

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

TRIAL COURT OF THE
COMMONWEALTH
SUPERIOR COURT DEPT.
INDICTMENT NO. 09-97

Commonwealth

v.

LIZARDO VEGA

PROPOSED FINDINGS OF FACT AND MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS

Respectfully Submitted,
THE DEFENDANT,

By 

His Attorney

LUKE RYAN

BBO#664999

SASSON, TURNBULL, RYAN & HOOSE

100 Main Street, 3rd Floor

Northampton, MA01060

(413) 586-4800

(fax) (413) 582-6419

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Introduction

On the morning of September 10, 2013, Assistant Attorney General (AAG) Kris Foster (Foster) sent an email to five colleagues reporting on a hearing from the day before. Foster had moved to quash a subpoena commanding Sergeant Joseph Ballou (Ballou) to produce all documents pertaining to the investigation of Sonja Farak (Farak). Foster's memorandum in support of that motion asked, in the alternative, for relief from the obligation to furnish "[i]nformation concerning the health or medical or psychological treatment of individuals." In her email, Foster said Judge C. Jeffrey Kinder denied the motion to quash and ordered her to review Ballou's file and provide copies of any undisclosed documents for an *in camera* review.

When asked about the contents of Ballou's file, AAG Anne Kaczmarek (Kaczmarek) told the group Ballou had a binder that contained a number of items including Farak's "mental health worksheets." One of these worksheets memorialized drug use by Farak at the Amherst Drug Lab over a year before her arrest. It had not been disclosed to District Attorneys and shed considerable light on the timing and scope of Farak's misconduct – one of the two issues the hearing before Judge Kinder had been convened to address.

Kaczmarek misjudged the dates on this document and did not recognize its probative value. Months before, she had told Farak's lawyer the Attorney General's Office (AGO) considered the mental health worksheets "privileged," and therefore copies of them would not be provided to "Farak defendants" seeking post-conviction relief.

After receiving Foster's email, Kaczmarek made arrangements for Ballou to bring his file to Boston. As it turned out, Ballou never printed hard copies of the mental health worksheets he had attached to an email he sent Kaczmarek on Valentine's Day. During a subsequent meeting in the

office of Criminal Bureau Chief John Verner (Verner), Kaczmarek told the group that everything in Ballou's file had already been turned over.

Foster understood that Judge Kinder had ordered her to review the file and had actually yelled at her for not doing so prior to filing her motion to quash. She nevertheless accepted Kaczmarek's representation. In a personal letter to Judge Kinder dated September 16, 2013, Foster said: "After reviewing Sergeant Ballou's file, every document in his possession has already been disclosed." Foster chose these words carefully. Her goal was to craft a deliberately "vague" message that conveyed the impression she complied with the order to personally review the file without actually saying she did so.

On October 1, 2013, Foster moved to quash a subpoena for Kaczmarek. In her pleadings, Foster took the position there was no indication Farak's misconduct dated back more than "roughly four months before [her] arrest." The following day, Foster appeared back in court to oppose motions to inspect the physical evidence and for the production of documentary evidence. Kaczmarek had directed Foster to argue that the physical evidence was irrelevant to any case but Farak's even though Kaczmarek had never inspected the so-called "assorted lab paperwork" herself. Foster's opposition to the motion for documentary evidence declared there was "no reason to believe that a third party had knowledge of Farak's alleged malfeasance prior to her arrest," even though the undisclosed mental health worksheets contained the identities of Farak's treatment providers. Kaczmarek had received her copies of these documents via email. During the hearing, Foster portrayed undersigned counsel's request for intra-office correspondence pertaining to the scope of evidence tampering as a "fishing expedition" and assured Judge Kinder that, although she had not reviewed Kaczmarek's emails, "there's no smoking gun."

Over the course of the next eight weeks, Foster continued to file pleadings (with her supervisor's blessing) seeking relief from the obligation to produce "[i]nformation concerning the health or medical or psychological treatment of individuals." Meanwhile, Judge Kinder issued a series of rulings "conclud[ing] that [Farak] removed controlled substances from samples that she was charged with testing" and that she "was doing so in the summer of 2012." These decisions, which denied post-conviction relief to any defendant who pled guilty before the summer of 2012, were largely based on a review of what Judge Kinder understandably believed was "all of the physical evidence seized in connection with the criminal investigation of Farak."

On November 1, 2014, undersigned counsel sent the AGO an eleven page letter. It detailed the results of a defense inspection of the physical evidence that had finally taken place two days earlier. This correspondence made it clear that the aforementioned representations by Foster were grossly inaccurate. An internal post-mortem confirmed the role Foster's "inaccurate" statements played in the non-disclosure of highly exculpatory evidence. At this point, the duty of candor compelled Foster to rectify her presentation of false evidence. She did not do so. For twenty-five months, she and her colleagues remained silent about what Kaczmarek now calls a "breakdown."

We now know Farak's misconduct did not begin in the summer of 2012; it spanned close to a decade. We know now that Farak not only removed controlled substances from samples that she was charged with testing; she stole and abused substances assigned to other chemists for analysis, as well as lab standards maintained for purposes of comparison. It is now undisputed that Farak spent the vast majority of her days at the Amherst drug lab under the influence of powerful, psychotropic drugs. We know she consumed narcotics moments before operating highly sensitive instruments, interacting with prosecutors and police officers, and testifying in court. We know Farak falsified official documents, altered the weights of samples in the computer system, and deliberately disabled

a device designed to protect the integrity of evidence. We know Farak even went so far as to misappropriate lab equipment and supplies to manufacture crack cocaine, which she sometimes smoked at her workstation or in the evidence room.

All of this knowledge was within the grasp of law enforcement in 2013. Instead of pursuing it, government officials erected roadblocks that concealed, for many months, a lapse of systemic magnitude in the criminal justice system. During those months, thousands of defendants like Lizardo Vega remained in confinement or suffering the collateral consequences of potentially tainted drug convictions. In the pages that follow, undersigned counsel will endeavor to untangle the web of mischaracterizations, half-truths, and falsehoods that warrant the dismissal of the above-reference indictment with prejudice.

Proposed Findings of Fact

A. Farak's Co-Workers Improperly Withheld Critical Evidence Concerning the Scope of Farak's Misconduct.

1. On Friday morning, January 18, 2013, Amherst Evidence Officer Sharon Salem (Salem) advised Lab Supervisor James Hanchett (Hanchett) that two cocaine samples assigned to Sonja Farak (Farak) were not in the main evidence room where they were supposed to be.¹
2. This was not the first time supervisors at the Amherst Drug Lab were unable to account for controlled substances.
3. In the fall of 2012, Hanchett did an inventory of lab standards² and discovered some were either "missing"³ or "lower than he thought they should be."⁴
4. According to Salem, Hanchett was "concerned" and raised the possibility of "wrongdoing."⁵
5. When Rebecca Pontes (Pontes) learned of the missing standards, she "was in shock" and tried to "wrap [her] brain about how that could have happened."⁶

¹ Hr'g Tr. 148-49 (Dec. 8, 2016) (testimony of Hanchett).

² Hr'g Tr. 79-80 (Dec. 8, 2016) (testimony of Hanchett).

³ Ex. 79, *Commonwealth v. Doe*, Grand Jury Minutes 110 (Feb. 4, 2016) (testimony of Pontes).

⁴ *Id.* at 33 (testimony of Salem).

⁵ *Id.* at 34-35 (testimony of Salem).

⁶ *Id.* at 111 (testimony of Pontes).

6. As the holder of a "federal license," Hanchett had an "obligation" to "make a report" of any "missing narcotics at [his] lab."⁷
 7. When asked why he did not report these missing narcotics, Hanchett explained that he was unable to say for certain how much of any particular standard was missing because the lab was not in compliance federal regulations requiring biennial inventories of all controlled substances.⁸
 8. Hanchett, Salem, and Pontes were each interviewed by investigators on January 18, 2013.⁹
 9. Hanchett and Salem ended up testifying at the Grand Jury which indicted Farak¹⁰ and all three of her former co-workers testified at the evidentiary hearing before Judge Kinder in the fall of 2013.¹¹
 10. During these interviews and in-court examinations, these witnesses were asked questions seeking information about the timing and scope of Farak's misconduct.¹²
 11. None of them said anything about the loss of lab standards until Salem and Pontes testified at the Grand Jury on February 4, 2016.¹³
 12. Their collective silence regarding this important event delayed the discovery that Farak's tampering was not "limited to drug submissions of crack cocaine"¹⁴ but encompassed numerous lab standards including methamphetamine, amphetamine, phentermine, cocaine, and ketamine.¹⁵
- B. Thomas and Ballou Knowingly Mischaracterized Personal Papers Containing Admissions by Farak of Drug Use at the Lab in Police Reports and the Search Warrant Return.**

⁷ Tr. Hr'g 78 (Dec. 8, 2016) (testimony of Hanchett); *see also* 21 C.F.R. § 1301.76 ("The registrant shall notify the Field Division Office of the Administration in his area, in writing, of the theft or significant loss of any controlled substances within one business day of discovery of such loss or theft.").

⁸ Hr'g Tr. 81 (Dec. 8, 2016) (testimony of Hanchett) ("Q. And did you, at this point, report the -- your concerns to anybody from the DEA? A. Number one, you have to have a starting point. I didn't have a reference point."); *see also* 78-79 (stating he learned about this regulation "late in [his] career"); 21 CFR 1304.04 & 21 CFR 1304.11.

⁹ Ex. 10, Ballou Police Report ¶ 2 (Feb. 6, 2013).

¹⁰ *See* Ex. 4, Grand Jury – Day 2 (Feb. 21, 2013); Ex. 6, Grand Jury – Day 4 (Mar. 11, 2013).

¹¹ Ex. 80, Transcript from Amherst Drug Lab Evidentiary Hearing (Sept. 9, 2013); Ex. 95, Transcript from Amherst Drug Lab Evidentiary Hearing (Oct. 7, 2013).

