURT: Well, you're right about that.

7 The objection is overruled.

8 You may answer.

9 THE WITNESS: Would you repeat the question?

10 MR. OLANOFF: Sure.

11 Q. (By Mr. Olanoff) The problems -- out of all of the

12 problems that you mentioned in the audit, did those, some or

13 all of those make it possible for there to be tampering by

14 Sonja Farak allegedly?

15 A. I don't know. I don't know what -- having not done it,

16 I don't know what you would need to do that; so, I don't

17 know.

18 Q. Okay. Do you think -- well, do you think it made

19 tampering possible?

20 Let me put it to you another way.

21 How could the tampering have been prevented?

22 A. There were things -- there are steps that could be

23 implemented that would make tampering more evident. I think

24 such as initialing and dating seals. And that's one way.

25 I don't know -- I don't know how to answer that

1 question.

2 Q. Okay. I'm not suggesting that you've ever tried to

3 tamper or you would try to tamper, but I mean, this lab --

4 you know, had some issues, that is fair to say?

5 A. I think they had some things that they needed to do to

6 reach the accreditation standards that our laboratory has.

7 I don't know if "issues" would be the right -- I don't know

8 if that's the word I would use.

9 Q. Okay. And so, well -- what I'm getting at is, what

10 we've now seen, a couple of cases where tampering by a

11 chemist has happened. And what I'm asking is, if we -- if

12 we follow Quality Assurance, if we do those things, can that

13 cut down on tampering?

14 A. I think it would make it more difficult to do it.

15 Q. Okay. Are you saying that if someone -- if a chemist

16 wants to tamper with drugs and hide it, they can do that for

17 a good period of time?

18 THE COURT: Mr. Olanoff, I can infer, that if Quality

19 Assurance standards had been met, it would be less likely

20 for anyone to tamper.

21 MR. OLANOFF: Okay. Thank you, Your Honor.

22 Q. (By Mr. Olanoff) I'm going to give you a hypothetical

23 just to wrap it up.

24 In 2010, a chemist in the lab is careless with a sample

25 and two bags of heroin fall out of the sample from the work

1 station onto the floor.

2 The next day, maybe the same chemist or a different

3 chemist -- doesn't matter -- finds those samples on the

4 floor, those two bags of heroin, picked them up off the

5 floor, rather than throwing them out, keeps them in her desk

6 at her work lab station.

7 The chemist keeps those bag in the work station

8 unsecured for a couple of years and never notifies the lab

9 supervisor that she found two bags or that they're being

10 kept for two years in her lab work station.

11 So, my first question is, would those actions be proper

12 by the chemist?

13 A. Not according to our -- the Forensic Services Group,

14 no.

15 Q. Why not?

16 A. We have policies and procedures in place if that were

17 to occur, and I was the analyst that came in the next day

18 and found those two bag on the floor, I would immediately

19 bring it to the attention of the supervisor and the

20 supervisor and other staff members would attempt to

21 determine the origin where those two bags may have come

22 from. They would be secured in the evidence vault

23 regardless.

24 Q. What are some of the dangers of having bags of heroin

25 in your lab work station where you're testing other drugs?

1 A. Well, I don't know if "danger" is the right word.

2 The immediate concern would be that it was evidence

3 that was, regardless of what type of evidence, it wasn't

4 under proper seal.

5 Drug evidence there's no particular health and safety

6 concern other than, you know, in terms of being in that

7 location versus the drug vault.

8 Q. According to Quality Assurance, is it ever okay for a

9 chemist to keep counterfeit substances at a lab work

10 station?

11 A. All of the standards in our agency are secured in a

12 predetermined location.

13 Q. Okay. What about keeping lab evidence in your personal

14 vehicle, is that permitted?

15 A. That's not something -- no, no.

16 Q. Are chemists allowed to bring lab evidence with them to

17 court, like packaging sample -- like packaging materials?

18 A. I believe, and I believe it is the responsibility of

19 the police officers to come and pick the evidence up from

20 Sudbury and bring it to the location. The chemists

21 generally do not do that.

22 Q. What about any kind of packaging materials from old

23 cases, cases that have been resolved? Is it okay to then

24 take those things from the lab and keep them in your

25 personal -- with your personal items?

1 A. No.

2 THE COURT: By "things" what do you mean?

3 MR. OLANOFF: Packaging materials.

4 Q. (By Mr. Olanoff) Can you keep packaging materials from

5 old resolved cases in your car?

6 A. No. If they are old resolved cases I -- depending on

7 what the destruction policy of the agency was, I guess I

8 don't know. It's not something that we would do.

9 Generally our evidence room, when we destroy

10 evidence -- I believe you'd have to check with,

11 specifically, evidence supervisor, but I think the policy is

12 when we get a destruction that is still the responsibility

13 of the agency to come and pick that up.

14 Q. And what would be destroyed?

15 A. What would be destroyed?

16 Q. Yes, what gets destroyed in that process?

17 A. I don't know. We don't actually do destruction in our

18 location.

19 Q. Okay. Where's that then?

20 A. Drugs are destroyed at Department of Public Health and

21 I believe -- I'm not sure what the individual police

22 departments -- how they destroy their evidence.

23 Q. And what happens to the external packaging, like the

24 envelopes it comes in, the KPac bags?

25 A. They -- that all stays as part of the package. We

1 don't throw any of that away.

2 MR. OLANOFF: Thank you.

3 Your Honor, I have nothing further.

4 THE COURT: Further defense inquiry?

5 MR. RYAN: If I may ask opposing questions?

6 THE COURT: Briefly.

7 MR. RYAN: Thank you.

8 **CONTINUED DIRECT EXAMINATION BY MR. RYAN:**

9 Q. Ms. Morrison, to your knowledge, did anybody from the

10 Massachusetts State Police pay a visit to the Amherst lab

11 prior to July 1, 2012 in anticipation of the takeover?

12 MR. FLANNERY: Objection.

13 THE COURT: Basis for your objection?

14 MR. FLANNERY: Just the scope of this hearing.

15 As I understand it, Your Honor, Ms. Morrison has

16 testified about results of this audit. I don't know if

17 that --

18 THE COURT: How is that relevant, Mr. Ryan?

19 MR. RYAN: Your Honor, I'm trying to determine when

20 remediations were made.

21 The audit indicates, as I would ask in a question or

22 two, that staff began running blanks at some period of time.

23 I received some discovery today that I'm not sure they were

24 following remediations that Ms. Morrison and her people were

25 trying to --

1 THE COURT: Objection is overruled.

2 You may answer.

3 THE WITNESS: I am sorry. Can you repeat the question?

4 Q. (By Mr. Ryan) To your knowledge, did anybody from the

5 Massachusetts State Police pay a visit to the Amherst

6 laboratory in anticipation of the takeover on July 1, 2012?

7 A. I don't know the answer to that question.

8 Q. Do you know if anybody from Massachusetts State Police

9 went to the Amherst laboratory prior to your visit in August

10 of 2012?

11 A. I don't know.

12 Q. Do you know the date that you went to the Amherst

13 laboratory in 2012 for this meet and greet?

14 A. I do. I can -- it was August 7, 2012.

15 Q. And on that date, if you -- if I could refer you to

16 Items 12 and 14 of your technical audit report.

17 Were you told on August 7 or on August 7, did the issue

18 of running blanks between samples come up?

19 A. It just -- my notes, the blanks were run routinely. I

20 don't know. I don't recall what was meant by routinely.

21 Q. With respect to Item 12, the question was: Are

22 instruments adequate for the procedures used.

23 Your answer -- the audit team's answer was: Yes.

24 Though another GC-MS would be helpful, have three currently.

25 One is a 5975, and two are older 5973 models. And with now

1 running blanks in between samples, the instruments are

2 busier.

3 Do you see that?

4 A. Yes.

5 Q. And so was there some report that this was a recent

6 implementation of a new protocol?

7 A. Yes. Discussions with the staff there we talked about

8 do you need additional instrumentation. As part of our

9 audit is work flowing through, do you have a enough

10 instrumentation to do the work. And we were told they do,

11 but things were taking longer now because they were running

12 blanks in between samples.

13 Q. And if you look at Item 14 on the following page, when

14 it says: Just began running blanks, would be kept in batch

15 files.

16 Did they tell you when they started running blanks?

17 A. I don't have that document. I don't recall.

18 Q. And you talked about the accreditation that the Mass.

19 State Police has. And I think my notes it's ASCLD.

20 A. It's ASCLD. The acronym is ASCLD LAB.

21 Q. And are you familiar with an acronym known as SWGDRUG?

22 A. I am.

23 Q. And what does SWGDRUG stand for?

24 A. SWGDRUG stands for the Scientific Working Group for

25 Drug Analysis (sic) or Seized Drugs.

1 Q. And is it fair to say that the ASCLD standards are
2 actually higher than the SWGDRUG standards?
3 A. I don't know if "higher" would be the right word. They
4 are different, different criteria. SWGDRUG is looking
5 specifically at things related to drug cases. ASCLD is more
6 of an overarching set of standards that apply to any type of
7 forensic analysis.
8 Q. Now, with respect to the policy at the Massachusetts
9 State Police, are there regular lab hours that the labs are
10 up and running?
11 A. I'm sorry. Did you say "hours"?
12 Q. Yes.
13 A. Generally, we're open -- we have staff there as early
14 as 6:00 or 6:30 in morning. We may have staff there until 9
15 o'clock at night depending on caseload and cases that are
16 being worked on.
17 Q. Are there any policies in place that prevent
18 individuals from being in the laboratory alone?
19 A. I'm not aware of written policies. I believe it is the
20 practice in the drug unit, if you were the only person there
21 you are not to enter the drug vault. You were to do
22 administrative work only.
23 Q. And at the Massachusetts State Police, if someone were
24 to enter the drug vault, would that be a documented
25 incident?

1 A. Yes. It's an electronic key system or key fob reader
2 that we use, so entry into the drug vault or main evidence,
3 first you go through the main evidence door, then into the
4 drug vault. That would all be captured electronically.
5 Q. And at the Amherst laboratory, did they have something
6 similar in place when you paid them a visit in 2012?
7 A. I believe they had a key fob system in place.
8 Q. Do you know whether that key fob system was working?
9 A. I don't, no.
10 Q. Do you know whether there was another way to get into
11 the drug vault?
12 A. I don't know.
13 MR. RYAN: Nothing further.
14 THE COURT: Cross examination?
15 **CROSS EXAMINATION BY MR. FLANNERY:**
16 Q. Good morning.
17 A. Good morning.
18 Q. Now, you indicated that the purpose of that audit was
19 to determine whether the Amherst lab or to what extent the
20 Amherst lab was up to the standard of the State Police
21 protocol; is that correct?
22 A. That's correct.
23 Q. And that protocol is derived from standards of ASCLD;
24 is that correct?
25 A. That's correct.

1 Q. Is that a national organization?
2 A. That's actually international, it's a national
3 organization; international.
4 Q. Is it also an accrediting body?
5 A. It is, yes.
6 Q. Are there other similar accrediting entities that
7 accredit drug labs?
8 A. There is, there are.
9 Q. And so I take it that they don't all have precisely the
10 same standards?
11 A. That's correct.
12 Q. And is it up to the laboratory to choose which
13 accrediting body to seek accreditation from?
14 A. Yes.
15 Q. Now, the State Police, I take it, are accredited
16 through ASCLD?
17 A. That's correct.
18 Q. And that's where your standards come from; have you
19 always been accredited by ASCLD?
20 A. We were accredited in the process between 2001 and
21 2002.
22 Q. Okay. So prior to 2002, the State Police laboratory
23 was not accredited?
24 A. That's correct.
25 Q. And you indicated that you worked for approximately 23

1 years as a chemist or supervisor in your current capacity.
2 Prior to 2002, did you work at a State Police drug lab?
3 A. I did.
4 Q. Did you work as a chemist or supervisor or both?
5 A. I was -- both. I was a chemist for approximately seven
6 years and then I was a supervisor.
7 Q. And is it fair to say that when you were working as a
8 analyst, when you were a supervisor in those labs, the lab
9 you worked in probably would not have met ASCLD standards
10 prior to 2002?
11 A. That's correct.
12 Q. So many of the same concerns that you noted or
13 discoveries you noted with respect to the Amherst lab last
14 year, probably could have been, some of the same criticisms
15 could have been made of the State Police lab prior to early
16 as 2001?
17 A. That's correct.
18 Q. Now, Mr. Olanoff went over a few things with you. I
19 just want to quickly go through some of those. I believe he
20 began by asking you about short-term chain of custody
21 policy.
22 Now, there is a chain of custody policy or was, at the
23 time of the audit, in the Amherst lab, correct?
24 A. I believe so, yes.
25 Q. And drugs were logged in when they first came in from

1 the various police departments, right?

2 A. Yes.

3 Q. And then once a chemist was ready to analyze the drugs,

4 there was a notation as to who was the analyst who would

5 have possession of the drugs while the analysis was

6 occurring, right?

7 A. Correct.

8 Q. And then once they went back into the drug lab, there

9 was another record kept of that, right?

10 A. When they went back to the drug vault.

11 Q. I'm sorry, the drug vault?

12 A. Yes.

13 Q. So what was not up to the ASCLD standard or the State

14 Police standard occurring in between when the drugs

15 themselves were still in the analysis phase, right?

16 A. That's correct.

17 Q. And there were four people working at the lab?

18 A. Yes.

19 Q. All chemists or supervisors, right?

20 A. Yes.

21 Q. And when the drugs were being analyzed, they were

22 either, as far as you know, either at the work station of

23 the analyst or one of the floor safes, right?

24 A. In one of -- the second part, I'm sorry?

25 Q. In one of the floor safes?

1 A. Yes.

2 Q. And it was that -- it's during that period where there

3 isn't that additional level of documentation in terms of

4 chain of custody, right?

5 A. That's correct.

6 Q. Now, you also noticed that some of the samples weren't

7 sealed; is that correct?

8 A. That's correct.

9 Q. And were those the samples that were being analyzed?

10 A. Those were samples that were in the short-term floor

11 safe, yes.

12 Q. So those samples that had been analyzed and then logged

13 back into the vault, those were samples that were still in

14 the process of being analyzed?

15 A. That's correct.

16 Q. And perhaps if the chemist didn't finish the analysis

17 that day, put them into the short-term locker or safe over

18 night and resume testing the next day, but didn't seal the

19 evidence in the meantime?

20 A. That's correct.

21 Q. Okay. And that's one of the standards that -- that

22 would fall short of the standards of the State Police?

23 A. Yes.

24 Q. Or have since 2002?

25 A. Yes.

1 Q. But they would, still would have been in the locker or

2 that safe; is that correct?

3 A. That's correct.

4 Q. Okay. And as far as you knew, there are only two

5 people who typically use those safes, Ms. Farak and

6 Ms. Pontes, the other -- there's another chemist who shared

7 that safe; is that your understanding?

8 A. I don't recall who of the four who were using the safe.

9 Q. Okay. But the evidence that wasn't sealed was still in

10 a safe?

11 A. That's correct.

12 Q. Presumably a locked safe --

13 A. Yes.

14 Q. -- when it wasn't being worked on?

15 Now, you also testified in terms of record keeping that

16 or procedures, that although the drugs were weighed in terms

17 of their gross weight, when they were first brought into the

18 lab and also when they were assigned to an analyst, there

19 were some procedures that varied in terms of what happened

20 when there was a discrepancy between those two weights; is

21 that correct?

22 A. That's correct.

23 Q. All right. Now, that -- and you indicated that might

24 make it easier to gain access or it might cost someone to

25 overlook some discrepancy that might, in some cases,

1 indicate tampering, right?

2 A. They didn't document that type of discrepancy, so --

3 Q. Okay. But their procedure was similar to the State

4 Police procedure, they made that second check?

5 A. They made a second check as we do, yes.

6 Q. And in terms of whether a large discrepancy would be

7 brought to a supervisor, what would happen after that is not

8 clear, right?

9 A. Not clear.

10 Q. It is just not documented, it is not a written

11 procedure in terms of what they do at that point?

12 A. That's correct.

13 Q. And that is all before the analyst starts to analyze

14 the sample?

15 A. Yes.

16 Q. Now, in terms of the actual testing, the terms standard

17 and reagent, at least in -- from where I was sitting were

18 sometimes used in a way that I found confusing. They were

19 almost interchangeable. What's the difference between a

20 standard and reagent.

21 A. A "standard" is something that you know what it is

22 before you're starting. So, for example, if a cocaine

23 standard or heroin standard, it's material that you know the

24 composition.

25 A reagent is something you use as part of the testing

1 process. You add it to another material. It's not a known
 2 substance that is being used as a reference.
 3 Standard is something we use as a reference material.
 4 Q. Okay. If you don't know where the lab got its
 5 standards, that wasn't part of your review, correct?
 6 A. We did look at -- we did look at the standards and we
 7 noted that they don't keep the certificates of analysis on
 8 file, which is something that our laboratory uses. It tells
 9 us where the standard was purchased from, and you know, what
 10 it's chemical composition was, any testing results. They
 11 didn't have those available.
 12 Q. So the problem you noted in terms of the standards was
 13 more about documentation?
 14 A. Documentation, traceability, where did it come from.
 15 Q. And your standards required you to keep those records?
 16 A. Yes.
 17 Q. In terms of the actual testing and the machines, the
 18 way the testing was conducted, did it raise any concerns in
 19 your mind about the reliability of the end result?
 20 A. No, it didn't.
 21 Q. And given your testimony about reagents and blanks and
 22 some of these things that perhaps weren't happening or
 23 weren't being documented or at least up to the State Police
 24 standards, can you explain why it wasn't a concern of yours
 25 that some of these tests that were coming out of that lab

1 before this audit were unreliable?
 2 A. If I can step back to the question I just answered. In
 3 terms of the testing, I want to clarify a little bit.
 4 The blanks, not running a blank in between two cases
 5 was something that is not something that I would have done,
 6 or that our laboratory would have done. However, there are
 7 other laboratories that do that.
 8 They have documented studies on file to show why they
 9 don't feel that there is carryover or need to run blanks in
 10 between. It saves time and it saves money, so it's not
 11 something that our laboratory would do. But, you know, in
 12 terms of being a concern in here, it's something that we
 13 wanted to change to reach our accreditation standards.
 14 I'm sorry. Could you repeat the next question.
 15 Q. (By Mr. Flannery) Well, I guess stepping back, so in
 16 terms of the reagents and the standards, it was really more
 17 the lack of documentation that was of concern to you?
 18 A. That's correct.
 19 Q. And it wasn't because of concern about the reliability
 20 of the test, it's because in order for this lab to be
 21 accredited they had to follow certain procedures and
 22 protocols?
 23 A. That's correct.
 24 Q. Although different labs might follow different
 25 procedures and protocols, those were the procedures they had

1 to follow in order to gain this accreditation?
 2 A. To meet our standards, yes.
 3 There are laboratories who are credited that may have
 4 different quality controls and checks in places that may not
 5 run their reagents daily or weekly, like we do; that may not
 6 run blanks between their samples, like we do; but those are
 7 standards we set as an agency and that's what we were trying
 8 to -- those are the standards we wanted them to meet as
 9 well.
 10 Q. Okay. So let me ask the question again because I think
 11 it's important.
 12 As an experienced chemist and supervisor, as a member
 13 of this audit team, when you went in and you looked at all
 14 of the procedures that were in place and the machines
 15 themselves, the equipment itself, and how the equipment was
 16 maintained, did you see anything that made you concerned
 17 about the reliability of the results of the testing that was
 18 being performed at the Amherst lab, both in terms of whether
 19 the test as to whether it was a certain controlled substance
 20 was reliable and accurate and also in terms of the weight?
 21 A. No, I didn't.
 22 Q. Now, you also were asked questions about training and
 23 instrument logs.
 24 Again, in those areas was your concern mostly the lack
 25 of documentation?

1 A. Part of the Quality Assurance, yes, is having what we
 2 call Quality Assurance files in our office that maintains
 3 all of that documentation. And in order for us to assess or
 4 essentially prove that people had this training, we are
 5 looking for the documentation that supports it. So we did
 6 not have anything for them, so we asked that they start to
 7 forward those records to us. They indicated they existed,
 8 but we just didn't have them.
 9 Q. So you just didn't have them, the documentation, and it
 10 wasn't so much about whether the chemists were adequately
 11 trained, as much as it was about whether that training had
 12 been documented in a way that the State Police documents it?
 13 A. That's correct.
 14 Q. Now, you were asked about, and I think a hypothetical
 15 was used, but you were asked about whether certain items
 16 from the lab, if found in a vehicle will be considered a
 17 violation of the protocol or just sort of generally
 18 inappropriate.
 19 You were asked about whether packaging should be in a
 20 chemist's personal vehicle.
 21 I just want to make this clear. When you responded to
 22 that question, did you have in mind, in terms of packaging,
 23 the packaging that is used both to bring the drug samples to
 24 the lab as well as the KPac bags that are used to place the
 25 samples in a packaging material with the original evidence

1 bag into, and then sealed up and sent back to State Police?

2 That is what you meant by packaging?

3 A. I meant packaging to be essentially every container

4 that I'm picturing it as our laboratory would. It would be

5 a KPac, then perhaps a State Police evidence bag, and then

6 within that State evidence -- State Police evidence bag

7 there may be individual types of glassine baggies. All of

8 that is what I considered packaging, so any of those things.

9 Q. And so, let me try and rephrase that.

10 So would packaging include -- so in terms of what

11 shouldn't be in a chemist's personal vehicle, obviously,

12 anything that would be evidence, so the drugs themselves and

13 packaging material, correct?

14 A. Correct.

15 Q. And any evidence bag, typically plastic evidence bag

16 with any evidence bag that came from the originating police

17 department, right?

18 A. Correct. Something that had been marked or had a

19 laboratory number, that's what I mean by packaging.

20 Something that appeared that had been submitted as evidence.

21 Q. And something, more importantly, that drugs had

22 actually been placed into?

23 A. That's correct.

24 Q. So packaging would be something that would be used to

25 package evidence in a drug case?

1 A. Correct.

2 Q. And that would also include what are known as KPac bags

3 or the bags that the lab uses and are sealed and signed by

4 the chemist, right?

5 A. Correct.

6 Q. So you're not talking about, for example, a file that

7 an analyst might take to court in order to testify?

8 A. No, that's not packaging.

9 Q. Or an envelope an analyst might put that file into in

10 order to go and testify at court?

11 A. No, that's just simply -- no, I wouldn't consider that

12 packaging. I mean specifically related to an item of

13 evidence.

14 MR. FLANNERY: I have nothing further.

15 THE COURT: I would like to finish this witness before

16 we break.

17 Is there further redirect examination?

18 MR. RYAN: Briefly.

19 **REDIRECT EXAMINATION BY MR. RYAN:**

20 MR. RYAN: May I approach the witness?

21 THE COURT: You may.

22 Q. (By Mr. Ryan) Ms. Morrison, I'm showing you a

23 particular reading from an instrument from the Amherst

24 laboratory. It's located -- Exhibit X.

25 And could you read the date that this test was run?

1 A. Twenty-one of December, 2011.

2 Q. And RPM; is that Rebecca Pontes?

3 A. I don't know what Rebecca's middle initial is. I don't

4 know what her --

5 Q. And according to this, is this a blank sample that had

6 been run through the machine.

7 A. Yes, it's labeled as blank.

8 Q. And have you looked at Mass Spectra lately in your

9 capacity at quality control?

10 A. Little bit, yeah.

11 Q. Are you familiar with the ions that should show up in a

12 blank sample versus a sample containing cocaine?

13 A. I am familiar with the cocaine ions.

14 Q. Are there cocaine ions?

15 MR. FLANNERY: I'm sorry. I'm going to object.

16 THE COURT: The objection, it would appear to me, that

17 this is beyond the scope of cross examination.

18 MR. RYAN: Ms. Morrison testified that the use of

19 blanks is just for accreditation purposes. This is sort of

20 a theoretical problem that can arise.

21 I'm presenting the witness with a blank that was run at

22 the Amherst laboratory that I believe the witness, if she's

23 up to speed with this, would have to acknowledge contains

24 ions of cocaine that shows the carryover to which she said

25 is just a theoretical possibility.

1 THE COURT: As the fact finder, I don't find that

2 particularly helpful. The objection is sustained.

3 Q. (By Mr. Ryan) Ms. Morrison, are you familiar with what

4 the blank policy was at Amherst?

5 A. I'm not.

6 Q. I show you a document.

7 (Pause)

8 Q. (By Mr. Ryan) Showing you a document, is that the

9 Amherst laboratory blank policy?

10 A. I have never seen this before, so I don't -- I mean,

11 it's marked University of Massachusetts Medical School Drugs

12 of Abuse Lab. This is not the Amherst laboratory. This is

13 the UMASS Medical School Drug Lab in Worcester, so this is a

14 different laboratory.

15 Q. Is this a blank policy that reflects that samples of

16 blanks are run between every sample?

17 (Pause)

18 Q. (By Mr. Ryan) Directing your attention to what's been

19 underlined up there? (Indicating)

20 A. I just want to read the whole thing.

21 (Pause)

22 THE WITNESS: Okay. Can you repeat the question?

23 Q. (By Mr. Ryan) Is this a sample that reflects that

24 blanks should be run between every sample that's analyzed at

25 the laboratory?

1 A. At that particular laboratory, yes. As I said, that is
2 not the Amherst laboratory.

3 THE COURT: Further inquiry?

4 MR. RYAN: I have one last question.

5 Q. (By Mr. Ryan) Showing you a document labeled with
6 Quality Assurance, I ask you to read the very first line.

7 A. All procedures performed are the same as any accredited
8 drug analysis laboratory.

9 Q. At the Amherst laboratory, is that a true and accurate
10 statement of what you found when you did your technical
11 audit in October of 2012?

12 A. No.

13 MR. RYAN: Nothing further.

14 THE COURT: Recross examination?

15 MR. FLANNERY: Just one question.

16 THE COURT: I'm sorry. We have questions from --

17 MR. HENNESSY: Robert Hennessy on behalf of Omar
18 Harris.

19 I have a question for the witness.

20 **CONTINUED REDIRECT EXAMINATION BY MR. HENNESSY:**

21 Q. On direct and cross examination you talked about the
22 Amherst lab's way of dealing with discrepancies between
23 weights on their weight coming in and the time they are
24 weighed by the analyst?

25 A. Yes.

1 Q. And I believe on cross examination you were asked or
2 about to characterize the deficiencies of the Amherst lab.

3 I think the question was whether or not it was just the
4 documentation issue, it's a failure to document these
5 discrepancies and you agreed it was?

6 A. Yes.

7 Q. But in your audit report, you actually say that the
8 policy of Amherst lab when it was a discrepancy, was to
9 change the weight in the computer?

10 A. Yes.

11 Q. And that's the weight coming in, right?

12 A. Incoming weights, yes.

13 Q. So it was just that they weren't documenting these
14 discrepancies, they were actually hiding them or at least
15 correcting them in such a way that they wouldn't appear,
16 going forward as a discrepancy?

17 A. I don't know. I don't know what they did with that
18 information, there was no indication to us that that was
19 something they were documenting or tracking.

20 Q. But, just hypothetically, if something you were
21 discussing came in at 10 grams and then it was weighed by
22 the analyst and it came in at 6 grams, and the resolution or
23 the way of dealing with that was to go back to the initial
24 weight and change it to 6 grams, wouldn't that cover up that
25 discrepancy?

1 A. I don't know if "cover up" is --

2 Q. Well, wouldn't that create a record where that
3 discrepancy did not exist anymore?

4 A. Yes.

5 MR. HENNESSY: I have no further questions.

6 THE COURT: Recross examination?

7 MR. FLANNERY: I have nothing.

8 THE COURT: You're excused. Thank you.

9 (The witness stepped down.)

10 THE COURT: We are going to take 15 minutes recess. We
11 are going to start in 15 minutes whether all defendants and
12 counsel are present or not. So if you wish to participate,
13 please be here.

14 The record should reflect that Mr. Elliott is now here
15 and he has been here through most of the testimony of that
16 witness.

17 (The Court exited at 11:01 a.m.)

18 (* * * *)

19 (The Court entered at 11:17 a.m.)

20 (The defendants and interpreter were present.)

21 THE COURT: Mr. Olanoff, are you prepared to call your
22 next witness?

23 MR. OLANOFF: May I call the third witness, please,
24 he's from out of town.

25 THE COURT: You may.

1 MR. OLANOFF: Defendant will call Jeremy Miller.

2 THE COURT: All right. Mr. Miller, you may come
3 forward.

4 (Jeremy Miller, sworn)

5 THE COURT: Mr. Miller, were you in the courtroom to
6 hear my cautionary instructions for the last witness?

7 THE WITNESS: Yes, I was.

8 THE COURT: Please bear those in mind.

9 You may proceed.

10 (Jeremy M. Miller)

11 **DIRECT EXAMINATION BY MR. OLANOFF:**

12 Q. Good morning. Please you state your name.

13 A. Jeremy Michael Miller, M-I-L-L-E-R.

14 Q. Thank you. How are you employed?

15 A. I'm employed with the Massachusetts State Police
16 Forensic Services Group in Maynard, Mass.

17 Q. Do you have a particular title there?

18 A. I am the Evidence Control Unit and LIMS Administrator.
19 LIMS stands for Laboratory Information Management System.

20 Q. And what exactly does your job entail?

21 A. I have overseen the evidence technicians assigned to
22 the evidence control unit for the Massachusetts State Police
23 to ensure that the evidence technicians are following their
24 policies and procedures dictated in our evidence control
25 manual.

1 Q. And when you say "lab evidence technician", do you mean
2 chemists?
3 A. The evidence technicians under the State Police are
4 actually civilian technicians, they are not analysts.
5 Q. Okay.
6 A. They don't analyze the evidence, they just receive the
7 evidence when it comes into the lab.
8 Q. Oh, I see. Are you familiar with Sharon Salem?
9 A. Yes, I am.
10 Q. Would she be the equivalent of a lab evidence
11 technician?
12 A. She performed similar duties as an evidence technician,
13 correct.
14 Q. How long have you held that position?
15 A. I've been employed since August 7, 2000, so over 13
16 years.
17 Q. Have you held any other positions with the
18 Massachusetts State Police?
19 A. I was hired as evidence technician, so I have been an
20 administrator since probably 07.
21 Q. Okay. And what -- now, I'm going to direct your
22 attention to an inventory that happened at the Amherst lab
23 in January 2013. Did you participate in that?
24 A. Yes, I did.
25 Q. How did you become involved in that?

1 A. Major James Connolly instructed me to report, I believe
2 it was January 19, to conduct an inventory of the Amherst
3 evidence room.
4 Q. Had you ever been to the Amherst lab before?
5 A. Yes. I believe either August, September 2012.
6 Q. Why were -- why did you go then?
7 A. I was asked to conduct an inventory at that time as
8 well.
9 Q. Okay. And that was August of?
10 A. I want to say it was early September 2012.
11 Q. And what is an inventory?
12 A. An evidence inventory is a process of taking evidence
13 control sheets that are printed from our management system
14 and verifying that the evidence, the samples are present at
15 that time.
16 Q. When you went out and let's just call it August of
17 2012, to conduct the inventory, who else participated in
18 that -- in that inventory with you?
19 A. Forensic Scientist Caroline Tatro and Forensic
20 Scientist Sharon Salem.
21 Q. Did you generate a report as a result of that
22 inventory?
23 A. I did.
24 Q. Do you happen to have that report?
25 A. I don't, not with me today.

1 Q. Do you happen to recall what the results were of that
2 inventory?
3 A. To the best of my knowledge, all samples were present
4 during that inventory.
5 Q. Okay. Did you notice any deficiencies in packaging of
6 samples at that time?
7 (Pause)
8 A. I don't remember any deficiencies at that time.
9 Q. Would it be possible for you to provide the Court and
10 the attorneys, at a later time, that report when you have
11 it?
12 A. Yes.
13 Q. Okay. And so did -- when you went to the Amherst lab
14 on January 19, 2013, what was -- why were you there?
15 A. I was informed that there was an alleged tampering
16 incident with one of the analysts at the Amherst lab.
17 Q. And where did the inventory actually take place?
18 A. At the Amherst drug lab in the evidence room.
19 Q. And when you say the "evidence room" do you mean the
20 main evidence safe or locker?
21 A. Yes, there's a walk-in evidence room locker, correct.
22 Q. Okay. And who was present with you for that inventory
23 process?
24 A. Detective Lieutenant Paul Magee, Jr., Lieutenant Danny
25 Regan, Jr., Lieutenant Paul Letsche, Jr., and Sergeant Roger

1 Tatro, Jr., Bruce Kranston (phonetic), Sharon Salem and
2 myself.
3 Q. Okay. And were some of those law enforcement officers?
4 A. Yes, they were State Police lieutenants and sergeants.
5 Q. And were there any other sort of scientists there
6 besides you?
7 A. Only forensic scientist Sharon Salem.
8 Q. And was a report generated from that inventory process?
9 A. Yes. Yes.
10 MR. OLANOFF: And, Your Honor, if I could approach the
11 witness, please?
12 THE COURT: You may.
13 Q. (By Mr. Olanoff) I'm showing you what's been marked
14 Exhibit B. Do you -- that is the report that was generated?
15 A. Yes, it was.
16 Q. Okay. What is the inventory process like?
17 A. The first step is to receive a printout, the forms from
18 the management system, which in this case was presented by
19 Sharon Salem, and then the -- break out into teams to start
20 the process of just documenting that each sample is present.
21 Q. Captain, so was the Amherst lab able to provide you
22 with a printout of all of the samples that they supposedly
23 had?
24 A. Yes. Yes. Yes, they did.
25 Q. And how -- do you remember how many samples they

1 supposedly had at that time?

2 A. Approximately 1400.

3 Q. Okay. And how were these samples labeled?

4 A. The Amherst drug lab has a unique identifier starting

5 off with A for Amherst; the year, for example, A12, 2012;

6 then a sequential number thereafter, 001.

7 Q. They don't use case numbers, right?

8 A. Just sample numbers.

9 Q. Okay. And so once you've identified the print- -- once

10 you have the printout of the samples that are supposedly

11 there, then what do you do?

12 A. You verify any deficiencies in seals as well, for

13 example, a package wasn't sealed properly. And what I mean

14 by seal, the -- if it's a plastic bag, the State Police will

15 heat seal the package and initial and date the seal. That,

16 for the State Police is what we ensure is a seal.

17 Check the item, the sample is there, and then mark

18 anything that's not there.

19 Q. Now, you said that you were in the main evidence room.

20 Were all of the samples on the printout in that room?

21 A. No, they were not.

22 Q. Could you explain further?

23 A. There were four samples that were not present during

24 the inventory.

25 Q. Okay. Were those eventually located?

1 A. To my knowledge, no.

2 Q. And are those the four samples that are listed in Item

3 Number One there?

4 A. Correct.

5 Q. That inventory report form?

6 A. Yes.

7 Q. And you said if there were deficiencies in packaging

8 you would correct those deficiencies?

9 A. Correct.

10 Q. What type of deficiencies would there be in packaging?

11 A. One example would be for our State Police standards,

12 initials and date of the person who sealed the evidence were

13 not present; possibly a package that was thin or tearing in

14 some sort, we may reinforce that packaging.

15 Q. Okay. So were there, aside from Item Number One, those

16 four samples, were there any other samples that you could

17 not locate?

18 A. No.

19 Q. Okay. And how many of these inventories have you done

20 in your career?

21 A. I would say over two dozen at least. The State Police

22 crime lab does minimum of three a year of our evidence

23 rooms.

24 Q. How long did this particular inventory take?

25 A. Approximately four hours.

1 Q. And you said you divided up the work so you would give

2 each person there a list of items to find?

3 A. Correct.

4 Q. Okay. You have, in the past, seen items go missing

5 from labs?

6 A. Misplaced, not missing.

7 Q. Was this the first time you had seen items missing?

8 A. There probably had been times, very rare occasions

9 where we are unable to find something, but at a later date

10 that evidence may have been returned and accidentally not

11 scanned in the system, so we have been able to rectify

12 those.

13 Q. Did the Amherst lab use a scanning system?

14 A. They did have a bar code, but they didn't use the

15 inventory management system that I'm familiar with, so I

16 don't believe they scanned the evidence.

17 Actually, incorrect. I do believe they scanned the

18 evidence there.

19 Q. But you did all of this by hand, correct?

20 A. Correct.

21 Q. So you would have to look, find the -- you would find a

22 sample number on the form, and then you would have to go in

23 the evidence locker and find the corresponding sample,

24 correct?

25 A. Yes.

1 Q. Were there any other samples that were not in -- that

2 were not inside the locker?

3 A. There were samples in a temporary storage safe in the

4 lab, and we also found a substance form in a drawer. We

5 were also looking through all of the drawers in the lab and

6 I believe, from memory, there was a white box that had some

7 type of substance in it that we also documented.

8 Q. Okay. So going down the list there to number two, it

9 says: Control samples were found in a chemist's work area.

10 What are "control samples"?

11 A. A control sample is used by an analyst to document if

12 that sample is actually a controlled substance.

13 Q. Okay. Is that something that would typically be found

14 in a chemist's work area?

15 According to standards and protocols?

16 A. No.

17 Q. Where should it have been?

18 A. It should be in a controlled, safe, locked area in the

19 laboratory.

20 Q. Do you remember what chemist's area it was located at?

21 A. I don't -- I don't recall. I don't remember whose

22 station was.

23 Q. Was there one particular station in this lab where you

24 found a number of other things that shouldn't have been

25 there?

1 A. No.

2 Q. And having those controlled samples at the chemist's

3 work area, would that have been in compliance with national

4 standards?

5 A. I don't believe so.

6 Q. Now, you also, going down to Number 3 found a white box

7 containing three heat-sealed packages containing

8 miscellaneous contents. What is this white box you refer

9 to?

10 A. I'm not a forensic scientist, so I can't tell you what

11 the substance was. It was just a -- a white box, possibly a

12 battery and a liquid-type substance.

13 Q. And so that, to you, was an unknown substance?

14 A. An unknown substance.

15 Q. And typically, according to the protocols and

16 standards, should that substance have been anywhere in a

17 chemist work area?

18 A. I wouldn't think so.

19 Q. So, to your knowledge right now, you don't know whose

20 work area that was found?

21 A. I don't believe I remember. No, I don't recall.

22 Q. And you don't remember what the contents -- what those

23 miscellaneous contents were?

24 A. No, sir.

25 Q. The white box, when you say a white box you're

1 referring to a white bin, a plastic bin?

2 A. It was a small, almost like a jewelry box type.

3 Q. Going down to Number Four, miscellaneous platinum

4 dishes in an open safe. Are you referring to -- what was

5 that all about?

6 A. In the evidence room where the inventory was being

7 conducted it's also where the samples would come in from the

8 submitting agencies, there was a safe on -- a floor safe and

9 there was petty cash. I guess the office kept petty cash in

10 it and we also found these platinum dishes. We thought they

11 may be of some value so it was worth documenting that these

12 platinum dishes were found in the safe just for control

13 purposes.

14 Q. Okay. Would those particular platinum dishes normally

15 be found in the evidence room?

16 A. Not normally. It wasn't something I had seen before.

17 Q. Okay. Are they supposed to be at some other place in

18 the lab?

19 A. Honestly, I don't know why they were there and what

20 purpose they have.

21 Q. Okay. But to the best of your knowledge, they were

22 there to weigh incoming samples?

23 A. They were just platinum dishes. And again, it was more

24 of controlling them for in case they had any financial value

25 to them.

1 Q. I see.

2 Now, going down to number five, on the report form. It

3 says: Several samples were repackaged during inventory

4 because of deficiencies in the packaging seals.

5 And you already mentioned the -- the different types of

6 deficiencies, like it's not sealed properly. Were there

7 also problems with labeling?

8 A. I don't -- labeling in the sense there weren't initials

9 and date of the person who sealed the evidence for,

10 approximately -- I think it was around 50 or so packages

11 that did not bear the initial and date, if that's what you

12 mean by labeling.

13 Q. Why would you look for that sort of thing?

14 A. That's one requirement by the State Police. One of our

15 requirements is that any piece of evidence, a sample, is

16 uniquely identified with initials and date of the person who

17 sealed the evidence. When these packages were found, we

18 sealed them into a heat-sealed packet and initialed and

19 dated it.

20 Q. Why is it important to have the initials and date on

21 the packaging whenever someone seals it?

22 A. For chain of custody purposes to ensure tampering

23 doesn't occur with the evidence.

24 Q. Is that one of the, sort of the risks of not labeling

25 the heat seal?

1 A. Tampering, correct.

2 Q. Now, in number five, you -- the -- on the form it's

3 listed, the sample numbers that had to be repackaged,

4 correct?

5 A. Correct.

6 Q. And there are a couple of samples that are grouped.

7 For example A12-5080 through A12-5153. That's approximately

8 70 -- more than 70 samples right there, correct?

9 A. Correct.

10 Q. So, if -- taking them all together, there's over 100

11 samples there that had to be repackaged, correct?

12 A. Yes. One thing to note, there may be multiple samples

13 per package.

14 Q. Okay. So even though there's one lab number listed

15 there, there could be multiple, actually drug samples

16 contained in it?

17 A. Yes.

18 Q. And so do you happen to remember how many drug samples

19 this refers to, aside from the case numbers?

20 A. The samples alone? I think it's close to 100 samples

21 listed in number five and approximately 50 packages.

22 Q. Okay. And these -- were these items that weren't

23 sealed properly by submitting agencies or by chemists at the

24 lab?

25 A. Specifically number five, I believe, were submitting

1 agencies.

2 Q. Okay. Contained within those five were there -- I'm

3 sorry, contained within those 100 samples, were there some

4 packaging deficiencies by chemists at the lab?

5 A. Not to my knowledge, not number five.

6 Q. Okay. Did you write a supplemental report regarding

7 your -- the inventory you conducted?

8 A. Yes, I did.

9 Q. Okay. If you can flip the page there, is that a copy

10 of your report?

11 A. Yes, it is.

12 Q. All right. Going down to number three on your report,

13 it says: Approximately 44 samples did not have the initials

14 of the person who sealed them or the date they were sealed.

15 Is that correct?

16 A. Correct.

17 Q. And were these 44 samples in addition to the 100 or so

18 that you mentioned in the other report?

19 A. No, they are bullet number five in the original report,

20 part of.

21 Q. And who didn't put their initials and the date when

22 they were sealed?

23 A. The local -- the submitting agency, the local police

24 departments.

25 Q. Okay. Were there any samples that you found that were

1 not sealed properly or by chemists at the lab?

2 A. I believe there's one sample post-analysis that did not

3 bear the initials and date of the chemist that sealed it.

4 Q. Okay. Is that listed in number six of your first

5 report?

6 A. Yes.

7 Q. Okay. And do you recall the chemist that did not seal

8 that item properly?

9 A. I don't recall.

10 Q. Okay. And you recall whether it was a sealing issue or

11 a labeling issue?

12 A. I believe in that case it was the initials of the

13 chemist were not on the seal.

14 Q. When evidence is submitted from an agency and it's not

15 packaged properly, what should happen -- what should the lab

16 do?

17 A. The Massachusetts State Police, we will address it at

18 the point of submission, meaning we will inquire the

19 submitting officer to seal the evidence prior to submitting

20 it to us.

21 Q. Okay. Now, the hundred or so samples that are

22 mentioned in number five, you mentioned the labeling system,

23 number evidencing system at the Amherst lab, some of them

24 are A12 and some of them are A13, correct?

25 A. Correct.

1 Q. We'll get to those in a second.

2 Are there any other samples there that don't have a

3 letter A and year after it?

4 A. Yes.

5 Q. And what are those?

6 A. Proficiency tests, competency tests that an analyst

7 will take.

8 Q. What do you mean by that?

9 A. To the best of my knowledge an analyst has to perform

10 annual proficiency tests. So an external laboratory will

11 mail the actual sample to the laboratory for the analyst to

12 analyze.

13 Q. So those were not sealed properly, a couple of those

14 items?

15 A. Yeah, to my knowledge, they did not bear the initials

16 and date of the person who sealed the evidence.

17 Q. And who would have been the person in charge of sealing

18 had that rise?

19 A. I would assume a Sharon Salem at the Amherst lab.

20 Q. So going back to the samples labeled A12 and A13.

21 Those are samples from the 2012 and 2013, correct?

22 A. Correct.

23 Q. And when I say from those years, I mean they were

24 submitted by a submitting agency in 2012 and 2013?

25 A. Correct.

1 Q. So if an item is submitted in -- on January 1, 2013 it

2 will be A13, correct?

3 A. Correct.

4 Q. So it has nothing do with when the analyst analyzes the

5 substance, correct?

6 A. Correct.

7 Q. So the A12s that are there, do you happen to know how

8 far back they went?

9 A. I don't.

10 Q. You don't know -- happen to know the earliest that

11 evidence was submitted, but not sealed properly?

12 A. I don't remember the actual dates of the samples of

13 when they were submitted.

14 Q. Okay. Are you aware of how long the backlog was at the

15 Amherst lab, that type?

16 A. I believe the backlog was approximately 3 to 400 cases

17 with their backlog.

18 Q. Are you able to give an estimate how many months that

19 number of cases would be in the backlog?

20 A. Approximately six months.

21 Q. Okay. And so, safe to say, just estimating here that

22 those A12s could go back as far as six months before you did

23 your inventory, correct?

