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 MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

[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.

Table of Contents

Introduction

The Office of the Attorney General ("AGO") intervened in this case for the sole and limited purpose of addressing the allegations of egregious prosecutorial misconduct the defendants make against the AGO. To that end, the AGO's Memorandum in Opposition to the Defendants' Motions to Dismiss focuses only on the defendants' arguments that the Court should dismiss their indictments because of the AGO's conduct. [2]

The indictments in these cases should not be dismissed based on the conduct of the AGO for at least two reasons. First, the conduct of the AGO was not egregious and the defendants cannot show prejudice or irremediable harm. Second, the prophylactic remedy of dismissal is not appropriate under the law where well-intentioned Assistant Attorneys General ("AAsG") made unintentional mistakes.

As the Court noted at the outset of the December 2016 evidentiary hearing, the limited question about the AGO's conduct in the investigation and prosecution of Sonja Farak ("Farak"), a state chemist who was using drugs and tampered with evidence that had been submitted to the Amherst Lab for testing, is whether "somebody buried, intentionally, credible important exculpatory evidence." Tr. II:176-177. In six days of testimony from former AAsG and hundreds of exhibits, there is simply no "direct, first-hand knowledge and proof" that the AGO "intentionally buried" anything. Tr. II:176-177.

[2] The AGO does not take any position as to whether the conduct of Sonja Farak ("Farak"), including for example, Farak's use of drugs, constitutes "newly discovered evidence" that might, where the defendants can show prejudice, serve as the basis for their motions for a new trial or to withdraw their guilty plea under Mass. R. Crim. P. Rule 30. The AGO confines its opposition to the defendants' motions to dismiss for prosecutorial misconduct.

Instead, the evidence and testimony show that well-intentioned AAsG at the AGO, who were prosecuting Farak but not these defendants, reasonably handled a unique, complex, and evolving case involving egregious misconduct on Farak's part, *Commonwealth v. Cotto*, 471 Mass. 97, 114 (2015); that while prosecuting Farak, the AGO turned over allegedly exculpatory evidence to the District Attorneys' Offices that were prosecuting defendants whose drugs Farak had analyzed; and that, admittedly, in doing so, the AGO made unintentional mistakes.

Unintentional mistakes, however, do not constitute egregious misconduct. The unintentional mistakes the AGO committed did not prejudice the defendants legally. Any harm caused is remediable: the defendants have access to the relevant evidence now and can use it to argue for new trials or to withdraw their guilty pleas. Furthermore, in most cases, the drug samples tested by Farak have been re-tested and independently confirmed, and those test results may be admitted at new trials or to support a new guilty plea.

Finally, it is unlikely that the unusual circumstances of this case will occur again. The AGO was prosecuting a state chemist whose misconduct affected defendants the AGO was not prosecuting. While investigating and prosecuting the case against Farak, members of the AGO team were simultaneously providing case material to other prosecuting authorities. There were multiple AAsG working on various aspects of the Farak case while responding to numerous third-party requests for discovery in a very fast-moving case involving a substantial number of documents and physical evidence. The AGO failed to recognize that some evidence in its possession had not been turned over, but was potentially exculpatory to the third party defendants.

The AGO regrets that its unintentional mistakes delayed the defendants' ability to pursue their motions for new trial or to withdraw their guilty pleas and that the Court and the parties have had to spend valuable time and resources in order to determine what happened and effectuate an appropriate remedy. Nevertheless, these AGO mistakes do not warrant the remedy of dismissal sought by the defendants.

FACTS [3]

In January 2013, the State Police and the AGO learned about missing evidence at the Department of Public Health's State Laboratory Institute in Amherst ("Amherst Lab") and immediately opened an investigation – interviewing witnesses, interviewing the potential suspect, applying for and executing search warrants, and attempting to determine the scope of the alleged misconduct. The investigation and subsequent prosecution came to focus on Farak, who was ultimately prosecuted on charges of tampering with drug evidence and later admitted to a long history of drug abuse. FOF, ¶¶ 27-242, 386-406, 450.[4]

At the very beginning of the investigation, State Police troopers assigned to the AGO conducted a search of Farak's car, which was a mess and filled with garbage and other items. They seized hundreds of pages of paperwork, some of which was found in manila envelopes that appeared to be from the Amherst Lab. All of this paperwork was described as "assorted

[3] In this memorandum, the AGO provides a brief summary of the facts. Detailed facts with record evidentiary citations are contained in the AGO's Proposed Findings of Fact, submitted separately.

[4] References to the AGO's Proposed Findings of Fact are denoted "FOF, ¶ ___." References to the Transcript of the Evidentiary Hearing held December 12-16, 2016 are denoted "Tr. Vol:page." References to exhibits introduced at the Evidentiary Hearing are denoted "Ex.___."

lab paperwork" on the search warrant return and on State Police inventory logs. FOF, ¶¶ 68-112.

Massachusetts State Police Sergeant Joseph Ballou ("Sgt. Ballou") later reviewed the seized evidence in greater detail. Among the hundreds of pieces of paper, Sgt. Ballou identified seven (7) pages that appeared to contain admissions of Farak's drug use.[5] He immediately notified Anne Kaczmarek, the AAG assigned to the case. Both Sgt. Ballou and Ms. Kaczmarek were concerned that the papers with the potential admissions could be privileged mental health material (collectively referred to as "mental health records"). As a result, in seeking indictments against Farak, Ms. Kaczmarek decided not to present these potentially-privileged records to the grand jury both because of the possible protections that applied to them and because she believed there was ample evidence to establish probable cause without them. FOF, ¶¶ 113-149, 153-192.

Both Sgt. Ballou and Ms. Kaczmarek mistakenly thought the potentially-privileged records had been prepared just a few weeks before Farak's arrest. One record – a ServiceNet diary card – contained entries with reference to December and days (*e.g.*, 12/23, 12/24, 12/25), but it did not include the year. Because Farak was arrested in January 2013, Sgt. Ballou and Ms. Kaczmarek thought the dates referred to December 2012. This conclusion was consistent with interviews of Farak's co-workers who had indicated they had not previously suspected Farak of

[5] The seven papers were: (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." Ex. 205; *see also* Tr. IV:17-18, 41. For consistency and ease of reference, these records are referred to throughout as "mental health records."

any wrongdoing and noted that her work performance had recently declined, and also with Sgt. Ballou and Ms. Kaczmarek's own personal past and recent observations of her appearance. FOF, ¶¶ 153-165.

As it had done in the Dookhan[6] case, the AGO sought to assist local District Attorneys' Offices in identifying and notifying defendants whose cases might have been affected by Farak's misconduct. The AGO therefore immediately notified the District Attorneys' Offices of Farak's arrest; sent them arrest reports, evidence logs, and other case material as soon as possible; and, once Farak was indicted, sought and received permission from the Court to release the grand jury minutes and exhibits to the District Attorneys' Offices. The mental health records were not included in the material sent to the District Attorneys' Offices because those records had not been presented to the grand jury. Instead, they were kept in a locked evidence room with all other physical evidence. The AGO did make the mental health records – along with all other physical evidence and case material – available to Farak and her defense counsel. FOF, ¶¶ 122-125, 150-152, 202-220, 226-242, 278, 307.

As the Farak investigation progressed, criminal defendants whose cases were potentially affected by Farak's misconduct – primarily because she signed the certificates indicating she

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[6] As used throughout this memorandum, "Dookhan" refers to Annie Dookhan, a state chemist whom the AGO investigated and prosecuted. The State Police investigation into Dookhan revealed numerous instances of misconduct, including "dry labbing," contaminating samples intentionally, including turning negative samples into positive samples, removing samples from the evidence locker without following procedures, postdating entries in the evidence log book, forging an evidence officer's and another chemist's initials, and falsifying reports intending to certify the proper working order of a machine used to test drug samples. Dookhan pled guilty to twenty-seven charges arising out of the AGO investigation, including one count of perjury, four counts of witness intimidation, and eight counts of evidence tampering. *See Commonwealth v. Scott*, 467 Mass. 336, 340 at n. 3 (2013).

tested drug evidence in their cases – began to bring motions for post-conviction relief or pre-trial discovery in cases being handled by the District Attorneys' Offices. In doing so, some defendants served third-party subpoenas *duces tecum* upon Sgt. Ballou and Ms. Kaczmarek for testimony and documents related to the Farak investigation. Because the AGO's Farak investigation and prosecution was ongoing, the AGO opposed the third-party subpoenas and discovery requests to the extent they sought to inspect the physical evidence or sought privileged material (such as material protected by the investigative privilege and work product doctrine). Additionally, because the AGO had provided a substantial amount of Farak case material to the District Attorneys' Offices, the attorneys and investigators involved believed the defendants already had access to anything from the investigation that would be relevant to their cases. None of the attorneys or investigators realized that the mental health records were not included in the materials sent to the District Attorneys' Offices. FOF, ¶¶ 271-385.

