COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 2007-770

COMMONWEALTH

v.

ERICK COTTO, JR., and related cases.[1]

OFFICE OF THE ATTORNEY GENERAL'S PROPOSED FINDINGS OF FACT

[1] Commonwealth v. Aponte, 1279CR00226; Commonwealth v. Brown, 0579CR01159; Commonwealth v. Harris, 1079CR01233; Commonwealth v. Liquori, 1279CR00624; Commonwealth v. Penate, 1279CR00083; Commonwealth v. Richardson, 1279CR0399; Commonwealth v. Ware, 0779CR01072, 0979CR01072 & 1079CR00253; Commonwealth v. Watt, 0979CR01068 & 0979CR01069; and Commonwealth v. Vega, 0979CR00097.

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Back at the Office, the AGO Attorneys Attempted to Figure Out What the Court Had

Introduction

The Office of the Attorney General ("AGO"), which has intervened in the above-captioned cases for the sole and limited purpose of addressing the defendants' allegation of prosecutorial misconduct against it, respectfully submits the following proposed findings of fact. First is a summary of proposed factual and legal conclusions (without citations), followed by detailed proposed findings with record evidentiary citations. The AGO also submits a separate memorandum of law, which is incorporated herein by reference.

For all the reasons stated herein as well as in the supporting memorandum, the motions to dismiss based upon an allegation of prosecutorial misconduct should be **DENIED**.

Summary of Proposed Factual and Legal Conclusions

1. In January 2013, the AGO and Massachusetts State Police ("State Police") investigated and prosecuted Sonja Farak ("Farak"), a former chemist at the Department of Public Health's State Laboratory Institute in Amherst ("Amherst Lab"), on charges of drug tampering in relation to drugs she analyzed for evidentiary purposes in state criminal cases while so employed. The investigation and prosecution of Farak was focused on her misconduct. Based on numerous interviews of witnesses, the limited number of drug samples that appeared to have been the subject of tampering, the six-month window during which Farak's physical appearance had changed, the Assistant Attorney General's belief that drug users stick to one drug, a mistake in reading and interpreting the timing of a ServiceNet diary card that appeared to date back to December 2012, and leads that did not pan out, the Assistant Attorney General's working theory was that Farak's drug use and misconduct took place over the course of about six months. The AGO did not widen its investigation to include an investigation of the Amherst Lab, which may have exposed more instances of misconduct, because its efforts to do so in an earlier case involving another disgraced state chemist, Annie Dookhan ("Dookhan"), and the laboratory in which she worked, the William A. Hinton State Laboratory Institute ("Hinton Lab"), had been halted when the defense bar questioned the impartiality of the AGO. In the Farak case, the AGO told other executive state agencies that it was going to focus its investigation on her misconduct and not undertake a wider investigation.[2]

[2] Citations to exhibits and transcripts from the evidentiary hearing that support these facts may be found below in the relevant subsections. For purposes of these summary paragraphs, citation references have been omitted.

2. The Court finds that the AGO's decision to limit its investigation to Farak was reasonable and that its mistakes regarding the disclosure of allegedly exculpatory evidence were unintentional. The Court finds that there is no deliberate, intentional misconduct to deter.

3. The focused investigation and prosecution of Farak took place over the course of about a year, 2013-2014. While charges against Farak were pending, the AGO began a process of providing the District Attorneys' Offices with case material from the AGO's Farak investigation with the express purposes that the District Attorneys' Offices would evaluate the case material for exculpatory evidence and, at their discretion, disclose it as discovery in their prosecutions of drug offenders whose drug samples may have been tested by Farak. Over the course of nine months, the AGO made three separate disclosures to the District Attorneys' Offices. But as a result of the Assistant Attorney General's initial belief that they might be privileged, followed by unintentional oversights and mistakes, the AGO did not include in the case materials sent to the District Attorneys' Offices copies of a ServiceNet diary card and six additional pages of physical evidence (sometimes referred to by the witnesses as "mental health worksheets" or "mental health records"[3]). The mental health records at issue had been found in and among hundreds of papers during the execution of a search warrant of Farak's car and had been labeled on the warrant return as "assorted lab paperwork." The hundreds of papers and other items seized from Farak's car were photographed en masse, boxed, and stored in the State Police evidence room at the AGO's Springfield Office. They were fully disclosed to Farak's counsel, but were not photocopied and sent to the District Attorneys' Offices.

4. Later the same year, while Farak's charges were still pending, the lead Assistant Attorney General and the State Police case officer were served with subpoenas *duces tecum* in criminal cases against other defendants and the AGO was served with third party motions for discovery for Farak-related information. As a result of mistaken impressions on the part of the Assistant Attorney General that the contents of the case officer's file and photographs of physical evidence had already been turned over to the District Attorneys' Offices and that anything that remained was protected by the investigative privilege or work product doctrine, and out of a concern about maintaining the integrity of the ongoing prosecution of Farak, the AGO filed oppositions to the subpoenas and third party motions. The mental health records were not produced at that time, and the defendants did not conduct an inspection of the physical evidence kept in the evidence room at the AGO's Springfield Office, where the mental health records were kept.

5. After Farak pled guilty in 2014, one of the attorneys for defendants in other criminal cases approached the AGO again with a request to inspect physical evidence kept in the AGO's evidence room. The AGO readily agreed because it was no longer as concerned

[3] For consistency and ease of reference, these records are referred to throughout as "mental health records."

about maintaining the integrity of the physical evidence. The other defendants' attorney inspected the physical evidence and among the hundreds of papers, found the mental health records and determined that the undated diary cards actually refer to December 2011 rather than December 2012. Once this was pointed out to the AGO, the AGO photocopied all the papers and sent the information to the District Attorneys' Offices.

6. The Court finds, based on the testimony and the exhibits introduced at an evidentiary hearing held by this Court on December 5-9, 2016, and as set forth in greater detail below, that the AGO properly conducted an investigation of Farak; that the AGO provided the District Attorneys' Offices with Farak case material for further distribution to the defendants; that as a result of unintentional mistakes and oversights, the AGO did not disclose the mental health records to the District Attorneys' Offices in its early disclosures; that the AGO did not prosecute the named defendants directly and, in the course of providing case material to the District Attorney's Office about Farak's case, responding to subpoenas served by the defendants, or responding to motions for third party discovery served by the defendants, the AGO did not intentionally withhold evidence regarding the scope of Farak's misconduct, or any evidence regarding any third person's knowledge of Farak's misconduct, but rather asserted typical privileges available to third parties who have been served with subpoenas; and that once it was determined that the mental health records had not been turned over, the AGO quickly did turn them over.

7. The Court rules that the AGO did not have a duty to disclose exculpatory evidence in the post-conviction or plea context. The Court finds and rules that whether or not the duty to disclose actually applied, the AGO intended and attempted to disclose exculpatory evidence to the defendants, but as a result of mistakes made in doing so, it unintentionally did not disclose mental health records which were, arguably, exculpatory.

8. Therefore, the Court rules that the AGO made a series of unintentional mistakes and did not engage in "egregious misconduct."

9. The Court finds that many of the drug samples have been re-tested and the analyses are consistent with Farak's. The Court finds that the mental health records, which the defendants now have, arguably show that Farak's drug use dated back further than the AGO had supposed, and that this is arguably impeachment evidence. The Court finds that the defendants, who have motions to withdraw their guilty pleas or for new trials pending, now have evidence that Farak's drug use extended as far back as when they pled guilty or were tried and now have the opportunity to show that they would not have pled guilty had they known of Farak's drug use, or that they would have used such evidence to impeach Farak.

10. Therefore, the Court finds and rules that the defendants have not been prejudiced and that their right to a have a fair trial has not suffered irremediable harm from the AGO's conduct.

11. The Court rules that dismissal of the indictments in this case on the basis of alleged misconduct by the AGO is not necessary or appropriate. The Court rules that this is not a case which warrants the imposition of the drastic sanction of dismissal as a "prophylactic remedy." Therefore, the defendants' motions to dismiss on the basis of alleged AGO misconduct is **DENIED**.

Proposed Findings of Fact

The State Police and AGO Began its Investigation and Prosecution of Farak at the Same Time it Was Investigating and Prosecuting Another State Chemist, Dookhan.

12. While undertaking the investigation and prosecution of Farak, a state chemist at the Amherst Lab, the AGO and State Police were also investigating and prosecuting Dookhan, who had been a chemist at the Hinton Lab. That investigation had begun approximately six months earlier. *Commonwealth v. Scott*, 467 Mass. 336, 339 (2014).

13. The investigation of Dookhan by State Police assigned to the AGO began in July 2012, sometime after the Legislature transferred operation of the Hinton Lab to the State Police.[4] In the Dookhan investigation, the State Police were made aware of an incident dating back to 2011 which raised questions about Dookhan's breach of lab protocols involving ninety (90) cases. The State Police asked its detectives assigned to the AGO to launch a broader formal investigation to determine if more than ninety (90) cases were affected. *Scott*, 467 Mass. at 339.

14. The State Police/AGO investigation of Dookhan was "broad" and resulted in evidence of the scope and timing of Dookan's misconduct and led to the finding of numerous improprieties; the ninety (90) cases were just the "tip of the iceberg." *Scott*, 467 Mass. at 339.

15. In September 2012, in relation to the AGO's investigation and prosecution of Dookhan, (former) Governor Patrick asked the AGO to conduct a larger independent investigation of the Drug Analysis Unit of the Hinton Lab. Tr. IV:105; Ex. 239.

16. Initially, the Committee for Public Counsel Services ("CPCS"), the Massachusetts Bar Association, leaders of the defense bar (including Attorney Max Stern) and the ACLU also "pushed" the AGO to expand its investigation beyond Dookhan's conduct and into a larger investigation of the Hinton Lab. The AGO had discussions about this larger investigation with Lisa Hewitt (CPCS), Marty Healy (Massachusetts Bar Association), and Max Stern. Tr. IV:115; 117-118; Ex. 242.

[4] In July 2012, as part of the Commonwealth's budget bill, the Legislature transferred oversight of the Hinton Lab from the Department of Public Health to the State Police. *See* St. 2012, c. 139, § 56 (replacing G.L. c. 22C, § 39); St. 2012, c. 139, § 107 (repealing G.L. c. 111, §§ 12–13); see also *Scott*, 467 Mass. at 338.

17. In relation to the Dookhan prosecution, the AGO spent considerable resources, time, and effort organizing a larger investigation into the Hinton Lab. Within a period of several weeks, the AGO designated Hélène Kazanjian, the Chief of the AGO's Trial Division, to lead a team; assembled a team of three full time Assistant Attorneys General and support staff; considered the potential hiring of contract help and experts; set up a conflict screen between the team handling the criminal prosecution of Dookhan and the team that would handle the larger investigation of the Hinton Lab; and hired a database company to handle the voluminous records that the AGO would need to review. In addition, the AGO held discussions with private attorneys, including David Meier and Marty Murphy, to work as consultants and determined how much money it would need to conduct the investigation. Tr. IV:107-117.

With Regard to the Investigation of Dookhan, the AGO Did Not Conduct a Wider Investigation of the Hinton Lab Because the Defense Bar Questioned its Integrity to Do So.

18. On September 20, 2012, First Assistant Attorney General Edward Bedrosian, Jr. ("Bedrosian") sent a letter to Worcester County District Attorney Early and the Chief Counsel of CPCS indicating that the Governor had asked the AGO to conduct an independent investigation of the Drug Analysis Unit of the Hinton Lab. Mr. Bedrosian wrote that the review would focus on whether any systemic failures at the Hinton Lab had an impact on the reliability of the results on cases beyond those handled directly by Dookhan. The broader review of the Hinton Lab would be led by the Chief of the (civil) Trial Division at the AGO, who had been a federal prosecutor. Ex. 239. Mr. Bedrosian acknowledged that determining the impact of any systemic failures was critically important to persons previously charged and convicted of crimes in part based on the scientific test results from the Hinton Lab. Tr. IV:105-06; Ex. 239.

19. Mr. Bedrosian drafted a memorandum (dated October 20, 2012) outlining the AGO's plan to conduct the larger investigation of the Hinton Lab and the AGO's planned commitment of resources. Tr. IV:107-08; Ex. 240. In the memorandum, Mr. Bedrosian confirmed that the Governor had asked the AGO to conduct a review of the Hinton Lab and that the AGO would conduct a comprehensive review of the day-to-day operations, procedures, and administration of the Hinton Lab, including whether there existed any facts or circumstances that impacted the reliability of the test results on drug samples that had been submitted to the Hinton Lab; and that Ms. Kazanjian would lead the AGO's investigation team. Ex. 240.

20. The defense bar maintained contact with Mr. Bedrosian about the AGO's plan to conduct the investigation of the Hinton Lab. *See, e.g.*, Ex. 242.

21. As the conversations with the defense bar continued, however, Mr. Bedrosian learned for the first time – when the AGO Press Office received an inquiry from the Boston Globe

concerning a letter that had been circulated – that the same group of defense attorneys who had initially asked the AGO to conduct a larger investigation, were questioning whether the AGO was independent enough to undertake that investigation. Tr. IV:118-119.

22. The Globe was inquiring about a letter dated October 24, 2012, which the defense bar – the Massachusetts Bar Association, CPCS, defense attorney Max Stern, and the ACLU – had written to Attorney General Coakley. In the letter, the defense bar expressed their concerns with the possibility that the AGO would conduct the broader investigation of the Hinton Lab and its drug analysis unit. Ex. 243. In essence, the defense bar stated that the AGO could not be trusted to conduct the investigation. Tr. V:182; *see also* Tr. IV:120; Ex. 243.

23. Mr. Bedrosian was very surprised by the letter because, up until that point, the AGO had been working somewhat collaboratively with the defense bar. Tr. IV:119-120.

24. After the defense bar sent the letter to Attorney General Coakley taking the position that the AGO could not be trusted to conduct the larger investigation of the Hinton Lab, the AGO decided that it would not undertake the larger investigation of the Hinton Lab after all. Tr. IV:120.

25. On October 30, 2012, after receiving the defense bar's letter and consulting with the District Attorneys' Offices and defense counsel, Mr. Bedrosian wrote to the Governor's Office asking that the Governor appoint an independent investigator to conduct the larger investigation of the Hinton Lab. Tr. IV:121; Ex. 244.

26. Subsequently, the Governor referred the larger investigation of the Hinton Lab to the Inspector General's Office and the Inspector General's Office eventually handled the larger investigation of the Hinton Lab. Tr. V:182; Tr. IV:121-122.

The AGO Focused Its Investigation of Farak on Her Misconduct and, Based on its Experience in Dookhan, Decided Not to Undertake a Wider Investigation of the Amherst Lab.

27. In January 2013, the AGO began an investigation into allegations of Farak's misconduct at the Amherst Lab. Tr. II:8*; see* ¶¶ 59-99, *infra*.

28. This was a high-priority investigation involving allegations of misconduct, including the theft of controlled substances. Tr. II:59, 61, 138.

29. The investigation began on January 17, 2013, when the evidence officer at the Amherst Lab, Sharon Salem, was attempting to match certificates of drug analysis with the corresponding samples when she realized that she was missing the samples in two cases. Lab records indicated that one of the chemists, Farak, had completed testing on those

samples earlier in the month and had confirmed that the substances were cocaine. *Cotto*, 471 Mass. at 100.

30. On January 18, 2013, Ms. Salem reported the missing evidence to her supervisor, James Hanchett ("Hanchett"). Mr. Hanchett searched Farak's work station and found a manila envelope containing the packaging for the two missing samples, which had been cut open. Although Farak's analysis was that the samples were cocaine, the samples now tested negative for cocaine. *Cotto,* 471 Mass. at 100.

31. Mr. Hanchett contacted the State Police. Tr. I:100. The State Police shut down the Amherst Lab and began an investigation. The State Police found two additional case envelopes in a temporary storage locker used by Farak, a location where evidence was not allowed to be stored overnight. These envelopes were supposed to have contained suspected cocaine but neither did and the cocaine could not be found. *Cotto*, 471 Mass. at 100.

32. After receiving the call from Mr. Hanchett, State Police detectives interviewed Farak's colleagues. They reported that they had observed a change in Farak's behavior beginning in September 2012, including frequent unexplained absences from her work station and a decrease in her productivity. *Cotto,* 471 Mass. at 100.

33. On that same date, January 18, 2013, the detectives interviewed Farak at the Springfield Courthouse. Ex. 10. Farak ended the interview after a short time and declined to consent to a search of her car. Ex. 10.

34. On January 19, 2013, forensic services personnel at the Amherst Lab conducted an inventory of all drug evidence at the lab. Only the four above-described samples were missing. A similar inventory conducted approximately four months earlier had not uncovered any missing samples, either. *Cotto*, 471 Mass. at 100-101.

35. On January 19, 2013, the State Police searched Farak's car pursuant to a search warrant. *See* ¶¶ 68-99, *infra*. The State Police seized manila envelopes marked with case numbers, paperwork relating to the Amherst Lab, a plastic bag containing a white powdery substance and a brown tar-like substance, a plastic bag containing assorted pills, and photocopies of three newspaper articles about individuals who had been investigated, charged, or sentenced for the illegal possession or theft of controlled substances. Attached to one of the articles was a handwritten note stating, "Thank [G]od I'm not a law enforcement *officer* (emphasis in original)." *Cotto*, 471 Mass. at 101.

36. On January 19, 2013, the State Police arrested Farak at her home. Tr. V:109.

37. On January 25, 2013, the State Police, pursuant to a warrant, searched a tote bag that had been seized from Farak's work station. "The bag contained a variety of substances that could be used to dilute or replace cocaine (soap, baking soda, soy candle flakes, and

oven-baked clay), other items commonly used in the drug trade (plastic laboratory dishes, waxed paper, and fragments of copper wire), and several evidence bags that had been cut open. The evidence bags bore diverse dates from December 16, 2012, to January 6, 2013." *Cotto*, 471 Mass. at 101.

38. At the same time that the AGO was investigating and had begun the prosecution of Farak, the AGO was continuing its investigation and prosecution of Dookhan and therefore, had two cases involving state lab chemists ongoing at the same time. Tr. IV:92-93; *see* ¶¶ 12-26, *supra*.

39. At various times, the AGO staff involved in the separate investigations of the two chemists included Mr. Bedrosian; Sheila Calkins ("Calkins"), a Deputy Attorney General; John Verner ("Verner"), the Chief of the AGO's Criminal Bureau; Dean Mazzone ("Mazzone"), the Chief of the AGO's Enterprise and Major Crime Division within the Criminal Bureau; and Anne Kaczmarek ("Kaczmarek"), an Assistant Attorney General in the Enterprise and Major Crimes Division. Tr. IV:88-90; Tr. VI:36, 67; Tr. V:106.

40. The weekend of Farak's arrest, Mr. Bedrosian and Mr. Verner agreed that Ms. Kaczmarek, as a result of her experience as the lead Assistant Attorney General in the Dookhan case, Tr. V:107, would also be assigned as the lead in the Farak case. Tr. V:125-126.

41. Ms. Kaczmarek was an experienced prosecutor who, at the time she was assigned to prosecute Dookhan and Farak, already had extensive experience in drug cases. Tr. V:126; Tr. VI:150-151. She began her career as a prosecutor in July 2000 in Suffolk County, where she served as a general District Court prosecutor in Dorchester District Court and handled a variety of cases, including guns, drugs, assault and batteries, and miscellaneous District Court misdemeanors. Tr. VI:150. Ms. Kaczmarek was later assigned to the General Felony Team in Superior Court, handling drug and burglary cases, and to the Safe Neighborhood Initiative, concentrating on gang cases that involved guns and drugs. Tr. VI:150.

42. While the Farak case was ongoing and pending, there was an open issue whether there would be, beyond the investigation of Farak, a larger investigation of the Amherst Lab itself and, if so, who would conduct the larger investigation. Tr. V:181.

43. The open question regarding the larger investigation of the Amherst Lab itself was similar to the open question regarding the larger investigation of the Hinton Lab that the AGO had faced less than one year earlier in the Dookhan case. Tr. V:182-183; Tr. IV:110.

44. The discussions at the AGO regarding the possible larger investigation into the Amherst Lab itself centered around the fact that in relation to the Dookhan/Hinton Lab case, the CPCS, Massachusetts Bar Association, Max Stern, and the ACLU had decided that the AGO did not have the impartiality necessary to undertake the larger investigation of the

Hinton Lab. The AGO believed that a similar tack would be taken by the defense bar in the Farak case. Tr. IV:109-110.

45. As a result of what had happened in relation to the Dookhan-related Hinton Lab investigation – the AGO gearing up for a larger Hinton Lab investigation, the defense bar taking the position that the AGO was not independent enough to conduct the investigation, and in the end, the Governor's Office referring the larger investigation to the Inspector General – Mr. Bedrosian believed that the Executive Branch would take responsibility for the larger Amherst Lab investigation related to Farak, just as it had the Hinton Lab investigation related to Dookhan. Tr. IV:111-122.

46. Mr. Bedrosian did not receive any direction from anyone at the AGO indicating that the scope of the investigation of Farak should be limited to the evidence found in her car and desk, Tr. IV:128, and the AGO did not make a decision not to fully investigate the case against Farak or to investigate the case in a way that it would be kept small and "look like it was not a big scandal." Tr. IV:124.

47. The AGO's intention was to go to wherever the facts of the investigation into Farak's misconduct took it. Tr. IV:122-123. The AGO hoped that focusing on Farak's misconduct would result in the ability to identify the scope of her misconduct at the Amherst Lab, but the AGO was not going to undertake a larger investigation into any systemic problems within the Amherst Lab. Tr. IV:111.