24 A. Correct.

25 Q. So in other words, samples were submitted by law

1 enforcement agencies and they may not get to testing until
 2 six months later; is that correct?
 3 A. That is correct.
 4 Q. So these samples would, I guess, sit in the evidence
 5 room waiting to be tested then and they were not sealed
 6 properly, correct?
 7 A. They didn't bear the initials and date of the person
 8 who sealed it, correct.
 9 Q. Okay. Did any of those have a heat-seal issue or just
 10 initials and dates?
 11 A. To my knowledge, it was just the initials and date.
 12 Q. Okay. If a chemist from the lab wanted to go into some
 13 of these hundred or so samples that were waiting to be
 14 tested in the evidence room and wanted to tamper with them,
 15 and then re-heat seal it, would that have been possible?
 16 MR. FLANNERY: Objection.
 17 THE COURT: Overruled.
 18 You may answer.
 19 THE WITNESS: It would be possible.
 20 Q. (By Mr. Olanoff) Would there be any record of that
 21 happening?
 22 A. No record.
 23 Q. Would it be possible to, by looking at it, see that
 24 something happened?
 25 A. The -- I remember these seals in specific. They didn't

1 appear to have any tampering, meaning that they still looked
 2 like they were in the same length and form. They had no
 3 inconsistencies to them to show that someone had opened it
 4 up and, you know, would be a shorter package if it was cut
 5 and sealed. The -- there was -- to my knowledge, there
 6 wasn't any issues, per se, to those.
 7 Q. Well, getting into the drugs can be cut in a number of
 8 ways. You can slice into it or you could unseal it and then
 9 re-heat seal it, correct?
 10 A. At the -- when an analyst opens up a package at our lab
 11 they usually use scissors to open it up and then they will
 12 place the seal into the heat-seal packet and then reseal it.
 13 Q. So there will be a packet within a packet, right?
 14 A. Yes.
 15 Q. So there will be a packet with a slice -- with a cut
 16 into it and it will be inside of another heat-sealed packet?
 17 A. Correct.
 18 Q. Okay. Are you aware of whether this lab had a policy
 19 to seal things properly upon submission?
 20 A. I never read any policies or procedures the Amherst lab
 21 had.
 22 Q. But as far as the Massachusetts State Police lab?
 23 A. Yes. We require the evidence is sealed when the
 24 evidence comes in.
 25 Q. And were you aware that the Amherst lab was now under

1 the control of the Massachusetts State Police?
 2 A. It was.
 3 Q. And was this lab directed to follow MSP guidelines?
 4 A. I'm not sure if they were at that particular time, but
 5 they were moving towards accreditation, our accreditation
 6 standard at some point.
 7 Q. Were you involved in the October 2012 audit at the lab.
 8 A. No, I was not.
 9 MR. OLANOFF: Okay. Thank you.
 10 I don't have anything further.
 11 THE COURT: Further inquiry by the defendants?
 12 (Pause)
 13 THE COURT: Cross-examination?
 14 MR. FLANNERY: I have no questions for this witness,
 15 Your Honor.
 16 THE COURT: You are excused Mr. Miller. Thank you.
 17 THE WITNESS: Thank you, Your Honor.
 18 (The witness stepped down.)
 19 THE COURT: Mr. Olanoff, your next witness.
 20 MR. OLANOFF: Well, Your Honor, we've arrived at the
 21 point where I'm about to call the second person, Sergeant
 22 Ballou.
 23 I have just -- I have been handed a package of
 24 materials of new discovery regarding a new case involving
 25 tampering that would put our date back to probably July of

1 2012, and right now we're just working on January, so I
 2 haven't been able to read it and I don't --
 3 THE COURT: Is there -- obviously, you prepared for the
 4 hearing except for that new information?
 5 MR. OLANOFF: Sure.
 6 THE COURT: I'm only assuming that most of Sergeant
 7 Ballou's testimony will relate to matters other than that
 8 information, so I'm going to ask you to call him and cover
 9 the ground that we can with the understanding that you may
 10 need to recall him at some point.
 11 MR. OLANOFF: Understood. I will do that, Your Honor,
 12 with -- there's one issue that is just coming to mind right
 13 now, that is this goes back to the discovery issue.
 14 I don't know if there are more cases out there that
 15 Mr. Flannery hasn't been told about and all of us haven't
 16 been told about. And what I don't want to do is keep
 17 calling Sergeant Ballou every time the Attorney General
 18 decides to leak a case to either Mr. Flannery or to the
 19 defense attorneys or to a Grand Jury or a jury because the
 20 amount of pleadings and the amount of time and Court's time
 21 and recalling all witnesses to have an evidentiary hearing
 22 is going to be a mess.
 23 So my only suggestion before calling this witness would
 24 be that if the Attorney General has cases now that pertain
 25 to this hearing where there may be evidence of tampering,

1 they should tell us now because we can't accommodate
2 anything -- I can tell you myself, personally, I can't do
3 this anymore. So --
4 THE COURT: Can't do what anymore?
5 MR. OLANOFF: I can't repeat what we've been doing for
6 the last six weeks. So I would like to do it at once and I
7 will start now, if Your Honor is ordering me to do, so I
8 will call Sergeant Ballou.
9 THE COURT: Your concern is noted. I am ordering you
10 to call Sergeant Ballou.
11 Sergeant Ballou can you come forward.
12 (Joseph Ballou, sworn)
13 THE CLERK: Please step forward.
14 THE COURT: Sergeant, good morning.
15 THE WITNESS: Good morning Your Honor.
16 THE COURT: Before we begin, let me just remind you to
17 keep your voice up so that I can hear you.
18 Second, we want to make sure you understand the
19 question. If you don't, please let us know. If you do
20 understand it, please limit your response to the question
21 presented. And make certain that we only have one person
22 speaking at a time.
23 THE WITNESS: Yes, Your Honor.
24 THE COURT: You may proceed, Mr. Olanoff.
25 MR. OLANOFF: Thank you.

(Joseph Ballou)
DIRECT EXAMINATION BY MR. OLANOFF:
3 Q. Good morning.
4 A. Good morning.
5 Q. Could you please state your full name.
6 A. Joseph Ballou, B-A-L-L-O-U.
7 Q. Are how are you employed?
8 A. By the Massachusetts State Police.
9 Q. And do you have a particular rank?
10 A. I hold the rank of sergeant.
11 Q. How long have you held that rank?
12 A. For about 3 1/2 years.
13 Q. Did you become involved in the investigation of drug
14 tampering at the Amherst drug lab?
15 A. Yes, I did.
16 Q. How did you become involved?
17 A. Drug packaging that appeared to have been tampered with
18 was discovered and an investigation had been started by the
19 Hampshire County DA's Office, then it was decided to refer
20 it to the Office of the Attorney General so I got a call and
21 came in.
22 Q. So the Hampshire County DA's Office called you to come
23 up and investigate?
24 A. I think it was the lab that called our office.
25 Q. Okay. And do you remember who called you?

1 A. It was Detective Lieutenant Robert Irwin called me.
2 Q. Okay. And someone from the lab called him?
3 A. Yes. I believe it was Major Connolly who's a major
4 from the State Police at our general headquarters.
5 Q. And so, can you tell us what you did?
6 A. The first thing I did is I went to the Hampshire County
7 DA's Office and I was told that they had kept Sonja Farak's
8 car and that we were going to write a search warrant to
9 search her car.
10 Q. Okay. What did you do next?
11 A. I wrote a search warrant to search her car.
12 Q. Had you been to the Amherst lab?
13 A. No.
14 Q. Okay. And how did you write a search warrant to search
15 her car before going to the lab?
16 A. All the investigators and troopers, many of the ones
17 that were involved at the lab, essentially told me what they
18 had seen.
19 Q. Okay. And so did you obtain that warrant?
20 A. I did.
21 Q. And did you execute it before going to the lab?
22 A. Yes.
23 Q. Okay. Well, let me then go backwards then. When did
24 you get to the Amherst lab?
25 A. The first -- I'm not sure when the first time was I

1 went to the lab. I believe it was -- sometime after that.
2 I think it was the following week.
3 Q. Well, do you know the date?
4 A. Not off hand.
5 Q. Okay. The week after what?
6 A. After the search of the car and the arrest.
7 Q. Okay. What was your understanding though of what had
8 happened up at that lab?
9 A. My understanding is that the Evidence Officer Sharon
10 Salem had discovered a discrepancy, I believe it was the
11 Thursday before. She -- there was evidence that two drug
12 cases that should have been in the locker and they weren't
13 there and she had looked in all of the places that she
14 thought they could have been and then it was, I guess it was
15 late until the following morning, Friday morning 18th of
16 January, she notified her supervisor Jim Hanchett and they
17 searched and they actually found the two items or packaging
18 in Sonja Farak's desk and then they notified the State
19 Police crime lab.
20 Q. Okay. I want to ask you about those particular
21 samples.
22 First two that went missing, do you know -- do you
23 remember what the lab number was for those samples?
24 A. I know they both started with A12 I don't remember the
25 numbers exactly.

1 Q. And do you know who had submitted them to the lab,
2 which law enforcement agency?
3 A. Springfield Police Department.
4 Q. Do you remember when they were submitted?
5 A. I believe they were submitted the end of November,
6 early December.
7 Q. And were they assigned to a chemist to be analyzed?
8 A. They had been assigned to Sonja Farak, correct.
9 Q. And did Ms. Farak author drug certificates regarding
10 those samples?
11 A. Yes, she had certified they were positive for cocaine.
12 Q. Okay. And are you familiar with the testing that Jim
13 Hanchett did regarding those substances?
14 A. Yes.
15 Q. Okay. What were his findings?
16 A. I'll just say there were a lot of samples and there
17 were a lot of numbers and I wasn't told ahead of time what
18 the questions what would be.
19 Essentially, I do know there was one sample he tested
20 where he saw what he thought was part of it was not cocaine,
21 and he tested that and found that to be true. That the
22 sample that she had previously certified to be cocaine, that
23 part of it was not.
24 Q. And regarding the other sample was the same situation?
25 A. I -- again, without referring to reports and notes, I'm

1 not sure.
2 Q. Okay.
3 A. I know one was less in weight, also, than what she had
4 certified.
5 Q. Okay. Were there -- do you know what the results of
6 those -- were those samples then sent to the State Police
7 State Police lab in Sudbury to be retested?
8 A. Yes.
9 Q. Do you know what the results were there?
10 A. Yeah, I received an analysis of all of the items that
11 we took, were retested, and I think those were consistent
12 with what Mr. Hanchett had found.
13 Q. Okay. Were there any other samples that were missing
14 from the lab?
15 A. Right. When the State Police came in that day they
16 searched the entire lab and they found two other.
17 Essentially, they had a temporary safe which Ms. Pontes,
18 Rebecca Pontes and Sonja Farak shared and was a bin for
19 Sonja Farak in there. And in there there was one empty
20 evidence bag and then in her work bench they searched more
21 thoroughly and they found another empty evidence bag.
22 Q. Okay. Do you know when those two samples had been
23 submitted to the lab and by whom?
24 A. I just -- without looking, I don't want to make a
25 mistake. I'm not sure exactly. I believe one of them -- I

1 just don't know. I think one was Holyoke and one was
2 Springfield.
3 Q. Do you have any notes that could refresh your
4 recollection as to that?
5 A. I do.
6 THE COURT: You may review them if that would help you.
7 (Pause)
8 THE WITNESS: It would take me a long time to be sure.
9 I'm not sure.
10 Q. (By Mr. Olanoff) Don't worry about it.
11 There was -- was there one from Holyoke ending in 156?
12 A. Yes.
13 Q. A12-0156?
14 A. Yes.
15 Q. And was anything in the sample when it was found?
16 A. The sample in the safe was empty, and it tested
17 positive for a cocaine residue.
18 Q. Okay. Do you remember how much was originally in the
19 sample?
20 A. No, I don't.
21 Q. Okay. And what about the other sample A12-4973 do you
22 remember if that had been assigned to a chemist for testing?
23 A. Yes.
24 Q. Okay. And who was it assigned to?
25 A. I don't recall. I think it was assigned to Sonja Farak

1 also, but I'm not sure.
2 Q. Okay. Did she author a drug certificate as to that
3 sample?
4 A. I believe those two samples hadn't been certified yet,
5 but I'm not sure.
6 Q. Were there any other items found in Sonja Farak's work
7 station?
8 A. Yes.
9 Q. What was found?
10 A. There was a tub, like a -- I think of it like a dish
11 tub, like a white tub. It had a lot of things I would call
12 adulterants or filler-type materials. I know there was
13 baking soda, a waxy like wax flakes and some lab
14 instruments, tools, and there also was like a sandwich bag
15 of white substance that appeared to be cocaine.
16 Q. Okay. And were those items sent to the Sudbury lab for
17 testing?
18 A. Yes.
19 Q. And were they, in fact, adulterants and counterfeit
20 substances in there?
21 A. Yes, except the baggie did contain -- tested positive
22 for cocaine.
23 Q. Do you remember how much cocaine it was?
24 A. I don't -- I don't remember exactly.
25 Q. Well, do you remember what kind of cocaine it was; was

1 it crack or powder?

2 A. I believe it was crack cocaine.

3 Q. Okay. Did you eventually search a tote bag?

4 A. Yes.

5 Q. And to your knowledge, who did the tote bag belong to?

6 A. Sonja Farak.

7 Q. How long after the initial search of the lab was

8 that -- did that search of the bag occur?

9 A. It was about a week later.

10 Q. What -- and what kinds of things were found in the bag?

11 A. A lot of lab packaging. What I learned is something

12 called KPac bags. They are like the heat-sealed bags, a lot

13 of them sliced open, a lot of empty ones and a lot of,

14 again, adulterants or fillers like baking soda, soap, wax

15 shavings, things like that.

16 Q. Where was this bag found?

17 A. It was in her lab bench. There was, if you open the

18 cupboards, towards the back there was a hollow spot. There

19 was a space where the floor didn't continue, and it was kind

20 of tucked down behind there.

21 Q. Okay. And you mentioned that there were evidence bags

22 in there. Did you call them KPac bags?

23 A. Yes.

24 Q. What are those?

25 A. They're clear plastic bags that I've learned that the

1 lab uses to put their evidence into and then seal.

2 Q. And those bags were in what condition when you found

3 them?

4 A. I found some that had been sliced open and I found some

5 that appeared to be, you know, unused, brand new.

6 Q. Did any of them have any residue in them?

7 A. Yes.

8 Q. Do you remember what kind?

9 A. Yeah, like a white powder residue.

10 Q. So cocaine residue?

11 A. That's what -- right, it tested for cocaine.

12 Q. And do you remember how many were in there?

13 A. I believe there was only one that tested positive for

14 cocaine.

15 Q. Did any of the bags in there have any evidence numbers

16 on them?

17 A. Again, I don't recall for sure. I would have to look

18 that up.

19 Q. Well, did one of the evidence KPac -- did one of the

20 KPac bags have the initials RP on it?

21 A. Yes.

22 Q. And is it your understanding that RP stand for Rebecca

23 Pontes?

24 A. Yes. It looked like that's how she initialed her bags.

25 Q. So, and she's a -- she was a chemist at the lab at the

1 time?

2 A. Yes.

3 Q. And do you remember that that was the packaging for the

4 156 sample?

5 A. I don't remember that, no.

6 Q. Okay. There was -- you mentioned other items like

7 baking soda and soap bar, baking powder and oven baked clay?

8 A. Yes.

9 Q. Were those items all found in the bag?

10 A. Yes.

11 Q. Were there also soy candle wax shavings?

12 A. Yes.

13 Q. Did you -- are you aware of when there was a search

14 of Ms. Farak's desk at the lab?

15 A. Yes.

16 Q. And what were the results of that search?

17 A. I believe they found a bag of pills.

18 Q. And whose pills were they?

19 A. I believe hers.

20 Q. Do you remember what kind they were?

21 A. There was assorted pills. I know we sent them to the

22 lab and I don't recall what the results were. We didn't

23 charge her with that.

24 Q. Okay. And they had been prescribed to her, you think?

25 A. It seemed like a lot of them had been prescribed to

1 her.

2 Q. Well, did they have her name on the bottle?

3 A. They weren't in a bottle.

4 Q. What were they?

5 A. Again, I'm not the one who found them and they were

6 submitted not by me, but I understood they were just loose

7 pills.

8 Q. Okay. Now, let me -- before we go any further, if you

9 could turn to Exhibit J in that binder there?

10 A. Yup.

11 Q. Do you recognize that?

12 A. Yes.

13 Q. What is that?

14 A. It's my case report for the destruction of evidence by

15 Sonja Farak.

16 Q. Okay. And does that report accurately reflect your

17 knowledge of this investigation?

18 A. Yes.

19 Q. Okay. And does it have the details of the things that

20 I was asking you about, all along, that you really haven't

21 been able to remember contained in there?

22 A. Yeah, I'm sure my memory was more accurate back then

23 than it is now, yes.

24 Q. Okay. And I also direct your attention to Exhibits L

25 and M.

1 A. Yup.

2 Q. Are those your reports as well?

3 A. Yes.

4 Q. Okay. And are those accurate as to your knowledge of

5 the investigation?

6 A. Yes.

7 Q. Now, you said that you executed the search warrants on

8 Ms. Farak's vehicle, what were the results of that?

9 A. We found a lot of evidence. A lot of different types

10 of lab packaging. We found, in the door pocket we found

11 like a sandwich bag type of a bag with what appeared to be

12 cocaine and actually appeared to be a kit, you know a kit

13 for a drug user.

14 Q. And did you actually perform her -- help perform the

15 search?

16 A. Yes.

17 Q. All right. So when you say lab evidence packaging,

18 different kinds, what do you mean, sir?

19 A. Right. There were -- the first thing we found was a

20 lot of Manila envelopes that had in black marker had lab

21 number across the top, which I actually later found out that

22 they used to put their own notes and certifications in. But

23 then there were also, again, more of those KPac bags, some

24 of them that appeared to be sliced open.

25 Q. And did they put their lab notes and materials in those

1 KPac bags?

2 A. No. No.

3 Q. What were those for?

4 A. Those were for storing drug evidence.

5 Q. And what was the condition of those bags?

6 A. They -- there was a lot of them, but they generally

7 were sliced open, some of them had residue. One of them had

8 something -- a residue, to me, that even to me didn't appear

9 to be cocaine, and it tested to not be cocaine.

10 Q. And what -- how many of them were there, do you think?

11 A. Probably over a dozen.

12 Q. And were any of them labeled?

13 A. Yes, with initials.

14 Q. Whose initials?

15 A. Most of them had SF.

16 Q. Were there any case numbers on them?

17 A. On the K-Pacs, I don't believe there were case numbers.

18 Q. Were -- whose initials were there on those?

19 A. Most of them had SF, which I believe would be Sonja

20 Farak. And I know at some point we saw an RP for Rebecca

21 Pontes, but as I sit here, I can't remember if that was from

22 her car or from the bag.

23 Q. So there may have been a bag in her car, a KPac bag in

24 her car with the initials RP?

25 A. There may have been, yes.

1 Q. Okay. Was there also a piece of paper with initials RP

2 up and down it?

3 A. Yes.

4 Q. And where was that found?

5 A. That was found in one of those Manila envelopes that

6 she had a lot of other papers mixed in with.

7 Q. Okay. And based on your investigation, what was that

8 all about?

9 A. Well, my feeling was that she was trying to practice

10 those initials to make them look as much like the initials

11 of Rebecca Pontes as she could.

12 Q. Okay. The cocaine you said there was cocaine found in

13 the door. Was it crack cocaine?

14 A. Yes.

15 Q. Do you remember how much it was?

16 A. No.

17 Q. And it was in, you said a baggie?

18 A. Yes.

19 Q. Was it labeled at all?

20 A. No.

21 Q. And then you said there were counterfeit substances in

22 the car, correct?

23 A. Yes.

24 Q. How much and what kind?

25 A. Well, specifically, I just remember that one bag with

1 just the residue.

2 Q. There were also newspaper articles in her car as well,

3 correct?

4 A. Correct, copies.

5 Q. Copies. What do you mean by copies?

6 A. They were, like, printed copies of articles she may

7 have found online.

8 Q. Right. So you mean that these were articles from the

9 internet that somebody had printed out?

10 A. Yes.

11 Q. How many articles were there?

12 A. I think I remember three or four.

13 Q. Okay. And did any of the articles have anything in

14 common with each other?

15 A. Yes.

16 Q. What did they have?

17 A. Generally, they were about people in law enforcement or

18 in chem. labs that had stolen drugs or used drugs.

19 Q. What were the -- what publications were these articles

20 from?

21 A. I remember at least a few of them were from newspapers

22 that I recognized, but I don't know off hand.

23 MR. OLANOFF: Okay. If I could approach the witness

24 and show him the exhibits?

25 THE COURT: You may.

1 Q. (By Mr. Olanoff) Okay. I'm now showing you what has
 2 been marked as Exhibits E2, E3, and E4. Are those the
 3 articles that were found in Ms. Farak's vehicle?
 4 A. Yes.
 5 Q. So -- okay. So we have a Masslive article?
 6 A. Yes.
 7 Q. Pittsfield.com article?
 8 A. Yes.
 9 Q. And then an SFGate.com article?
 10 A. Correct, yes.
 11 Q. Okay. And?
 12 THE COURT: I'm am sorry, Mr. Olanoff. I'm having a
 13 little trouble locating.
 14 MR. OLANOFF: Sure. It's right after the transcript
 15 part of E.
 16 (Pause)
 17 THE COURT: Thank you.
 18 MR. OLANOFF: Sure.
 19 Q. (By Mr. Olanoff) And what did you mention that they all
 20 had in common?
 21 A. It seemed like they were either law enforcement or lab
 22 people who had stolen drugs or used drugs.
 23 Q. What were the dates of these articles?
 24 A. As I look here, one is October 25, 2011.
 25 Q. And do you know what date -- staying on that first one,

1 you're referring to the Masslive article, correct?
 2 A. Right. Right.
 3 Q. "Pittsfield pharmacist Nicole Bombardier sentenced
 4 three years for stealing 200 plus Oxycontin pills."
 5 So the date of the article is October 25, 2011. What's
 6 the date that it was printed out?
 7 A. It's covered by the exhibit number. It looks like
 8 October something, 2013 I believe.
 9 Q. Okay. What about the second article, so that would be
 10 Exhibit E3?
 11 A. Yes.
 12 Q. What's the date of this article, approximately?
 13 A. It's too small and faded. I can't read it.
 14 Q. Okay. Is March 29, 2011 sound right?
 15 A. Is that up on the top right?
 16 Q. Top left under where it says staff report Tuesday,
 17 March 29, 2011?
 18 A. Okay. Yes.
 19 Q. Okay. And going to the bottom of the page, can you
 20 tell when this article was printed out?
 21 A. Yes. It says September 20, 2011.
 22 Q. Okay. And is there anything else on this particular
 23 page?
 24 A. Yes, handwritten notes.
 25 Q. And what was the -- what's, like, a summary of what the

1 handwritten notes say?
 2 A. Well, the article is regarding a police officer and a
 3 trooper that were found with steroids and one of their names
 4 she refers to it as: And Kirschner seems like such a good
 5 guy. I feel bad for his five year old daughter. I'm glad I
 6 don't work as law enforcement officer.
 7 It's hard to read there.
 8 P.S. most of the cases he's been a part of have been
 9 dismissed for exactly this reason.
 10 Q. Do you know who wrote that?
 11 A. I don't.
 12 Q. Do you know who printed these articles out?
 13 A. No, I don't.
 14 Q. Do you know whether Ms. Farak printed them out or
 15 someone printed them out and gave them to her?
 16 A. No, I do not know.
 17 Q. Can you tell from the note, from the handwriting there,
 18 whether it was written to someone or it was written by
 19 someone?
 20 A. I can't tell.
 21 Q. Okay. Going onto the third page, SFGate.com, when is
 22 this article from?
 23 A. December, maybe 2, 2011.
 24 Q. Okay. And do you know when this was printed up?
 25 A. Again, it's blocked by the discovery type, but it likes

1 like December 2011.
 2 Q. Okay. What is this article regarding?
 3 A. It says: Feds indict former SFPD drug lab technician.
 4 Q. And why would these three pieces of these articles be
 5 relevant to your investigation in the search of her car?
 6 A. Right. To find her state of mind, I guess, if she is
 7 the type of person wondering what would happen to her if she
 8 got caught.
 9 Q. Did you find any other prescription pills inside the
 10 car?
 11 A. Yes.
 12 Q. What kind?
 13 A. Again, there were assorted pills and majority of them
 14 were over-the-counter medications and some were prescribed
 15 to her and we didn't charge her with that.
 16 Q. Okay. Going back to her work station, were there
 17 capsules found there? Where were the capsules found?
 18 A. In her work station there was just -- the only capsule
 19 I know was that one, the one that was found with the heroin
 20 packet.
 21 Q. Do you remember -- do you know if there were capsules
 22 found with a white powdery substance inside of them?
 23 A. I don't recall.
 24 Q. Do you know what plaster of Paris is?
 25 A. It was a number of adulterants and that probably was

1 one of them.

2 Q. Okay. And that was at her work station?

3 A. Either in a duffle bag or her work station.

4 Q. Okay. Now, the capsules I'm talking about are -- were

5 in the search of her vehicle. So if you can go to F13. The

6 best way to do it is to find F12, and then go on to the next

7 page.

8 There's a package of capsules?

9 A. This is the photographs that you're referring to or?

10 (Pause)

11 Q. (By Mr. Olanoff) Here. (Indicating)

12 Do you remember finding those in her vehicle?

13 A. Yes.

14 Q. Okay. And what were they?

15 A. I don't recall. I just -- I know that we never charged

16 her with any pills and the reason was because some of them

17 were over-the-counter medications and/or prescribed to her.

18 Q. Well, some of these pills had white powder in them,

19 some of them were empty, correct?

20 A. I don't remember that part.

21 Q. Did members of your investigatory team interview Sonja

22 Farak?

23 A. Again that was the -- yes, from the Hampden County DA's

24 Office they interviewed her.

25 Q. Do you remember who interviewed her?

1 A. Yes, it was Detective Lieutenant Robin Whitney and

2 Sergeant John Cummings.

3 Q. And in that interview, do you remember Miss Farak was

4 asked if she kept any drugs at her work station?

5 A. Yes.

6 Q. Do you remember what her response was to that?

7 A. Well, her response was there would be no reason for her

8 to keep drugs in her work station.

9 Q. But she did admit that there were some drugs there,

10 correct?

11 A. Right.

12 MR. FLANNERY: Your Honor, I'm going to object just

13 because I don't believe Sergeant Ballou was present for this

14 interview. The transcript of the interview itself I think

15 has been admitted, so I don't know what the purpose of this

16 questioning would be.

17 THE COURT: Does seem to be, Mr. Olanoff, that you are

18 having this witness repeat much of what is documentary

19 evidence already admitted.

20 MR. OLANOFF: Understood.

21 THE COURT: So perhaps we can move on to what you think

22 is relevant to that misconduct.

23 MR. OLANOFF: Sure.

24 Q. (By Mr. Olanoff) So the other day, did you happen to

25 finish your investigation as to the Finch and Espinosa

1 cases?

2 A. Yes.

3 Q. Can you tell us who Finch and Espinosa were?

4 A. They were two defendants in a Springfield Police case

5 and search warrant was done at their house and drug evidence

6 and a firearm were seized.

7 Q. And how did their cases come to your attention?

8 A. The affiant on the search warrant, I believe was about

9 a year ago, he felt that -- he felt he had submitted

10 Oxycodone pills for analysis.

11 Q. And are you referring to a Springfield Police Officer?

12 A. Yes.

13 Q. Do you know which one?

14 A. Yes, Greg Bigda.

15 Q. Okay. Continue.

16 So he wrote an affidavit that described the substances

17 he submitted?

18 A. No -- no. He wrote an affidavit for a search warrant

19 to that house.

20 Q. I see.

21 A. And another officer had recovered what they thought was

22 Oxycodone pills and they had submitted it to the lab for

23 analysis, but when it came back it came back as not as a

24 controlled substance and the count was different from what

25 he thought he had submitted.

1 Q. Okay. And to the officer did those look like Oxycodone

2 pills?

3 A. When he submitted them he said used an online pill

4 identifier and felt they were probably Oxycodone pills.

5 Q. And how many pills did he submit?

6 A. I believe he said he submitted 51 and when the analysis

7 came back there was 61.

8 Q. And did the officer have a chance to look at the pills

9 after they came back?

10 A. Yes.

11 Q. What was his take on the pills then?

12 A. He couldn't remember what the pills looked like that he

13 submitted and he hadn't described them or photographed them,

14 but he felt that if he had submitted the pills that he now

15 had that he wouldn't have identified them as Oxycodone.

16 Q. Okay. And so was it his -- it was his understanding

17 that those may not have been the pills that he submitted?

18 A. That's what he felt, yes.

19 Q. When was -- when did this search take place where these

20 items were seized?

21 A. Again, I don't have everything locked in memory, but I

22 think it was March of 2012.

23 Q. Would it help you to take a look at your police report?

24 A. Yes.

25 Q. If you were to go to Exhibit 0.

1 A. He submitted it for testing on March 16, 2012.

2 Q. When was it discovered that the pills that he submitted

3 were probably not the ones that came back?

4 A. I think he discovered it back in, basically when he had

5 to go to Grand Jury on that case. He -- wait a minute. No,

6 he didn't have the analysis back at that point.

7 Q. Well, who supposedly analyzed the drugs?

8 A. Sonja Farak.

9 Q. Okay. And she certified that these were not Oxys,

10 correct?

11 A. Correct.

12 Q. Now, if you could tell us a little bit about the

13 Berkshire case.

14 A. The first I heard of the Berkshire case was this

15 morning.

16 Q. How did you hear about it?

17 A. From you.

18 Q. From me?

19 A. From opening.

20 Q. I've never met you.

21 A. Well, just at the start of this hearing this morning.

22 Q. Okay. So you didn't investigate that?

23 A. No.

24 Q. Do you know who did?

25 A. No.

1 Q. Are there any other cases besides Finch and Espinosa

2 and the evidence recovered from the lab, are there any other

3 cases that you're aware of that may have had tampering going

4 on or where there's suspected tampering?

5 THE COURT: We're talking about suspect tampering by

6 Miss Farak?

7 MR. FLANNERY: Correct.

8 THE WITNESS: I know there's an investigation at the

9 lab and that's ongoing and that they're retesting. I don't

10 know the results of any of those tests.

11 Q. (By Mr. Olanoff) Do you know which cases they pertain

12 to?

13 A. I don't.

14 Q. And so there's testing going on now for additional

15 samples other than the ones we've talked about here today?

16 A. I don't know about now, but back when I did my

17 investigation, just as an example, I submitted all of the

18 lab numbers for the packaging that was found in her car.

19 And I know that was all looked at, but again, I haven't

20 gotten any results.

21 I know at that time Major Connolly had said they were

22 going to retest things at the lab.

23 MR. OLANOFF: Your Honor, may I have a moment?

24 THE COURT: You may.

25 (Off the record discussion with Defense Counsel)

1 Q. (By Mr. Olanoff) Did you find any crack pipes in your

2 investigation?

3 A. I didn't, but I believe in her desk or her work station

4 that was found.

5 Q. Okay. And was that noted anywhere or was that ever

6 documented?

7 A. Everything that was found was documented, yes.

8 Q. Okay. Are you familiar with the evidence report form?

9 A. Yes.

10 Q. And it has dozens of items in there that were found --

11 it's every piece of evidence that was collected in this

12 case, correct?

13 A. Correct.

14 Q. And do you remember where it says crack pipe in there?

15 A. There was a -- there was like a glass rod or something

16 found, but there was no -- there was no pipe, like a

17 certain -- not like a specific type.

18 Q. I see. So it was the trooper's understanding that it

19 was a used for smoking crack, correct?

20 A. Again, I would have to know what you're referring to.

21 I don't know if you -- I don't know if you're referring to

22 what was found in her work station.

23 Q. Well, the crack pipe.

24 A. Well, it was nothing that was labeled a crack pipe. I

25 believe there was a glass rod with soot.

1 Q. With what?

2 A. With possibly with residue.

3 Q. Okay. And there was also some, an item that had some

4 copper wire in it?

5 A. Yes.

6 Q. And where was that located and where was it?

7 A. That was located in her car, as I said, the bag that

8 seemed to be like her work was -- there were little balls of

9 copper wire.

10 Q. Why was that significant?

11 A. It appears that it would be something that somebody

12 would use to smoke crack rocks.

13 Q. Was copper wire found anywhere else in this

14 investigation?

15 A. Yes, in a duffle bag. In those items there, there were

16 little fragments of copper found.

17 Q. And what did that tell you about finding the copper

18 wire there?

19 A. Well, to me it was a connection. It made a connection

20 between her duffle bag and her car.

21 Q. And are the -- are you saying the copper wire is

22 fragments from smoking crack?

23 A. I think the ones that were in the duffle bag were --

24 seemed, I know, clean, not sooty or anything like that.

25 MR. OLANOFF: Your Honor, at this time, I'm done with

1 my portion. Like I said, I haven't had a chance to review
 2 the materials that were just handed over, so I guess we will
 3 address that later.

4 THE COURT: Although I understand that you may have at
 5 some other time further inquiry for this witness; while we
 6 are here, further they're inquiry from defense counsel?

7 MR. RYAN: If I may?

8 **CONTINUED DIRECT EXAMINATION BY MR. RYAN:**

9 Q. Good afternoon.

10 A. Good afternoon.

11 Q. If you could pull back up Exhibit O in the binder.

12 A. Sure.

13 Q. Now, Attorney Olanoff had asked you about some
 14 questions about your investigation?

15 A. Yes.

16 Q. This document is back in May of this year; is that
 17 correct?

18 A. Yes.

19 Q. Back on May 10 you met with Officer Bigda?

20 Feel free to look at your notes.

21 A. Yes, May 10.

22 Q. Now, in addition to speaking with Officer Bigda you
 23 obtained an evidence card from the Springfield Police
 24 Department, correct?

25 A. Yes.

1 Q. And that evidence card is located, it's the very last
 2 piece of paper, correct?

3 A. Yes, it is.

4 Q. And that evidence card, if you look down at about
 5 halfway down the middle it says "item".

6 A. Yes.

7 Q. And it says "51 Oxycodone pills"?

8 A. Yes.

9 Q. Now, if you look at the evidence sheet, the page that
 10 precedes this in Exhibit O.

11 A. Yes.

12 Q. Is that a drug certification?

13 A. Yes.

14 Q. And at the top of the drug certification, can you tell
 15 the Court how many tablets Ms. Farak certified were in this
 16 sample?

17 A. Sixty-one tablets.

18 Q. Now, this, what we've received so far, is your police
 19 report and for Exhibit O the drug certification and this
 20 evidence tag; is that correct?

21 A. I didn't understand that question.

22 Q. Well, what's before you are those four pieces of paper,
 23 right?

24 A. Yes. Yes.

25 Q. A two-page police report?

1 A. Right, and those two items.

2 Q. Now, in the course of investigating this, did you
 3 obtain what's known as a drug receipt from the Amherst
 4 laboratory with respect to this submission?

5 A. No, I did not.

6 Q. And in the course of your investigation you have become
 7 familiar with these so-called drug receipts?

8 A. I don't know what you're referring to, no.

9 Q. Well, local police departments would drop-off suspected
 10 narcotics at the Amherst lab. Did you become familiar with
 11 the protocol that would be involved with Evidence Officer
 12 Salem?

13 A. Yes.

14 Q. They would turn over the submission, correct?

15 A. Right.

16 Q. The detective or the officer dropping them off would
 17 receive in return a receipt for what they dropped off?

18 A. I know it was logged in. I didn't know they received
 19 an actual receipt.

20 Q. So you're not -- haven't become familiar with this
 21 document that is generated in all drug cases?

22 A. Not what you're referring to, no.

23 Q. So in the course of investigating this -- you would
 24 agree that on its face value, if a police officer writes
 25 down 51 pills and drops it off at the Amherst laboratory and

1 gets 61 pills back, that raises your concerns on your part,
 2 doesn't it?

3 A. It does, yes.

4 Q. So in your investigation, did you inquire of the
 5 evidence officer at the Amherst lab as to if there was any
 6 paperwork as to how many pills she counted when the police
 7 department dropped off this submission?

8 A. No, I do not.

9 Q. Do you think that might be relevant evidence in terms
 10 of looking to see whether or not there was some breach in
 11 protocol that took place with respect to this submission?

12 A. Yes, that would be relevant.

13 Q. Now, Attorney Olanoff asked you some questions about
 14 other cases where suspected evidence tampering is sort of in
 15 the air. Do you recall those questions?

16 A. Yes.

17 Q. And I believe you said that there was an investigation
 18 going on at the lab?

19 A. Yes.

20 Q. Who's conducting that investigation?

21 A. It was Major Connolly and -- Major James Connolly and a
 22 captain -- I can't remember his name off hand.

23 Q. Are these members of the investigative team that's
 24 prosecuting Sonja Farak?

25 A. No.

1 Q. And so there is an independent investigation that's
2 being conducted by these individuals that you just named?
3 A. Correct.
4 Q. And you are not privy to what they're investigating?
5 A. Correct.
6 Q. Now, there's been an Assistant Attorney General who's
7 been assigned to prosecute Ms. Farak; is that correct?
8 A. Yes.
9 Q. And what's her name?
10 A. Anne Kaczmarek.
11 Q. Does Ms. Kaczmarek, to your knowledge, is she aware of
12 what's -- this independent investigation that's ongoing,
13 retesting?
14 A. I'm not sure what their, exactly what their connection
15 is.
16 Q. Well, if -- let me ask you this. If this independent
17 investigation, of which you have no knowledge were to --
18 A. No, I do -- I'm aware of it. They're in charge of the
19 overall investigation. When I have things, I have sent them
20 to them.
21 Q. Well, are you aware of any specific cases they are
22 retesting based on concerns of evidence tampering?
23 A. They have not come back to me and said they have found
24 anything would pertain to Sonja Farak that I should be aware
25 of.

1 Q. Lieutenant, so -- but they are -- their investigation
2 is not completed?
3 A. No.
4 Q. So there is an investigation that is ongoing, that
5 involves retesting of samples?
6 A. Yes.
7 Q. If those retesting of samples were to result in some
8 indication of evidence tampering, that could be relevant to
9 your prosecution of Ms. Farak; is that correct?
10 A. Yes.
11 Q. Now, you're aware that in the course of this proceeding
12 that you've been called here today, there's been some
13 disclosures that your office has made to defense counsel; is
14 that correct?
15 A. Yes.
16 Q. Have you had any role to play in deciding what
17 documentation is provided to the defendants in this case?
18 A. No, I've -- everything in my case file has been turned
19 over.
20 Q. And to your knowledge, is everything in Ms. Kaczmarek's
21 case file been turned over?
22 THE COURT: You're asking this witness whether
23 something in Ms. Kaczmarek's case file has been turned over?
24 MR. RYAN: I'm just trying to find out what we have and
25 don't have. And if he knows that's she's maintaining a file

1 that reflects the investigation that he just referenced by
2 Major Connolly.
3 THE COURT: If, for some reason you know the answer to
4 that question, you may answer it.
5 THE WITNESS: I believe everything pertaining to the
6 Farak investigation has been turned over. I am not aware of
7 anything else.
8 MR. RYAN: I would join attorney Olanoff in stating I
9 have no further questions at this time.
10 I would like to reserve the right to reopen or recall
11 this witness should additional materials comes to light.
12 THE COURT: I'm going to assume that's the case of all
13 defense counsel present.
14 You may cross examine, Mr. Flannery.
15 MR. FLANNERY: Thank you.
16 **CROSS EXAMINATION BY MR. FLANNERY:**
17 Q. Good afternoon.
18 A. Good afternoon.
19 Q. I'm going to start where direct left off. The
20 Finch/Espinosa case.
21 A. Yes.
22 Q. That was something that was brought to your attention
23 relatively early on in this investigation; is that correct?
24 A. Yes, it was.
25 Q. And, you interviewed Officer Bigda from the Springfield

1 Police Department?
2 A. Yes.
3 Q. And he indicated to you what he believed was a
4 discrepancy in terms of the amount and the type of pills
5 that he got back from the lab, right?
6 A. Yes.
7 Q. But he also conceded that he had no specific memory of
8 the pills before they went to the lab, right?
9 A. Yes.
10 Q. He didn't photograph them, correct?
11 A. Correct.
12 Q. He didn't describe them with any particularity in any
13 report that you're aware of?
14 A. Right.
15 Q. And so at that point, investigation wasn't closed, it
16 wasn't finished, right?
17 A. Right.
18 Q. And the purpose of your investigation was to collect
19 evidence that would go to not just what Ms. Farak had
20 already been charged with, but also with an eye towards
21 potentially bringing further charges with respect to other
22 specific episodes of tampering, right?
23 A. Yes.
24 Q. And based on your investigation of this issue that
25 Officer Bigda brought to your attention, based on your

1 conversation with him, you've decide not to suggest another
 2 charge in relation to these pills, right?
 3 A. Yes.
 4 Q. And can you tell us why that is?
 5 A. You know, I'm looking at it from the standpoint of
 6 trying to charge Ms. Farak, whether there's probable cause
 7 and ability to convict. I felt because we couldn't describe
 8 the pills, we don't know. And Oxycodone is a generic term
 9 that applied to -- every brand has a different type of pill
 10 and Officer Bigda didn't know what the pills looked like
 11 that he submitted.
 12 There wasn't a lot to go forward on.
 13 Q. All right. So was it possible, in your mind, that
 14 Officer Bigda was the one who made a mistake and he was now
 15 justifying that or viewing it differently based on the
 16 allegations against Ms. Farak?
 17 A. No, I don't -- I don't know if he made a mistake or
 18 not. I don't know.
 19 Q. So you just didn't know based on what you have?
 20 A. Yes.
 21 Q. Now, getting back to your testimony concerning the
 22 warrants that were executed, the case against Ms. Farak.
 23 You testified at various points about things that were --
 24 items that were found in her vehicle and also in a tote bag?
 25 A. Yes.

1 Q. And you expressed, I believe, some reservation about
 2 the clarity of your memory with respect to what was found
 3 where; is that fair to say?
 4 A. Yes.
 5 Q. Now, you testified, I believe, that --
 6 A. Well, specifically with lab numbers and weight. I
 7 don't have weights and lab numbers memorized.
 8 Q. Okay.
 9 THE COURT: Mr. Flannery, let me interrupt for just a
 10 minute and tell you for scheduling purposes what I have in
 11 mind.
 12 I would like to break if we haven't concluded with
 13 Sergeant Ballou's testimony at quarter of 1:00 so that we
 14 can address this outstanding issue of the motion having to
 15 do with Ms. Farak's spouse, to resolve that before we move
 16 on with the hearing. So I just want to let you know we have
 17 another five minutes before we break, for that purpose.
 18 MR. FLANNERY: Yes, Your Honor.
 19 Thank you.
 20 Q. (By Mr. Flannery) Well, you indicated, I believe,
 21 during your testimony that a number of KPac bags with
 22 initials were found in Ms. Farak's car as opposed to the
 23 tote bag. Is your memory clear on that?
 24 A. Well, as far as like KPac bags, I don't remember, you
 25 know, I have a visual memory of seeing KPac bags. I don't

1 know exactly which ones were found in the bag versus the car
 2 without referring to a report.
 3 Q. Well, I have a copy of -- you authored a report
 4 relative to a search of Ms. Farak's vehicle, correct?
 5 A. Yes.
 6 Q. And do you remember that you listed items that were
 7 found in her vehicle?
 8 A. Yes.
 9 Q. And that's a copy of her report, just for the record,
 10 which is contained in Exhibit K.
 11 MR. FLANNERY: If I may approach, Your Honor?
 12 THE COURT: You may.
 13 Q. (By Mr. Flannery) I'm just going to ask you to just
 14 quickly look at that report and see if it refreshes your
 15 memory as to whether there are KPac bags.
 16 A. (Complying)
 17 There's no KPac bags listed here.
 18 Q. Now, you recall KPac packages, but does that refresh
 19 your memory as to whether they were found in the vehicle?
 20 A. We also weren't referring to them as KPac bags at that
 21 time because I didn't realize that's what they were called.
 22 Q. Okay. Well, were there any bags that had initials that
 23 were sealed?
 24 A. No.
 25 Q. Okay. So, what you did find among other things were

1 envelopes with lab numbers, correct?
 2 A. Yes.
 3 MR. FLANNERY: And if I may I approach again?
 4 THE COURT: You may.
 5 Q. (By Mr. Flannery) And did you recall you photographed
 6 the evidence that was found in the vehicle?
 7 A. Yes.
 8 MR. FLANNERY: And, just for the record, I'm referring
 9 to Exhibit H.
 10 Q. (By Mr. Flannery) My binder doesn't -- isn't more
 11 specific than that, but there are -- I'll show you
 12 photographs.
 13 A. Yes.
 14 Q. Showing you a photograph of Manila envelope that is
 15 contained in Exhibit H.
 16 A. Yes.
 17 Q. Can you just describe what we're looking at?
 18 A. It's a Manila envelope, in handwriting and a black
 19 marker, lab number written on the top and lab number is
 20 crossed out.
 21 Q. Okay. So the lab number is written on this Manila
 22 envelope, appeared to have been handwritten, perhaps with a
 23 magic marker?
 24 A. Yes.
 25 Q. And then it's crossed out?

1 A. Yes.

2 Q. I'm going to show you another photograph not separately
3 marked, but again part of the same exhibit.

4 And, again, can you tell us what that depicts?

5 THE COURT: Maybe you can orient me as to at least
6 where it appears. There seems to be a page number
7 underneath these photographs.

8 THE WITNESS: 3384.

9 MR. FLANNERY: I'm sorry, Your Honor, there is a --
10 33 -- no. Yes, 3384 is in the small print in the corner.

11 THE COURT: All right. I see that.

12 Q. (By Mr. Flannery) And again, can you tell us what that
13 depicts in terms of the envelope?

14 A. It's in a different Manila envelope, also with a lab
15 number written on the top, which is also scratched out with
16 black marker.

17 Q. And very next page, again, is that another envelope?

18 A. Yes. Same Manila envelope, handwritten lab number and
19 scratched out with black marker.

20 Q. All right. And then one last one, and that's a few
21 pages later, Numbers 3393.

22 Did I read that correctly?

23 A. Yes. That's a Manila envelope with a lab number hand
24 written scratched out in black marker and the words "to do"
25 written on it in black marker.