AAG Kris Foster, a new prosecutor who worked in the AGO Criminal Bureau's Appeals Division, was assigned to respond to the third-party subpoenas and discovery requests. Throughout the fall of 2013, she presented the AGO's arguments to the Court in various hearings, pleadings, and correspondence. Based in part on those arguments, the Court denied, among other things, the defendants' requests to inspect the physical evidence. FOF, ¶¶ 243-256, 282-385.

After Farak pled guilty and the initial Farak investigation was closed, the AGO immediately assented to a defendant's motion to inspect the Farak physical evidence. When counsel for the moving defendant reviewed the evidence, he realized that the December dates on the ServiceNet diary card referred to December 2011, not 2012, suggesting that Farak's drug

use went back further than the AGO had found in its investigation. It was not until then that the AGO became aware of its understandable mistake regarding the dates on the ServiceNet diary card. FOF, ¶¶ 406-417.

As soon as defense counsel made the AGO aware of the issue, the AGO sought to correct its mistake by sending copies of all documentary evidence that was held in its evidence room as physical evidence to the District Attorneys' Offices, and assenting to motions to allow other defendants access to the mental health records. After the Court indicated in *Commonwealth v. Cotto*, 471 Mass. 97, 115 (2015) and *Commonwealth v. Ware,* 471 Mass. 85, 96 n. 14 (2015), that the Commonwealth should conduct a wider investigation of Farak and the Amherst Lab, the AGO undertook a broader investigation into Farak's conduct and set up an independent investigation of the AGO's own conduct concerning the handling of the evidence under the supervision of Retired Superior Court Justice Peter Velis. FOF, ¶¶ 418-452.

Argument

I. Dismissal With Prejudice is a Drastic Remedy of Last Resort, and Even if Misconduct is Egregious, Dismissal Is Not an Appropriate Remedy Unless Irremediable Harm is Shown. The Court Has Never "Pulled the Trigger" for Prophylactic Reasons, and the Circumstances of this Case Do Not Warrant the Trigger Being Pulled for the First Time.

The Court should not dismiss the defendants' case with prejudice because such a drastic remedy is not supported by the law or the evidence regarding the AGO's conduct.

"[D]ismissal with prejudice 'is a remedy of last resort.'" *Bridgeman v. District Attorney for the Suffolk District*, 476 Mass. 298, 316 (2017) ("*Bridgeman II"*) (internal quotations omitted). "The dismissal of a criminal case [with prejudice] is a remedy of last resort because it precludes a public trial and terminates criminal proceedings." *Commonwealth v. Cronk*, 396

Mass. 194, 198 (1985); *accord Commonwealth v. Viverito*, 422 Mass. 228, 230 (1996) ("Precluding trial of the accused based on some unauthorized or unconstitutional conduct on the part of wayward prosecutors, police, or other officers within the law enforcement or judicial system deprives the public of its ability to protect itself by punishing an offender"). Except under carefully limited circumstances, dismissing a complaint or indictment with prejudice amounts to an "usurpation of the 'decision-making authority constitutionally allocated to the executive branch,'" *Commonwealth v. Borders*, 73 Mass. App. Ct. 911, 913 (2009) (quoting *Commonwealth v. Gordon*, 410 Mass. 498, 501 (1991)), and, therefore, there are very limited circumstances in which an indictment may be dismissed based on prosecutorial misconduct: (1) where the prosecutor intended to goad the defendant into moving for a mistrial; (2) where the prosecutor's conduct resulted in such irremediable harm that a fair trial is not possible; or (3) where the prosecutor's conduct is so egregious that dismissal is warranted to deter similar future misconduct. *Commonwealth v. Merry*, 453 Mass. 653, 666 (2009).

Although the Court has referenced the "prophylactic" standard in a number of cases, the "prophylactic trigger" has never in fact been "pulled" for egregious misconduct without a showing of prejudice. *See Commonwealth v. Mason*, 453 Mass. 873, 877 (2009) (Court observing it had never dismissed charges when presented with egregious prosecutorial misconduct in the absence of prejudice); *Commonwealth v. Monteagudo*, 427 Mass. 484, 485-486 (1998) ("We have never ordered the dismissal of an indictment for misconduct in the absence of prejudice"); *Commonwealth v. Drumgold*, 423 Mass. 230, 246 (1996) (same); *see also Commonwealth v. Hernandez*, 421 Mass. 272, 278 (1995) ["[The Court has] never upheld the dismissal of a complaint or indictment for misconduct in the absence of a showing of

prejudice"); *Commonwealth* v. *Lewin*, 405 Mass. 566, 586 (1989) ("We have sometimes remarked that outrageous police conduct, not shown to be prejudicial to a fair trial, may require the dismissal of charges, but we have never dismissed charges in such a circumstance"); *Cronk*, 396 Mass. at 201 (before dismissing an indictment, the Court should make a finding as to "whether the prosecutor's . . . response to discovery orders caused such irreparable prejudice that the defendant could not receive a fair trial if the [indictment] were reinstated"); *Commonwealth v. Teixiera*, 76 Mass. App. Ct. 101, 108 (2010) ("So far as we can determine, the third and final trigger (prosecutorial conduct so egregious dismissal necessary to deter future misconduct) has never been pulled").

In its most recent consideration of the issue whether indictments should be dismissed as a prophylactic remedy on account of egregious misconduct attributable to the Commonwealth--ironically in the context of a case involving the egregious misconduct of another state chemist, Dookhan--the Supreme Judicial Court set forth "'[t]wo parallel legal principles' governing when this last resort might be necessary, balancing the rights of defendants 'against the necessity for preserving society's interest in the administration of justice.'" *Bridgeman II*, 476 Mass. at 316 (quoting *Cronk*, 396 Mass. at 198-199). First, "where a prosecutor fails to disclose evidence the defendant is entitled to receive and the defendant is prejudiced by the failure to disclose, a motion to dismiss with prejudice should be allowed only where there is 'a showing of irremediable harm to the defendant's opportunity to obtain a fair trial.'" *Bridgeman II*, 476 Mass. at 316 (quoting *Cronk*, 3964 Mass. at 198). As the Court noted, "[d]ismissal with prejudice is 'too drastic a remedy' if the error can be remedied and the defendant can still obtain a fair trial." *Bridgeman II*, 476 Mass. at 316 (citing *Cronk*, 396 Mass. at 200). Second,

"[u]nder the alternative principle, prosecutorial misconduct that is egregious, deliberate, and intentional, or that results in a violation of constitutional rights may give rise to presumptive prejudice. In such instances prophylactic considerations may assume paramount importance and the 'drastic remedy' of dismissal of charges may become an appropriate remedy." *Bridgeman II*, 476 Mass. at 316 (quoting *Cronk*, 396 Mass. at 198-199). "This alternative principle is narrowly applied; 'the only reason to dismiss criminal charges because of non-prejudicial but egregious police misconduct would be to create a climate adverse to repetition of that misconduct that would not otherwise exist.'" *Bridgeman II*, 476 Mass. at 316 (quoting *Lewin*, 405 Mass. at 587).

In every case, the burden is on the defendant to demonstrate that dismissal of criminal charges is necessary. *See Viverito*, 422 Mass. at 230; *see also Lewin,* 405 Mass. at 585. Under the first principle, the defendant must show egregious misconduct, prejudice, and irremediable harm. Under the second alternative principle, the defendant must show that the prosecutor's misconduct is so egregious that the conduct gives rise to presumptive prejudice and the defendant does not have to show irremediable harm.

Here, the defendants' arguments for dismissal fail under both principles because the AGO's conduct was not egregious and the defendants cannot show prejudice or irremediable harm, and the series of unintentional errors committed by the AGO are not the type of conduct that courts have found would relieve the defendants of their obligation to prove prejudice for the sake of the application of a prophylactic remedy.

II. The AGO Did Not Engage in "Egregious Misconduct": in the Process of Investigating the Farak Case, Disclosing Allegedly Exculpatory Evidence Concerning Farak, and Handling Third-Party Subpoenas and Discovery, AGO AAsG Made Unintentional Mistakes, But Unintentional Mistakes Do Not Equate to Egregious Misconduct.

With regard to application of the first principle, there was no "egregious misconduct." The AGO did not "intentionally bury" evidence that the defendants were entitled to receive. Instead, the AGO investigated and prosecuted the Farak case reasonably and provided a substantial amount of case material to the defendants through the District Attorneys' Offices and in the context of third party discovery, albeit making mistakes along the way. As it turned out, mistakes and misunderstandings within the AGO with respect to the significance of a discrete piece of evidence--the dates on a ServiceNet diary card seized from Farak's car and left undisturbed in the evidence room--in part affected the scope and extent of the investigation the AGO undertook and what was disclosed to the District Attorneys' Offices. But when the ServiceNet diary card and other mental health records were ultimately identified as significant, they were turned over to the District Attorneys' Offices and to defendants who requested them, as quickly as possible. The delayed disclosure has not caused prejudice or irremediable harm to the defendants because they now have the records, which provide them with impeachment evidence as to the full scope of Farak's misconduct, and they can now seek new trials or seek to withdraw their guilty pleas based on the impact that evidence has in the circumstances of their individual cases.