48. This thinking was conveyed to the AGO Criminal Bureau team handling the investigation and prosecution of Farak. Tr. IV:111, 122-124. Mr. Verner had no expectation that the AGO would conduct the larger investigation of the Amherst Lab. Tr. V:204. The AGO would "do what was in front of [them], the car, things that were readily apparent. And then the bigger investigation was going to be someone else['s.]" Tr. V:205. Mr. Verner did not know who, if anyone, was going to conduct the larger investigation of the Amherst Lab, but he knew, at least, that it was not going to be the AGO. Tr. V:181.

49. Although she was the lead Assistant Attorney General in the Dookhan case, Ms. Kaczmarek had no role in determining whether the AGO would do a wider investigation of the Hinton Lab. She was not involved in the conversations between the AGO and the Governor's Office, between the AGO and the defense bar, or in any conversations or decisions that led to the possible investigation of the Hinton Lab that would have been done by the Trial Division in the AGO. Tr. VI:85-86, 142. Ms. Kaczmarek did not know how the matter of the wider investigation of the Hinton Lab actually came to be handled by the Inspector General's Office. Tr. VI:85, 142-143.

50. Ms. Kaczmarek was also under the impression that the larger investigation of the Amherst Lab would be conducted by someone other than the AGO. Ms. Kaczmarek knew that the larger investigation of the Hinton Lab was being conducted independently of the AGO's criminal investigation of Dookhan, and assumed that the investigation of the

Amherst Lab would be conducted in the same way, that is, that someone other than the AGO would handle the larger investigation of the systemic flaws in the Amherst Lab. Tr. VI:85-86.

51. On February 26, 2013, Ms. Kaczmarek sent a January 29, 2013, news article about Farak and the Amherst Lab to her friend Audrey Mark ("Mark") at the Inspector General's Office. The Hampshire County Assistant District Attorney quoted in the article stated that, "[his office was] [a]waiting word on whether the Amherst [Lab] would be subject of an investigation by the Inspector General." Tr. VI:90.

52. Ms. Kaczmarek and Ms. Mark had known each other since about 2001 or 2002, having worked together in the Suffolk County District Attorney's Office. Tr. VI:172.

53. In her email, Ms. Kaczmarek pointed out that the Amherst Lab was different than the Hinton Lab, meaning that it looked to her at the time that Farak (not the Amherst Lab itself) was the "bad actor" and that in contrast to the Hinton Lab, there was not a breakdown of quality control and managerial oversight. Tr. VI:91; Ex. 163.

54. Ms. Kaczmarek also wrote, "Audrey, when they ask you to do this audit say no." Knowing Ms. Mark was currently in the middle of the Hinton Lab investigation, had young children, and worked part-time, when she said "you," Ms. Kaczmarek meant that Audrey, personally, should say "no" to any request that she do the investigation and that someone in the Inspector General's Office other than Ms. Mark should do the investigation. Tr. VI:91, 173. She did not mean that the Inspector General's Office should not do the investigation. Tr. VI:91, 173.

55. Ms. Mark wrote back: "Am I allowed to say no ???" and inserted a smiley face. Tr. VI:173. Ms. Kaczmarek understood Ms. Mark to mean that if Ms. Mark was asked to work on the investigation, she was not sure she could refuse – in other words, she was joking. Tr. VI:173.

56. The AGO informed the Executive Branch that the AGO was not going to conduct the larger investigation of the Amherst Lab in three specific ways: (1) the AGO alerted the Governor's Office and the District Attorneys that the AGO was not going to conduct an investigation into the Amherst Lab, Tr. IV:111; (2) Mr. Verner told Major James Connolly, who was the head of the State Police Crime Laboratory in Maynard, Tr. V:204, that the AGO was not going to conduct an investigation into the Amherst Lab, Tr. V:183, 204-05; and (3) Ms. Calkins told Andrea Cabral, the Secretary of Public Safety, that the AGO was not going to conduct an investigation into the Amherst Lab. Tr. V:183.

57. The Court finds that the AGO did not fail to comply with any alleged duty it had to search for exculpatory evidence or act with any intention to deprive any defendant of any right to exculpatory evidence when it determined that it would keep its investigation focused on Farak and would not undertake a larger investigation of the Amherst Lab, but that it

would leave that investigation to other Executive Branch agencies. The Court finds that the AGO informed other agencies that it would not undertake a wider investigation of the Amherst Lab.

The State Police and the AGO Assigned an Experienced Team to Conduct a Thorough Investigation of Farak.

58. In January 2013, State Police Detective Lieutenant, now Major, Robert Irwin served as the general supervisor to all State Police troopers assigned to the AGO. Tr. II:94; Tr. III:138. Mjr. Irwin has been a member of the State Police for over thirty (30) years. Tr. II:144.

59. Mjr. Irwin was based out of the AGO's Boston office and was heavily involved in the Dookhan investigation when the Farak investigation began in January 2013. Tr. II:99, 142.

60. On an ongoing basis, the State Police has troopers embedded in the AGO's Springfield and Boston offices. Tr. II:138-139. The State Police unit assigned to the AGO's Springfield office was comprised of only a sergeant and two troopers, so the troopers in the unit had to perform many different types of investigations, unlike troopers assigned to the AGO's Boston office, who are typically assigned to specific divisions (*e.g.*, White Collar or Enterprise and Major Crimes). Tr. II:138-139.

61. In January 2013, Sgt. Joseph Ballou ("Sgt. Ballou") was the ranking trooper embedded in the AGO's Springfield office. Tr. II:58; Tr. III:137-139. Sgt. Ballou has been a member of the State Police for over twenty-three (23) years. Tr. III:137.

62. Mjr. Irwin assigned troopers to investigations on a case-by-case basis. Tr.II:139.

63. On January 18, 2013, at approximately 7:00 PM, Mjr. Irwin called Sgt. Ballou and informed him that two drug samples had been discovered to be missing from the Amherst Drug Lab. Tr. III:138.

64. Mjr. Irwin assigned Sgt. Ballou as the case officer on the Farak case, and instructed him to proceed immediately to the District Attorney's Office in Hampshire County (the Amherst Lab is located in Hampshire County). Tr. II:58; Tr. III:138-139.

65. Within the State Police, when a trooper is assigned to be the case officer, the trooper is responsible for obtaining search warrants, reviewing the evidence seized, writing the case report, providing the Assistant Attorney General with a report on the evidence in order to assist the AGO in determining whether to prosecute, and communicating with the Assistant Attorney General about the case. Tr. II:58; 66; Tr. III:140.

66. The main line of communication in an AGO criminal investigation is, typically, between the case officer and the Assistant Attorney General assigned to prosecute the case. Tr. II:59. In the Farak investigation, this was Sgt. Ballou and Ms. Kaczmarek.

67. The Court finds that Sgt. Ballou, the case officer, was based in the AGO's Springfield Office. The Assistant Attorney General, Ms. Kaczmarek, was based in the AGO's Boston Office.

The State Police Searched Farak's Car, Photographed its Contents, Seized Physical Evidence that it Stored in the Evidence Room at the AGO's Springfield Office, and Submitted a Search Warrant Return Grouping and Labeling Certain Papers Seized as "Assorted Lab Paperwork."

68. On January 18, 2013, following the call from Mr. Hanchett, the interviews of Farak's co-workers, and the brief interview of Farak, State Police troopers worked into the night drafting a search warrant affidavit to obtain a warrant to search Farak's car. The troopers applied for and were granted the warrant at approximately 1:00 AM the following morning. Tr. III:175; Tr. V:123.

69. The warrant authorized a search for: (1) white powdery substances that could be used as adulterants/dilutants; (2) records of purchases of lighters, substances that could be used as adulterants/dilutants, plastic bags, pipes/smoking implements; (3) cocaine and other controlled substances; (4) records of ownership or access/possession/control of the car; and (5) records or paperwork associated with controlled substances. Ex. 172.

70. Upon receipt of the search warrant, State Police troopers immediately executed a search on Farak's car, starting at approximately 3:23 AM. Tr. II:9-10.

71. Mjr. Irwin, the highest ranking officer on the scene, directed the other State Police troopers during the search. Tr. II:80. Over the course of his career, Mjr. Irwin has executed hundreds of search warrants. Tr. II:144.

72. Mjr. Irwin, State Police Trooper Randy Thomas, and Sgt. Ballou conducted the car search, and Trooper Christopher Dolan (from State Police Crime Scene Services) took photographs during the search. Tr. II:9, 13, 92-93; Tr. III:141.

73. The State Police troopers involved in the search worked a long day and night. On January 18, 2013, Tpr. Thomas worked his regular shift from 8:30 AM to 5:00 PM, Tr. II:10, 59, received a call about the Farak investigation at around 7:00 PM or 8:00 PM, and stayed awake the whole night before actually executing the warrant. Tr. II:10, 59. Similarly, Mjr. Irwin had been awake for approximately twenty-four (24) hours by the time the car search concluded. Tr. II:102.

74. After participating in the search of Farak's car, Mjr. Irwin was not directly involved in the Farak investigation other than in his role as the general supervisor of the State Police unit assigned to the AGO. Tr. II:94.

75. Tpr. Thomas has been a trooper for 16-1/2 years, and has been assigned to the AGO for 8-1/2 years. Tr. II:55. He has received various trainings with the State Police and the AGO, including several trainings regarding the seizure, documentation, and inventory of evidence. Tr. II:55-56.

76. Tpr. Thomas was assigned as the evidence officer at the scene of Farak's car search. Tr. II:56-57. As such, he collected evidence that was found and labelled by other troopers, put it in an evidence bag, and secured it from the scene to the AGO's Springfield office for review at a later time. Tr. II:56-57.

77. The Northampton barracks is the location for the State Police "B" troop headquarters, and consists of, among other things, a three-story building with a lower level consisting of four (4) or five (5) garage bays. Tr. II:77.

78. There was a State Police cruiser in one of the bays and Farak's car in another, leaving the troopers two (2) or three (3) empty garage bays with which to work. Tr. II:77-78.

79. The search of Farak's car took place in the garage at the Northampton barracks, which was not heated, and it was very cold during the search. Tr. II:12, 76-77; Tr. III:141.

80. The search of Farak's car took approximately 1-1/2 hours to execute. Tr. II:82.

81. Tpr. Dolan first took photographs of the overall scene and then photographed items as the other troopers took them out of the car. Tr. III:141.

82. The troopers divided up the car into areas for each to search. Tr. II:61, 142.

83. There were no tables in the garage and so the troopers had to lay evidence out on the floor as they removed it from the car. Tr. II:62, 78; Tr. III:175.

84. In executing the search warrant, the State Police troopers searched Farak's car for, and ultimately seized, any items that were clearly or possibly relevant and that fell within the parameters of the search warrant's authorization. Tr. II:21.

85. After securing any evidence or possible evidence from the car, the State Police troopers transported it back to the AGO's Springfield office for a more thorough review at a later date. Tr. II:22, 145.

86. In executing a search warrant, law enforcement officers often do not know the true significance of the items they seize. Tr. II:63. Rather, the significance may become

apparent later as they are reviewed and considered in the context of the investigation. Tr. II:15.

87. Tpr. Thomas's initial observation of Farak's car was that it appeared as if someone lived out of it – it was a complete mess, full of trash, papers, stuff everywhere, with junk and garbage amongst the paperwork. Tr. II:60, 82-83. Tpr. Thomas had never executed a search warrant on a car in such condition. Tr. II:61.

88. Mjr. Irwin's initial observation of Farak's car was that it was disgusting, completely unkempt, with paper and debris everywhere. Tr. II:142-143.

89. Sgt. Ballou observed that Farak's car was in deplorable condition, absolutely full of stuff. Tr. III:141.

90. Hundreds of pieces of paper were found in Farak's car during the search. Tr. II:50, 68.

91. Most of the papers seized as physical evidence from Farak's car were found inside lab folders. Tr. III:142.

92. While executing the search of the car, Sgt. Ballou scanned through papers that he found inside lab folders, and these papers appeared to be lab-related paperwork; he did not go through every single piece of paper found at the time of the search. Tr. III:143.

93. Due to the circumstances of the search, including the volume of physical evidence, which included hundreds of pieces of paper, it would have been unreasonable for the troopers to review every piece of paper in detail at the time of its seizure. Tr. II:68, 95; Tr. III:143; Tr. IV:10-11.

94. At the time of the car search, the investigation into Farak's misconduct was in its infancy. Tr. II:102. Therefore, in searching Farak's car, State Police troopers seized everything they thought might have any connection to the theft of controlled substances, including papers they later labelled as "assorted lab paperwork," because these items could have some significance to her prosecution. Tr. II:64-65.

95. The night the search warrant was executed, Mjr. Irwin was in contact with Mr. Verner, then Chief of the AGO's Criminal Bureau. Tr. II:94. Mr. Verner was out of state at the time and Mjr. Irwin kept him apprised with updates throughout the night. Tr. V:123-124.

96. Mr. Verner, in turn, updated Mr. Bedrosian and Ms. Kaczmarak throughout the weekend regarding the ongoing and developing case. Tr. V:124-126.

97. Based on the physical evidence seized from the car and information obtained from interviews, Farak was arrested at approximately 10:30 PM on Saturday, January 19, 2013,

Tr. II:97-98, and was arraigned in Belchertown District Court on January 22, 2013. Tr. V:126.

98. The Court finds that the State Police obtained the warrant to search Farak's car in accordance with standard practices.

99. The Court finds that the State Police conducted the search in accordance with standard practices, including labeling the papers as "assorted lab paperwork" and setting them aside for further review later.

The State Police Wrote a Proper Search Warrant Return.

100. Where a search warrant is involved, time is of the essence; the failure to file a search warrant return in a timely manner could result in suppression of the evidence. Tr. II:70.[5]

101. On January 23, 2013, Tpr. Thomas timely filed the search warrant return for the items seized from Farak's car within the seven (7) days required by law. Tr. II:22-23; Ex. 172.

102. When Tpr. Thomas filed the search warrant return, the Farak investigation was ongoing and there were "moving parts." Tr. II:34-35, 53. For example, the AGO was preparing an affidavit for a search warrant for a duffel bag that was found at Farak's work station. Tr. II:34-35, 53.

103. Tpr. Thomas did not review each of the hundreds of pieces of paper seized prior to drafting the search warrant return. Tr. II:51, 68. On the search warrant return, Tpr. Thomas listed twenty (20) items, or in some cases, groups of items, which had been seized from Farak's car by number. Tr. II:23; Ex. 172. Some items on the search warrant return were singled out and itemized in more detail because they were readily identifiable and immediately appeared important and relevant, such as an envelope that was marked and appeared to be related to a specific case. Tr. II:26-28, 69; Ex. 172 (Item 11).

104. Items numbered four (4), five (5), and eight (8) were listed on the return as "[a]ssorted lab paperwork." Tr. II:23; Ex. 172.

105. Tpr. Thomas did not recall whether Mjr. Irwin, Sgt. Ballou, or anyone specifically instructed him to use the phrase "assorted lab paperwork," Tr. II:29, but use of the phrase "assorted lab paperwork" is a common practice in a situation such as this one, given all the circumstances of the search, including the voluminous papers seized and the need to secure items for more thorough review at a later time. Tr. II:24-26.

[5] Section 3A of G.L. c. 276, provides: "Every officer to whom a warrant to search is issued shall return the same to the court by which it was issued as soon as it has been served and in any event not later than seven days from the date of issuance thereof, with a return of his doings thereon . . . ."

106. Mjr. Irwin confirmed that in his more than thirty (30) years of writing and viewing search warrant returns for the State Police, the use of phrases such as "assorted paperwork" and "assorted lab paperwork" on a warrant return to describe papers seized was extremely common, because officers do not have time to go through and itemize every piece of paper seized that might have evidentiary value. Tr. II:101-102, 144-145.

107. Tpr. Thomas testified that the difference between the three groups of assorted lab paperwork was likely just packaging, because only so many papers would fit into an evidence bag. Tr. II:26. Sgt. Ballou testified that the three groups of assorted lab paperwork were designated separately because they were in separate lab manila folders. Tr. III:205; Tr. IV:9-10.

108. On January 24, 2013, Tpr. Thomas wrote a search warrant execution report, which is a synopsis or summary of what occurred during the search warrant execution. Tr. II:29; Ex. 11. Typically, details regarding what was found during the execution of the warrant are provided at a later time by the case officer. Tr. II:71.

109. Tpr. Thomas did not personally review the papers that were described as "assorted lab paperwork" prior to writing his search warrant execution report. Tr. II:31.

110. After executing the warrant for the search of Farak's car and writing the search warrant return and search warrant execution report, Tpr. Thomas did very little, if any, work on the Farak case. Tr. II:67. Tpr. Thomas never reviewed Sgt. Ballou's file on the Farak investigation, Tr. II:71, and does not recall having any conversations with Ms. Kaczmarek about the paperwork found in Farak's car. Tr. II:73.

111. The Court finds that there was nothing unusual or untoward about Tpr. Thomas's description of the contents of the trunk as "assorted lab paperwork" where the papers were voluminous, the items were being secured for review at a later time, and the troopers were required to file the search warrant return within seven days.

112. The Court finds that the State Police submitted the search warrant return in accordance with standard practice.

The State Police Secured the Physical Evidence, Including the "Assorted Lab Paperwork" (which Included the Mental Health Records) In the State Police Evidence Room at the AGO's Springfield Office. There Is a Distinction Between Physical Evidence, Which Is Stored in A Locked Evidence Room and Documents Such as Case Reports, Which Are Kept in the Trooper's Case File.

113. The State Police assigned to the AGO have a separate, secure, alarmed, and locked evidence room in the AGO's Springfield office. Tr. II:83, 85; Tr. III:144-145.[6]

114. Evidence is secured in the State Police evidence room in the AGO's Springfield office until an Assistant Attorney General or case officer takes the evidence out to examine it in more detail. Tr. II:85.

115. The evidence officer is responsible for maintaining the chain of custody from the crime scene to the evidence room, and the case officer then takes over responsibility for the evidence going forward. Tr. II:85.

116. In accordance with their training and customary practice, after securing the physical evidence seized from Farak's car pursuant to the search warrant, Tpr. Thomas and Sgt. Ballou transported the evidence to the AGO in Springfield in a cruiser, and then secured the evidence in the State Police evidence room. Tr. II:83-84; Tr. III:144-145, 165-166, 211-212; Tr. IV:22.

117. Consistent with standard practice, Sgt. Ballou, the case officer, was responsible for turning over reports, evidence logs, and photographs of the physical evidence to the Assistant Attorney General. The Assistant Attorney General would then be responsible for providing any discovery to the defendant. All physical evidence would remain in the evidence room in the AGO's Springfield office. Tr. III: 211-212.

118. On February 6, 2013, Sgt. Ballou wrote a police report covering the initial stages of the investigation and the obtaining and execution of a search warrant, and referencing the physical evidence seized from Farak's car, including notes, papers, packaging, and lab test results. Tr. III:152-154; Ex. 10.

119. In mid-February 2013 and in preparation for testimony at the grand jury, Sgt. Ballou reviewed in more detail the physical evidence that had been seized from the car and was being stored in the boxes and bags in the evidence room, including the three groups of envelopes which had previously been described as "assorted lab paperwork." Tr. II:31; Tr. III:145, 175, 206, 209.

[6] Some witnesses referred to the evidence room as a "locker." *See, e.g.,* Tr. II:85. For consistency and clarity, this space is referred to throughout as the "evidence room."

120. In separate envelopes among the boxes and bags of physical evidence seized from Farak's vehicle were news articles with handwritten comments about officials who had been caught with drugs and a few papers arguably containing admissions of drug use, including: (1) one page titled, "ServiceNet diary card;" (2) one page containing a handwritten chart with a column labelled "Pros," a column labelled "Cons," a row labelled "resisting," and a row labelled "TB;" (3) one page containing handwritten charts that appeared to list emotions and days of the week; (4) a Quest Diagnostics lab report; (5) two pages titled, "Emotion Regulation Worksheets;" and (6) one page with a chart labelled "Skills" and a column on the left-hand side labelled "Notes."[7] Tr. IV:17-18, 41; Ex. 205. (For ease of reference, these papers are collectively referred to as "mental health records.")

121. Sgt. Ballou thought these specific pieces of paper, which suggested Farak's drug use, might be useful evidence for the grand jury hearing. Tr. III: 208.

122. Sgt. Ballou called Ms. Kaczmarek after he identified the papers, "scanned them to Boston," then returned the papers to the evidence room. Tr. III: 166, 208.

123. Sgt. Ballou considered these papers to be "physical evidence," not "documents." Tr. III: 122.

124. Per Sgt. Ballou's training and experience as a State Police Officer, an item seized by a police officer that remains in his custody for the purpose of preserving its integrity for use in a court of law is "physical evidence;" something that is written to document a police investigation, such as a police report or evidence log, is a "document," and is "much different" than physical evidence. Tr. IV: 22-23.

125. Because the news articles and mental health records were physical evidence, Sgt. Ballou did not keep them in his case file. Tr. III:165-166. After taking the physical evidence out of the evidence room for review, he then returned all of it to the evidence room. Tr. III:166.

126. The Court finds that there is a distinction between "physical evidence" kept in an evidence room and "documents" kept in a police file.

127. The Court finds under the circumstances of this case that the mental health records were "physical evidence."

[7] ServiceNet is an "integrated behavioral health agency serving the broad needs of people with mental illness, homelessness, brain injuries, and intellectual disabilities throughout Hampden, Hampshire, Franklin, and Berkshire counties." ServiceNet Website, located at http://www.servicnet.org/content/our-history (last visited on January 27, 2017).

128. The Court finds that although the mental health records were in documentary form, they were papers seized from Farak's car and therefore, they were physical evidence and were kept as physical evidence in the evidence room at the AGO's Springfield office.

129. The Court finds that the State Police at the AGO kept the mental health records as physical evidence in its evidence room and that they were not kept as part of Sgt. Ballou's "file."

130. The Court finds that the fact that the mental health records were, at one time, scanned and sent to Ms. Kaczmarek, does not change their character from physical evidence to something that would be kept as part of Sgt. Ballou's file.