1 Q. Okay. Now is it fair to say, of the items found in Ms.
2 Farak's vehicle, the only items with identifying lab numbers
3 are these envelopes?

4 A. Yes.

5 Q. You didn't find any evidence bags --

6 A. No.

7 Q. -- with the official lab number on them, correct?

8 A. No. No, we didn't.

9 Q. And the cocaine was contained in a Ziplock bag?

10 A. Or a sandwich bag.

11 Q. A sandwich bag?

12 A. Yes.

13 Q. Which would not have -- the bag itself would not have
14 come from a lab as far as you know?

15 A. Right.

16 Q. Now, with respect to the search of the tote bag which
17 was found inside of the lab --

18 A. Yes.

19 Q. You also wrote a report relative to that, correct?

20 A. Yes.

21 Q. And, is your memory now refreshed that the KPac bags
22 that you referred to were actually found --

23 A. Inside the duffel bag, yes.

24 Q. And there would have been, in addition to the
25 description in the report of those KPac bags, there would

1 have been an even more detailed description that would have
2 been part of the, sort of official inventory of that
3 evidence?

4 A. Yes.

5 Q. And I don't expect that you would remember this off the
6 top of your head, but would it refresh your memory as to the
7 dates and the initials that appeared on those bags to look
8 at -- would looking at this inventory refresh your memory as
9 to those details?

10 A. Yes.

11 THE COURT: Mr. Flannery, why don't we start there when
12 we resume after lunch.

13 Sergeant, I'm going to ask you to step down and we're
14 going to address a legal matter and I will ask you to return
15 at two o'clock, please.

16 THE WITNESS: Thank you, Your Honor.

17 (The witness stepped down.)

18 THE COURT: Ms. Elkins, could you come forward, please.

19 Ms. Elkins, I understand you represent Ms. Lee who also
20 appears on the witness last as those subpoenaed by the
21 defendants. I have before me your notice of Ms. Lee's
22 intent to invoke both her privilege against
23 self-incrimination and the marital privilege.

24 I gather that you are asking me to consider this as a
25 motion to quash the subpoena?

1 MS. ELKINS: I am, Your Honor. I didn't phrase it as
2 motion to quash. It was unclear from Rule 17 whether or not
3 a motion to quash was the proper terminology as it appears
4 to just refer to production of documents, but yes, in
5 essence.

6 THE COURT: Mr. Harper-Nixon?

7 MR. HARPER-NIXON: Yes, Your Honor.

8 THE COURT: I have a memo in opposition, that you have
9 filed, and let me see if I can outline what I understand the
10 competing positions before me to be.

11 First, Ms. Lee has previously testified in the Grand
12 Jury in this case and as I understand it, her Grand Jury
13 testimony is already part of the record, that is the
14 exhibits that have been agreed to and admitted.

15 The rule of evidence that applies, as you know, is
16 Massachusetts Guide to Evidence, Section 505, which
17 describes the spousal privilege. And, in general, the
18 primary rule that is a spouse shall not be compelled to
19 testify in a trial of an indictment, complaint or other
20 criminal proceeding brought against the other spouse.

21 Mr. Harper-Nixon suggests that this is not such a case
22 since we're not here to try the indictments complained or
23 other criminal proceeding against Ms. Farak.

24 It is, however, a somewhat unusual circumstance in that
25 we are here hearing testimony which will certainly be a part

1 of that criminal case, a case that is pending and not yet
 2 resolved.

3 And although it is true that there are cases that
 4 suggest that a spousal privilege does not apply in other
 5 proceedings like Grand Jury proceeding, I'm not certain that
 6 that exception applies under the circumstances of this case,
 7 but before we -- well, let me hear from you on that
 8 Mr. Harper-Nixon.

9 MR. HARPER-NIXON: Well, Your Honor, in my memorandum I
 10 am pointing the Court to, in matter of Grand Jury Subpoena
 11 which is a 2006 case, and I think the relevant portion of
 12 that case was the SJC has ruled this is a statutory
 13 privilege because legislature has the ability to define the
 14 extent of that statutory privilege and has not done so in
 15 this case. It should be strictly construed, in that case
 16 that was the decision which stated fairly definitively that
 17 a spouse does not have -- excuse me, privilege against
 18 testifying to a Grand Jury because that was not considered
 19 to be a trial of a complained indictment or a proceeding
 20 against the spouse. I think this is a completely analogous
 21 situation. This is not a trial of an indictment complaint
 22 or the proceeding against Ms. Farak. This is 15 other named
 23 parties who are involved here. Ms. Farak is not named in
 24 any way, shape or form.

25 THE COURT: Although, you would concede, would you not,

1 that if I were to allow the testimony that that information
 2 may well be used against Ms. Farak in an upcoming criminal
 3 case?

4 MR. HARPER-NIXON: I would concede that, but I would
 5 also acknowledge, note that is true, potentially, at least
 6 of testimony to a Grand Jury. And I think the Court
 7 minimizes in the case that I cited, but the fact a Grand
 8 Jury testimony can lead to an indictment being issued, which
 9 is considerably more serious than potentially testimony
 10 coming like here today, which ultimately would, in the trial
 11 of Ms. Farak, presumably be attackable on other grounds.

12 THE COURT: Ms. Elkins, your position on the claim that
 13 the privilege doesn't apply because we're not trying this
 14 case against Ms. Farak?

15 MS. ELKINS: Your Honor, I disagree. The Grand Jury
 16 testimony would be likely to come in at a trial against
 17 Ms. Farak, whereas evidence produced in a contested hearing
 18 in which cross-examination was afforded, the opportunity for
 19 cross-examination and a direct examination, various parties
 20 with various interests could, in fact, result in preserved
 21 testimonial evidence that could conceivably become
 22 admissible in the event that Ms. Lee is legally unavailable
 23 for trial, which is -- which should would be, if she
 24 asserted her spousal privilege at any matter involving
 25 Ms. Farak. She would then become unavailable for the

1 purposes of a privilege.

2 I would also point out, Your Honor, that my motion also
 3 deals with or my notice to the Court also deals, I believe
 4 there is potential Fifth Amendment privilege as well, given
 5 what I've read of the police report and the Grand Jury
 6 minutes; and also I would suggest the Court has discretion
 7 in the interest of, in the interest of justice, but also
 8 discretion in management of court proceedings to find that
 9 evidence that can be presented in this matter in the form of
 10 affidavit or otherwise previously sworn testimony can be
 11 received by the Court in this matter.

12 We do have previously sworn testimony in the Grand
 13 Jury. Ms. Lee is certainly amenable to affirming under oath
 14 that that testimony was true to the best of her ability to
 15 render it at the time.

16 And that, Your Honor, simply can choose and, in your
 17 discretion, to not enforce her to endure something that, as
 18 I say in my motion, is going to be significantly difficult
 19 for her, cause her psychiatric mental health issues to be
 20 exacerbated.

21 Also regarding -- also, I raise the issue of the
 22 disqualification portion of the privilege statute as well,
 23 Section 20. And the opposition in this case suggests that
 24 it -- that any communications should only date back to the
 25 date of their marriage which is April 15, 2005.

1 I would suggest that the evidence is that they have
 2 been together since May 11 of 2000. They could not legally
 3 get married but prior to May 17, 2004. Recent Supreme Court
 4 ruling suggests that that's -- well, recent Supreme Court
 5 rulings as well as Massachusetts decision Goodrich vs. The
 6 Department of Health indicate that that was an
 7 unconstitutional limitation on their right to marry. And
 8 it's a question of fact as to whether or not, I would
 9 suggest, that any communications prior to the date of their
 10 marriage, in absence of a legal ability to wed, that this
 11 qualification should apply.

12 THE COURT: Talk to me for a moment about your view
 13 that she has a Fifth Amendment privilege that hasn't been
 14 waived by her testimony by the Grand Jury.

15 MS. ELKINS: Your Honor, there are two points regarding
 16 that, the Grand Jury testimony indicated that -- I'm sorry,
 17 the police reports that I have been provided indicate that
 18 when police came to the home that she -- that Ms. Lee
 19 asserted that there was potentially marijuana in the house.

20 I am concerned about further cross examination in that
 21 regard as to quantity, in that area in particular whether or
 22 not there is, in fact, a Fifth Amendment privilege, what
 23 privilege exists goes directly to something -- to questions
 24 that were not asked in the Grand Jury or indicated in the
 25 police report that above a certain quantity gets to be a

1 criminal level.

2 And in addition to that, she makes admissions -- she

3 makes admissions in Grand Jury regarding cocaine use, but

4 that she had used cocaine in the past, but has not -- does

5 not indicate when, where, how much, amount. All of that

6 would be open cross-examination in this proceeding. I would

7 suggest she has Fifth Amendment privilege to answer no

8 further questions and she has not waived by the limited

9 responses she gave in Grand Jury.

10 THE COURT: Well, I'm not certain that defense counsel

11 has much interest of eliciting that sort of information, but

12 Mr. Ryan I sense you have something you want to say?

13 MR. RYAN: I do. In fact, this is my witness I

14 summonsed here and I would like to respond to Ms. Elkins

15 contention that there is some possibility that Ms. Lee says

16 at this proceeding could be recorded and introduced at Ms.

17 Farak's trial. The law on this is pretty clear on this.

18 You have to have an opportunity for cross-examination of

19 similar motivation. There is no party in this room that

20 will be questioning this witness that will share the same

21 motivation that Elaine Pourinski, counsel for Sonja Farak,

22 would at that trial. So I don't think we need to worry in

23 that respect that this is opening up a door and is going to

24 jeopardize Ms. Farak's rights in the pending indictment

25 against her.

1 I think the -- as Mr. Harper-Nixon made clear, this is

2 a statute that takes into consideration certain public

3 policy requirements with respect to spousal privilege and

4 it, essentially, prevents one spouse from having to testify

5 at a trial that could result in the deprivation of the other

6 spouse's liberty.

7 Nothing that happens with respect to these motions for

8 new trial is going to in any way affect Sonja Farak's

9 liberty.

10 With respect to the spousal disqualification issue that

11 Ms. Elkins has raised, I think it -- think we are going to

12 have to hear from this witness as to if they were going to

13 get married the day they met; that's one thing; but I think

14 the Goodrich issue and the Supreme Court decisions, I think

15 you still have a situation where you have two people who

16 apparently, at least the witness that I want to call,

17 observed this chemist, before her employment at the Amherst

18 laboratory, used illicit substances. And I think it is an

19 extremely probative -- as to the extent of her involvement

20 in narcotics before and during her employment as a chemist

21 who analyzed substances in all 15 of these cases.

22 And I think the Court's -- I didn't think we've heard

23 any sort of adequate explanation as to why any Fifth

24 Amendment privilege was not waived before the Grand Jury.

25 Ms. Lee, as the Grand Jury minutes made clear, wasn't

1 represented by Ms. Elkins, but she was represented by

2 counsel, and there was no indication at that time, so I

3 would suggest that that privilege has been waived and I

4 would ask to be permitted to question the witness.

5 THE COURT: I think the wisest course with respect to

6 the Fifth Amendment privilege would consider on a question

7 by question basis to determine whether or not there is a

8 privilege that exists that has not been waived.

9 But I don't believe I need to get there because I am

10 interpreting, as I think the cases suggest, the spousal

11 privilege broadly, even though this is not a criminal trial

12 against Ms. Farak, that criminal trial is pending, and we

13 are talking about evidence that relates directly to the same

14 conduct. Therefor, I am finding that Section 504 of the

15 Massachusetts Guide to Evidence does apply, the privilege

16 applies, and I will interpret the document filed by

17 Ms. Elkins as a motion to quash.

18 It is allowed.

19 MS. ELKINS: Thank you, Your Honor --

20 MR. HARRINGTON: May I be heard, please?

21 I just want to join the objection of the other

22 defendant and waive argument on behalf of my client.

23 THE COURT: Could you state your name, please.

24 MR. HARRINGTON: William Harrington on behalf of Jose

25 Torres.

1 THE COURT: Thank you, Mr. Harrington.

2 Let me ask it this way, is there any counsel

3 representing a defendant who would prefer not to join in

4 those motions?

5 (Pause)

6 THE COURT: All right. The record will reflect that

7 all defense counsel have joined in the objection to my

8 ruling.

9 We will resume at two o'clock.

10 We are in recess.

11 (The Court exited at 12:58 p.m.)

12 (* * * *)

13 (The Court entered at 2:03 p.m.)

14 THE COURT: Mr. Olanoff, Mr. Ryan, you may call your

15 next witness.

16 MR. OLANOFF: We are still on a witness, cross.

17 THE COURT: Yes, we are still on cross-examination.

18 Sergeant, can you resume the stand, please.

19 THE COURT: Mr. Flannery, you may continue.

20 MR. FLANNERY: Thank you.

21 (Joseph Ballou, continued)

22 CROSS EXAMINATION BY MR. FLANNERY:

23 Q. Good afternoon, Sergeant.

24 A. Good afternoon.

25 Q. To start with, I just want to, I think, correct a

1 statement that I made earlier. And that pertains to an item
 2 or items that were found in Ms. Farak's vehicle.

3 After the break, did you have an opportunity to review
 4 the police report that related to the search of Ms. Farak's
 5 vehicle?

6 A. Yes.

7 Q. And although it's not been described, not described as
 8 KPac bags, did that report refresh your memory that some of
 9 those KPac bags were found in her vehicle as well?

10 A. Confirmed my original memory that we did find KPac bags
 11 in her car, but they were inside the envelopes, so they
 12 weren't itemized separately.

13 Q. Okay. Those weren't the bags that have initials or
 14 dates on them, correct?

15 A. They only had initials and none of them had dates.

16 Q. Okay. With respect to the bags that had initials and
 17 dates, those would have been found in the tote bag, correct?

18 A. Yes.

19 MR. FLANNERY: Your Honor, if I may I approach?

20 THE COURT: You may.

21 Q. (By Mr. Flannery) I'm going to show you what is
 22 contained in Exhibit N and it's page 11 for the record.
 23 Actually, beginning on page 10, that -- can you tell us
 24 whether that indicates in more detail what those bags looked
 25 like?

1 A. Yes. This is the evidence inventory that I took and it
 2 describes the items in more detail.

3 Q. Okay. And in terms of the dates that are listed on the
 4 KPac evidence bags, can you tell us, without listing all of
 5 the dates, what the range of dates -- what the range of
 6 dates is as reflected there?

7 A. February 16, 2012 through January 6 of 2013.
 8 January, January 6 -- January 6 of 2013.

9 Q. Okay. You said February?

10 A. December 16, 2012 through January 6, 2013.

11 Q. Okay. So the earliest one would have been dated
 12 December of 2012, December 6 (sic)?

13 A. Yes.

14 Q. And then, that ranged from that to some bags that were
 15 dated January 2013?

16 A. Correct.

17 THE COURT: And just to clarify, those are the dates on
 18 the KPac bags that were taken from the duffle bag?

19 THE WITNESS: Yes, Your Honor.

20 THE COURT: All right.

21 Q. (By Mr. Flannery) One last topic, there was some --
 22 what you initially believed to be heroin found in
 23 Ms. Farak's vehicle, correct?

24 A. Correct.

25 Q. That substance was later analyzed and determined not to

1 be heroin; is that right?

2 A. That's correct.

3 Q. So, in terms of your initial investigation, at least in
 4 all of the charges that flowed from that investigation,
 5 cocaine was really the only drug that appeared Ms. Farak was
 6 stealing or tampering with?

7 A. Yes.

8 MR. FLANNERY: I have nothing further.

9 THE COURT: Redirect examination limited to those
 10 areas?

11 MR. OLANOFF: Yes, thank you, Your Honor.

12

13 **RE CROSS EXAMINATION BY MR. OLANOFF:**

14 Q. With respect to those evidence bags found in
 15 Ms. Farak's vehicle, if I could direct your attention to
 16 Exhibit H. And it's going to be page number 3369.

17 So it's about 20 photos into this Exhibit H, number
 18 3369.

19 A. I have it.

20 Q. Okay. That is a Manila envelope with lab a number on
 21 it, correct?

22 A. Yes.

23 Q. The 508 would refer to the Amherst lab number for
 24 evidence that was submitted in the year 2008, correct?

25 A. Correct.

1 Q. Okay. Now, on the next page --

2 A. But it is crossed out.

3 Q. It is crossed out, I understand.

4 Now, on the next page, 3370, another photograph of that
 5 same Manila envelope, correct?

6 A. Yes.

7 Q. And going the next page after that, 3371, that is the
 8 contents of that Manila envelope, correct?

9 A. Yes.

10 Q. And those are the KPac bags or the evidence bags that
 11 we've been talking about that were found in Ms. Farak's
 12 vehicle, correct?

13 A. Yes.

14 Q. As you can see from that photograph, and the one
 15 following it, there's initials on that KPac bag, correct?

16 A. Yes.

17 Q. Are those Rebecca Pontes' initials, RP?

18 A. It's hard to read, but as I said I remember there was
 19 one that said RP and the rest were all SF.

20 Q. Okay. And these bags had been sliced open, correct?

21 A. Yes.

22 Q. And as you testified on direct examination, one of
 23 these bags contained cocaine residue, correct?

24 A. It was -- there was a bag that contained something that
 25 tested not positive for cocaine.

1 Q. Okay. And that was from this particular envelope,
 2 correct, and the KPac bag?
 3 A. No. There was like a baggie that was not a KPac bag
 4 that had a white crystal substance in it. It didn't appear
 5 to be cocaine to me, and it tested not to be cocaine. The
 6 bag that had residue was from the lab, from the bag from the
 7 tote bag that we recovered.
 8 Q. I understand, and so these KPac bags that had been
 9 sliced open, you didn't notice any residue in those,
 10 correct?
 11 A. Right.
 12 Q. And those were not sent for testing, correct?
 13 A. Correct.
 14 Q. And again, there's no date on those KPac bags, but they
 15 are inside of that larger Manila envelope with the 08
 16 evidence number, correct?
 17 A. Right. There was actually a lot of KPac bags stuffed
 18 into one envelope.
 19 Q. And those had all been sliced open?
 20 A. I think all of them.
 21 MR. OLANOFF: Thank you. I have nothing further.
 22 THE COURT: Mr. Ryan?
 23 MR. RYAN: Thank you.
 24 **CONTINUED RECROSS EXAMINATION BY MR. RYAN:**
 25 Q. Sir, we've been talking quite a bit now about the

1 evidence that was in Ms. Farak's car, correct?
 2 A. Yes.
 3 Q. And what we've been talking about is how you described
 4 that evidence in various reports you wrote, correct?
 5 A. Yes.
 6 Q. And we've been looking at photographs of this
 7 particular evidence?
 8 A. Yes.
 9 Q. And the reason we're doing that is because this
 10 evidence no longer exists, right?
 11 A. No. It still exists.
 12 Q. Oh, where is it?
 13 A. It's in a drug storage locker -- I mean, excuse me,
 14 evidence storage locker.
 15 Q. And can you tell me why none of the counsel for none of
 16 the defendants have been permitted to look at any of this
 17 evidence?
 18 MR. FLANNERY: Objection.
 19 THE COURT: Sustained.
 20 Q. (By Mr. Ryan) Well, there's this physical evidence that
 21 we've been discussing from the car, correct?
 22 A. Yes.
 23 Q. And you would agree that your reports regarding what
 24 was in the car are summary notes?
 25 A. Summary, yes.

1 Q. You didn't write paragraph after paragraph about what
 2 assorted lab paperwork was found, right?
 3 A. As you mentioned, we also took pretty detailed photos,
 4 yes.
 5 Q. Well, how many photos did you take?
 6 A. I didn't take any. This was from -- the crime scene
 7 services took these.
 8 Q. And whatever is in that book, is that a fair
 9 representation of how many photographs were taken?
 10 A. From the car, sir, yes; vehicle search warrant, yes.
 11 Q. A couple dozen?
 12 A. Yes.
 13 Q. And about how many items of evidentiary interest were
 14 there?
 15 MR. FLANNERY: Objection, Your Honor. This is not to
 16 the scope of the direct.
 17 THE COURT: Sustained as to what has evidentiary
 18 interest.
 19 Q. (By Mr. Ryan) Well, you did an evidence log, correct?
 20 A. Yes.
 21 Q. And that had some 67 items on it?
 22 A. Yes.
 23 Q. And a number of those items were from the car?
 24 A. Yes. That included all of the evidence seized in the
 25 case.

1 Q. Did you photograph every piece of evidence that was
 2 seized from the automobile?
 3 A. As I said, I didn't photograph anything. But yeah,
 4 crime scene services photographed the evidence as we seized
 5 it, yes.
 6 Q. Did anybody make a video recording of the execution of
 7 the search warrant?
 8 A. There's no video, no.
 9 Q. Now, you talked earlier about some, what was perceived
 10 to be heroin that was found in Ms. Farak's possession. Do
 11 you remember that?
 12 A. Yes.
 13 Q. And you said that that was -- that turned out not to be
 14 heroin, correct?
 15 A. Correct.
 16 Q. That actually field-tested positive for heroin, didn't
 17 it?
 18 A. Yes.
 19 Q. And there was some field-testing positive for cocaine
 20 as well?
 21 A. Yes.
 22 Q. And when those particular items went to the laboratory
 23 and there was actual analysis done on these substances, it
 24 turned out they weren't narcotics, correct?
 25 A. No. One of them was cocaine and the other one of was

1 not heroin.

2 Q. The one with heroin, that's sort of why we have a crime

3 lab that analyzes drugs, right?

4 A. Yes.

5 Q. Because those field-tests aren't always accurate?

6 MR. FLANNERY: Objection.

7 THE COURT: I'm not sure of the relevance of this,

8 Mr. Ryan.

9 MR. RYAN: Well, with respect to my client's case,

10 there was field-testing that was done and there's been some

11 indication that this goes to the, you know, what he knew

12 about the substances at the time of law enforcement, whether

13 there was actually any need to implicate -- duplicate Ms.

14 Farak's testing in question.

15 THE COURT: It's beyond the scope of today's hearing.

16 MR. RYAN: Understood.

17 Q. (By Mr. Ryan) You testified earlier that cocaine was

18 the only substance that it appeared that Ms. Farak had any

19 interest in tampering with; is that correct?

20 A. Yes.

21 Q. With respect to Exhibit O, we talked about earlier?

22 A. Yes.

23 Q. Those are Oxycodone pills?

24 A. Yes.

25 Q. That is not a derivative of cocaine?

1 A. No.

2 Q. That would be more of the nature of a -- well,

3 Oxycodone, what is it, do you know?

4 A. I don't know.

5 Q. But it's not cocaine?

6 A. No.

7 Q. And we talked about before there was some evidence that

8 that particular evidence is not -- was not returned to the

9 police department in the state that it was arrived at the

10 lab; is that correct?

11 A. That's what the officer thinks, yes.

12 Q. And would you agree with Mr. Flannery that this officer

13 apparently made some huge mistake in counting the number of

14 pills that his department submitted to the laboratory?

15 A. I don't know what happened. I don't know if he made a

16 mistake or not.

17 Q. It's because you haven't looked at any of the

18 laboratory records that would indicate what the evidence

19 officer said as to how many pills she counted when she

20 accepted the sample?

21 A. I haven't looked at those no.

22 MR. RYAN: No further questions.

23 THE COURT: Recross-examination limited to those areas?

24 Any further?

25 MR. FLANNERY: No.

1 THE COURT: Any further inquiry from defense counsel

2 noting your earlier conditional decision not to ask further

3 questions today, but reserving the right to do so at a

4 future time?

5 Sergeant, you are excused.

6 You may step down.

7 MS. FOSTER: Your Honor, if I may ask quickly, related

8 to subpoena for document and photographs, we're wondering if

9 we could have a different date to respond to that.

10 THE COURT: The subpoena?

11 MS. FOSTER: For Sergeant Ballou included all documents

12 and photographs.

13 THE COURT: Let's address that at the end of this

14 hearing.

15 MS. FOSTER: Okay.

16 (The witness stepped down.)

17 (* * * *)

18 THE COURT: Mr. Ryan, you may call your next witness.

19 MR. OLANOFF: Defense calls Sharon Salem.

20 THE CLERK: Raise your right happened, ma'am.

21 (Sharon Salem, sworn)

22 THE COURT: Ms. Salem, good afternoon.

23 THE WITNESS: Hi.

24 THE COURT: Is that the way you pronounce your last

25 name?

1 THE WITNESS: Salem.

2 THE COURT: Salem.

3 Ms. Salem, before we begin, I want to remind you that

4 it's important I hear everything and please keep your voice

5 up and try to make certain your responses are verbal rather

6 than just by gesture.

7 If you don't understand the question, please let us

8 know. If you do understand the questioning, please limit

9 your response to that question.

10 Do you understand me so far?

11 THE WITNESS: Yes.

12 THE COURT: You may proceed.

13 (Sharon Salem)

14 **DIRECT EXAMINATION BY MR. RYAN:**

15 Q. Good afternoon, Ms. Salem.

16 A. Hi.

17 Q. Can you state your name and spell your last name for

18 the record?

19 A. Sharon Salem, S-A-L-E-M.

20 Q. And where are you employed currently, Ms. Salem?

21 A. Department of State Police Forensic Services Group.

22 Q. And in what capacity are you employed?

23 A. I'm a Forensic Scientist III.

24 Q. And is it sometimes also referred to as Chemist III?

25 A. Yes.

1 Q. And when did you become a Chemist III?

2 A. Good question. I'm thinking maybe 2002.

3 Q. Now, back in 2002, were you working at the Amherst

4 laboratory?

5 A. Yes.

6 Q. Did you begin working there in 1987?

7 A. Yes.

8 Q. Now, at some point when you were working there, when

9 you first started working there, was there an evidence

10 officer?

11 A. Yes.

12 Q. And who was that?

13 A. Donna Lacroix.

14 Q. And did Ms. Lacroix eventually retire?

15 A. Yes.

16 Q. And did you volunteer to take her place?

17 A. Yes.

18 Q. And was that assignment given to you?

19 A. Yes.

20 Q. And when you became the evidence officer, prior to

21 becoming the evidence officer, did you test substances that

22 had been submitted for analysis?

23 A. Yes.

24 Q. Upon becoming the evidence officer, did you continue to

25 test samples that were submitted for analysis?

1 A. Yes. For awhile I was doing in transition both

2 positions.

3 Q. And at some point or another, did you stop testing

4 substances submitted for analysis?

5 A. Yes.

6 Q. And about when was that?

7 A. 2007 maybe.

8 Q. Now, at that point, is it fair to say that your primary

9 assignment was maybe keeping track of evidence?

10 A. Yes.

11 Q. And you also did some paperwork?

12 A. Yes.

13 Q. And is it -- did you also deal with something known as

14 a technical review?

15 A. Yes.

16 Q. Now technical reviews, that would involve checking the

17 work of the analyst; is that correct?

18 A. Correct.

19 Q. So a particular substance would come to the laboratory,

20 police would bring a substance to the laboratory; is that

21 how it would get there?

22 A. Yes.

23 Q. And as evidence officer, you would check that substance

24 in?

25 A. Yes.

1 Q. And eventually you would assign it to a chemist for

2 analysis?

3 A. Correct.

4 Q. And is it accurate that your testing at the laboratory

5 involved both presumptive testing and confirmatory testing?

6 A. Correct.

7 Q. And what's the difference between the two of those?

8 A. Presumptive, the substance could be several different

9 substances. The different substances would come out or

10 interfere with -- with the same substance, it could have the

11 same characteristics. Once you do a confirmatory test

12 there's only that substance is confirmed.

13 Q. So if you have a presumptive test for cocaine, that

14 means it could be cocaine, correct?

15 A. Correct.

16 Q. If you did a presumptive test and it did not come back

17 for cocaine, that meant it could not be cocaine?

18 A. Correct.

19 Q. And if it was the former, where it showed it could be,

20 that's where it would then be tested in a more sophisticated

21 manner, correct?

22 A. Correct.

23 Q. Now, these technical reviews that you did, you would

24 review a particular chemist's work who did the testing?

25 A. I would review every chemist's work.

1 Q. We're talking about a particular sample. So you're not

2 talking about multiple chemists who had any involvement with

3 that particular sample?

4 A. Correct.

5 Q. You utilized the system where there would be only one

6 chemist who would do both the presumptive and the

7 confirmatory testing, correct?

8 A. Correct.

9 Q. And with the presumptive testing, that would entail a

10 chemist doing a relatively quick test that was fairly

11 unsophisticated, correct?

12 A. I wouldn't call it unsophisticated.

13 Q. Well, compared to the gas chro- -- maybe can you help

14 me with that, Gas -- the GC?

15 A. Chromatograph.

16 Q. And the mass spectrometer?

17 A. Correct.

18 Q. That wouldn't be more sophisticated than a

19 microcrystalline test, correct?

20 A. They're both testing different things. The gas

21 chromatograph is fairly well sophisticated. It will

22 separate substances. The crystalline test is done actually

23 to determine whether it is a certain diastereomer of

24 cocaine.

25 Q. Well, let me ask you this, is there anything that you

1 can check after a chemist does the microcrystalline test
 2 other than what they write in the lab notebook? Is there
 3 any computer printout or any data that is you can review?
 4 A. No, there isn't and it's a wet chemistry technique.
 5 Q. So that is one of the distinguishing features, is it
 6 not, between presumptive and confirmatory testing, correct?
 7 A. Whether it's a printout or not?
 8 Q. An instrument generated data --
 9 A. Well, you need the microcrystalline test to confirm
 10 cocaine.
 11 Q. I understand that. At the end of this process you have
 12 to determine whether it's a particular isomer of cocaine,
 13 but with respect to the microcrystalline test, it's also a
 14 test that will basically let you know whether you are going
 15 to put this through the GC-MS, correct?
 16 A. No.
 17 Q. What do you use to do the preliminary test?
 18 A. The GC. Gas chromatograph.
 19 Q. So it goes right to the GC?
 20 A. Correct.
 21 Q. Now, in this capacity as a chemist, I suspect you've
 22 come in contact with an organization that uses the acronym
 23 SWGDRUG; is that correct?
 24 A. Correct.
 25 Q. Do you know what SWGDRUG stands for?

1 A. Scientific Working Group.
 2 Q. I'm going to be asking you some questions about their
 3 recommendations that are found in Exhibit T in the binder
 4 before you. It might be helpful if you can review them
 5 along with me.
 6 Exhibit T.
 7 A. Oh, I'm sorry.
 8 Q. Now, SWGDRUG publishes these recommendations?
 9 THE COURT: Is that question?
 10 MR. RYAN: Yes.
 11 THE WITNESS: Is that a question?
 12 Q. (By Mr. Ryan) Yes. Do they publish these
 13 recommendations that are before you?
 14 A. Yes.
 15 Q. And it's the mission of this organization to assist
 16 people like you?
 17 A. Correct. I assume so.
 18 Q. Well, in the forward, does it say the mission is to,
 19 quote: Assist forensic analysts and managers in the
 20 development of analytical techniques, protocols, and
 21 policies?
 22 A. Well, yes, it does.
 23 Q. And if you were to look at the introduction in the
 24 first paragraph, does SWG come and say what they are
 25 recommending are quote: Minimum standards for the forensic

1 examination of seized drugs?
 2 MR. FLANNERY: Your Honor, I'm going to just object to
 3 the use of this witness to testify about what's written in
 4 these recommendations.
 5 THE COURT: I think that's a fair point. It is clear
 6 it is in evidence.
 7 Are you asking her to interpret it for me?
 8 MR. RYAN: No. I'm going to be asking this witness to
 9 acknowledge that these are guidelines that guide the work of
 10 forensic laboratories and I am going to be contrasting some
 11 of the things this witness has said in an affidavit I
 12 received and what these minimum requirements are according
 13 to this organization.
 14 THE COURT: All right. Let's get to that.
 15 Q. (By Mr. Ryan) Now, is it fair to say this organization,
 16 these recommendations that are made are really considered
 17 more or less the floor under which a forensic drug
 18 laboratory should not go?
 19 A. I actually cannot comment on that. I do not know what
 20 the floor is.
 21 Q. You have no -- well, that -- I think I just read it in
 22 the introduction.
 23 A. Well, yes. I do understand that this is the minimum
 24 standard.
 25 Q. Okay.

1 MR. RYAN: If I could approach the witness?
 2 THE COURT: You may.
 3 Q. (By Mr. Ryan) Ms. Salem, I'm handing you a copy of a
 4 document. Do you recognize that?
 5 A. Yes.
 6 Q. And what is that?
 7 A. This is an affidavit that I signed stating what my
 8 duties were at the drug lab.
 9 Q. Okay. We'll get into the details of it, but you say
 10 that you signed it. Did you draft it?
 11 A. I refined it. It was drafted by the DA's Office, I
 12 believe, and I fine tuned it and made sure it was up to what
 13 I wanted it to say and then I signed it.
 14 Q. Now, you said before that some of this affidavit
 15 details what your responsibilities were at the lab. I want
 16 to talk about that a little bit more, but I would like to
 17 focus on paragraphs 12 to 17.
 18 THE COURT: Is this document in evidence?
 19 MR. RYAN: It is not. Well, it was submitted by the
 20 District Attorney's Office in response -- in opposition to
 21 my motion for new trial.
 22 THE COURT: Well, if it's something you want me to
 23 consider carefully, perhaps I should have a copy of it as
 24 you're inquiring.
 25 MR. RYAN: Well, I can work on obtaining -- I don't

1 think -- I think the witness --

2 THE COURT: All right. You may proceed.

3 I just find it more helpful if I know what it is when

4 the witness is looking at.

5 MR. RYAN: Okay.

6 Q. (By Mr. Ryan) Paragraphs 12 through 17, Ms. Salem.

7 Do these document what happens when chemists go to

8 court to testify?

9 A. Yes, it does.

10 Q. And it's fair to say that once you became the evidence

11 officer, you didn't go to court to testify very much?

12 A. Not very much.

13 Q. And you stopped testing -- you said in 2007?

14 A. Correct.

15 Q. And this was before the Melendez Diaz decision,

16 correct?

17 A. Correct.

18 Q. And that's when analysts in your laboratory were called

19 upon to testify more frequently, correct?

20 A. More frequently, yes.

21 Q. And in paragraph 13, we talk about how chemists would,

22 quote, Bring a copy of the relevant file to the court to aid

23 in their testimony, end quote.

24 That's not something you would personally do?

25 A. If I was called to court I would do it and I was at

1 times.

2 Q. Okay. And in paragraph 16, and you say quote, Chemists

3 typically place the copy of the a file in a Manila envelope

4 or file folder which they mark with a relevant lab number,

5 end quote.

6 That is something you saw your colleagues do?

7 A. Yes.

8 Q. And it's something you personally did?

9 A. Yes.

10 Q. Now, with respect to paragraphs 16 and 17, you make

11 some statements there that reflect policies and procedures

12 at the laboratory; is that correct?

13 A. Correct.

14 Q. You say in paragraph 16, quote, The Manila envelope and

15 the copy of the file were not part of the official file and

16 there was no requirement that it be returned to the lab, end

17 quote.

18 Is that correct?

19 A. Correct.

20 Q. And in paragraph 17 you state, quote, Chemists were

21 free to reuse or disregard the envelope and the copies in

22 any manner that they saw fit; is that correct?

23 A. Correct.

24 Q. That was the policy at the Amherst laboratory?

25 A. It was; it was, yes.

1 Q. Was that policy memorialized anywhere?

2 A. No, not that I'm aware of.

3 Q. There's no piece of paper that essentially gives

4 chemists or people going to court carte blanche to do

5 whatever they like with the copies that they bring with

6 them?

7 A. Correct.

8 Q. But that was the policy according to your experience in

9 the laboratory?

10 A. Correct.

11 Q. Now, during the course of your involvement in this

12 investigation after Ms. Farak was arrested, did you learn

13 that she, in fact, had some lab materials in her car at the

14 time that she was arrested?

15 A. I did learn that.

16 Q. And did you learn that some of these items dated back

17 to 2008?

18 A. That's possible. I don't remember the numbers.

19 Q. And are these paragraphs of the affidavit that we've

20 been talking about an attempt to explain what that, what

21 some of this paperwork was doing with notations back to 2008

22 cases?

23 A. Yes. It was -- it was an attempt to explain why there

24 would be files in her car.

25 Q. Now, I'd like to talk about when you say they could

1 print out a copy of the file and do with it what they would.

2 I'd like to talk a little more about the contents of

3 files that would -- that chemists would use to testify.

4 Is one of the documents they would frequently bring

5 with them something called a drug receipt?

6 A. Correct.

7 Q. And if an Assistant District Attorney asked a chemist

8 on the witness stand at what point a sample was dropped off

9 for testing, is there any a document to which they would

10 refer?

11 A. Yes.

12 Q. And this so-called drug receipt, this was something

13 that you generated every time a department dropped off a

14 batch of samples, correct?

15 A. Correct.

16 Q. And, I'd ask you to turn to be Exhibit Y.

17 And if you flip a few pages in --

18 A. Is Y labeled?

19 Q. Well, there's an X, Y, Z. If you find the yellow card

20 stock separating --

21 Okay. Flip a few pages in, you'll see a document that

22 reflects, I believe, a submission of samples from the

23 Springfield Police Department on September 25, 2011.

24 Do you see that?

25 A. October 25, 2011?

1 (Pause)

2 MR. RYAN: There may have been multiple ones here.

3 Bear with me. So just bear me a moment.

4 (Pause)

5 MR. RYAN: Exhibit X, the exhibit before. My mistake.

6 Exhibit X.

7 THE COURT: Where in Exhibit X?

8 MR. RYAN: It would be the third page.

9 THE COURT: Ask your next question.

10 Q. (By Mr. Ryan) This is a copy of this drug receipt, an

11 example of one of the drug receipts we're talking about?

12 A. Okay. Dated October 25, 2011?

13 MR. RYAN: Perhaps I can be of assistance.

14 (Pause)

15 Q. (By Mr. Ryan) You're right. It is October 25. Let's

16 use this one right here. (Indicating)

17 MR. RYAN: If we can go back to Exhibit Y, Your Honor.

18 And it will be the fourth page.

19 Q. (By Mr. Ryan) So this exhibit designates, it's two

20 pages, correct?

21 A. Correct.

22 Q. And there's approximately two dozen names of

23 individuals on there, right?

24 A. Correct.

25 Q. And those individuals have been designated as

1 defendants?

2 A. Yes.

3 Q. And the top of the sheet, it says the word "drug

4 receipt"?

5 A. Yes.

6 Q. Now, when you created this document that you would give

7 to police departments, you didn't know if any of these

8 samples that are mentioned here were actually drugs,

9 correct?

10 A. Correct.

11 Q. That's why they brought them to your laboratory?

12 A. Correct.

13 Q. To find out if they were drugs?

14 A. Correct.

15 Q. And with respect to the names of the individuals there,

16 you didn't know when these samples were dropped off, if they

17 were defendants and defendants in criminal cases or not, did

18 you?

19 A. No.

20 Q. They could be individuals who were suspects in an

21 investigation?

22 A. Correct.

23 Q. So calling them defendants, is a bit, in some cases, a

24 bit premature, isn't it?

25 A. I suppose. I didn't write the program.

1 Q. It's a program that your laboratory used?

2 Now, is it -- it's your testimony that at the Amherst

3 laboratory this would be a document that a chemist would

4 print out in going to court?

5 A. Correct.

6 Q. It would contain the names of potentially two dozen

7 people?

8 A. Yes.

9 Q. And it would be called a drug receipt?

10 A. Correct.

11 Q. And it's your testimony that the chemist, when they

12 finish testifying, could take this piece of paper and leave

13 it at a coffee shop?

14 A. It wouldn't be vary responsible, but yes.

15 Q. There would be nothing improper about that?

16 A. I didn't say that. It would be improper. It would be

17 irresponsible.

18 Q. Well, the affidavit you said, you wrote said they were

19 free to dispose of this as they saw fit?

20 A. Correct.

21 Q. So it's your testimony, the policy at Amherst was to

22 entrust analysts with a great deal of discretion with

23 respect to these kinds of documents?

24 A. Yes.

25 Q. Now, if we go back to Exhibit T, the SWGDRUG protocols,

1 and if I could draw your attention to Section 2.2A.

2 There's a section in there entitled casework; do you

3 see that?

4 A. Yes.

5 Q. And does this recommendation talk about what analysts

6 shall strive to do to demonstrate the integrity and security

7 of evidentiary materials?

8 A. Apparently.

9 Q. Reviewing that document, is it fair to say that the

10 Amherst laboratory policy of permitting analysts to just

11 discard evidentiary materials was not keeping with the

12 minimum guidelines that SWGDRUG promulgates?

13 THE COURT: Can I ask you, do you mean by that --

14 (Phone ringing.)

15

16 COURT OFFICER: Turn that off.

17 (Pause)

18 THE COURT: -- that you are referring to this drug

19 receipt as, quote, evidentiary material?

20 MR. RYAN: I believe that SWGDRUG would refer to that

21 and I think that the example that I showed this witness for

22 the -- for with the next exhibit would be indicative of

23 that.

24 THE COURT: You believe that SWGDRUG would refer to

25 that document as evidentiary material?

1 MR. RYAN: What they would do, in Section 2.2-1 of a
 2 supplemental document that's in the binder before you, Your
 3 Honor, they would state that the job analyst is to, quote,
 4 ensure the access to evidential materials and all
 5 documentation relating to these, before and after their
 6 examination, is restricted to authorized personnel.

7 THE COURT: So that's the point you're trying to make
 8 by the contrasting Mass. State Police procedure with this
 9 policy or protocol, used by some other organization that
 10 they acknowledge they did not use are different?

11 MR. RYAN: I wouldn't say that they will acknowledge
 12 they don't use them. I think the witnesses will say that
 13 they were in keeping with these guidelines and that it's my
 14 argument that this representation of the witness' affidavit,
 15 as to those materials, that we spend a great deal of time
 16 talking with Trooper Ballou. This is, as she said, an
 17 attempt to explain how lab materials ended up in the trunk
 18 of Ms. Farak's car and she's averred, in an affidavit, that
 19 there was really nothing improper, out of the ordinary.

20 THE COURT: Oh, all right. I don't need to hear more.
 21 Let's move it along.

22 Q. (By Mr. Ryan) Now, I'll like to talk about what
 23 happened on August -- excuse me January 17, 2013, but before
 24 I do, I would like to talk about the evidence safe at the
 25 Amherst laboratory.

1 Where was the main evidence safe located?

2 A. In my office area.

3 Q. And we talked before about the police departments
 4 coming to your -- to the lab to drop off samples.

5 Do you recall that?

6 A. Yes.

7 Q. Is that where they would encounter you?

8 A. Yes.

9 Q. And when they would encounter you, what would be the
 10 protocol you would engage in with an evidence officer from a
 11 police department?

12 A. I don't understand the question.

13 We would log in their samples.

14 Q. When you logged in their samples, would you assign each
 15 sample a log number?

16 A. Correct.

17 Q. And eventually they would go into the evidence safe; is
 18 that correct?

19 A. Correct.

20 Q. And now, in theory, this is the location where the
 21 sample was supposed to be until it was assigned for
 22 analysis; is that correct?

23 A. Correct.

24 Q. And the lab had four full-time employees at the time?

25 A. Correct, including myself.

1 Q. And the others were Jim Hanchett?

2 A. Yes.

3 Q. Rebecca Pontes?

4 A. Yes.

5 Q. And Sonja Farak?

6 A. Yes.

7 Q. Now, is it true that all four of you had access to this
 8 main evidence safe?

9 A. Yes.

10 Q. And you could access this main evidence safe by way of
 11 a swipe card?

12 A. Yes.

13 Q. And when you did this, the card would generate a --
 14 well, it would have memorialized the moment before it was
 15 accessed, right?

16 A. I assume so.

17 Q. And it would also memorialize who accessed it, right?

18 A. Yes, I would assume so.

19 Q. Now, that wasn't the only way to get into the evidence
 20 safe, correct?

21 A. Correct.

22 Q. It was also entry by way of keys?

23 A. Yes.

24 Q. And are these just typical like house keys?

25 A. No. They were issued by UMASS. They were a little

1 bigger than a house key.

2 Q. And each of you was given one?

3 A. Correct.

4 Q. And each of you could use this -- this key to gain
 5 access to the main evidence safe?

6 A. Correct.

7 Q. If you use a -- this key to get in, would there be any
 8 record of the entry?

9 A. No, there was not.

10 Q. Did you have a -- any paper or sign-up sheet or
 11 acknowledgment that analysts would have to sign, if they use
 12 their key, to get into the main evidence safe?

13 A. No.

14 Q. Now, this was really a discretionary choice with any
 15 particular analyst as to whether to use a swipe card or key,
 16 correct?

17 A. Correct. We were used, supposed to use swipe cards.

18 Q. But sometimes the swipe cards weren't working, correct?

19 A. Correct.

20 Q. And sometimes people forgot their swipe cards?

21 A. Correct.

22 Q. And so, if you had your swipe card in your pocket and
 23 your key in your hand, there wasn't any reason why you
 24 couldn't use your key, correct?