¹² *See, e.g.*, Ex. 50 Transcript of Pontes Interview 11 ("Did you notice her mood change recently for any reason or sometime in the past . . . ?").

¹³ *See, e.g.*, Ex. 95, Transcript from Amherst Drug Lab Evidentiary Hearing (Oct. 7, 2013) (testimony of Pontes) ("Q. And other than those observations [of Farak disappearing for 10 or 15 minutes] that you say go back maybe to September of 2012, there was nothing that you noticed about Ms. Farak that led you to believe, even in hindsight, that she was tampering with evidence, correct? A. Correct.").

¹⁴ Hr'g Tr. 164 (Dec. 16, 2016) (testimony of Kaczmarek) (citing Ex. 163, Prosecution Memo with handwritten notes).

¹⁵ *See generally* Ex. 56, *Commonwealth v. Doe*, Grand Jury Minutes (Sept. 16, 2015).

13. On the afternoon of January 18, 2013, Massachusetts State Police (MSP) troopers questioned Farak at the Hampden County Hall of Justice.¹⁶
14. She denied any wrongdoing and ultimately terminated the interview by invoking her right to counsel.¹⁷
15. Farak's car was in the parking lot.¹⁸
16. When she did not permit troopers to search it, they impounded the vehicle and had it towed to the barracks in Northampton.¹⁹
17. That evening, Sergeant Joseph Ballou (Ballou) and Trooper Randy Thomas (Thomas) began drafting an application for a warrant to search Farak's car.²⁰
18. Among the items the troopers sought permission to seize were "any and all evidence related to Sonja Farak's crimes including but not limited to . . . Records or paperwork associated with controlled substances."²¹
19. At approximately 2:30 a.m., then-Detective Lieutenant Robert Irwin (Irwin), Ballou, and Thomas "met Clerk Brian M. St. Onge at the Amherst Police Department and he issued a search warrant for FARAK's vehicle."²²
20. Irwin, Ballou, and Thomas then proceeded to the garage underneath the Northampton barracks where Farak's car had been towed.²³
21. Trooper Christopher Dolan (Dolan) from Crime Scene Services was summonsed to the garage to take photographs while the three detectives executed the warrant.²⁴
22. The search began at 3:23 a.m. and concluded approximately ninety minutes later.²⁵
23. Waiting to start the search in the morning was not an option because this was a "high-priority investigation."²⁶
24. In fact, Irwin communicated with Criminal Bureau Chief John Verner (Verner) as he and his subordinates conducted the search.²⁷

¹⁶ Ex. 5A, Transcript of Farak Interview.

¹⁷ *Id.*

¹⁸ Ex. 10, Ballou Police Report ¶ 7 (Feb. 6, 2013).

¹⁹ *Id.* at ¶¶ 9-10.

²⁰ *Id.* at ¶ 12.

²¹ Ex. 172, Search Warrant and Return for Farak's Car, FARAK Discovery 3074.

²² Ex. 10, Ballou Police Report ¶ 12 (Feb. 6, 2013); Ex. 172, Search Warrant and Return for Farak's Car, FARAK Discovery 3075.

²³ Hr'g Tr. 9 (Dec. 12, 2016) (testimony of Thomas).

²⁴ Ex. 11, Thomas Police Report ¶ 1 (Jan. 24, 2013).

²⁵ Hr'g Tr. 10 (Dec. 12, 2016) (testimony of Thomas); Ex. 11, Thomas Police Report ¶¶ 2-3 (Jan. 24, 2013).

²⁶ Hr'g Tr. 11 (Dec. 12, 2016) (testimony of Thomas); Hr'g Tr. 98, 138 (Dec. 12, 2016) (testimony of Irwin).

²⁷ Hr'g Tr. 93-94 (Dec. 12, 2016) (testimony of Irwin).

25. Verner then passed along email updates to First Assistant Edward Bedrosian (Bedrosian).²⁸
26. Farak's car "was really a mess,"²⁹ "absolutely full of stuff,"³⁰ including "paper" and "debris."³¹
27. The troopers "essentially . . . took everything out of the car and laid it out," then "screen[ed] things" to determine if "items were evidentiary and . . . met the criteria of the search warrant."³²
28. Irwin, Ballou, and Thomas ended up seizing a couple hundred pieces of paper.³³
29. While "dozens" of these pages had "absolutely nothing to do . . . with work at the Amherst Drug Lab,"³⁴ the "majority" of the paperwork appeared lab-related.³⁵
30. Given the hour and location of the search, the troopers "did not go through every single paper they [they] found in the car at that time."³⁶
31. Instead, they decided to "collect these materials and . . . bring them to another location" where they could "conduct a more thorough review of them."³⁷
32. In the process of collecting these materials, the troopers placed items in evidence bags with tags containing brief descriptions of their contents.³⁸
33. Troopers utilized the phrase "assorted lab paperwork" or "lab paperwork" to describe the contents of seven bags.³⁹
34. At the conclusion of the search, all the items seized from the car were placed in a banker's box that Ballou transported to the evidence room at the Attorney General's Office in Springfield.⁴⁰
35. There was nothing improper about this aspect of the investigation.

²⁸ Hr'g Tr. 125 (Dec. 15, 2016) (testimony of Verner).

²⁹ Hr'g Tr. 82 (Dec. 12, 2016) (testimony of Thomas).

³⁰ Hr'g Tr. 141 (Dec. 13, 2016) (testimony of Ballou).

³¹ Hr'g Tr. 142-43 (Dec. 12, 2016) (testimony of Irwin); *See also* Ex. 8, Photographs of Farak's Car.

³² Hr'g Tr. 141-42 (Dec. 13, 2016) (testimony of Ballou).

³³ *See* Exs. 219-230, State Police Evidence Receipts 001, 004-006, 008, 011-015, 017, 020; Ex. 167, Letter from Verner to David Sullivan (Nov. 13, 2014) (referencing 289 pages).

³⁴ Hr'g Tr. 86-89 (Dec. 12, 2016) (testimony of Thomas).

³⁵ Hr'g Tr. 42 (Dec. 14, 2016) (testimony of Ballou).

³⁶ Hr'g Tr. 143 (Dec. 13, 2016) (testimony of Ballou).

³⁷ Hr'g Tr. 95 (Dec. 12, 2016) (testimony of Irwin).

³⁸ *See, e.g.*, Ex. 220, Bates #000419.

³⁹ Ex. 220, Bates #000419; Ex. 221, Bates #000463; Ex. 222, Bates #000477; Ex. 223, Bates #000513; Ex. 224, Bates #000537; Ex. 227, Bates #000655; Ex. 228, Bates #000671.

⁴⁰ Hr'g Tr. 144 (Dec. 13, 2016) (testimony of Ballou).

36. “[A]t some point over the weekend” of January 19, 2013, Irwin told Ballou that he wanted him “to be the case officer.”⁴¹
37. Ballou subsequently undertook one of the case officer’s most important, “painstaking” tasks by examining “each piece of paper.”⁴²
38. While performing this task, Ballou discovered a number of documents reflecting Farak’s treatment for a drug addiction.⁴³
39. Neither Ballou nor any other witness could recall when exactly he conducted this more thorough examination.⁴⁴
40. However, it is clear *someone* discovered this documentary evidence before the morning of January 23, 2013.
41. The night before, Ballou circulated a draft of an affidavit he prepared in support of an warrant application to search a tote bag found at Farak’s workstation.⁴⁵
42. Ballou encouraged recipients of the draft to “make any changes in the morning” in the hopes that Thomas could bring the completed warrant application “to court when he brings his return for the car (about 10:00).”⁴⁶
43. At 8:38 the next morning, Verner sent an email offering his feedback.⁴⁷
44. Among other things, Verner suggested paragraph 12 of Ballou’s affidavit reference “all that was found, including the papers.”⁴⁸
45. Verner went on to explain: “The fact that all this stuff was found in her car leads credence to our proposition that stuff will be found in the bag (most is in there, but *we found personal papers . . .*.”⁴⁹

⁴¹ Hr’g Tr. 139-40 (Dec. 13, 2016) (testimony of Ballou).

⁴² Hr’g Tr. 20 (Dec. 12, 2016) (testimony of Thomas).

⁴³ Hr’g Tr. 146-51 (Dec. 13, 2016) (testimony of Ballou). These documents – some of which contained admissions of drug use at the Amherst Drug Lab – came to be known as “FARAK admissions,” “personal papers,” or “mental health worksheets.”

⁴⁴ *See, e.g.*, Hr’g Tr. 145 (Dec. 13, 2016) (testimony of Ballou) (“ . . . I think it was a week or two after [the search], I started going through each piece of paper and trying to review it in more detail.”); Hr’g Tr. 20-21 (Dec. 12, 2016) (testimony of Thomas) (stating that within a “matter of days or weeks” of the search, Ballou disclosed that some of the items seized “were of concern” because they were related to Farak’s “mental health”).

⁴⁵ Ex. 261, Email from Ballou to Kaczmarek, Verner, & Thomas (Jan. 22, 2013; 8:09 pm).

⁴⁶ *Id.* A subsequent email from Verner suggests the return was not filed until much later that afternoon. *See* Ex. 245, Email from Verner to Bedrosian (Jan. 23, 2013; 4:11 pm).

⁴⁷ Ex. 261, Email from Verner to Ballou, Kaczmarek & Thomas (Jan. 23, 2013; 8:38 am).