131. The Court finds that the State Police and the AGO maintained the physical evidence, including the mental health records, in secure storage in the evidence room at the AGO's Springfield Office in accordance with standard practice.

Sgt. Ballou Reviewed the Physical Evidence in Preparation for the Grand Jury and Emails Ms. Kaczmarek Regarding Papers He Found Suggesting Farak's "Admissions" of Drug Use on a ServiceNet Diary Card and Emotion Regulation Worksheets (Mental Health Records) that Had Been Seized From the Trunk of Her Car, But Sgt. Ballou and the AGO Attorneys Were Concerned About Privileges.

132. Prior to viewing the mental health records in connection with the Farak investigation, Sgt. Ballou had never seen a ServiceNet diary card or an Emotion Regulation worksheet, and he did not know what they were. Tr. III:146, 149. But, he thought that the mental health records contained possible admissions of drug use by Farak and he believed that the diary card and worksheet were something that a psychiatrist or counselor might have asked her to fill out. Tr. III:148, 150.

133. Sgt. Ballou was "excited" when he found these papers suggestive of admissions of drug use and he notified Ms. Kaczmarek about them right away. Tr. III:159. At the same time, Sgt. Ballou was concerned that the papers might be "privileged" due to a doctor/patient relationship and he wondered whether the papers could be admitted into evidence at the grand jury. Tr. III:159. When Sgt. Ballou called Ms. Kaczmarek to tell her about the evidence, she asked him to email the papers to her so that she could take a look at them herself. Tr. III:158-159, 166, 208; Tr. IV:14.

134. On February 14, 2013, Sgt. Ballou sent an email to Ms. Kaczmarek, copying Mjr. Irwin and Mr. Verner. Tr. II:152; Tr. III:157-158; Ex. 205. The body of the email 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

Ex. 205.

135. Sgt. Ballou attached to his February 14, 2013 email the ServiceNet diary card and the six (6) other pages of mental health records, *see* ¶ 120, which he thought might be admissions. He also included scanned copies of news articles that had been found in the trunk. Tr. II:152-154; Ex. 205.

136. The ServiceNet diary card indicated drug activity between Tuesday, December 20 and Monday, December 26, without any reference to the year. Ex. 205.

137. One of the newspaper articles, dated March 29, 2011, was a story about the illegal possession of steroids by law enforcement officers and had been printed from a computer on September 20, 2011. Another newspaper article, dated October 25, 2011, was a story about a Pittsfield pharmacist who was sentenced to three years in prison for stealing OxyContin from her workplace, and had been printed from a computer on October 28, 2011. Another newspaper article, dated December 2, 2011, was a story about a former San Francisco police department drug laboratory technician who had stolen cocaine from her workplace and had been printed from a computer on December 6, 2011. One of the articles bore the handwritten note, "Thank [G]od I'm not a law enforcement *officer* (emphasis in original)." Ex. 205.

138. Sgt. Ballou sent the ServiceNet diary card, worksheets, and news articles to Ms. Kaczmarek (with a cc to John Verner) because he thought those were the papers that were "potentially inculpatory or potentially relevant to the case." Tr. IV:19.

139. When Ms. Kaczmarek received Sgt. Ballou's email with the mental health records attached, it was first time she had seen them. Tr. VI:97.

140. As Chief of the AGO's Criminal Bureau, Mr. Verner received such a large volume of emails per day that he only dealt immediately with emails directed at him, not to emails in which he was only copied. With regard to Sgt. Ballou's email regarding Farak's admissions, he had only been copied. Tr. V:120. Mr. Verner never actually looked at the attachments to Sgt. Ballou's email dated February 14, 2013. Tr. V:120; Ex. 205.

141. Ms. Kaczmarek put the mental health records aside, segregating them in a separate folder in her file because, like Sgt. Ballou, she thought they might be privileged and was

concerned about potential violations of *Dwyer* and HIPAA if she were to handle the records improperly. Tr. VI:167-168; 181.[8]

142. Ms. Kaczmarek and Mr. Verner discussed Farak's admissions of drug use and, more specifically, her concerns regarding whether the records containing her admissions of drug use might be privileged, and whether she should introduce the records into evidence in the grand jury. Tr. V:120, 133-134, 214-215; Tr. VI:181.

143. Mr. Verner asked Ms. Kaczmarek if she needed to introduce the admissions of drug use in order to get the indictments; Ms. Kaczmarek said no. Tr. V:133.

144. With regard to the grand jury, Mr. Verner and Ms. Kaczmarek decided together, out of an abundance of caution, that there was no need to introduce the admissions of drug use into evidence against Farak and risk causing a *McCarthy*/*O'Dell* issue later. Tr. V:134, 215.[9]

145. Ms. Kaczmarek's understood that *Dwyer* set forth a protocol for releasing mental health records, which she believed the papers containing Farak's admissions might be. Ms. Kaczmarek also understood that the violation of that protocol could have resulted in disbarment. Tr. VI:167.

146. That Ms. Kaczmarek and Sgt. Ballou's were concerned that the mental health records raised potential privilege and *Dwye*r issues was corroborated by the fact that after the papers were viewed by Attorney Luke Ryan ("Ryan"), who represented defendant Rolando Penate ("Penate"), and Attorney Ryan moved for an order to disseminate the records further (to the attorneys for defendants Rafael Rodriguez ("Rodriguez"), Jermaine Watt ("Watt"), and Erick Cotto ("Cotto")), Farak's defense counsel Attorney Elaine Pourinski ("Pourinkski") objected on the grounds the AGO had allowed Mr. Ryan to view the mental health records without giving Farak an opportunity to object and in violation of *Commonwealth v. Dwyer* and Farak's privacy rights. Ex. 192.

147. The Court finds that Ms. Kaczmarek was concerned about what she perceived as the privileged nature of Farak's mental health records.

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[8] *Dwyer* is a reference to *Commonwealth v. Dwyer*, 448 Mass. 122 (2006) (the protocol set forth in *Dwyer* governs review or disclosure of presumptively privileged records by defense counsel), *see* http://www.mass.gov/courts/forms/tc/dwyer-forms-gen.html) (last visited February 17, 2017), and HIPAA is a reference to the Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191, 110 Stat. 1936, and privacy regulations promulgated pursuant to its Title II at 45 C.F.R. Parts 160 and 164 (2007).

[9] These are references to two seminal cases that challenged indictments based upon the Commonwealth's presentations to the grand jury: *Commonwealth v. O'Dell*, 392 Mass. 445 (1984), and *Commonwealth v. McCarthy*, 385 Mass. 160, 163 (1982).

148. The Court finds that Ms. Kaczmarek did not introduce the mental health records into the grand jury out of respect for Farak's privacy and because she did not need the records to secure an indictment.

149. The Court finds that after discussion with Mr. Verner and out of an abundance of caution, Ms. Kaczmarek did not present the mental health records to the grand jury in her prosecution of Farak, but that this was as the result of a mistake as to their character and their significance, not as the result of an intentional or deliberate design to withhold exculpatory evidence from the third party defendants. The Court finds that Ms. Kaczmarek acted responsibly in this regard.

The AGO Made a Full Disclosure of All the Evidence, Including the Mental Health Records, to Farak.

150. Although Ms. Kaczmarek had set aside the mental health records and had not presented them to the grand jury, Ms. Kaczmarek, pursuant to her obligations under Mass. R. Crim. P. Rule 14, disclosed the mental health records to Farak's own defense attorney, Ms. Pourinski. Tr. VI:111, 113, 168.

151. In accordance with AGO standard practice, Farak and her attorney, Ms. Pourinski, visited the AGO's Springfield office to examine all of the physical evidence associated with the Farak case that was held in the evidence room, which included the mental health records. Tr. III:167; Tr. IV:20-21.

152. The Court finds that Ms. Kaczmarek discharged her obligations under Rule 14 to the defendant Farak, the sole defendant she was prosecuting, by making the mental health records available to her.

The Assistant Attorney General Made Mistakes Regarding the Dates on the ServiceNet Diary Card but Her Assumption That the Year of the Entries was 2012, not 2011, was Consistent with Witness Interviews, Observations, and Other Factors.

153. The ServiceNet diary card contained handwritten notes about Christmas time and the dates December 20 through 26 were listed, but without any corresponding year. When Sgt. Ballou reviewed the mental health records and discovered what appeared to be admissions of Farak's drug use, he presumed that the worksheets were prepared just a few weeks prior to her January 2013 arrest. Tr. III:151, 195-197; Ex. 176.

154. Ms. Kaczmarek had seen photos taken of Farak's car at the time of the search, and given its condition, Ms. Kaczmarek presumed that Farak had just recently tossed the papers into the pile of stuff. As Ms. Kaczmarek testified, she could not imagine someone keeping something in her car for over a year. Tr. VI:165-166.

155. Consequently, when Ms. Kaczmarek reviewed the mental health records that Sgt. Ballou had emailed her, she did not realize, either, that the dates on the ServiceNet diary card referred to anything other than the Christmas that had just recently occurred, December 2012. Tr. VI:85.

156. Ms. Kaczmarek's working theory of the Farak case was that Farak had been using drugs over the course of only the past six months, particularly given the grand jury testimony from Farak's supervisor at the Amherst Lab, Mr. Hanchett, who testified that Farak was a great performer up until about four or five months prior to her arrest and that she did not miss work, and from Farak's wife, who testified that she had only seen Farak use drugs prior to her working as a chemist. Tr. VI:126-127, 144-145.

157. This working theory of the case was also supported by Ms. Kaczmarek's own personal observations of Farak. Ms. Kaczmarek had first met Farak while investigating the Dookhan matter in early fall 2012 and when she saw Farak again at her arraignment in the beginning of 2013, Farak looked like a completely different human being. Tr. VI:128, 143-144. Further, in Ms. Kaczmaerk's experience as a prosecutor, drug users stick to one drug. Tr. V:101.

158. Sgt. Ballou had the same working theory. As a result of interviews with Farak's co-workers, who had noted a recent decline in Farak's production, and his personal observations of Farak, Sgt. Ballou also believed that her misconduct began just a couple of months prior to her arrest. Tr. III:194-195; Tr. IV:31-32.

159. Specifically, when Sgt. Ballou personally observed Farak in September 2012, she appeared healthy, and did not appear like someone who was addicted to crack cocaine. Tr. IV:30.

160. Ms. Salem worked side by side with Farak for nine years at the Amherst Lab and she never noticed any decline in Farak's productivity until July or August 2012, when the State Police took over control of the lab and there was a resulting increase in their paperwork requirements. It had never occurred to Ms. Salem that Farak was under the influence of narcotics or anything else while at work. Tr. II: 199-201.

161. Ms. Kaczmarek conceded at the recent evidentiary hearing that she had misjudged the dates on the ServiceNet diary card and had made a mistake as to their significance in terms of the duration of Farak's drug use. If Ms. Kaczmarek had realized that the information written on the ServiceNet diary card was actually written a year earlier, she would have realized that the scope of Farak's misconduct was greater than she thought, and when she asked the Court to let her share grand jury transcripts with the District Attorneys' Offices, she would have sought an order that would have permitted her to share arguably privileged mental health records to the District Attorneys' Offices at the same time. Tr. VI:113, 166-167.

162. Indeed, as late as September 10, 2013, Ms. Kaczmarek had not realized that Farak's drug use stretched back further than her working theory allowed. In a September 10, 2013 email to Sharon Salem (at the Amherst Lab), she wrote: "Can you think of anything else that came up in court yesterday that I need to get for the defense attorneys? I feel like they're seeking answers for how long Sonja was doing this when there is no way to tell." Ex. 208.

163. The Court finds that in early 2013 when Ms. Kaczmarek saw the ServiceNet diary card and other worksheets, she did not realize their significance, specifically, that she did not realize that the dates on Farak's ServiceNet diary card referred to December 2011, not December 2012 and that especially in light of other information she had, such as that there had been no change in her appearance or her productivity at the Amherst Lab and that her car was full of other papers, she made an honest mistake in thinking that the entries related to Christmas 2012, which had just passed.

164. The Court finds that Ms. Kaczmarek's working theory of the case was reasonable and she proceeded according to her working theory.

165. The Court finds that Ms. Kaczmarek's failure to recognize the significance of the ServiceNet diary card was unintentional and was not a deliberate intention to withhold the information from the District Attorneys, these defendants, or others.

The AGO Wrote the Farak Prosecution Memorandum, Pointing Out the Privilege Issue with the Mental Health Records and Noting that the Mental Health Records Have Not Been Given to the District Attorneys "Yet."

166. Per AGO Policy, before indicting someone on criminal charges, an Assistant Attorney General was required to prepare a prosecution memorandum ("pros memo") detailing the facts of the case, the evidence, the charges the Assistant Attorney General planned to seek, and any possible problems with the case. Tr. IV:96; Tr. VI:107-108.

167. The pros memo would be submitted to the Division Chief, Bureau Chief, and then to the Executive Bureau (either to the First Assistant Attorney General or Deputy Attorney General) for approval. Tr. IV:96; Tr. V:169-170; Tr. VI:108-109.

168. When Mr. Verner served as Chief of the Criminal Bureau and was approving a particular pros memo, he would do "some issue spotting" and write notes on the memorandum in order to provide his additional thoughts about the case to the First Assistant or Deputy Attorney General. Tr. IV:158-159; Tr. V:170; Tr. VI:169.

169. If Mr. Verner had questions for the Assistant Attorney General who drafted the document or if he did not approve the pros memo, he would return the memorandum to the Assistant Attorney General or the Division Chief, and say, "you've got to fix some stuff." Tr. V:170.

170. Mr. Verner's comments for the Assistant Attorney General were relayed in person or by email and the Assistant Attorney General corrected any problems in the memorandum before it was forwarded to the Executive Bureau (either the First Assistant Attorney General or Deputy Attorney General). Tr. VI:169-170.

171. Once approved by Mr. Verner, the pros memo would go "upstairs" (meaning, to the Executive Bureau) to Mr. Bedrosian (the First Assistant Attorney General) or Ms. Calkins (the Deputy Attorney General) and, once either Mr. Bedrosian or Ms. Calkins gave final approval of the pros memo, it was sent back to the Assistant Attorney General to be placed in the file. Tr. V:170.

172. In March 2013, Ms. Kaczmarek prepared and circulated a pros memo about the arrest and investigation of Farak (the "Farak Pros Memo"). Ex. 163.

173. In the Farak Pros Memo, Ms. Kaczmarek outlined the facts of the case and listed various "items of note" that the State Police had recovered from Farak's car, including "manila envelopes with sample numbers; news article involving an indicted chemist out in San Francisco; and mental health [records] describing how Farak feels when she uses illegal substances and the temptation of working with 'urge-ful samples.'" Ex. 163.

174. After discussing the matter with Mr. Verner and out of an abundance of caution, Ms. Kaczmarek decided not to introduce the ServiceNet diary card or other mental health records into evidence at the grand jury because they were not needed to establish probable cause in the case against Farak and there was a concern that the evidence could potentially be privileged. Tr. III:161-162; Tr. IV:15; Tr. VI:111, 188. In footnote seven (7) of the Farak Pros Memo, Ms. Kaczmarek wrote that the mental health records were not submitted to the grand jury out of an abundance of caution in order to protect possibly privileged information," but noted that case law suggested it was not privileged. Ex. 163.

175. On March 27, 2013, Ms. Kaczmarek's supervisor, Mr. Mazzone, then Chief of the Enterprise and Major Crimes Division, approved the Farak Pros Memo and forwarded it to the Bureau Chief, Mr. Verner, for his review. Tr. V:171; Tr. V:56; Tr. VI:40.

176. When Mr. Verner reviewed the Farak Pros Memo, he circled footnote seven (7) (see ¶ 174) and added his own note: "this paper[work] NOT turned over to DA's Office yet." Tr. V:169; Ex. 163.

177. At the same time, Mr. Verner was in the process of sending Farak-related information to the District Attorneys' Offices (*see* ¶ 211, *infra*) and so these mental health records were, at that time, on his mind. Tr. V:229.

178. The Farak Pros Memo outlined "Potential Issues" with the case, noting that "[t]he most significant issue that is outstanding is the scope of Farak's drug abuse. We are charging her with the tampering of the four [4] 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 cases from July 1, 2012 until January 18, 2013 has been requested." Ex. 163.

179. Mr. Verner, Mr. Mazzone, and Ms. Kaczmarek decided to move forward and indict Farak based on the four samples they had and determined that if they later found evidence of more tampering, they would convene a new grand jury. Tr. V:207; Tr. VI:163.

180. The basis for the AGO's decision to proceed on the indictment of Farak on the four charges of tampering was that these charges were supported by the evidence they had at the time, the additional reports of tampering they had investigated had not changed their theory of the case, and an additional count or two would not have an impact on Farak's sentence. Tr. V:207-208; Tr. VI:157, 163-164.

181. The AGO's thinking remained the same as the case progressed: while every new report was investigated, nothing changed the theory of the case or justified convening a new grand jury. Tr. V:207.

182. The Farak Pros Memo noted how the Farak case was unlike the Dookhan case, including "there was not a breakdown of quality control and managerial oversight." Ex. 163.

183. The Farak Pros Memo also referenced the possibility of that Farak might make a "proffer." Tr. IV:148-149; Tr. VI:164; Ex. 163. A proffer is an agreement between a criminal defendant or suspect and a prosecutor pursuant to which the defendant provides information that cannot be used against him. Tr. IV:98.

184. In noting the possibility of a proffer, Ms. Kaczmarek was indicating that a proffer might be worth considering, but she did not yet have sufficient details to know if it would ultimately make sense in the case. Tr. VI:164.

185. Mr. Verner approved the Farak Pros Memo. Ex. 163.

186. The Farak Pros Memo was sent to the Executive Bureau. Mr. Bedrosian's name was listed on the cover page, but was crossed out and Ms. Calkins's name is to the right of it. Mr. Bedrosian has no memory now of having seen the Farak Pros Memo at the time it was sent upstairs for approval. Tr. IV:96.

187. Ms. Calkins's name is handwritten next to the other reviewers at the top of the Farak Pros Memo. Tr. IV:96; Ex. 163. Ms. Calkins recalls receiving the Farak Pros Memo and made a note on it on page two. However, Ms. Calkins did not sign the Farak Pros Memo

(although that would be her normal practice) and she does not remember either reviewing it or meeting about it. Tr. IV:140; 159-160; Ex. 163.

188. Ms. Kaczmarek did not review the approved Farak Pros Memo when it was returned to her. Consequently, Ms. Kaczmarek never saw Mr. Verner's handwritten note to the effect that the mental health records had not been turned over "yet." Tr. VI:170.

189. On April 1, 2013, the grand jury indicted Farak on four (4) counts of tampering with evidence, four (4) counts of theft of a controlled substance (cocaine) from a dispensary, and two (2) counts of unlawful possession of a class B substance (cocaine). Tr. VI:112; *Cotto*, 471 Mass. at 98.

190. The Court finds that at the time the Farak Pros Memo was written, the issue of the privileged nature of the mental health records was still under review and in the Assistant Attorneys' General minds; Mr. Verner noted that the mental health records had not been turned over to the District Attorneys' Offices "yet;" the AGO had the intention of sending the mental health records to the District Attorneys' Offices; and that Ms. Kaczmarek did not see Mr. Verner's note to that effect.

191. The Court finds that the AGO did not turn the mental health records over to the District Attorneys' Offices at the time of indictment, but intended to turn them over once they resolved the issue whether they were privileged or obtained a court order for their release. The Court finds that while, ultimately, the AGO did not turn over the mental health records until much later, there was no deliberate intent not to disclose them, only oversights.

192. The Court finds that at the time the Farak Pros Memo was written and approved, the AGO did not have a sense of the extent of her drug use, but, while focusing on the evidence at hand, the AGO recognized that a proffer would be worth considering in order to determine the scope of her drug use, and was also willing to investigate other cases in which it was suspected she may have tampered with the samples submitted to her for analysis.

The State Police and AGO Investigated Additional Possible Tampering by Farak in Order to Ensure that They Conducted a Full Investigation of Her Misconduct.

193. The State Police/AGO Farak investigation was focused upon any criminal actions that the AGO could prove beyond a reasonable doubt. Tr. II:120, 122-123. The AGO's initial plan was to seek indictments from the grand jury with the evidence the AGO had from the initial investigation and, if evidence of additional tampering or other crimes came to light after the grand jury ended in April 2013, to consider convening a new grand jury. Tr. V:207; Tr. VI:153-155.

194. Early in the investigation and after Farak was arrested, Ms. Kaczmarek and Sgt. Ballou started to receive emails and information concerning other cases in which Farak had issued drug analysis certificates and there was a question whether she had tampered with the tested samples. Tr. V:180, 205. The AGO, primarily Ms. Kaczmarek, followed up on that information. Tr. V:206.

195. For example, an Assistant District Attorney from Hampden County reported to Sgt. Ballou that she had had a case in which Farak had been the chemist who had done the testing and that after the testing was finished, the number of pills was "off." Ms. Kaczmarek told Sgt. Ballou to follow up and investigate the report in order to determine whether there was enough evidence to establish tampering. In the follow up, Sgt. Ballou learned that a police officer had submitted some pills to the Amherst Lab for testing and when they were returned, the quantity of pills was not the same and what was returned was not an illegal substance. Tr. VI:98.

196. In another example, an Assistant District Attorney reported to Sgt. Ballou that in a case where Farak was the chemist, the tested sample had come back four (4) grams lower than the 100-gram threshold required for a more significant charge. The Assistant District Attorney was disappointed in the quantity certified and she was insinuating that Farak could have tampered with it. Tr. VI:99.

197. Sgt. Ballou displayed some skepticism about the two cases because neither the pill nor 100-gram case seemed to fit the tampering scheme that Ms. Kaczmarek was starting to fashion as a working theory, namely, that Farak was using crack cocaine. Tr. VI:100.