25 A. Correct.

1 Q. Now, there were no cameras in front of the -- this main
 2 evidence safe?
 3 A. No.
 4 Q. Now, on the afternoon of January 17, 2013, you were
 5 working that day?
 6 A. Yes.
 7 Q. And is it correct you signed some drug certs that
 8 afternoon?
 9 A. Correct.
 10 Q. And after doing this, you made a discovery?
 11 A. Correct.
 12 Q. Well, you discovered that you don't have some results
 13 for samples that you had assigned, correct?
 14 A. Correct.
 15 Q. And this was about a batch of samples you assigned
 16 Sonja Farak?
 17 A. Correct.
 18 Q. And according to your records, she completed testing on
 19 some of these samples?
 20 A. She had completed testing on -- on what samples are you
 21 referring?
 22 Q. This batch that had some incomplete results for.
 23 A. Okay.
 24 Q. I am trying to understand.
 25 A. Are you talking about the missing samples or are you

1 talking about --
 2 Q. Well, before you realized there were any samples
 3 missing --
 4 A. Right.
 5 Q. -- you discovered that you did not have some results
 6 back from her that you would have examined by that point in
 7 time; is that correct?
 8 A. Correct. They were late in getting the results -- she
 9 was late in getting results back to me.
 10 Q. Now, when you would assign a batch of samples for
 11 testing, would you give them to the chemist, the actual
 12 samples, correct?
 13 A. Correct.
 14 Q. And you would give them a spreadsheet that corresponded
 15 to the samples in their batch?
 16 A. Correct.
 17 Q. Now, when a chemist would analyze a particular
 18 substance and make a finding, they would write on that
 19 spreadsheet the results of the examination, correct?
 20 A. Correct.
 21 Q. And, I guess my question is, is that spreadsheet, is
 22 that something that they would return half finished to you
 23 or would they wait until they finalized the entire
 24 spreadsheet before giving it back to you?
 25 A. They would wait until they finalized the entire

1 spreadsheet.
 2 Q. So were you policing the entire spreadsheet from Sonja
 3 Farak?
 4 A. Correct.
 5 Q. Okay. Now, this batch that you had assigned contained
 6 a couple of lab numbers that I think you're familiar with at
 7 this point being A12-4791 and A12-4793; is that correct?
 8 A. No. That batch only contained -- the batch that I was
 9 missing only contained A12-04793; 0791 was in a previous
 10 batch that I did get results back on.
 11 Q. So in that case you had already gotten the -- that
 12 sample had returned with the other samples in the batch?
 13 A. Correct.
 14 Q. And had gone back into the main evidence safe?
 15 A. Oh, correct.
 16 Q. And so you were just looking for one particular sample?
 17 A. Actually, both samples had been returned to me, both.
 18 two different batches had already been -- the samples had
 19 been returned. I just didn't have the results back for 793.
 20 The sample had actually been returned back to the safe.
 21 Q. So, you, at that point, decided to go conduct a little
 22 bit more of an investigation, correct?
 23 A. Correct. I just wanted to make sure that maybe I
 24 wasn't missing something that -- you know, that the samples
 25 that had actually been returned to me. It was sometimes

1 easier to just to look for the sample than it was to
 2 actually go through the computer system and look.
 3 And when I went to the evidence safe, it wasn't there.
 4 Q. And which one wasn't there?
 5 A. A12-04791 and A12-04793.
 6 Q. You just happened to be looking for the results related
 7 to one of them, correct?
 8 A. I was looking for -- yeah, I was looking to make sure
 9 07439 had actually been returned to me even though I didn't
 10 have the results yet. I was making sure that it had been
 11 returned and I should be looking for results.
 12 Q. Did you expect to find the results in the --
 13 A. No, that's just it. The results aren't in the sample,
 14 are in the safe.
 15 Q. At that point you decide to go look in the temporary
 16 safes that were at the laboratory?
 17 A. Yes, I did check the chemists' safes.
 18 Q. And you did this because you thought maybe somebody
 19 took them to double check something?
 20 A. Right.
 21 Q. Now, you'd agree that nobody had logged out these
 22 samples to double check anything?
 23 A. Correct.
 24 Q. But is it -- was, that occurred to you as a possibility
 25 that somebody just decided to go into the main evidence

1 safe, pull out some samples that have already been tested
 2 and double checked -- double checked them without, in any
 3 way alerting you to this or noting any --
 4 A. That should not be done.
 5 Q. But that was something that you thought may occur?
 6 A. Occurred -- it might have happened.
 7 Q. Is that something that might have happened previously?
 8 A. No.
 9 Q. And it was at that point you couldn't find those
 10 samples that you decided there was a real problem?
 11 A. Correct.
 12 Q. Now, you would agree that it would have been a real
 13 problem if you did find the samples and somebody had just --
 14 A. That would be a problem also, yes, that would be
 15 against protocol.
 16 Q. Now, let me go back and ask you about at the lab, right
 17 at the transaction where an evidence officer hands you
 18 substances suspected of being narcotics. Is it sometimes
 19 the case that you will receive narcotics in pill form?
 20 A. Yes.
 21 Q. And what is the standard practice that takes place if
 22 the police department drops off a number of pills that they
 23 want tested?
 24 A. The same as any other substance that they drop off.
 25 You weigh it. And if it's like under 10 tablets I would try

1 to count the 10 tablets, but other than that I would have to
 2 take the police officer's word as to how many tablets were
 3 in the bag.
 4 Q. So you wouldn't actually count how many tablets were in
 5 any bag?
 6 A. Not necessarily, no. It would be too money, hundreds.
 7 Q. All right. Let's say that if an officer came to the
 8 laboratory and handed you a bag that had what the officer
 9 said were 51 tablets, you would just adopt their description
 10 of how many tablets they had and write it on the drug
 11 receipt?
 12 A. Correct. I would log it in as 51 tablets. It would be
 13 up to the chemist to verify that the 51 tablets was correct.
 14 Q. And after that, the conclusion of that they would --
 15 after doing the count and doing the testing, they would
 16 generate a drug certification, correct?
 17 A. Correct.
 18 Q. And if the drug certification indicated on it that
 19 there were 61 tablets, would that be a significant
 20 discrepancy between what was on what the officer submitted?
 21 A. It would be significant, but we have the gross weight
 22 when it was logged in, you know, that -- well, actually,
 23 going up in number, so it wouldn't really matter all that
 24 much. But if it was 41 versus 51, you would go by the gross
 25 weight that you would verify, the chemist would verify that

1 the gross weight was similar to what was logged in on that
 2 day.
 3 Q. Before an evidence officer from a police department
 4 came and picked up these submissions we're talking about,
 5 you would have a copy of the drug receipt, the drug receipt
 6 you initially generated, correct?
 7 A. Correct.
 8 Q. And that would list how many tablets were, or this
 9 particular sample, according to the police department?
 10 A. Correct.
 11 Q. And then you would have a drug certification from the
 12 chemist and she would also list how many, a numerical number
 13 as to how many tablets, correct?
 14 A. Correct.
 15 Q. And would you be in a position to look at those two and
 16 notice, compare any differences?
 17 A. What -- I don't understand the question?
 18 Q. In your role as returning this to the police
 19 department, you were handing them both the drugs and --
 20 A. Oh, I see. I see.
 21 Q. -- the drug certification --
 22 THE COURT: Hold on. One at a time, please.
 23 THE WITNESS: Sorry.
 24 THE COURT: Please wait until the question is complete.
 25 Now, you may respond.

1 THE WITNESS: Okay. You're asking me if I have an
 2 exact count when I returned the sample to the police
 3 department, whether I would know if it was the exact count
 4 that was submitted to me or not? No, I would not.
 5 Q. (By Mr. Ryan) So you wouldn't -- you wouldn't be, as
 6 part of quality control, in a position to make sure that
 7 there's corresponding numbers between what the police say
 8 they're submitting and what they're getting back?
 9 A. No. Not in that sense, no.
 10 Q. And the gross weight that you mentioned as part of you
 11 doing quality control, that would be the responsibility of
 12 the testing chemist, correct?
 13 A. Correct.
 14 Q. So whatever they say the gross weight is, it is
 15 something that they would write down in the lab book,
 16 correct?
 17 A. Correct.
 18 Q. But you wouldn't have any instrument generated reading
 19 that you would crosscheck with what you were given, correct?
 20 A. Correct.
 21 Q. Now, I just want to return to January 17, at this point
 22 where you discovered there was this real problem and you
 23 were missing samples. At that point in time, did you call
 24 Jim Hanchett?
 25 A. No, I did not. I waited until the next morning.

1 Q. Did you call the police?

2 A. No.

3 Q. And that's because why, exactly?

4 A. Well, I wasn't sure. I wanted to go through the entire

5 inventory in the drug safe, make sure I hadn't misplaced it,

6 that it hadn't slipped through, it has been placed somewhere

7 else, that I had made a mistake.

8 I wanted to confer with my supervisor before I made any

9 further phone calls.

10 Q. Now, the next day you came in at your normal time?

11 A. Came in about half an hour earlier actually.

12 Q. And what time would that be?

13 A. About 8:30.

14 Q. And you're aware of what the typical hours of your

15 three other coworkers kept; is that correct?

16 A. Correct.

17 Q. And by this point and in -- by the end of the day on

18 that the day of the 17th you knew to whom you assigned the

19 samples, correct?

20 A. Yes.

21 Q. And that was Sonja Farak?

22 A. Yes.

23 Q. And you knew her schedule as well, correct?

24 A. Yes.

25 Q. And you knew she would be at the laboratory long before

1 8:30 in the morning, correct?

2 A. Correct.

3 Q. And so when you came in at 8:30 in the morning who did

4 you talk to?

5 A. My supervisor Jim Hanchett.

6 Q. And was this after you had done these other things you

7 said about kind of hoping they are going to magically appear

8 somewhere?

9 A. No, it was before.

10 Q. And had -- what did you and Mr. Hanchett do?

11 A. We started going through the inventory. I started

12 going through my side, my office. Jim went across the hall,

13 into the laboratory and was looking around Sonja's bench,

14 maybe it was in her bench at that point.

15 Q. Now, eventually, did Jim Hanchett find a white bucket?

16 A. Yes.

17 Q. Where did he find that?

18 A. Under her bench.

19 Q. And this, under her bench, did he need a key to access

20 under her bench?

21 A. No.

22 Q. Were these -- were keys ever issued for under the

23 bench?

24 A. There are no keys for under the bench.

25 Q. What do you recall were the -- were you present when he

1 proceeded to examine the contents of this white bucket?

2 A. I was in the desk area. It was probably about 15 feet

3 away.

4 Q. And what observations did you make of his search of

5 this white bucket?

6 A. Of the search or of the white bucket?

7 Q. Well, he pulled out the white bucket, correct?

8 A. Correct.

9 Q. And it was kind of -- it contained a number of

10 different materials?

11 A. Correct.

12 Q. And he began to search through this bucket and pull out

13 the various materials as they appeared in the bucket,

14 correct?

15 A. He didn't pull anything out, he just looked at it.

16 Q. Did you look at it with him?

17 A. Yes.

18 Q. And what did you see?

19 A. What looked like fake crack, fake substances, soap,

20 waxy materials.

21 Q. And did you see anything else?

22 A. Probably, I can't recall exactly what was in the

23 bucket -- spatula, mortar and pestle. I can't remember at

24 this point what was in the bucket.

25 Q. Now, you previously testified at a Grand Jury; is that

1 correct?

2 A. Yes.

3 Q. And when you were at the Grand Jury, did you tell the

4 Assistant Attorney General that chemists didn't normally

5 assign drugs to themselves for testing?

6 A. Correct.

7 Q. So sometimes they did assign drugs to themselves for

8 testing; is that correct?

9 A. In a pinch, yes.

10 Q. Now, as Jim Hanchett looked at these items, do you

11 recall what the conversation was between the two of you?

12 A. More like: Oh, my God. Oh, my God. Oh, my God. This

13 shouldn't be here.

14 Q. And eventually did he -- did he -- did his search

15 continue beyond what was found in those -- in the white

16 bucket?

17 Did he look anywhere besides the white bucket for

18 initial items that --

19 A. Yes. Then I started looking through more drawers in

20 her bench area.

21 Q. And did he eventually find these two samples that had

22 gone missing?

23 A. Yes.

24 Q. And can you describe the conditions that these samples

25 were in?

1 A. You'll have to ask him. I believe the bags were sliced
 2 open and they were empty. The samples weren't in there, but
 3 the -- you'd have to ask him. I don't recall exactly what
 4 was said.
 5 Q. And just so we're clear, these samples, according to
 6 your records, should have been in the main evidence safe?
 7 A. Yes.
 8 Q. And there was no record anywhere documenting their
 9 disappearance from the main evidence safe?
 10 A. Correct.
 11 Q. And their appearance anywhere else?
 12 A. Correct.
 13 Q. Now, did you eventually learn that another sample had
 14 gone missing?
 15 A. Yes.
 16 Q. And would this have been a submission from the Holyoke
 17 Police Department?
 18 A. Yup. Yes. Yes. I believe there was one from Holyoke.
 19 Q. And did Holyoke drop a sample off on January 11, 2013?
 20 A. I'd have to check my notes.
 21 Q. Please do.
 22 (Pause)
 23 A. Yes, it was January 11, 2013.
 24 Q. (By Mr. Ryan) And, when it arrived on January 11, 2013,
 25 was this sample given a laboratory number?

1 A. Yes.
 2 Q. And what was that?
 3 A. A13-00156.
 4 Q. And did you participate in weighing this sample?
 5 A. I believe I logged it in.
 6 Q. And do you recall what the weight was that you logged
 7 in?
 8 A. 35.3 grams.
 9 Q. Now, according to the -- your records, was -- and just
 10 for convenience sake I'll call this sample 156, where was
 11 this supposed to be located?
 12 A. In my evidence safe.
 13 Q. And what was the typical turnaround time, at that time,
 14 between the moment that a sample would be dropped off and
 15 the moment that it will be assigned for testing?
 16 A. Probably about four weeks.
 17 Q. So this is about a week later?
 18 A. Correct.
 19 Q. And so this -- had this sample been earmarked for any
 20 particular analyst?
 21 A. No.
 22 Q. And when you eventually found the sample, could you
 23 describe the condition that it was?
 24 A. I did not find the sample. I found out, after the
 25 fact, that the sample was found under a bench, but I can't

1 testify as to how it was found.
 2 Q. So when you were looking in the main the evidence safe,
 3 on the afternoon of the 17, you didn't notice that this had
 4 been removed from the main evidence safe?
 5 A. Correct. I didn't know.
 6 Q. Now, you testified that when you weighed this sample
 7 upon it's submission it was 36.3 grams; is that right?
 8 A. Right.
 9 Q. And what does that number reflect?
 10 A. The gross weight.
 11 Q. The grows weight of what?
 12 A. Of the evidence packaging when the police submit it
 13 along with our lab sticker that we place on the evidence
 14 bag.
 15 Q. And what was the protocol at the lab for a chemist who
 16 is assigned a sample in terms of weighing that sample?
 17 A. They would weigh -- they would double check the gross
 18 weight to make sure it's approximately 36.3 grams again and
 19 then they would sample the sample.
 20 Q. Now, if I could draw your attention to what's been
 21 marked as Exhibit X, and your third page in, that there's a
 22 drug receipt. I will ask you to take a look at A11-04049.
 23 A. Yup.
 24 Q. You received from the Springfield Police department, a
 25 substance described as a powder; is that correct?

1 A. That's what the receipt says, but I must point out that
 2 Rebecca Pontes logged in these samples, I did not.
 3 Q. Okay.
 4 A. Okay.
 5 Q. And so you weren't acting as the evidence officer that
 6 day?
 7 A. I must not have been in.
 8 Q. Now, eventually Rebecca Pontes was the one who did the
 9 testing on this. If you flip forward a few pages, I'd ask
 10 you to take a look at the lab notebook entry that you see
 11 for A11-4049.
 12 A. Correct.
 13 Q. And if you look at the gross weight, what does it say
 14 in the lab notebook?
 15 A. 4.44.
 16 Q. And if you look at the gross weight on the drug
 17 receipt, what does it say?
 18 A. 4.50.
 19 Q. Is that a significant discrepancy in terms of gross
 20 weights?
 21 A. No.
 22 Q. Why -- what would reflect the difference between that?
 23 A. Because the balance that is what I use to log in
 24 samples, it only goes to one decimal point, so it will only
 25 be 4.5, 4.44 is not very far off from 4.5.

1 Q. So you said earlier you do the tech reviews for the
2 lab, correct, or did the tech reviews?
3 A. Correct.
4 Q. So eventually you would be looking at this, this sheet
5 right here, this lab notebook sheet?
6 A. Yes.
7 Q. And you would be comparing it to the spreadsheet of the
8 batch?
9 A. Correct.
10 Q. And the spreadsheet for the batch would contain the
11 4.5 grams figure; is that correct?
12 A. Yes.
13 Q. Is there a point at which there's a discrepancy in
14 the -- in terms of weight that becomes something that needs
15 to be explained?
16 A. Yeah, about 10 percent.
17 Q. Now, I'd like to draw your attention to Exhibit Y.
18 And a few pages in you will see a drug receipt. Do you
19 see that?
20 A. Yes.
21 Q. And this is another one that Rebecca Pontes logged?
22 A. It's the same one.
23 Q. If you look at A11-4063. That would say that there is
24 4.4 grams for the gross weight.
25 If you flip a few more pages and you come to the first

1 lab notebook, what are the gross weight figures that are
2 reflected in the -- on this document?
3 A. She didn't write it down.
4 Q. Who didn't write it down?
5 A. This is Sonja's notebook, and Sonja didn't write it
6 down. She didn't record it.
7 Q. Well, is that a problem?
8 A. It was -- we didn't do tech reviews at this point. It
9 was the way she did it. And then it was up to the chemist's
10 discretion whether she wrote it down in her notebook or not.
11 Q. If you could continue to flip through until you come to
12 the next drug receipt in this submission.
13 And this would be samples that were received on 11/16.
14 Have you found the drug? Have you found the drug receipt
15 for that date?
16 A. Yes.
17 Q. You have?
18 A. I have it.
19 Q. If you take a look at A11-04262. Do you see the gross
20 weight for that?
21 A. Yes.
22 Q. That is 4.5 grams?
23 A. Yes, it is.
24 Q. According to the next sheet, are you the person who
25 received this sample?

1 A. Yes.
2 Q. And so that's the weight that you got when you weighed
3 it?
4 A. Yes.
5 Q. Is if you flip ahead to the first lab notebook page
6 you'll --
7 THE COURT: When you refer to a "lab notebook page"?
8 MR. RYAN: It's handwritten.
9 I'm sorry, Your Honor. It looks something like that.
10 (Indicating)
11 THE COURT: Okay. Thank you.
12 (Pause)
13 THE WITNESS: I don't see the corresponding notes for
14 4262.
15 Q. (By Mr. Ryan) Let me give you a hand here.
16 (Pause)
17 Q. (By Mr. Ryan) Is this 4262?
18 A. It's 4280.
19 Q. Take a look at this one. (Indicating)
20 A. Yup. Yup.
21 Q. For 4262, according to Sonja Farak's lab notes, what
22 was the gross weight that she recorded upon receiving this
23 sample?
24 A. Again, she didn't record it.
25 Q. You found some other lab notebook, included in this

1 submission, if you continue down 4282, you said you found?
2 A. Yes.
3 Q. And a couple of pages before, if you look at 4282, that
4 would have been 7 grams that you received on November 16,
5 that you weighed upon arrival?
6 A. Yes.
7 Q. And, what did Sonja Farak say the gross weight was when
8 she brought it back to her work station?
9 A. Again, she didn't record it.
10 Q. Did she record the gross weights of any of these
11 samples, as best you can tell if you crosscheck them between
12 your --
13 A. No.
14 Q. So that wasn't something that she was doing?
15 A. Correct.
16 Q. And so there was no tech reviews that were taking place
17 back at this point in time?
18 A. Correct.
19 Q. Tech reviews were something that came to be when the
20 Mass. State Police took over your laboratory?
21 A. Correct.
22 Q. And that was in July 1 of 2012?
23 A. Correct.
24 Q. Were there any evidence audits that took place before
25 July 1 and 2012?

1 A. No.

2 Q. And when you say no, that's -- you mean from 1987, when

3 started working at the lab, until July 2012, nobody ever did

4 any evidence audits after that?

5 A. No.

6 Q. Now, on Friday afternoon did you have a conversation

7 with First Assistant Flannery about this case?

8 A. About this case? No.

9 Q. Not about the case before you, but about this

10 proceeding that you're going to be testifying on?

11 A. Oh, yes.

12 Q. Did you bring to Mr. -- did you ask Mr. Flannery if he

13 heard about what you called the Berkshire case?

14 A. Correct.

15 Q. Can you tell us about the Berkshire case?

16 A. It was brought to my attention, from the Attorney

17 General's Office, that there was some discrepancy in one of

18 Sonja's cases.

19 Q. And can you tell me who, from the Attorney General's

20 Office, who brought it to your attention this discrepancy

21 exists?

22 A. Anne Kaczmarek.

23 Q. And what did Ms. Kaczmarek say to you about this

24 discrepancy?

25 A. She sent it to me in an email saying that she wanted

1 the discovery packet for Sonja's notes on those samples.

2 Q. And you provided that to her?

3 A. Yes, I did.

4 Q. And after that, what did you learn?

5 A. I haven't learned anything.

6 When she sent the email she attached the Sudbury

7 chemist's report for those samples. I guess they had been

8 re-analyzed in Sudbury after Sonja had done them.

9 Q. And did you compare the attachment to that email, what

10 was in your records as to testing that Ms. Farak conducted?

11 A. Yes, I did.

12 Q. What did you find?

13 A. I found it was a very strong cocaine sample.

14 Q. When was it a strong cocaine sample?

15 A. When Sonja Farak tested it.

16 Q. And was it a strong cocaine sample when it was

17 retested?

18 A. Apparently not. The Sudbury chemist reported it was a

19 trace amount of cocaine.

20 MR. RYAN: If I could just have a moment, Your Honor?

21 THE COURT: You may.

22 (Pause)

23 Q. (By Mr. Ryan) Now as an employee of the Department of

24 Health, was your work evaluated from time to time?

25 A. No.

1 Q. You received no performance evaluations?

2 A. Oh, I did receive performance evaluations, yes.

3 Q. And when were they -- was that something done on an

4 annual basis or any regular schedule?

5 A. Apparently, sort of annually. I know they weren't done

6 in recent years. And it wasn't tech review of our work. It

7 was just basic overall performance.

8 Q. And, would this review be memorialized in any kind of

9 document?

10 A. Yes, it would be.

11 Q. And what would it include in terms of the performance

12 evaluation review?

13 A. It would just be, basically, your basic job

14 performance.

15 Q. Were there any checklists or was it just -- well, let

16 me ask you this, is this something that Jim Hanchett did?

17 A. Yes.

18 Q. And so, he would, from time to time, not in any

19 particular regular basis, but from time to time would

20 generate a document that said how you were doing?

21 A. Correct. But it was done through Jamaica Plain through

22 Public Health. They would tell us to do the performance

23 reviews.

24 Q. And would this document reflect what your duties were?

25 A. I don't think so.

1 Q. What sort of --

2 A. It was just whether we exceeded expectations or didn't

3 meet expectations. It was very general, very vague

4 document.

5 Q. Okay. Was there any tracking of work performance on

6 the part of the analyst?

7 A. It would be the same thing; if one was done on me, we

8 would do everybody all at the same time.

9 Q. And so it would be, more or less, just a general

10 statement either meeting or failing to meet performance

11 expectations?

12 A. Correct.

13 Q. Now, you were previously asked some questions about

14 any -- whether you made any observations regarding

15 Ms. Farak's performance in the months leading up to her

16 arrest; do you recall being asked about that?

17 A. During the Grand Jury or -- yes.

18 Q. And what -- what, as best you can recall, was there any

19 performance issues in that Ms. Farak was having at the

20 laboratory?

21 A. No. There was no performance other than disappearing

22 and not being, you know, in the lab -- I would receive a

23 phone call and for her, and I wouldn't be able to track her

24 down. I wouldn't know where she was at that particular

25 point in time and I would have to go track her down for a

1 message or whatever.

2 Q. Now, so other than that, you had no indication of any

3 fall off in her performance?

4 A. No. Jim and I did notice that she wasn't outputting as

5 many samples as she was previous months, but it could have

6 also been the extra amount of paperwork that we were doing

7 with the State Police protocols, we were trying to, you

8 know, come up to speed with the paperwork aspect of things.

9 We weren't quite sure what was going on.

10 Q. Now, the take over, the State Police caused

11 considerable disruption to the way things had been done at

12 your laboratory, isn't that a fair statement?

13 A. Not considerable, it was more just paperwork, more

14 documentation. We were doing things the same way, it was

15 just a matter of documenting we were doing things properly.

16 We had to sign and date everything. We had to, you know,

17 make paper chains for everything.

18 Q. Well, one thing that you began doing that you hadn't

19 been doing before, you began running blanks between samples

20 of suspected narcotics, correct?

21 A. Correct.

22 Q. Up until the State Police came, that was not something

23 that your laboratory did?

24 A. No, we only ran a blank after the standard. We didn't

25 run it in between the sample.

1 Q. So you could run a standard sample then a blank and

2 then you run another 15 samples?

3 A. Correct.

4 Q. Now, what additional duties, beside analyzing suspected

5 narcotics, did Rebecca Pontes have at the laboratory?

6 A. Oh, she wrote some of the protocols and she did more of

7 the protocol documentation for us.

8 Q. And what additional duties beyond analyzing substances

9 did Sonja Farak have at the laboratory?

10 A. None that I know of.

11 Q. Well, she had the same rank as Chemist II as Rebecca

12 Pontes, correct?

13 A. Correct.

14 Q. And so did Ms. Farak -- was she in charge of the

15 reagents at the laboratory?

16 A. We all kind of helped out with reagents.

17 Q. Did she -- so is it your testimony, although she had

18 the same rank as Rebecca Pontes all she did was test

19 substances and Rebecca Pontes was writing protocols and

20 everybody else was pitching in on everything else?

21 A. Well, Sonja would pitch in on the reagents too. It

22 was, you know, we just all kind of chipped in together. We

23 didn't have assigned --

24 Q. Did she have any responsibilities regarding quality

25 control?

1 A. (Pause)

2 In what respect?

3 Q. Well, in -- with respect to the integrity of evidence.

4 A. Well, we all had responsibilities for the quality

5 control to make sure everything was done properly and

6 documented.

7 Q. What year was the Berkshire case, if you know?

8 A. 2012.

9 Q. Well, and was that July 2012 or -- when?

10 A. Yes, I believe so.

11 MR. RYAN: Just another minute.

12 (Off the record discussion among Defense Counsel.)

13 Q. (By Mr. Ryan) Ms. Salem, at some point during the

14 course of being interviewed and giving testimony, did you

15 tell anybody that you thought the falloff on Ms. Farak's

16 work was some 20 to 30 percent in output?

17 A. I don't think I put a number on it.

18 Q. Did you quantify when that falloff began?

19 A. I don't recall. Probably in September or so.

20 THE COURT: September of?

21 THE WITNESS: 2012.

22 THE COURT: I don't have any further questions.

23 Cross-examination.

24 **CROSS EXAMINATION BY MR. FLANNERY:**

25 Q. Good afternoon, Ms. Salem.

1 A. Hi.

2 Q. Just in starting with your observations of Ms. Farak

3 prior to her arrest, fair to say that you didn't notice any

4 change in her overall demeanor?

5 A. No.

6 Q. And in terms of her productivity had seemed to trail

7 off shortly after some new procedures and protocols were

8 implemented?

9 A. Correct.

10 Q. So at the time it didn't seem suspicions, there was

11 that explanation for that change in her output, correct?

12 A. Correct.

13 Q. But you did note, I believe you indicated, it was maybe

14 as far back as September of 2012, a change in her behavior

15 with respect to disappearing during the day for 10, 15

16 minutes or so?

17 A. Correct.

18 Q. And so you might get a phone call and look for her and

19 you would look for her and she wouldn't be there?

20 A. Correct.

21 Q. And did you also sometimes go looking for her say in

22 the bathrooms that the analysts typically used?

23 A. Yes.

24 Q. And you weren't able to find her, at least in the

25 bathrooms that you expected to find her in, right?

1 A. Correct.

2 Q. And that didn't strike you as unusual until January of

3 2013, when her misconduct came to light?

4 A. Correct.

5 Q. It was at that point, looking back, that struck you as

6 perhaps relevant to what was happening with the State

7 Police?

8 A. Correct.

9 Q. Okay. But that was something that was relatively --

10 that went back a couple of months maybe, September, I think

11 at some point you may have actually said August through

12 July. But I take it you did note in a journal or a log the

13 first time you made that observation?

14 A. No, not at all.

15 Q. Okay. Now, you've heard a lot of testimony about

16 packaging. I just want to ask you a few questions to

17 clarify that.

18 The drugs, the samples would come to you by way of an

19 evidence officer from the originating police department,

20 right?

21 A. Right.

22 Q. And they would come in the evidence bag that that

23 department used, correct?

24 A. Correct.

25 Q. And so the drugs and whatever packaging the drugs were

1 in, would be contained in this evidence bag?

2 A. Correct.

3 Q. And the evidence bag would have some writing on it,

4 some notation on it?

5 A. Sometimes.

6 Q. But it was that bag that you would -- once you logged

7 that bag in, once you took control and possession of that

8 from the evidence officer and logged it in, it was at that

9 point that you would attach a lab number to that bag?

10 A. Correct.

11 Q. Okay. And that is -- that was the formal lab number

12 that was actually in the form of the barcode?

13 A. Correct.

14 Q. And that again stayed on their evidence bag, the police

15 department's evidence bag?

16 A. Yes.

17 Q. At that point or the next step would be to assign that

18 sample to an analyst?

19 A. Correct.

20 Q. And so, it would, until that happened, it would stay in

21 the evidence vault?

22 A. Correct.

23 Q. And this lab was divided into two sections. There was

24 a laboratory section and then there was an office in this

25 vault where the evidence initially came into?

1 A. Yes.

2 Q. And so, when an analyst was ready to test more samples

3 they would take the sample from the vault, in this

4 evidence -- in this police evidence bag to their lab

5 station, right?

6 A. Correct.

7 Q. They would then cut that bag open, the police evidence

8 bag open, take out the contents, weigh them and analyze

9 them?

10 A. Correct.

11 Q. If they were still working on that at the end of the

12 working day, for example, they wouldn't bring the -- that

13 sample or that evidence bag or any of that back to the drug

14 vault, they would instead put it in one of the -- one of the

15 two floor safes or evidence lockers that was contained

16 within the lab section, right?

17 A. Correct.

18 Q. And once they finished analyzing and weighing the

19 sample, so they're at the point where the lab is ready to

20 generate a drug cert, then and correct me if I'm wrong, the

21 drugs, the packaging that the drugs may have come in, the

22 evidence bag, that all that had gone into before it even

23 reached the lab, all of that went into what's called a KPac

24 bag?

25 A. Correct.

1 Q. And a KPac bag didn't have a lab number on it, right?

2 A. Correct.

3 Q. The KPac bag that -- the evidence bag inside the K-Pac

4 bag would have the lab number, but the KPac bag was a clear

5 plastic bag?

6 A. Correct.

7 Q. And that would be sealed and initialed, ideally by the

8 analyst?

9 A. Correct.

10 Q. And then it would go back to the other side of the lab

11 to the vault and await pickup by the police department?

12 A. Exactly.

13 Q. Now, we've heard testimony some items that were found

14 in Ms. Farak's car, in a tote bag that was found inside her

15 work station at the lab. I'm sure you'd agree that an

16 evidence bag never should have been in the possession of an

17 analyst outside the lab?

18 A. Correct.

19 Q. So -- the police evidence bag?

20 A. Correct.

21 Q. And there would also be no reason for a KPac plastic

22 bag to be in the possession of an analyst outside of the

23 lab?

24 A. Correct.

25 Q. So there shouldn't be a KPac bag in a purse or tote bag

1 or a vehicle owned by one of the analysts?

2 A. Correct.

3 Q. Now, these KPac bags, they weren't numbered just for

4 purposes of the lab keeping track of how many they used,

5 right?

6 A. No. They're not numbered.

7 Q. Would they just come in a big package of bags?

8 A. Correct.

9 Q. And they weren't -- a certain number wasn't meted out

10 to the analysts and they just took them as needed?

11 A. Correct.

12 Q. So you wouldn't know if an analyst was taking more bags

13 than they really should?

14 A. No, you wouldn't.

15 Q. Okay. And there wouldn't be any indication on that

16 bag, which case that bag related to, right? Unless it was

17 signed and dated the evidence was inside the bag?

18 A. Correct. They're all clear.

19 Q. Now, when an analyst was called to testify, the analyst

20 wouldn't bring the drugs or samples to court, right?

21 A. No.

22 Q. At that point those samples would have gone back to the

23 originating police department?

24 A. Correct.

25 Q. And it would be up to the police department to bring

1 the evidence to court?

2 A. Correct.

3 Q. What the analyst would do is bring a copy of their file

4 and it wasn't the original file, correct, it was a copy?

5 A. Correct.

6 Q. And typically, the analysts that you worked with, would

7 put these files in a Manila envelope and write the lab

8 number on that envelope?

9 A. Correct.

10 Q. Now. I just want to show you a photo, one of several

11 contained in Exhibit H, and the specific number is 3393.

12 I'm just going to ask you to look at that photograph

13 and tell me if that's consistent or the type of envelope

14 that you just described.

15 A. The type of envelope is very consistent. This labeling

16 is very consistent.

17 "To do" I don't understand that on there.

18 Q. Okay. Well, when the analyst was done testifying,

19 would they have to bring the copy of the file back to the

20 lab?

21 A. No. There was no -- I mean, they normally would bring

22 it back in case it was needed again, but --

23 Q. But the envelopes, would they reuse those envelopes?

24 A. Possibly. I don't know.

25 Q. And there wasn't any requirement that they reuse the

1 envelopes in a certain way or dispose of them in a certain

2 way?

3 A. No.

4 Q. And so, there was nothing -- in terms of the practice

5 of the lab, that would prevent somebody from taking one of

6 these envelopes after a trial and crossing out that number

7 and using it for some other purpose?

8 A. Nope.

9 Q. And you indicated that there was no protocol

10 prohibiting the dissemination of these lab materials, but

11 was that ever a problem?

12 Did you ever get any complaints about analysts

13 disseminating, in some sort of public way, the documents

14 they took to court to use to testify?

15 A. No.

16 MR. FLANNERY: I have nothing further.

17 THE COURT: Redirect examination limited to those

18 areas?

19 MR. HARRINGTON: Your Honor, can I ask a few questions.

20 I was slow in getting up before.

21 THE COURT: All right. You may do so.

22 MR. HARRINGTON: Wayne Harrington for the defendant

23 Jose Torres.

24 THE COURT: I assume this is redirect.

25 MR. HARRINGTON: I stood up before, the end of my

1 brother's direct. I was -- you didn't notice me.

2 THE COURT: We're now on redirect examination. I hope

3 you are not going to reinvent the wheel.

4 MR. HARRINGTON: I certainly won't.

5 THE COURT: You may proceed.

6 **REDIRECT EXAMINATION BY MR. HARRINGTON:**

7 Q. Ms. Salem, during your job, would you ever have

8 occasion to assign drug certificates where you're the notary

9 and the jurat and there is a drug analyst assigned as well?

10 A. When I'm the analyst and the notary?

11 Q. No, when you're the notary, would you ever --

12 A. No. I signed as a notary a lot, yeah.

13 Q. And was there a practice that developed with respect to

14 the analyst printing out and signing it and you signing it,

15 was there a typical practice or habit that you or procedure

16 that you engaged in?

17 A. I suppose so. It was routine.

18 Q. And the routine, directing your attention to April

19 2010, please describe the routine with respect to your being

20 a notary on a drug certificate with respect to a drug

21 certificate that Ms. Farak was the drug analyst.

22 A. She would sign the certificate first and then I would

23 notarize it.

24 Q. Would she sign in your presence?

25 A. She would be in the lab when she signed it. She

1 wouldn't -- she would be in the lab, she wouldn't
 2 necessarily be in the room with me at the time.
 3 Q. Okay. So you would not witness -- you would not
 4 physically eyewitness her signing the certificates; is that
 5 correct.
 6 A. Not all the time, no.
 7 Q. And was there a practice where she would sign the
 8 certificate and leave a stack in -- on your desk or in your
 9 box?
 10 A. Sometimes.
 11 Q. Okay. And in that circumstance, what would you do in
 12 terms of signing, before you signed the certificate?
 13 A. I would check her signature and make sure that it was
 14 her signature on the certificate.
 15 Q. Aside with that, would you do anything with respect to
 16 having any communication with her?
 17 A. That it was -- that she had signed it. I don't
 18 understand the question.
 19 Q. Okay. Is it true that back in the April 2010 time
 20 frame, that Ms. Farak would submit some drug certificates
 21 that she had signed in your office or in your in box, and
 22 then you would, at some point later, would take them out.
 23 Look at her signature, and then sign the drug certificate.
 24 Is that a fair description of the procedure you engaged in?
 25 A. It's possible.

1 Q. Would you at any point have her swear under oath that
 2 what she signed was accurate?
 3 A. No.
 4 Q. Okay. Now when you signed it --
 5 MR. HARRINGTON: If I may I approach, Your Honor?
 6 THE COURT: You may.
 7 Q. (By Mr. Harrington) I'm showing you a document which
 8 I'm going to ask you whether you recognize -- does that
 9 appear to be your signature?
 10 A. Yes, it does.
 11 Q. Above that there appears to be a form. You have no
 12 memory of signing a drug certificate on April 15, 2010 is
 13 that a fair statement?
 14 A. Yes, that's fair.
 15 Q. But with respect to the drug certificates you would
 16 sign in that time frame, would they include the language
 17 about your signature?
 18 A. I assume so, yes.
 19 Yes, it would.
 20 Q. Now, could you read that language?
 21 A. "On this Thursday, April 15, 2010, before me the
 22 undersigned notary public, personally appeared the above
 23 signed subscriber, having proved to me through Department of
 24 Public Health documentation to be the person whose name is
 25 signed on this certificate and to be an Assistant Analyst of

1 the Department of Public Health and who swore to me that the
 2 contents of this document are truthful and accurate to the
 3 best of his or her knowledge and belief."
 4 Q. Okay. It's a fair statement, when you signed that, you
 5 didn't have Ms. Farak take out an ID card; is that correct?
 6 A. Correct.
 7 Q. And is it also fair that when you signed that, you
 8 didn't have her swear under oath that what she -- that
 9 certificate was true; is that correct?
 10 A. Correct.
 11 Q. Okay.
 12 MR. HARRINGTON: I will move to introduce that into
 13 evidence, Your Honor.
 14 THE COURT: Any objection?
 15 MR. FLANNERY: No objection.
 16 THE COURT: Admitted as what will be agreed upon
 17 Exhibit C -- Double C; is that correct?
 18 MR. HARRINGTON: I believe, so Your Honor.
 19 THE CLERK: Thank you.
 20 (Exhibit CC, drug certificate signed 4/15/10, marked)
 21 THE COURT: Questions?
 22 Q. (By Mr. Harrington) Ms. Salem, are you familiar with
 23 the State Police audit report that was dated October 2012?
 24 A. I'm actually not familiar with it. I know it exists.
 25 I haven't actually seen it.

1 Q. Are you familiar with some of the concerns of -- the
 2 State Police raised?
 3 A. Some of them, yes.
 4 Q. Were any of the concerns that they raised, did you
 5 disagree with?
 6 A. No, I don't disagree with the State Police.
 7 Q. Okay. So, is it fair to say they raised concerns about
 8 the procedure that was in place at the time of October 2012,
 9 isn't that correct?
 10 A. Right.
 11 Q. And what were the some of the concerns they raised?
 12 A. That they wanted blanks after each --
 13 MR. FLANNERY: I'm going to be object, Your Honor.
 14 THE COURT: Sustained.
 15 We covered this ground.
 16 MR. HARRINGTON: One, just one follow-up.
 17 Q. (By Mr. Harrington) With respect to the issues that the
 18 State Police raised, isn't it true that those procedures had
 19 been going on at the Amherst drug lab at Amherst drug lab at
 20 least since 2007, until that point in time?
 21 THE COURT: By "those procedures" what did you mean?
 22 MR. HARRINGTON: Well, the procedures, her
 23 understanding of the concerns raised by State Police and the
 24 result of the audit.
 25 THE COURT: Well, I think it's -- as the fact finder, I

1 accept as a fact that up until the October 2012 audit, the
 2 negative findings in the audit were negative findings from
 3 the beginning of time until 2012.
 4 MR. HARRINGTON: Okay. Thank you.
 5 I have no further questions, Your Honor.
 6 THE COURT: Further redirect examination?
 7 MR. OLANOFF: Just, Your Honor, very briefly, may I?
 8 **CONTINUED REDIRECT EXAMINATION BY MR. OLANOFF:**
 9 Q. Did you testify in Grand Jury that you noticed
 10 Ms. Farak's work productivity decline noticeably?
 11 A. Probably.
 12 Q. Did you testify that it declined in July or August of
 13 2012?
 14 A. It's possible. I don't have anything concrete in front
 15 of me.
 16 Q. Did you testify it dropped 20 to 30 percent?
 17 A. I don't believe I put a number on it like that.
 18 MR. OLANOFF: Your Honor, may I approach the witness?
 19 THE COURT: You may.
 20 THE WITNESS: It's possible I did.
 21 Q. (By Mr. Olanoff) Well, if you will just take a look at
 22 it and tell me if you did or did not.
 23 A. (Complying)
 24 Okay. I did say 20 to 30 percent.
 25 Q. Did you say that it happened in July or August of 2012?

1 A. Yes, I did.
 2 MR. OLANOFF: Thank you. Nothing further, Your Honor.
 3 THE COURT: Recross-examination limited to those
 4 questions?
 5 MR. FLANNERY: Nothing further.
 6 THE COURT: Ms. Salem, you are excused. You may step
 7 down.
 8 MR. FLANNERY: I would just want to note for the record
 9 that I would also reserve questions for Ms. Salem concerning
 10 what was referred to as the Berkshire case.
 11 That is the case for which new information, about which
 12 new information had just come to light. I think that we may
 13 be exploring that in more detail.
 14 THE COURT: All right. Hopefully it won't be necessary
 15 to recall all witnesses to talk to them about this
 16 particular case, but your concern is noted.
 17 You are excused, Ms. Salem. Thank you.
 18 (The witness stepped down.)
 19 THE COURT: Rather than proceeding further today, I'm
 20 going to suspend with the understanding that the hearing is
 21 not yet complete and that it will be necessary to
 22 reschedule, not only to complete for witnesses that we
 23 anticipated for today, but also any additional testimony
 24 that might relate to these so-called new cases or newly
 25 discovered cases.

1 So I want to select a date, understanding, of course,
 2 that selecting a date that is going to be without conflict
 3 for 16 lawyers is next to impossible. So if need be, I will
 4 arbitrarily select a date, but I want to hear, I guess,
 5 first from the Commonwealth as to what period of time you
 6 expect you will need to make this full disclosure of
 7 whatever the new information is.
 8 So let me hear from you as to that.
 9 MR. FLANNERY: I think, to be on the safe side, I would
 10 ask that we go at least three or four weeks out because I
 11 want to make sure that I have not only all of the
 12 information with respect to the cases I just learned about,
 13 but also that I know with some confidence if there were any
 14 other retests performed, any that raised any kind of
 15 suspicion, that I have those as well. And, unfortunately, I
 16 am -- I have not been, apparently, in the loop, so to speak
 17 as much as I should have been. There is both the Attorney
 18 General's investigation relative to Ms. Farak and the State
 19 Police lab that I believe they are conducting investigation,
 20 but they are also dealing with a number of backlogs.
 21 I think that would be sufficient time though to gather
 22 all of the relevant information that currently exists and by
 23 that, provide to defense counsel, give them time to
 24 adequately prepare for the next and hopefully last hearing.
 25 THE COURT: All right.

1 And I'm assuming, Ms. Foster, I'm going to give you a
 2 deadline to comply with whatever other discovery obligations
 3 you have. You had referred specifically to something that
 4 you wanted additional time for. What was that?
 5 MS. FOSTER: You had mentioned that you wanted to see
 6 all documents that the Attorney General believed would be
 7 confidential or privileged and you would review them in
 8 camera. And I was just wondering the scope of that, if
 9 that's --
 10 THE COURT: Well, obviously, I don't want to see what's
 11 already been turned over.
 12 MS. FOSTER: Correct.
 13 THE COURT: And I don't want to see anything that
 14 you're agreed should be turned over.
 15 MS. FOSTER: But as to those documents that you believe
 16 are somehow privileged or otherwise not discoverable, and I
 17 understand many of them you are saying you don't have, so I
 18 had assumed, based on what you told me earlier, that we were
 19 talking about a fairly narrow universe of documents where
 20 you had -- you on behalf of the Commonwealth, and the
 21 Attorney General had an objection to turning over those
 22 documents.
 23 MS. FOSTER: It's -- that's correct. It's just
 24 language of the subpoena was for all documents and
 25 photographs for the whole investigation, so I was wondering

1 since the subpoena was for Sergeant Ballou, the documents he
 2 has or the documents the Attorney General's Office has?

3 THE COURT: The subpoena duces tecum, as I understood
 4 it, went to Sergeant Ballou and that was the subpoena that
 5 you sought to quash.

6 MS. FOSTER: Correct.

7 THE COURT: So that's what we are talking about.

8 All right. So what I am proposing then, is a next
 9 hearing date of Monday October 7.

10 (Pause)

11 THE COURT: Hearing no objection, we will continue the
 12 hearing to Monday October 7 at 9:00 a.m.

13 Mr. Ryan.

14 MR. RYAN: Your Honor, may I be heard with respect to
 15 one issue that I think it will be in the interest in
 16 judicial economy to take up now, which is access to the
 17 evidence that was seized from Ms. Farak's car.

18 As you gather from the hearing we've had, there was
 19 some efforts that were made and Mr. Flannery had made that,
 20 an attempt to get at least a portion of the defense counsel
 21 in to view this evidence. The Attorney General's Office has
 22 not permitted to happen, to take place.

23 And so given the fact that Sergeant Ballou is a witness
 24 who is going to be called back and I continue to believe
 25 that his representations and writings and photographs are

1 inadequate, I would like permission and the Attorney General
 2 representative is to here to be heard, I would like to look
 3 at this evidence. I don't think I can adequately prepare
 4 for the memorandum of law I would like to submit and further
 5 the evidentiary hearing the way I would like to without
 6 looking at this evidence.