⁴⁸ *Id.*

⁴⁹ *Id.*

46. When confronted with this correspondence, Thomas testified: "I don't recall the time frame when Sergeant Ballou did, but clearly that's -- somebody had reviewed the evidence more thoroughly, found the paperwork, now Verner was following up with us."⁵⁰
47. For his part, Verner expressed certainty that "by that point, . . . I knew there were papers found in the car. I'm sure there was discussion about admissions."⁵¹
48. The return Thomas filed in the Eastern Hampshire District Court later that day purported to be "a true and detailed account of all the property taken."⁵²
49. Yet, this document did not acknowledge the existence of any personal papers or mental health worksheets and gave no indication the AGO obtained items containing admissions of drug use by Farak.⁵³
50. Instead, the return merely reproduced the descriptions troopers placed on the evidence tags while collecting items in the garage.⁵⁴
51. The next day, Thomas submitted a police report.⁵⁵
52. The "whole purpose of this report" was to memorialize the car execution of the warrant and "talk about the items that [were] found."⁵⁶
53. Nevertheless, Thomas simply cut and pasted the item descriptions from the return.⁵⁷
54. On January 25, 2013, Ballou filed the application for a warrant to search the tote bag.⁵⁸
55. The final draft of his affidavit did not incorporate Verner's suggestion to include "all that was found."⁵⁹
56. Most significantly, the paragraph pertaining to the execution of the car warrant made no mention of personal papers or admissions.⁶⁰
57. According to Irwin, it was "the responsibility of the case officer to go through these papers and detect anything and everything of evidentiary value and turn that into a report."⁶¹

⁵⁰ Hr'g Tr. 39 (Dec. 12, 2016) (testimony of Thomas).

⁵¹ Hr'g Tr. 121 (Dec. 15, 2016) (testimony of Verner).

⁵² Ex. 172, Search Warrant and Return for Farak's Car, FARAK Discovery 3071.

⁵³ *Id.*

⁵⁴ This can be seen when one compares the first pages of Exhibits 219 through 230 with the search warrant return. See Ex. 172, Search Warrant and Return for Farak's Car, FARAK Discovery 3070-71.

⁵⁵ Ex. 11, Thomas Police Report (Jan. 24, 2013).

⁵⁶ Hr'g Tr. 25-26 (Dec. 12, 2013) (testimony of Thomas).

⁵⁷ Compare Ex. 172, Search Warrant and Return for Farak's Car, FARAK Discovery 3070-71, with Ex. 11, Thomas Police Report ¶ 2 (Jan. 24, 2013).

⁵⁸ Ex. 173, Search Warrant and Return for Farak's Tote Bag, FARAK Discovery 3267.

⁵⁹ Ex. 173, Search Warrant and Return for Farak's Tote Bag, FARAK Discovery 3268-72.

⁶⁰ Ex. 173, Search Warrant and Return for Farak's Tote Bag, FARAK Discovery 3270.

⁶¹ Hr'g Tr. 155 (Dec. 12, 2016) (testimony of Irwin).

58. On February 6, 2013, Ballou submitted a nine-page police report to Irwin that discussed the search of the car (and discovery of “a sheet of paper” with the initials “RP” scrawled “repeatedly” across the page) but contained no reference to the mental health worksheets.⁶²
59. During the recent evidentiary hearing, Thomas attempted to explain the omissions in his official reports by claiming he “may not have ever seen what was seized.”⁶³
60. As for Ballou, when confronted with his February 6, 2013 report, he maintained that his closer review of the car evidence must not have occurred until after that date.⁶⁴
61. Neither of these claims is worthy of credence.
62. As noted above, Thomas and Ballou were both recipients of Verner’s email on the morning of January 23, 2013, advocating for a reference to the “personal papers” in Ballou’s affidavit.
63. Even if Thomas never personally encountered the mental health worksheets, he knew – *before filing his return and police report* – that some of the documents seized could not be accurately described as “assorted lab paperwork.”
64. While Thomas suggested there would have been “no reason not to” memorialize the seizure of “personal paperwork,”⁶⁵ he also conceded the “mental health” documents “were of concern.”⁶⁶
65. As Irwin eventually acknowledged, the “concern” was “information” contained in these documents might be “privileged” under “HIPPA.”⁶⁷
66. According to Irwin, a decision was made to call the mental health worksheets “assorted lab paperwork” because “the return of the search warrant had to be completed within seven days and a determination of the HIPPA concern had not been reached.”⁶⁸

⁶² See Ex. 10, Ballou Report ¶ 13 (Feb. 6, 2013).

⁶³ Hr’g Tr. 25-26 (Dec. 12, 2016) (testimony of Thomas); Hr’g Tr. 51 (Dec. 12, 2016) (testimony of Thomas) (“Q. . . So it’s your testimony here today that when you filed this inventory, this true and detailed account of all of the property taken by you, that you had not reviewed those couple hundred pieces of paper? A. That’s right. Not in any further detail than when we took them, that’s correct.”); *see also* Hr’g Tr. 25-26 (Dec. 12, 2016) (testimony of Thomas) (stating it was “probably true” he “did not review the documents that were in the assorted lab paperwork prior to writing [his] police report”).

⁶⁴ Hr’g Tr. 153 (Dec. 13, 2016) (testimony of Ballou).

⁶⁵ Hr’g Tr. 28-29 (Dec. 12, 2016) (testimony of Thomas).

⁶⁶ Hr’g Tr. 20-21 (Dec. 12, 2016) (testimony of Thomas).

⁶⁷ Hr’g Tr. 103 (Dec. 13, 2016) (testimony of Irwin).

⁶⁸ Hr’g Tr. 103 (Dec. 13, 2016) (testimony of Irwin). Irwin testified it was “very common” for investigators to use the phrase “assorted paperwork” in search warrant returns to describe the seizure of documents when there was not “time to go through and itemize each piece of paper.” Hr’g Tr. 101 (Dec. 12, 2016) (testimony). Asked to confirm the difference between the phrases “assorted paperwork” and “assorted lab paperwork,” Irwin initially refused. *Id.* When he later testified about the decision to use the phrase “assorted lab paperwork” in the return Thomas filed, Irwin claimed to have only learned about this decision after it was made. *Id.* at 103.

67. This was highly improper.
 68. Putting aside the inapplicability of HIPPA,⁶⁹ investigators concerned about the sensitive nature of paperwork cannot resolve such concerns by misrepresenting said paperwork in official reports – particularly ones they submit to a Court.
 69. The failure to document the discovery of the mental health worksheets became particularly problematic during the 2013 hearing before Judge Kinder when Ballou testified: “Everything that was found was documented.”⁷⁰
- C. **The AGO Hierarchy was Negligent in Failing to Seek the Appointment of an Entity to Determine the Impact of Systemic Failures at the Amherst Drug Lab.**
70. The MSP assumed control of both Department of Public Health (DPH) Drug Labs on July 1, 2012, and soon commenced an investigation at the Hinton facility based on concerns regarding the performance of former chemist Annie Dookhan (Dookhan).⁷¹
 71. Irwin was the lead investigator and his goal was to “conduct as comprehensive an investigation as possible.”⁷²
 72. He eventually interviewed Dookhan, and she admitted to “dry-labbing” and falsifying test results.⁷³
 73. Two days later, on August 30, 2012, “Governor Deval Patrick closed the Drug Lab, and all [Hinton] Drug Lab employees were placed on paid administrative leave.”⁷⁴
 74. On September 11, 2012, investigators seized the computers assigned to Dookhan and fifteen other Hinton chemists.⁷⁵

⁶⁹ “The HIPAA Rules apply to covered entities and business associates. . . . If an entity does not meet the definition of a covered entity or business associate, it does not have to comply with the HIPAA Rules.” U.S. Dep’t of Health & Human Services, “Covered Entities and Business Associates,” <https://www.hhs.gov/hipaa/for-professionals/covered-entities/> (last visited Jan. 21, 2017). Covered entities include health care providers, health care plans, and health care clearinghouses. *Id.* They do not include law enforcement agencies that discover admissions of criminal behavior in the trunk of a suspect’s car.

⁷⁰ Ex. 80, Transcript from Amherst Drug Lab Evidentiary Hearing (Sept. 9, 2013). *Contrast* Hr’g Tr. 155 (testimony of Ballou) (acknowledging he never wrote “a police report talking about those ServiceNet Diary Cards and Emotion Regulation Worksheets”).

⁷¹ Tr. Hr’g 113 (Dec. 12, 2016) (testimony of Irwin).

⁷² *Id.* at 114, 115.

⁷³ *Id.* at 96; Ex. 64, OIG, “Investigation of the Drug Laboratory at the William A. Hinton State Laboratory Institute 2002 – 2012, pg. 5 (Mar. 4, 2014).

⁷⁴ Ex. 64, OIG, “Investigation of the Drug Laboratory at the William A. Hinton State Laboratory Institute 2002 – 2012, pg. 5 (Mar. 4, 2014).

⁷⁵ Hr’g Tr. 117-18 (Dec. 12, 2016) (testimony of Irwin).

75. Approximately six days later, the AGO sent discovery packets to the District Attorneys containing “investigative reports pertaining to this Office’s ongoing criminal investigation.”⁷⁶
76. In a cover letter accompanying those reports, Verner wrote that they “may contain potentially exculpatory information, as well as information necessary to your Offices’ determination about how to proceed with cases in which related narcotics evidence was tested at the Hinton laboratory.”⁷⁷
77. “On September 20, 2012, the Governor established a task force headed by Attorney David Meier . . . in an attempt to identify all criminal defendants whose drug samples Dookhan tested during her nine-year tenure at the Drug Lab.”⁷⁸
78. That same day, Bedrosian announced the AGO “had agreed to conduct a broader review of the drug analysis unit at the Hinton Laboratory.”⁷⁹
79. The purpose of this review was to determine “whether any failures at the laboratory impacted the reliability of the results on cases beyond those handled directly by [Dookhan].”⁸⁰
80. Over the course of the next month, the AGO devoted “considerable resources, considerable time,” and “considerable effort” assembling a team to conduct this broader review.⁸¹
81. On October 24, 2012, members of the criminal defense bar sent a letter to AG Martha Coakley requesting that her office not undertake the broader review and instead “call for the appointment of . . . an independent investigator unencumbered by [a] potential conflict of interest.”⁸²
82. During the recent evidentiary hearing, both Bedrosian and Verner testified that the AGO was more or less blindsided by this request.⁸³
83. Nevertheless, on October 30, 2012, Bedrosian sent a letter to the Governor’s Chief of Staff “asking that the Governor – in consultation with District Attorneys and defense counsel – appoint an independent investigator to conduct [the] broader review of the [Hinton] lab’s policies, practices, and oversight.”⁸⁴

⁷⁶ Ex. 259, Letter from John Verner to Daniel Conley (Sept. 17, 2012).