198. In an email to Sgt. Ballou about the two cases, Ms. Kaczmarek made a "throw away comment" to the effect of, "Please don't let this get more complicated than we thought. If she was suffering from back injury maybe she took the oxies." By this statement, Ms. Kaczmarek wasn't saying that it was outside of the realm of possibility that it was Farak who tampered with the sample. Instead, she was "almost pleading to G-d" that an "avalanche" of work would not hit the AGO. She explained that by the "oxie" comment she meant that in her experience, people with drug habits use one drug and in this case, Farak would not go "outside to the oxies." Tr. VI:101-102.

199. The AGO's initial plan was to seek indictments from the grand jury with the evidence the AGO had and, if a tip came in after the grand jury ended in April 2013, to present the information to a new grand jury, Tr. V:207; Tr. VI:153-55, but the tips did not pan out. Although, in the beginning, Ms. Kaczmarek was receptive to the idea of indicting Farak on more charges, after Farak was indicted in April 2013 and as time progressed, she started to have less interest in pursuing additional charges. In her experience as a prosecutor, doing so would not have changed the sentence the judge would impose.

200. Although Mr. Verner and Mr. Bedrosian discussed whether to indict Farak on additional charges, they, too, believed that additional charges would not affect the sentence that

Farak would receive, and so, although the AGO followed up on the tips, the AGO determined that no additional charges would be sought. Tr. V:181.

201. The Court finds that there was no plan on the part of the AGO to limit the investigation or prosecution of Farak so as to keep the impact of Farak's misconduct contained.

The AGO Disclosed Case Material to the District Attorneys' Offices in March 2013, Before Farak Was Even Indicted, Because the AGO Wanted the District Attorneys' Offices to Evaluate the Significance of Farak's Misconduct to the Cases They Were Prosecuting.

202. The "Farak cases" were unusual because the AGO was prosecuting Farak but the District Attorneys' Offices, which were prosecuting defendants on the basis of Farak's testing of the drug evidence in their cases, were responsible for identifying and disclosing any potentially exculpatory evidence to the defendants they were prosecuting. Tr: V:102.

203. When Farak was arrested, the AGO was considering how to communicate with the District Attorneys' Offices about the arrest and the implications thereof on their prosecutions. Tr. VI:58-59; Tr. V:210.

204. In the Dookhan case, the AGO had provided notice to the District Attorneys' Offices about potentially exculpatory information, namely, her arrest and its possible impact on cases pending in their jurisdictions. In the Farak case, the AGO was going to provide this information to the District Attorneys' Offices, just like it had done in the Dookhan case. Tr. IV:125; Tr. V:132-133, 210-211; Tr. VI:176-177; Ex. 263; Ex. 285.

205. Mr. Mazzone and Mr. Verner felt they had an ethical obligation to provide the information to the District Attorneys so that they could prepare certificates of discovery and answer discovery requests from any potentially affected defendants they were prosecuting. Tr. V:210; Tr. VI:58-59.

206. In the Dookhan case, the AGO had started to send the District Attorneys' Offices investigation and case information even before the chemists were indicted. In Farak, the AGO did the same thing: before she was even indicted, the AGO had started to send information to the District Attorneys' Offices. Tr. V:211; Tr. VI:58-59.

207. And so at about the same time that the Farak Pros Memo was being written and submitted for approval, Mr. Verner was sending initial case material, including State Police reports, to the District Attorneys' Offices. Tr. V:216.

208. Normally, a prosecutor has direct access to discovery through his investigators. But the Farak case was unusual. The District Attorney's Office was not prosecuting Farak, so Assistant District Attorneys at the District Attorneys' Offices, including Frank Flannery in

the Hampden County District Attorney's Office, were going to get information from the AGO and disseminate exculpatory information to defense counsel in cases being prosecuted by the District Attorney's Office. Tr. II:158-160.

209. In the beginning, Mr. Flannery did not know "how big of a problem it was going to be or how to handle it." Tr. II:159. Part of Mr. Flannery's job was to develop a policy or protocol for handling the cases and providing discovery to defense counsel in cases the Hampden County District Attorney's Office was prosecuting. Tr. II:159.

210. Based on information about the Farak investigation, the Hampden County District Attorney's Office itself had had some of the Farak-related drug samples re-tested. The District Attorney's Office was not trying to investigate the Amherst Lab on its own, but rather it wanted to go forward on some of the potentially affected cases. Tr. II:162.

211. On March 27, 2013, in a letter prepared by an administrative assistant and signed by Mr. Verner, the AGO provided seven (7) police reports, photographs, four (4) witness interview transcripts, an evidence log, a 2012 audit of the Amherst Lab, and a 2012 State Police safety assessment report on the Amherst Lab to the District Attorneys' Offices pursuant to what Mr. Verner characterized as "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 [L]aboratory." Tr. V:98-99, 129; Ex. 165; Ex. 260.

212. According to Mr. Verner, because Ms. Kaczmarek was the Assistant Attorney General assigned to the case, it was her responsibility to provide the potentially exculpatory information to the District Attorneys. Tr. V:129.

213. Ms. Kaczmarek never intentionally withheld the mental health records from the named defendants in this case or any other defendant potentially impacted by Farak's misconduct. Tr. VI:176.

214. The fact that Ms. Kaczmarek did not disclose the mental health records to the District Attorneys' Offices was an honest mistake on her part. Tr. VI:176, 191.

215. The Court finds that on March 27, 2013, Ms. Kaczmarek and Mr. Verner were in the process of obtaining indictments of Farak. As of that day, they had not finally settled the issue whether the mental health records were privileged but had decided that since the records were not needed to secure an indictment, they would not be introduced as an exhibit in the grand jury. Ms. Kaczmarek noted this on her Farak Pros Memo.

216. The Court finds that on the same day, March 27, 2013, Mr. Verner was in the process of having a letter prepared that he would send to the District Attorneys, in which the AGO would make an initial disclosure of Farak-related information. This information was potentially exculpatory evidence in cases they were prosecuting.

217. The Court finds that Mr. Verner, who had in mind the initial disclosure to the District Attorneys, noted on the Farak Pros Memo that the "paperwork" was not being turned over to the District Attorneys "yet." The Court finds that it was Mr. Verner's intention that the AGO would provide the "paperwork" after the privilege issue was settled.

218. The Court finds that although Mr. Verner signed the letter to the District Attorneys, he believed it was Ms. Kaczmarek's responsibility to provide potentially exculpatory information to the District Attorneys.

219. The Court finds that It is not clear whose responsibility it was to follow up with sending the records to the District Attorneys' Offices or how or when that would take place, but that the lack of clarity is due to inadvertence or a failure of communication, not to any deliberate intent to withhold the information from the District Attorneys, these defendants, or others.

220. The Court finds that neither Mr. Verner nor Ms. Kaczmarek deliberately or intentionally withheld the mental health records from the District Attorneys, these defendants, or others.

Farak Was Concerned About the Disclosure of Her Wife's Testimony, Not Farak's Mental Health Records.

221. In early 2013, the AGO presented evidence of Farak's drug tampering to a statewide grand jury, which was sitting in Suffolk County. See Tr. VI:112.

222. Ms. Kaczmarek subpoenaed Farak's wife to testify at the grand jury. Tr. VI:141.

223. In her testimony, Farak's wife spoke candidly about her own mental health issues. Tr. VI:141.

224. After Farak was indicted, Ms. Kaczmarek asked the Court for an order so that she could disseminate the grand jury minutes to the District Attorneys' Offices. Tr. VI:111.

225. Ms. Pourinski, Farak's lawyer, knew that Ms. Kaczmarek was planning to ask the Court to allow her to release the grand jury minutes to the District Attorneys and asked Ms. Kaczmarek to redact Farak's wife's testimony about her own mental illness, which Ms. Kaczmarek agreed to do. Tr. VI:141-142.

226. In the summer of 2013, the Court approved the AGO's request to release the redacted transcripts, and the AGO sent the grand jury minutes and exhibits to the District Attorneys' Offices. Tr. V:98, 111. Included within the information sent to the District Attorneys' Offices were news articles that had been admitted as exhibits to the grand jury. These were the news articles that had been among the papers seized from Farak's

car and had been sent by Sgt. Ballou to Ms. Kaczmarek on February 14, 2013. The mental health records (ServiceNet diary card, worksheets, etc.), which the AGO had thought were privileged and which had been segregated by Ms. Kaczmarek, were not sent to the District Attorneys' Offices. Tr. VI:168.

227. Had Ms. Kaczmarek recognized the significance of the dates on the ServiceNet diary card at the time, she would have taken the records in with her at the same time she sought an order to release the grand jury minutes and would have asked the judge to review the records in camera and "release [her] from any sort of privilege." Tr. VI: 167.

228. The Court finds that as a result of Ms. Kaczmarek's not having introduced Farak's mental health records into the grand jury and as a result of her segregating them, those mental health records were not sent to the District Attorneys' Offices.

229. The Court finds that as a result of Ms. Kaczmarek's (or for that matter, Sgt. Ballou's or Mr. Verner's) failure to realize that the ServiceNet diary card entries referred to 2011, not 2012, and consequent failure to realize that they indicated Farak was using drugs for a longer time frame than was initially supposed, Ms. Kaczmarek did not realize that the mental health records might have been exculpatory to the defendants in this case in the sense that they suggested Farak might have been using drugs while employed as a chemist and while conducting drug analysis tests at the Amherst Lab at least as far back as 2011 and possibly longer.

230. The Court finds that when the AGO made its initial disclosure of case material to the District Attorneys' Office in March 2013, that it had every intention of following up with the mental health records once the issue of their privileged nature was resolved and a release from the Court was obtained.

231. The Court finds that the AGO made an honest oversight – caused by different individuals having some understanding of what had been disclosed and what still needed to be disclosed, but no one having the whole picture – when no one followed up to resolve the privilege issues and ensure the mental health records were disclosed to the District Attorneys' Offices.

232. The Court finds that the AGO's failure to disclose the mental health records to the District Attorneys' Offices during this time frame was due to inadvertence, not to any deliberate intent to withhold the information from the District Attorneys, these defendants, or others.

233. The Court finds that news articles printed on September, October, and December 2011 were, however, sent to the District Attorneys' Offices. The Court finds further that the newspaper articles may have served as a basis for concluding that Farak engaged in misconduct at the Amherst drug lab earlier than the summer of 2012. *See*

Commonwealth v. Ware, 471 Mass. 85, 94 n.13 (2015), and that the ability to draw that inference was equally available all parties, including the defendants.

The AGO Provided Full Discovery to Farak in Her Own Case.

234. Farak was arrested on January 19, 2013, Tr. II:97-98, and arraigned on April 22, 2013. Tr. VI:114.

235. On April 22, 2013, the AGO filed in the Farak case, pending in Hampshire County Superior Court, a First Certificate of Discovery, listing the discovery material that was provided to Farak. The list of items on the Certificate included CD # 2, Item 4, seven pages of "paperwork recovered from M/V." Ex. 168.

236. The discovery provided to Farak included seven (7) pages of "Paperwork recovered from M/V," which were the mental health records. Tr. VI:19, 114-115; Exs. 168, 169.

237. Ms. Pourinski and Ms. Kaczmaerk did not discuss whether the mental health records (which were kept as physical evidence) might be privileged. Tr. VI:115, 141.[10]

238. Ms. Pourinski and Farak reviewed all of the physical evidence that was kept in the evidence room at the AGO's Springfield office. Tr. III:178; Tr. IV:33-34; Tr. VI:133.

239. The Court finds that the AGO listed on its Certificate of Discovery, which was filed in Court, seven (7) pages of "paperwork recovered from [Farak's] M/V."

240. The Court finds that the AGO provided Farak, through Ms. Pourinski, with digital copies of seven (7) pages of "paperwork recovered from [Farak's] MV/," which were her mental health records and which were being maintained as physical evidence at the AGO's Springfield Office.

241. The Court finds that the AGO provided Farak and Ms. Pourinski with an opportunity to inspect all the physical evidence that had been seized in relation to her case.

242. The Court finds that Ms. Pourinski and Ms. Kaczmarek did not discuss any privileges Farak had in regards to her mental health records but rather, discussed any privileges Farak's wife may have had in relation to her own mental health.

[10] Although Ms. Pourinski testified that Ms. Kaczmarek said that the AGO was considering mental health records relating to Farak to be privileged, it is more likely that, as Ms. Kaczmarek remembers the conversation, Ms. Pourinski's concern was about the release of the grand jury minutes, which contained testimony from Farak's wife about her own mental health issues. As Ms. Kaczmarek remembers the conversation, they spoke about redacting the grand Jury minutes. Tr. VI:141. There is no evidence to corroborate Ms. Pourinski's memory that their conversation concerned a privilege surrounding Farak's mental health records.

The AGO Appeals Division Handles Complex Cases and Many of Them.

243. As the Farak case developed, the Hampden County District Attorney's Office received, and Mr. Flannery, then First Assistant District Attorney, handled, motions for new trial filed by convicted defendants who were seeking post-conviction relief based on alleged misconduct on the part of Farak and based on questions that had been raised as to the integrity of the Amherst Lab. Tr. V:97.

244. The AGO, as the relevant prosecuting authority in the Dookhan and Farak cases, began to receive and to respond to third party subpoenas and discovery requests related to those cases and based on either Mass. R. Crim. P. 17 (the AGO was served with subpoenas for trial in pending cases) or Mass. R. Crim. P. Rule 30 (the AGO was served with Rule 30(c)(4) discovery requests in relation to motions for new trial). The AGO's Appeals Division handled these motions. Tr. II: 130; Tr. III:9-10, 31; Tr. V:9-13.

245. In general, the Appeals Division is responsible for: (1) federal habeas cases brought by criminal defendants who have exhausted state remedies and are seeking federal relief, Tr. VI:63-64; (2) direct criminal appeals in state court; and (3) responses to third party subpoenas served on state public safety agencies or on any other state agency in a criminal matter. Tr. III:82; Tr. IV:164-165, 185; Tr. V:42.

246. Assistant Attorneys General who work in the Appeals Division are expected to work on each type of case the Division handles—habeas cases, direct criminal appeals, and third party subpoenas. Tr. IV:187; Tr. V:47.

247. Habeas cases make up the largest area of practice in the Appeals Division and generally involve serious felonies such as rape, murder, and child sexual assault. Tr. VI:63-64.

248. The volume of cases in the Appeals Division is high and a great number of the cases they handle are "extremely consequential." Tr. VI:65.

249. Over the past four years, the Appeals Division has handled nearly 120 subpoenas, approximately half of which were related to the Farak or Dookhan matters. Tr. V:43.

250. Assistant Attorney General Randall Ravitz ("Ravitz") has been Chief of the Appeals Division for four (4) years and has been employed by the AGO for twelve (12) years. Tr. V:41. As Chief of the Appeals Division, Mr. Ravitz is often in the position of legal adviser, suggesting any legal issues that might need to be addressed or protections that might be applicable in a given situation. Tr. V:56.

251. From January 2013 to the summer of 2015, Assistant Attorney General Suzanne Reardon ("Reardon") served as Deputy Chief of the Appeals Division. Tr. IV:161-162. Since that time, Ms. Reardon has served as an Assistant Attorney General in the Appeals Division. Tr. IV:161; Tr. V: 41-42.

252. As Deputy Chief of the Appeals Division, Ms. Reardon was responsible for monitoring work flow, assigning cases, and checking and editing the work of Assistant Attorneys General. Tr. IV:184.

253. In 2013, Mr. Ravitz and Ms. Reardon were each responsible for supervising approximately half of the attorneys in the Appeals Division. Tr. IV:162. As supervisors, Mr. Ravitz and Ms. Reardon reviewed pleadings, motions, and briefs before they were filed with the courts by the Assistant Attorneys General they supervised. Tr. IV:178.

254. Kris Foster ("Foster") served as an Assistant Attorney General in the Appeals Division from July 2013 to February 2015. Tr. III:81; Tr. V:43.

255. During that time, Ms. Reardon served as Ms. Foster's supervisor. Tr. IV:162.

256. Prior to joining the AGO, Ms. Foster had spent approximately four (4) years in the Suffolk County District Attorney's Office Appeals Division where she handled a substantial number of appeals in the Supreme Judicial Court and the Appeals Court as well as post-trial motions and proceedings in the Single Justice Session of the Supreme Judicial Court, worked on trial teams and drafted pre-trial motions, and was part of the Narcotics Case Integrity Unit that the office established to deal with Dookhan-related drug lab matters. Tr. IV:186-187; Tr. V:43-44.

The AGO Provides Training to the Assistant Attorneys General.

257. When Ms. Foster started working at the AGO, she had no experience with motions to quash. Tr. III:84.

258. All new Assistant Attorneys General are required to complete an internal new hire training. Tr. V:83-84.

259. The AGO has a formal requirement that all Assistant Attorneys General take at least twelve (12) hours of continuing legal education each year and has an in-house training program, the AG Institute. Tr. V:48.

260. The AGO provides training to Assistant Attorneys General in at least three ways: through formal training; through informal training; and by providing written materials. Tr. V:48; *see also* Tr. IV:163. There is an internal new hire training. Tr. V:83. Assistant Attorneys General also have the opportunity to receive training through the National Association of Attorneys General and "CAAAP." Tr. V:48-49. In addition, there are often informal presentations at division and bureau meetings, Tr. V:49; Bureau Chiefs will go over cases with the Assistant Attorneys General, Tr. V:50; and an experienced Assistant Attorney General will often accompany a new Assistant Attorney General to court, Tr. V:84.

The AGO Provided Formal and Informal Training and Has a Manual About Handling Third Party Subpoenas and Related Discovery.

261. In spring 2013 and again in 2015, the AG Institute conducted a training on responding to subpoenas. Tr: V:48.

262. Ms. Foster, the Assistant Attorney General who handled the third party subpoenas at issue in this case, was not present at this training, but had been given sample motions to quash from her supervisor, Ms. Reardon. Tr. III:33.

263. The AGO has a manual on responding to third party subpoenas. Tr. V:9; Ex. 247.

264. Every subpoena must be considered on a case-by-case basis, including whether the subpoena is a request for testimony, a request to look at original physical evidence, or a request for documents from a state employee's file. Tr. V:56-57.

265. Typically, the following things need to be done to determine how to respond to a third party subpoena: (1) contact the counsel who served it; (2) contact the client and collect files if the subpoena calls for documents; and (3) analyze the subpoena, the facts of the case, and any relevant documents to determine which privileges and protections might apply. Tr. V:25, 57.

266. Certain types of protections or objections that might be asserted by the client agency or the AGO are apparent from the face of the subpoena. Tr. V:85.

267. When handling third party subpoenas on behalf of client state agencies whose files have been subpoenaed, the Appeals Division insists that the agency provide access to agency files, V:52, which files may include relevant emails. Tr. V:36.

268. When Ms. Foster started working at the AGO and before she was assigned a third party subpoena matter to handle, Mr. Ravitz gave her an informal training on motions to quash during which he showed her samples and discussed the steps and process involved in filing a motion to quash. Tr. V:50-51, 79.

269. In addition, Mr. Ravitz sent Ms. Foster a Memorandum in Support of a Motion to Quash Subpoena that he filed in one of his own cases, *U.S. v. Vaughan*, in order to give Ms. Foster a sample to review as she drafted similar motions (the "Vaughan Memo"). Tr. V:58; Ex. 254.

270. The Court finds that the AGO provides formal and informal training to Assistant Attorneys General. Specifically, the Court finds that the AGO provided training on handling third party subpoenas and discovery to Assistant Attorneys General in the Appeals Division and that although she did not attend the formal training on handling

subpoenas, Ms. Foster received at least some guidance about third party subpoenas, including sample motions to quash.

The AGO Received and Responded to Third Party Subpoenas and Motions Related to the Farak Investigation.

271. In August 2013, the AGO became aware that Farak-related third party subpoenas and discovery motions were likely to be filed in post-conviction and pre-trial proceedings pending before this Court, which had been specially assigned to the Honorable Jeffrey A. Kinder. Tr. IV:169.

272. By the time third party subpoenas or other discovery requests seeking case material related to the Farak prosecution were served on the AGO, substantial case material had already been sent to the District Attorneys' Offices, for further dissemination to the defendants, in two separate disclosures: in March 2013, Mr. Verner had sent to the District Attorneys' Offices the initial police reports, witness interviews, etc., Tr. I:110; V:98-99; 129; Ex. 165; Ex. 260; in the summer of 2013, Mr. Verner had sent the grand jury transcripts and exhibits, Tr. V:98, 111. Because the mental health records were not submitted to the grand jury, they were not part of the disclosures sent to the District Attorneys' Offices and instead remained with the rest of the physical evidence. Tr. III:165-166; Tr. V:134, 215.

273. Ms. Kaczmarek's principal focus was to preserve the integrity of the evidence for purposes of prosecuting Farak. Ms. Kaczmarek and Mr. Verner were concerned about the chain of custody and integrity of the evidence. Tr. V:212-214; VI:178-179.

274. In fact, Ms. Kaczmarek had previously had a trial, a case involving the violation of a restraining order and stalking, in which the defendant had presented letters from the victim in order to show she had been contacting him while he was under a restraining order. Tr. VI:179. When Ms. Kaczmarek showed the letters to the victim, however, the victim told Ms. Kaczmarek that she had dated the letters. Tr. VI:179. It turned out that the defense attorney had cut the dates off the letters so as to be able to pass the letters off as contemporary when in fact they had been written long ago. Tr. VI:179. As a result of this experience and her training, Ms. Kaczmarek was concerned about the integrity of the Farak evidence. Tr. VI:178-179.

275. Because the Farak investigation was an ongoing criminal investigation and the AGO attorneys involved thought that non-privileged case material had already been disclosed to third party defendants through the District Attorneys' Offices, the Appeals Division decided it would move to quash the subpoenas seeking testimony and to oppose the discovery motions seeking access to the physical evidence. Tr. IV:173-174; Tr. V:34, 212-213.