7 THE COURT: Let me suggest that we deal with that
 8 dispute in the way we deal with all disputes and that is
 9 first I would encourage you, the Attorney General's Office,
 10 the DA's Office and defense try to work through some
 11 agreement about viewing, physically, the evidence, if that
 12 can be done.

13 I understand it's -- there's an ongoing criminal case
 14 and it might be a little bit out of the ordinary for third
 15 parties to be given an opportunity review evidence.

16 If that can't be done, then it is incumbent upon the
 17 defendants to file a motion to compel. And then I will hear
 18 a response from the Commonwealth. That will be marked up
 19 and we will deal with it in the normal course in advance of
 20 the next hearing.

21 So, we are on for October 7.

22 Ms. Foster, having heard my response to your inquiry
 23 about the Attorney General's obligation with respect to
 24 Sergeant Ballou's file, how much time do you need?

25 MS. FOSTER: I would probably only need a couple of

1 weeks, Your Honor.

2 THE COURT: All right. All right. Today is the 9th.
 3 I'm going to give you until the 18th.

4 MS. FOSTER: Okay. Thank you.

5 THE COURT: And what I expect, again, if you can
 6 provide and that will be for my in camera review, those
 7 documents that you feel should not be disclosed with some
 8 indication somewhere in the body of the pleading why it is
 9 you feel those documents should not be disclosed.

10 MS. FOSTER: Thank you.

11 MR. HARRINGTON: Your Honor, may I be heard on motion
 12 to decline -- reduce my client's bail? My client is in
 13 custody. He has already served his main sentence. He is on
 14 a school zone sentence. I think he has spent 3 1/2 years in
 15 jail. He's on a school zone, he's three months in.

16 His bail was returned to 10,000 dollars. He, prior to
 17 trial, had been held at 10,000. He cannot make that. He
 18 can make 500. I will ask Your Honor to consider reducing it
 19 so that he has the chance of making bail pending Your
 20 Honor's decision on this motion.

21 THE COURT: I understand your concern. It's now
 22 quarter of 4:00. That was not -- I am sure many defendants
 23 may have bail issues they would like to raise. I will
 24 certainly consider it. You can file a motion, we will
 25 schedule a hearing if necessary.

1 MR. HARRINGTON: Thank you.

2 THE COURT: Anything else to address today?

3 MR. FLANNERY: No, Your Honor.

4 THE COURT: We are in recess.

5 (The Court exited at 3:46 p.m.)

6 THE CLERK: Mr. Alfred Andrews, sir, you are currently
 7 heard at Souza Baranowski?

8 THE DEFENDANT: Yes, sir.

9 THE CLERK: Thank you very much.

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CERTIFICATION

I, ALICIA CAYODE KYLES, REGISTERED PROFESSIONAL
REPORTER, REGISTERED MERIT REPORTER, OFFICIAL COURT
STENOGRAPHER, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE
AND ACCURATE TRANSCRIPT FROM THE RECORD OF THE COURT
PROCEEDINGS IN THE ABOVE ENTITLED MATTER.

I, ALICIA CAYODE KYLES, FURTHER CERTIFY THAT THE
FOREGOING IS IN COMPLIANCE WITH THE ADMINISTRATIVE OFFICE OF
THE TRIAL COURT DIRECTIVE ON TRANSCRIPT FORMAT, RESERVING MY
RIGHT TO PROVIDE AN ELECTRONIC COPY, WHEN REQUESTED, AT THE
COPY RATE AS PROVIDED BY THE STATUTE IN CHAPTER 221: SECTION
88, AS AMENDED.

I, ALICIA CAYODE KYLES, FURTHER CERTIFY THAT I NEITHER
AM COUNSEL FOR, RELATED TO, NOR EMPLOYED BY ANY OF THE
PARTIES TO THE ACTION IN WHICH THIS HEARING WAS TAKEN, AND
FURTHER THAT I AM NOT FINANCIALLY NOR OTHERWISE INTERESTED
IN THE OUTCOME OF THE ACTION.

ALICIA CAYODE KYLES, RPR, RMR, OCR

Dated: February 19, 2014

50 State Street

Springfield, Massachusetts 01103

413-748-7624

EXHIBIT 25

From: Verner, John (AGO)
Sent: Tuesday, September 10, 2013 9:57 AM
To: Kaczmarek, Anne (AGO); Foster, Kris (AGO); Mazzone, Dean (AGO)
Cc: Ravitz, Randall (AGO); Reardon, Susanne (AGO)
Subject: RE: press from Farak hearing

Is that everytinh in his file?

-----Original Message-----

From: Kaczmarek, Anne (AGO)
Sent: Tuesday, September 10, 2013 9:52 AM
To: Verner, John (AGO); Foster, Kris (AGO); Mazzone, Dean (AGO)
Cc: Ravitz, Randall (AGO); Reardon, Susanne (AGO)
Subject: RE: press from Farak hearing

Joe has all his reports and all reports generated in the case. All photos and videos taken in the case. His search warrants and returns. Copies of the paperwork seized from her car regarding new articles and her mental health worksheets.

-----Original Message-----

From: Verner, John (AGO)
Sent: Tuesday, September 10, 2013 9:46 AM
To: Foster, Kris (AGO); Kaczmarek, Anne (AGO); Mazzone, Dean (AGO)
Cc: Ravitz, Randall (AGO); Reardon, Susanne (AGO)
Subject: RE: press from Farak hearing

Anne, can you get a sense from Joe what is in his file? Emails etc? Kris, did the judge say his "file" or did he indicate Joe had to search his emails etc?

-----Original Message-----

From: Foster, Kris (AGO)
Sent: Tuesday, September 10, 2013 9:43 AM
To: Verner, John (AGO); Kaczmarek, Anne (AGO); Mazzone, Dean (AGO)
Cc: Ravitz, Randall (AGO); Reardon, Susanne (AGO)
Subject: RE: press from Farak hearing

Terrible photo.

So at yesterday's hearing, my motion to quash was flat out rejected. Judge Kinder has given us until September 18th (next Wed) to go through Sgt. Ballou's file and anything in it we think is privileged/shouldn't be disclosed, we have to give it to Judge Kinder to review in camera along with a memo explaining why we think each document is privileged. The evidentiary hearing is continued until October 7th. The defendants have reserved calling Sgt. Ballou again on the 7th.

Sgt. Ballou only testified to what was in the grand jury- i.e. what he found in Farak's car, work station, etc. Judge Kinder did not allow any kind of questioning anywhere near anything privileged. Although Anne, I would not be surprised if you get subpoenaed for the next date -- defense counsel was frustrated by Sgt. Ballou's lack of memory and kept indicating that maybe you'd have a better memory.

Regarding the Rule 30 discovery motion, Judge Kinder denied it as untimely and refused to rule on the merits of it, saying something along the lines of "I'm permitting myself to revisit this if need be at a later time."

Kris C. Foster
Assistant Attorney General
Appeals Division, Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 963-2833

-----Original Message-----

From: Verner, John (AGO)
Sent: Tuesday, September 10, 2013 8:55 AM
To: Kaczmarek, Anne (AGO); Mazzone, Dean (AGO)
Cc: Foster, Kris (AGO)
Subject: RE: press from Farak hearing

Thanks. Kris, what happened w/ request for documents etc?

-----Original Message-----

From: Kaczmarek, Anne (AGO)
Sent: Tuesday, September 10, 2013 8:46 AM
To: Mazzone, Dean (AGO); Verner, John (AGO)
Cc: Foster, Kris (AGO)
Subject: press from Farak hearing

http://www.masslive.com/news/index.ssf/2013/09/activities_of_sonja_farak_form.html

EXHIBIT 26

Luke Ryan

From: Luke Ryan
Sent: Tuesday, September 10, 2013 6:12 PM
To: Foster, Kris (AGO) (kris.foster@state.ma.us)
Cc: jolanoff@publiccounsel.net
Subject: Viewing the evidence

Hi Kris,

Could you let me know whether we are going to be able to work something out or whether I should file a motion?

Thanks, Luke

lryan@strhlaw.com
SASSON, TURNBULL, RYAN & HOOSE
100 Main Street, 3rd floor
Northampton, MA 01060
(413) 586-4800
www.strhlaw.com

From: Foster, Kris (AGO)
Sent: Monday, September 16, 2013 4:45 PM
To: Kaczmarek, Anne (AGO)
Subject: FW: Motion for Access to the Amherst Lab

Thoughts?

*Kris C. Foster
Assistant Attorney General
Appeals Division, Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 963-2833*

From: Luke Ryan [mailto:LRyan@strhlaw.com]
Sent: Monday, September 16, 2013 4:45 PM
To: Foster, Kris (AGO)
Subject: RE: Motion for Access to the Amherst Lab

Hi Kris,

Has your office determined what it's position will be with respect to viewing the seized evidence?

Best,

Luke

From: Luke Ryan
Sent: Thursday, September 12, 2013 11:50 AM
To: Foster, Kris (AGO)
Subject: RE: Motion for Access to the Amherst Lab

Hi Kris,

I am interested in inspecting the evidence seized from ms. farak's car & from her drawer & white bucket at the lab. I will make sure UMass knows about my motion for access to the lab itself.

Best, Luke

Sent from Samsung Conquer™ 4G

"Foster, Kris (AGO)" <kris.foster@state.ma.us> wrote:

Hi Luke,

Thanks for sending along your motion. As you may know, as of Sept. 1, 2013, the Mass. State Police don't control the Amherst drug lab anymore. It's totally a UMass facility now.

Are you looking to view evidence seized from Farak's car or have access to the evidence locker? Your previous requests have been for access to the evidence locker.

Thanks,
Kris

*Kris C. Foster
Assistant Attorney General
Appeals Division, Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 963-2833*

From: Luke Ryan [<mailto:LRyan@strhlaw.com>]
Sent: Wednesday, September 11, 2013 6:49 PM
To: Foster, Kris (AGO)
Cc: Velazquez, Eduardo (WES)
Subject: Motion for Access to the Amherst Lab

Attached is a pleading I filed earlier today that I asked to be heard on 9/19, the date scheduled for the hearing on my rule 17 pleadings and any motions to quash.

Has there been any decision as to whether I'll be permitted to view the evidence seized from Ms. Farak's car?

Best, Luke



Luke Ryan
Sasson, Turnbull, Ryan & Hoose
100 Main Street
Northampton, MA 01060
413.586.4800
www.strhlaw.com

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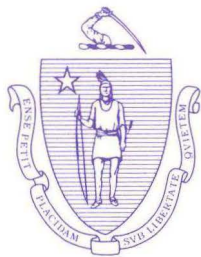
From: Foster, Kris (AGO) [mailto:kris.foster@state.ma.us]
Sent: Tuesday, September 17, 2013 9:28 AM
To: Luke Ryan
Subject: RE: Motion for Access to the Amherst Lab

Hi Luke,
Our position is that viewing the seized evidence is irrelevant to any case other than Farak's.

Kris

*Kris C. Foster
Assistant Attorney General
Appeals Division, Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 963-2833*

EXHIBIT 27



MARTHA COAKLEY
ATTORNEY GENERAL

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

(617) 727-2200
www.mass.gov/ago

September 16, 2013

Honorable Jeffrey Kinder
Hampden County Superior Court
Hall of Justice
P.O. Box 559
Springfield, MA 01102-0559

RE: *Commonwealth v. Jermaine Watt, et al*, HDCR2009-01068, evidentiary hearing

Dear Judge Kinder:

On September 9, 2013, pursuant to a subpoena issued by defense counsel, you ordered the Attorney General's Office to produce all documents in Sergeant Joseph Ballou's possession that the Attorney General's Office believes to be privileged by September 18, 2013, to be reviewed by your Honor in camera. After reviewing Sergeant Ballou's file, every document in his possession has already been disclosed. This includes grand jury minutes and exhibits, and police reports. Therefore, there is nothing for the Attorney General's Office to produce for your review on September 18, 2013.

Please do not hesitate to contact me should you require anything further.

Sincerely,

A handwritten signature in blue ink, appearing to read "Kris C. Foster".

Kris C. Foster
Assistant Attorney General
(617) 963-2833

cc: Jared Olanoff, Esq. (via electronic mail)



EXHIBIT 28

Pages: 1-39
Exhibits: None

COMMONWEALTH OF MASSACHUSETTS
HAMPDEN, SS SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

COMMONWEALTH OF MASSACHUSETTS

vs.

Docket No:
2012-083

ROLANDO PENATE,

Hearing: Evidentiary - Dismiss
BEFORE THE HONORABLE C. JEFFREY KINDER

APPEARANCES:

For the Commonwealth:

Hampden County District Attorney's Office
50 State Street, Springfield, MA 01102

By: EDUARDO VELAZQUEZ, ASSISTANT DISTRICT ATTORNEY

For the Defendant:

LUKE RYAN, ESQUIRE, Sasson, Turnbull, Ryan & Hoose, 100 Main
Street, Northampton, MA 01060

Also Present:

SEAN W. FARRELL, ASSOCIATE CHIEF LEGAL COUNSEL, and JENNIFER
O'NEIL, ESQUIRE, State Police Headquarters, 470 Worcester
Road, Framingham, MA 01702

KRIS FOSTER, ASSISTANT ATTORNEY GENERAL, Office of the
Attorney General, Appeals Division, One Ashburton Place,
A-19, Boston, MA 02108

Hampden Superior Court
50 State Street
Springfield, Massachusetts
October 2, 2013

ALICIA CAYODE KYLES
Official Court Stenographer
Registered Merit Reporter

EXHIBITS

PAGE

(No exhibits were marked.)

1 (The Court was present at 11:27 a.m.)

2 THE CLERK: Hearing on Page 13, Item 26, Rolando
3 Penate, Indictment 12-83. Attorneys Velazquez and Ryan.

4 MR. VELAZQUEZ: Your Honor, there is also counsel here
5 from the State Police and the Attorney General's Office who
6 had filed or will file opposition.

7 THE CLERK: Any other counsel involved in the case, if
8 they could identify themselves and who they represent.

9 THE COURT: Good morning, Counsel.

10 MR. FARRELL: Good morning, Your Honor. My name is
11 Sean Farrell. I'm here on behalf of the State Police.

12 THE COURT: Mr. Farrell, good morning.

13 MS. FOSTER: And Kris Foster on behalf of the Attorney
14 General's Office and Department of Public Health.

15 MS. O'NEIL: Jennifer O'Neil also here for the State
16 Police.

17 THE COURT: All right. Let me take just a moment and
18 outline where I understand we are.

19 You may be seated.

20 This is a pending drug case which I understand, at
21 least currently, has a hearing date of October 23, and a
22 final pretrial conference today.

23 MR. RYAN: That's correct.

24 THE COURT: I don't know whether or not if you were
25 successful in accomplishing the final pretrial conference or

1 these matters made that not practical.

2 MR. VELAZQUEZ: I am prepared to report, however I
3 believe Mr. Ryan has some opposition filling it out today.

4 THE COURT: All right. Let me go forward then.

5 There are two motions before me. One is a motion to
6 compel production of documentary evidence and it lists
7 specifically 11 paragraphs, various documentary evidence
8 that Mr. Ryan is seeking. And, second, there is a motion to
9 inspect physical evidence seized in connection with the
10 criminal -- that case now pending against Sonja Farak,
11 previously a chemist at the Amherst laboratory, now run by
12 the Massachusetts State Police.

13 As I understand it, Mr. Ryan, you are seeking this
14 discover in connection with a motion to dismiss that you
15 have filed alleging egregious government misconduct and
16 that, as I understand it from Judge Carey, is not the
17 subject of our discussion today, rather the motions to --
18 for discovery; is that correct?

19 MR. RYAN: Yes, Your Honor. I think it's partly in
20 for -- in evidence for the dismissal motion, but also if
21 that's denied I'll try -- potential trial evidence as well.

22
23 THE COURT: Sorry. Were you referring to the trial
24 date?

25 MR. RYAN: Well, for Mr. Penate's ultimate trial, if

1 his motion to dismiss is not allowed, I think it will be a
2 live issue at trial on a chain of custody defense.

3 THE COURT: Right.

4 MR. RYAN: That is --

5 THE COURT: All right. And your -- I have seen in the
6 file Mr. Ryan's opposition to the motion of the Attorney
7 General to quash. Perhaps, I just overlooked it, but I
8 haven't seen, at least in the files that I have, that motion
9 to quash.

10 MS. FOSTER: Your Honor, if I may. I have two motions
11 to quash. One, is a motion to quash subpoena for Sergeant
12 Ballou and the other is for the Assistant Attorney General,
13 and then I also have three oppositions to the Rule 17.

14 THE COURT: Are these oppositions that have been filed
15 or are you filing them for the first time at this moment?

16 MS. FOSTER: I am filing them for the first time. I
17 did serve it on defense counsel yesterday.

18 THE COURT: Did you not think it would be helpful for
19 the Court -- for me to look at them before the hearing?

20 MS. FOSTER: I did, Your Honor. Honestly, they weren't
21 prepared until last minute.

22 THE COURT: Apparently, Mr. -- I'm confused. Mr. Ryan
23 had at least an opportunity to review a written opposition.
24 It must have been prepared and served on him some time ago.

25 MS. FOSTER: I believe I served them on him yesterday.

1 (Pause)

2 THE COURT: Well, I think it makes sense rather than
3 have me shoot in the dark at this moment, to read what has
4 now been filed for the first time before I address you
5 further.

6 We are in recess.

7 (The Court exited at 11:31 a.m.)

8 (* * * * *)

9 (The Court entered at 11:47 a.m.)

10 (The defendant was present with an interpreter.)

11 THE COURT: Counsel, I have now at least perused the
12 various pleadings. As I'm sure you understand, there's some
13 frustration in this unique circumstance because I am in the
14 middle of an ongoing evidentiary hearing on 15 pending
15 motions for new trial where there is direct overlap between
16 the information sought in connection with that, those cases
17 and this case in which, pretrial, Mr. Ryan is seeking to
18 discover much of the same information.

19 I addressed this with Mr. Ryan once previously and
20 expressed a hope that the parties might come to some
21 agreement as to avoid a duplication of evidence in the case
22 and Mr. Ryan, I understand, there's been some effort in that
23 regard. Perhaps you can tell me the posture of the
24 evidentiary hearing on the motion to dismiss.

25 MR. RYAN: I would be happy to, Your Honor.

1 As you just mentioned, we were last here on September
2 17, for sort of impromptu status conference and at that time
3 I advised the Court, when the Court addressed the desire to,
4 with the conservation of judicial resources, that I just
5 receive a transcript of the proceeding that took place on
6 September 9. Since that date, I've had a chance to review
7 that. And so with respect to Mr. Penate's motion to
8 dismiss, I would be prepared to, instead of calling --
9 recalling those same witnesses, to offer that transcript as
10 evidence to be considered on his motion to dismiss for
11 egregious government misconduct and I would not intend to
12 take live testimony from the witnesses who are available
13 today, who have also been subpoenaed for Monday for the
14 ongoing evidentiary hearing.

15 So I think -- I believe Mr. Velazquez is willing to go
16 down this route, which I think will save considerable amount
17 of time and effort on the part of the Court and would result
18 in a duplication of a lot of testimony. So I think that on
19 that front, there is -- that goal of the Court has been
20 achieved and not wasting time having the same witnesses
21 repeat the same testimony for this motion.

22 THE COURT: All right. Is that correct, Mr. Velazquez?

23 MR. VELAZQUEZ: That is correct, Your Honor.

24 THE COURT: All right. Don't several of the motions to
25 quash anticipate that these witnesses would be giving live

1 testimony today and are those now rendered moot?

2 For example, you have filed -- Ms. Foster, if you could
3 stand, please -- a motion to quash the subpoena issued to
4 Sergeant Ballou, which appears to be identical to the one
5 you previously filed expressing concern about the contents
6 of Mr. Ballou's file, only to disclose to me that you hadn't
7 reviewed the file; and then when I asked you to submit to me
8 those parts of the file that you were objecting to producing
9 I received a letter from you saying that, in fact, the
10 entire file had already been produced.

11 MS. FOSTER: It has, Your Honor. I mostly filed this
12 motion to quash because there is this outstanding subpoena
13 for Sergeant Ballou to testify.

14 THE COURT: Do you agree that the motion is identical
15 to the one you filed in the other case?

16 MS. FOSTER: I believe it is, yes.

17 THE COURT: And you, therefor agree that all of the
18 contents of Mr. Ballou's file have already been turned over?

19 MS. FOSTER: They have, Your Honor.

20 THE COURT: So you're not seeking to quash those
21 despite the fact that the motion says that?

22 MS. FOSTER: I guess not, Your Honor. I apologize for
23 that, but I am seeking to quash his testimony.

24 THE COURT: All right. Testimony which I now hear will
25 not be taken today in any event because there is an

1 agreement that the evidence in the motion for new trial will
2 be taken as the evidence in the motion to dismiss, correct?

3 MS. FOSTER: That's my understanding.

4 MR. RYAN: Yes.

5 THE COURT: So your motion to quash is moot, is it not?

6 MS. FOSTER: I believe it is, Your Honor.

7 THE COURT: What other motions that you have filed are
8 now moot?

9 MS. FOSTER: I believe that's the only one. The only
10 other motion I filed was a motion to quash Assistant
11 Attorney General Anne Kaczmarek's testimony and production
12 of documents.

13 THE COURT: Well, she will not be testifying,
14 correct?

15 MS. FOSTER: She is still subpoenaed, Your Honor.

16 THE COURT: Mr. Ryan?

17 MR. RYAN: I can tell the Court I subpoenaed
18 Ms. Kaczmarek for the August 27 hearing on this particular
19 case. That hearing had to be rescheduled because I just
20 received some discovery that day.

21 Ms. Kaczmarek was not on the witness list for the
22 postconviction proceeding and at the postconviction
23 proceeding I thought that we were going to be able to,
24 essentially -- potentially obtain evidence that she had from
25 Sergeant Ballou. Unfortunately, as the Court may recall,

1 Sergeant Ballou, during his testimony, indicated this was
2 this parallel investigation that was not connected to the
3 criminal prosecution of Ms. Farak, that he knew the name of
4 the Major at the State Police who was conducting, but he had
5 no knowledge, there was nothing in his file. And it was --
6 it was like a firewall that he had no knowledge of.

7 During that hearing, Sharon Salem, when questioned
8 about the so-called Berkshire case, the recent discovery we
9 received that day, was advised that Ms. Kaczmarek was the
10 source of that information to her.

11 So at this stage of the proceeding, I filed an
12 opposition essentially to protect my client's rights in the
13 sense I don't want to put a prosecutor on the stand unless I
14 have to, but the Attorney General's Office is aware of an
15 investigation and is producing ongoing discovery without
16 providing defense counsel with the identity of individuals
17 who are re-testing substances or the overall scope of this
18 parallel investigation.

19 So, in filing my opposition to the motion to quash
20 Ms. Kaczmarek, I'm essentially just not letting go of the
21 one witness I know who has knowledge of an investigation
22 that directly relates to this case and the parallel
23 proceeding.

24 THE COURT: Well, let's focus on what we can accomplish
25 today. I am not going to take evidence today based on your

1 representation regarding your agreement, so if there are
2 witnesses waiting in the hallway that have been subpoenaed
3 here to testify, one of you can go tell them they are free
4 to leave.

5 MR. VELAZQUEZ: Very well. May I?

6 THE COURT: You may.

7 (Pause)

8 THE COURT: Then, I think what I would like to do is,
9 starting with defense counsel, hear from you on those
10 motions that are still pending and in play today and these
11 are motions having to do with the discovery you are seeking
12 and then I will hear from counsel in opposition.

13 MR. RYAN: Thank you, Your Honor.

14 If I could start with the motion to inspect the
15 physical evidence.

16 As Your Honor may recall, my -- at the conclusion of
17 the September 9, hearing I made an oral motion seeking
18 access to the -- essentially, this evidence appears to be
19 being maintained at the State Police Evidence Room in its
20 western barracks.

21 Your Honor advised the parties that we should seek --
22 we should confer with an eye towards trying to come to some
23 mutual agreement that would not necessitate the filing of a
24 motion. That conversation took place over a period of days.
25 On September 17, Ms. Foster advised me it was the position

1 of her office that that physical evidence was irrelevant to
2 any case except Ms. Farak's prosecution.

3 THE COURT: Let me stop you, just to make sure I
4 understand the universe of physical evidence we are talking
5 about. You're talking about the evidence that was seized
6 during the search of her work station and during the search
7 of her automobile and tote bag; is there other evidence?

8 MR. RYAN: No. That is all of the evidence that I
9 understand is being held.

10 THE COURT: So much of this evidence has been discussed
11 and photographed. And those photographs have been provided
12 to you?

13 MR. RYAN: That's correct.

14 THE COURT: Can you tell me how you think your motion
15 would be advanced by an actual physical review?

16 MR. RYAN: Certainly some of the photographs -- there
17 were approximately two dozen that were taken. They depict
18 these KPacs that there's been testimony about, inside a
19 manila envelope that appear to have some writing on it. We
20 are left in a position of taking the officer's word saying
21 what these bags say on them, to the extent they've been
22 compromised in any way, to the connection of the outside
23 baggie. They did take pictures and they did write summary
24 notes as to what the evidence is, but this really, I think,
25 particularly the car, there was indication that the -- there

1 were materials and packaging that dated back to cases going
2 back to 2008.

3 The Commonwealth is aware of the significance of this
4 evidence and has furnished an affidavit for Ms. Salem that
5 she was cross-examined about saying that these materials
6 were paperwork that were discretionary as to what to do with
7 them. But we haven't seen what the paperwork was and
8 whether there's any connection with these packaging
9 materials.

10 So I -- it's such a critical issue in terms of how far
11 back Ms. Farak's conduct goes, and I should say one of the
12 things that was found was some newspaper articles, as the
13 Court is aware, from September of 2011 that had been --
14 shared in common a theme that somebody was printing articles
15 out that discussed the misuse and mishandling of narcotics
16 and it was handwritten notes there to the effect of: I'm
17 glad I'm not in law enforcement.

18 So there is this -- this is not a just a shot in the
19 dark in terms of trying to move the date back as to when
20 this misconduct began. I think that in order to do right by
21 this client and my other client, I need to go into the -- to
22 take a look at it.

23 I understand this is an unusual circumstance. Attorney
24 General's Office doesn't want to open themselves up to chain
25 of custody issues in Ms. Farak's prosecution, but I think

1 where there's a will there has to be a way here and what I'm
2 asking for is, you know, is standard. Pending criminal case
3 where there is relevant evidence, I want to have a
4 first-hand look at that evidence and not rely on
5 representations in police report and photographs.

6 THE COURT: Well, you're correct it would be standard
7 for Ms. Farak's counsel to be able to view the physical
8 evidence against Ms. Farak. I can understand the
9 Commonwealth's concern about a third party having the
10 ability to physically inspect discovery in a case in which
11 that third party is not a party.

12 So I am mindful and somewhat sympathetic to the
13 Commonwealth's over-arching concern.

14 Let me turn first to Ms. Foster. As a practical
15 matter, if Mr. Ryan were to show up with his investigator
16 and say simply: I would like an opportunity to physically
17 view, without physically handling the exhibits, what is the
18 prejudice to the Commonwealth?

19 MS. FOSTER: This motion was only served on me at 9:30
20 this morning so I haven't had much time to look over it, so
21 I would like to reserve the opportunity to put something in
22 writing.

23 THE COURT: Well, for now, why don't you focus on my
24 question.

25 MS. FOSTER: Correct, Your Honor. I think the problem

1 is that this is just irrelevant evidence.

2 I think the prejudice would be the fact that every
3 single defendant who has ever had an Amherst case will, all
4 of a sudden be asking for access to the lab to look at,
5 essentially, irrelevant evidence.

6 THE COURT: Well -- let me finish.

7 I understand your concern that you might be setting
8 some precedent. However, I'm not persuaded necessarily that
9 what Mr. Ryan is seeking an opportunity to view is
10 necessarily irrelevant. There have been representations
11 made in the hearing, for example, that a handful of these
12 files found in Ms. Farak's vehicle were numbered in some way
13 and there was reference in a fairly general way to
14 laboratory paperwork without more specifics.

15 It may well be, and I don't know what that information
16 is, but that may well be that information, if Mr. Ryan were
17 able to look at it, might have some relevance to the defense
18 of the case.

19 So let's assume, for the moment, that I conclude that
20 what he's seeking to look at would have some bearing on the
21 issues before me.

22 Other than your concern about setting a precedent of
23 third parties looking at discovery in a criminal case, do
24 you have other specific concerns?

25 MS. FOSTER: I don't with -- for looking at the

1 evidence in Ms. Farak's case except for the fact it would
2 open the door to all third party requests to look at the
3 evidence in this case.

4 And I'm not sure if this motion includes having access
5 to the drug lab or if that was a separate motion, but I also
6 am opposing that.

7 THE COURT: Well, right now we're only focused on this
8 motion which is, I understand, having read it, that it does
9 not apply to access to the drug lab which is a separate
10 motion.

11 MS. FOSTER: Okay. I just haven't had an opportunity,
12 really, to read this yet.

13 THE COURT: All right.

14 MR. RYAN: Could I just be heard briefly?

15 THE COURT: You may.

16 MR. RYAN: As the Court may be aware from the motion
17 itself, I'm asking the opportunity to document this in a way
18 that could be reproduced to other defendants with drug lab
19 cases, so I think it would not necessarily open the door.
20 It would open the door for the -- and it could be under a
21 protective order, of course, but it would not necessitate
22 setting a precedent that would result in multiple people
23 going to the evidence room. It could be shared, I think,
24 within a fairly easy way with our defendants who are
25 similarly situated.

1 THE COURT: As a practical matter, Ms. Farak's case is
2 scheduled for trial in February; is that correct?

3 MR. VELAZQUEZ: I believe so, Your Honor.

4 THE COURT: So your concern regarding the integrity of
5 the files used in Ms. Farak's prosecution would apply up to
6 and through the trial, but not thereafter; is that correct?

7 MS. FOSTER: I believe so, yes.

8 THE COURT: So are you telling me you wouldn't have
9 objection to -- if, for some reason, I would put this issue
10 off, and allow discovery of that information after the Farak
11 trial, you would not be opposed to it?

12 MS. FOSTER: I think I still would be opposed to it for
13 the same reason that it would open the floodgates to
14 everyone.

15 THE COURT: Of course every case is considered on its
16 own merits.

17 MS. FOSTER: Correct, Your Honor.

18 THE COURT: The fact that I allow it in this case would
19 not necessarily automatically open the floodgates to every
20 defendant in every criminal case.

21 MS. FOSTER: Correct, but just as an example though,
22 Defense Counsel Mr. Ryan cites -- I believe it's a Hampden
23 County case where there's access to the Amherst Lab, Suffolk
24 County case with access to the Hinton lab, so I think once
25 it's allowed it does start a chain.

1 THE COURT: All right. Let me ask whether or not other
2 counsel wish to speak only to this motion, that is the
3 motion to inspect physical evidence.

4 Mr. Velazquez?

5 MR. VELAZQUEZ: Your Honor, I just have a point of
6 clarification, that is, this is in the context of a motion
7 to dismiss.

8 THE COURT: As I understand it, Mr. Ryan is seeking an
9 opportunity to view this motion to further support his
10 motion to dismiss; is that correct, Mr. Ryan?

11 MR. RYAN: And as well as to potentially develop trial
12 evidence, yes.

13 MR. VELAZQUEZ: And I just wanted to throw it out
14 there, but the Court is aware that the evidence we are
15 talking about in the Penate case has been re-tested and
16 found to be the same substance that it was originally found
17 to be by Ms. Farak.

18 THE COURT: Thank you for reminding me. I do recall
19 when you were last before me that you did mention that.
20 Which, of course, doesn't necessarily end the issue on the
21 motion to dismiss.

22 MR. VELAZQUEZ: Right. It doesn't, but it certainly
23 puts in the context of the evidence that was seized by
24 Ms. Farak was videoed, photographed. It was documented in
25 writing. And I don't see how a defense photographer is

1 going to get any better pictures than the State Police has
2 already done and its been provided to defense counsel. And
3 every time we have an issue like that, it opens up yet
4 another avenue of arguments that just goes further and
5 further into it, and there seems to be no end. And I'm just
6 looking at the practical matter of this, because right now
7 we're addressing it from the point of view of this case and
8 then obviously the State Police and the Attorney General's
9 concern are that we're going to address this both in prior
10 violations of probation and we're going to address this in
11 all appeals, anything that's ever been done in that
12 particular lab and the floodgate argument, I think, is a
13 strong one and should be really seriously considered in
14 this.

15 But beyond that, Your Honor, I certainly would oppose
16 it only because in terms of how it relates to what Sonja
17 Farak did in this case. And we are alleging, obviously that
18 the testing was done. There were over 20,000 such samples
19 that were being tested at the same time, and I -- I sort of
20 see this going to each and every one those samples as a
21 potential way to somehow cast aspersions on that lab. But,
22 the people who have testified thus far, and I expect Jim
23 Hanchett and Rebecca Pontes will address that issue when
24 they testify on the 7th.

25 THE COURT: Mr. Ryan, couple of thoughts; one, your

1 client is currently held; is he not?

2 MR. RYAN: That's correct.

3 THE COURT: So your argument, I assume, regarding the
4 suggested delay until the close of the Sonja Farak case
5 would be that your client, unfortunately, remains
6 incarcerated and further delay is of obvious prejudice to
7 him?

8 MR. RYAN: Yes, Your Honor.

9 THE COURT: In order to prevail on a motion to dismiss
10 based on egregious government misconduct you, of course,
11 would have to show some prejudice to your client and what
12 Mr. Velazquez suggests is that the drugs have now been
13 re-tested and that the Commonwealth, in its presentation
14 would be presenting no evidence of any prior testing,
15 granted they may be raised on cross examination.

16 I am trying to get a handle on how you think the --
17 Ms. Farak's conduct, in light of the fact that she would not
18 be a trial witness, has prejudiced your client such that
19 that dismissal is warranted.

20 MR. RYAN: Well, respectfully, there are two avenues in
21 which to obtain dismissal based on egregious government
22 misconduct. One is through the showing of prejudice, the
23 other is, there is a remedy for that. It embraces
24 prophylactic considerations where a defendant need not show
25 prejudice. If the conduct is egregious enough the Court can

1 dismiss, absent a finding of prejudice.

2 In this case, I think that is very much in play.

3 Now, with respect to Mr. Velazquez's argument that
4 re-testing has occurred, that may be true; but I think that
5 it is still -- I am still waiting for my expert, who has
6 been given the discovery from the Mass. State Police Lab, as
7 to re-testing to compare quantity of substances, to compare
8 the spectra from one test to another as the Court is aware.
9 Ms. Farak's -- the Berkshire case, there was a high degree
10 of purity with some cocaine that was submitted to her when
11 it went to the State Police lab. It was still cocaine, but
12 it was of a much lower quantity. So I'm not conceding that
13 these re-tests are going to put Mr. Velazquez in the
14 position that he thinks they will.

15 I think that is still an open issue. I am not sure, at
16 the end of the day, whether on their motion to dismiss the
17 Court necessarily has to find that Mr. Penate has been
18 prejudiced by what, I think we all would agree, is egregious
19 government misconduct. This is a Commonwealth agent who,
20 essentially, is caught using this laboratory for her own
21 purpose.

22 We don't know exactly what those purposes were, but the
23 evidence is pretty compelling that she broke the law and did
24 not discharge her duties in the manner that she was paid to
25 do. So I understand these floodgate arguments, but this is

1 not something that any criminal defendant can have
2 responsibility for.

3 The Commonwealth hired a person to do a job and she did
4 it in a way that has given rise to these challenges that I
5 think, unfortunately, Courts are put in a position to have
6 that increase to their workload; but this is a natural
7 consequence of misbehavior on the part of a government
8 official.

9 THE COURT: Well, it may be misbehavior in that the
10 evidence at least suggests that Ms. Farak was dipping into
11 the substances and using them herself. Not sure that the
12 evidence suggests there was any false testing. Rather, I
13 think it is reasonable to infer, based only on what I have
14 heard thus far, that she was taking cocaine from samples
15 seized and replacing it with substances other than cocaine
16 to cover her tracks and that, in my view, sets this case
17 apart from the conduct of Ms. Dookhan who, apparently, was
18 deliberately falsifying tests that were either never
19 conducted or where there was evidence, there was no -- she
20 reflected drugs were found when they were not.

21 I am not certain we have that evidence here, but that
22 is an issue for another day.

23 Let me ask Mr. Farrell and Ms. O'Neil, if, on this
24 motion, which is the motion to inspect physical evidence,
25 you have a position you wish to be heard on?

1 MR. FARRELL: Your Honor, I think you've heard it. I
2 will join in the arguments that have been already
3 forwarded -- put forth with this particular issue.

4 THE COURT: All right. Thank you.

5 MR. FARRELL: Thank you.

6 THE COURT: Mr. Ryan, your next motion that you would
7 like to address?

8 MR. RYAN: Thank you, Your Honor.

9 I guess, at this point, I would like to turn to the
10 motion to permit access to the Amherst Laboratory. This a
11 motion that I filed, as the Court is aware, this is,
12 basically, a crime scene that's over at the University of
13 Massachusetts. And the Commonwealth v. Matis provides some
14 precedent for the idea that a physical location in the
15 custody of a third party is susceptible to a Rule 17 motion
16 to essentially take a view and memorialize a document.

17 I should say that in filing this motion I had some
18 conversations with an attorney who is not present today,
19 Byron Knight, who I believe Ms. Foster can clarify this. I
20 think he represents the Department of Public Health.

21 My review of the file indicates that Crime Scene
22 Services from the State Police went to the location and
23 produced a video recording of the premises. And in speaking
24 to Attorney Knight I said: Look, I filed this motion, but
25 this is discovery that has not been provided, and if you

1 were to provide it, either one of two things would happen.
2 You would have to withdraw the motion, or, I think you'd be
3 in a substantially better position with the Court to say
4 Attorney Ryan doesn't need to do this. He's got a video of
5 the walk-thru.

6 So I think that that is a potential way to -- for me to
7 get what I need and I think I spell out why I need it.

8 Part of the argument that is going to be banted about
9 here is how much misconduct did this chemist engage in
10 during days when other people were at the laboratory. And
11 the physical location gives some sense as to what's
12 available and who is -- what are the sight lines, where were
13 different people stationed, where was this work
14 accomplished. Right now this is information that has been
15 sort of sketched out in a narrative form, but either a video
16 of it that exists according to a police report I have or my
17 own opportunity to go and walk the premises and take a video
18 I think are necessary, in order for me to feel like I'm
19 doing right by my clients.

20 THE COURT: Ms. Foster, is there such a video?

21 MS. FOSTER: This is the first I've heard of it, but I
22 can check into that, Your Honor.

23 THE COURT: Well, as I understand it, Ms. Foster, this
24 is no longer a working laboratory, correct?

25 MS. FOSTER: That's correct. It's in the process of

1 being turned back over to UMASS. I've been told that the
2 room has been moved around, it wouldn't look how it looked
3 when it was a functioning lab.

4 THE COURT: So what is the prejudice to the
5 Commonwealth in allowing Mr. Ryan an opportunity go in and
6 look at it even though it may not be quite the same?

7 MS. FOSTER: I think it's the same argument I made for
8 inspecting the physical evidence. I think it just opens the
9 floodgates to -- shortly we -- the Attorney General's Office
10 and Department of Public Health won't have access to the
11 lab, but I do think it opens up floodgates for inspecting
12 what appears to be even less relevant evidence or less
13 relevant than the physical evidence in Ms. Farak's case.

14 THE COURT: Okay. Let's move onto the other motion,
15 you have, Mr. Ryan.

16 MR. RYAN: Just so the record is clear, I just handed
17 Ms. Foster a copy of the police report that indicates that a
18 video was made of that premises, and I don't know if that
19 will impact her position or not.

20 The next motion that I would ask the Court an
21 opportunity to be heard on is a motion I filed for the
22 production of documentary evidence. This might bring some
23 of the other attorneys into the fray.

24 I can say that I filed this motion seeking production
25 of 11 different categories of evidence and I think that the

1 litigation and the responsive pleadings have established
2 that a number of these items do not exist.

3 THE COURT: So why don't we put a finer point on it.
4 Perhaps you can summarize for me, to the extent you know
5 about it now, where the areas of disagreement are in these
6 11 paragraphs.

7 MR. VELAZQUEZ: Certainly.

8 MR. RYAN: Certainly. Item Number Four -- excuse me,
9 Item Number Three I think is probably one of the biggest
10 ones out there, is a copy of Ms. Farak's personnel file.
11 And Number Six dovetails with that. It's copies of
12 performance evaluations of her and other individuals at the
13 lab. And then Items Seven and Eight are -- seek the
14 production of inter or intra-agency communications regarding
15 the scope of the misconduct at the Amherst lab.

16 Those, I think, are the only issues that are really
17 before the Court.

18 THE COURT: Three, six, seven and eight?

19 MR. RYAN: Correct.

20 THE COURT: All right. Let me perhaps hear the
21 opposing position with respect to those paragraphs.

22 Who wants to carry the ball?

23 MS. FOSTER: I will, Your Honor.

24 I do agree those are the paragraphs in question.

25 The Rule 17 motion was filed on, I think four different

1 agencies -- the Attorney General's Office and Department of
2 Public Health. I filed oppositions for those two.
3 Regarding the Attorney General's Office, the numbers in
4 question are Seven and Eight, which relate to
5 correspondence. And its correspondence inside the Attorney
6 General's Office and correspondence with other DA's Offices.

7 I think that a lot of that is going to -- almost all of
8 that is going to be work-product preparation.

9 THE COURT: Well, let me ask the same question that I
10 asked with respect to Mr. Ballou's file, are you saying that
11 because you've actually looked at it or are you just
12 guessing?

13 MS. FOSTER: I haven't, Your Honor. The office has not
14 compiled every email that mentions the word "Farak" in it
15 from this time period that he's requesting.

16 THE COURT: All right. Have you looked at any of the
17 correspondence or other documents that would arguably
18 qualify in these paragraphs?

19 MS. FOSTER: I have talked to Assistant Attorney Genral
20 Anne Kaczmarek and she says the correspondence which would
21 pretty much all be in email form would be work product or
22 part of the ongoing investigation.

23 THE COURT: And other than talking to Ms. Kaczmarek,
24 have you actually looked at any of the emails.

25 MS. FOSTER: I have not, Your Honor. I know the office

1 has not gathered them in one database.

2 THE COURT: All right.

3 MS. FOSTER: And for the Department of Health, I agree
4 that the only thing in question there are the Sonja
5 Farak's -- I think a few different people, personnel files
6 and performance evaluations, and I think those are
7 privileged.

8 I -- I really -- the -- I think the defendant has to
9 show some type of relevance that outweighs the privacy
10 interest in it and I don't think he's shown anything from
11 Rule 17 purposes that shows a prima facie showing.

12 THE COURT: All right. And have you looked at either
13 the personnel files?

14 MS. FOSTER: I have not, Your Honor.

15 THE COURT: Counsel, do you wish to be heard on this
16 motion?

17 MR. FARRELL: Judge, I would only add, as the Court is
18 fully aware of, the Lampron requirements place the burden on
19 the defendants to demonstrate to this Court how any
20 documents that he seeks are relevant, how they're admissible
21 at trial; and most importantly, Your Honor, he has to make a
22 showing of some specificity.

23 In this particular case no speci- -- excuse me,
24 specificity, has been demonstrated by counsel. He hasn't --
25 he hasn't explained to the Court how the contents of any

1 personnel file are relevant to any issue that he's dealing
2 with.

3 He hasn't explained how any of the other items he is
4 seeking are relevant or admissible at trial.

5 If you look at the affidavit that's been submitted in
6 the case, counsel states in his affidavit no less than five,
7 six, seven paragraphs: Well, I believe this evidence; I
8 believe; I believe; In my view.

9 THE COURT: Well --

10 MR. FARRELL: That, I think, goes towards the state of
11 mind as to --

12 THE COURT: Let me interrupt for a moment. Of course
13 the personnel files are not public documents, so he would
14 not have seen the contents of the public -- of the personnel
15 file.

16 Let's just assume, for example, that there's some
17 information in the personnel file that deals with the
18 discipline, disciplinary matters involving Ms. Farak in the
19 relevant time period that may have to do with work
20 attendance, work performance, information that may arguably
21 bear some relationship to the misconduct that's been charged
22 in the criminal case and may arguably be relevant to the
23 defense.

24 Is more than that needed?

25 MR. RYAN: Well, whether we know that's in the contents

1 of those files, we don't know. That's the burden of the
2 defendant to demonstrate to this Court how the contents of
3 that file are relevant to this particular case.

4 THE COURT: And how can he do that?

5 MR. O'CONNOR: Your Honor, I'd ask the SJC that
6 question because it's his burden. It's clear from the
7 Lampron case, one is Rodriguez, those line of cases, that
8 the burden lies squarely on the defendant or moving party
9 seeking those files.

10 THE COURT: Well, we get these motions all the time,
11 for example, in cases where victims in crimes of violence
12 have a history of mental health treatment. Of course,
13 without looking at those files, defense counsel cannot say
14 without any certainty what is there, but I frequently and
15 regularly find that evidence of past counseling may be
16 relevant to the issue of credibility.

17 It seems to me that the defendant isn't in a much
18 different position with respect to personnel files, perhaps
19 the argument is not quite as strong, but in any event he's
20 never going to be able to describe in detail the contents of
21 the file without first seeing it.

22 So perhaps it's a chicken and egg kind of argument, but
23 it seems to me the Lampron standard is a little bit looser
24 than you're suggesting.

25 MR. FARRELL: The -- based upon the affidavit, Your

1 Honor, there's -- and I'd suggest to the Court there's
2 nothing in that affidavit that suggests in any way how
3 any -- first of all, there's no specific documents
4 requested.