A. The AGO Did Not Engage in "Egregious Misconduct" in the Process of Investigating the Farak Case within the Original Scope Because There Was No Duty to Go Further.

With regard to the investigation of Farak, the defendants' have not shown, as it is their burden to do, *Viverito*, 422 Mass. at 230, that the AGO engaged in "egregious misconduct," only that well intentioned AAsG made a series of unintentional mistakes and, as a result, did not, at the time of Farak's prosecution, learn the full scope and extent of her drug abuse. But "egregious misconduct" means more than unintentional mistakes. *See Merry*, 453 Mass. at 664-665 (no egregious misconduct where Essex County prosecutor did not intentionally fail to inform the Suffolk County prosecutor who tried the case about relevant expert witness opinion); *Cronk*, 396 Mass. at 201 (no egregious misconduct where prosecutor repeatedly failed to meet discovery order deadlines because the conduct appeared to be unintentional and compliance ultimately occurred); *Commonwealth v. Light*, 394 Mass. 112, 115 (1985) (no egregious misconduct where prosecution failed to disclose exculpatory evidence before defendant's bench trial because there was no indication that the failure to disclose was intentional); *Commonwealth v. Lam Hue To*, 391 Mass. 301, 311 (1984) (no egregious misconduct where prosecution failed to disclose evidence later found to be the murder weapon because lack of disclosure and inept performance of police absent any intent to "goad" the defendant is not sufficient to justify dismissal of the indictment). Rather, "egregious misconduct" has an element of intent, for example, intentional goading, withholding, or noncompliance with orders, and there was no such intent here.

The AGO's decision to conduct a narrow, focused investigation and prosecution of Farak was not "egregious misconduct." There was no legal duty to conduct a broader investigation at

the time the AGO investigated Farak. Generally speaking, a prosecutor has no duty to investigate. "[P]rosecutors (district attorneys and the Attorney General) have broad discretion in deciding whether to prosecute. Judicial review of decisions which are within the executive discretion of the Attorney General would constitute an intolerable interference by the judiciary in the executive department of the government and would be in violation of art. 30 of the Declaration of Rights. As a result, in the absence of allegations that the Attorney General acted arbitrarily and capriciously, discretionary executive decisions made by the Attorney General are beyond judicial review." *Shepard v. Attorney Gen*., 409 Mass. 398, 401-402 (1991) (internal citations and quotations omitted); *see also Burlington v. District Attorney for the N. Dist*., 381 Mass. 717, 721 (1980) ("virtual exclusion of judicial intervention to check or correct the district attorney [in his choosing to *nol pros* a criminal case] follows from Part I, art. 30 of the Massachusetts Constitution declaring a separation of powers").[7] Based on the AGO's mistaken but reasonable belief that Farak's drug use only spanned the six-month period preceding her arrest, there was no general underlying duty to undertake a broader investigation of Farak herself.

Moreover, there was no *Brady*-type duty to broaden the investigation so as to find exculpatory evidence. "The so-called *Brady* obligation is one of disclosure; it imposes no

[7] This case is not like *Commonwealth v. Smith*, 90 Mass. App. Ct. 261, 268 (2016), where, on appeal from an order denying a motion for new trial without a hearing, the Court, acknowledging there was no general duty to search out exculpatory information on behalf of defendants, held that the defendant had a right to an evidentiary hearing to determine what the Suffolk County prosecutor knew about benefits being conferred on a witness by other entities where it was clear the prosecutor was coordinating with other law enforcement agencies. Here, in connection with the prosecution of Farak, the AGO attorneys had allegedly exculpatory information in their possession about cases they were not prosecuting but did not realize its significance and mistakenly thought they had shared it with the prosecutors in those cases.

obligation on the prosecution to gather evidence or conduct additional investigation." *Commonwealth v. Caillot*, 454 Mass. 245, 262 (2009); *Commonwealth v. Lepage*, 435 Mass. 480, 488 (2001) ("While the prosecution remains obligated to disclose all exculpatory evidence in its possession, it is under no duty to gather evidence that may be potentially helpful to the defense"); *Commonwealth v. Beal*, 429 Mass. 530, 531-532 (1999) (duty of disclosure does not require prosecution to solicit information from witness). "[A] Brady violation does not exist just because 'the government, through a more vigorous investigation, might have been able to discover the evidence.'" *United States v. DeCologero*, 2013 U.S. Dist. LEXIS 97476, 2013 WL 3728409, at *5 (D. Mass. 2013)[8] (quoting *United States v. Maldonado-Rivera*, 489 F.3d 60, 67 (1st Cir. 2007)). Therefore, at the time the AGO was conducting an investigation of Farak, there being no duty to investigate further, there was nothing "egregious" about its decision to keep the investigation focused on Farak and not undertake a wider investigation of the Amherst Lab, which, theoretically, may have exposed more information about the nature and extent of Farak's drug use.

The undertaking of a wider investigation was suggested by the Supreme Judicial Court in 2015. A year earlier, as a result of the revelation of the egregious misconduct of Dookhan, a state chemist who had tampered with drugs while employed at another Department of Public Health lab, the William A. Hinton State Laboratory Institute ("Hinton Lab"), the Court had established a special evidentiary rule whereby a defendant seeking to vacate a guilty plea under Rule 30(b) would be entitled to a conclusive presumption that egregious government misconduct occurred. *Commonwealth v. Scott*, 467 Mass. 336, 351-352 (2014). In

[8] *See* Affidavit of Heather A. Valentine ("Valentine Aff."), at Ex. L (copy of unpublished decision).

Commonwealth v. Cotto, 471 Mass. 97, 111-112 (2015), based on Farak's misconduct, the defendant sought application of the same sort of conclusive presumption that egregious government misconduct occurred in his case, and claimed that therefore, he was not required to prove that Farak's misconduct occurred in his case. There had been, however, a formal, broad investigation of Dookhan and her practices at the Hinton Lab, but there had not been a comparable investigation of Farak at the Amherst Lab. *Cotto*, 471 Mass. at 111-112. Thus, while Cotto had not satisfied his burden of establishing that the *Scott* conclusive presumption should be applied to him, there had been a showing of Farak's egregious misconduct at the Amherst Lab, and any deficiencies in the evidence as to the timing and scope of her misconduct was attributable to the Commonwealth's failure to conduct a wider investigation. The Court indicated its view that defendants should not shoulder the burden of ascertaining whether Farak's misconduct had created a problem of systemic proportions and second, that it was "imperative that the Commonwealth thoroughly investigate the timing and scope of Farak's misconduct at the Amherst drug lab in order to remove the cloud that has been cast over the integrity of the work performed at that facility, which has serious implications for the entire criminal justice system." *Cotto*, 471 Mass. at 115. Therefore, the Court ordered the Commonwealth to notify the trial court whether it intended to undertake such an investigation, and, in the absence of such an investigation, presented an alternative framework for going forward. *Cotto*, 471 Mass. at 114.

While the Court did not define what it meant when it suggested the "Commonwealth" should undertake an investigation into the full scope and extent of Farak's misconduct, it is evident the Court meant something broader than the AGO, because in the companion case,

Commonwealth v. Ware, 471 Mass. 85 (2015), the Court went on to say 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 n. 14. And, the AGO did so, convening two grand juries; calling as witnesses Farak, three other chemists who worked in the state drug laboratories including the Amherst Lab and elsewhere, and Nancy Brooks, a State Police chemist; interviewing Dookhan; reviewing thousands of pages of evidence; and filing its Report to the Court about the scope and extent of Farak's misconduct on April 1, 2016.[9] *See* Cotto Dkt. (HDCR2007-00770); Valentine Aff., at Ex. K (copy of Report). Four things about the *Cotto* and *Ware* decisions cannot be overlooked: (1) the Court's suggestion that the Commonwealth undertake a wider investigation was based on the exercise of its superintendence power to fashion procedures for giving defendants whose evidence samples were analyzed by Farak an opportunity to get discovery of how her misconduct may have affected their cases; (2) the suggestion was that the Commonwealth (not the AGO) should undertake an investigation, *Cotto*, 471 Mass. at 114; *Ware*, 471 Mass. at 95; (3) the Court suggested the AGO was the appropriate agency to pursue the investigation now, *Ware*, 471 Mass. at 95-96; and (4) most significantly for this case, the Court did not suggest that dismissal was an appropriate remedy for the Commonwealth's not undertaking the wider investigation sooner. To the contrary, the defendant's explicit remedy was to obtain post-conviction discovery and proceed in the form of

[9] In addition, to better understand what happened and in an effort to improve its own practices, the AGO asked that an independent investigation into the AGO's investigation and prosecution of Farak ensue. *See* FOF, ¶¶ 449-450.

a new trial or withdrawal of his guilty plea based on what the investigation revealed. *See Cotto*, 471 Mass. at 117; *Ware*, 471 Mass. at 96. The defendants here can proceed accordingly.