⁷⁷ *Id.*

⁷⁸ Ex. 64, OIG, “Investigation of the Drug Laboratory at the William A. Hinton State Laboratory Institute 2002 – 2012, pg. 6 (Mar. 4, 2014).

⁷⁹ Ex. 239, Letter from Edward Bedrosian to Joseph Early & Anthony Benedetti (Sept. 20, 2012).

⁸⁰ *Id.* at 105-06.

⁸¹ Hr’g Tr. 181-82 (Dec. 15, 2016) (testimony of Verner); Hr’g Tr. 108 (Dec. 14, 2016) (testimony of Bedrosian); *see also* Ex. 240, Memorandum from Edward Bedrosian to Mark Reilly & David Meier (Oct. 20, 2012).

⁸² Ex. 243, Letter from Martin Healy et al to Martha Coakley (Oct. 24, 2012).

⁸³ Hr’g Tr. 119-20 (Dec. 14, 2016) (testimony of Bedrosian); Hr’g Tr. 181-82 (Dec. 15, 2016) (testimony of Verner).

⁸⁴ Ex. 244, Letter from Edward Bedrosian to Mo Cowan (Oct. 30, 2012).

84. "On November 5, 2012, the Governor asked the Office of the Inspector General ("OIG") to conduct an independent, comprehensive review of the Drug Lab."⁸⁵
85. When Farak's misconduct came to light, Bedrosian and his colleagues quickly determined "the same concerns the defense bar raised in Dookhan applied in this case."⁸⁶
86. Having just had the Hinton investigation "pulled out from under [them]," they never had any intention of looking into "broader reliability" issues in Amherst.⁸⁷
87. Bedrosian and his colleagues therefore "alerted the administration and the DAs to say they were in the same position."⁸⁸
88. During his cross-examination, Bedrosian said he expected the "Executive Branch" would "take responsibility for the Amherst lab . . . and refer that to whoever was going to do an investigation."⁸⁹
89. However, he later clarified did not know if anybody was going to do a broader reliability investigation.⁹⁰
90. It is difficult to see how an expectation for such an investigation could have emerged.
91. Bedrosian had no knowledge of anyone being tapped to perform the task David Meier had undertaken,⁹¹ and he did not "write a similar letter" to the Governor's Chief of Staff asking for appointment of independent investigator to "do an investigation of the Amherst Lab."⁹²
92. Perhaps more importantly, the information supplied to the administration created the impression that policies, practices, and oversight in Amherst were beyond reproach.
93. Days after Farak's misconduct came to light, Bedrosian received an email containing an article with this quote from Governor Patrick: "I don't think that the oversight in Amherst really can fairly be questioned since it was the people doing the oversight who dealt with it, dealt with it promptly."⁹³
94. This piece contained additional quotes from Patrick "commend[ing] the coworkers . . . and supervision in the lab" and assuring the public "[n]o individuals due process rights have been compromised."⁹⁴

⁸⁵ Ex. 64, OIG, "Investigation of the Drug Laboratory at the William A. Hinton State Laboratory Institute 2002 – 2012, pg. 7 (Mar. 4, 2014).

⁸⁶ Hr'g Tr. 111 (Dec. 14, 2016) (testimony of Bedrosian).

⁸⁷ *Id.* at 123.

⁸⁸ *Id.* at 111.

⁸⁹ *Id.* at 122.

⁹⁰ *Id.* at 136.

⁹¹ *Id.* at 134-35.

⁹² *Id.* at 136

⁹³ Ex. 238, Email from Corey Welford to Bedrosian, Verner, Calkins & Irwin (Jan. 22, 2013; 9:58 pm).

⁹⁴ *Id.*

D. Kaczmarek's Quest to Avoid Complications Caused Her and Ballou to Disregard Evidence of Farak's Longstanding Polysubstance Disorder.

95. Farak was arrested at approximately 10:30 p.m. on Saturday, January 19, 2013.⁹⁵
96. At some point that weekend, Kaczmarek became the lead prosecutor in the case.⁹⁶
97. The day after Farak's arraignment in District Court, Ballou told Kaczmarek, Verner, and Irwin about a report he received from Hampden County Assistant District Attorney (ADA) Karen Southerland (Southerland) regarding a case where "one of the samples contains fewer pills than originally seized."⁹⁷
98. During the recent evidentiary hearing, Kaczmarek claimed this report "didn't fit the profile that [she] had in [her] head that [Farak] was using crack."⁹⁸
99. This testimony is inconsistent with the reply Kaczmarek sent seven minutes later which predicted this was "the tip of the iceberg."⁹⁹
100. During a meeting the next day with Southerland, Ballou learned the following information:
- The Springfield Police report shows 51 Oxycodone pills were seized on March 16, 2012. Sonja Farak conducted the analysis on May 8, 2012, but now there are 61 pills. The cert shows no controlled substances found. The police officer thinks the pills look different than the ones he seized. Unfortunately, he did not describe the pills [in] his report.¹⁰⁰
101. Southerland also told Ballou about a colleague who had "a cocaine case that was light by 4 grams (102 grams when weighed by the police w/package and yet certified as 98 grams by Farak)."¹⁰¹
102. This other ADA was apparently "upset because they missed the 100 gram threshold" and "4 grams seems like a lot for packaging."¹⁰²
103. Ballou indicated he was "a little skeptical because neither of these cases seem to fit the scheme that we think Farak was perpetrating. . . . They also go back a lot further than the cases we are looking at."¹⁰³

⁹⁵ Ex. 10, Ballou Police Report ¶ 16 (Feb. 6, 2013).

⁹⁶ Hr'g Tr. 125 (Dec. 15, 2016) (testimony of Verner).

⁹⁷ Ex. 231, Email from Ballou to Kaczmarek, Verner & Irwin (Jan. 23, 2013; 10:23 am).

⁹⁸ Hr'g Tr. 149 (Dec. 16, 2016) (testimony of Kaczmarek).

⁹⁹ Ex. 231, Email from Kaczmarek to Ballou, Verner & Irwin (Jan. 23, 2013; 10:30 am.).

¹⁰⁰ Ex. 231, Email from Ballou to Kaczmarek (Jan. 23, 2013; 4:41 pm).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

104. The next morning, Ballou spoke “to ADA [Diane] Dillon about her cocaine case that was light by 4 grams.”¹⁰⁴
105. Ballou told Kaczmarek “Farak tested it back in 2005” and relayed Dillon’s theories as to why Farak might not have tampered with the sample.¹⁰⁵
106. In response, Kaczmarek wrote: “Please don’t let this get more complicated than we thought. If she were suffering from back injury- maybe she took some oxys?”¹⁰⁶
107. Kaczmarek testified that her first comment was not really meant for Ballou; rather, it was “kind of a plea to God” to spare her team from “an avalanche of work.”¹⁰⁷
108. Prior to receiving Kaczmarek’s plea, Ballou had been told by Irwin to “document everything.”¹⁰⁸
109. After receiving Kaczmarek’s plea, Ballou did not write “a police report . . . documenting Diane Dillon’s concern about a 2005 cocaine case being light by 4 grams.”¹⁰⁹
110. During the recent evidentiary hearing, Kaczmarek suggested such a report was unnecessary because a prosecutor in the Hampden County District Attorney’s office was aware of the information and the sample in question had been “retested.”¹¹⁰
111. There are two problems with this testimony.
112. First, when the AGO subsequently made disclosures of “potentially exculpatory information” to the District Attorneys, no information was furnished concerning the 2005 case.¹¹¹
113. Accordingly, the lone District Attorney’s office aware of the case could reasonably infer the AGO had conducted an investigation and determined no tampering took place; the other ten offices would have had no reason to know there was ever any such concern.
114. Second, Ballou’s email to Foster said nothing about retesting and no evidence has ever been produced suggesting any such retesting was ever performed.
115. As for Kaczmarek’s speculation that Farak may have pilfered pills on this one occasion for an isolated, medicinal purpose, this was purportedly based on her “experience” that users “usually have a drug and [they] stick with it.”¹¹²

¹⁰⁴ Ex. 231, Email from Ballou to Kaczmarek (Jan. 24, 2013; 9:16 am).

¹⁰⁵ *Id.*

¹⁰⁶ Ex. 231, Email from Kaczmarek to Ballou (Jan. 24, 2013; 9:47 am).

¹⁰⁷ Hr’g Tr. 102 (Dec. 16, 2016) (testimony of Kaczmarek).

¹⁰⁸ Ex. 231, Email from Irwin to Verner, Ballou & Kaczmarek (Jan. 23, 2013; 10:39 am).

¹⁰⁹ Hr’g Tr. 184 (Dec. 13, 2016) (testimony of Ballou).

¹¹⁰ Hr’g Tr. 102-03 (Dec. 16, 2016) (testimony of Kaczmarek).

¹¹¹ Ex. 260, Letter from Verner to Dan Conley (Mar. 27, 2013).

¹¹² Hr’g Tr. 101 (Dec. 16, 2016) (testimony of Kaczmarek).

116. As the investigation progressed, Kaczmarek and Ballou stuck with this dubious hypothesis even as it became apparent this was more than “a cocaine case.”¹¹³
117. On February 7, 2013, Kaczmarek called Farak’s wife, Nikki Lee (Lee), as the first witness at the Grand Jury.¹¹⁴
118. During the recent evidentiary hearing, Kaczmarek stated the “primary reason that we subpoenaed [Lee] in to the Grand Jury, was to see if she could help us determine what Farak’s drug use was, when it began.”¹¹⁵
119. According to Kaczmarek, Lee “was particularly unhelpful in that regard or said that she’d only seen Farak use drugs, I think prior to her working as a chemist.”¹¹⁶
120. This testimony is at odds with the Grand Jury minutes.
121. The following exchange features the only questions Kaczmarek posed pertaining to what Farak’s drug use was and/or when it began:

Q. As far as you know with your wife, have you ever seen her use Cocaine?

A. Yes.

Q. When was that?

A. In 2000 in Philadelphia

Q. Since 2000, have you seen Ms. Farak use Cocaine?

A. No.

Q. Or any other controlled substances?

A. Yes.

Q. Can you tell me –

A. I’ve seen her smoke Marijuana.

Q. Can you tell us a little bit about your wife’s daily habits?¹¹⁷

¹¹³ *Id.* at 150.