5 Testimony -- it's couched in "any and all records
6 relating to this". "Any and all records". There's no
7 specificity in there. And that's just, I suggest to the
8 Court, that that is what the standard requires that there be
9 specificity.

10 From what I've seen so far, we've seen a form motion
11 going to four separate State agencies asking for the same
12 thing. I would suggest this is nothing more than counsel
13 cast a broad net in this particular case seeking information
14 which may or may not exist.

15 That's specifically what the SJC and Lampron warned
16 against, criminal discovery is not open season. It's not a
17 civil case where we have a right to discovery. There is no
18 right to discovery of third parties unless the showing has
19 been made, Your Honor, and I'd suggest with all of these,
20 particularly with the ones that are at issue here, no
21 showing has been made whatsoever, Your Honor.

22 THE COURT: Mr. Ryan, why should you be entitled to the
23 personnel file in its entirety?

24 MR. RYAN: Well, Your Honor, I think two reasons. I
25 think the Court hit upon it. The only reason anybody files

1 a discovery motion is if I already had the information then
2 I wouldn't need to file the discovery motion. The reason I
3 am entitled to the personnel files, it's going to show one
4 or two things, it's either going to show an absence of
5 supervision -- in other words, it's going to be a manila
6 folder with a couple of pieces of paper in there that
7 suggests that there was no supervision that took place.
8 That would undercut an argument that, you know, we knew that
9 she wasn't engaging in misconduct because we had a close
10 watch on our employees.

11 Or, it's going to show a more detailed level of
12 supervision that I think, ultimately, will give rise to the
13 argument that Ms. Farak was engaged in a game of deception.
14 I mean, one of the things that I think is -- I want to see
15 in the personnel file is did anybody ask Ms. Farak whether
16 she had a history of using elicited substances.

17 Ms. Farak's wife testified at the Grand Jury that she
18 used cocaine before she became a chemist at a laboratory
19 where she was going to be charged with analyzing substances
20 suspected of being cocaine highly addictive substance that
21 has a huge street value.

22 I think if this personnel file doesn't address that, if
23 there's no job application in there where she's asked that
24 specific question, it's going to buttress arguments I'm
25 going to make that the supervision at this laboratory, as

1 the Quality Assurance Audit from October 2012, makes clear,
2 what was lacking -- there's a reason this lab wasn't
3 accredited. They did not do things in a way that accredited
4 labs do and I think that goes down to training and
5 supervision that employees like Ms. Farak had.

6 I don't know what's in that file, but I do know that
7 the misconduct alleged here occurred on the job and it --
8 her performance, at least in the Grand Jury minutes that
9 I've received and some of the testimony came in from
10 Ms. Salem suggests that Ms. Farak's performance was
11 beginning to spiral in the months preceding this.

12 Well, if there's no notation of that, then I think that
13 starts to look like an argument that supervisors are making
14 to cover themselves to be able to say: Look, you know,
15 trust me, back in 2007, 2008 she was a model employee, but
16 in the, you know, in the months preceding this, as the
17 Attorney General's pleading repeatedly -- she didn't start
18 doing any problematic things until roughly four months
19 before her arrest.

20 Well, that's because supervisors who have an incentive
21 to misrepresent Ms. Farak's performance as being stellar
22 right up until it wasn't, I have given them that
23 information.

24 So this personnel file goes right to the heart of key
25 witnesses on this motion and potentially at trial as well.

1 THE COURT: If the Commonwealth were to seek a Rule 17
2 subpoena to your client's employer for his personnel file to
3 discover whether or not there might be evidence of
4 misconduct or drug use on the job, would they be entitled to
5 that?

6 MR. RYAN: That's a very good question. I don't know
7 the answer to that. I think that, as is often the case, the
8 rules don't exactly apply in the same way for a defendant
9 who is facing deprivation of his liberty as for the
10 Commonwealth who is attempting to deprive him of his
11 liberty.

12 So my instinct would be to fight that. I don't think I
13 would be adopting any inconsistent positions. I think it
14 would have to do with the different positions that the
15 parties would face.

16 THE COURT: Does that exhaust the motions that are
17 before me today?

18 MR. RYAN: It does. I haven't been heard on the
19 intra-office correspondence.

20 I can very quickly say --

21 THE COURT: Those are which paragraphs?

22 MR. RYAN: Seven and eight.

23 THE COURT: Thank you.

24 MR. RYAN: I think that my -- and again, I wouldn't
25 file this motion if I knew what the contents of these emails

1 are, but I suspect they're -- particularly in the immediate
2 days and weeks after Ms. Farak's arrest -- there was
3 probably quite a bit of correspondence related to how bad is
4 this scandal that we're facing here, and how bad was the
5 supervision at Amherst. And this sort of correspondence, I
6 don't think would be something that Ms. Farak's attorney
7 would necessarily be entitled to because I think there's an
8 argument that it is work product in that context, but I
9 think, if you look at the rules on this, this work product
10 is about opposing parties and the Attorney General's Office
11 is not an opposing party to Mr. Penate, they are a third
12 party. I don't think that rule applies and I don't think
13 that the Attorney General's Office has made a showing in
14 citing civil case after civil case where law enforcement
15 privileges trump the needs of civil litigants to depose or
16 obtain documentary evidence.

17 This is a criminal case and this is this man's liberty
18 on the line. And I think that, under the circumstances,
19 this is exculpatory evidence. It goes to the scope of a
20 problem with a chemist who is at the heart of his criminal
21 prosecution.

22 THE COURT: Well, if it's exculpatory evidence, the
23 Commonwealth would have an obligation to turn it over.

24 Let me ask Mr. Velazquez.

25 Let's assume that this flurry of emails that Mr. Ryan

1 thinks might be there is present and there is an email
2 exchange regarding the scope of the misconduct and some
3 statements by some party at the lab, which opines that it
4 would appear that this conduct has been ongoing for some
5 time; would you agree that that would be exculpatory
6 information?

7 MR. VELAZQUEZ: Sure, I would agree to that.

8 THE COURT: Has anybody looked at the emails to
9 determine whether or not that might exist? I understand
10 from Ms. Foster she hasn't looked at any of them.

11 MR. VELAZQUEZ: I have no access to them, but I'm not
12 aware if anybody has, in fact, looked.

13 THE COURT: All right. Let me ask that question of
14 you, Ms. Foster.

15 MS. FOSTER: I do believe -- I agree that that would be
16 exculpatory, but I also think this is a fishing expedition.
17 I believe anything that -- presuming that the Attorney
18 General's Office is hiding some type of exculpatory
19 evidence.

20 THE COURT: My question is: Has anybody looked?

21 MS. FOSTER: Not that I know of. As I said, no one has
22 compiled all of these correspondence because there could be
23 letters, emails, voice mails.

24 THE COURT: So you agree that that kind of information
25 would be exculpatory if it existed, but you don't believe

1 anybody has even looked to determine whether it exists?

2 MS. FOSTER: I know the lead investigators and the lead
3 prosecutor, they would naturally be the people who wrote the
4 most correspondence on this and they have said that nothing
5 in it is outside, really, what has already been disclosed
6 other than work product.

7 THE COURT: Let me just say in the future, it would be
8 helpful for me, in attempting to resolve these matters and
9 deciding them, if you actually looked at the information you
10 were talking about other than making bold pronouncements
11 about them being privileged or the content of them.

12 MS. FOSTER: I agree, Your Honor, but again, we don't
13 have this in some type of database.

14 I think the fact that I don't think there's even been a
15 prima facie showing on this being relevant to the
16 defendant's guilt or innocence, I think requiring the
17 Attorney General's Office to compile possibly thousands of
18 emails, voice mails, letters, requiring everyone who has
19 been related to that unit to go through all their work to
20 find these documents, I think that's asking a lot.

21 THE COURT: Well, I agree that compiling it all in a
22 database may be time consuming. Picking up a phone and
23 talking to the lead investigators about what might exist and
24 whether or not any of it has been reviewed doesn't seem, to
25 me, to be asking too much.

1 MS. FOSTER: I have done that, Your Honor. I have
2 talked to Assistant Attorney General Kaczmarek. I talked to
3 Sergeant Joe Ballou and both of them has said there's
4 nothing -- there's no smoking gun, as I think Attorney Ryan
5 is looking for other than what's already been disclosed in
6 Grand Jury minutes, Grand Jury exhibits, police reports and
7 the like, other than just office conversation about thought
8 processes.

9 THE COURT: I'm prepared to take the matters under
10 advisement unless any counsel has anything more to add?

11 MR. RYAN: No, Your Honor. Thank you very much for
12 your time today.

13 THE COURT: All right. Let me just drop back on two
14 unrelated matters.

15 First, Mr. Ryan, I have asked that the Campos matter be
16 recalled, so I'm going to ask you to stand by for that.

17 Second, Ms. Foster, I don't know what Monday is going
18 to bring in terms of motion practice, but if you intend, on
19 behalf of the Attorney General, to file any motions, you
20 have until close of business Friday at 5:00.

21 MS. FOSTER: Thank you, Your Honor.

22 THE COURT: We are in recess.

23 (The Court exited at 12:31 p.m.)

24 (* * * * *)
25

C E R T I F I C A T I O N

I, ALICIA CAYODE KYLES, REGISTERED PROFESSIONAL REPORTER, REGISTERED MERIT REPORTER, OFFICIAL COURT STENOGRAPHER, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND ACCURATE TRANSCRIPT FROM THE RECORD OF THE COURT PROCEEDINGS IN THE ABOVE ENTITLED MATTER.

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I, ALICIA CAYODE KYLES, FURTHER CERTIFY THAT I NEITHER AM COUNSEL FOR, RELATED TO, NOR EMPLOYED BY ANY OF THE PARTIES TO THE ACTION IN WHICH THIS HEARING WAS TAKEN, AND FURTHER THAT I AM NOT FINANCIALLY NOR OTHERWISE INTERESTED IN THE OUTCOME OF THE ACTION.

ALICIA CAYODE KYLES, RPR, RMR, OCR

Dated: May 1, 2015

50 State Street

Springfield, Massachusetts 01103

413-748-7624

EXHIBIT 29

From: Verner, John (AGO)
Sent: Wednesday, October 02, 2013 11:12 AM
To: Kaczmarek, Anne (AGO)
Subject: RE: Farak

Interesting. Let me talk to Ed Bed

From: Kaczmarek, Anne (AGO)
Sent: Wednesday, October 02, 2013 10:26 AM
To: Verner, John (AGO)
Subject: FW: Farak

Farak is willing to do a proffer regarding the scope of her drug use in exchange for state and federal immunity against future charges.

The DAs in Western MA would love this. Not sure its viable but worth a discussion?

From: EPOURINSKI@aol.com [<mailto:EPOURINSKI@aol.com>]
Sent: Wednesday, October 02, 2013 10:16 AM
To: Kaczmarek, Anne (AGO)
Subject: Farak

Anne,
You have not responded to my last email regarding the proffer which is unusual for you. Would you please respond one way or the other.
Thanks,
Elaine

EXHIBIT 30

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

TRIAL COURT OF THE
COMMONWEALTH
SUPERIOR COURT DEPT.
INDICTMENT NO. 12-083

HAMPDEN COUNTY
SUPERIOR COURT
FILED

OCT - 2 2013

Commonwealth

v.

ROLANDO PENATE

HAMPDEN COUNTY
SUPERIOR COURT
FILED

OCT - 4 2013


CLERK OF COURTS


CLERK OF COURTS

DEFENDANT'S MOTION TO INSPECT PHYSICAL EVIDENCE

Now comes the defendant in the above-entitled action and respectfully requests that this Honorable Court issue an order, pursuant to Mass. R. Crim. P. 17(a)(2), *Commonwealth v. Lampron*, 441 Mass. 265 (2004), and *Commonwealth v. Matis*, 446 Mass. 632 (2006), compelling the Attorney General's Office and/or the Massachusetts State Police to permit undersigned counsel, an investigator and/or expert to conduct an inspection/examination of physical evidence recovered during searches conducted in the course of the investigation and prosecution of Sonja Farak. (See Ex. A, Report of Trooper Randy Thomas re: Search Warrant Execution of Farak vehicle (Jan. 24, 2013; Ex. B, Report of Sgt. Joseph Ballou re: Search Warrant Execution of Tote Bag Recovered from Amherst Lab (Feb. 15, 2013); Ex. C, Report of Sgt. Joseph Ballou re: Visit to the Amherst Laboratory (Feb. 15, 2013); Ex. D, Office of the Attorney General Department Case Report (Jan. 29, 2013).)

The Supreme Judicial Court (SJC) has made clear that Rule 17(a)(2) governs these circumstances,

DEVIDED. I am not persuaded that Rule 17(a)(2) permits a third-party to inspect evidence held in a pending criminal case. Particularly under the circumstances of this case where the physical evidence has been described in detail for the defendant and photographs of that evidence have been provided. *Skid* 10/2/13

as it provides for the summoning of documentary evidence and other “objects” from third parties for use at trial, and permits the judge to order that they be produced prior to trial for purposes of inspection. Such inspection can include inspection by experts who may be called as witnesses to testify at trial regarding the import or significance of the objects.

Matís, 446 Mass. at 634.

The defendant states that disgraced chemist Sonja Farak originally analyzed the alleged cocaine and heroin he is charged with distributing and possessing with the intent to distribute. Recently furnished discovery reveals that, following Farak’s arrest and indictment, the Commonwealth had these substances “re-tested” at the State Police Crime Laboratory in Sudbury.

The defendant states that, in order to effectively defend his case at trial, and at pretrial motions – where he has sought dismissal and will likely seek to exclude the results of any “re-testing” should his motion to dismiss be denied – his counsel requires a full understanding of the items seized by law enforcement in the course of its investigation. Such an understanding can only be achieved by means of a personal inspection of the evidence.

Police reports generated as a result of the search of Farak’s car indicate that it contained lab materials related to cases dating back to 2008, as well as plastic bags containing substances believed to be narcotics. While pictures were taken during the execution of the warrant, neither the quantity nor quality of these photographs is sufficient to resolve what the evidence in Farak’s car means in terms of the timing and scope of her criminal conduct and the timing and scope of the deficiencies at the

laboratory where she was employed. These are among the very issues the evidentiary hearing in this case has been scheduled to resolve.¹

During a recent evidentiary hearing in parallel post-conviction proceedings, Sgt. Joseph Ballou was questioned extensively regarding the physical evidence in the possession of law enforcement. (*See* Ex. E, Transcript of Testimony of Joseph Ballou (Sept. 9, 2013).) While the defendants in these proceedings have argued that such evidence suggests that Farak was engaged in evidence tampering years before her arrest, the Hampden County District Attorney's office has adopted the position taken by the Attorney General's office that the physical evidence in its possession only supports an inference that her misconduct began in the fall of 2012. To date, defendants like Mr. Penate have been forced to accept representations concerning the nature of this critical evidence from an agency that has consistently turned a blind eye toward anything suggesting that the target of its prosecution committed other crimes with which she has not been charged.²

¹ On July 23, 2013, following the argument of counsel, the Honorable Mary-Lou Rup issued an order finding that

[A]n evidentiary hearing must be conducted on the following issues: (1) if Ms. Farak and/or the Amherst drug lab engaged in egregious misconduct in the handling, storage, and analysis of suspected narcotics during the time period between November 2011 and January 2012, when the Amherst drug lab had custody and control of the alleged controlled substances related to the defendant's case; (2) if such misconduct has substantially prejudiced the defendant or irreparably harmed his right to a fair trial; or (3) if such egregious misconduct was deliberate and intentional, warranting a prophylactic sanction of dismissal.

(Mem. on Def.'s Mot. to Dismiss 2 (July 23, 2013).)

² For example, on May 10, 2013, Sgt. Ballou conducted an interview with Springfield Police Officer Gregory Bigda. According to Officer Bigda, at some point in early 2012, he seized 51 pills suspected of being oxycodone. These 51 pills were submitted to the

Following the presentation of evidence at aforementioned post-conviction proceeding, undersigned counsel made an oral motion for the relief sought by this written motion. When the Attorney General's office objected, the Honorable Jeffrey Kinder directed the parties to confer with an eye towards reaching an agreement. Ultimately, discussions with the Attorney General's office concluded on September 17, 2013, when an Assistant Attorney General conveyed the position of her office that "viewing the seized evidence is irrelevant to any case other than Farak's." (Ex. F, E-mail correspondence between AAG Kris Foster and Attorney Luke Ryan.)

Based on the foregoing, the defendant respectfully requests that this Honorable Court allow this motion and issue an order permitting counsel for the defendant (including an investigator and/or expert) to:

1. Access the location where the physical evidence pertaining to the prosecution of Sonja Farak is currently being stored and, while under the supervision of the State Police, conduct a visual inspection of said physical evidence;
2. Take photographs, video recordings, measurements, notes, and/or drawings of said physical evidence; and
3. Make available to other defense attorneys handling cases involving the Amherst laboratory the results of the inspection, including access to any

Amherst Laboratory for analysis on March 8, 2012. On May 8, 2012, Farak analyzed the pills and certified that the 61 pills submitted for analysis did contain any narcotics or illegal drugs. When asked whether these facts raised concerns regarding the possibility that Farak tampered with additional evidence, Ballou stated that they did. However, neither he nor anyone else involved in the Farak investigation made any effort to determine how many pills were logged into evidence when Springfield Police relinquished custody of them to the Amherst lab.

photographs, video recordings, measurements, notes, and/or drawings made during the inspection.

Respectfully Submitted,
ROLANDO PENATE.

By 

His Attorney

LUKE RYAN

BBO#664999

SASSON, TURNBULL, RYAN & HOOSE

100 Main Street, 3rd Floor

Northampton, MA01060

(413) 586-4800

(fax) (413) 582-6419

EXHIBIT 31

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 2007-00770

COMMONWEALTH

HAMPDEN COUNTY
SUPERIOR COURT
FILED

vs.

OCT 30 2013

ERICK COTTO, JR.


CLERK OF COURTS

**MEMORANDUM OF DECISION AND ORDER ON
DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEA**

On June 14, 2007, a Hampden County grand jury returned an indictment against the defendant, Erick Cotto, Jr. ("Cotto"), charging him with trafficking in cocaine (Count I) and unlawful possession of ammunition without a firearms identification card, a subsequent offense, under G. L. c. 269, § 10 (h) (Count II). On April 13, 2009, pursuant to a plea agreement, the defendant pled guilty to trafficking in cocaine (14-28 grams) in violation of G. L. c. 94C, §32E (b)(1), and unlawful possession of ammunition, in violation of G. L. c. 269, § 10 (h). In exchange for the defendant's guilty plea, the Commonwealth agreed to reduce the trafficking charge from 28-100 grams to 14-28 grams and to jointly recommend a sentence of five years to five years and one day in state prison. The court, Page, J., adopted the joint recommendation and sentenced him to MCI-Cedar Junction for not more than five years and one day and not less than five years on the trafficking charge, and on the ammunition charge to one year in the Hampden County House of Correction to run concurrently with the sentence on Count I. Before me now is Cotto's motion to withdraw his guilty plea because he claims: (1) it was not knowing, intelligent and voluntary; and (2) newly discovered evidence casts doubt on the justice of the conviction. Specifically, Cotto asserts that the alleged criminal conduct of Sonja Farak

("Farak"), the chemist who tested the controlled substances for the Commonwealth, is newly discovered evidence that would have been material to his decision to plead guilty, and that his guilty plea without knowledge of her alleged misconduct was unknowing and involuntary. For the reasons that follow, the motion is **DENIED**.

FACTUAL BACKGROUND

1. The Underlying Offenses

In the Spring of 2007, Springfield Police Officer Thomas Nehmer, through the use of a confidential informant, developed information that Cotto was in the business of selling cocaine. On May 4, 2007, based on information received from the informant regarding Cotto's involvement in an upcoming drug transaction, police established surveillance at the time and place that the transaction was to occur. When Cotto arrived as predicted, he was secured by police. At the time he had on his person 8 grams cocaine, 2 cell phones and \$91. He was arrested and transported to the police station. Following a waiver of his Miranda rights, Cotto told officers that his bedroom at 38 Alvord Street contained packaging materials, scales and approximately 30 grams of cocaine.

Officer Nehmer applied for a search warrant which was granted. The subsequent search of Cotto's residence resulted in the seizure of : (1) 58 rounds of .22 ammunition; (2) two bags of cocaine weighing approximately 44 grams; (3) scales; and (4) cutting agents.

The suspected controlled substances were tested by chemist Farak on June 8, 2007, at the Department of Public Health Laboratory in Amherst, Massachusetts ("Amherst Lab"). According to the certificates of analysis prepared by Farak, each substance tested positive for cocaine.

2. The Guilty Plea

On April 13, 2009, Cotto pled guilty after a complete colloquy. He stated that he understood the charges in the indictments and understood that the Commonwealth would be required to prove the charges beyond a reasonable doubt. He indicated that his attorney had explained the elements of the charges to him. Defense counsel confirmed Cotto's understanding of the elements.

Cotto also stated that he understood he was waiving: the right to a trial with or without a jury; the right to confront witnesses; the right to present witnesses; the right to be presumed innocent; and the privilege against self-incrimination. He further acknowledged that he was pleading guilty willingly, freely, and voluntarily and that no one threatened him or promised him anything to induce his plea.

3. The Evidentiary Hearing Regarding the Amherst Lab

On September 9, 2013, October 7 and 23, 2013, I conducted an evidentiary hearing on post-conviction motions filed by this defendant and fourteen others, all based on Farak's alleged criminal conduct. I limited the presentation of evidence to: (1) the timing and scope of Farak's alleged criminal conduct; (2) the timing and scope of the conduct underlying the negative findings in the October 10, 2012, MSP Quality Assurance Audit at the Amherst lab; and (3) how the alleged criminal conduct and audit findings might relate to the testing performed in this and the fourteen other "drug lab" cases. As to those areas, I find the following credible, relevant facts:

a. The Amherst Lab

The Amherst Lab began operation in 1987. Its primary function was the testing of suspected controlled substances for law enforcement agencies involved in the prosecution of

criminal cases in western Massachusetts. As of January of 2013, there were four employees at the Amherst Lab, supervisor James Hanchett ("Hanchett"), evidence officer Sharon Salem ("Salem"), chemist Rebecca Pontes ("Pontes") and chemist Farak. Suspected controlled substances seized during criminal investigations were hand delivered to the Amherst Lab by the investigating agencies in sealed packaging, logged into evidence, given a laboratory number and placed in the evidence safe by the evidence officer. Samples remained there until testing.

All four Amherst Lab employees had access to the evidence safe by electronic cards and keys. Although employees were supposed to use the electronic cards, they often used keys. No record was maintained of entry to the safe when keys were used.

In the normal course, at the time of testing, the chemist removed the sample from the evidence safe, transported it to the chemist's work station, cut open the sealed evidence bag and conducted chemical testing of the sample. The chemists had short term storage lockers at their work stations where evidence could be kept while they examined it. Evidence should not have been stored overnight in these short term storage lockers.

After testing was complete, the sample and its package were placed in a larger plastic bag known as a "K-pack" and resealed. The chemist prepared a written certification of the test results and the submitting agency was notified testing was complete. The submitting agency then retrieved the sample and certification from the Amherst Lab and maintained custody of the sample inside the K-pack until it was needed for trial.

When chemists were summoned to testify regarding their test results, they carried the Amherst Lab file with them. The lab file contained documentary evidence related to the testing and chain of custody, but did not contain any of the controlled substance. For transportation to court, the chemists placed the lab file inside a manila envelope and wrote the lab number on the

outside of the envelope. These outer envelopes were often discarded after the case was complete. The controlled substance was transported to court separately by the law enforcement agency.

b. The October 2012 Massachusetts State Police Quality Assurance Audit

On July 1, 2012, administration of the Amherst Lab was taken over by the Massachusetts State Police (“MSP”). Prior to that date the Amherst Lab was administered by the Massachusetts Department of Public Health. In October 2012, the MSP conducted a Quality Assurance Audit of the Amherst Lab. The audit was a matter of routine in that a quality assurance audit is conducted at all MSP laboratories each year. Part of the purpose of the October audit was to determine what steps the Amherst Lab would have to take to meet the accreditation standards required by the MSP. The Amherst Lab had not been accredited since it began operation in 1987. Laboratories frequently operate without accreditation. Indeed, all MSP laboratories operated without accreditation until 2001.

The MSP audit team made certain negative findings which were documented in the Annual Technical Audit Worksheet dated October 10, 2012. Exhibit 1. The negative findings considered most immediate for accreditation purposes were the following:

- Chain of custody of evidence stored in short-term overnight storage was not properly documented and evidence retained in short-term storage was not properly sealed.
- Evidence seals were initialed, but not dated by the chemists.
- Variances between incoming weights of substances and weights at testing were not documented.
- Inventory discrepancies were not verified.

In addition, the audit team reported negative findings with respect to quality control of the drug testing performed at the Amherst Lab. So called “reagents” were not regularly tested and known standards were not tested on a daily basis.

The audit team recommended steps to remediate each of these problems. According to the audit report, as of October 10, 2012, personnel at the Amherst Lab had taken steps to address all of the negative findings. Kathleen Morrison, a member of the Quality Assurance Audit Team and author of the report, testified that the audit did not raise any question related to the reliability of the testing performed at the Amherst Laboratory. In contrast, the defendants called forensic chemistry consultant Heather Harris who opined that the negative audit findings, while not calling into question the accuracy of individual tests, did raise questions regarding the general reliability of chemical tests performed at the Amherst Lab. I conclude that while the negative findings in the October 2012 Quality Assurance Audit reflect a lax atmosphere in which theft of controlled substances could go undetected for a period of time, the audit did not reveal any unreliable testing.

4. The Criminal Investigation of Sonja Farak

a. Missing Drug Samples

On January 17, 2013, Salem, the evidence officer at the Amherst Lab, was attempting to match drug test certifications with the corresponding drug samples and realized that she was missing samples in two cases. The missing samples were in cases A12-04791 and A12-04793, both of which had been submitted to the Amherst Lab by the Springfield Police Department on November 14, 2012. Records reflected that Farak had completed testing on those samples earlier in January 2013, and confirmed that the substances were cocaine. Salem’s search of the evidence locker and temporary evidence storage safes was unsuccessful.

On January 18, 2013, Salem reported the missing evidence to her supervisor, Hanchett. Hanchett then searched Farak's workstation and located a white plastic tub inside an unlocked cabinet. The white tub contained what appeared to be controlled substances and related paraphernalia, specifically: (1) chunks of a yellowish wax-like substance on a saucer; (2) chunks of what appeared to be plaster of Paris on a saucer; (3) a plastic bag containing apparent cocaine; and (4) a broken crack pipe. The substance which appeared to be cocaine field tested positive for the presence of cocaine and weighed approximately 12 grams. The presence of these items in an unsecure area of Farak's workstation was a violation of protocol at the Amherst Lab.

Hanchett continued his search of Farak's workstation and located an envelope containing packaging for the missing cases, A12-04791 and A12-04793. The cases were properly packaged and labeled except that the packages were cut open. Case number A12-07491 contained two different kinds of white chunks, one of which did not appear to be cocaine. Hanchett tested that substance for the presence of cocaine. The test was negative. Records of Farak's test of the substance show that she certified that it tested positive for cocaine on January 4, 2013. Hanchett also tested the substance in the package labeled A12-04793 and found that it tested negative for cocaine, contrary to Farak's earlier test results. At that point Hanchett and Salem stopped their search and contacted MSP.

MSP responded, conducted a further search and located two additional case envelopes in a temporary locker used by Farak. The envelope, labeled A12-4973, was supposed to contain 13.6 grams of suspected cocaine. The second envelope, labeled A13-00156, was supposed to contain 28.5 grams of suspected crack cocaine. Neither envelope contained the suspected controlled substances and a search for those substances was unsuccessful.

On January 19, 2013, Jeremy Miller ("Miller") of MSP Forensic Services conducted an inventory of all drug evidence at the Amherst Lab. Only the four samples listed above were missing. However, over 100 samples were repackaged because of deficiencies in the packaging. These were deficiencies in packaging by the submitting agencies, not by Amherst Lab personnel. A similar inventory was conducted approximately four months earlier by Miller. No missing samples were noted at that time.

Hanchett and Pontes observed a change in Farak's behavior in the months before her arrest. Beginning in September of 2012, Pontes noticed that Farak was frequently absent from her work station during the workday without explanation. During that same time period, Hanchett observed a drop-off in Farak's productivity, such that he spoke with her about it.

b. Search of Farak's Car

Also on January 18, 2013, MSP determined that Farak was at the Springfield Hall of Justice waiting to testify. Investigators approached her and Farak agreed to be interviewed. After a brief conversation, Farak asked to speak to her union representative and the interview ceased. She declined to consent to a search of her vehicle. Farak's 2002 Volkswagen Golf, which she had driven to the Hall of Justice, was secured pending application for a search warrant.

MSP Sergeant Joseph Ballou applied for and received a warrant authorizing a search of the 2002 Volkswagen Golf. The search was conducted on January 19, 2013, at the MSP barracks in Northampton. In pertinent part, MSP seized the following items from the cluttered vehicle: (1) manila envelopes with case numbers written on them; (2) assorted laboratory paperwork; (3) plastic bag containing a white powdery substance; (4) plastic bag containing assorted pills; and (5) several copies of newspaper articles related to chemical analysts accused

of using or stealing controlled substances. Exhibit H. The white powder substance seized from a plastic bag located in the driver's side door field tested positive for cocaine. A brownish tar-like substance found in the same plastic bag field tested positive for heroin.

One of the newspaper articles seized from her vehicle was printed from a computer on September 20, 2011, contained a story about law enforcement officers illegally possession steroids. The article contained a handwritten note stating "thank god I am not a law enforcement officer." A second article printed on October 28, 2011, reports that a Pittsfield pharmacist was sentenced to 3 years for stealing oxycontin pills from her workplace. The article refers to the pharmacist having replaced the oxycontin with other medications. A third article downloaded and printed in December of 2011, refers to a former San Francisco Police Department drug lab technician who stole cocaine from the drug laboratory.

Some of the manila envelopes seized from Farak's car bore handwritten case numbers. One manila envelope was labeled A11-03020 to A11-03022 and contained lab paperwork. It also bore the name Dimitry Bogo. Another manila envelope contained an empty evidence bag and bore the numbers A08-02990 + 0289. A third manila envelope bore the number A10-04462 and contained multiple clear plastic bags, some of which were cut open. Another manila envelope with the number A09-01405 contained assorted lab paperwork. The first three digits of the lab numbers refer to the year the lab number was created. Lab numbers A11-03020 to A11-03022, A08-02990 + 0289 and A10-04462 each had a line drawn through them on the outside of the manila envelope.

Farak was charged by criminal complaint with two counts of tampering with evidence, unlawful possession of cocaine and unlawful possession of heroin for conduct occurring on January 18, 2013. She was arrested at her residence on January 19, 2013.

c. Search of the Tote Bag

A nylon tote bag seized earlier from Farak's work station was searched pursuant to a warrant on January 25, 2013. The search revealed a variety of substances that could be used to dilute or replace cocaine: a bar of soap together with a razor blade; two containers of baking soda; a one-pound container of soy candle wax off-white flakes and an 8-ounce bar of oven baked clay. There were other items commonly used in the drug trade: plastic lab dishes; a plastic bag containing a wax paper fold and fragments of copper wire. Finally, the bag contained several laboratory "K-pack" lab evidence bags. One bore the initials "RP," presumably for Rebecca Pontes, another chemist at the Amherst Lab and one of Farak's coworkers. Seven other K-pack bags had been cut open. Two of them bore Farak's initials "SF." The various K-pack evidence bags bore dates spanning the time period from December 16, 2012, to January 6, 2013.

5. Retesting of Substances Previously Tested By Farak

On June 15, 2012, the Westfield Police Department submitted suspected cocaine to the Amherst lab for testing in connection with a prosecution of Byron Stradford. Farak tested the substances on July 11, 2012. The substances tested positive for the presence of cocaine. After the criminal investigation of Farak, the same substances were sent to the drug laboratory at the University of Massachusetts Medical School for retesting. Exhibit 40. The substances were retested by William Hebard ("Hebard") on March 23, 2013. Hebard observed that the sample submitted appeared to contain two different substances in that they were different in color and consistency. The testing notes and data prepared by Farak did not refer to substances that were

different in appearance. Hebard's test did not identify the second substance, but the mixture of those substances tested positive for the presence of cocaine.

On July 5, 2012, the Springfield Police Department submitted suspected cocaine to the Amherst lab for testing in connection with a prosecution of Xavier Sands. Farak was the testing analyst. Hebard retested the substances on June 27, 2013, and determined that one sample consisting of 14 bags included 3 bags which contained a substance that looked different in color and consistency than the others. His test of those bags revealed the presence of cocaine and another unidentified substance. Exhibit 36. Farak's test of those same bags was positive for cocaine, but made no reference to another substance.

On October 10, 2012, the Springfield Police Department submitted suspected cocaine to the Amherst Lab in connection with the prosecution of Richard Charles. The sample was signed out to Farak for testing on November 14, 2012. Her test results were positive for cocaine, but no more detail than that. Upon retesting, Hebard noticed three different kinds of white chunks in the sample and an unusual "soapy" or "moth ball" smell. His analysis of the three chunks revealed that one tested positive for cocaine and the other two were not controlled substances.

On July 6, 2012, the Pittsfield Police Department submitted suspected cocaine to the Amherst Lab in connection with a prosecution of Shaun Morton. It was signed out by Farak on July 18, 2012, and tested by her on July 23, 2012. The substance was retested by MSP chemist Kimberly Dunlap ("Dunlap") on or about July 24, 2013. Dunlap observed that the sample contained a waxy or chalk-like substance unlike she had seen before. Her test revealed that the mixture contained a small amount of cocaine and other substances that were not cocaine.

On July 25, 2013, Dunlap retested a second sample related to the prosecution of Shaun Morton. The sample consisted of five bags of white powder. Farak had tested the same

substance on August 6, 2012. Dunlap found that the sample contained waxy balls unlike the first Morton sample. She found that four of the bags contained cocaine. The fifth bag had only a trace amount of cocaine and that there were other “fatty acids” present.

6. The Finch and Espinosa Cases

On March 17, 2012, Springfield Police Detective Greg Bigda submitted to the Amherst Lab what he counted as 51 suspected oxycodone tablets. According to the certification, Farak tested the pills on May 8, 2012, and concluded that they did not contain any controlled substance. Further, Farak’s certification reported 61 rather than 51 pills. Upon learning of the discrepancy, Detective Bigda contacted the assigned Assistant District Attorney to express concern. Although he admitted that he could not remember exactly what the pills he submitted looked like, given his experience as a drug investigator and his use of an on-line pill identifier, he did not think he could have been mistaken about what he submitted. The District Attorney’s Office has dismissed the controlled substance offenses, but firearms offenses remain pending against Finch and Espinosa. As to this evidence, I do not find that the discrepancy in the number of pills or Farak’s conclusion that the pills were not oxycodone to be probative on the timing and scope of Farak’s misconduct.

CONCLUSIONS OF LAW

1. Knowing and Voluntary Plea

A motion to withdraw a guilty plea, which is treated as a motion for new trial, may be granted if it appears that justice may not have been done. Mass. R. Crim. P. 30(b); Commonwealth v. Correa, 43 Mass. App. Ct. 714, 716 (1997). Where a defendant does not challenge the actual plea colloquy, he bears the burden of production and proof on a motion to withdraw a guilty plea. Commonwealth v. Thurston, 53 Mass. App. Ct. 548, 549-550 (2002).

The defendant must come forward with a credible reason for withdrawing the plea that outweighs the risk of prejudice to the Commonwealth, and provide plausible evidence that, if fully informed, he would have preferred to go to trial. Commonwealth v. Murphy, 73 Mass. App. Ct. 57, 67 (2008).

Cotto does not contend that he lacked understanding of either the elements of the charges against him or the consequences of pleading guilty, or that the plea colloquy proceedings were deficient. Rather, he argues that his plea was not intelligent and voluntary because it was made without knowledge of Farak's misconduct. Where, as here, the defendant was "warned of the usual consequences of pleading guilty and the range of potential punishment for the offense before entering a guilty plea," Ferrara v. United States, 456 F. 3d 278, 290 (1st Cir. 2006), a defendant seeking to set aside a guilty plea as involuntary must show that: (1) the government or its agents committed some egregiously impermissible conduct that antedated the entry of the plea; and (2) the misconduct was material to the defendant's choice to plead guilty. Id.

In applying the Ferrara analysis, I must first determine whether Farak is a government agent. Farak's role at the laboratory was to provide evidentiary support for the Commonwealth's prosecution of alleged drug offenses. That support included her scientific opinion as to the weight and composition of the substances seized from Cotto. Her scientific findings were essential to the Commonwealth's proof of Cotto's criminal behavior. I therefore conclude, for purposes of this analysis, that Farak was an agent of the Commonwealth.

Next, I must determine whether Farak's alleged misconduct antedated Cotto's guilty plea. Farak analyzed the drugs in this case on June 8, 2007, and Cotto entered his guilty pleas almost two years later on April 13, 2009. Thus, to prevail on the motion to withdraw his guilty plea Cotto must establish that Farak's misconduct came before April 13, 2009. He argues that I can

reasonably infer from the evidence presented at the evidentiary hearing that Farak was stealing drugs from samples that she tested and replacing the drugs with counterfeit substances, and that that conduct was ongoing at the time Cotto pled guilty. While there is powerful evidence that Farak was stealing cocaine and replacing it with other substances, I am not persuaded that the evidence established that she was doing so at the time of Cotto's guilty plea.

Farak was arrested on January 19, 2013, for conduct alleged to have occurred on January 18, 2013. However, there is powerful circumstantial evidence that this was not the first time that Farak tampered with drug samples at the Amherst Lab. Beginning in September of 2012, her coworkers noticed that Farak was frequently absent from her work station during the workday without explanation. During that same time period, her supervisor observed a drop-off in Farak's productivity and talked to her about it. Even more telling, the retesting of samples examined by Farak in cases against defendants Stratford, Sands, Charles and Morton, revealed the presence of foreign substances inconsistent with cocaine in color and consistency. These substances were not mentioned in any of Farak's original tests of these substances which occurred as early as July of 2012. From these facts and all of the physical evidence seized in connection with the criminal investigation of Farak, I conclude that she removed controlled substances from samples that she was charged with testing and replaced them with other substances to conceal her thefts. This is the kind of egregiously impermissible conduct contemplated by Ferrara. Further, I conclude from the evidence uncovered by retesting that she was doing so in the summer of 2012.¹ However, this misconduct postdates Cotto's guilty plea by

¹ Cotto suggests that it is reasonable to infer from manila envelopes seized from Farak's car which bore case numbers dating back to 2008, that Farak's criminal activity dated back that far. I do not find the argument persuasive. The evidence was that the manila envelopes were used by chemists to transport case related documents to court when they were summoned to testify. Thereafter, the manila envelopes were often discarded. The envelopes seized from Farak's car did not contain case-related materials and the case numbers on the outside of the envelopes had lines drawn through them. This evidence only suggests that Farak used these envelopes at one point to transport case related documents and then discarded them. Their presence in Farak's car does not imply criminal

almost three years. I therefore conclude that Cotto has failed to establish that Farak's misconduct antedated his guilty plea.

Beyond allegations of Farak's criminal conduct while employed at the Amherst Lab, Cotto relies on the negative findings made during the October 2012 laboratory audit performed by the Massachusetts State Police to support his claim that his plea was not knowing and voluntary. It is clear that procedural deficiencies and a lack of administrative oversight created a culture at the Amherst Lab in which Farak's misconduct could occur. For example, the chain of custody of evidence stored in short-term overnight storage was not properly documented. Evidence retained in short-term storage was often not properly sealed. Evidence seals were initialed, but not dated by the chemists. Variances between incoming weights of substances and weights at testing were not documented. While disconcerting, there is no evidence that these general deficiencies had any bearing on the testing performed in this case. I therefore conclude that they do not amount to the kind of egregiously impermissible government conduct contemplated by Ferrara.

In analyzing whether Farak's misconduct would have been material to Cotto's decision to plead guilty, a court "considers whether a reasonable defendant standing in the [defendant's] shoes would likely have altered his decision to plead guilty" had he known about the misconduct. Id. at 293. Cotto claims that he relied on the accuracy of the certificates of analysis prepared by Farak and would not have pled guilty had he known about her misconduct and the deficiencies in the Amherst Lab. However, as discussed above, there is no evidence that the test results in this case were inaccurate, or that Farak was involved in any misconduct at the time Cotto pled guilty. Moreover, there were good reasons to accept the plea agreement. Cotto knew

activity. Similarly, I am not persuaded that it is reasonable to infer from Farak's possession of newspaper articles downloaded in 2011, about other chemists charged with theft of controlled substances, that she was doing so at the time.

that cocaine had been seized from his person, that he had confessed to having cocaine in his residence and that the execution of a search warrant had resulted in the seizure of that cocaine. He also knew that that the Commonwealth had offered a significant charge concession and sentence concession in exchange for his guilty plea. If convicted at trial, Cotto faced a minimum mandatory sentence of 5 years, but could have been sentenced up to 20 years. By accepting the plea agreement, Cotto was assured that he would be sentenced to no greater than 5 years and 1 day. Given the strength of the Commonwealth's case, including Cotto's own incriminating statements, the significant benefit he received from the plea agreement and the absence of any evidence that Farak's misconduct affected the testing in Cotto's case, I conclude that Farak's misconduct would not have been material to his decision to plead guilty.

In addition, I find that the negative audit findings in October of 2012, fail to satisfy the threshold of materiality required to invalidate Cotto's guilty plea. The audit findings, if known before Cotto's plea, would have been impeachment evidence that Cotto could have used to challenge the chain of custody of the substances in this case. In my judgment, this does not constitute the kind of "powerful impeachment evidence apt to skew the decision making of a defendant pondering whether to accept a plea agreement." Ferrara, 456 F.3d at 296. A defendant's plea is not rendered invalid simply because he miscalculated the strength of the Commonwealth's case. Commonwealth v. Berrios, 447 Mass. 701, 707 (2006).

Considering the totality of these circumstances, I conclude that Cotto has failed to establish that information of Farak's misconduct would have been material to his decision to plead guilty, even if the misconduct had antedated his guilty plea. For all of these reasons I conclude that Cotto has failed to establish that his guilty plea was not intelligently and voluntarily made.

2. Newly Discovered Evidence

Watt also urges me to vacate his guilty plea on the ground that Farak's misconduct at the Amherst Lab is newly discovered exculpatory evidence. "A defendant seeking a new trial on the ground of newly discovered evidence must establish . . . that the evidence is newly discovered and that it casts real doubt on the justice of the conviction." Commonwealth v. Grace, 397 Mass. 303, 305 (1986). Evidence is "newly discovered" if it was "unknown to the defendant or his counsel and not reasonably discoverable by them at the time of [the defendant's plea]." Id. at 306. Here, there is no evidence that either Cotto or his attorney was aware of Farak's misconduct or the negative audit findings, or that either had been discovered at the time of the plea. Therefore, this evidence qualifies as "newly discovered."

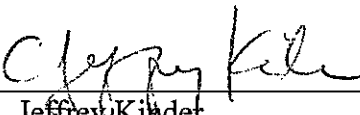
However, to constitute an appropriate basis for a new trial, newly discovered evidence "not only must be material and credible . . . but also must carry a measure of strength in support of the defendant's position." Grace, 397 Mass. at 305. Newly discovered evidence is material only if it is "weighty and of such nature as to its credibility, potency, and pertinency to fundamental issues in the case as to be worthy of careful consideration." Commonwealth v. Brown, 378 Mass. 165, 171 (1979). Moreover, "[t]he strength of the case against a criminal defendant . . . may weaken the effect of evidence which is admittedly newly discovered." Grace, 397 Mass. at 306 (citation omitted). For all the reasons set forth above, this newly discovered evidence about Farak's misconduct is not sufficiently weighty, potent, or pertinent to the fundamental issues of this case to be worthy of consideration at a new trial. See Brown, 378 Mass. at 171.

The evidence about the administrative problems at the Amherst Lab is similarly newly discovered, but immaterial in this case. The failure to follow protocol established by the MSP is

a serious matter. Yet there is no evidence that any of these problems were specifically related to the particular samples involved in Cotto's case. Any suggestion that his samples were tainted as a result of these problems is merely conjecture. Thus, I find that this new evidence concerning the negative audit findings is not sufficiently material to the fundamental issues of this case to warrant a new trial.

CONCLUSION

For all of the foregoing reasons, Defendant's Motion to Withdraw Guilty Plea is **DENIED**. The order staying the sentence will expire on November 15, 2013. On that same date the defendant will appear before me at 2:00 p.m. for execution of the remainder of his sentence.



C. Jeffrey Kinder
Associate Justice of the Superior Court
October 30, 2013

EXHIBIT 32

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 2012-0083

COMMONWEALTH

HAMPDEN COUNTY
SUPERIOR COURT
FILED

vs.

NOV - 4 2013

ROLANDO PENATE


CLERK OF COURTS

MEMORANDUM OF DECISION AND ORDER ON
DEFENDANT'S MOTION TO DISMISS COUNTS 1-10 AND 13

The defendant, Rolando Penate ("Penate"), is charged with multiple counts of possession of cocaine and heroin with intent to distribute, and related school zone and firearms offenses. Before me now is Penate's motion to dismiss all of the controlled substance offenses based on egregious government misconduct. Specifically, he argues that the misconduct of chemist Sonja Farak ("Farak"), who tested some of the substances seized in this case in December, 2011 and January 2012, has caused a substantial threat of prejudice to him such that his right to a fair trial has been irreparably harmed. On July 23, 2013, this court, Rup J., ordered an evidentiary hearing on the following issues: (1) whether Farak engaged in egregious misconduct at the Amherst Drug Laboratory ("Amherst Lab") from November 2011 to January 2012, when the Amherst Lab had custody and control of the substances related to Penate's case; (2) if such misconduct has substantially prejudiced the defendant or irreparably harmed his right to a fair trial; and (3) if such misconduct was intentional such that dismissal is appropriate. In light of the fact that I was conducting an evidentiary hearing on the timing and scope of Farak's alleged misconduct in connection with several motions for new trials in other cases, the parties agreed evidence taken in those cases (in which Penate's counsel was a participant) would satisfy Judge

Rup's order that an evidence be taken on Penate's claims. I concluded those hearings on October 23, 2013. For the reasons that follow, the Motion to Dismiss is **DENIED**.