In any case, the investigation the AGO conducted of Farak was guided by and subject to longstanding legal and ethical obligations governing the investigation and prosecution of criminal cases. The AGO reasonably kept the scope of its initial investigation focused on Farak, not the Amherst Lab or any potential broader impact on criminal cases, and the AGO made no secret of the limited scope and extent of its investigation. In fact, from the very beginning of the investigation, the AGO did not expand its investigation beyond Farak, and specifically told other Executive Branch authorities that it was not going to expand its investigation more widely. There was a context to this decision: at the same time that the State Police arrested Farak, a state chemist at the Amherst Lab, the AGO was in the middle of investigating Dookhan and her misconduct in the Hinton Lab. FOF, ¶¶ 12-13. In the Dookhan matter, the AGO had been ready to conduct a wider investigation of the Hinton Lab. But the members of the defense bar had, questioning its independence and integrity in a letter sent to then-Attorney General Martha Coakley and published in the Boston Globe. FOF ¶¶ 20-26. Expecting the same response to any overtures it might have made to investigate the Amherst Lab, the AGO notified the Governor's Office, the Executive Office of Public Safety, and the District Attorneys' Offices that the focus of its investigation was on Farak, only. FOF ¶¶ 42-45, 56.

The defendants' argument that the AGO had a duty to widen its investigation is premised on the fact that the AGO had in its possession--but did not know it--a ServiceNet diary card and other mental health records which, if read and understood properly, suggested Farak was using drugs as early as December 2011, not December 2012 as the AGO supposed. As Ms.

Kaczmarek candidly acknowledged, she made a mistake when she looked at the dates on the ServiceNet diary card and presumed their date to be 2012 based on the absence of any "year" in relation to the December dates on the card and the coincidence of the arrest date, January 2013, with the entries' dates, December. *See* FOF, ¶¶ 153-165.

Evaluated in the context of Ms. Kaczmarek's quick review of evidence to prepare for the grand jury presentation of the Farak case, the prosecutor's mistake was not unreasonable, particularly since other evidence in the case tended to corroborate the prosecutor's working theory that Farak had recently begun using drugs. This theory was based on the fact that Farak's co-workers had noticed a recent deterioration in her work after years of consistent performance, and both the State Trooper and the prosecutor involved in the Farak investigation had personally met Farak in another context less than a year before her arrest and, at the time of her arrest, noticed a significant change in her appearance. FOF, ¶¶ 156-160.

While it is apparent now, looking back, that there was, among the piles of papers seized from Farak's car, a ServiceNet diary card that suggested Farak's drug use went back further than what the AGO inferred and while we know now, again looking back, that the AGO was in possession of evidence which may have been exculpatory to defendants whose drugs Farak had analyzed earlier in time, any arguable responsibility to widen its investigation could not have been triggered by what the AGO did not know or appreciate. Therefore, that the AGO did not pursue a wider investigation into the scope and extent of her drug use sooner does not amount to egregious misconduct.

B. The AGO Did Not Engage in "Egregious Misconduct" in the Process of Disclosing Allegedly Exculpatory Evidence to the Defendants Because There Was No Duty to Disclose in the Post-Conviction Context; An Alleged Non-Disclosure Cannot Per Se Be the Basis of the Withdrawal of a Guilty Plea; and In Any Event, The AGO Did Disclose, To a Large Extent, Evidence It Did Not Have a Legal Duty to Disclose, and in Doing So, Merely Made Unintentional Mistakes.

To the extent the defendants argue that the AGO had a specific duty to disclose exculpatory evidence to them under *Brady* [10] as the basis for their motions to dismiss, they apply the *Brady* principles too broadly. But even if *Brady* applied, the AGO did not engage in egregious misconduct, but merely made mistakes in providing allegedly exculpatory evidence to the defendants through the District Attorneys' Office.

1. There Was No Duty to Disclose in the Post-Conviction Context.

There can be no "egregious misconduct" premised on a failure to disclose where there is no duty to disclose. With the exception of Penate and Liquori, all defendants who now argue that their cases should be dismissed based on the AGO's conduct were indicted and had pled guilty to drug-related charges long before the State Police ever arrested Farak on January 19, 2013.[11] *See* FOF, ¶¶ 453-605. In the post-conviction context, there is no duty to disclose.

The AGO did not have an obligation to disclose allegedly exculpatory evidence contained in the ServiceNet diary card or mental health records to the defendants after their convictions. While "the suppression by the prosecution of evidence favorable to an accused upon request

[10] The defendants predicate their argument loosely on the principles of *Brady v. Maryland*, 373 U.S. 83 (1963), that a prosecutor has a duty to disclose exculpatory evidence.

[11] Brown pled guilty on Mary 24, 2006; Vega, on January 28, 2010; Watt, on September 22, 2010; Richardson, on November 5, 2012; Ware, on Mary 21, 2008 and February 4, 2011; Cotto, on April 13, 2009; Aponte, on October 16, 2012; and Harris, on September 21, 2011.

violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution," *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and the duty encompasses impeachment evidence as well as exculpatory evidence, *United States v. Bagley*, 473 U.S. 667, 676 (1985), the obligation of disclosure is a pretrial requirement which does not continue after the defendant is convicted and the case is closed. The pretrial obligation of disclosure discussed in *Brady* is simply not applicable to evidence discovered post-trial. *District Attorney's Office for the Third Judicial Circuit v. Osborne*, 557 U.S. 52, 68 (2009) (reversing the Ninth Circuit's conclusion that a state prisoner had a due process right to DNA evidence in a post-conviction proceeding because: "nothing in [*Brady's*] precedents suggest[s] that [*Brady's*] disclosure obligation continue[s] after the defendant [is] convicted and the case [is] closed"); *Tevlin v. Spencer*, 621 F. 3d 59, 70 (1st Cir. 2010) (rejecting defendant's claim that failure to grant him post-conviction access to fingerprint evidence violated his due process rights); *White v. Dickhaut*, 2011 U.S. Dist. LEXIS 39136, 2011 WL 1085977, *4 (D. Mass. 2011)[12] (rejecting defendant's claim that failure to grant him post-conviction discovery of allegedly exculpatory information relating to a state investigation into wrongdoing by two state fingerprint experts violated his due process rights). Because there was no post-conviction obligation to disclose allegedly exculpatory evidence contained in Farak's mental health records, there was no "egregious misconduct" on the part of the AGO.

The defendants' reliance on *Cotto*, 471 Mass. at 112, for the proposition that the duty to disclose allegedly exculpatory evidence "applies in the post-conviction context," *see, e.g.*, defendants Watt's and Cotto's briefs, at p. 21, is misplaced. In *Cotto*, 471 Mass. at 112, and its

[12] *See* Valentine Aff., at Ex. H (copy of unpublished decision).

companion case, *Ware*, 471 Mass. at 94, the Court held that the Commonwealth should conduct an investigation to determine the nature and extent of Farak's misconduct, and the effect of that misconduct on pending and closed cases in which she was the state chemist who had analyzed the drug samples. There is a vast difference, however, between deciding that the Commonwealth should undertake an investigation to determine whether the state chemist's misconduct affected cases which are being or were prosecuted, and establishing a new rule of law that the AGO had a constitutional obligation to disclose exculpatory evidence post-conviction to defendants whom it did not prosecute.