¹¹⁴ Ex. 3, Grand Jury Testimony Nikki Lee – Day 1 (Feb. 7, 2013).

¹¹⁵ Hr’g Tr. 127 (Dec. 16, 2016) (testimony of Kaczmarek).

¹¹⁶ *Id.*; see also *id.* at 145 (“[Lee] said that she had only seen her use drugs once before, cocaine before. And it was, I believe, predated her work as a chemist.”).

¹¹⁷ Ex. 3, Grand Jury Testimony Nikki Lee 10 – Day 1 (Feb. 7, 2013).

122. As the foregoing makes clear, once Lee testified that she had witnessed Farak stray from her supposed drug of choice, Kaczmarek did not ask the witness to identify any other substances she had seen Farak use or any occasions when she observed Farak use them.
123. When Lee nevertheless volunteered that she had seen Farak smoke marijuana, Kaczmarek changed the subject.
124. Other papers in Farak's car suggested polysubstance abuse.
125. For example, Farak possessed the print-out of a 2011 article listing the locations where users of controlled medications could dispose of drugs during a "Prescription Drug Take Back Day."¹¹⁸
126. She also had a Servicenet Diary Card indicating her near-complete consumption of the lab's supply of phentermine.
127. Specifically, this diary card stated: "Shame at work. Going to use phentermine, but when I went to take it, I saw how little (v. little) there is left = ended up not using."¹¹⁹
128. As for oxycodone, a vial of white powder on Farak's desk tested positive for a mixture of this substance and acetaminophen.¹²⁰
129. When shown a picture of this vial,¹²¹ Salem confirmed it was not something Farak should have had at her desk based on the batch of samples that had recently been assigned to her.¹²²
130. In spite of all this, Kaczmarek deemed it "reasonable" to only scrutinize "crack cocaine cases" dating back to July 1, 2012.¹²³
131. Ballou later conveyed his opinion to Judge Kinder that "cocaine was the only substance that it appeared that Ms. Farak had any interest in."¹²⁴

E. Kaczmarek and Ballou Failed to Take Reasonable Steps to Learn the Probative Value of the Mental Health Worksheets.

132. On February 14, 2013, Ballou sent an email with the subject heading, "FARAK admissions," to Kaczmarek, Irwin, and Verner.¹²⁵
133. The text read:

¹¹⁸ Bates# 000602.

¹¹⁹ Hr'g Tr. 197 (Dec. 13, 2016) (testimony of Ballou).

¹²⁰ Ex. 6A, MSP certificate of analysis; Ex. 14, Attorney General's Evidence Log.

¹²¹ See Ex. 174, Photos of vial from workstation and packaging.

¹²² Hr'g Tr. 185 (Dec. 12, 2016) (testimony of Salem).

¹²³ Ex. 163, Prosecution Memo with Handwritten Notes 12 (Mar. 27-28, 2013).

¹²⁴ Ex. 80, Transcript from Amherst Drug Lab Evidentiary Hearing 177 (Sept. 9, 2013).

¹²⁵ Ex. 205, Email from Ballou to Kaczmarek, Irwin & Verner (Feb. 14, 2013; 3:31 pm).

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.

Joe¹²⁶

134. Among the “forms” Ballou attached were two “Emotion Regulation Worksheets,” a list of “pros” and “cons” of “resisting” or engaging in “target behavior,” and a “Servicenet Diary Card.”¹²⁷
135. The Servicenet Diary card memorialized drug activity – including drug activity on two occasions at the Amherst Drug Lab – between Tuesday, December 20 and Monday, December 26.¹²⁸
136. These dates last fell on these particular days of the week in 2011.¹²⁹
137. During the recent evidentiary hearing, Kaczmarek testified she did not consult old calendars and just presumed that Farak was recording misconduct she perpetrated less than a month before her arrest.¹³⁰
138. Kaczmarek based this presumption, in large part, on the unlikelihood Farak would have kept papers in her car for longer than that; as she put: “I can’t imagine someone keeping something for over a year in their car. I mean, I know her car was a mess, but I wouldn’t -- my brain didn’t go there.”¹³¹
139. If Kaczmarek had bothered to actually review the car evidence,¹³² she would have discovered dozens of items that were clearly generated or printed out prior to 2012, including: emails;¹³³ news articles;¹³⁴ letters;¹³⁵ manila envelopes;¹³⁶ receipts;¹³⁷ travel authorization forms;¹³⁸ a hotel reservation;¹³⁹ an NFL Schedule;¹⁴⁰ a Quest Diagnostics

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Ex. 205, Email from Ballou to Kaczmarek, Irwin & Verner (Feb. 14, 2013; 3:31 pm).

¹²⁹ Hr’g Tr. 82-83 (Dec. 16, 2016) (testimony of Kaczmarek).

¹³⁰ Hr’g Tr. 151 (Dec. 13, 2016) (testimony of Ballou); Hr’g Tr. 165-66 (Dec. 16, 2016) (testimony of Kaczmarek).

¹³¹ Hr’g Tr. 166 (Dec. 16, 2016) (testimony of Kaczmarek).

¹³² Hr’g Tr. 44 (Dec. 14, 2016) (testimony of Ballou).

¹³³ Bates# 000424-26, 000432-34, 000437, 000441-43, 000453, and 000543.

¹³⁴ Bates# 000420-22, 000429-31, 000447-49, 000457-58, 000561, 000563, 000567, 000569, 000587, 000589, 000602.

¹³⁵ Bates# 000444, 000451, 000461.

¹³⁶ Bates# 000

¹³⁷ Bates# 000436, 000510, and 000631.

¹³⁸ Bates# 000465-66.

¹³⁹ Bates# 000473-75.

¹⁴⁰ Bates# 000585.

laboratory report;¹⁴¹ a “Homework” assignment dated “11-16-11”;¹⁴² actual assorted lab paperwork;¹⁴³ and a mini-, 2009 dossier on a UMass communications specialist.¹⁴⁴

140. Other mental health worksheets without dates almost certainly could have been dated.
141. For example, one of the Emotion Regulation Worksheets Kaczmarek received contained an admission that Farak had “12 urge-ful samples to analyze out of the next 13.”¹⁴⁵
142. According to this worksheet, the “prompting event” for these urges was Farak’s realization that her supervisor would soon realize that she had lied about submitting a DEA application.¹⁴⁶
143. Among the other materials seized from Farak’s trunk was a letter dated January 4, 2012, confirming Farak’s enrollment in an upcoming DEA seminar.¹⁴⁷
144. One could reasonably infer that Farak submitted the application weeks, if not months, before she received notice of her acceptance.
145. Like Kaczmarek, Ballou “presumed” that because the December Servicenet Diary Card he sent “was in her car,” it was “a few weeks’ old at most.”¹⁴⁸
146. Unlike Kaczmarek, Ballou was the custodian of the physical evidence and the only government official to thoroughly examine it while the case against Farak was pending.¹⁴⁹
147. He knew Farak possessed a large volume of pre-2012 paperwork and therefore should have known there was no factual basis to presume the December Diary card necessarily reflected 2012 misconduct.
148. Ballou made another faulty presumption with respect to the other Servicenet Diary Card memorializing Farak’s phentermine abuse.
149. As noted above, this second diary card reflects an experience of “[s]hame at work” when Farak decided to use then discovered “how little” there was “left.”

¹⁴¹ Bates# 000557.

¹⁴² Bates# 000548.

¹⁴³ Bates# 000414, 000423, 000435, 000459-60, 000481, 000483, 000485, 000489, 000491, 000501, 000503, 000505, 000507, 000509, 000511, 000542, 000545, 000550, 000552, 000554-55, 000587, 000657-58, 000688, 000690, 000692, 000694, 000696, 000698.

¹⁴⁴ Bates# 000675, 000677, 000679, 000681, 000683, 000685, 000695, 000697. As it turned out, the UMass employee was the husband of Farak’s first therapist. See Bates# 000675 (listing “ownership” information for Greenfield property).

¹⁴⁵ Ex. 205, Email from Ballou to Kaczmarek, Irwin & Verner (Feb. 14, 2013; 3:31 pm).

¹⁴⁶ *Id.*

¹⁴⁷ Bates# 000471.

¹⁴⁸ Hr’g Tr. 195-96 (Dec. 13, 2016) (testimony of Ballou).

¹⁴⁹ Hr’g Tr. 42-44 (Dec. 14, 2016) (testimony of Ballou).

150. When confronted with this evidence at the recent hearing, Ballou conceded that it sounded like phentermine might have been a “drug that was at work.”¹⁵⁰

151. He nevertheless “assumed” this was “some type of psychological medication”¹⁵¹ and therefore decided this mental health worksheet was not among those Kaczmarek “need[ed] to see.”¹⁵²

F. Kaczmarek’s Grand Jury Presentation Falsely Portrayed Farak’s Criminal Conduct as a Sudden and Unexpected Fall from Grace.

152. Given the highly personal nature of the mental health worksheets she received from Ballou, Kaczmarek was concerned about introducing them at the Grand Jury and discussed the situation with Verner and Mazzone.¹⁵³

153. By this point, the Criminal Division had elected to “focus on Farak’s wrong doings associated with her arrest.”¹⁵⁴

154. In Mazzone’s view, the mental health worksheets “weren’t really necessary to establish probable cause”; nor were they “relevant to the presentation of the crimes” for which the office would be seeking indictments.¹⁵⁵

155. Out of an abundance of caution, Kaczmarek and her supervisors chose not to utilize the mental health worksheets at the Grand Jury.¹⁵⁶

156. Kaczmarek informed Ballou of this decision¹⁵⁷ and instructed him not to discuss the mental health worksheets when testifying about the search of the car.¹⁵⁸

157. There was nothing improper about this use of prosecutorial discretion.

158. Problems arose, however, when Kaczmarek presented evidence suggesting Farak had been a model employee up until a few months before her arrest.