FINDINGS OF FACT

1. The Evidentiary Hearing Regarding the Amherst Lab

On September 9, 2013, October 7 and 23, 2013, I conducted an evidentiary hearing on: (1) the timing and scope of Farak's alleged criminal conduct; (2) the timing and scope of the conduct underlying the negative findings in the October 10, 2012, MSP Quality Assurance Audit at the Amherst lab; and (3) how the alleged criminal conduct and audit findings might relate to the testing performed in "drug lab" cases. As to those areas, I find the following credible, relevant facts:

a. The Amherst Lab

The Amherst Lab began operation in 1987. Its primary function was the testing of suspected controlled substances for law enforcement agencies involved in the prosecution of criminal cases in western Massachusetts. As of January of 2013, there were four employees at the Amherst Lab, supervisor James Hanchett ("Hanchett"), evidence officer Sharon Salem ("Salem"), chemist Rebecca Pontes ("Pontes") and chemist Farak. Suspected controlled substances seized during criminal investigations were hand delivered to the Amherst Lab by the investigating agencies in sealed packaging, logged into evidence, given a laboratory number and placed in the evidence safe by the evidence officer. Samples remained there until testing.

All four Amherst Lab employees had access to the evidence safe by electronic cards and keys. Although employees were supposed to use the electronic cards, they often used keys. No record was maintained of entry to the safe when keys were used.

In the normal course, at the time of testing, the chemist removed the sample from the evidence safe, transported it to the chemist's work station, cut open the sealed evidence bag and conducted chemical testing of the sample. The chemists had short term storage lockers at their work stations where evidence could be kept while they examined it. Evidence should not have been stored overnight in these short term storage lockers.

After testing was complete, the sample and its package were placed in a larger plastic bag known as a "K-pack" and resealed. The chemist prepared a written certification of the test results and the submitting agency was notified testing was complete. The submitting agency then retrieved the sample and certification from the Amherst Lab and maintained custody of the sample inside the K-pack until it was needed for trial.

When chemists were summoned to testify regarding their test results, they carried the Amherst Lab file with them. The lab file contained documentary evidence related to the testing and chain of custody, but did not contain any of the controlled substance. For transportation to court, the chemists placed the lab file inside a manila envelope and wrote the lab number on the outside of the envelope. These outer envelopes were often discarded after the case was complete. The controlled substance was transported to court separately by the law enforcement agency.

b. The October 2012 Massachusetts State Police Quality Assurance Audit

On July 1, 2012, administration of the Amherst Lab was taken over by the Massachusetts State Police ("MSP"). Prior to that date the Amherst Lab was administered by the Massachusetts Department of Public Health. In October 2012, the MSP conducted a Quality Assurance Audit of the Amherst Lab. The audit was a matter of routine in that a quality assurance audit is conducted at all MSP laboratories each year. Part of the purpose of the October audit was to

determine what steps the Amherst Lab would have to take to meet the accreditation standards required by the MSP. The Amherst Lab had not been accredited since it began operation in 1987. Laboratories frequently operate without accreditation. Indeed, all MSP laboratories operated without accreditation until 2001.

The MSP audit team made certain negative findings which were documented in the Annual Technical Audit Worksheet dated October 10, 2012. Exhibit 1. The negative findings considered most immediate for accreditation purposes were the following:

- Chain of custody of evidence stored in short-term overnight storage was not properly documented and evidence retained in short-term storage was not properly sealed.
- Evidence seals were initialed, but not dated by the chemists.
- Variances between incoming weights of substances and weights at testing were not documented.
- Inventory discrepancies were not verified.

In addition, the audit team reported negative findings with respect to quality control of the drug testing performed at the Amherst Lab. So called “reagents” were not regularly tested and known standards were not tested on a daily basis.

The audit team recommended steps to remediate each of these problems. According to the audit report, as of October 10, 2012, personnel at the Amherst Lab had taken steps to address all of the negative findings. Kathleen Morrison, a member of the Quality Assurance Audit Team and author of the report, testified that the audit did not raise any question related to the reliability of the testing performed at the Amherst Laboratory. In contrast, the defendants called forensic chemistry consultant Heather Harris who opined that the negative audit findings, while not calling into question the accuracy of individual tests, did raise questions regarding the

general reliability of chemical tests performed at the Amherst Lab. I conclude that while the negative findings in the October 2012 Quality Assurance Audit reflect a lax atmosphere in which theft of controlled substances could go undetected for a period of time, the audit did not reveal any unreliable testing.

2. The Criminal Investigation of Sonja Farak

a. Missing Drug Samples

On January 17, 2013, Salem, the evidence officer at the Amherst Lab, was attempting to match drug test certifications with the corresponding drug samples and realized that she was missing samples in two cases. The missing samples were in cases A12-04791 and A12-04793, both of which had been submitted to the Amherst Lab by the Springfield Police Department on November 14, 2012. Records reflected that Farak had completed testing on those samples earlier in January 2013, and confirmed that the substances were cocaine. Salem's search of the evidence locker and temporary evidence storage safes was unsuccessful.

On January 18, 2013, Salem reported the missing evidence to her supervisor, Hanchett. Hanchett then searched Farak's workstation and located a white plastic tub inside an unlocked cabinet. The white tub contained what appeared to be controlled substances and related paraphernalia, specifically: (1) chunks of a yellowish wax-like substance on a saucer; (2) chunks of what appeared to be plaster of Paris on a saucer; (3) a plastic bag containing apparent cocaine; and (4) a broken crack pipe. The substance which appeared to be cocaine field tested positive for the presence of cocaine and weighed approximately 12 grams. The presence of these items in an unsecure area of Farak's workstation was a violation of protocol at the Amherst Lab.

Hanchett continued his search of Farak's workstation and located an envelope containing packaging for the missing cases, A12-04791 and A12-04793. The cases were properly packaged

and labeled except that the packages were cut open. Case number A12-07491 contained two different kinds of white chunks, one of which did not appear to be cocaine. Hanchett tested that substance for the presence of cocaine. The test was negative. Records of Farak's test of the substance show that she certified that it tested positive for cocaine on January 4, 2013. Hanchett also tested the substance in the package labeled A12-04793 and found that it tested negative for cocaine, contrary to Farak's earlier test results. At that point Hanchett and Salem stopped their search and contacted MSP.

MSP responded, conducted a further search and located two additional case envelopes in a temporary locker used by Farak. The envelope, labeled A12-4973, was supposed to contain 13.6 grams of suspected cocaine. The second envelope, labeled A13-00156, was supposed to contain 28.5 grams of suspected crack cocaine. Neither envelope contained the suspected controlled substances and a search for those substances was unsuccessful.

On January 19, 2013, Jeremy Miller ("Miller") of MSP Forensic Services conducted an inventory of all drug evidence at the Amherst Lab. Only the four samples listed above were missing. However, over 100 samples were repackaged because of deficiencies in the packaging. These were deficiencies in packaging by the submitting agencies, not by Amherst Lab personnel. A similar inventory was conducted approximately four months earlier by Miller. No missing samples were noted at that time.

Hanchett and Pontes observed a change in Farak's behavior in the months before her arrest. Beginning in September of 2012, Pontes noticed that Farak was frequently absent from her work station during the workday without explanation. During that same time period, Hanchett observed a drop-off in Farak's productivity, such that he spoke with her about it.

b. Search of Farak's Car

That same day, MSP determined that Farak was at the Springfield Hall of Justice waiting to testify. Investigators approached her and Farak agreed to be interviewed. After a brief conversation, Farak asked to speak to her union representative and the interview ceased. She declined to consent to a search of her vehicle. Farak's 2002 Volkswagen Golf, which she had driven to the Hall of Justice, was secured pending application for a search warrant.

MSP Sergeant Joseph Ballou applied for and received a warrant authorizing a search of the 2002 Volkswagen Golf. The search was conducted on January 19, 2013, at the MSP barracks in Northampton. In pertinent part, MSP seized the following items from the cluttered vehicle: (1) manila envelopes with case numbers written on them; (2) assorted laboratory paperwork; (3) plastic bag containing a white powdery substance; (4) plastic bag containing assorted pills; and (5) several copies of newspaper articles related to chemical analysts accused of using or stealing controlled substances. Exhibit H. The white powder substance seized from a plastic bag located in the driver's side door field tested positive for cocaine. A brownish tar-like substance found in the same plastic bag field tested positive for heroin.

One of the newspaper articles seized from her vehicle that was printed from a computer on September 20, 2011, contained a story about law enforcement officers illegally possessing steroids. The article contained a handwritten note stating "thank god I am not a law enforcement officer." A second article printed on October 28, 2011, reports that a Pittsfield pharmacist was sentenced to 3 years for stealing oxycontin pills from her workplace. The article refers to the pharmacist having replaced the oxycontin with other medications. A third article downloaded in December of 2011, refers to a former San Francisco police Department drug lab technician who stole cocaine from the drug laboratory.

Some of the manila envelopes seized from Farak's car bore hand written case numbers. One manila envelope was labeled A11-03020 to A11-03022 and contained lab paperwork. It also bore the name Dimitry Bogo. Another manila envelope contained an empty evidence bag and bore the numbers A08-02990 + 0289. A third manila envelope bore the number A10-04462 and contained multiple clear plastic bags, some of which were cut open. Another manila envelope with the number A09-01405 contained assorted lab paperwork. The first three digits of the lab numbers refer to the year the lab number was created. Lab numbers A11-03020 to A11-03022, A08-02990 + 0289 and A10-04462 each had a line drawn through them on the outside of the manila envelope.

Farak was charged by criminal complaint with two counts of tampering with evidence, unlawful possession of cocaine and unlawful possession of heroin for conduct occurring on January 18, 2013. She was arrested at her residence on January 19, 2013.

c. Search of the Tote Bag

A nylon tote bag earlier seized from Farak's work station was searched pursuant to a warrant on January 25, 2013. The search revealed a variety of substances that could be used to dilute or replace cocaine: a bar of soap together with a razor blade; two containers of baking soda; a one-pound container of soy candle wax off-white flakes and an 8-ounce bar of oven baked clay. There were other items commonly used in the drug trade: plastic lab dishes; a plastic bag containing a wax paper fold and fragments of copper wire. Finally, the bag contained several laboratory "K-pack" lab evidence bags. One bore the initials "RP," presumably for Rebecca Pontes, another chemist at the Amherst Lab and one of Farak's coworkers. Seven other K-pack bags had been cut open. Two of them bore Farak's initials

“SF.” The various K-pack evidence bags bore dates spanning the time period from December 16, 2012, to January 6, 2013.

3. Retesting of Substances Previously Tested By Farak

On June 15, 2012, the Westfield Police Department submitted suspected cocaine to the Amherst lab for testing in connection with a prosecution of Byron Stradford. Farak tested the substances on July 11, 2012. The substances tested positive for the presence of cocaine. After the criminal investigation of Farak, the same substances were sent to the drug laboratory at the University of Massachusetts Medical School for retesting. Exhibit 40. The substances were retested by William Hebard (“Hebard”) on March 23, 2013. Hebard observed that the sample submitted appeared to contain two different substances in that they were different in color and consistency. The testing notes and data prepared by Farak did not refer to substances that were different in appearance. Hebard’s test did not identify the second substance, but the mixture of those substances tested positive for the presence of cocaine.

On July 5, 2012, the Springfield Police Department submitted suspected cocaine to the Amherst lab for testing in connection with a prosecution of Xavier Sands. Farak was the testing analyst. Hebard retested the substances on June 27, 2013, and determined that one sample consisting of 14 bags included 3 bags which contained a substance that looked different in color and consistency than the others. His test of those bags revealed the presence of cocaine and another unidentified substance. Exhibit 36. Farak’s test of those same bags was positive for cocaine, but made no reference to another substance.

On October 10, 2012, the Springfield Police Department submitted suspected cocaine to the Amherst Lab in connection with the prosecution of Richard Charles. The sample was signed out to Farak for testing on November 14, 2012. Her test results were positive for cocaine, but no

more detail than that. Upon retesting, Hebard noticed three different kinds of white chunks in the sample and an unusual “soapy” or “moth ball” smell. His analysis of the three chunks revealed that one tested positive for cocaine and the other two were not controlled substances.

On July 6, 2012, the Pittsfield Police Department submitted suspected cocaine to the Amherst Lab in connection with a prosecution of Shaun Morton. It was signed out by Farak on July 18, 2012, and tested by her on July 23, 2012. The substance was retested by MSP chemist Kimberly Dunlap (“Dunlap”) on or about July 24, 2013. Dunlap observed that the sample contained a waxy or chalk-like substance unlike she had seen before. Her test revealed that the mixture contained a small amount of cocaine and other substances that were not cocaine.

On July 25, 2013, Dunlap retested a second sample related to the prosecution of Shaun Morton. The sample consisted of five bags of white powder. Farak had tested the same substance on August 6, 2012. Dunlap found that the sample contained waxy balls unlike the first Morton sample. She found that four of the bags contained cocaine. The fifth bag had only a trace amount of cocaine and that there were other “fatty acids” present.

5. The Finch and Espinosa Cases

On March 17, 2012, Springfield Police Detective Greg Bigda submitted to the Amherst Lab what he counted as 51 suspected oxycodone tablets. According to the certification, Farak tested the pills on May 8, 2012, and concluded that they did not contain any controlled substance. Further, Farak’s certification reported 61 rather than 51 pills. Upon learning of the discrepancy, Detective Bigda contacted the assigned Assistant District Attorney to express concern. Although he admitted that he could not remember exactly what the pills he submitted looked like, given his experience as a drug investigator and his use of an on-line pill identifier, he did not think he could have been mistaken about what he submitted. The District Attorney’s

Office has dismissed the controlled substance offenses, but firearms offenses remain pending against Finch and Espinosa. As to this evidence, I do not find that the discrepancy in the number of pills or Farak's conclusion that the pills were not oxycodone to be probative on the timing and scope of Farak's misconduct.

CONCLUSIONS OF LAW

Dismissal of a criminal case is warranted only where the prosecution or police have engaged in misconduct so egregious that dismissal is warranted to deter future misconduct or where the harm is so great that a fair trial is no longer possible. Commonwealth v. Merry, 453 Mass. 653, 666 (2009). It is a remedy of last resort because it precludes a public trial and terminates criminal proceedings. Commonwealth v. Washington, 462 Mass. 204, 215 (2012). The Commonwealth bears the burden of demonstrating that the defendant was not prejudiced by the misconduct. Commonwealth v. Fontaine, 402 Mass. 491, 497-498 (1988).

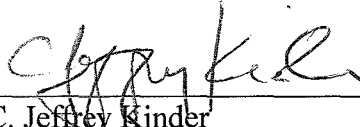
Here, there is powerful evidence that Farak was stealing cocaine and replacing it with other substances. However, there is insufficient evidence before me that she tampered with the samples in Penate's case or even that she was engaged in misconduct in November 2011, and January of 2012, when the samples in this case were tested.

Farak was arrested on January 19, 2013, for conduct alleged to have occurred on January 18, 2013. However, there is circumstantial evidence that this was not the first time that Farak tampered with drug samples at the Amherst Lab. Beginning in September of 2012, her coworkers noticed that Farak was frequently absent from her work station during the workday without explanation. During that same time period, her supervisor observed a drop-off in Farak's productivity and talked to her about it. Even more telling, the retesting of samples examined by Farak in cases against defendants Stratford, Sands, Charles and Morton, revealed

the presence of foreign substances inconsistent with cocaine in color and consistency. These substances were not mentioned in any of Farak's original tests of these substances which occurred as early as July of 2012. From these facts and all of the physical evidence seized in connection with the criminal investigation of Farak, I conclude that she removed controlled substances from samples that she was charged with testing and replaced them with other substances to conceal her thefts. Further, I conclude from the evidence uncovered by retesting that she was doing so in the summer of 2012. However, this misconduct, while deplorable, postdates the testing in this case. Therefore, I am not persuaded that Farak's misconduct has substantially prejudiced the defendant or irreparably harmed his right to a fair trial.

CONCLUSION

For all of the foregoing reasons, Defendant's Motion to Dismiss is **DENIED**.



C. Jeffrey Kinder
Associate Justice of the Superior Court
November 4, 2013

EXHIBIT 33

**Commonwealth of Massachusetts
HAMPDEN SUPERIOR COURT
Case Summary
Criminal Docket**

Commonwealth v Penate, Rolando

Details for Docket: HDCR2012-00083

Case Information:

Docket Number:	HDCR2012-00083	Caption:	Commonwealth v Penate, Rolando
Entry Date:	02/01/2012	Case Status:	Crim 5 CtRm 5
Status Date:	02/04/2014	Session:	Disposed Appeal -awaiting Transcript
Lead Case:	NA	Deadline Status:	Active since
Trial Deadline:	02/10/2012	Jury Trial:	YES

Parties Involved

2 Parties Involved in Docket: HDCR2012-00083

Party Involved:
Last Name:
Address:
City:
Zip Code:
Telephone:

Penate
57 Johnson Street
Springfield

Role:
First Name:
Address:
State:
Zip Ext:

Defendant
Rolando
MA

Party Involved:
Last Name:
Address:
City:
Zip Code:
Telephone:

Commonwealth

Role:
First Name:
Address:
State:
Zip Ext:

Plaintiff

Attorneys Involved

3 Attorneys Involved for Docket: HDCR2012-00083

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Attorney Involved:		Firm Name:	
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Telephone:	781-431-2652	Tel Ext:	
Fascimile:		Representing:	Penate, Rolando (Defendant)

Calendar Events

70 Calendar Events for Docket: HDCR2012-00083

No.	Event Date	Event Time	Calendar Event	SES	Event Status
1	02/10/2012	09:01	Arraignment	1	Event held as scheduled
2	06/25/2012	09:19	Hearing: Pre-Trial	1	Event held as scheduled
3	08/30/2012	09:17	Hearing: Motion to	1	Event held as scheduled

			Dismiss		
4	08/30/2012	09:21	Hearing: Non-evidentiary--funds	1	Event held as scheduled
5	08/30/2012	09:23	Hearing: Motion	1	Event held as scheduled
6	10/12/2012	09:23	Hearing: Motion	1	Event not held--joint request
7	10/19/2012	09:35	Conference: Status Review	1	Event held as scheduled
8	11/01/2012	09:32	Hearing: Motion	1	Event held as scheduled
9	11/01/2012	09:39	Conference: Final Pre-Trial	1	Event not held--req of Defendant
10	11/07/2012	09:11	Hearing: Plea Change	1	Event not held--joint request
11	11/07/2012	09:23	Hearing: Non-evidentiary--funds	1	Event held as scheduled
12	11/07/2012	09:35	Status: Review by Session	1	Event held as scheduled
13	11/15/2012	09:07	TRIAL: by jury	1	Event rescheduled by court prior to date
14	11/16/2012	09:00	Hearing: Motion to Suppress Evidence	5	Event continues over multiple days
15	11/16/2012	09:15	Hearing: Motion to Suppress Evidence	1	Event moved to another session
16	11/19/2012	09:00	Hearing: Motion to Suppress Evidence	5	Event held as scheduled
17	12/14/2012	09:39	Conference: Final Pre-Trial	1	Event not held--joint request
18	12/21/2012	09:35	Conference: Status Review	1	Event held as scheduled
19	12/21/2012	09:39	Conference: Final Pre-Trial	1	Event not held--joint request
20	01/04/2013	09:07	TRIAL: by jury	1	Event not held--joint request
21	01/04/2013	09:23	Hearing: Motion	1	Event held as scheduled
22	01/04/2013	09:35	Conference: Status Review	1	Event held as scheduled
23	03/13/2013	09:39	Conference: Final Pre-Trial	1	Event not held--joint request
24	03/19/2013	09:39	Conference: Final Pre-Trial	1	Event held as scheduled
25	03/20/2013	09:07	TRIAL: by jury	1	Event not held--joint request
26	03/26/2013	14:00	Hearing: Bail	1	Event not held--joint request
27	03/26/2013	14:00	Conference: Status Review	1	Event held as scheduled

28	04/11/2013	09:23	Hearing: Motion	1	Event not held--joint request
29	05/20/2013	09:23	Hearing: Motion	1	Event not held--joint request
30	06/04/2013	09:39	Conference: Final Pre-Trial	1	Event held as scheduled
31	06/14/2013	09:07	Hearing: Motion to Dismiss	1	Event not held--req of Defendant
32	06/14/2013	09:07	TRIAL: by jury	1	Event not held--req of Defendant
33	06/14/2013	09:39	Conference: Final Pre-Trial	1	Event not held--req of Defendant
34	07/22/2013	09:17	Hearing: Motion to Dismiss	1	Event held as scheduled
35	07/31/2013	09:23	Hearing: Motion to Continue	1	Event held as scheduled
36	08/13/2013	09:39	Conference: Final Pre-Trial	1	Event not held--joint request
37	08/27/2013	09:07	TRIAL: by jury	1	Event not held--joint request
38	08/27/2013	09:15	Hearing: Evidentiary-suppression	1	Event not held--joint request
39	09/10/2013	09:37	Hearing: Non-evidentiary--funds	1	Event held as scheduled
40	09/13/2013	09:39	Conference: Final Pre-Trial	1	Event rescheduled by court prior to date
41	09/13/2013	09:45	Hearing: Misc Matters	1	Event held as scheduled
42	09/16/2013	09:00	Hearing: Motion	7	Event held as scheduled
43	09/16/2013	09:23	Hearing: Motion	1	Event moved to another session
44	09/17/2013	09:00	Conference: Status Review	7	
45	09/19/2013	09:23	Hearing: Motion	1	Event moved to another session
46	09/19/2013	09:23	Hearing: Motion	1	Event not held--joint request
47	09/23/2013	09:07	TRIAL: by jury	1	Event rescheduled by court prior to date
48	09/23/2013	09:15	Hearing: Evidentiary-dismiss	1	Event not held--joint request
49	10/02/2013	09:17	Hearing: Evidentiary-dismiss	1	Event not held--joint request
50	10/02/2013	09:23	Hearing: Motion	1	Event not held--joint request
51	10/02/2013	09:39	Conference: Final Pre-Trial	1	Event not held--joint request

52	10/18/2013	09:37	Hearing: Non-evidentiary--funds	1	
53	10/22/2013	09:37	Hearing: Non-evidentiary--funds	1	Event held as scheduled
54	10/23/2013	09:07	TRIAL: by jury	1	Event not held--joint request
55	10/23/2013	09:39	Conference: Final Pre-Trial	1	Event not held--joint request
56	11/04/2013	09:23	Hearing: Non-evidentiary--funds	1	Event not held--joint request
57	11/13/2013	09:39	Conference: Final Pre-Trial	1	Event held as scheduled
58	11/22/2013	09:07	TRIAL: by jury	1	Event not reached by Court
59	11/22/2013	09:23	Hearing: Motion	1	Event held as scheduled
60	11/25/2013	09:23	Hearing: Motion	1	Event held as scheduled
61	11/26/2013	09:07	TRIAL: by jury	1	Event moved to another session
62	11/26/2013	09:07	TRIAL: by jury	5	Held in Session Ready for trial
63	12/02/2013	09:30	Conference: Status Review	5	Event held as scheduled
64	12/04/2013	09:00	Hearing: Motion	5	Event held as scheduled
65	12/09/2013	09:00	TRIAL: by jury	5	Trial begins
66	12/10/2013	09:00	TRIAL: by jury	5	Event continues over multiple days
67	12/11/2013	09:00	TRIAL: by jury	5	Event held as scheduled
68	12/12/2013	09:00	TRIAL: by jury	5	Event held as scheduled
69	12/13/2013	09:00	TRIAL: by jury	5	Event held as scheduled
70	12/16/2013	09:00	Hearing: Plea Change	5	Event held as scheduled

Full Docket Entries

341 Docket Entries for Docket: HDCR2012-00083

Entry Date	Paper No.	Docket Entry
02/01/2012	1	Indictment returned
02/01/2012		RE: offense #11 Penalty Enhancement Under 269/10G(c):
02/01/2012		RE: offense #12 Penalty Enhancement Under 269/10G(c):
02/06/2012		Habed for arraignment issued ret 2-10-12
02/10/2012		Deft arraigned before Court
02/10/2012		Appointment of Counsel Luke Ryan, pursuant to Rule 53

02/10/2012		Legal counsel fee assessed in the amount of \$150.00 (Carey, J.)
02/10/2012	2	Notice of assignment of counsel filed. (Carey, J.)
02/10/2012	3	Appearance of Deft's Atty: Luke Ryan
02/10/2012		Deft waives reading of indictments
02/10/2012		RE Offense 1:Plea of not guilty
02/10/2012		RE Offense 2:Plea of not guilty
02/10/2012		RE Offense 3:Plea of not guilty
02/10/2012		RE Offense 4:Plea of not guilty
02/10/2012		RE Offense 5:Plea of not guilty
02/10/2012		RE Offense 6:Plea of not guilty
02/10/2012		RE Offense 7:Plea of not guilty
02/10/2012		RE Offense 8:Plea of not guilty
02/10/2012		RE Offense 9:Plea of not guilty
02/10/2012		RE Offense 10:Plea of not guilty
02/10/2012		RE Offense 11:Plea of not guilty
02/10/2012		RE Offense 12:Plea of not guilty
02/10/2012		RE Offense 13:Plea of not guilty
02/10/2012		Ball set: \$50,000.00 cash / \$500,000.00 surety without prejudice
02/10/2012		(Carey, J.)
02/10/2012		Bail warning read (Carey, J.)
02/10/2012		Assigned to Track "B" see scheduling order
02/10/2012		Tracking deadlines Active since return date
02/10/2012	4	Bail: mittimus issued
06/25/2012	5	Pre-trial conference report filed (see pleading) (Page, J.)
06/25/2012		Interpreter present
08/08/2012	6	MOTION by Deft: to Dismiss counts Two, Four, Six , Eight, Ten,
08/08/2012	6	Eleven, Twelve and Thirteen
08/08/2012	6	Deft files Affidvit of Counel in Support of Motion to Dismiss counts
08/08/2012	6	Two, Four, Sic, Ten, Eleven, Twelve, and Thirteen
08/08/2012	7	Deft files Memorandum of Law in Support of Motion to Dismiss Counts
08/08/2012	7	Two, Four, Six, Eight, Ten, Eleven, Twelve, and Thirteen
08/08/2012	8	Deft files Ex-Parte request for Additional Fees and Costs Pursuant to
08/08/2012	8	G. L. c. 261,s27C(4) for Ballistics Expert and Affidavit
08/08/2012	9	Deft files Ex-Parte request for Additional Fees and Costs Pursuant to
08/08/2012	9	G.L. c261 s 27C(4) for Drug Analyst and affidavit
08/08/2012	10	Deft files Motion to Compel
08/08/2012	11	Deft files Memorandum of Law in Support of Motion to Compel

08/30/2012	12	Commonwealth files Response to Defendant's Motion to Compel
09/17/2012		MOTION (P#11) (see pleading) (Page, J.) N.
09/19/2012		MOTION (P#6) denied (see Memorandum and Order this date) (Page, J.) N.
09/19/2012	13	ORDER on defendant's Motion to dismiss (McCarthy) (Page, J.) N.
10/11/2012	14	MOTION by Deft: to amend scheduling order
10/22/2012	15	Request for Interpreter by Rolando Penate
11/01/2012		MOTION (P#14) allowed (Ferrara, J.)
11/01/2012	16	Request for Interpreter by Rolando Penate
11/07/2012		Hearing on (P#8 & 9) Exparte motions for funds held, matter taken
11/07/2012		under advisement (C.J. Moriarty, Justice)
11/07/2012		MOTION (P#8 and 9) allowed (C.J. Moriarty, Justice)
11/13/2012	17	MOTION by Deft: to suppress evidence
11/13/2012	17	Affidavit of counsel in support of defendant's Motion to suppress
11/13/2012	17	evidence
11/13/2012	18	Deft files Memorandum of law in support of defendant's Motion to
11/13/2012	18	suppress evidence
11/14/2012	19	Request for Interpreter by Rolando Penate
11/15/2012	20	MOTION by Deft: to suppress evidence
11/15/2012	20	Affidavit of counsel in support of defendant's Motion to suppress
11/15/2012	20	evidence
11/15/2012	21	Deft files Memorandum of law in support of defendant's Motion to
11/15/2012	21	suppress evidence
11/16/2012	22	Commonwealth files Response to defendant's Motion to suppress
11/26/2012	23	FINDINGS of FACT, RULINGS of LAW and Order on defendant's Motion to
11/26/2012	23	suppress (Richard J. Carey, Justice) N.
11/26/2012		MOTION (P#20) denied - See findings (Richard J. Carey, Justice) N.
11/28/2012	24	Request for Interpreter by Rolando Penate
11/29/2012	25	MOTION by Deft: to Stay Court Proceedings N. 12/11/12
11/29/2012	26	Notice of Interlocutory Appeal filed by Rolando Penate N. 12/11/12
12/11/2012	27	Court Reporter Javs Hampden CtRm 5 is hereby notified to prepare one
12/11/2012	27	copy of the transcript of the evidence of 11/16/2012
12/11/2012	28	Court Reporter Marzano (Santos), Elizabeth is hereby notified to
12/11/2012	28	prepare one copy of the transcript of the evidence of

		11/19/2012	
12/12/2012		MOTION (P#25) Defendant's motion that the trial be stayed pending	
12/12/2012		determination of the defendant's appeal on the motion to suppress is	
12/12/2012		denied (Richard J. Carey, Justice)	
12/19/2012		Transcript of testimony received 1-CD dated 11/19/12 Transcript of	
12/19/2012		proceedings from Court Reporter Marzano (Santos), Elizabeth	
01/04/2013	29	MOTION by Deft: to continue and Affidavit	
01/04/2013		MOTION (P#29) allowed (C.J. Moriarty, Justice)	
01/22/2013	30	At SJC, for Suffolk County: Notice of Docket Entry: ORDER:... "it is	
01/22/2013	30	ORDERED that the defendant's application for leave to pursue an	
01/22/2013	30	interlocutory appeal be, and hereby is, denied." (Duffly, J.)	
01/23/2013	31	Order for Transcript Cancelled Javs Hampden CtRm 5 for event on	
01/23/2013	31	11/16/2012	
02/15/2013	32	Deft files request to change name of record for ballistics expert	
02/26/2013	33	Exhibits - Motion to suppress hearing	
03/13/2013	34	Request for Interpreter by Rolando Penate	
03/13/2013	35	Commonwealth files Anticipated Witness List	
03/19/2013		MOTION (P#32) allowed (Richard J. Carey, Justice).	
03/19/2013	36	Agreement on Discovery motions	
03/19/2013	37	MOTION by Deft: to Preclude Introduction of Visual Identification of	
03/19/2013	37	Purported Narcotics and or Results of any Presumptive Testing	
03/20/2013	38	Request for Interpreter by Rolando Penate	
05/14/2013	39	Second MOTION by Deft: to compel	
05/16/2013	40	Request for Interpreter by Rolando Penate	
06/04/2013	41	MOTION by Deft: to continue	
06/04/2013		MOTION (P#41) allowed by agreement (McDonough, Justice)	
06/14/2013		MOTION (P#41) (See Pleading) (Constance M. Sweeney, Justice)	
07/15/2013	42	Deft files Memorandum of Law in Support of Defendant's Motion to	
07/15/2013	42	Dismiss Counts One through Ten and Thirteen	
07/18/2013	43	MOTION by Deft: In Limine to Preclude Introduction of "Expert" Visual	
07/18/2013	43	Identification of Purported Narcotics	
07/22/2013		Hearing on (P#42) held, matter taken under advisement (Mary Lou Rup,	

07/22/2013		Justice)
07/22/2013		Interpreter present: Torres, Sylvia on 7/22/2013
07/22/2013	44	Commonwealth files Memorandum in support of offering proof of
07/22/2013	44	controlled substances through police expert
07/23/2013		MOTION (P#42 and #43) (See Judge's Memorandum) (Rup, J.) N.
07/23/2013	45	MEMORANDUM on defendant's Motion to dismiss and Motion in limine to
07/23/2013	45	preclude evidence of expert visual identification of purported
07/23/2013	45	narcotics (Mary Lou Rup, Justice) N.
08/05/2013	46	Request for Interpreter by Rolando Penate
08/27/2013	47	Appearance of Atty. Marissa Elkins for Nikki Lee (witness)
08/27/2013	48	Commonwealth files Response to defendant's Motion to suppress and/or
08/27/2013	48	dismiss for egregious government conduct
08/27/2013	49	Pre-trial conference report filed
08/27/2013	50	Request for Interpreter by Rolando Penate
08/27/2013	51	MEMORANDUM & Scheduling ORDER (Rup, J.)N.
09/04/2013	52	Request for Interpreter by Rolando Penate
09/04/2013	53	Request for Interpreter by Rolando Penate
09/04/2013	54	MOTION by Deft: for additional fees and costs pursuant to G.L. c.
09/04/2013	54	261, Sec. 27C(4) for drug analyst & affidavit
09/06/2013	55	MOTION by Deft: to compel production of documentary evidence pursuant
09/06/2013	55	to Mass. R. Crim. 17(a)(2)
09/06/2013	55	Affidavit of counsel in support of defendant's Motion to compel
09/06/2013	55	production of documentary evidence pursuant to Mass. R. Crim. 17(a)(2)
09/06/2013	56	Deft files Memorandum of law in support of defendant's Motion to
09/06/2013	56	compel production of documentary evidence pursuant to Mass. R. Crim.
09/06/2013	56	17(a)(2)
09/10/2013		MOTION (P#54) allowed (Richard Carey, Justice)
09/10/2013	57	MOTION by Deft: for funds to pay for daily copy of transcript of
09/10/2013	57	hearing on Motion for new trial
09/11/2013	58	MOTION by Deft: Amended Ex Parte Motion For Funds To Pay For Daily
09/11/2013	58	Copy of Transcript of Hearing on Motions For New Trial.
09/11/2013	59	MOTION by Deft: For Access to Amherst Laboratory
09/11/2013		MOTION (P#58) allowed (Richard Carey, Justice)

09/13/2013	60	MOTION by Deft: to quash and notice of witness, Nikki Lee's, intent
09/13/2013	60	to invoke certain privileges
09/16/2013	61	Deft files opposition to Nikki Lee's motion to quash and intent to
09/16/2013	61	invoke certain privileges
09/16/2013		MOTION (P#60) allowed, See endorsment on following page. (C. Jeffrey
09/16/2013		Kinder, Justice) N. 9/17/13
09/18/2013	62	Request for Interpreter by Rolando Penate
10/02/2013		MOTION (P#55) allowed (see pleading) (Kinder, J.) N.
10/02/2013		MOTION (P#59) allowed (see pleading) (Kinder, J.) N.
10/02/2013	63	Non-party, Massachusetts Department of State Police's opposition to
10/02/2013	63	defendant's Motion for Rule 17 summons
10/02/2013	64	Opposition to the defendant's Rule 17(a)(2) Motion for access to the
10/02/2013	64	Amherst Laboratory
10/02/2013	65	Opposition to the defendant's Rule 17(a)(2) Motion for production
10/02/2013	66	Opposition to the defendant's Rule 17(a)(2) Motion for production
10/02/2013	67	MOTION by Deft: to inspect physical evidence
10/02/2013		MOTION (P#67) denied (see pleading) (Kinder, J.) N.
10/02/2013	68	MOTION by AG's Office to quash subpoena for AAG Anne Kaczmarek
10/02/2013	69	AG's Office files Memorandum of law in support of Attorney General's
10/02/2013	69	Motion to quash summons served on Assistant Attorney General Anne
10/02/2013	69	Kaczmarek
10/02/2013		MOTION (P#68) denied as moot, the parties having agreed that no
10/02/2013		evidence will be taken from Ms. Kaczmarek at this time (Kinder, J.) N.
10/02/2013	70	Deft files Opposition to Motion of Attorney General to quash summons
10/02/2013	70	served as Assistant Attorney General Anne Kaczmarek
10/02/2013	71	MOTION by AG's Office to quash subpoena for Sergeant Joseph Ballou
10/02/2013	72	AG's Office files Memorandum of law in support of Attorney General's
10/02/2013	72	Motion to quash summons served on Sergeant Joseph F. Ballou
10/02/2013		MOTION (P#71) denied (see pleading) (Kinder, J.) N.
10/08/2013	73	Non-Party Massachusetts Department of State Police's

		Opposition To
10/08/2013	73	Defendant's Motion for Access to the Amherst Lab.
10/10/2013	74	MOTION by Deft: for Funds to Pay for Daily Copy of Transcript of
10/10/2013	74	Evidentiary Hearing in Parallel Proceeding
10/10/2013	75	MOTION by Deft: to Expand Time Permitted to Access Amherst Laboratory
10/21/2013	76	MOTION by Deft: for funds to pay for daily copy of transcript of
10/21/2013	76	evidentiary hearing in parallel proceeding
10/22/2013		MOTION (P#76) allowed (Tina S. Page, Justice).
10/22/2013	76	Massachusetts Attorney General's Office's Motion for Clarification of
10/22/2013	76	Order for Production Dated October 2, 2013
10/23/2013	77	ORDER Clarifying Partial Allowance of Defendant's Rule 17 Motion for
10/23/2013	77	Production of Documents (Kinder, Justice) N 10-23-13
10/28/2013	78	MOTION by Deft: for funds to pay for daily copy of transcript of
10/28/2013	78	evidentiary hearing in parallel proceeding
10/28/2013	79	Ex parte Request by Deft: for additional fees and costs pursuant to
10/28/2013	79	M.G.L. CH. 261, sec 27C(4) for private investigator and Affidavit
10/29/2013		MOTION (P#78 and 79) allowed (Kinder, J.) N.
11/04/2013	80	Commonwealth files Anticipated Witness List
11/04/2013	81	MEMORANDUM of DECISION and ORDER on Defendant's Motion to Dismiss
11/04/2013	81	Counts 1-10 and 13 N. 11/5/13
11/13/2013	82	Filed: Joint Pre-Trial Memorandum
11/13/2013	83	Deft files anticipated witness list
11/19/2013	84	MOTION by Deft: for Protective Order for November 27 and November 29,
11/19/2013	84	2013
11/22/2013	85	MOTION by Deft: to Reconsider Denial of Motion to Dismiss Counts Two,
11/22/2013	85	Four, Six, Eight and Ten in light of Commonwealth V. Bradley, SJC
11/22/2013	85	11457 (Nov. 21, 2013)
11/22/2013		MOTION (P#85) Commonwealth assents to motion and is going to file
11/22/2013		Nolle Prosquies with respect to these counts (John S. Ferrara, Justice).
11/22/2013	86	MOTION by Commonwealth: InLimine
11/22/2013	87	MOTION by Deft: In Limine to Preclude Testimony Regarding the Results

11/22/2013	87	of any Forensic Testing Performed on Purported Narcotics or in the
11/22/2013	87	Alternative, the results of any Forensic Testing Performed by Sonja
11/22/2013	87	Farak
11/22/2013	88	Deft files Emergency Motion to Compel Discovery
11/22/2013		MOTION (P#88) allowed (John S. Ferrara, Justice)
11/22/2013	89	MOTION by Deft: for Protective Order for November 27 and November
11/22/2013	89	29,2013
11/22/2013		MOTION (P#89) allowed (John S. Ferrara, Justice).
11/22/2013	90	MOTION by Deft: for Sequestration of Witnesses
11/22/2013	91	MOTION by Deft: In Limine to Preclude Testimony Regarding Auditory
11/22/2013	91	Observations made while Monitoring Audio Device used by Undercover
11/22/2013	91	Officer without a Warrant in a Private Home
11/22/2013	92	MOTION by Deft: In Limine to Exclude the "Soft Expert" Testimony of
11/22/2013	92	Jamie Bruno
11/22/2013	93	MOTION by Deft: for Individual Voir Dire of Prospective Jurors
11/22/2013	94	Deft files Proposed Voir Dire Questions
11/22/2013	95	RE Offense 2:Nolle prosequi
11/22/2013		RE Offense 4:Nolle prosequi
11/22/2013		RE Offense 6:Nolle prosequi
11/22/2013		RE Offense 8:Nolle prosequi
11/22/2013		RE Offense 10:Nolle prosequi
11/22/2013	96	Commonwealth files amended trial witness list
11/25/2013	97	Commonwealth files Request for Protective Order
11/25/2013	97	Affidavit
11/25/2013		MOTION (P#97) allowed (John S. Ferrara, Justice)
11/26/2013		Case held in Session- Ready for trial
12/02/2013	98	MOTION by Attorney General's Office: to quash subpoena for AAG Anne
12/02/2013	98	Kaczmarek
12/02/2013	99	Attorney General's office files memorandum of law in support of
12/02/2013	99	Attorney General's motion to quash summons served on Assistant
12/02/2013	99	Attorney General Anne Kaczmarek
12/02/2013	100	MOTION by Attorney General's Office: to quash subpoena for Sergeant
12/02/2013	100	Joseph Ballou
12/02/2013	101	Attorney General's Office files memorandum of law in support of

12/02/2013	101	Attorney General's motion to quash summons served on Sergeant Joseph
12/02/2013	101	F. Ballou
12/02/2013	102	MOTION by Deft: for Protective Order for Afternoon of December 12,
12/02/2013	102	2013
12/02/2013	103	Deft files: Opposition to Commonwealth's Motion in Limine
12/02/2013	104	Deft files: Amended Witness List
12/02/2013	105	Deft files Proposed pre-charge on eyewitness identification
12/04/2013	106	MOTION by Deft: in Limine to Preclude Testimony Regarding So-Called
12/04/2013	106	Confidential and Reliable Informant
12/04/2013	107	Request for Interpreter by Rolando Penate
12/09/2013		Jurors selected
12/09/2013	108	Request for Interpreter by Rolando Penate
12/10/2013		MOTION (P#106) allowed without objection (Tina S. Page, Justice).
12/10/2013		Parties agree to stipulation (Page, J.)
12/10/2013	109	Request for Interpreter by Rolando Penate
12/10/2013		Interpreter present: McDonald, Enrique in morning, Interpreter Iia
12/10/2013		Cormier begins at noon; Enrique McDonald returns at 12:48PM
12/11/2013	110	Request for Interpreter by Rolando Penate
12/11/2013	111	Request for Interpreter by Rolando Penate, cancellation, then Reuquest
12/11/2013	111	for Interpreter
12/11/2013	112	MOTION by Deft: for a required finding of not guilty at the close of
12/11/2013	112	the Commonwealth's case
12/11/2013		MOTION (P#112) allowed as to Counts 11, 12 and 13 (see pleading)
12/11/2013		(Tina S. Page, Justice)
12/11/2013		RE Offense 11:Not guilty finding
12/11/2013		RE Offense 12:Not guilty finding
12/11/2013		RE Offense 13:Not guilty finding
12/13/2013	116	RE Offense 5:Guilty verdict
12/13/2013	113	Ex parte MOTION by Deft: for additional funds for ballistics expert
12/13/2013	113	and Affidavit
12/13/2013		MOTION (P#113) allowed (Tina S. Page, Justice)
12/13/2013	117	RE Offense 7:Not guilty verdict
12/13/2013	115	RE Offense 3:Not guilty verdict
12/13/2013	118	RE Offense 9:Not guilty verdict

12/13/2013	114	RE Offense 1:Not guilty verdict
12/13/2013		Bail revoked
12/13/2013	119	Bail: mittimus issued
12/13/2013	120	Request for Interpreter by Rolando Penate
12/16/2013	121	MOTION by Deft: for required finding of not guilty pursuant to Mass.
12/16/2013	121	R. Crim. P. 25(b)(2)
12/16/2013		MOTION (P#121) denied (Tina S. Page, Justice)
12/16/2013		RE: offense #5: Guilty plea to subsequent portion
12/16/2013	122	Finding on plea of guilty on subsequent portion of Count 5 (Tina S.
12/16/2013	122	Page, Justice)
12/16/2013	123	Defendant sentenced on Count 5 to MCI - Cedar Junction for not more
12/16/2013	123	than 7 years and not less than 5 years (Tina S. Page, Justice)
12/16/2013		Sentence credit given as per 279:33A: 763 days by agreement
12/16/2013		Commonwealth waives victim witness assessment and drug assessment fees
12/16/2013		Defendant warned per Chapter 22E Sec. 3 of DNA
12/16/2013		Notified of right of appeal under Rule 64
12/16/2013		Notified of right of appeal under Rule 65
12/16/2013		Oral request for a stay of execution of the sentence is denied (Page, J.)
12/16/2013	124	Exhibits
12/20/2013	125	MOTION by Deft: to Rivise and Revoke N
12/20/2013	126	NOTICE of APPEAL FILED by Rolando Penate N.
12/20/2013	127	MOTION by Deft: to Withdraw as Counsel N.
12/20/2013	128	MOTION by Deft: to Appoint Counsel N.
02/04/2014	129	Court Reporter Foulks, Amy (DIGITAL RECORDING DEVICE) is hereby
02/04/2014	129	notified to prepare one copy of the transcript of the evidence of
02/04/2014	129	08/30/2012
02/04/2014	130	Court Reporter Javs Hampden CtRm 5 is hereby notified to prepare one
02/04/2014	130	copy of the transcript of the evidence of 11/16/2012
02/04/2014	131	Court Reporter Marzano (Santos), Elizabeth is hereby notified to
02/04/2014	131	prepare one copy of the transcript of the evidence of 11/19/2012
02/04/2014		Court Reporter Marzano (Santos), Elizabeth is hereby notified to
02/04/2014		prepare one copy of the transcript of the evidence of 07/22/2013
02/04/2014	132	Court Reporter Donnellan, Judith L is hereby notified to prepare

		one
02/04/2014	132	copy of the transcript of the evidence of 12/09/2013
02/04/2014		Court Reporter Donnellan, Judith L is hereby notified to prepare one
02/04/2014		copy of the transcript of the evidence of 12/10/2013
02/04/2014		Court Reporter Marzano (Santos), Elizabeth is hereby notified to
02/04/2014		prepare one copy of the transcript of the evidence of
		12/11/2013
02/04/2014		Court Reporter Marzano (Santos), Elizabeth is hereby notified to
02/04/2014		prepare one copy of the transcript of the evidence of
		12/12/2013
02/04/2014	133	Court Reporter Flaherty, Patricia A. is hereby notified to prepare
02/04/2014	133	one copy of the transcript of the evidence of 12/13/2013
02/04/2014		Court Reporter Donnellan, Judith L is hereby notified to prepare
		one
02/04/2014		copy of the transcript of the evidence of 12/16/2013
02/04/2014		MOTION (P#127) allowed (Tina S. Page, Justice)
02/04/2014		MOTION (P#128) Pls. refer to CPCS Appellate Division (Tina S.
		Page,
02/04/2014		Justice)
02/18/2014	134	Notice of assignment of counsel filed. (Tina S. Page, Justice)
04/03/2014		Transcript of testimony received 1-CD dated 11/19/12 Transcript
		of
04/03/2014		proceedings from Court Reporter Marzano (Santos), Elizabeth
04/03/2014		Transcript of testimony received ON CD dated 7/22/13
		Transcript of
04/03/2014		proceedings from Court Reporter Marzano (Santos), Elizabeth
04/03/2014		Transcript of testimony received ON CD dated 12/11/13
		Transcript of
04/03/2014		proceedings from Court Reporter Marzano (Santos), Elizabeth
04/03/2014		Transcript of testimony received ON CD dated 12/12/13
		Transcript of
04/03/2014		proceedings from Court Reporter Marzano (Santos), Elizabeth
04/08/2014	135	Notice of assignment of counsel filed.
04/10/2014	136	Appointment of Counsel Jennifer Appleyard, pursuant to Rule 53
04/18/2014		Transcript of testimony received 1-CD dated 8/30/12 from
		Transcript
04/18/2014		of proceedings from Court Reporter Foulks, Amy (DIGITAL
		RECORDING
04/18/2014		DEVICE)
04/18/2014		Transcript of testimony received ON CD from 11/16/12 from
		Transcript
04/18/2014		of proceedings from Court Reporter Javs Hampden CtRm 5
05/02/2014		Transcript of testimony received 1-CD dated 12/13/13 Transcript

	of
05/02/2014	proceedings from Court Reporter Flaherty, Patricia A.
10/20/2014	Transcript of testimony received 1-CD dated 12/9/13 Transcript of
10/20/2014	proceedings from Court Reporter Donnellan, Judith L
10/20/2014	Transcript of testimony received ON CD dated 12/10/13 Transcript of
10/20/2014	proceedings from Court Reporter Donnellan, Judith L
10/20/2014	Transcript of testimony received ON CD dated 12/16/13 Transcript of
10/20/2014	proceedings from Court Reporter Donnellan, Judith L

Charges

13 Charges for Docket: HDCR2012-00083

No.	Charge Description	Indictment	Status
1	COCAINE, POSSESS TO DISTRIBUTE, SUBSQ. c94C s32A(d)		Not guilty verdict
2	DRUG VIOLATION NEAR SCHOOL/PARK c94C s32J		Nolle prosequi
3	DRUG, POSSESS TO DISTRIB CLASS A, SUBSQ. c94C s32(b)		Not guilty verdict
4	DRUG VIOLATION NEAR SCHOOL/PARK c94C s32J		Nolle prosequi
5	DRUG, DISTRIBUTE CLASS A, SUBSQ.OFF. c94C s32(b)		Guilty verdict
6	DRUG VIOLATION NEAR SCHOOL/PARK c94C s32J		Nolle prosequi
7	DRUG, DISTRIBUTE CLASS A, SUBSQ.OFF. c94C s32(b)		Not guilty verdict
8	DRUG VIOLATION NEAR SCHOOL/PARK c94C s32J		Nolle prosequi
9	DRUG, POSSESS TO DISTRIB CLASS A c94C s32(a)		Not guilty verdict
10	DRUG VIOLATION NEAR SCHOOL/PARK c94C s32J		Nolle prosequi
11	FIREARM WITHOUT FID CARD, POSSESS c269 s10(h)		Not guilty finding
12	FIREARM WITHOUT FID CARD, POSSESS c269 s10(h)		Not guilty finding
13	FIREARM IN FELONY, POSSESS c265 s18B		Not guilty finding

EXHIBIT 34

From: Foster, Kris (AGO)
Sent: Monday, June 23, 2014 3:05 PM
To: Kaczmarek, Anne (AGO)
Subject: FW: Farak Evidence

Hi Anne,
Any thoughts on Luke Ryan's request to see the evidence in Farak's case?