276. The investigators and Assistant Attorneys General involved in the Farak cases were not concerned about providing Sgt. Ballou's file to the defendants and believed that everything from Sgt. Ballou's file already had been disclosed to the District Attorneys' Offices. Tr. III:201; Tr. V:213; Tr. VI:184.

277. The investigators and the Assistant Attorneys General involved in the Farak cases reasonably believed that the material the defendants were seeking had been provided to the defendants through the District Attorneys' Offices. Tr. III:201; Tr. IV:37-39; Tr. V:211-213.

278. Notwithstanding that Sgt. Ballou had emailed to Ms. Kaczmarek a copy of the mental health records, Ms. Kaczmarek did not know that the mental health records were not kept in Sgt. Ballou's file but instead, were in the evidence room. Tr. VI:175.

279. Ms. Foster believes that one of her supervisors told her there was no need to look at the file. Tr. III:96. But this does not sound like something Mr. Ravitz would say, Tr. V:70; Ms. Reardon told Ms. Foster to look at the file, Tr. IV:201; Mr. Mazzone never told her not to look at the file, Tr. VI:66-67; and Mr. Verner did not tell her not to bother looking in the file. Tr. V:224.

280. The Court finds that the relevant AGO staff, Sgt. Ballou, Mr. Verner, and Ms. Kaczmarek all believed that the mental health records had been turned over to the District Attorneys' Offices and that Ms. Foster had no knowledge specifically about mental health records, but believed that everything had been turned over to the District Attorneys' Offices.

281. The Court finds that it was reasonable for the AGO investigators and Assistant Attorneys General to believe that the material the defendants were seeking in this case had already been provided to the District Attorneys' Offices (and, in turn, to the defendants), even if that belief turned out to be mistaken.

The AGO Made Mistakes in Handling the Third Party Subpoenas *Duces Tecum* and Discovery Requests, But Did Not Intentionally Withhold Evidence.

282. Ms. Reardon and Mr. Ravitz assigned Ms. Foster to handle the third party subpoenas and Rule 30(c)(4) discovery motions in these cases for several reasons: (1) Ms. Foster was available because she had only recently started at the AGO; (2) the Farak matter involved a state criminal case, and Ms. Foster had considerable experience in state criminal matters; and (3) Ms. Foster expressed interest in expanding her range of experience and she did not have prior experience filing motions to quash. Tr. IV:172-173; Tr. V:46-47.

The Rodriguez Rule 30 Motion

283. On August 26, 2013, Mr. Ryan sent an email to Ms. Foster in which he indicated that he represented a defendant named Rodriguez who was one of fifteen (15) post-conviction defendants scheduled for a hearing in this Court on Farak-related matters on September 9, 2013, Rodriguez Dkt., No. 36, and asked Ms. Foster about inspecting sixty (60) items seized during the Farak investigation. Tr. III:33-36.

284. Ms. Foster responded that she could not give Mr. Ryan access to the main evidence room because the Farak investigation was ongoing. Tr. III:38-39.

285. On August 29, 2013, Rodriguez filed a post-conviction motion for discovery pursuant to Mass. R. Crim. P. 30(c)(4) in *Commonwealth v. Rodriguez*, HDCR2010-01181. Ex. 212[11]; *see also* Rodriguez Dkt., No. 42.

286. In Rodriguez's Rule 30(c)(4) motion, Rodriguez sought several categories of documents from the Hampden County District Attorney's Office, the State Police, the Department of Public Health, and the AGO. Ex. 212.

287. On September 6, 2013, Ms. Foster filed the AGO's opposition to Rodriguez's Rule 30(c)(4) motion. Ex. 212. In the opposition, the AGO argued that the documents Rodriguez requested could only be used to impeach Farak and therefore, were an insufficient basis upon which to satisfy his burden of establishing a prima facie case that his plea had not been entered into voluntarily and intelligently, Ex. 212, and argued additional grounds for denying each of the twelve (12) specific requests made in the motion. Ex. 212. For eight (8) of the requests, the AGO argued that the AGO did not have access, control, or possession of anything responsive. Ex. 212. For the remaining requests, other specific arguments were made. Ex. 212. Specifically, in response to Rodriguez's request for "inter- and intra- office correspondence at the AGO" and "AGO correspondence with DAs' offices," the motion was opposed on the ground that such correspondence would be protected by the work product doctrine and law enforcement investigative privilege. Ex. 212. In response to defendant Rodriguez's request for "[a]ccomplice evidence" and evidence of "third party knowledge," the motion was opposed on the ground that "[t]he AGO has turned over all grand jury minutes, exhibits, and police reports in its possession to the DA's office. Based on these records, to which the defendant has access, there is no reason to believe that an accomplice was involved" or "that a third party had knowledge of Farak's alleged malfeasance prior to her arrest." Ex. 212.

288. The Court considered the Rodriguez Rule 30(c)(4) motion during a hearing on September 9, 2013, and ultimately allowed the motion in part. *See* ¶¶ 297-316, *infra*.

[11] Defendant Rodriguez passed away and his case is no longer before the Court.

289. The Court finds that Ms. Foster had no knowledge that the mental health records existed, or were exculpatory evidence, or had not been turned over when she filed the AGO's opposition to Rodriguez's motion for discovery.

The Watt Subpoena

290. Sgt. Ballou received a subpoena dated August 30, 2013, commanding him to appear before this Court on September 9, 2013, to give evidence relating to *Commonwealth v. Watt*, HDCR2009-01068 (the "Watt Subpoena") and to "bring with [him] a copy of all documents and photographs pertaining to the investigation of Sonja J. Farak and the Amherst drug laboratory." Ex. 249.

291. On September 5, 2013, Ms. Foster, who was assigned to handle the response to the subpoena, sent her supervisor, Ms. Reardon, a first draft of a motion to quash the Watt Subpoena. Tr. IV:195; Ex. 248. Mr. Ravitz did not review Ms. Foster's draft motion because he was out of the office for a religious holiday. Tr. V:61-62.

292. In response later that afternoon, Ms. Reardon provided comments on the draft and made additional recommendations in the body of the email returning the draft. Tr. IV:196-197; Ex. 248. She wrote:

> I also wonder if we would be able to make an argument like the attached memo (related to Dookhan subpoena) on pp. 5-6 that because this defendant plead guilty, this impeachment information won't help him. And if we could get any more information about what was already given to defense counsel that might help . . . . Because the judge has scheduled this hearing for several cases in one day, we may be less likely to get the subpoena quashed altogether but it never hurts to make him aware of the privileges involved. Looking back at motions to quash that were filed in the Dookhan cases, it looks like [we] only raised the investigative privilege. Although CORI might be relevant, I would be more comfortable knowing what documents are at issue or what was already turned over before we raise that privilege.

Tr. IV:196-197; Ex. 248.

293. The next day, September 6, 2013, Ms. Foster filed a Motion to Quash the Summons served on Sgt. Joseph Ballou (the "Watt Motion to Quash"). Ex. 213; Ex. 250.

294. In the Memorandum of Law in Support of Attorney General's Motion to Quash Summons Served on Sgt. Joseph Ballou (the "Watt Memo of Law"), the AGO argued that the court should quash the subpoena because: (1) it was unreasonable in light of the scope of the evidentiary hearing; (2) documents and information regarding an ongoing criminal investigation are privileged; (3) the AGO had not waived the privilege by providing

information to the District Attorneys; and (4) certain testimony and documentary evidence would be protected by work product. Ex. 250.

295. As an alternative to quashing the subpoena, the AGO's memorandum asked the Court to restrict its scope by not requiring the AGO to produce a list of seven (7) specific types of information, including "Emails responsive to the subpoena, but not already contained in the case files specifically listed therein; and "[i]nformation concerning the health or medical or psychological treatment of individuals." Ex. 250, at p. 9. This section of the Watt Memo of Law was a direct cut-and-paste from the Vaughan Motion that Mr. Ravitz had provided to Ms. Foster to use as a sample. Tr. V:62; Ex. 254.[12]

296. The Court finds that Ms. Foster had no knowledge that the mental health records existed, or were exculpatory evidence, or had not been turned over when she filed the Watt Motion to Quash.

At the September 9 Hearing, the AGO Moved to Quash the Subpoenas Served on Sgt. Ballou and Ms. Kaczmarek Based, in Part, on the Investigator's Privilege.

297. On September 9, 2013, this Court (Kinder, J.) held an evidentiary hearing for sixteen (16) defendants, each of whom had filed a motion for a new trial because of Farak's conduct (the "September 9 Hearing"). Ex. 80. The defendants Rodriguez and Watt were among the defendants included in the hearing. Ex. 80. This was the hearing to which Sgt. Ballou had been subpoenaed. Ex. 249.

298. The scope of the hearing was limited to: (1) "the timing and scope of Farak's alleged criminal conduct and how it might relate to the testing in the cases before me;" and (2) "the timing and scope of the negative findings in the October 2012 administration audit of the Amherst laboratory and how those negative findings might relate, if at all, to Farak's testimony in these cases." Ex. 80, at p. 10 (transcript).

299. Ms. Foster was under the impression that everything in Sgt. Ballou's file had been turned over. Her understanding that everything had been turned over was based on a meeting she had had with Mr. Verner, Mr. Mazzone, and Mr. Ravitz sometime prior to the September 9 Hearing. Tr. III:15.

[12] Similarly, on September 12, 2013—after Ms. Foster filed the Watt Motion to Quash—Mr. Ravitz sent Ms. Foster comments to two motions to quash she drafted in an unrelated case, *Commonwealth v. Secreast-Velasquez*. Tr. V:58-59; Exs. 255, 256. In those comments, Mr. Ravitz notes that the section on alternatives to quashing the subpoena should be tailored to the issues in the specific case, the kinds of information that may be protected, and to whether the subpoena seeks testimony or documents. Tr. V:59. Mr. Ravitz made this comment to Ms. Foster's drafts because in both draft motions, she had cut and paste that section directly from the Vaughan Memo and he wanted her to tailor the sections to the facts of the specific cases she was handling. Tr. V:60. Ms. Foster made the adjustments suggested by Mr. Ravitz in the final Motion to Quash that she filed in the *Secreast-Velasquez* case. Tr. V:61.

300. Ms. Foster remembers that she was told she did not "need to see the file, that there was nothing in it . . . Being told that everything had been turned over, there's no need to see the trial file." Tr. III:89.

301. She did not review the file herself and she met with Sgt. Ballou only briefly right before the hearing. Tr. III:10, 14.

302. During the September 9 Hearing, the Court denied the Watt Motion to Quash Sgt. Ballou's testimony, but then addressed the "*duces tecum*" part of the subpoena, inquiring about the AGO's alternative request to limit the alternative a motion for protective order as to (the seven (7)) certain categories of documents the AGO asserted should be protected. Ex. 80 at p. 15-19 (transcript).

> THE COURT: We have been addressing various administrative matters, one of which is the motion you have filed to quash the subpoena issued to Sergeant Ballou. I have read your pleading carefully. I do not need to hear additional argument on the motion to quash. I understand it is in the alternative a motion for a protective order as to certain categories of documents. The motion to quash the subpoena duces tecum and to quash – the extent that you motion seeks to quash a subpoena to Sergeant Ballou for his appearance and testimony here today, it is denied.
> With respect to the request for protective order. My first question is, have you actually personally reviewed the file to determine that there are categories of documents in the file that fit the description of those that you wish to be protected?
>
> MS. FOSTER: I have been talking with Assistant Attorney General Kaczmarek who has been doing the investigation for the Attorney General's Office. She has indicated that several documents, emails, correspondence, would be protected under work product mostly.
>
> THE COURT: But you don't know, having never even looked at the file, what those documents are?
>
> MS. FOSTER: I – correct.

Ex. 80, at pp. 15-16 (transcript).

303. The Court ordered Ms. Foster "to submit . . . copies of all of these documents that you believe fit into one of these categories that should be protected. I will review it in camera, and make a determination, after hearing from you . . . whether or not it needs to be protected further." Ex. 80, at p. 19 (transcript).

304. The Court expressed frustration that Ms. Foster had not reviewed the file and that Sgt. Ballou failed to bring his file as ordered by the subpoena: "I must say I am a little bit disturbed that a court order for the production of a file has not been produced absent a determination by me as to whether it should or should not be produced." Ex. 80, at p. 19 (transcript); Tr. V:13.

305. During the September 9 Hearing, Sgt. Ballou was asked on direct examination by defense counsel if he "had any role to play in deciding what documentation is provided to the defendants in this case." Ex. 80, at p. 150 (transcript). Sgt. Ballou responded that "No . . . everything in my case file has been turned over." Ex. 80, at p. 150 (transcript). When asked if everything in Ms. Kaczamarek's case file had been turned over, Sgt. Ballou responded, "I believe everything pertaining to the Farak investigation has been turned over. I am not aware of anything else." Ex. 80, at pp. 150-151 (transcript).

306. By "everything," Sgt. Ballou meant reports, evidence logs, and pictures; not physical evidence. Tr. III: 211-212.

307. Sgt. Ballou turned over everything from his Farak investigation file for production to the District Attorneys' Offices and retained all of the physical evidence – including the mental health records – in the evidence room. Tr. III: 211-212; Tr. IV:20.

308. Sgt. Ballou's testimony that everything in his file had been turned over was consistent with what Ms. Foster had been told, that everything in his case file had been turned over. Tr. III:91.

309. At the end of the September 9 Hearing, Ms. Foster asked the Court to clarify the scope of the potential additional discovery she had been ordered to produce. Ex. 80, at p. 244 (transcript). The Court (Kinder, J.), referring to the list of possible privileges Ms. Foster had listed at the end of her memorandum, indicated he did not want to see what had already been provided, or what would be provided, but that Ms. Foster should identify what documents were privileged and present those documents to him for in camera review. Ex. 80, at pp. 244-245 (transcript).

310. Ms. Foster inquired further. "[T]he language of the subpoena was for all documents and photographs for the whole investigation, so I was wondering since the subpoena was for Sergeant Ballou, the documents he has or the documents the Attorney General's Office has?" Ex. 80, at pp. 244-245 (transcript). The Court responded, "[t]he subpoena duces tecum, as I understood it, went to Sergeant Ballou and that was the subpoena you sought to quash." Ex. 80, at p. 245 (transcript).

311. Because the Watt Subpoena was for Sergeant Ballou and documents and photographs he had pertaining to the Farak investigation, the Court's inquiry during the September 9 focused on Sergeant Ballou and his "file." Ex. 80.

312. Mr. Ryan, who represented the defendant Rodriguez, then made a separate request to see all evidence seized from Farak's car. Ex. 80 at p. 246 (transcript). The Court encouraged the parties to work together to come to some "sort of agreement about viewing the evidence" and if no agreement could be reached, then the defendant could file a motion to compel. Ex. 80, at p. 246 (transcript).

313. During the September 9 Hearing, the Court took the Rodriguez Rule 30(c)(4) motion under advisement to consider whether there would be a need for additional discovery or evidence after the hearing. Ex. 80, at p. 20 (transcript).

314. Ms. Foster left the September 9 Hearing with the impression that Sgt. Ballou was ordered to produce anything he had in his file that had not already been turned over. Tr. III:61, 95-96.

315. The Court finds that Ms. Foster attempted to clarify what additional discovery she was being asked to provide and that she left the September 9 Hearing reasonably thinking that she had been ordered to identify and produce for an in camera inspection by Judge Kinder, anything from Sergeant Ballou's file that had not been produced or would not be produced that she believed was privileged, and to indicate the basis for the privilege.

316. The Court finds that there was no order to provide access to physical evidence issued at the September 9 Hearing.

Back at the Office, the AGO Attorneys Attempted to Figure Out What the Court Had Ordered at the September 9 Hearing and to Comply with Whatever the Order Was. Response to Court's Order to Provide Potentially Privileged Documents for In Camera Review.

317. After the September 9 Hearing, Ms. Foster called Mr. Ravitz and told him that "there was repetition of the grand jury testimony, that the witness Ballou was asked if Anne Kaczmarek has anything that he doesn't have, and that the Judge didn't allow that questioning." Tr. V:65.

318. Ms. Foster did not tell Mr. Ravitz that the Court had asked her specifically if she had looked at Sgt. Ballou's file, either then, Tr. V:65, or during a conversation they had the next day, September 10, 2013. Tr. V:66. Had Mr. Ravitz known what Judge Kinder had said to Ms. Foster, he would have told her to look at the file. Tr. V:68.

319. Ms. Foster did not tell any of her supervisors that the Court questioned her about whether she had personally looked at the file. Tr. V:68, 218; Ex. 210.

320. Had Mr. Verner known what Judge Kinder had said to Ms. Foster, he would have been upset and would have talked to Mr. Ravitz about it. Tr. V:218-219.

321. The Court finds that Ms. Foster did not tell her supervisors or anyone else at the AGO that Judge Kinder had ordered her personally to look at Sgt. Ballou's file.

322. Ms. Foster testified that if she were presented with this situation again, she would personally look at the file. Tr. III:96. But she does not believe it was bad practice not to look at the file at the time because she relied on her supervisors and had no reason to disbelieve Ms. Kaczmarek, who had said everything had been turned over. Tr. III:97.

323. In the days following the September 9 Hearing, AGO attorneys considered the scope of the Court's order to determine what they needed to do in response to the Court's order. Ex. 210.

324. The need for consideration about the scope of the Court's order stemmed from a disconnect between what was articulated in the subpoena *duces tecum* that had been served on Sgt. Ballou by defendant Watt ("a copy of all documents and photographs pertaining to the investigation of Sonja J. Farak and the Amherst drug laboratory"), Ex. 290; what Ms. Foster thought the Court had ordered at the end of the September 9 Hearing ("You[r Honor] had mentioned that you wanted to see all documents that the Attorney General believed would be confidential or privileged and you would review them in camera. And I was just wondering the scope of that"), Ex. 80, at p. 244 (transcript); and what the Court ordered ("[t]he subpoena duces tecum, as I understood it, went to Sergeant Ballou and that was the subpoena you sought to quash."). Ex. 80, at p. 245 (transcript).

325. Ms. Foster had left the September 9 Hearing under the impression that the Court had ordered review of files in the possession of Sgt. Ballou, not files in the possession of the AGO. Tr. III:95-96.

326. In an email dated September 10, 2013, Mr. Verner asked Ms. Foster what had happened at the hearing, and she replied:

> 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.'

Ex. 210.

327. Mr. Verner then asked Ms. Kaczmarek, "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?" Ex. 210.

328. Ms. Kaczmarek responded via email that "Joe has all his reports and all reports generated in the case. His search warrants and returns. Copies of paperwork seized from her car regarding new[s] articles and her mental health worksheets." Ex. 210.

329. Ms. Foster did not know what Ms. Kaczmarek was talking about when she wrote "mental health worksheets" because Ms. Foster had not reviewed the file but had been told that everything had been turned over. Tr. III:26-27, 57. When she testified at the evidentiary hearing on this matter in December 2016, Ms. Foster had still never seen the mental health records. Tr. III:26.

330. The term "mental health worksheets" did not stick in Ms. Foster's memory at all and did not strike her as unusual because the way she understood it, the mental health worksheets were just part of Ms. Kaczmarek's list of what had been turned over. Tr. III:90-91.

331. Mr. Verner was not focused on the mental health worksheets. He was concerned about protecting the AGO's work product, emails, and notes, and therefore was trying to determine whether the Court was asking the AGO to disclose these types of records. Tr. V:188; Ex. 210.

332. Ms. Kaczmarek also remembers discussing AGO emails and that the concern was whether the AGO's own emails would be discoverable: "I think that was the great concern, is that our emails would be discoverable." Tr. VI:184.

333. Mr. Verner and Ms. Kaczmarek assumed that everything from Sgt. Ballou's file had been turned over. Tr. V:189; Tr. VI:184.

334. Ms. Kaczmarek has no recollection of personally reviewing Sgt. Ballou's case file. Tr. VI:175, 187. However, Ms. Kaczmarek believed that everything in Sgt. Ballou's file had been turned over to the District Attorneys' Offices, including the mental health records. Tr. VI:175; 184.

335. Ms. Foster did not go through Sgt. Ballou's file herself and she did not believe that Judge Kinder had ordered her to review the file personally. Tr. III:19-21.

336. After discussion about the September 9 Hearing and what the AGO was supposed to do, the AGO concluded that: (1) the court had ordered production of documents responsive to the Watt Subpoena, which was limited to Sgt. Ballou's "file," Tr. III:96; (2) Sgt. Ballou's file had been provided to the District Attorneys' Offices, Tr. V:189, 193; Tr. VI:184; (3) the District Attorneys' Offices provided relevant information to the defendants they were prosecuting, Tr. I:110; V:98-99, 111, 129; Exs. 165, 260; and, therefore (4) there was nothing that the Court needed to review to determine whether there was anything to withhold on account of any privilege.

337. The Court finds that when Sgt. Ballou testified at the September 9 Hearing that he turned over everything to Ms. Kaczmarek, he meant his case file, not what was in the evidence room, and that the mental health records were not in his case file.

338. The Court finds that for her part, Ms. Kaczmarek believed that Sgt. Ballou had the mental health records in his file and that when she said everything had been turned over to the District Attorneys' Offices, she mistakenly believed that the mental health records had been included.

339. The Court finds that Ms. Foster believed the judge had ordered review of Sgt. Ballou's files, not the AGO's files.

340. The Court finds that for her part, Ms. Foster had no knowledge about the mental health records. The Court finds further that Ms. Foster believed that the contents of Sgt. Ballou's file were turned over to the District Attorneys' Offices. The Court finds further that Ms. Kaczmarek's reference to mental health records in her email regarding Sgt. Ballou's file being turned over meant nothing to Ms. Foster because she had never reviewed any file and assumed that Ms. Kaczmarek's reference was just part of a list of "everything" that had been turned over to the District Attorneys' Offices.