2. An Alleged Non-Disclosure May Be the Basis of a New Trial, But Not Per Se the Basis of a Withdrawal of a Guilty Plea.

The defendants' arguments that they are entitled to a dismissal of their indictments on the basis of an alleged violation of a duty to disclose also overlooks the fact that an alleged violation of a duty to disclose may be the basis of a new trial, but it is not a basis for the withdrawal of a guilty plea and *a fortiori*, not the basis for the dismissal of an indictment. As the Supreme Judicial Court has already recognized in the context of an attempt by one defendant to withdraw his guilty plea on the basis of the Commonwealth's alleged failure to disclose the misconduct of similarly disgraced state chemist Dookhan, whose misconduct was attributable to the Commonwealth, "[t]he law currently is unsettled among the Federal circuits, and we have yet to determine, whether a defendant may assert a violation of his right to prosecutorial disclosure of exculpatory evidence as a ground to withdraw a guilty plea, or whether that is one of many constitutional rights deemed waived upon entry of a voluntary and intelligent guilty plea." *Commonwealth v. Scott,* 467 Mass. 336, 346 n.5 (2014); *see also Commonwealth v. Mello*, 90 Mass. App. Ct. 1117, *6 n.5 (2016) (Unpublished Decision Pursuant

to Rule 1:28)[13] (noting that while defendant referenced failure by Commonwealth to produce *Brady* material, Court declines to address whether such failure is ground to withdraw guilty plea and focuses instead on voluntariness of plea); *see also United States v. Wilkins*, 943 F. Supp. 2d 248, 255 (D. Mass. 2013) (rejecting defendants' claims that the government's failure to disclose the full range of Dookhan's malfeasance at the Hinton Lab before they pled guilty violated their due process rights). "[W]hen a defendant chooses to admit his guilt, *Brady* concerns subside." *United States v. Mathur*, 624 F.3d 498, 507 (1st Cir. 2010) ("[The Supreme Court's decision in *United States v. Ruiz*, 536 U.S. 622, 633 (2002)] teaches that *Brady* does not protect against the possible prejudice that may ensue from the loss of an opportunity to plea-bargain with complete knowledge of all relevant facts"). Therefore, since the defendants cannot base a post-conviction motion to withdraw their guilty pleas upon a claim of a failure to disclose exculpatory evidence, so, too, they should not be able to base their motions to dismiss for failure to disclose on such a claim.

3. The AGO Was, In Fact, Trying to Provide Material to the District Attorneys' Offices, Whether or Not it Had a Duty to Do So.

Even if there was a duty to disclose in the post-conviction context, the AGO's conduct was still not "egregious misconduct" because the AGO was, in fact, trying to provide material to the District Attorneys' Offices for further evaluation and disclosure to the defendants the District Attorneys' Offices were prosecuting. FOF, ¶¶ 202-206. In the Dookhan case, the AGO had provided notice and potentially exculpatory material to the District Attorneys' Offices. In the Farak case, the AGO similarly provided potentially exculpatory material to the District

[13] *See* Valentine Aff., at Ex. F (copy of unpublished decision).

Attorneys' Offices. FOF, ¶¶ 204, 206. It was not entirely clear what the scope of the AGO's responsibility was to third party defendants it was not prosecuting. But the supervisors at the AGO, Mr. Verner (who was the Chief of the Criminal Bureau) and Mr. Mazzone (who was the Chief of the relevant Division), believed they had an ethical obligation to provide the information to the District Attorneys' Offices so that they, in turn, could prepare certificates of discovery and answer discovery requests from any potentially affected defendants they were prosecuting, and they acted accordingly, guided by their own sense of right and wrong. FOF, ¶ 205.

Prior to April 2016, it was unclear that a prosecutor had an ethical duty to provide exculpatory evidence to a defendant in a case that was not prosecuted by his own office. In April 2016, due at least in part to the Dookhan and Farak matters, the Supreme Judicial Court amended Rule 3.8 of the Massachusetts Rules of Professional Conduct to define a prosecutor's obligation when he or she finds evidence that potentially impacts a criminal case prosecuted by a different office:

> When, because of new, credible, and material evidence, a prosecutor knows that there is a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall within a reasonable time . . . if the conviction was not obtained by that prosecutor's office, disclose that evidence to an appropriate court or the chief prosecutor of the office that obtained the conviction.

Mass. R. of Prof. Conduct, Rule 3.8(i)(1) (Supreme Judicial Court Rule 3:07) (2016).

The fact that a rule change was necessary illustrates that the AGO's ethical obligation to disclose Farak case material to third party defendants was, at most, unsettled in 2013. Regardless, as discussed in detail *infra* at pp. 23-25, the AGO believed it had an obligation to

provide Farak evidence to the District Attorneys' Offices so that they could determine what needed to be disclosed to individual defendants, and the AGO did so, just as the rule now requires.

The AGO immediately notified the District Attorneys' Offices that Farak had been arrested, and even before the AGO indicted her, provided the District Attorneys' Offices with arrest reports, evidence logs, search warrant execution reports, photographs, and other case information, so that they could determine whether Farak's misconduct affected cases they were prosecuting and so that they could provide appropriate disclosures to affected defendants. *See* FOF, ¶ 211. After Farak was indicted by the grand jury, the AGO sought and obtained court approval to disclose grand jury minutes and exhibits as soon as possible after Farak was indicted. *See* FOF, ¶ 226. Copies of the mental health records were not included in this second disclosure to the District Attorneys' Office because Ms. Kaczmarek had chosen not to admit the records in the grand jury presentation due to concern for any privilege Farak had, the knowledge that the AGO did not need the mental health records to establish probable cause, and the mistaken belief that the records had been created within the limited time frame the AGO was investigating. Although it was the intention of the AGO to send the mental health records to the District Attorneys at a later time, Ms. Kaczmarek's copies were set aside and forgotten about, and the originals remained in the locked evidence room with the rest of the physical evidence. *See* FOF, ¶¶ 122-125, 141, 278, 307. The AGO's conduct in providing potentially exculpatory evidence to the District Attorneys' Offices was not "egregious;" the AGO provided the evidence, but, unintentionally imperfectly.

C. The AGO Did Not Engage in "Egregious Misconduct" When it Responded to Third Party Subpoenas and Requests for Post-Conviction Discovery; The AAsG Merely Made Unintentional Mistakes, Largely Premised Upon Their Earlier Undiscovered Mistake.

The AGO's handling of the subpoenas served on Sgt. Ballou and Ms. Kaczmarek by the defendants in the context of their Rule 30(c)(4) (motion for new trial) discovery requests or their Rule 17 subpoenas *duces tecum* did not constitute egregious misconduct, either. Rather, the AAsG made unintentional mistakes which, for the most part, were bound to follow from their earlier mistakes. When the defendants sought additional discovery through the service of subpoenas *duces tecum* and motions for third party discovery, the AAsG did not provide additional documentary material to the defendants directly because they were under the mistaken impression that all potentially exculpatory evidence had been provided already to the District Attorneys' Offices, and that if there was any additional documentary evidence, their own files were protected by the investigators' privilege or work product doctrine. They opposed giving third parties access to the physical evidence, which included the mental health records, so as not to compromise evidence while their own Farak case was open and ongoing.

The District Attorneys' Offices, not the AGO, were prosecuting the defendants and as such, Sgt. Ballou and Ms. Kaczmarek were third parties, not parties, to the District Attorneys' prosecution of the defendants. Irrespective of how the defendants may have styled their requests, they were pursuing documents in the possession of a nonparty, the AGO. There is a well-established procedure for the issuance of subpoenas *duces tecum* on third parties. *See* Mass. R. Crim. P. 17. Before documents in the custody of a nonparty may be ordered produced, they must be shown to be relevant. *See Commonwealth v. Wanis,* 426 Mass. 639, 643–645 (1998). The procedure contemplates the possibility that the recipient of the subpoena will

challenge it by filing a motion to quash and the challenge will be considered and analyzed under Mass. R. Crim. P. 17(a)(2). That is precisely what the AGO did. FOF, ¶¶ 283-385.

When the subpoenas were served in the fall of 2013, the AGO's prosecution against Farak was open and ongoing. *See* FOF, ¶¶ 271-275. On that basis, the prosecutor assigned to handle the matter of the subpoenas served on Sgt. Ballou and Ms. Kaczmarek, Ms. Foster, prepared motions to quash and supporting memoranda asserting the investigative privilege. *See,* e.g., Exs. 198, 250. Well-established principles apply to protect information and evidence being used in ongoing criminal investigations and to protect government officials' deliberative process. *See, e.g., Kattar v. Doe*, No. CIV.A. 86-2206-MC, 1987 WL 11146 (D. Mass. 1987);[14] *Puerto Rico v. United States*, 490 F.3d 50, 64 (1st Cir. 2007). The AGO had legitimate reasons to seek to quash the subpoenas during the pendency of the Farak investigation, and Ms. Foster prepared standard motions to quash and supporting memoranda. FOF, ¶¶ 294-295; Exs. 198, 250.

Ms. Foster was relatively new to the AGO and these motions to quash were the first she had been assigned to handle. FOF, ¶¶ 254, 257, 282. She had not attended the formal training the AGO held on handling third party subpoenas but she had been given informal training on motions to quash by the Chief of the Appeals Division, Mr. Ravitz, and she had been given sample motions to quash from both Mr. Ravitz and her supervisor, Ms. Reardon. FOF, ¶¶ 262, 268-269.