159. As Farak’s supervisor, Hanchett had an obvious incentive to minimize his subordinate’s misdeeds, as the longer Farak tampered with evidence at the lab, the more poorly it would reflect on him.¹⁵⁹

¹⁵⁰ Hr’g Tr. 197 (Dec. 13, 2016) (testimony of Ballou).

¹⁵¹ Hr’g Tr. 198 (Dec. 13, 2016) (testimony of Ballou).

¹⁵² Hr’g Tr. 19 (Dec. 14, 2016) (testimony of Ballou).

¹⁵³ Hr’g Tr. 133 (Dec. 15, 2016) (testimony of Verner); Hr’g Tr. 53-54 (Dec. 16, 2016) (testimony of Mazzone).

¹⁵⁴ Hr’g Tr. 123 (Dec. 12, 2016) (testimony of Irwin).

¹⁵⁵ Hr’g Tr. 54 (Dec. 16, 2016) (testimony of Mazzone).

¹⁵⁶ *Id.*

¹⁵⁷ Hr’g Tr. 162 (Dec. 13, 2016) (testimony of Ballou).

¹⁵⁸ Hr’g Tr. 194 (Dec. 13, 2016) (testimony of Ballou).

¹⁵⁹ *See infra.*

160. Kaczmarek nevertheless elicited Hanchett's self-serving assessment that Farak had "meticulous . . . work habits" up until "the last few weeks prior to *the incident*."¹⁶⁰
161. Ballou went so far as to tell grand jurors that when he met Farak for the first time during the Dookhan investigation, he found her to be "somewhat pretty," at least in contrast to her more recent "drawn and pale" appearance.¹⁶¹
162. This purposefully incomplete and misleading presentation to the Grand Jury became the official version of events.
163. When the time came to respond to subpoenas and discovery motions, Foster repeatedly drew attention to the relatively short span of misbehavior "revealed in the grand jury minutes."¹⁶²

G. Kaczmarek Consciously Created the Misperception that Amherst was a "Professional Lab" in an Email to a High-Ranking OIG Official.

164. Ten days after Farak's arrest, Chief Legal Counsel for the MSP sent Kaczmarek, Verner, and others an email asking if recipients had any concerns about releasing the results of an October 10, 2012 audit of the Amherst Drug Lab in response to a public records request from the *Boston Herald*.¹⁶³
165. Kaczmarek told Verner she was "ok" disclosing the audit but confessed it was "a little embarrassing how little quality control they had."¹⁶⁴
166. Weeks later, an article appeared in the *Daily Hampshire Gazette*, which contained the following quote from Jeremy Bucci, one of the First Assistants for the Northwestern District Attorney: "We are . . . awaiting word on whether Amherst will be the subject of an investigation by the inspector general."¹⁶⁵
167. Kaczmarek forwarded the article to Audrey Mark (Mark), an attorney with the OIG.¹⁶⁶
168. Kaczmarek's email contained this message: "Audrey- when they ask you to [do] this audit- say no. (actually its very different than JP. A professional lab)."¹⁶⁷

¹⁶⁰ Ex. 6, Grand Jury Minutes – Day 4, 36 (Mar. 11, 2013) (testimony of Hanchett) (emphasis added).

¹⁶¹ Ex. 6, Grand Jury Minutes – Day 4, 58 (Mar. 11, 2013) (testimony of Ballou).

¹⁶² Opp'n to Def.'s Rule 17(a)(2) Mot. For Production 3, *Commonwealth v. Penate*, No. 12-00083, Paper No. __ (Oct. 1, 2013).

¹⁶³ Ex. 268, Email from Michael Halpin to Verner, Kaczmarek, Elisabeth Ryan, Jane Gabriel, David Procopio & James Connolly (Jan. 29, 2013; 10:14 am).

¹⁶⁴ Ex. 269, Email from Kaczmarek to Verner (Jan. 29, 2013; 12:52 pm); Hr'g Tr. 88-89 (Dec. 16, 2016) (testimony of Kaczmarek).

¹⁶⁵ Hr'g Tr. 89 (Dec. 16, 2016) (testimony of Kaczmarek).

¹⁶⁶ Ex. 270, Email from Kaczmarek to Audrey Mark (Feb. 26, 2013; 11:10 am); Hr'g Tr. 90 (Dec. 16, 2016) (testimony of Kaczmarek).

¹⁶⁷ *Id.*

169. During the recent evidentiary hearing, Kaczmarek initially testified that her advice was directed to Mark personally and that she believed “someone else in [Mark’s] office should” conduct an investigation.¹⁶⁸
170. This explanation made no sense, and Kaczmarek quickly abandoned it when asked why anyone at the OIG should investigate such “a professional lab.”¹⁶⁹
171. In response, Kaczmarek claimed that, by the time she wrote to Mark, she no longer found the quality control in Amherst embarrassing; rather, she had come to realize that “in order for Amherst to have operated the way it did, it did have to have a different operating systems than say Sudbury lab did.”¹⁷⁰
172. This second explanation made no more sense than her first.
173. The MSP Quality Assurance Audit identified “different operating systems” in Amherst that were indefensible.
174. Among other things, the audit revealed that:
- (i) Amherst Drug Lab personnel did “not have a quality manual, nor d[id] they comply with MSPFSG QA procedures”;
 - (ii) “the instrument logs [were not] current and complete” and “no documented policies existed prior to [September 2012]” with regard to doing checks, running standards or performing auto tunes;
 - (iii) “evidence in the Unit [was] [im]properly secured” insofar as “the short term/overnight safe storage” often “contain[ed] unsealed evidence which all staff [could] access”;
 - (iv) “evidence [was] [im]properly marked and sealed” as “no initials/dates [were placed] on the seals”;
 - (v) “new procedures [were not] properly validated”; (vi) newly written procedures were “incomplete”;
 - (vii) “[n]o training manual exist[ed]”;
 - (viii) “the Unit [did not] routinely check the reliability of its reagents”;
 - (ix) no “records [were] kept of commercial reagents, in house reagents and supplies, which identif[ied], where appropriate, lot number or batch number, manufacturer’s specifications, internal evaluations and shelf life”;

¹⁶⁸ Hr’g Tr. 91 (Dec. 16, 2016) (testimony of Kaczmarek).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 91-92.

(x) "critical reagents [were not] checked against known material prior to being placed into service";

(xi) "the results of critical reagent Quality Control checks [were not] documented";

(xii) "no positive control checks [were] performed";

(xiii) when "reagents [we]re used as received from the manufacturer, . . . records [were not] maintained of the manufacturer-supplied Quality Control data sheets for each reagent";

(xiv) "blanks [were not] analyzed with the appropriate frequency";

(xv) "Submittal and Chain-of-Custody forms [were neither] completely [nor] accurately filled out [nor] . . . establish[ed] custody of [each] sample at all times";

(xvi) "[s]eals [we]re not initialed/dated so could be opened and resealed";

(xvii) "[s]ignificant weight variances" were not documented on "[d]iscrepancy forms"; and

(xviii) "[n]o one verifie[d] inventory discrepancies."¹⁷¹

175. When confronted with the contents of this audit, Kaczmarek conceded it did not "paint[] the picture of a professional lab."¹⁷²

176. During her cross-examination, things came full circle when Kaczmarek accepted the invitation to return to her initial explanation for her Mark email.

Q. And you knew Audrey had children?

A. I did, yes.

Q. And that she worked part-time?

A. Yes.

Q. And did that go into your advice to her to personally say no to this?

A. Yes.¹⁷³

¹⁷¹ Ex. 1, MSP Crime Laboratory – Quality Assurance Audit Amherst Drug Lab (Oct. 10, 2012).

¹⁷² Hr'g Tr. 93 (Dec. 16, 2016) (testimony of Kaczmarek).

¹⁷³ Hr'g Tr. 173 (Dec. 16, 2016) (testimony of Kaczmarek).

H. Kaczmarek Withheld Potentially Exculpatory Information Including but not Limited to the Mental Health Worksheets.

177. On March 27, 2013, the AGO distributed materials to the District Attorneys pursuant to the “Office’s obligation to provide potentially exculpatory information.”¹⁷⁴
178. None of the mental health worksheets were included in these packets.¹⁷⁵
179. Other potentially exculpatory information was missing as well.
180. One of Farak’s conditions of release called for random drug screens.
181. On January 24, 2013, the Chief Probation Officer for the Belchertown District Court told Kaczmarek that Farak just tested positive for cocaine and admitted last using cocaine on her final day at work.¹⁷⁶
182. A week later, Kaczmarek received Door Access Reports documenting each entry into the “drug evidence storage room” for every Amherst employee but Farak.¹⁷⁷
183. Withholding evidence like this not only hurt defendants; it compromised the Court’s ability to make accurate factual findings.
184. Each of the Rule 30 decisions Judge Kinder eventually issued contained this paragraph:

All four Amherst Lab employees had access to the main evidence safe by electronic cards and keys. Although employees were supposed to use the electronic cards, they often used keys. *No record was maintained of entry to the safe when keys were used.*¹⁷⁸

I. Kaczmarek Unilaterally Declared the Mental Health Worksheets “Privileged” and Made an Inappropriate Pledge Not to Disclose them to Post-Conviction Defendants.

185. At the end of March, 2013, Kaczmarek completed a Prosecution Memo and submitted it to Mazzone, Verner, and Shelia Calkins (Calkins) for their approval.¹⁷⁹
186. The memo contained multiple references to the mental health worksheets and noted they had “not been submitted to the grand jury out of an abundance of caution,” even though “[c]ase law” suggested “the paperwork [was] not privileged.”¹⁸⁰

¹⁷⁴ Ex. 165, Letter from Verner to Daniel Conley (Mar. 27, 2013).