341. The Court finds that even if Ms. Foster had reviewed Sgt. Ballou's file, she would not have found the mental health records, including the ServiceNet diary card, which he had emailed to Ms. Kaczmarek in February 2013, because they were in the evidence room, not in his file.

342. The Court finds that the attorneys in the AGO each knew a part of what had been disclosed to the District Attorneys' Offices but no one person knew the sum of the parts and that, as a result, they individually and collectively made mistakes as to what had actually been turned over to the District Attorneys' Offices.

343. The Court finds, however, that there was no deliberate, intentional withholding of evidence.

The AGO's Response to the Court's Order Was Made in Good Faith, Even if It was Not Correct.

344. At the end of the September 9 Hearing, the Court (Kinder, J.) scheduled another hearing for October 7, 2013, and gave Ms. Foster until September 18 to provide allegedly privileged documents for his *in camera* review. Ex. 80, at pp. 244-245 (transcript).

345. On September 12, 2013, the Court allowed the defendant Rodriguez's Rule 30(c)(4) motion to the extent it sought: (1) copies of police reports, chain of custody reports and drug certificates related to the drug samples in Farak's possession at the time of her arrest; (2) copies of any documents related to the field testing of substances seized from Farak's car; and (3) copies of any documents relating to a search of Farak's workstation computer or cellular telephone. Ex. 190. The Court denied the motion in all other respects and therefore did not require the AGO to provide evidence of third party knowledge of Farak's alleged misconduct. Ex. 190. This ruling did not change the AGO's analysis of how to respond to the Court's order at the end of the September 9 Hearing because the categories of discovery that the Court allowed related to information that the District Attorneys' Offices, not the AGO, controlled, while the categories of allegedly privileged discovery the AGO would submit to the Court for *in camera review* related to the categories of privileged information suggested by the AGO in its motion to quash. Tr. III:40.

346. The Court's continuance of the matter and its ruling on defendant Rodriguez's Rule 30(c)(4) motion left open the question how the AGO would respond to the outstanding issues.

347. According to Ms. Foster, Mr. Ravitz told her to draft a letter "saying there was nothing to turn over." Tr. III:20. Mr. Ravitz does not recall ever seeing the letter until he started preparing for the hearing that took place in December 2016 and there is no red-lined copy of the document saved in his computer, as is his practice when he reviews drafts. Tr. V:38, 40, 69. In his view, the letter was something substantive that should have been reviewed before it was sent to the Court and because there were grammatical errors in it, he would not have signed off on the letter. Tr. V:38-40.

348. In a letter addressed to Judge Kinder dated September 16, 2013, Ms. Foster reported to the Court that "[a]fter reviewing Sergeant Ballou's file, every document in his possession has already been disclosed" (the "September 16 Letter"). Ex. 193. In the September 16 Letter, Ms. Foster specifically used the words "after reviewing" and specifically left who had done the review vague because, not knowing who had reviewed the file, she did not want to misrepresent that she herself had looked at the file. Tr. III:93-94. She "draft[ed] [her] letter to the Court leaving open to the fact that [she] did not review the file. Tr. III:20, 80, 92.

349. Ms. Foster believes Mr. Ravitz reviewed the September 16 Letter before she signed it. Tr. III:64.

350. Mr. Ravitz, does not remember reviewing the September 16 Letter. Tr. V:39-40, 69. If he had reviewed it, Mr. Ravitz is sure he would have fixed a grammatical error and capitalized the "Y" in "your Honor (sic)," consistent with his drafting practice. Tr. V:39-40, 69. In addition, Mr. Ravitz searched his computer system and could not find any red-lined copy of the letter, which, if he had reviewed the letter, would have been consistent with his practice. Tr. V:39-40, 69, 87.

351. The Court finds that, given the grammatical errors and the absence of any indication (such as a red-lined version) that Mr. Ravitz received it, that it is unlikely that Mr. Ravitz reviewed the letter before it went out.

352. However, the Court finds that Ms. Foster did not deliberately misrepresent to Judge Kinder that she herself had looked at the file and when she wrote the letter and that she was trying to respond to the Court's order without making any such misrepresentation.

The AGO Did Not Assent to Mr. Ryan's Request to View the Physical Evidence Seized from Farak's Car Because the Farak Prosecution Was Still Open and Ongoing.

353. On September 11, 2013, Mr. Ryan followed up with the AGO on the request he had made at the end of the September 9 Hearing and to which the Court deferred his ruling, asking whether the AGO had made any decision "as to whether I'll be permitted to view the evidence seized from Farak's car." Ex. 211.

354. Ms. Foster asked Mr. Ryan to clarify whether he was asking to access the evidence room or inspect the evidence seized from Farak's car. Ex. 211.

355. Mr. Ryan confirmed that he was "interested in inspecting the evidence seized from Farak's [sic] car & from her drawer & white bucket at the lab." Ex. 211.

356. On September 16, 2013, Mr. Ryan sent Ms. Foster an email, asking whether the AGO had "determined what it's position will be with respect to viewing the seized evidence." Ex. 211.

357. Ms. Foster asked Ms. Kaczmarek for her thoughts about Mr. Ryan's request to inspect the seized evidence. Ex. 211.

358. Ms. Kaczmarek responded, "No. Why is that evidence relevant to his case?" Ex. 211.

359. On September 17, 2013, Ms. Foster responded to Mr. Ryan's request to inspect the seized evidence, saying "[o]ur position is that viewing the seized evidence is irrelevant to any case other than Farak's." Ex. 214.

360. The Court finds that the AGO had a valid reason not to assent to a third party defendant's request to view the physical evidence that had been seized from Farak's car because at the time the request was made, the Farak prosecution was open and ongoing. The Court finds that the defendant's appropriate recourse was to press his motion for the inspection of physical evidence upon the Court, as the Court had indicated he should do if agreement could not be reached.

The AGO Responded to Subpoenas and Motions in the Penate Case by Filing a Standard Motion to Quash, the Defendant Narrowed the Scope of His Request, and the AGO Complied with the Court Order.

361. In the fall of 2013, the defendant Penate served the following subpoenas and motions related to the AGO's investigation of Farak: (1) on August 22, 2013, Sgt. Ballou and Ms. Kaczmarek received subpoenas compelling their testimony at an evidentiary hearing in *Commonwealth v. Penate*, HDCR2012-00083, Tr. IV:169; (2) on September 6, 2013, Penate filed a motion to compel production of documentary evidence pursuant to Mass. R. Crim. P. 17(a)(2) (the "Penate Motion to Compel"), seeking production of eleven different (11) categories of documentary evidence in connection with a motion to dismiss or, in the alternative, to be used at Penate's trial, Penate Dkt. No. 55; Ex. 216, at pp. 4-5 (transcript); Ex. 252; (3) Penate filed a motion pursuant to Mass. R. Crim. P. 17(a)(2) to inspect physical evidence recovered during searches conducted in the course of the Farak investigation and prosecution (the "Penate Motion to Inspect Physical Evidence"); and (4) Penate filed a motion to inspect the Amherst Lab (the "Penate Motion to Inspect the Lab"), Ex. 189; Ex. 216 at p. 23 (transcript).

362. Ms. Foster filed an opposition to the Penate Motion to Compel (production of eleven (11) different categories of documentary evidence), which motion was also directed at the State Police, the Executive Office of Public Safety and Security, and the Department of Public Health. Penate Dkt. No. 65, 66; Ex. 216, at p. 5 (transcript).

363. On October 2, 2013, the Court (Kinder, J.) held a hearing to consider the Penate Motion to Compel and the Penate Motion to Inspect (the "October 2 Penate Hearing"). Tr. V:13; Ex. 216, at p. 4 (transcript).

364. At the October 2 Penate Hearing, Ms. Foster filed motions to quash the subpoenas that had been served on Ms. Kaczmarek and Sgt. Ballou. Ex. 216, at p. 5. The Court asked Ms. Foster if she agreed that motion to quash the subpoena issued to Sgt. Ballou was moot because the subpoena and the motion to quash were identical to those filed in the Watt case and, in connection with that case, the AGO had represented that "all of the contents of Mr. Ballou's file have already been turned over." She agreed. Ex. 216, at pp. 8-9 (transcript).

365. With respect to the subpoena issued to Ms. Kaczmarek, the Court denied the motion to quash as moot because the parties agreed that no evidence would be taken from Ms. Kaczmarek at that time. Penate Dkt. The Court decided that rather than take testimony and evidence that was likely to be largely repetitive of the September 9 Hearing, he – with the parties' agreement – would admit the transcript from the September 9 Hearing into evidence in the Penate case. Ex. 216, pp. 6-11.

366. During the October 2 Penate Hearing, the Court questioned Mr. Ryan and Ms. Foster about the Motion to Inspect. Ex. 216, at pp. 11-22 (transcript).

367. During the October 2 Penate Hearing, Hampden County Assistant District Attorney Eduardo Velazquez reminded the Court that the Penate evidence that was initially tested by Farak had been re-tested by another chemist and found to be the same substance identified in the original test. Ex. 216, at p. 18 (transcript).

368. With respect to the Penate Motion to Compel, the parties notified the Court during the October 2 Penate Hearing that of the eleven (11) categories, there remained three areas of disagreement: (1) Farak's personnel file; (2) copies of Amherst Lab employees' performance evaluations; and (3) inter or intra-agency communications regarding the scope of misconduct at the Amherst Lab. Ex. 216, at p. 26 (transcript).

369. During the October 2 Penate Hearing, Ms. Foster argued that any AGO inter- or intra-agency communications would be protected by the work product doctrine. Ex. 216, pp. 27-28 (transcript). The Court asked Ms. Foster if she had reviewed the potentially responsive documents, and Ms. Foster responded that she had not. Ex. 216, at p. 27 (transcript).

370. The Court asked whether Ms. Foster thought that emails regarding the scope of Farak's conduct could be exculpatory to the defendant Penate's case. Ex. 216, at p. 35-36 (transcript). Ms. Foster responded that emails could be exculpatory and told the Court, as well, that no one at the AGO had compiled the communications and that the attorneys involved said that nothing in their communications was outside what had already been disclosed or would be protected by the work product doctrine. The Court again expressed frustration that Ms. Foster had not reviewed the materials at issue. Ex. 216, pp. 36-37 (transcript).

> THE COURT: Let me just say in the future, it would be helpful for me, in attempting to resolve these matters and deciding them, if you actually looked at the information you were talking about other [sic] than making bold pronouncements about them being privileged or the content of them.
>
> MS. FOSTER: I agree, Your Honor, but again, we don't have this in some type of database. I think the fact that I don't think there's even been a prima facie showing on this being relevant to the defendant's guilt or innocence, I think

> requiring the Attorney General's Office to compile possibly thousands of emails, voice mails, letters, requiring everyone who has been related to that unit to go through all their work to find these documents, I think that's asking a lot.
>
> THE COURT: Well, I agree that compiling it all in a database may be time consuming. Picking up a phone and talking to the lead investigators about what might exist and whether or not any of it has been reviewed doesn't seem, to me, to be asking too much.
>
> MS. FOSTER: I have done that, Your Honor. I have talked to Assistant Attorney General Kaczmarek. I talked to Sergeant Joe Ballou and both of them has said there's nothing – there's no smoking gun, as I think Attorney Ryan is looking for other than what's already been disclosed in grand jury minutes, grand jury exhibits, police reports and the like, other than just office conversation about thought processes.

Ex. 216, at p. 38 (transcript).

371. Following the October 2 Penate Hearing, the Court denied the Penate Motion to Inspect Physical Evidence, noting, "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." Ex. 189.

372. The Court allowed the Penate Motion to Compel "only insofar as it seeks production of drug testing administered to Farak by her employer, and any correspondence related directly to drug use or evidence tampering by Farak" (the "October 2 Order"). Ex. 252.

373. Following the October 2 Penate Hearing, the AGO filed a motion for clarification of the Court's October 2 Order (to the extent that the Court was allowing the Penate Motion to Compel, insofar as it sought production any correspondence related directly to drug use or evidence tampering by Farak). Tr. V:22.

374. Mr. Ravitz reviewed the motion for clarification before it was filed and, among other things, added a footnote supporting the proposition that it would be appropriate for the Court to accept the AGO's representation as to the existence of work product within its materials. Tr. V:22-23. In doing so, Mr. Ravitz thought that Ms. Foster would have examined any responsive AGO correspondence to determine that it was, in fact, work product. Tr. V:24.

375. On October 23, 2013, the Court clarified the October 2 Order: "It was my intention to order the production of any correspondence that shows knowledge by any state employee of [ ] Farak's drug use or evidence tampering before the criminal investigation of Farak was initiated on January 18, 2013. That is to say, any correspondence which

reflects that state employees were aware of alleged misconduct by Farak prior to the criminal investigation . . . It was not my intention to order that any agency of the Commonwealth produce work product related to the criminal investigation, Criminal Offender Record Information or grand jury information, not already disclosed." Ex. 188.

376. The AGO did not produce any documents in response to the October orders because it had no such responsive documents. The defendant was seeking employment-related information, for example, what supervisors knew about Farak's drug use before the criminal investigation got underway. Ex. 188; Ex. 216, at p. 26 (transcript).

377. Even if Ms. Foster had reviewed the evidence and found the mental health records, those records would not have been responsive to what was ordered to be produced. *See* Ex. 188.

378. On November 4, 2013, the Court denied defendant Penate's motion to dismiss. Penate Dkt. 81.

379. On November 13, 2013, defendant Penate served subpoenas on Sgt. Ballou and on Ms. Kaczmarek, seeking testimony from both at a pre-trial hearing scheduled for November 22, 2013 (the "Second Penate Subpoenas"). Exs. 198, 199.

380. On December 2, 2013, Ms. Foster filed motions to quash the Second Penate Subpoenas. Ex. 198; Penate Dkt. Nos. 98, 99, 100, 101. The Penate docket does not indicate how the Court ruled on these motions. The proceedings that followed in the Penate case are detailed below. *See* ¶¶ 587-600, *infra*.

381. The Court finds that Ms. Foster acknowledged to the Court that she had not reviewed the AGO's inter- and intra- office communications, that no one had compiled a database of emails, and that such communications about an ongoing investigation could be privileged.

382. The Court finds that to the extent Ms. Foster agreed when the Court asked her if everything in Sgt. Ballou's file was turned over, that she was merely restating her understanding and the position the AGO had taken at the September 9 Hearing, and that she did not intentionally make any misrepresentations.

383. The Court finds that the AGO was not required to produce work product related to the criminal investigation, Criminal Offender Record Information, or grand jury information, not already disclosed.

384. The Court finds that in relation to the orders issued after the October 2 Hearing, the AGO did not produce additional documents because it did not have responsive documents. The subpoena sought the production of documents showing what Farak's employers or

supervisors knew about Farak's drug use before the criminal investigation got underway. The AGO did not have responsive documents.

385. The Court finds that the mental health records that are the focus of these motions to dismiss would not have been responsive to the Court's October Orders.

The AGO Exercised its Discretion Reasonably When It Decided Not to Negotiate a Proffer with Farak.

386. At about the same time as the AGO Appeals Division was responding to the third party subpoenas and discovery motions, Ms. Kaczmarek continued to move forward on the prosecution of Farak and she and Ms. Pourinski discussed the possibility of Farak's making of a proffer. Ex. 267.

387. At that time, Mr. Verner, the Chief of the AGO's Criminal Bureau, had initial authority to determine whether a proffer was appropriate in a given case. Tr. IV:98.

388. As Mr. Verner testified, proffers are one of the hardest decisions for prosecutors to make because of the judgment calls involved in determining whether someone is going to tell the truth and how gaining access to the truth should be balanced against sentencing goals. Tr. V:178.

389. On September 10, 2013, Ms. Kaczmarek approached Ms. Pourinski about the possibility of a proffer in the Farak case. Tr. VI:30; Ex. 267.

390. On September 10, 2013, Ms. Pourinski sent Ms. Kaczmarek an email inquiring whether the AGO "intend[s] to bring further charges against [Farak]." Ex. 267; Tr. VI:30-32.

391. Ms. Kaczmarek responded the same day, noting that she was not sure what the AGO would do because District Attorneys' Offices could "be finding these cases for years" and asked if Sonja would "think about doing a proffer to determine the scope of [Farak's] alleged misconduct." Ex. 267.

392. Ms. Kaczmarek was considering a proffer because she did not have evidence to show that Farak had used drugs outside of the six-month window she was investigating and she knew it was a big issue for third party defendants. Tr. VI:159.

393. On September 22, 2013, Ms. Pourinski responded that she was "thinking about the possibility of a proffer" but "[i]t would have to include complete immunity for any possible additional charges in State and/or Federal court." Ex. 267.

394. On October 2, 2013, Ms. Pourinski sent Ms. Kaczmarek and email asking her to "please respond one way or the other" to her last email regarding "the proffer." Ex. 265.

395. Ms. Kaczmarek forwarded the email to Mr. Verner, noting that "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?" Ex. 265.

396. Mr. Verner responded, "Interesting. Let me talk to [Mr. Berdrosian]." Ex. 265. Mr. Bedrosian does not remember discussing a possible proffer in the Farak case specifically. Tr. IV:98-99.

397. On October 7, 2013, Ms. Kaczmarek responded to Ms. Pourinski, letting her know that she was "still waiting to hear what my bosses think about the immunity idea." Tr. VI:160; Ex. 282.

398. Generally, Mr. Bedrosian and Mr. Verner had discussed proffers together for years. They would consider whether the defendant was going to be honest, how to determine if the defendant were going to be honest, and what the sentencing goals were for the particular case. Tr. V:176-177.

399. Making decisions about proffers is extremely difficult and the AGO did the best it could with the information it had at the time. Tr. V:179.

400. The Dookhan case was "right on the heels of this," and Mr. Verner applied the same proffer analysis in both cases. Tr. V:177.

401. In both the Dookhan and Farak cases, Mr. Verner was concerned about the defendant's ability to tell the truth about the scope of her misconduct. Tr. V:177.

402. Mr. Verner felt strongly that both Dookhan and Farak should serve significant prison sentences, so he was also concerned about any reduction in sentence that would result from a proffer. Tr. V:177.

403. Mr. Verner was particularly concerned about the likelihood of Farak's giving an honest proffer because she had not cooperated with the prosecution up to that point: "There was nothing about the situation that led us to believe that she was going to be 100 percent honest. Again, we have all these drug samples. We didn't believe she was going to be able to tell us she used from this one, or used from that one, or on [what] date this was." Tr. V:179.

404. Consistent with his prior practice, Mr. Verner did not attempt to negotiate a proffer with Ms. Pourinski once he decided not to accept the offer. Tr. V:180.

405. The Court finds that it was within the AGO's discretion, and that the AGO exercised its discretion reasonably, to not negotiate a proffer from Farak, particularly given her uncooperativeness in the past.

The AGO Readily Agreed to the Defendant's Request to Inspect Evidence Once Farak Pled Guilty and Her Case Was Closed.

406. Farak pleaded on January 6, 2014. Tr. VI:60; Ex. 180.

407. On July 21, 2014, Ms. Kaczmarek left the AGO. Tr. V:230-231.

408. In the summer of 2014, Mr. Ryan approached the AGO to see if he could inspect the physical evidence that had been seized in the Farak case. Tr. V:70.

409. Because the Farak criminal case was now closed, the AGO did not have any objection to counsel for third party defendants viewing the evidence. Tr. V:71, 223-224.

410. The emails among the Assistant Attorneys General indicate that all readily and immediately agreed that they would assent to the inspection. *See* Ex. 257.

411. As evidenced by Mr. Ryan's discovery upon performing the inspection of physical evidence, *see* Ex. 166, the AGO made all of the evidence from the Farak case available for inspection once its case against Farak had completed – no one at the AGO tried to hide anything. Tr. V:71.

412. On July 31, 2014, Mr. Ryan and the AGO filed an assented-to motion to inspect physical evidence in *Commonwealth v. Burston*, HSCR2013-00113, a case pending in Hampshire County. Ex. 196.

413. Patrick Devlin ("Devlin"), an Assistant Attorney General in the AGO's Enterprise and Major Crimes Division who was responsible for dealing with the "collateral consequences" in the Dookhan and Farak cases, arranged for Mr. Ryan to inspect the physical evidence. Tr. V:70-71; Tr. VI:74.

414. On October 30, 2014, Mr. Ryan went to the Attorney General's office in Springfield to inspect the boxes and bags of physical evidence seized in the Farak investigation. Tr. V:71. Sgt. Ballou took all of the evidence out of the evidence room and placed it on the table reserved for reviewing evidence and supervised as Mr. Ryan reviewed all of the evidence in a controlled environment. Tr. IV:43, 47-48.

415. The Court finds that the AGO immediately and readily agreed to the defendant's request to inspect the physical evidence once the Farak case was over.

416. The Court finds that the readiness with which the AGO agreed to the request to inspect the physical evidence further corroborates the fact that the AGO did not know, up until that time, that the mental health records had not been provided to the District Attorneys' Offices.

417. The Court finds that the readiness with which the AGO agreed to the request to inspect the physical evidence further corroborates that the AGO did not intentionally withhold any evidence from the defendants but rather, simply made a mistake.

Mr. Ryan Inspected the Physical Evidence in the Evidence Room and Then Wrote to the AGO About the Mental Health Records He Had Found – for the First Time, the AGO Attorneys Realized that they Had Not Sent the Mental Health Records to the District Attorneys and that the Mental Health Records Arguably Showed Farak's Drug Use Dated Back Earlier than the AGO Had Supposed.

418. On November 1, 2014, Mr. Ryan sent a letter to Mr. Devlin (the "November 1 Letter") regarding the results of his inspection of the physical evidence. Tr. V:71; Tr. VI:74-75; Ex. 166.