Notwithstanding the guidance in the AGO's manual concerning responding to third party subpoenas and from her supervisor to collect the files and review the relevant documents

[14] *See* Valentine Aff., at Ex. I (copy of unpublished decision).

to determine what privileges and protections applied, Ms. Foster did not personally review Sgt. Ballou's or Ms. Kaczmarek's files or relevant documents before she drafted the memoranda. Ms. Foster testified that she did not review the files herself because she believed that one of her supervisors had told her that she need not bother to do so, and she believed there was no need to look at the file. She relied on what she considered to be her supervisors' assurances, and she had no reason to disbelieve Ms. Kaczmarek, who had told her--based on Ms. Kaczmarek's mistaken belief--that everything had been turned over. FOF, ¶¶ 279, 322.

Ms. Kaczmarek and others in the AGO were laboring under the misimpression that "everything had been turned over." In fact, the AGO had provided a substantial amount of case material to the District Attorneys' Offices in order for those offices to determine what was relevant and necessary to disclose to the defendants they were prosecuting. *See* FOF, ¶¶ 211, 226. What had been provided to the District Attorneys' Offices included everything that the AGO had used to indict Farak, as well as police reports, evidence logs, photographs, and other case material, just not physical evidence. *See* FOF, ¶¶ 211, 226.

At the time the motions to quash and supporting memoranda were filed and Ms. Foster appeared in Court to argue the motions to quash, the AGO had reason to believe that "everything was turned over;" that the defendants had access to all Farak-related material that was relevant to their cases; and that the AGO had provided "everything" to the District Attorneys' Offices. *See* FOF, ¶¶ 276, 299-300, 305-308, 322, 329-330, 333-334. We now know that the ServiceNet diary card and other mental health records were not part of the material that had been provided to the District Attorneys' Offices at that point because of a series of missteps. Those missteps-- a quick review which resulted in Ms. Kaczmarek's overlooking of the

significance of the dates on the ServiceNet card; the concern about the doctor-patient privilege which led to the decision not to introduce the mental health records into the grand jury; the intent but failure to send the mental health records to the District Attorneys' Offices separately after the privilege issue was resolved; the return of the papers to the evidence room in which physical evidence was stored--resulted in a complete failure on the part of the AGO to realize that the ServiceNet diary card or other mental health records might have been relevant or exculpatory and had not been included with the materials previously provided to the District Attorneys' Offices. FOF, ¶¶ 428-433, 435. As for Ms. Foster, when she filed the AGO's motions to quash and appeared in Court, she had no knowledge that the ServiceNet diary card or mental health records even existed. FOF, ¶¶ 329-330.[15]

As an inexperienced lawyer, Ms. Foster also used memoranda of law that her supervisors had filed in other cases and had given her as examples, from which to write her memorandum. Instead of using these samples as the basis from which to tailor arguments that suited the individual circumstances of the case, as her supervisors had instructed her to do, she basically cut and pasted from the sample memoranda and, therefore did not, present as an alternative to the quashing of the subpoenas in their entirety on the basis of the investigative privilege, a request for a protective order and a list of potential privileges that might apply to individual documents in the file. Unfortunately, and perhaps being overly optimistic that the principal plan to quash the subpoena would be successful, Ms. Foster did not personally review the individual documents in the files to identify the particular documents that might be

[15] In fact, she had no knowledge about the ServiceNet diary card or mental health records even at the time of the evidentiary hearing on this matter. FOF, ¶ 329.

privileged or determine whether the privileges actually applied. This led, however, to the Court's exasperation with her level of preparation and her legal position at the September 9 Hearing, and to confusion back at the AGO about the scope of the Court's order for her to review the file, identify any allegedly privileged documents, and submit the documents to the Court for *in camera* inspection. FOF, ¶¶ 297-343.

When Ms. Foster returned from the September 9 Hearing and reported back that the AGO was supposed to go through Sgt. Ballou's file, identify anything in it the AGO thought was privileged, and provide it to the Court with a memorandum explaining for the assertion of privilege with respect to each withheld document, there was confusion on her part and on the part of others in the AGO over the differences between the phrase "Sgt. Ballou's file," the phrase used in one of the subpoenas *duces tecum* at issue for "all documents and photographs," and the scope of the Court's order to review the contents of the file and indicate what was "privileged." FOF, ¶¶ 317-343. But at bottom, the AAsG involved mistakenly assumed that the requested material fell into one of two categories: either everything had already been provided to the District Attorneys' Offices, or anything which had not been produced was either privileged because there was an open and ongoing investigation, or protected by work product. FOF, ¶¶ 326-336.

Based on her conversation with Ms. Kaczmarek and her supervisors that there was no need to review Sgt. Ballou's file; that "everything" had been produced; and that there was nothing else to turn over, Ms. Foster, reported back to the Court in a letter dated September 16, 2013, that "[a]fter reviewing Sergeant Ballou's file, every document in his possession has already been disclosed." FOF, ¶ 348. Because she did know who had reviewed the file, but she

did not want to misrepresent to the Court that she had reviewed the file, she "draft[ed] [her] letter to the Court leaving open to the fact that [she] did not review the file." FOF, ¶ 348.

The AGO handled the subpoenas *duces tecum* and discovery motions served later in the Penate case in similar fashion, without any intentional misrepresentations or deliberate withholding of exculpatory evidence. At the October 2, 2013 hearing, Sgt. Ballou's subpoena was treated as "moot" based on the AGO's understanding, which had not changed since the September 9 Hearing, that the contents of Sgt. Ballou's file had been turned over. FOF, ¶ 364. With respect to Penate's Motion to Compel, Ms. Foster informed the Court that all the AGO emails had not been compiled into a database and made a standard argument that the AGO communications would be protected by the work product doctrine. At first, the motion to compel was allowed "insofar as it [sought] production of drug testing administered to Farak by her employer, and any correspondence related directly to drug use or evidence tampering by Farak," but then the Court clarified and narrowed the order so that "any correspondence" was limited to correspondence which reflected that state employees were aware of Farak's alleged misconduct prior to the criminal investigation, and that it was not the Court's intention to order that any agency of the Commonwealth produce work product related to the criminal investigation. The mental health records did not fall within the Orders. FOF, ¶¶ 372-377.

While Ms. Foster and Ms. Kaczmarek should have done more to review the files and determine exactly what the defendants were requesting and whether anything they were requesting might have fallen through a gap between what had been provided and what had not been, and while Ms. Foster should have been clearer and more precise in her submissions and verbal representations to the Court, the AGO did not intentionally withhold evidence but

rather, individually and collectively made and then compounded mistakes that resulted in a delay in not only the defendants' but also the Commonwealth's appreciation of the full extent and scope of Farak's misconduct. However, putting aside the mistakes that were made, the AGO's decision to oppose the subpoenas and motions was not "egregious misconduct" but was a reasonable and customary legal response--opposing third party subpoenas or motions for discovery in unrelated cases the AGO was not handling--taken by AAsG in the context of and in order to protect an open and ongoing prosecution of their own. For all of these reasons, there was no "egregious misconduct" on the part of the AGO.

It is very significant that after Farak pled guilty and the AGO's prosecution was closed, the AGO immediately assented to a defendant's renewed motion to inspect physical evidence which was filed in *Commonwealth v. Burston*. *See* FOF, ¶¶ 406-412. The emails sent among the AAsG are matter of fact and they suggest a willingness to continue to provide access to information. FOF, ¶ 410; Ex. 257. At that point, Farak having pled guilty and the case having been closed, the AGO was not as concerned about third parties inspecting the physical evidence as it had been during the course of the investigation when it had to be concerned about the integrity of the evidence. FOF, ¶ 409. That the AGO immediately assented--without any hint that in doing so it would subject itself to allegations of *Brady* violations--shows that the AGO had provided and was continuing to provide potentially affected defendants with as much information as possible and reasonable in the context of the Farak case. More to the point, this conduct shows that the AGO was not deliberately "burying intentionally" exculpatory evidence.

After Mr. Ryan reviewed the physical evidence and wrote a letter to the AGO explaining what he had found and its significance, and as soon as the AAsG understood, based on Mr.

Ryan's letter, that they had misjudged the dates of the entries on Farak's ServiceNet diary card and its potential impact, the AGO disclosed the mental health records, as well as close to 300 more pages of materials that had been kept as physical evidence in the evidence room, to the District Attorneys' Offices and to third party defendants who requested them. *See* FOF, ¶¶ 418-441. Ultimately and quickly, the AGO made the decision to make further disclosures, without any internal debate. *See* FOF, ¶ 436.

In the end, the AGO produced thousands of pages of documents and made witnesses available for the defendants and this Court to examine the AGO's prosecution of Farak in exceptional detail. As that evidence and testimony shows, the AGO did what *Bridgeman II* now instructs is necessary when a government employee's misconduct impacts other criminal cases: the AGO took reasonable steps to identify and remedy the scope of Farak's conduct as the case evolved. *See Bridgeman II,* 476 Mass. at 315.