¹⁷⁵ *Id.*

¹⁷⁶ Ex. 232, Email from Ballou to Kaczmarek (Jan. 24, 2013; 2:02 pm).

¹⁷⁷ Hr’g Tr. 105-08 (Dec. 12, 2016) (testimony of Irwin).

¹⁷⁸ See Ex. 184, Order Denying Motion for New Trial in *Commonwealth v. Cotto*, Hampden Superior Court No. 07-00770, pg. 4.

¹⁷⁹ Ex. 163, Prosecution Memo with Handwritten Notes

¹⁸⁰ *Id.* at 5 n.7.

187. Verner reviewed the memo on or about the same day he signed the cover letter that went to the District Attorneys along with the first batch of Farak discovery.¹⁸¹
188. He knew the mental health worksheets were not a part of this distribution and hand-wrote a note to Kaczmarek on the prosecution memo reminding her this evidence had “NOT” been “turned over to DAs offices yet.”¹⁸²
189. After Calkins approved the memo, it was returned to its author; Kaczmarek testified that she placed the memo in her file without reviewing it and never saw Verner’s reminder.¹⁸³
190. By the time Farak was arraigned in Superior Court on April 22, 2013,¹⁸⁴ multiple defendants had filed motions for post-conviction relief based on her alleged misconduct.¹⁸⁵
191. Kaczmarek “was really nervous” about the mental health records.¹⁸⁶
192. Had she not “totally misjudged the dates” on the diary card Ballou sent, Kaczmarek “would have . . . asked a court to do an in camera review and release [her] from any sort of privilege.”¹⁸⁷
193. Instead, she proceeded under the assumption that the worksheets were privileged and told Farak’s lawyer, Elaine Pourinski (Pourinski), they would not be shared with defendants seeking post-conviction relief.¹⁸⁸
194. Pourinski had a distinct recollection of receiving this information in the Hampshire County Superior Court outside the courtroom in the afternoon while waiting for a judge to take the bench.¹⁸⁹
195. The announcement “affected [her] thinking about the case” because it helped Pourinski understand the extent of her client’s “exposure.”¹⁹⁰

J. Kaczmarek’s Deliberately Kept Critically Information from Western Massachusetts Prosecutors.

196. Several months after Farak’s Superior Court arraignment, Kaczmarek distributed copies of the grand jury minutes to prosecutors in the four western counties.¹⁹¹

¹⁸¹ Ex. 165, Letter from Verner to Daniel Conley (Mar. 27, 2013).

¹⁸² Ex. 163, Prosecution Memo with Handwritten Notes 5.

¹⁸³ Hr’g Tr. 110 (Dec. 16, 2016) (testimony of Kaczmarek).

¹⁸⁴ Hr’g Tr. 114 (Dec. 16, 2016) (testimony of Kaczmarek).

¹⁸⁵ See, e.g., *Commonwealth v. Watt*, Hampden Superior Court No. 09-01068, Paper No. 17.

¹⁸⁶ Hr’g Tr. 112 (Dec. 16, 2016) (testimony of Kaczmarek).

¹⁸⁷ Hr’g Tr. 166-67 (Dec. 16, 2016) (testimony of Kaczmarek).

¹⁸⁸ Hr’g Tr. 21-22, 25 (Dec. 16, 2016) (testimony of Pourinski).

¹⁸⁹ Hr’g Tr. 27 (Dec. 16, 2016) (testimony of Pourinski).

¹⁹⁰ *Id.* at 35.

¹⁹¹ Hr’g Tr. 111 (Dec. 15, 2016) (testimony of Verner).

197. By this point, Kaczmarek had grown sick of traveling to Western Massachusetts¹⁹² and dealing with Western Massachusetts prosecutors.¹⁹³
198. In July of 2013, she forwarded one of her email exchanges with Hampden County First Assistant District Attorney Frank Flannery (Flannery) to her Boston colleagues in the Enterprise and Major Crimes Unit.¹⁹⁴
199. Kaczmarek changed the title of the subject heading to: "For your viewing pleasure and an advisement against moving to Western Mass."¹⁹⁵
200. Later that summer, Kaczmarek received a phone call from Berkshire County Assistant District Attorney John Bosse (Bosse).¹⁹⁶
201. Defense counsel in the case of *Commonwealth v. Manson* had sent Bosse two discovery letters.¹⁹⁷
202. The second letter contained the following paragraph:
- b. Regarding Sergeant Ballou's testimony about the "writings" and lab test paperwork" found in Ms. Farak's car at page 14 of the 2/28/13 Grand Jury Minutes, would you be so kind as to provide me with copies of any additional documents found in Ms. Farak's car dated 2010 or earlier, and/or that are exculpatory in Mr. Manson's case because they indicate Ms. Farak may have been tampering with evidence prior to 2013. For instance, Exhibit 3 from the 2/28/13 Grand Jury hearing tends to indicate that Ms. Farak was engaging in misconduct in September of 2011. (If the State Police have figured out to whom the note was written, would you kind also disclose that?)¹⁹⁸
203. At the conclusion of his phone call with Kaczmarek, Bosse faxed to her the letter containing this discovery request.¹⁹⁹
204. Kaczmarek forwarded to Bosse a copy of an opposition to a new trial motion Kaczmarek had previously obtained from Suffolk County Assistant District Attorney Vincent J. DeMore (DeMore); this opposition had been filed by DeMore in 2012 in response to the pleading of a so-called "Dookhan defendant."²⁰⁰

¹⁹² Hr'g Tr. 173-74 (Dec. 16, 2016) (testimony of Kaczmarek).

¹⁹³ Hr'g Tr. 38 (Dec. 16, 2016) (testimony of Mazzone).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ See Ex. 233, "Joint Stipulation" (Dec. 14, 2016).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

205. Bosse made arrangements to meet with Kaczmarek in Boston to discuss the Manson discovery requests.²⁰¹
206. During that meeting, Kaczmarek told Bosse that all “relevant discovery” from the Farak prosecution had already been provided to Berkshire County District Attorney’s office.²⁰²
207. Several weeks later, Bosse drafted a letter to defense counsel communicating Kaczmarek’s representation.²⁰³
208. Before Bosse sent the letter, Kaczmarek confirmed its accuracy.²⁰⁴
209. This letter was obviously inaccurate; unbeknownst to Bosse, his office had not been provided copies of Farak’s mental health worksheets.
210. Even if the December Servicenet Diary Card did memorialize misconduct a few weeks before Farak’s arrest that would not have made it irrelevant.
211. Unlike this diary card, none of the evidence disclosed by the AGO “show[ed] that [Farak] was actually using drugs at work.”²⁰⁵
212. Moreover, one could reasonably infer: (i) Farak did not begin recording her drug abuse at the lab the moment it started; and (ii) by the time she completed the card, she was receiving treatment at Servicenet.
213. Meanwhile, on or about July 22, 2013, Judge Kinder found fifteen post-conviction defendants were entitled to an evidentiary hearing to determine “the timing and scope of Sonja Farak’s alleged misconduct.”²⁰⁶
214. On August 16, 2013, Flannery informed Kaczmarek this hearing had been scheduled “for 9/9 . . . to define the scope, to the extent possible, of Farak’s misconduct.”²⁰⁷
215. Flannery predicted the hearing would “include the testimony of some of the investigators and chemists involved in [Kaczmarek’s] investigation.”²⁰⁸
216. Sensitive to the complications this could present, Flannery made a commitment to keep Kaczmarek “in the loop.”²⁰⁹

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ Hr’g Tr. 174 (Dec. 12, 2016) (testimony of Flannery).

²⁰⁶ Order Regarding Evidentiary Hearing,” *Commonwealth v. Rodriguez*, Hampden County Indictment No. 10-1181 (July 22, 2013). Judge Kinder also found the defendants were entitled to explore the consequences of the “negative findings of the October 10, 2012 MSP Quality Assurance Audit.” *Id.*

²⁰⁷ Hr’g Tr. 119 (Dec. 16, 2016) (testimony of Kaczmarek).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

217. On August 28, 2013, Kaczmarek learned that “re-testing” done in the Worcester and MSP labs revealed instances where it appeared Farak had tampered with samples.²¹⁰
218. Kaczmarek did not inform Flannery of this potentially exculpatory information.²¹¹
219. This development only came to his attention when Salem inadvertently disclosed it during a telephone conversation on the afternoon of Friday, September 6, 2013.²¹²
220. Flannery “contacted contacted AG’s Office right away, but . . . didn’t get a response.”²¹³
221. He ultimately had to ask Judge Kinder for a second hearing date “three or four weeks out” because he had “not been . . . in the loop . . . as much as [he] should have been.”²¹⁴

K. Supervisors in the AGO’s Appeals Division Inexplicably Assigned an Inexperienced AAG to Handle High Stakes Litigation.

222. On or about August 22, 2013, Kaczmarek and Ballou each received a subpoena *duces tecum* in the case of *Commonwealth v. Rolando Penate*.²¹⁵
223. Among other things, the Penate subpoenas commanded the production of “Copies of any and all inter and intraoffice correspondence pertaining to the scope of evidence tampering and/or deficiencies at the Amherst Drug Laboratory from January 18, 2013 to the present.”²¹⁶
224. Whenever an AAG or state trooper assigned to the AGO received a subpoena, an attorney in the Appeals Division would be assigned to the case.²¹⁷
225. In 2013, Randall Ravitz (Ravitz) was the Chief of the Appeals Division and Suzanne Reardon (Reardon) served as his Deputy.²¹⁸
226. In March 2013, Reardon made revisions to a manual entitled, “Responding to Subpoenas Where the AGO is a Third Party.”²¹⁹

²¹⁰ Hr’g Tr. 119-23 (Dec. 16, 2016) (testimony of Kaczmarek).

²¹¹ Hr’g Tr. 122 (Dec. 16, 2016) (testimony of Kaczmarek).

²¹² Hr’g Tr. 188-89 (Dec. 12, 2016) (testimony of Salem).