419. In the November 1 Letter, Mr. Ryan notified Mr. Devlin that during the October 30 inspection of physical evidence, he discovered papers seized from Farak's car at the time of her arrest that he believed supported his theory that Farak's misconduct predated July 2012. Ex. 166.

420. Specifically, the ServiceNet diary card contained dates that corresponded with days of the weeks – 12-26/Monday, 12-20/Tuesday, 12-21/Wednesday, 12-22/Thursday, 12-23/Friday, 12-24/Saturday, 12-25/Sunday. Tr. VI:82-83; Ex. 205.

421. The ServiceNet diary card contained a chart and handwritten notes about drug and alcohol use on December 22. Ex. 166. There was no year, only month and day dates, on the paper. Ex. 166. Mr. Ryan determined that the month and day dates matched the days of the week in the year 2011. Ex. 166. *See also* ¶¶ 120, 136, 153-155, *supra*.

422. Mr. Ryan asked the AGO to: (1) assent to an emergency motion he planned to file to amend the protective order in *Commonwealth v. Burston* (the Hampshire County case in which the AGO assented to the motion to inspect physical evidence) so that he could disclose the results of his inspection to other defense attorneys; and (2) provide copies of the papers in question to each defendant who had moved for post-conviction relief based on misconduct on the part of Farak. Ex. 166.

423. Mr. Devlin forwarded Mr. Ryan's letter via email to Mr. Verner, Mr. Ravitz, and Mr. Mazzone. Tr. V:118, 220-221.

424. When Mr. Verner, Mr. Ravitz, and Mr. Mazzone learned about the issues raised in the November 1 Letter, they were shocked and upset because they thought this type of information had been provided to the defendants through the District Attorneys' Offices. Tr. V:75, 119, 221.

425. When Mr. Ryan sent the letter to Mr. Devlin, Mr. Verner was "angry," "upset," "shocked," and "frustrated," particularly when he looked at the mental health records and realized he had never seen them before. Tr. V:196.

426. Mr. Verner assumed that Ms. Kaczmarek had provided the mental health records to the District Attorneys' Offices at some point during the investigation. Tr. V:189-190, 191, 193, 227-230.

427. Because the AGO policy in the Dookhan and Farak matters was to provide the District Attorneys' Offices with any information that may impact the cases they were prosecuting, Mr. Mazzone and Mr. Ravitz assumed that anything potentially relevant to those cases had been provided. *See, e.g.*, Tr. V:72, 211; Tr. VI:57-58.

428. On November 3, 2014, Mr. Verner, Mr. Mazzone, and Mr. Ravitz started to try to re-create what happened with the goal of sending anything that had not been disclosed to the District Attorneys and third party defendants. Tr: V:73-74, 221-222, 227; Tr. VI:76.

429. Mr. Ravitz searched his emails to try to piece together why the defendants had not received the mental health records such as the ServiceNet diary card (that Mr. Ryan had found within the papers stored in the evidence room) from the District Attorneys when the AGO had given the District Attorneys voluminous documents, at first, police reports from Sgt. Ballou's file when Farak was arrested, and then additional documents such as grand jury minutes and exhibits after she was indicted. Tr. V:73; *see also* ¶¶ 211, 226, 272, *supra*.

430. Mr. Ravitz found "an email where Anne [Kaczmarek] references mental health worksheets and appears to say those are in Ballou's file, and then there was something else to suggest that everything in Ballou's file was turned over already. So the two emails, taken together, would mean that the mental health [records] were turned over already." Tr. V:73-74; Ex. 258.

431. Mr. Verner had a conversation with Ms. Foster to try to determine what had happened. Tr. V:200-203.

432. Mr. Verner took notes about that meeting on a printed copy of an email chain from September 10, 2013. Ex. 266.

433. Mr. Verner's notes reflect: Ms. Foster's statement to him that according to Sgt. Ballou, everything from his file had been turned over to defense counsel; Ms. Foster had not looked at Sgt. Ballou's file; and, after the Court had issued an order, she had gone back to ask Ms. Kaczmarek and Sgt. Ballou again about the production of Sgt. Ballou's file to the District Attorneys. Ex. 266.

434. Mr. Ravitz determined that the "wrong that had occurred" related to the representation made to the Court by Ms. Foster that "there's no evidence that a third party had knowledge" of Farak's conduct when, in the evidence room at the AGO's Springfield Office, among bags of papers that had been removed from Farak's car, the AGO had the mental health records that suggested otherwise. Tr. V:90-91.

435. Ms. Kaczmarek's "best guess" as to what happened "is that when discovery was being turned over, no one went through the trial box that I had, and simply went based on what I had submitted to the grand jury, like an electronic form and of my discovery certs that I had sent to Ms. Pourinski. And . . . I lost focus on the mental health records. I really didn't even contemplate them, because to look at them, . . . it looks like what I thought was that she had been using a week prior to her arrest, and so . . . when I initially received them, [I thought] I don't need this for the grand jury." Tr. VI:186.

436. Upon receipt of the November 1 Letter, Mr. Mazzone, Mr. Ravitz, and Mr. Verner all immediately agreed that the mental health records should be sent to the District Attorneys right away (for further disclosure by the District Attorneys to the defendants) and that the AGO should assent to any motion that Mr. Ryan filed in that regard (including the motion to amend the protective order and allow Mr. Ryan to provide copies of the mental health records to other defense attorneys with relevant cases). Tr. V:72, 223-24; Tr. VI:61; Ex. 257.

437. Mr. Verner asked Mr. Devlin to put everything together so they could provide it to the District Attorneys' Offices to provide to other third party defendants as appropriate. Tr. V:221-222.

438. At some point while the AGO was assembling additional information to be sent to the District Attorneys, Mr. Verner reviewed the case file boxes himself and realized that Mr. Devlin had not included everything in what he was putting together for the District Attorneys' Office. Tr. V:222.

439. Mr. Verner went over to the other side of the office where the EMC Division was and went into the evidence room, looked at the boxes, and realized that the papers in the evidence room is not what had gone out to the District Attorneys. He asked the Division Chief, Cara Krysil, to deal with the situation. It took some time to harness all the correct documents, but it was done and they were sent out. Tr. V:222.

440. Mr. Verner was anxious to get this information to the District Attorneys' Office and did so without waiting for any discovery motions: "I'm not quibbling or thinking about different rules. I'm thinking about, we have this stuff, and if its' affecting someone, it needs to go out." Tr. V:222.

441. By letter dated November 13, 2014, Mr. Verner notified the District Attorneys' Offices that pursuant to the Court's order allowing a motion to inspect all physical evidence, the

AGO was sending the District Attorneys 289 pages of "documentary evidence" that was not previously turned over to them but that had been "listed in the police report of Trooper Randy Thomas," such police report having been forwarded to the District Attorneys in March 2013. Ex. 167. The 289 pages consisted of copies of the papers that were among the physical evidence seized during the Farak investigation, including the mental health records. Ex. 167.

442. The Court finds that after the AGO attorneys realized that the mental health records had not been provided to the District Attorneys' Offices and therefore, not to the defendants, that the AGO attorneys were genuinely individually and collectively taken aback, surprised, and upset. Mr. Verner was shocked and angry. The Court finds that the AGO attorneys immediately set about trying to determine how the nondisclosure could have possibly happened, and that tempers flared.

443. The Court finds that the AGO attorneys realized for the first time that photocopies of the papers held in the evidence room, including the mental health records, had not been sent to the District Attorneys' Offices, and that they had wrongly assumed, and therefore wrongly stated, that everything had been turned over to the District Attorneys' Offices.

444. The Court finds that the AGO attorneys then acted expeditiously to assemble all of the papers and photocopy them so that they could be turned over to the District Attorneys, and that this was done within about ten (10) days of realizing a mistake had been made.

445. The Court finds that the original nondisclosure was unintentional and, when the AGO attorneys discovered their mistake, they immediately responded in order to rectify it.

446. The Court finds that there was no intentional, deliberate withholding of evidence, only a series of mistakes.

After the Supreme Judicial Court ordered that the Commonwealth Undertake a Broader Investigation into the Scope and Extent of Farak's Misconduct, the AGO Stepped Up to Do the Investigation.

447. In April 2015, the Supreme Judicial Court, in the context of its decision in *Commonwealth v. Cotto*, 471 Mass. 97 (2015), ruled that "it is imperative that the Commonwealth thoroughly investigate the timing and scope of Farak's misconduct at the Amherst Lab in order to remove the cloud that has been cast over the integrity of the work performed at that facility, which has serious implications for the entire criminal justice system. Within one month of the issuance of this opinion, the Commonwealth shall notify the judge below whether it intends to undertake such an investigation. If so, the investigation shall begin promptly and shall be completed in an expeditious manner." *Cotto*, 471 Mass. at 115.

448. In April 2015, in the companion case of *Commonwealth v. Ware*, 471 Mass. 85 (2015), the Supreme Judicial Court ruled that "[g]iven that the matter of Farak's misconduct at the Amherst drug lab involves defendants in multiple counties, the State police detective unit of the Attorney General's office might be best suited to lead an investigation." *Ware*, 471 Mass. at 96, 96 n. 14.

449. After the Supreme Judicial Court ruled in *Cotto*, 471 Mass. at 115, and *Ware*, 471 Mass. at 96, that the Commonwealth should conduct an investigation to determine the timing and scope of Farak's misconduct at the Amherst Lab and that the State Police at the AGO were best suited to do the investigation, the AGO undertook that investigation on behalf of the Commonwealth.

450. The AGO conducted an investigation into the scope and extent of Farak's misconduct and on April 1, 2016, filed its report with the Court, Investigative Report Pursuant to *Commonwealth v. Cotto*, 471 Mass. 97 (2015) ("Cotto Report"). In the course of that investigation, the AGO convened two grand juries and called as witnesses Farak, three other chemists who worked in the state drug laboratories in the Amherst Lab and elsewhere, and Nancy Brooks, a State Police chemist who presently works for the two State Police drug labs. AGO investigators interviewed Dookhan, who, herself in 2013 was convicted on charges of misleading investigators, filing false reports, and tampering with drug evidence. Thousands of pages of evidence were reviewed. *See* Affidavit of Heather A. Valentine ("Valentine Aff."), at Ex. J (Cotto Report).

451. In addition, on June 15, 2015, the Attorney General appointed Hon. Peter A. Velis (Ret.) to work as an independent investigator to address concerns articulated by the Supreme Judicial Court in *Cotto*, 471 Mass. at 115. On August 6, 2015, Northwestern District Attorney David E. Sullivan appointed Judge Thomas T. Merrigan (Ret.) "in the matter of the investigation and prosecution of the conduct of the Massachusetts Attorney General['s] Office relating to the case of Commonwealth v. Sonja Farark." The Judges submitted their report to this Court on March 31, 2016 ("Velis/Merrigan Report"). The Judges concluded, "After our thorough review of the investigative activities and their recommendations, we agree [with the conclusion of the State Police assigned to assist with the investigation] that there is no evidence of prosecutorial misconduct or obstruction of justice by the Assistant Attorney Generals and [State Police] officers in matters related to the Farak case." *See* Valentine Aff., at Ex. K (Velis/Merrigan Report)).

452. The Court finds that the AGO conducted a comprehensive investigation into the scope and extent of Farak's misconduct and has complied with the Supreme Judicial Court's directive in *Cotto* and *Ware*. The Court finds that the AGO not only complied with the Court's directive, but also took the additional step of inviting an investigation into its own conduct in connection with the prosecution of Farak and its effect on third party defendants, in which investigation it fully cooperated.

Defendants: Case Overviews and Pending Motions[13]

453. With the exception of Fiori Liquori ("Liquori"), whose conviction involved possession and distribution of Class B and E substances (Class E substances: zolpidem, carisoprodol, tramadol, and acyclovir; Class B substances: oxycodone, oxymorphone, and buprenorphine), each of the defendants before this Court pleaded to or was found guilty of a charge involving possession or distribution of cocaine. HDCR2005-01159 (Omar Brown ("Brown")); HDCR2009-00097 (Lizardo Vega ("Vega")); HDCR2009-01068 and HDCR2009-01069 (Watt); HDCR2012-00399 (Wendall Richardson ("Richardson")); HDCR2007-01072, HDCR2009-01072, and HDCR2010-00253 (Bryant Ware); HDCR2005-01159 (Cotto); HDCR2012-00226 (Glenda Aponte ("Aponte")); HDCR2010-01233 (Omar Harris ("Harris")); HDCR2012-00624 (Liquori); HDCR2012-00083 (Penate).

454. The alleged drug evidence recovered in each defendant's case was initially tested at the Amherst drug laboratory by Farak, Rebecca Pontes ("Pontes"), or Mr. Hanchett. *See* ¶¶ 458, 465, 478, 489, 504, 507, 518, 532, 549, 568, 589, *infra*.

455. The procedural details in each defendant's case are summarized below.

Omar Brown

456. Currently before the Court is Brown's November 30, 2015, motion to vacate convictions and for the sanction of dismissal, supported by memoranda filed March 15, 2016, and June 29, 2016. HDCR2005-01159, Dkt. Nos. 40, 48, 53.

457. On December 7, 2005, a grand jury indicted Brown on charges of possession of cocaine with intent to distribute, trafficking in cocaine, misdemeanor possession of marijuana, resisting arrest, and committing a drug violation near a school or park. Dkt. No. 1.

458. Ms. Pontes, not Farak, analyzed the drugs found on Brown. *See* Valentine Aff., at Ex. A (Cert. of Drug Analysis dated January 20, 2017 (Lab Case No. 16-3342) (referring to sealed samples marked with the initials "RP")).

459. On May 24, 2006, Brown pled guilty to one (1) count of trafficking in cocaine in violation of G.L. c. 94C, § 32E(b). Dkt. No. 29. The Court (Page, J.) sentenced the defendant Brown to a term of three (3) years to three years and one (1) day, to be served at MCI Cedar Junction. Dkt. No. 30.

460. By January 19, 2013, the date of Farak's arrest, Brown had served his sentence in full. Brown Dkt.

[13] Because the AGO is not a party in the individual defendants' cases, the status of these cases is based on information available to the AGO from the court dockets or from information contained in the defendants' recent pleadings.

461. On December 28, 2016, the Massachusetts State Police Crime Lab in Springfield re-analyzed the evidence samples in Brown's case. *See* Valentine Aff., at Ex. A (Cert. of Drug Analysis dated January 20, 2017 (Lab Case No. 16-3342)); Ex. 273.

462. The results of the 2016 testing indicated that, of the three (3) samples submitted, two (2) samples were found to contain cocaine, and one (1) sample was found to contain marihuana. *See* Valentine Aff., at Ex. A (Cert. of Drug Analysis dated January 20, 2017 (Lab Case No. 16-3342)).

Lizardo Vega

463. Currently before the Court is Vega's September 2, 2016, motion to dismiss or, in the alternative, for miscellaneous relief. HDCR2009-00097, Dkt. No. 67.

464. On February 10, 2009, a grand jury indicted Vega on charges of possession of a Class A substance (heroin) with intent to distribute, distribution of a Class A substance (heroin) as a subsequent offender, possession of a Class B substance (cocaine) with intent to distribute as a subsequent offender, and two (2) counts of committing a drug violation near a school or park. Dkt. No. 1.

465. Farak analyzed the evidence samples in Vega's case on March 16, 2009. *See* Certificates of Analysis marked Exs. N, O, and P to Affidavit of Attorney Luke Ryan in Support of Defendant Lizardo Vega's Motion for Scott "Conclusive Presumption" of "Egregious Government Misconduct" and Bridgeman "Exposure Cap," at Dkt. No. 63.1.

466. The results of the 2009 testing indicated the following: in three (3) glassine bags submitted, a powder analyzed was found to contain heroin; in nine (9) glassine bags submitted, a powder analyzed was found to contain heroin; and in nineteen (19) plastic bags, white chunks analyzed were found to contain cocaine. Dkt. No. 63.1 (Exs. N, O, P).

467. On January 28, 2010, Vega pled guilty to one (1) count of possession with intent to distribute (heroin), one (1) count of distribution (heroin), and one (1) count of possession with intent to distribute (cocaine). Vega Dkt.; *see also* Dkt. No. 63.1, at Affidavit of Attorney Luke Ryan, ¶ 28.

468. On January 28, 2010, the Court (Sweeney, J.) sentenced Vega to two (2), two and a half (2.5) year terms, to be served concurrently at the Hampden County House of Correction and ordered that he be placed on probation for two (2) years following the completion of his sentences. Dkt. No. 15.

469. The Court (Sweeney, J.) further ordered that Vega's sentence include 130 days direct (time served) with the balance suspended on the condition that he successfully complete two (2) years of probation. Dkt. No. 15.

470. On August 22, 2012, the Court (Kinder, J.) found that Vega violated the conditions of his probation and ordered him to serve the balance of his sentences at Hampden County House of Correction and to serve, concurrently, a sentence of two and a half (2.5) to three (3) years at MCI Cedar Junction. Dkt. No. 52.

471. As of January 19, 2013, the date of Farak's arrest, Vega was serving the balance of his sentence at Hampden County House of Correction. Dkt. No. 52.

472. In March 2014, Vega filed a motion to join a motion for leave to conduct post-conviction discovery, a motion to compel discovery, and a motion to inspect physical evidence related to the Farak investigation. Dkt. Nos. 57, 59, 60.

473. On August 12, 2014, the Court (Kinder, J.) denied the motion to join a motion for leave to conduct post-conviction discovery and allowed in part the motion to compel discovery. Vega Dkt. The motion to inspect physical evidence was withdrawn. Vega Dkt.

474. Vega has completed serving his sentence, and did so as of approximately October 2014. Vega Dkt.; *see also* Dkt. No. 63.1, at Affidavit of Attorney Luke Ryan, ¶ 32.

475. As far as the AGO has been able to determine, the drug samples from Vega's 2009 case have not been re-tested.

Jermaine Watt

476. Currently before the Court is Watt's November 21, 2014, motion to reconsider his motion in the "drug lab" case to withdraw guilty plea or, in the alternative, second motion to withdraw guilty plea, supported by his November 21, 2014, memorandum. HDCR2009-01068, Dkt. Nos. 48, 48.1; HDCR2009-01069.[14]

477. On November 25, 2011, a grand jury indicted Watt on two (2) counts of distribution (cocaine) as a subsequent offense. HDCR2009-01068; HDCR2009-01069.

478. Farak analyzed the evidence samples in Watt's case on September 14, 2009, and September 23, 2009. Ex. 236.

479. The results of the 2009 testing indicated the following: in two (2) plastic bags submitted, white chunks analyzed were found to contain cocaine. Ex. 236.

480. On September 22, 2010, Watt pled guilty to two (2) counts of cocaine distribution in violation of G.L. c. 94C, § 32A(a). Watt Dkts.

[14] For ease of reference, the events and pleadings from his cases are cited as they appear in HDCR2009-01068, unless otherwise noted.

481. On April 14, 2011, the Court (Kinder, J.) sentenced Watt to a term of three (3) to five (5) years to be served at MCI Cedar Junction. Dkt. No. 10. A sentence credit of 506 days was given to the defendant Watt by agreement. Watt Dkt.

482. On February 15, 2013, approximately a month after Farak's arrest on January 19, 2013, Watt filed a motion to stay his sentence and set bail pending the filing and resolution of a motion for new trial. Dkt. No. 16.1. On March 27, 2013, the Court (Carey, J.) allowed this motion. Dkt. No. 17.

483. On April 24, 2013, Watt filed a motion to withdraw his guilty plea in the "drug lab" case. Dkt. No. 21.

484. In connection with his motion to withdraw his guilty plea, Watt served a subpoena on a State Trooper related to the Farak investigation. Dkt. No. 30. Details about the subpoena and the AGO's response are described more fully herein. *See* ¶¶ 290-343, *supra*.

485. On October 30, 2013, the Court (Kinder, J.) denied Watt's motion to withdraw his guilty plea. Dkt. No. 35.

486. To the best the AGO can determine, the Springfield Police Department has not been able to locate the samples for Watt's cases (HDCR2009-01068, HDCR2009-01069) and no re-testing information is available.

Wendall Richardson

487. Currently before the Court is Richardson's February 26, 2015, motion in the "drug lab" case to withdraw guilty plea, supported by his February 26, 2015, memorandum. HDCR2012-00399, Dkt. No. 17, 18.

488. On April 17, 2012, a grand jury indicted Richardson on charges of cocaine distribution as a subsequent offense. Dkt. No. 1.

489. Farak analyzed the evidence samples in Richardson's case on March 15, 2012. Richardson Dkt.

490. On November 5, 2012, Richardson pled guilty to one (1) count of cocaine distribution. Richardson Dkt.

491. On November 5, 2012, the Court (Ferrara, J.) sentenced Richardson to a term of three (3) years to three (3) years and one (1) day, to be served at MCI Cedar Junction. Dkt. No. 10.

492. As of January 19, 2013, the date of Farak's arrest, Richardson was serving the terms of his sentence at MCI Cedar Junction. Dkt. No. 10.

493. On or about January 19, 2015, Richardson completed his sentence. Dkt. No. 10.

494. On June 8, 2015, the Massachusetts State Police Crime Lab in Springfield analyzed the evidence samples in Richardson's case. *See* Exs. 273, 274 (Cert. of Drug Analysis dated July 1, 2015 (Lab Case No. 13-158249)).

495. The results of the 2015 testing indicated that, of the two (2) samples submitted, both were found to contain cocaine. *See* Ex. 274.

Bryant Ware

496. Currently before the Court is Ware's June 1, 2015, motion to vacate convictions and for the sanction of dismissal, supported by his June 1, 2015, July 6, 2015, August 7, 2015, March 14, 2016, and July 7, 2016, memoranda. HDCR2010-00253, Dkt. Nos. 28, 29, 34, 36, 51, 58, 59.[15]

497. Ware has three cases at issue in the matter currently before the Court: HDCR2007-01072, HDCR2009-01072, and HDCR2010-00253.