Throughout this evolving case, the AGO's conduct was not "egregious misconduct" because the AGO did not know it had exculpatory evidence in its possession and when it learned it did, it rushed to disclose it and remedy the situation. Where the failure to disclose exculpatory evidence is unintentional rather than deliberate, the conduct is not egregious. *Merry*, 453 Mass. at 653; *Cron*k, 396 Mass. at 200-201; *Lam Hue To*, 391 Mass. at 304-305; *Caillot*, 454 Mass. at 262.[16] In *Merry*, 453 Mass. at 664, for example, the prosecutor failed to disclose until after trial an expert opinion that supported the defendant's theory of the case.

[16] By way of contrast, the Court has found "egregious misconduct" where the Commonwealth "deliberately, willfully, and repetitively" failed to provide specific, court- ordered discovery relevant to a claim of selective prosecution. *See Commonwealth v. Washington W*., 462 Mass. 204, 216 (2012).

The Supreme Judicial Court upheld the trial court's conclusion that there was no misconduct because, while the expert opinion was material and exculpatory, the trial prosecutor was unaware of the evidence at the time of trial. *Merry*, 453 Mass. at 665. Similarly, in *Cronk*, 396 Mass. at 195, the District Attorney's Office failed to timely comply with the discovery order set by the District Court, even after the court warned that failure to do so would result in dismissal of the complaint. The Supreme Judicial Court agreed with the trial court that the prosecutor's conduct appeared to be unintentional and therefore was not egregious: "the Commonwealth's conduct, however inexcusable, is clearly not sufficiently egregious to give rise to presumptive prejudice." *Cronk*, 396 Mass. at 199. In *Lam Hue To*, 391 Mass. at 311, the investigating officer mishandled two knives – both of which were exculpatory to the defendant and one of which would later be identified as the murder weapon. When the officer ultimately told the prosecutor about this material evidence, the prosecutor failed to inform the trial court. *Lam Hue To*, 391 Mass. at 304. The prosecutor later disclosed existence of one of the knives to defense counsel but incorrectly described how and when it had been found, indicated that it had nothing to do with the case, and failed to mention anything about the second knife. *Lam Hue To*, 391 Mass. at 305. When details about the knives were ultimately revealed at trial, defense counsel moved for dismissal. *Lam Hue To*, 391 Mass. at 305. The trial court allowed the defendant's motion to dismiss the indictment, concluding that the Commonwealth's failure to disclose exculpatory evidence in this case was prosecutorial misconduct. *Lam Hue To*, 391 Mass. at 306. The Supreme Judicial Court ruled that "[t]his sort of prosecutorial misconduct is not sufficient to invoke the double jeopardy bar to further prosecution." *Lam Hue To*, 391 Mass. at 311. Similarly, in *Caillot*, 454 Mass. at 262, there was no evidence that the prosecutor

knew before trial that there were two guns in State Police custody which may have had exculpatory value, and no intentional pretrial suppression of exculpatory evidence occurred. Rather, the police had in their custody two guns seized in separate investigations, and did not learn about their significance until after the trial had concluded. *Caillot*, 454 Mass. at 262.

Here, as in *Merry*, 453 Mass. at 665, and *Caillot*, 454 Mass. at 262, there is no evidence that the AGO was aware that it had material, exculpatory evidence in its possession at the time the defendants were pursuing motions for new trial in cases to which they had pled guilty several years earlier or, in the case of two defendants, were going to trial. With regard to the defendants who pled guilty or were tried before Farak's arrest, there would have been no way the AGO could know about the mental health records because it had not arrested her yet or seized evidence from her car. *See Commonwealth v. Ruffin*, 475 Mass. 1003, 1003-1004 (2016) (declining to apply the conclusive presumption of "egregious government misconduct" where the defendant pled guilty before Dookhan signed the drug certificate because the misconduct cannot be said to have affected the defendant's plea if the plea occurred before the misconduct). These defendants – Brown, Vega, Watt, Richardson, Ware, Cotto, Aponte, and Harris – cannot base a claim of "egregious misconduct" warranting dismissal on a claim that the AGO failed to disclose exculpatory evidence because any relevant AGO conduct occurred after their plea or trial. With regard to the defendants who went to trial or pled guilty during the course of the Farak investigation, the AGO was unaware that the mental health records could be material to these defendants because of the mistake Sgt. Ballou and Ms. Kaczmarek made in interpreting the dates on the ServiceNet diary card and as a result of the considerable confusion about what had or had not been previously disclosed and what the Court had

ordered. *See* FOF, ¶¶ 153-161, 323-336. Here, as in *Cronk*, 396 Mass. at 201, the AAs'G failure to comply with a discovery order was unintentional. Here, as in *Lam Hue To*, 391 Mass. at 311, the AAs'G failure to disclose evidence was perhaps even "bungling." But being unintentional, the AAs'G non-disclosure of the evidence was not "egregious misconduct."

III. The Indictments Should Not Be Dismissed Because There Was No Prejudice to the Defendants. The Defendants Have the Potentially Exculpatory Evidence Now.

If the Court finds the AGO did engage in "egregious misconduct"--which it should not, *see* Argument II, *supra*--the Court nevertheless should not order dismissal because the defendants cannot show they were prejudiced by the delayed disclosure of the ServiceNet diary card or mental health records, or that, if they have been prejudiced, that they have been irremediably prejudiced. There was no ongoing deliberate conduct that resulted in a violation of constitutional rights, only unintentional mistakes. Therefore, there is no reason to pull a prophylactic trigger, reserved for only the most intentional and severe circumstances, that the courts of the Commonwealth never have pulled before.

A. <u>There Was No Prejudice to the Defendants Because They Can Get a Fair Trial Based on Either Evidence of the Results of Retesting of Their Drug Samples or Evidence With Which to Impeach the Results of the Prior Testing</u>.

The appropriate framework of analysis is not, as the defendants would have it, whether a delay itself has been harmful in some way--such as impinging on defendants' liberty interests--but whether, given the late disclosure, a defendant can, nevertheless, have a fair trial. *Commonwealth v. Maso*n, 453 Mass. 873, 877 (2009) (for purposes of a motion to dismiss, prejudice means prejudice that cannot be cured by a new trial); *Lam Hue To*, 391 Mass. at 312-313 (whether a defendant has been prejudiced "turns primarily on the ability of the defendant

to obtain a fair trial after, and in light of, the impropriety"); *Viverito*, 422 Mass. at 231 (whether a defendant has been prejudiced for purposes of dismissal focuses on the subsequent trial, not the liberty interest); *see also United States v. Devin*, 918 F.2d 280, 289-290 (1st Cir. 1990). In this case, the defendants were not prejudiced by the delayed disclosure because for the majority of the defendants, the delayed disclosure occurred in the procedural context of motions for new trial or to withdraw their guilty pleas, not pre-trial. They can (and do) use the newly disclosed evidence to support their claims that had they known of the full nature and scope of Farak's drug use at the time they pled guilty, they would not have pled guilty. *See, e.g.*, Cotto's Brief in Support of Motion for New Trial at pp. 8-9. In these circumstances, there is no prejudice because the appropriate remedy is an evidentiary hearing on the impact of the newly disclosed evidence on the voluntariness of their pleas. In the case of defendants Penate and Liquori, the appropriate remedy is an evaluation of the impact of the newly disclosed evidence on their convictions.

If the defendants' motions for a new trial or to withdraw their guilty pleas are successful, they will get a fair trial. The defendants are now in possession of evidence concerning the nature and extent of Farak's drug use. In fact, they are in possession not only of evidence from the ServiceNet diary card, which suggests she was using drugs in 2011, but also more evidence about her drug use during all the years she worked in the Amherst Lab, *see* Report of the Attorney General dated April 1, 2016 (Valentine Aff., at Ex. J).

Further, the drug samples of many of the defendants have been re-tested and they can get a fair trial based on the results. For example, Brown's three (3) drug samples were re-tested on December 28, 2016, by the Massachusetts State Police Crime Lab in Springfield ("Crime Lab");

two (2) samples contained cocaine; one (1) sample contained marijuana. *See* Valentine Aff., at Ex. A (Cert. of Drug Analysis dated January 20, 2017 (Lab Case No. 16-3342)). Richardson's two (2) drug samples were re-tested on June 8, 2015, by the Crime Lab and the two (2) samples contained cocaine. *See* Ex. 274 (Cert. of Drug Analysis dated July 1, 2015 (Lab Case No. 13-158249)). Ware's two (2) drug samples were re-tested on January 20, 2017, by the Crime Lab and the two (2) samples contained cocaine. *See* Valentine Aff., at Exs. B, C (Certs. of Drug Analysis dated January 20, 2017 (Lab Case Nos. 13-152751 and 13-152752)). Cotto's drug samples were re-tested on January 20, 2017, by the Crime Lab and the samples contained cocaine. *See* Valentine Aff., at Ex. D (Cert. of Drug Analysis dated January 20, 2017 (Lab Case No. 16-33421)). Aponte's drug samples were re-tested on January 20, 2017, by the Crime Lab and the samples contained cocaine. *See* Valentine Aff., at Ex. E (Cert. of Drug Analysis dated January 20, 2017 (Lab Case No. 16-33419)). Harris's drug samples were re-tested on June 8, 2015, by the Crime Lab and the samples contained cocaine. *See* Ex. 276 (Cert. of Drug Analysis dated June 8, 2015 (Lab Case No. 13-155428)).[17] In the case of Penate and Liquori, in fact, newly re-tested results were available at their trials and it is inferable that they have had a fair trial. FOF, ¶¶ 570-578, 592-598.