*Kris C. Foster
Assistant Attorney General
Appeals Division, Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 963-2833*

From: Luke Ryan [mailto:LRyan@strhlaw.com]
Sent: Monday, June 23, 2014 10:06 AM
To: Foster, Kris (AGO)
Subject: Farak Evidence

Hi Kris,

Hope this finds you well. I am writing today because I represent a Hampshire County client charged with narcotics offenses and the substances at issue were deposited at the Amherst lab in December, 2012, never assigned to anybody, then brought to a state police lab where they were tested. I am moving to dismiss the drug charges and would like to take a look at the evidence seized during the Farak investigation.

I know that the last time I sought to do this, your office objected on the ground that the charges against Ms. Farak were pending and you did not want to introduce the possibility of a chain of custody defense by giving defense counsel access to it.

Now that Ms. Farak has pled guilty and been sentenced, would it be possible for me to view the evidence seized from, among other places, her car?

Sincerely,

Luke



Sasson Turnbull Ryan & Hoose
Experience. Dedication. Integrity.

Luke Ryan
Sasson, Turnbull, Ryan & Hoose
100 Main Street
Northampton, MA 01060
413.586.4800
www.strhlaw.com

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EXHIBIT 35

COMMONWEALTH OF MASSACHUSETTS

HAMPSHIRE, ss.

TRIAL COURT OF THE
COMMONWEALTH
SUPERIOR COURT DEPT.
INDICTMENT NO. 13-113

Commonwealth

v.

WAYNE BURSTON

DEFENDANT'S MOTION TO INSPECT PHYSICAL EVIDENCE

Now comes the defendant in the above-entitled action and respectfully requests that this Honorable Court issue an order, pursuant to Mass. R. Crim. P. 17(a)(2) and the principles enunciated in *Commonwealth v. Lampron*, 441 Mass. 265 (2004), and *Commonwealth v. Matis*, 446 Mass. 632 (2006), compelling the Attorney General's Office and/or the Massachusetts State Police to permit undersigned counsel, an investigator and/or expert to conduct an inspection/examination of physical evidence recovered during searches conducted in the course of the investigation and prosecution of Sonja Farak. (See Ex. A, Report of Trooper Randy Thomas re: Search Warrant Execution of Farak vehicle (Jan. 24, 2013); Ex. B, Report of Sgt. Joseph Ballou re: Search Warrant Execution of Tote Bag Recovered from Amherst Lab (Feb. 15, 2013); Ex. C, Report of Sgt. Joseph Ballou re: Visit to the Amherst Laboratory (Feb. 15, 2013); Ex. D, Office of the Attorney General Department Case Report (Jan. 29, 2013).)

The defendant states that the substances alleged to be narcotics in this case with submitted to the Amherst Drug Laboratory for analysis approximately five months before

the arrest of disgraced chemist Sonja Farak. The defendant further states that, in order to effectively contest the chain of custody in this case, his attorney requires a complete understanding of the tampering perpetrated by Ms. Farak which cannot be achieved absent a personal inspection of evidence seized by law enforcement in the course of the Farak investigation.

Police reports generated as a result of the search of Farak's car indicate that it contained lab materials related to cases dating back to 2008, as well as plastic bags containing substances believed to be narcotics. While pictures were taken during the execution of the warrant, neither the quantity nor quality of these photographs is sufficient to resolve what the evidence in Farak's car means in terms of the timing and scope of her criminal conduct and the timing and scope of the deficiencies at the laboratory where she was employed.

When undersigned counsel previously sought a court order for access to this evidence in the case of Commonwealth v. Rolando Penate, Hampden County Indictment No. 12-083, the Attorney General's successfully objected to the motion on the ground that such evidence had to be safeguarded during the pendency of Ms. Farak's prosecution, so as to prevent any chain of custody issues. (*See Ex. E, Ruling on Def.'s Motion to Inspect Physical Evidence, Hampden County Indictment No. 12-083 (Oct. 2, 2013).*)

Now that Ms. Farak's prosecution has concluded with convictions for evidence tampering, there is no compelling reason why defendants like Mr. Burstson should be forced to accept representations concerning the nature of critical evidence from an agency

that consistently turned a blind eye toward anything suggesting that the target of its prosecution committed other crimes with which she was not charged.

Based on the foregoing, the defendant respectfully requests that this Honorable Court allow this motion and issue an order permitting counsel for the defendant (including an investigator and/or expert) to:

1. Access the location where the physical evidence pertaining to the prosecution of Sonja Farak is currently being stored and, while under the supervision of the State Police, conduct a visual inspection of said physical evidence;
2. Take photographs, video recordings, measurements, notes, and/or drawings of said physical evidence; and
3. Make available to other defense attorneys handling cases involving the Amherst laboratory the results of the inspection, including access to any photographs, video recordings, measurements, notes, and/or drawings made during the inspection.

Respectfully Submitted,
THE DEFENDANT,

By 

His Attorney

LUKE RYAN

BBO#664999

SASSON, TURNBULL, RYAN & HOOSE

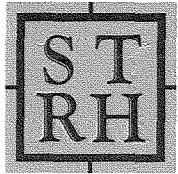
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EXHIBIT 36



Sasson Turnbull Ryan & Hoose

Experience. Dedication. Integrity.

Howard S. Sasson

Cynthia J. Turnbull

Luke Ryan

David P. Hoose

100 Main Street, 3rd Floor | Northampton, MA 01060 | www.strhlaw.com

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November 1, 2014

Patrick Devlin
Assistant Attorney General
One Ashburton Place, 19th Floor
Boston, MA 02108
patrick.k.devlin@state.ma.us

VIA E-MAIL AND U.S. MAIL

Re: Newly Discovered Evidence

Dear Attorney Devlin:

My purpose in writing today is to bring to your attention certain evidence I discovered during the inspection that took place at your office on October 30, 2014, in accordance with the protective order I executed in the pending Hampshire County Superior Court case of Commonwealth v. Wayne Burston, Indictment No. 13-113.¹ Because you did not participate in the litigation that took place in Hampden County Superior Court last fall, the significance of what I found may not be immediately apparent to you. Accordingly, before discussing this evidence, I am going to provide the following summary of the circumstances surrounding Ms. Farak's arrest and the litigation it spawned in other criminal cases.

Sonja Farak was one of four chemists who worked analyzing unknown substances at a forensic laboratory in Amherst. On January 17, 2013, an evidence officer named Sharon Salem discovered that two samples entrusted to Farak, A12-04793 and A12-04791, were not in the main evidence vault where they were supposed to be. The following morning, another supervisor named James Hanchett discovered a sandwich bag containing cocaine at Farak's workstation, as well as counterfeit cocaine and the two missing samples that inspired Salem's original search.

The condition of the K-pac bags containing A12-04793 and A12-04791 proved to be a source of great concern. Hanchett later explained that these bags would have had to have been heat-sealed when they were returned to the main evidence vault. However, on the morning of January 18, 2013, they were not only unsealed; they had not been cut open. This led Hanchett to conclude

¹ A copy of that protective order is attached to this correspondence as Exhibit A.

that Farak had cut open the original bags and removed the contents, then put other substances into a new bags she created to take the place of the original ones. According to Hanchett, if Salem had not happened to check the main evidence safe that day, Farak could have sealed the replacement K-pac bags for A12-04791 and A12-04793, returned them to the vault, and her tampering would have gone undetected. As much as it pained him to admit, Hanchett conceded that Farak could have been doing this sort of thing for years.

When Farak's malfeasance came to light, it had serious implications for hundreds, if not thousands, of criminal cases in which she had purportedly done analytic testing. Many, but not all, of these cases that were pending at the time of her arrest were dismissed. *See, e.g., "Arrest of chemist Sonja Farak results in dismissals of drug cases against 14 people in Hampden County"* http://www.masslive.com/news/index.ssf/2013/02/so_far_14_defendants_arrested.html (Feb. 21, 2013). In addition, these allegations of evidence tampering called into question the integrity of convictions in many other cases where Farak had either testified at trial and/or signed her name to so-called "drug certs," attesting that samples assigned to her for testing contained controlled substances.

At the time, I happened to represent defendants in both camps.

Commonwealth v. Rolando Penate, Hampden County Indictment No. 12-083, was a pending case where my client was charged with multiple counts of distribution of heroin and possession of heroin and cocaine with the intent to distribute. Discovery in that case indicated that the substances at issue were assigned to Farak for testing on December 20, 2011, and January 4, 2012.

Commonwealth v. Rafael Rodriguez, Hampden County Indictment No. 10-1181, was a post-conviction case where my client had pled guilty on September 9, 2011, to possessing cocaine with the intent to distribute and received an agreed upon sentence to state prison of four to five years.

Eventually, it became clear that the Hampden County District Attorney's office remained committed to prosecuting Mr. Penate and keeping Mr. Rodriguez in state prison. In both cases, prosecutors took the position that there was no evidence suggesting that Farak was engaging in misconduct either at the time the substances in question were at the Amherst Laboratory or when Mr. Rodriguez tendered his plea.

I subsequently filed a motion to dismiss the charges against Mr. Penate and a motion to withdraw Mr. Rodriguez's plea. Judge Mary-Lou Rup decided that Mr. Penate was entitled to an evidentiary hearing. Judge Jeffrey Kinder reached the same conclusion in Mr. Rodriguez's case and decided, for reasons of judicial economy, to consolidate his hearing with hearings for fourteen other post-conviction defendants.

In advance of the consolidated post-conviction hearing that began on September 9, 2013, the Hampden County District Attorney's office provided defense counsel with certain discovery, including police reports and the grand jury minutes related to Farak's prosecution. First

Assistant Frank Flannery was assigned to Mr. Rodriguez's case, and I quickly learned from my conversations with him that he was essentially acting as a conduit in providing defense counsel with whatever discovery he received from your office.

As you may know, on the day Farak was arrested her car was impounded and investigators obtained a warrant to search it. In a report memorializing that search, Trooper Randy Thomas indicated that among the items seized was "assorted lab paperwork."² Photographs were taken of Farak's car at the time of the search, but few captured the contents of this paperwork and no reports were authored detailing what exactly these papers contained.

During the grand jury proceedings that culminated in Farak's indictment, the only papers from her car that your office offered as exhibits were news articles concerning chemists and/or law enforcement officers who had been caught mishandling drug evidence. One of these articles appeared on-line at Pittsfield.com and was printed on September 20, 2011.³ This article reported that an investigation into the illegal possession of steroids led to the removal of a Pittsfield Narcotics Officer named David Kirchner from the Berkshire County Drug Task Force. The bottom right-hand corner of the article contained the following handwritten correspondence:

- And Kirchner seemed like such a good guy. I do feel bad for his 5 y.o. daughter.
- (Thank god I'm not a law enforcement officer)
- p.s. Most of the cases he's been a part of have been dismissed for exactly this reason.

This piece of paper constituted the most compelling piece of evidence disclosed to defense counsel insofar as it undercut an official version of events that depicted Farak as a model employee with "meticulous . . . work habits" up until "the last few weeks prior to *the incident*."⁴ That being said, the value of the document to defendants like Rolando Penate and Rafael Rodriguez depended on a factfinder making a number of crucial inferences.

First, one had to infer that Farak was responsible for printing the article and/or received it shortly after it was printed. Second, one had to infer that Farak's possession of the article reflected her interest in what might happen to her should she be caught doing something similar. Finally, one had to infer that Farak had such an interest because she was in the process of doing something similar at the time she printed and/or received the article.

² A copy of this report is attached as Exhibit B to this letter.

³ A copy of this article is attached as Exhibit C.

⁴ In fact, lead Farak investigator Sgt. Joseph Ballou went so far as to tell grand jurors that when he met Farak for the first time the summer before (during the Dookhan investigation), he found her to be "somewhat pretty," at least in contrast to her "drawn and pale" appearance on the day of her arrest.

Due, in part, to my concern that a factfinder might not draw all these inferences, I filed motions seeking documentary evidence in the possession of your office and/or the State Police. Among other things, I sought any evidence suggesting that a third party had knowledge of Farak's alleged malfeasance prior to her arrest. In response to this request, your office took the position that:

The AGO has turned over all grand jury minutes, exhibits, and police reports in its possession to the District Attorney's office. Based on these records, to which the defendant has access, *there is no reason to believe that a third party had knowledge of Farak's alleged malfeasance prior to her arrest.*

Several days before the consolidated post-conviction evidentiary hearing began, First Assistant Flannery agreed to arrange for me and two other defense attorneys to view the evidence in your office's possession. Much to our surprise, he subsequently informed us that your office was unwilling to permit this inspection to occur.

During Sergeant Ballou's testimony at that hearing, we had the following exchange:

Q. Sir, we've been talking quite a bit now about the evidence that was in Ms. Farak's car, correct?

A. Yes.

Q. And what we've been talking about is how you described that evidence in various reports you wrote, correct?

A. Yes.

Q. And we've been looking at photographs of this particular evidence?

A. Yes.

Q. And the reason we're doing that is because this evidence no longer exists, right?

A. No. It still exists.

Q. Oh, where is it?

A. It's in a drug storage locker -- I mean, excuse me, evidence storage locker.

Q. And can you tell me why none of the counsel for none of the defendants have been permitted to look at any of this evidence?

MR. FLANNERY: Objection.

THE COURT: Sustained.

Q. (By Mr. Ryan) Well, there's this physical evidence that we've been discussing from the car, correct?

A. Yes.

Q. And you would agree that your reports regarding what was in the car are summary notes?

A. Summary, yes.

Q. You didn't write paragraph after paragraph about what assorted lab paperwork was found, right?

A. As you mentioned, we also took pretty detailed photos, yes.

Q. Well, how many photos did you take?

A. I didn't take any. This was from -- the crime scene services took these.

Q. And whatever is in that book, is that a fair representation of how many photographs were taken?

A. From the car, sir, yes; vehicle search warrant, yes.

Q. A couple dozen?

A. Yes.

Q. And about how many items of evidentiary interest were there?

MR. FLANNERY: Objection, Your Honor. This is not to the scope of the direct.

THE COURT: Sustained as to what has evidentiary interest.

Q. (By Mr. Ryan) Well, you did an evidence log, correct?

A. Yes.

Q. And that had some 67 items on it?

A. Yes.

Q. And a number of those items were from the car?

A. Yes. That included all of the evidence seized in the case.

Q. Did you photograph every piece of evidence that was seized from the automobile?

A. As I said, I didn't photograph anything. But yeah, crime scene services photographed the evidence as we seized it, yes.

Q. Did anybody make a video recording of the execution of the search warrant?

A. There's no video, no.

At the conclusion of the hearing on September 9, 2013, I informed the Court that your office had refused to permit me to inspect the physical evidence and conveyed my opinion that neither Sgt. Ballou's testimony nor the photographic evidence in existence served as an adequate substitute for such an inspection. Judge Kinder encouraged the parties to "work through some agreement about viewing, physically, the evidence" and placed the onus on the defense to file a motion if no such agreement could be reached.

As you know, subsequent discussions did not produce an agreement. Your office took the position that "viewing the seized evidence [was] irrelevant to any case other than Farak's." I then filed a motion to inspect in Mr. Penate's case, which Judge Kinder denied due to the pendency of the criminal charges against Farak and the existence of the aforementioned photographs.

Judge Kinder went on to deny both Mr. Penate's motion to dismiss and Mr. Rodriguez's motion to withdraw his guilty plea. In his decisions, Judge Kinder found that while Farak's conduct was "deplorable," it "postdate[d] the testing in th[ese] cases." With respect to the aforementioned news articles, Judge Kinder drew the inference that Farak was responsible for downloading and printing them, but refused to infer that "she was engaged in criminal conduct at that time." In his view, defense counsel could not point to any persuasive evidence of tampering that took place prior to July, 2012.

Mr. Penate's case proceeded to trial before Judge Tina Page. After the Commonwealth rested, I attempted to show that the samples in question could have been tampered with due to the poor oversight that existed at the Amherst lab. Judge Page sustained Commonwealth objections to this line of questioning based on the absence of any concrete proof that Farak was tampering with evidence in December, 2011 or January, 2012. Mr. Penate was ultimately convicted of one count of distributing a Class A substance and sentenced to 5.5 – 7 years in state prison.

As for Mr. Rodriguez, he and several other post-conviction defendants appealed Judge Kinder decisions denying their motions to withdraw their pleas.⁵ Recently, the Supreme Judicial Court granted an application for direct appellate review in one of these cases, *see Commonwealth v. Erick Cotto, Jr.*, SJC-11761, and invited Mr. Rodriguez to submit an amicus brief. Oral argument in Mr. Cotto's case has been scheduled for December 4, 2014.⁶ This past Thursday, the Justices issued an announcement seeking additional amicus briefs on the following issue:

Where a defendant pleaded guilty to a drug offense and thereafter sought to withdraw his plea on the basis of evidence that had surfaced concerning misconduct in other cases by the analyst at the Amherst drug laboratory who had tested the substances in this case, whether the judge erred in denying the motion because the defendant had failed to establish that any misconduct by the analyst had occurred prior to the date of the defendant's plea, or whether the defendant is entitled to a conclusive presumption that egregious misconduct occurred in his case in the same manner as a defendant seeking to withdraw a guilty plea on the basis of misconduct at the Hinton drug laboratory pursuant to this court's decision in *Commonwealth v. Scott*, 467 Mass. 336 (2014).

* * * * *

All of this brings me to what I discovered yesterday. In the box containing items seized from Farak's vehicle was an evidence bag containing the aforementioned articles, along with other

⁵ I have continued to represent Mr. Rodriguez and filed an appellate brief on his behalf on August 1, 2014.

⁶ The *Cotto* case has been joined for argument with *Commonwealth v. Ware*, SJC-11708. In *Ware*, the Justices issued the following announcement seeking amicus briefs on this issue:

Whether the defendant, who pleaded guilty in 2011 to multiple drug-related offenses, was erroneously denied postconviction discovery under Mass. R. Crim. P. 30 (c) (4), specifically, comprehensive retesting of numerous drug samples that had previously been tested by Sonja Farak, a chemist at the State drug lab in Amherst who subsequently pleaded guilty to tampering with evidence at the lab, to determine whether Farak was engaged in such misconduct at the time the substances in his case were tested.

papers Trooper Thomas had described as “assorted lab paperwork.” A review of these other papers revealed the following.

Two papers have this type-written heading:

EMOTION REGULATION Worksheet
OBSERVE AND DESCRIBE EMOTIONS

***DIRECTIONS:** Write as much as you can about each as soon as after “event” as possible. Write on back for more room.*

Below this heading are boxes for the following categories:

- **Vulnerability Factors:** What me more vulnerable?
- **Emotion Name(s):** _____ **Intensity: (0-10)** ____
- **Prompting Event:** For my emotion (what, who, where, when?)
- **Interpretations:** What are my Thoughts, Judgments, Beliefs, Assumptions, Appraisals of the situation?
- **Face and Body Changes:** What am I feeling in my face and body?
- **Body Language:** What is my facial expression, body posture and gestures?
- **Action Urge:** What do I feel like doing or saying?
- **What I Did or Said:**
- **After Effects:** What is my state of mind, other emotions, actions or thoughts?
- **Function of Emotions:** Communicate? Organize? Give Information?

One of these worksheets contains these (and other) handwritten notes:

Vulnerability Factors:

last night w/Molly
Sharon (+ Becky) ~~not~~ taking today off

Emotion Name(s): (Pre-) Shame

Intensity: (0-10) 7

Prompting Event:

got a ‘good’ sample @ work & having urges to use
(& knowing that I will be the only one here after lunch)

Interpretations:

I’m a bad person for having urges	I know I should
I’m a bad person for not wanting to stop them	call Anna, but I
It doesn’t matter – I won’t get caught	don’t want to.
Know I’ll feel worse when/if I use	I can lie on my homework

Action Urge:

hurry up & prepare/use (my mind says to get it out of way, but
I don't think that will be the end of it.)
> give in and go w/urge

The other worksheet contains these (and other) handwritten notes:

Vulnerability Factors: - tired this morning (though enough sleep)
- urges to use beforehand

Emotion Name(s): Shame Intensity: (0-10) 6 ½

Prompting Event:
told Jim earlier in week I put DEA application in, but I didn't
(figured I would later/soon). Today found out I need his signature on it =
he knows/will know I lied)

Interpretations:
- He will know I lied – judge me
- wondering if I can ~~sen~~ have boss over him sign it
- have to wait until at least tomorrow to tell/face him = build up
anxiety

Action Urge:
Asking Becky who she had sign it
Use (have 12 urge-ful samples to analyze out of next 13)
- make up lie

What I Did or Said: call Anna – commit to not using
asked Becky – she thinks Jim signed her stuff

With respect to the names referenced in these worksheets, I believe that “Sharon” is Evidence Officer Sharon Salem, “Jim” is Supervisor James Hanchett, and “Becky” is the other chemist at the lab, Rebecca Pontes. As for “Anna,” on another piece of scrap paper I found these handwritten notes:

Anna Kogan MSW LICSW
256 N. Pleasant St
Suite 6
Am 01002
413-944-0965

do you EAP
accept

Based on these notes, I believe that the “Anna” referred to in the worksheets is an Amherst therapist who lists “addiction” as one of the “issues” for which she provides treatment. See http://therapists.psychologytoday.com/rms/name/Anna_Kogan_MSW.LICSW_Amherst_Massachusetts_72054 (last visited Nov. 1, 2014).⁷ I do not know whether the reference to “Molly” is to a person or the recreational drug.

As for the reference to “homework,” another page I came across has, in the top left-hand corner, the following handwritten heading: “Homework 11-16-11:” Below that is handwriting describing a specific “Problem/Solution.” It would appear that Farak had an appointment the following day with a “prescriber.” This appointment seems to have served as a source of anxiety for Farak because while she intended to disclose an intention to stop taking one medication, she was so invested in staying on a second medication she was prepared to “lie about certain things to possibly help prevent being taken off [this] med.”

Also included in these papers described by Trooper Thomas as “assorted lab paperwork” are two “ServiceNet Diary Cards,” which contain the following pertinent boxes:

Name: _____ Week of: _____

Observe and Describe Emotions: Today I felt (0-5):	----- ---Mon	----- ---Tues	----- ---Wed	----- --Thurs	----- ---Fri	----- ---Sat	----- ---Sun
Target Behaviors: Today I felt an urge to (0-5):							
Kill myself							
Injure myself							
Drink or take drugs							
Binge, purge or not eat							

Write “Yes” in the box next to the number if you acted on an urge.

On the line next to “Name” on one diary card is the handwritten name “Sonja.” The “Drink or take drugs” box indicates that Sonja experienced an urge to take drugs that rated a “4” on Thursday and succumbed to that urge. This “ServiceNet Diary Card” does not contain any dates.

The other “ServiceNet Diary Card” has the following handwritten dates at the top of the form:

⁷ Based on these notes, I believe I have the requisite good faith basis to seek records pertaining to Farak’s treatment that are in the possession of Ms. Kogan and intend to file a motion pursuant to *Commonwealth v. Dwyer*, 448 Mass. 122 (2006), on Monday.

Observe and Describe Emotions: Today I felt (0-5):	12-26 ----- ---Mon	12-20 ----- ---Tues	12-21 ----- ---Wed	12-22 ----- --Thurs	12-23 ----- ---Fri	12-24 ----- ---Sat	12-25 ----- ---Sun
---	--------------------------	---------------------------	--------------------------	---------------------------	--------------------------	--------------------------	--------------------------

No year can be found on this document. However, a look at past calendars reveals that “12-26” fell on a Monday in 2011.⁸ Accordingly, it would appear that this document memorializes actions Farak took during the week of December 20, 2011, i.e. more than six months before Judge Kinder found that there was any evidence that she engaged in criminal behavior. On December 22, 2011, the very same day a sample assigned to Farak in the Penate case supposedly went back to the main vault, she admitted to taking drugs. This Diary Card indicates that Farak also took drugs on December 23 and December 26, 2011.

It would be difficult to overstate the significance of these documents. In terms of establishing misconduct on the part of Farak prior to July, 2012, they constitute much stronger evidence than the notes on the aforementioned articles as they do not depend on a fact finder drawing inferences favorable to the defense.

Whether law enforcement officials overlooked these papers or intentionally suppressed them is a question for another day. For the time being, I believe that two things must take place immediately.

First, your office should assent to the emergency motion to amend the protective order in Mr. Burston’s case, which I intend to file on Monday. This motion will request the removal of the condition that I not reveal the results of my inspection to other defense attorneys handling Amherst Lab cases. As the attorney of record for Rafael Rodriguez, I believe I have an ethical obligation to advise counsel for the defendants in the Cotto and Ware cases that new, exculpatory evidence exists calling in question the factual basis of the paradigm Judge Kinder adopted in adjudicating Amherst Lab cases.

Second, your office should provide copies of the papers in question to each and every defendant who moved for post-conviction relief based on misconduct on the part of Farak.

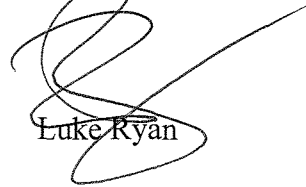
I understand that you did not become involved in this litigation until recently and want to be clear that to the extent this letter – and prior pleadings I have filed – paints your office in an unfavorable light, I am not suggesting that you have engaged in any misconduct. I appreciate the professionalism you exhibited in arranging the inspection that occurred on Thursday and trust that you will discharge the responsibilities you now have as the recipient of this letter in the same conscientious manner.

If you would like to discuss this matter, I can be reached at the number above. Inasmuch as I would like to give you and your office time to formulate a position with respect to my motion to

⁸ In 2012, December 26th fell on a Wednesday.

amend, looming deadlines in the Cotto and Watts cases leave me little choice but to ask the Hampshire Superior Court to schedule a hearing on this motion as soon as possible.

Sincerely,



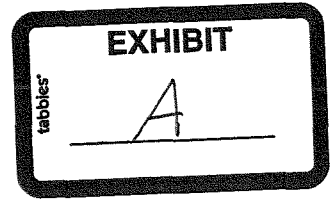
Luke Ryan

Enc.

Cc: Steven Gagne
First Assistant
Northwestern District Attorney
One Gleason Plaza
Northampton, MA 01060
steven.e.gagne@state.ma.us

Jane Davidson Montori
Office of the Hampden County District Attorney
Hall of Justice
50 State Street
Springfield, MA 01102-0559
[Fax] 413.731.9019

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT



Hampshire, ss.

HSCR2013-113

COMMONWEALTH

v.

WAYNE BURSTON

ASSENTED-TO MOTION TO INSPECT PHYSICAL EVIDENCE

The defendant, Wayne Burston, and non-party Attorney General's Office respectfully request that this Court grant the defendant's motion to inspect physical evidence pursuant to Mass. R. Crim. P 17(a)(2) with the following terms:

1. Within a reasonable time and on an agreed-upon date, the defendant may have access to the physical evidence pertaining to the prosecution of Sonja Farak that is in the care, custody, and control of the Attorney General's Office while under the supervision of the Massachusetts State Police, and may conduct a visual inspection of said physical evidence;
2. The defendant may take photographs, video recordings, measurements, notes, and/or drawings of said physical evidence;
3. The defendant may not remove said evidence from the Attorney General's Office nor may he conduct testing on said evidence; and
4. The defendant may not share the results of his inspection with other defense attorneys handling cases involving the Amherst laboratory, including but not

limited to, photographs, video recordings, measurements, notes, and drawings
made during the inspection.

Accordingly, the defendant and the Attorney General's Office respectfully request the Court to
allow the defendant's motion with the above terms.

Respectfully Submitted,

Luke Ryan, Esq.
Sasson Turnbull Ryan & Hoose
100 Main Street, 3rd Floor
Northampton, Mass. 01060
(413) 586-4800

Kris C. Foster
Assistant Attorney General
Massachusetts Attorney General's Office
One Ashburton Place
Boston, Mass. 02108
(617) 963-2833

Patrick K. Devlin
Assistant Attorney General
Massachusetts Attorney General's Office
One Ashburton Place
Boston, Mass. 02108
(617) 963-2957



*The Commonwealth of Massachusetts
Massachusetts State Police
Office of the Attorney General - West
1350 Main Street, Fourth Floor
Springfield, Massachusetts 01103*

January 24, 2013

To: Detective Lieutenant Robert M. Irwin
SPDU AG, Commanding

From: Trooper Randy Thomas #2935
SPDU AG West

Subject: 13-034-4804-1003
Search warrant execution
Vehicle of Sonja FARAK

1. On 01-19-13 at 0323 hours, a search warrant was executed on a vehicle owned by Sonja FARAK of 37 Laurel Park in Northampton. The search was of a 2002 Volkswagen Golf, color black, VIN: 9BWGK61J524069609, and bearing MA registration 80WJ06 registered to Sonja J. FARAK. The search was conducted at the State Police Barracks in Northampton at 555 North King St. in Northampton where the vehicle had been secured the previous day. The search was conducted by Detective Lieutenant Robert Irwin, Sergeant Joseph Ballou and I, Trooper Randy Thomas, all assigned to the State Police Detective Unit of the Attorney General's Office. Trooper Christopher Dolan from the State Police Crime Scene Services Section photographed the vehicle and evidence before and during the search.

2. The search commenced at 0323 hours. The following items were found in the vehicle and were secured and seized into evidence:

- 1 1 manila envelope "A08-02990 + 0289" containing evidence bag & unknown paper
- 2 1 envelope "For Jim Hanchett"
- 3 1 Zip lock baggie containing (34) white capsules
- 4 Assorted lab paperwork
- 5 Assorted lab paperwork

BUREAU OF INVESTIGATIVE SERVICE

MASS. STATE POLICE

Year/Dist/Crime/Case

13-034-4804-1003

Serial # 001

Captain

Supervisor

DB

13-034-4804-1003

Search warrant execution

Vehicle of Sonja FARAK

- 6 Envelope "A11-03020 -> A1103022, 2-29-12 SFD V. Dimitry Bogo"
containing lab paperwork
- 7 2 manila envelopes "A12-01204" and "A11-04545 -> A11-04546"
- 8 Assorted lab paperwork
- 9 1 Zip lock bag containing white powder substance
- 10 1 Zip lock bag containing (10) assorted pills
- 11 1 Envelope "A11-01848-01849" "To Joseph Wentworth Northampton
District ADA Michael Russo" containing assorted lab paperwork
& positive morphine test
- 12 1 Manila envelope "A10-04462" "To do" containing paperwork and
multiple clear plastic bags (some cut open).
- 13 1 large Manila mailing envelope with Hinton State Lab return address
containing 3 clear plastic bags (all cut open) & 1 knife
- 14 1 Manila mailing envelope labeled 'return to sender' contains assorted lab
paper work
- 15 1 Manila envelope "A09-01405" containing assorted lab paperwork
- 16 1 CVS pill bottle containing (19) orange pills & 1 CVS empty pill bottle
labeled" Sonja Farak"
- 17 1 Clear glass beaker
- 18 Metal mesh, 1 metal rod, clear plastic baggie containing dark colored
substance, wax paper containing white chunk substance, and 1
clear, knotted, plastic baggie containing white chunk substance
(That bag was inside of 2 outer baggies.)
- 19 1 CVS pill bottle labeled "Sonja Farak" "IC LAMOTRIGINE 150
MG" containing (41.5) white pills & 1 CVS pill bottle labeled
"Sonja Farak" "IC ESCITALOPRAM 20 MG" containing (55)
white pills

13-034-4804-1003

Search warrant execution

Vehicle of Sonja FARAK

20 1 MA DOT Certificate of Registration for MA Reg 80WJ06, 2002
Volkswagen Golf, Black to Sonja Farak

3. The search of the vehicle was completed at 0456 hours. A copy of the search warrant was left in the vehicle.

4. The car was re-secured at the Northampton Barracks and the evidence was transported by Sergeant Ballou and Trooper Thomas to the Attorney General's Office at 1350 Main St. 4th Floor in Springfield where it was secured.

Respectfully submitted,

 # 2135

Randy Thomas

Trooper, Massachusetts State Police
Office of the Attorney General

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Capeless Statement on Steroid Probe

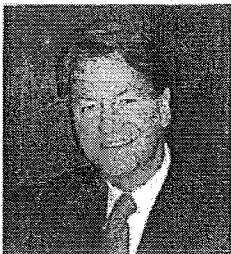
Staff Reports,
06:51PM / Tuesday, March 29, 2011

Like

0

0

Important 0 Interesting 0 Funny 0 Awesome 0 Intriguing 0 Ridiculous 0



DA David F. Capeless

PITTSFIELD, Mass. — The articles, rumors and blogs about the investigation into the use of steroids by local law enforcement officers has prompted the district attorney to address the ongoing investigation through a statement released on Tuesday afternoon.

District Attorney David F. Capeless revealed the name of the state trooper implicated in the probe, Daniel Gale, and confirmed that Pittsfield Police Officer David Kirchner was removed as a member of the Berkshire County Drug Task Force.

Indications that the investigation was undertaken by authorities outside the county were confirmed in Capeless' statement. The district attorney says the allegations of steroid use were brought to his attention after a "local police department was contacted by a federal agency." Capeless does not state which police department or which agency (the U.S. Postal Service has told local media that there is an investigation but not into who or what).

The probe was first revealed by postings on the discussion site Topix and on a blog run by former county resident GM Heltter and Daniel Valenti's PlanetValenti.com.

The Berkshire Eagle

has followed up with two articles that revealed Kirchner's involvement and that of a then unnamed state trooper from the Russell barracks in Hampden County.

Capeless said he had decided to make the following limited public statement about the investigation:

"Over the past week, the public has been exposed to rumors, in addition to hard information, regarding steroids and their sale and use here in Berkshire County. Ordinarily, it is the firm policy of my office not to confirm ongoing investigations, much less to divulge their specifics, in order to maintain the integrity and effectiveness of our investigative efforts. However, exceptions need to be made when either public safety or public confidence is being jeopardized by a lack of information.

"In this case, I have decided to make a limited public statement, divulging only that information necessary to adequately explain the circumstances, since there remains an ongoing criminal investigation.

"Several weeks ago, a local police department was contacted by a federal agency to alert them that an investigation into the importation of steroids had uncovered deliveries into their town. A joint investigation was undertaken which resulted in the seizure of steroids and the execution of a search warrant. An examination of recovered materials revealed that two law enforcement officers, Pittsfield Police Officer David Kirchner (a member of the Berkshire County Drug Task Force) and state police Sergeant Daniel Gale (then assigned to the Russell barracks in Hampden County), had apparently been the recipients of steroid deliveries. So far, no information has been uncovered which would indicate involvement in anything other than personal use of steroids by these two, or that any other officers were involved.

"When the information about the two officers was discovered, the local investigating officer, a member of the Berkshire County Drug Task Force, notified his supervisors in the Task Force, who immediately notified me. Since Kirchner was, at the time, a member of the Task Force, it was agreed that we would seek assistance from outside the county in continuing the investigation. State police investigators normally assigned to other units in other jurisdictions were dispatched and are presently engaged in furthering that investigation. Colonel Marian McGovern, the head of the State Police, and Pittsfield Police Chief Michael Wynn were informed of the situation, and each has initiated administrative proceedings while the criminal investigation is underway. Kirchner was immediately removed from the Task Force.

"I take very seriously any allegation that a law enforcement officer has breached the public trust by engaging in criminal activity, and I take just as seriously the reputation of all of the rest of us in law enforcement who honor that trust and continue to guard the public with integrity. No arrests have been made and any decision regarding criminal charges relating to these circumstances will be made with a very clear eye towards those two principles but only upon completion of the ongoing investigation."

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And Kirchner seemed like such a good guy - I do feel bad for his 5 yo. daughter. (Thank god I'm not a law enforcement officer)

P.S. Most of the cases he's been a part of have been dismissed for exactly this reason.

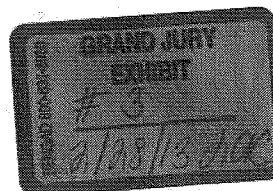


EXHIBIT 37

000240



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

MARTHA COAKLEY
Attorney General

(617) 727-2200
www.ago.state.ma.us

November 13, 2014

District Attorney David E. Sullivan
Northwestern County District Attorney's Office
One Gleason Plaza
Northampton, Massachusetts 01060
Attn: Steven Gagne, First Assistant

Re: Sonja Farak investigation/Amherst lab

Dear District Attorney Sullivan:

This Office previously prosecuted Sonja Farak, a chemist who analyzed drugs out of the Amherst drug lab. Ms. Farak pleaded guilty in Hampshire Superior Court to four counts of theft of a controlled substance from an authorized dispensary, four counts of tampering with evidence, and two counts of possession of cocaine. During our investigation, this office provided documents and reports relating to the prosecution of Ms. Farak. Included in those documents were the reports by Massachusetts State Police of all evidence seized during the execution of search warrants. Recently, Judge Richard Carey of Hampshire Superior Court allowed a Motion to Inspect all Physical Evidence from the Farak case currently in the custody of our Office. Responsive to that request, please find 289 pages of documentary evidence currently in our custody. This documentary evidence is listed in the police report of Trooper Randy Thomas that was forwarded to your office on March 25, 2013. This disclosure is pursuant to this Office's continuing obligation to provide potentially exculpatory information to the District Attorneys as well as information necessary to your Offices' determination about how to proceed with cases in which related narcotics evidence was tested at the Amherst laboratory.

Please do not hesitate to contact me at (617) 963-2489 with any questions or concerns.

Sincerely,

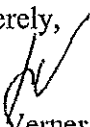
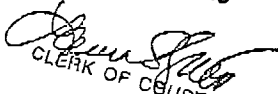

John Verner
Chief of the Criminal Bureau
Attorney General's Office
Enclosure

EXHIBIT 38

COMMONWEALTH OF MASSACHUSETTS**HAMPDEN, ss.****SUPERIOR COURT
NO. 10-1181, 09-1068, 11-461****COMMONWEALTH****v.****RAFAEL RODRIGUEZ
JERMAINE WATT
CHARLES DEON****HAMPDEN COUNTY
SUPERIOR COURT
FILED****FEB 20 2015**
CLERK OF COURTS**ORDER ON DEFENDANTS' MOTION TO COMPEL DISCOVERY**

The defendants in these actions previously pled guilty to controlled substance offenses in the above-captioned unrelated cases. They moved to withdraw their guilty pleas based upon the criminal conduct of Sonja Farak ("Farak"), the chemist who tested the suspected controlled substances at the Amherst Laboratory. I conducted an evidentiary hearing regarding the scope and timing of Farak's misconduct and thereafter denied the motions, concluding, among other things, that the defendants had failed to establish that Farak's misconduct antedated their guilty pleas. Before me now are the defendants' motions for additional post-conviction discovery. The motions are based on a claim that evidence seized from Farak's vehicle, which the defendants describe as newly discovered, suggests that Farak was using cocaine earlier than I originally found. They now seek discovery in two broad categories. First, the defendants request an order allowing the issuance of Rule 17 subpoenas to various third-party record holders regarding Farak's drug treatment records on the theory that those records may reveal more information about the scope and timing of Farak's drug use. Second, pursuant to Rule 30(c)(4) they seek a variety of records related to historical testing at the Amherst laboratory by Farak and others, and Farak's personnel file.

After hearing at which the record holders and Sonja Farak participated through counsel and objected to issuance of the summonses, I find, as to the records held by Kristen Joyce, Anna Kogan, Servicenet, Inc., and the Hampden County Sheriff, that the records are relevant within the meaning of Commonwealth v. Lampron, 441 Mass. 265 (2004), and are presumptively privileged. Accordingly the motions seeking issuance of Rule 17 Subpoenas to those record holders is ALLOWED. Summons will issue to those record holders for any and all records related to the treatment of Sonja Farak. The records will be maintained by the clerk's office, will be subject to a protective order and will not be available for public inspection unless otherwise ordered by the Court. Only counsel for the Commonwealth and the defendants will have access to the documents.

As to the documents the defendants seek to discover pursuant to Mass. R. Crim. P. 30(c)(4), I find, essentially for the reasons set forth in the Commonwealth's written opposition, that the defendants have failed to establish a *prima facie* case for relief. The records sought: (1) GC/MS testing data for all tests conducted by Farak; (2) her laboratory notes; (3) records for reagent preparation; (4) all of the evidence logs for samples assigned to Farak; and (5) Farak's personnel file; are not directly related to testing in these cases or the timing of Farak's drug use. Rather, the motions appear to seek records to support a claim that Farak was "dry labbing" or reporting positive test results without conducting tests. The issue of dry labbing was raised in the evidentiary hearing on the defendants' first motions for new trial, but I found no evidence of such a practice by Farak, and I am not persuaded that there is new evidence which warrants revisiting that conclusion. In short, on the record before me, the defendants are not

entitled to a second bite at the apple. Accordingly, as to these records, the motion for post-conviction discovery is **DENIED**.

So ordered:

A handwritten signature in black ink, appearing to read "C. Jeffrey Kinder", is written over a horizontal line.

C. Jeffrey Kinder
Associate Justice of the Superior Court
February 20, 2015