498. On August 29, 2007, a grand jury indicted Ware on charges of possession of a class B controlled substance (cocaine) with intent to distribute (count one), possession of a Class D controlled substance (count two), violation of the controlled substances laws in proximity to a school or park (count three), possession of a firearm without a firearm identification card (count four), and conspiracy to violate the drug laws (count five) (the "2007 charges"). HDCR2007-01072, Dkt. No. 1.

499. On May 21, 2008, Ware pled guilty to counts one, two, and four. HDCR2007-01072.

500. On May 30, 2008, the Court (Page, J.) sentenced Ware to a term of two-and-a-half (2.5) years on count one and to a term of six (6) months on counts two and four with both terms to be served concurrently at the Hampden County House of Correction. HDCR2007-01072, Dkt. No. 12.

501. The Court (Page, J.) further ordered that Ware's sentences include one (1) year of direct (time served), with the balances suspended on the condition that he successfully complete two (2) years of probation. HDCR2007-01072, Dkt. No. 12.

502. On November 25, 2009, while Ware was on probation, a grand jury indicted him on a charge of distribution of a class B controlled substance (cocaine) as a subsequent offense (the "2009 charge"). HDCR2009-01072, Dkt. No. 1.

[15] Ware filed these motions and memoranda in all three of his above-captioned cases. For ease of reference, the AGO will cite his pleadings as they are captioned on the docket in HDCR2010-00253, unless otherwise noted.

503. On January 12, 2010, the Court (Page, J.) released Ware on bail. HDCR2009-01072.

504. On August 5, 2009, Farak tested the sample related to Ware's 2009 charge. Ex. 201.

505. The results of the 2009 testing indicated that the sample submitted contained cocaine. Ex. 201.

506. On March 9, 2010, after Ware had been released on bail and was awaiting trial, a grand jury indicted him on new charges of possession of a class A controlled substance (heroin) with intent to distribute as a subsequent offense, violation of the controlled substances laws in proximity to a school or park (count two), five (5) counts of assault and battery by means of a dangerous weapon (a vehicle) (counts three through seven), and resisting arrest (count eight) (the "2010 charges"). HDCR2010-00253, Dkt. No. 1.

507. On February 5, 2010, Farak tested the samples related to the Ware's 2010 charges. Ex. 201.

508. On February 4, 2011, the Court (Page, J.) held a hearing regarding all of Ware's pending indictments which resulted in the following:
    a. In regard to the 2007 charges, the Court found that Ware violated the terms of his probation and ordered him to a term of eighteen (18) months to be served at the Hampden County House of Correction.
    b. In regard to the 2009 charge, Ware pleaded guilty to one count of cocaine distribution, and the Court sentenced him to a term of five (5) to seven (7) years to be served at MCI Cedar Junction. HDCR2009-01072, Dkt. No. 24.
    c. In regard to the 2010 charges, Ware pleaded guilty to counts one, three, four, five, six, seven and eight, and the Court sentenced Ware to a term of five (5) to seven (7) years to be served at MCI Cedar Junction. HDCR2010-00253, Dkt. No. 9.
    d. The Court ordered that all the sentences be served concurrently, and Ware was given a sentence credit of 408 days, by agreement. HDCR2010-00253, Dkt. No. 9.

509. As of January 19, 2013, the date of Farak's arrest, Ware was serving his sentences at MCI Cedar Junction. Ware Dkt.

510. On August 12, 2013, Ware filed a motion for a new trial with respect to the 2009 charge. HDCR2009-01072, Dkt. Nos. 28, 28.1, 29.

511. On February 14, 2014, Ware filed a motion for leave to conduct post-conviction discovery. HDCR2010-00253, Dkt. No. 17. Ware sought retesting of drug evidence maintained by the Springfield Police Department that related to any and all cases brought by the Commonwealth (not only his own) between July 2004 and January 18, 2013 (the day before Farak's arrest). HDCR2010-00253, Dkt. No. 17.

512. The Court (Kinder, J.) denied Ware's motion for post-conviction discovery, concluding that he failed to establish a prima facie case for relief under Mass. R. Crim. P. 30(c)(4). HDCR2010-00253.

513. Ware appealed. The Supreme Judicial Court affirmed the Court's denial of the motion for post-conviction discovery but held that Ware should be afforded an opportunity to conduct post-conviction discovery relating to his own 2009 charge. *Commonwealth v. Ware*, 471 Mass. 85, 96 (2015).

514. On January 20, 2017, the Massachusetts State Police Crime Lab in Springfield analyzed the evidence samples related to Ware's 2009 charge. *See* Valentine Aff., at Exs. B, C (Certs. of Drug Analysis dated January 20, 2017 (Lab Case Nos. 13-152751 and 13-152752)); *see also* Ex. 273.

515. The results of the 2017 testing indicated that, of the samples submitted, both were found to contain cocaine. *See* Valentine Aff., at Exs. B, C (Certs. of Drug Analysis dated January 20, 2017 (Lab Case Nos. 13-152751 and 13-152752)).

Eric Cotto

516. Currently before the Court is Cotto's September 27, 2016, motion for application of the "Bridgeman exposure cap" to Farak cases out of the Amherst Lab and incorporated memorandum of law. HDCR2005-01159, Dkt. No. 126.

517. On June 14, 2007, a grand jury indicted Cotto on charges of trafficking in cocaine, possession of a firearm without a firearm identification card, and being an armed career criminal. Dkt. No. 1.

518. On June 8, 2007, Farak analyzed the drug evidence samples in Cotto's case. Ex. 235.

519. The results of the 2007 testing indicted that all of the samples submitted and analyzed were found to contain cocaine. Ex. 235.

520. On April 13, 2009, Cotto pled guilty to one (1) count of trafficking in cocaine. Dkt. No. 21.

521. The Court (Page, J.) sentenced Cotto a term of five (5) years to five (5) years and one (1) day to be served at MCI Cedar Junction and a term of one (1) year to be served at the Hampden County House of Correction, to be served concurrently. Dkt. No. 22. A sentence credit of one (1) day was given, by agreement. Dkt. No. 22.

522. As of January 19, 2013, the date of Farak's arrest, Cotto was serving his sentences. Cotto Dkt.

523. On March 14, 2013, Cotto filed a motion to stay his sentence and set bail pending the filing and resolution of a motion for new trial. Dkt. No. 27.

524. On March 27, 2013, the Court (Carey, J.) allowed Cotto's motion to stay his sentence and set bail. Dkt. No. 28.

525. On April 25, 2013, Cotto filed a motion to withdraw his guilty plea that was denied by the Court (Kinder, J.) on October 30, 2013. Dkt. Nos. 31, 40.

526. On December 2, 2013, the Court (Kinder, J.) ordered Cotto to serve the remaining balance of his sentence at MCI Cedar Junction. Dkt. No. 44.

527. On or about December 10, 2013, Cotto completed his sentence. Cotto Dkt.

528. On January 20, 2017, the Massachusetts State Police Crime Lab in Springfield analyzed the evidence samples related to Cotto's case. *See* Valentine Aff., at Ex. D (Cert. of Drug Analysis dated January 20, 2017 (Lab Case No. 16-33421)).

529. The results of the 2017 testing indicated that, of the samples submitted, all were found to contain cocaine. *See* Valentine Aff., at Ex. D (Cert. of Drug Analysis dated January 20, 2017 (Lab Case No. 16-33421)).

Glenda Aponte

530. Currently before the Court is Aponte's December 11, 2015, motion to vacate convictions and for the sanction of dismissal, supported by a memorandum filed March 15, 2016; and the defendant's June 27, 2016, motion to vacate convictions and for the sanction of dismissal, which is meant to supplement the 2015 motion. HDCR2012-00226, Dkt. Nos. 48, 55, 60.

531. On March 6, 2012, a grand jury indicted Aponte on three (3) counts of distribution of cocaine as a subsequent offense and two (2) counts of committing a drug violation near a school or park. Aponte Dkt. No. 1.

532. On June 8, 2007, January 1, 2012, and April 24, 2012, Farak analyzed some of the evidence samples in Aponte's case, and on January 5, 2012, Mr. Hanchett analyzed the remaining samples in Aponte's case. Ex. 200.

533. The results of the 2007 and 2012 testing revealed that all of the samples submitted contained cocaine. Ex. 200.

534. On October 16, 2012, Aponte pled guilty to three (3) counts of cocaine distribution. Aponte Dkt.

535. The Court (Kinder, J.) sentenced Aponte to two (2), three-and-a-half (3.5) to four-and-a-half (4.5) year terms, to be served concurrently, at MCI Cedar Junction and further ordered that the defendant be placed on probation for two (2) years following the completion of her sentences. Dkt. No. 18.

536. As of January 19, 2013, the date of Farak's arrest, Aponte was serving her sentences at MCI Cedar Junction. Aponte Dkt.

537. On April, 23, 2013, Aponte filed a motion for stay of execution of sentence. Dkt. No. 25. On May, 17, 2013, the Court (Page, J.) allowed the defendant Aponte's motion pending the filing and resolution of a motion for new trial. Dkt. No. 27.

538. On June 26, 2013, Aponte filed a motion for new trial as an "Amherst drug lab case." Dkt. No. 33.

539. On December 30, 2013, the Court (Kinder, J.) allowed the motion for a new trial pursuant to an agreed-upon sentencing recommendation. Aponte Dkt.

540. On December 30, 2013, the defendant Aponte pled guilty to three (3) counts of cocaine distribution. Dkt. No. 43.

541. On December 30, 2013, the Court (Kinder, J.) sentenced Aponte to a three (3) year term to be served at the Hampden County House of Correction and ordered that she be placed on probation for two (2) years following the completion of her sentence. Dkt. No. 44.

542. On December 30, 2013, the Court (Kinder, J.) stayed Aponte's sentence until January 24, 2014, at which time, the defendant reported for execution of her sentence. Aponte Dkt.

543. On February 10, 2016, Aponte moved to stay the execution of her sentence. Dkt. No. 53.

544. On March 23, 2016, the Court (Carey, J.) stayed the execution of Aponte's sentence. Aponte Dkt.

545. On January 20, 2017, the Massachusetts State Police Crime Lab in Springfield analyzed the evidence samples related to Aponte's case. *See* Valentine Aff., at Ex. E (Cert. of Drug Analysis dated January 20, 2017 (Lab Case No. 16-33419)).

546. The results of the 2017 testing indicated that, of the samples submitted, all were found to contain cocaine. *See* Valentine Aff., at Ex. E (Cert. of Drug Analysis dated January 20, 2017 (Lab Case No. 16-33419)).

Omar Harris

547. Currently before the Court is Harris's July 24, 2015, motion to reconsider denial of his motion to withdraw guilty plea in the "drug lab" case and his September 19, 2016,

motion to dismiss based on prosecutorial misconduct in the "drug lab case." HDCR2010-01233, Dkt. Nos. 68, 86.[16]

548. On November 18, 2010, a grand jury indicted Harris for trafficking in cocaine (count one) and committing a drug violation near a school or park (count two). Dkt. No. 1.

549. Farak analyzed the evidence samples in Harris's case. *See* Ex. 276 (referencing heat-sealed sample with initials "SJF").

550. On September 21, 2011, Harris pleaded guilty one (1) count of trafficking in cocaine. Harris Dkt.

551. On September 21, 2011, the Court (Moriarty, J.) sentenced Harris to serve a ten (10) to twelve (12) year term at MCI Cedar Junction. Dkt. No. 12.

552. As of January 19, 2013, the date of Farak's arrest, Harris was serving his sentence at MCI Cedar Junction. Harris Dkt.

553. On February 15, 2013, Harris filed a motion to withdraw his guilty plea and for a new trial. Dkt. Nos. 19, 21.

554. On April 24, 2013, Harris filed a motion to stay his sentence and to set bail pending resolution of the motion for a new trial. Dkt. No. 29.

555. On May 17, 2013, the Court (Page, J.) allowed Harris's motion to stay sentence and set bail. Dkt. No. 31.

556. On July 12, 2013, Harris filed a motion to vacate his guilty plea. Dkt. Nos. 38, 38.1, 39.

557. On November 12, 2013, the Court (Kinder, J.) denied Harris' motion to vacate his guilty plea. Dkt. No. 45.

558. On January 2, 2014, the Court (Kinder, J.) issued a mittimus, revoking the stay of sentence and ordering Harris to serve the balance of his sentence. Dkt. No. 50.

559. In October 2014, Harris appealed the denial of the motion to vacate his guilty plea. Dkt. Nos. 60, 61.

560. On January 26, 2015, the Appeals Court gave Harris leave to file and the trial court leave to consider post-conviction motion(s) for discovery. Dkt. No. 61.1.

[16] There is no indication on Harris's docket suggesting that the Court ruled on his July 24, 2015, motion to reconsider denial of his motion to withdraw guilty plea in the "drug lab case," and no indication that he has withdrawn the motion. The AGO, therefore, treats the motion as still pending.

561. On February 2, 2015, Harris filed a motion for post-conviction discovery, which the Court (Kinder, J.) allowed on May 11, 2015, insofar as the defendant sought permission to view records held by the Clerk's Office. Dkt. No. 63.

562. On July 24, 2015, Harris filed a motion to reconsider the denial of his motion to vacate his guilty plea in his "drug lab case," a motion to stay sentence, and a motion to set bail pending reconsideration of his motion to withdraw guilty plea in the "drug lab" case. Dkt. Nos. 68, 69.

563. On July 29, 2015, the Court allowed the motion to stay sentence and set bail pending reconsideration of Harris's motion to withdraw his guilty plea. Harris Dkt.[17]

564. On June 22, 2015, the Massachusetts State Police Crime Lab in Springfield analyzed the evidence samples related to the defendant Harris's case. Ex. 276.

565. The results of the 2015 testing indicated that the sample submitted was found to contain cocaine. Ex. 276.

Fiori Liquori

566. Currently before the Court is Liquori's August 7, 2015, motion for new trial in the "drug lab" case and his September 19, 2016, motion to dismiss based on prosecutorial misconduct in the "drug lab case." HDCR2012-00624, Dkt. Nos. 95, 113.[18]

567. On June 28, 2012, a grand jury indicted Liquori on four (4) counts of distribution of a Class B substance, two (2) counts of possession of a Class B substance with intent to distribute, two (2) counts of possession of a Class E substance with intent to distribute, one (1) count of possession of a Class E substance, and one (1) count of possession of a Class B substance. Dkt. No. 1.

568. On June 22, 2012, Farak analyzed the evidence samples in Liquori's case. Ex. 278.

569. The results of the 2012 testing indicated that the samples analyzed were found to contain the following Class E substances: zolpidem, carisoprodol, tramadol, and acyclovir; and the following Class B substances: oxycodone, oxymorphone, and buprenorphine. Ex. 278. Tablets in two (2) of the samples analyzed were found to contain no narcotic or illegal drugs. Ex. 278.

[17] There is no indication on the defendant Harris's docket suggesting that he posted bail or was released from incarceration following the Court's ruling.

[18] There is no indication on the Liquori docket that the Court ruled on Liquori's August 7, 2015, motion for new trial in the "drug lab" case and no indication that the defendant has withdrawn the motion. The AGO, therefore, treats the motion as still pending.

570. As of January 19, 2013, the date of Farak's arrest, Liquori's indictment was pending in the pre-trial stage. Liquori Dkt.

571. On May 8 and May 9, 2013, Liquori's jury trial began (Ford, J., presiding). Liquori Dkt.[19]

572. On June 7, 2013, the Massachusetts State Police Crime Lab in Springfield analyzed the evidence samples related to Liquori's case. Ex. 278.

573. The results of the 2013 testing indicated that the samples analyzed and/or identified through pharmaceutical identifiers were found to contain the following Class E substances: zolpidem, carisoprodol, tramadol, and acyclovir; and the following Class B substances: oxycodone, oxymorphone, and buprenorphine. Ex. 278. Tablets in two (2) of the samples analyzed were found to contain no narcotic or illegal drugs. Ex. 278.

574. On June 26, 2013, the jury trial was scheduled to resume, but was rescheduled. Liquori Dkt.

575. On July 8, 2013, Liquori filed a motion to dismiss based on egregious government misconduct and a motion to suppress evidence. Dkt. Nos. 41, 43.

576. On October 30, 2013, the Court (Kinder, J.) denied both motions. Dkt. No. 49.

577. On September 9, 2014, the Court resumed the jury trial on the drug-related indictments. Liquori Dkt.

578. On September 12, 2014, the jury convicted Liquori of two (2) counts of distribution of a Class B substance; two (2) counts of possession of a Class B substance with the intent to distribute; and one (1) count of possession of a Class E substance. Dkt. Nos. 70, 72, 73, 74, 75.

579. On September 16, 2014, the Court (Rup, J.) sentenced Liquori to two (2), two-and-a-half (2.5) year terms, to be served concurrently, at the Hampden County House of Correction and ordered that he be placed on probation for two (2) years following the completion of his sentences. Dkt. No. 78.

580. On September 17, 2014, Liquori filed a notice of appeal. Dkt. No. 83.

581. On August 7, 2015, the Appeals Court granted Liquori's motion for leave to file and for this Court to consider, a motion for new trial and motion to stay sentence, which Liquori filed the same day. Dkt. Nos. 93, 94, 95.

[19] The May 8 and May 9, 2013, portion of the jury trial pertained only to Count 10 of the indictment -- one (1) count of possession of a firearm without a firearm identification, the only count of Liquori's indictment that is not drug-related.

582. On August 19, 2015, the Court denied Liquori's motion to stay his sentence. Liquori Dkt.

583. On November 10, 2015, Liquori filed a motion for reconsideration and rehearing of his motion to stay sentence and set bail in the "Drug Lab" case. Dkt. No. 101.

584. On February 1, 2016, the Court (Carey, J.) allowed Liquori's motion to stay his sentence and motion to be admitted to bail. Dkt. No. 104.

585. On April 26, 2016, Liquori was released on bail. Liquori Dkt.

586. There is no indication on the docket that Liquori has since resumed serving his sentence. Liquori Dkt.

Rolando Penate

587. Currently before the Court is Penate's May 21, 2015, motion for new trial, supported by memoranda filed May 21, 2015, and June 6, 2016. HDCR2012-00083, Dkt. Nos. 142, 143, 171.

588. On February 10, 2012, a grand jury indicted Penate on charges of possession of Class A and Class B substances with the intent to distribute as a second offender (courts 1 and 3), three (3) counts of distribution of a Class A substance as a second offender (counts 5, 7, and 9), five (5) counts of school zone violations (counts 2, 4, 6, 8, and 10), possession of a firearm without a valid FID card (count 11), possession of ammunition without a valid FID card (count 12), and possession of a firearm during the commission of a felony (count 13). Dkt. No. 1.

589. On January 9, 2012, Farak analyzed the evidence samples in Penate's case. Ex. 88.

590. The results of the 2012 testing indicated that the samples submitted were found to contain heroin and cocaine. Ex. 88.

591. Penate's jury trial was scheduled to begin on November 15, 2012, but was rescheduled for reasons unrelated to the Farak matter. Penate Dkt.

592. As of January 19, 2013, the date of Farak's arrest, Penate's indictment was pending in the pre-trial stage. Penate Dkt.

593. On February 26, 2013, Penate filed a motion to suppress and/or dismiss, for egregious government misconduct. Penate Dkt.

594. Penate served subpoenas and a motion to compel related to the Farak case. Dkt. Nos. 55, 6.8, 70, 71, 67. The content of these documents is described more fully herein. *See* ¶¶ 361-380, *supra*.

595. On August 8, 2013, the UMass Medical School Drug Lab in Worcester analyzed the evidence samples related to Penate's case. Ex. 277.

596. The results of the 2013 testing indicated that the samples analyzed were found to contain heroin and cocaine. Ex. 277.

597. From December 9 to 13, 2013, Penate was tried by a jury (Page, J., presiding). Penate Dkt.

598. On December 13, 2013, the jury convicted Penate on one (1) of the ten (10) drug-related counts on which he had been indicted, that is, (1) count of distribution of a Class A substance. Dkt. No. 116.

599. On December 16, 2013, the Court (Page, J.) sentenced Penate to a five (5) to seven (7) year term, to be served at MCI Cedar Junction. Dkt. No. 123.

600. At this time, Penate is serving the remaining balance of his sentence at MCI Cedar Junction. Penate Dkt.

Given the Status of the Defendants' Cases, They Have Not Been Prejudiced and Can Get a Fair Trial.

601. Mr. Flannery, a seasoned prosecutor, testified that if there were a retrial and Farak testified, the defendants would be able to impeach Farak. Tr. V:103.

602. Mr. Flannery also testified that If there were a retrial, the results of retesting the defendant's drug samples would be admitted. Tr. V:103.

603. The drug samples of seven (7) of the nine (9) defendants have been re-tested and they can get a fair trial based on those results. *See* ¶¶ 461-462, 494-495, 514-515, 528-529, 545-546, 564-565, 572-573, 595-596, *supra*.

604. If a drug sample no longer exists or has otherwise been compromised, the defendant can introduce the new evidence to impeach the reliability of the analysis done by Farak and thereby get a fair trial.

605. The Court finds that the defendants have not been prejudiced, let alone irremediably prejudiced, because they now have the evidence they need to proceed with their motions for new trial or motions to withdraw their guilty pleas.

Respectfully submitted,
THE COMMONWEALTH

MAURA HEALEY,
ATTORNEY GENERAL

By: Judy Zeprun Kalman, BBO # 539860
General Counsel
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
617.963.2018
Judy.Zeprun@massmail.state.ma.us

By: Kimberly P. West, BBO # 635401
Chief, Criminal Bureau
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
617.963.2864
Kimberly.West@massmail.state.ma.us

By: Heather A. Valentine, BBO # 657442
Assistant Attorney General
Office of the Attorney General
1350 Main Street
Springfield, MA 01103
413.523.7707
Heather.Valentine@massmail.state.ma.us