With regard to Watt and Vega, if their drug samples no longer exist, they can introduce the new evidence to impeach the reliability of the drug analysis done by Farak. Therefore, they cannot show prejudice because they can have a fair trial.

[17] The AGO has submitted the new drug analysis certificates, dated after the December 2016 hearing in the present cases, into evidence through the Affidavit of Heather A. Valentine, supplementing the stipulation regarding the availability of drug samples in the defendants' cases. Tr. VI:136; Exs. 273-278.

B. If There Was Any Prejudice to the Defendants' Ability to Get a Fair Trial --Which There Was Not--The Prejudice is not Irremediable.

Even if the AGO withheld exculpatory evidence that the defendants were entitled to receive and the defendants were prejudiced as a result, the indictments should not be dismissed on this ground because the harm is not irremediable. The analytical framework of the Dookhan-related cases is instructive. In *Commonwealth v. Scott*, 467 Mass. 226, 228 (2014), the Supreme Judicial Court considered the appropriate legal standard where a defendant who pled guilty moves to withdraw his guilty plea, and in *Commonwealth v. Francis*, 474 Mass. 816, 817 (2016), the Court considered a defendant's motion for new trial after conviction based on the admission into evidence of drug certificates signed by Dookhan where the defendant had no knowledge of Dookhan's misconduct prior to resolution of his case.

The remedy the Court found appropriate in cases in which Dookhan signed the defendant's drug certificate was the application of a conclusive presumption that egregious government misconduct occurred in the defendant's case. But the defendant still is required to show prejudice in the sense that there has been "irremediable harm" to the "defendant's opportunity to obtain a fair trial." *Bridgeman v. District Attorney for the Suffolk District*, 471 Mass. 465, 479 (2015) ("*Bridgeman I"*). Subsequently, in *Bridgeman II,* 476 Mass. at 322, the Supreme Judicial Court specifically rejected a global remedy on account of Dookhan's egregious misconduct, holding that even if there had been an inordinate delay resulting in a loss of liberty, anxiety, forfeiture of opportunity, damage to reputation, or other conceivable injuries, "Dookhan's conduct, serious as it was, did not result in 'irremediable harm to the defendant's opportunity to obtain a fair trial.'" (quoting *Cronk*, 396 Mass. at 198). Consequently, in *Bridgeman II,* a global dismissal of the Dookhan-affected indictments was too drastic a remedy.

476 Mass. at 317, 323. Here, too, even if there has been a delay in the resolution of the defendants' motions for new trial or to withdraw their guilty pleas, there has been no irremediable harm to the defendants' opportunity to obtain a fair trial, and therefore, dismissal is not appropriate.

IV. Because There has been No Egregious Conduct, the Court Should Not Presume Prejudice and Should Not Dismiss the Indictments as a Prophylactic Remedy.

Even assuming there was a *Brady* violation or some other "egregious misconduct" in this case–which there was not--the Court should not presume prejudice and apply a prophylactic remedy because the AGO's conduct was not so extraordinarily deliberate, calculated, and pervasive that it requires this extreme and consequential remedy. The AGO's conduct comes nowhere near such a threshold.

Notwithstanding the Supreme Judicial Court's recognition of a standard by which the court may dismiss an indictment on the basis of "egregious misconduct" without a showing of irremediable prejudice and as a prophylactic remedy, *see, e.g.*, *Bridgeman II,* 476 Mass. at 316, the appellate courts never done so, not even in a case involving police perjury, *see Lewin*, 405 Mass. at 587; in a case where there was a systematic pattern of delayed discovery by the District Attorney's Office, *Commonwealth v. Gould*, 83 Mass. App. Ct. 1138, 2013 WL 3184632, at *1 (2013)[18] (Unpublished Decision Pursuant to Rule 1:28); or repeated noncompliance with discovery orders, *Cronk*, 396 Mass. at 200.

In two cases in which the Court did dismiss indictments for egregious misconduct, the defendants showed irremediable prejudice, too. In *Commonwealth v. Manning*, 373 Mass. 438,

[18] *See* Valentine Aff., at Ex. G (copy of unpublished decision).

443 (1977), the Court implied that it might be appropriate to dismiss an indictment as a purely prophylactic measure in a case of particularly egregious misconduct, but the Court dismissed the indictments not solely as a prophylactic measure (a "stronger deterrent" was warranted), but also because the misconduct was so prejudicial that the Court could not be confident that a new trial would be free of the taint. *Manning*, 373 Mass. at 443-44. Similarly, in *Washington W.*, 462 Mass. at 217, the Court concluded that dismissal of the youthful offender indictments with prejudice was necessary to cure the unique prejudice that resulted in that case because the defendant had turned twenty-one and therefore was no longer eligible for the sentencing alternatives available when he was originally convicted. As in *Manning* and *Washington W.*, the defendants need to demonstrate some similarly unique prejudice, and, as discussed above, they have failed to do so.

Moreover, the conduct in this case--an unintentional failure to disclose exculpatory evidence while reasonably trying to do so--does not even come close to the type of misconduct the Supreme Judicial Court has found did not justify a determination of presumptive prejudice and a prophylactic remedy. For example, in *Lam Hue To*, 391 Mass. at 311, prosecutors failed to disclose and then misrepresented the facts about a knife that was later identified as the murder weapon; in *Commonwealth v. Phillips*, 413 Mass. 50, 53-54 (1992), Boston Police officers continuously undermined the constitutional rights of dozens of young black men by virtue of a department policy to search suspected black gang members and their associates on sight, with no constitutional justification; in *Lewin*, 405 Mass. at 587, police officers committed perjury; and in *Ligh*t, 394 Mass. at 113, the police prosecutor withheld exculpatory evidence contained in the chemist's report. Here, there was no constitutional violation, no ongoing,

pervasive policy or climate, and no deliberateness or calculation in the AGO's not disclosing the ServiceNet diary card and mental health records. What happened, happened because of mistakes.

In fact, and to a certain extent, ironically, the mistakes were made while the AGO was trying to do the right thing: to provide exactly what the defendants argue they were entitled to – information and evidence of how Farak's misconduct may have impacted their cases. The AGO provided two sets of case material to the District Attorneys' Offices and, when the AGO's prosecution of Farak was finished, readily provided access to the third party defendant's attorney, immediately assenting to a motion for inspection of physical evidence. When it was brought to the AGO's attention that mental health records the AAsG mistakenly thought had been turned over were not, the AGO immediately rushed to provide the mental health records--and about 300 pages more--to the District Attorneys' Offices and to defendants who asked for the records. Thus, this is not a case where the conduct was perfidious or where no one ever righted a wrong; when the mistakes were discovered, they were corrected. FOF, ¶¶ 418-452. The AGO's process may have been imperfect, and the AAsG made unintentional mistakes along the way, but nothing the AGO did was designed to subvert or interfere with the defendants' rights and therefore should not trigger presumptive prejudice or a prophylactic remedy.

Finally, in all likelihood, any mistakes that occurred in the Farak investigation would not happen today because the AGO – along with the rest of the Commonwealth, the courts, and the defense bar – now has the experience of the Dookhan and Farak matters to inform how such complex and far reaching cases are handled. The AGO conducts formal and informal training programs and has an internal continuing legal education requirement, FOF, ¶¶ 258-

260, and to be sure, the lessons learned in the Farak case has and will continue to inform attorney training.

"A dismissal with prejudice for government misconduct is very strong medicine, and it should be prescribed only when the government misconduct is so intentional and so egregious that a new trial is not an adequate remedy." *Bridgeman II,* 476 Mass. at 322-323. There was no intentional or egregious misconduct and a new trial, or a new guilty plea, is an adequate remedy in this case. Therefore, dismissal of the defendants' indictments is not necessary.

CONCLUSION

For the above reasons, the Court should deny the defendant's motions to dismiss. Whatever the consequences of Farak's misconduct, the Court should not find any egregious conduct on the part of the AGO and should not dismiss the cases against the defendants on the basis of the AGO's actions.

Respectfully submitted,
THE COMMONWEALTH

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