²¹³ Ex. 80, Transcript from Amherst Drug Lab Evidentiary Hearing 25 (Sept. 9, 2013).

²¹⁴ *Id.* at 243.

²¹⁵ Ex. 198, Motion to Quash Subpoena for Joseph Ballou and Memorandum of Law, pg. 4, *Commonwealth v. Rolando Penate*, Hampden Superior Court No. 12-00083 (Nov. 25, 2013); Ex. 199, Motion to Quash Subpoena for Anne Kaczmarek and Memorandum of Law, pg. 4, *Commonwealth v. Rolando Penate*, Hampden Superior Court No. 12-00083 (Nov. 25, 2013).

²¹⁶ Tr. Hr’g 81 (Dec. 16, 2016) (testimony of Kaczmarek).

²¹⁷ Hr’g Tr. 164-65 (Dec. 14, 2016) (testimony of Reardon).

²¹⁸ Hr’g Tr. 8 (Dec. 15, 2016) (testimony of Ravitz).

²¹⁹ *Id.*; see also Ex. 247, “Responding to Subpoenas Where the AGO is a Third Party.”

227. The revised manual provided step-by-step instructions based both on the law and common sense.²²⁰
228. One of the first and most important steps was to “[c]ollect the files that were requested under subpoena.”²²¹
229. The term “file” in this context “encompasses electronically stored information.”²²²
230. Emails and attachments to emails are a form of electronically stored information.²²³
231. According to the manual, conducting a “document review might suggest ways to settle the problem, e.g. the files may not contain the documents the party is seeking, or the only responsive documents are not privileged, or the requester already has what you have.”²²⁴
232. In past cases when file custodians refused to permit a review, AAGs in the Appeals Division found ways “to not give in” and “insist[ed]” upon the file’s production.²²⁵
233. These episodes illustrated the office’s dedication to getting “boots on the ground” to figure out where things stood before prosecutors started filing motions.²²⁶
234. Ravitz and Reardon assigned Kris Foster (Foster) to respond to handle the AGO’s response to the Penate subpoenas.²²⁷
235. Foster had only been working at the AGO for approximately six weeks.²²⁸
236. Before becoming an AAG, she had no exposure to subpoenas and had never filed a motion to quash.²²⁹
237. Ravitz and Reardon nevertheless “agreed that it would be a good case to give [Foster], to give her experience in these types of cases.”²³⁰
238. At 10:38 a.m. on August 26, 2013, Ravitz sent Foster copies of memos he had filed in prior cases seeking to quash subpoenas.²³¹

²²⁰ Hr’g Tr. 9 (Dec. 15, 2016) (testimony of Ravitz).

²²¹ Hr’g Tr. 166-67 (Dec. 14, 2016) (testimony of Reardon).

²²² Hr’g Tr. 25-26 (Dec. 15, 2016) (testimony of Ravitz).

²²³ Hr’g Tr. 167-68 (Dec. 14, 2016) (testimony of Reardon).

²²⁴ *Id.* at 168-69.

²²⁵ Hr’g Tr. 52 (Dec. 15, 2016) (testimony of Ravitz).

²²⁶ Hr’g Tr. 190 (Dec. 14, 2016) (testimony of Reardon).

²²⁷ Hr’g Tr. 33 (Dec. 13, 2016) (testimony of Foster).

²²⁸ Hr’g Tr. 88 (Dec. 13, 2016) (testimony of Foster).

²²⁹ *Id.* at 83-84.

²³⁰ Hr’g Tr. 211 (Dec. 14, 2016) (testimony of Reardon).

²³¹ Ex. 254, Email from Ravitz to Foster (Aug. 26, 2013; 10:38 am).

239. The purpose in providing these briefs was to give Foster a “template” she could use in drafting her own pleadings.²³²
240. Ravitz also had a one-on-one meeting with Foster where he “went through the steps and process in which you would file a motion to quash.”²³³
241. Later on August 26, 2013, undersigned counsel sent an email to Foster; attached to it was a motion for discovery filed on behalf of the defendant in *Commonwealth v. Rafael Rodriguez*.²³⁴
242. Among other things, the Rodriguez discovery motion sought the production of “any and all evidence suggesting that a third party may have been aware of Farak’s evidence tampering at the Amherst Drug Laboratory prior to Farak’s arrest in January, 2013.”²³⁵
243. Foster was tasked with responding to this motion.²³⁶
244. On August 30, 2013, Ballou received a subpoena *duces tecum* for the September 9 hearing “command[ing] the production of all documents and photographs pertaining to the investigation of Sonja Farak and the Amherst Drug Lab.”²³⁷
245. Responding to this subpoena in the case of *Commonwealth v. Jermaine Watt* became another one of Foster’s assignments.²³⁸

L. AAGs Sought to Quash the Watt Subpoena Due, in Part, to their Desire to Prevent the Dissemination of Farak’s Mental Health Worksheets.

246. On the morning of September 3, 2013, Kaczmarek offered these thoughts on whether the office should move to quash the Watt subpoena:

I [am] told that the judge wants to come to the bottom of the issues mentioned below making it unlikely he will allow a motion to quash. As long as the judge has set up the scope of the motion & I am confident that Ballou will be pretty unhelpful in what the judge is trying to do- do we just let Ballou go?²³⁹

247. Verner decided it might be best to have a group “talk” in person.²⁴⁰

²³² Hr’g Tr. 58 (Dec. 15, 2016) (testimony of Ravitz).

²³³ Hr’g Tr. 50-51 (Dec. 15, 2016) (testimony of Ravitz).

²³⁴ Hr’g Tr. 34-35 (Dec. 13, 2016) (testimony of Foster).

²³⁵ Hr’g Tr. 36 (Dec. 13, 2016) (testimony of Foster).

²³⁶ *Id.* at 35.

²³⁷ Hr’g Tr. 170 (Dec. 14, 2016) (testimony of Reardon); *see also* Ex. 183, Ballou Summons, *Commonwealth v. Watt*, Hampden County Superior Court No. 09-01068; Ex. 253, Email from Ballou to Kaczmarek & Irwin (Aug. 30, 2013; 2:19 pm).

²³⁸ Hr’g Tr. 8-9 (Dec. 13, 2016) (testimony of Foster).

²³⁹ Ex. 253, Email from Kaczmarek to Ravitz, Reardon & Verner (Sept. 3, 2013; 9:01 am).

²⁴⁰ Ex. 253, Email from Verner to Kaczmarek, Ravist, Reardon & Meghan Scafati (Sept. 3, 2013; 9:05 am).

248. An administrative assistant scheduled a meeting Verner's office from 1:30 pm to 1:45 pm that afternoon.²⁴¹

249. Those "required" to attend were: Foster, Verner, Ravitz, Reardon, Irwin, and Mazzone.²⁴²

250. In advance of that meeting, Ravitz sent an email offering some "food for thought."²⁴³

251. "One thing we can talk about," he wrote, "is that sometimes even if we can't . . . get the subpoena quashed entirely, we can get its scope limited so as to preclude certain types of questions."²⁴⁴

252. The morning after this first meeting, Ravitz returned to the subject of the Ballou subpoena in an email he sent to Foster, Verner, Kaczmarek, Reardon, and Mazzone.²⁴⁵

253. In pertinent part, this email stated:

My take on the "Order Regarding Drug Lab Evidentiary Hearing" that was circulated is that *there's still a rationale for moving to quash, or limit, the scope of the subpoena A defense attorney could still try to elicit information of the type that we think shouldn't be revealed* under the guise of fleshing out information concerning "the timing and scope of Ms. Farak's alleged criminal conduct" and the other categories. Thoughts?²⁴⁶

254. "OK," Verner wrote in response, "we should get the band back together."²⁴⁷

255. This led to a second Farak subpoena meeting.²⁴⁸

256. During the recent evidentiary hearing, all seven participants in these first two Farak subpoena meetings were asked about the details of their discussions.

257. Mazzone had no recollection of being involved in any such discussions,²⁴⁹ Kaczmarek could not "recall any meetings [she] attended or [was] invited to,"²⁵⁰ and Irwin was unsure whether he met with the others.²⁵¹

²⁴¹ Hr'g Tr. 43 (Dec. 13, 2016) (testimony of Foster).

²⁴² *Id.* at 43-44.

²⁴³ Hr'g Tr. 29 (Dec. 15, 2016) (testimony of Ravitz).

²⁴⁴ *Id.*

²⁴⁵ Ex. 253, Email from Ravitz to Foster, Verner, Kaczmarek, Reardon, & Mazzone (Sept. 4, 2013; 11:57 am).

²⁴⁶ *Id.* (emphasis added).

²⁴⁷ Hr'g Tr. 187 (Dec. 15, 2016) (testimony of Verner).

²⁴⁸ Hr'g Tr. 33-34 (Dec. 15, 2016) (testimony of Ravitz).

²⁴⁹ Hr'g Tr. 41 (Dec. 16, 2016) (testimony of Mazzone).

²⁵⁰ Hr'g Tr. 124 (Dec. 16, 2016) (testimony of Kaczmarek).

²⁵¹ Hr'g Tr. 130 (Dec. 12, 2016) (testimony of Irwin).

258. Verner “was sure there was a meeting” but he could not recall “what was said in it” or “who was there.”²⁵²
259. Ravitz could not “remember exactly what was said in various meetings.”²⁵³
260. When asked whether anybody tried to “find out what we’ve given them and what we haven’t given them,” Ravitz acknowledged “there were questions to that effect” but he could not recall who asked or answered them or what the answers were.²⁵⁴
261. Reardon agreed “there were some meetings about how to respond to these subpoenas” and Foster “had the benefit of having some more experienced attorneys . . . giving her advice and in some cases instructions on how to respond.”²⁵⁵
262. Reardon also admitted efforts to quash the Watt subpoena were motivated by the existence of “documents” the office “didn’t want to turn over.”²⁵⁶
263. Reardon went on to say she “learned about the categories” of certain undisclosed “documents” but never actually saw them.²⁵⁷
264. These categories were recognized “privileges” document holders could assert in seeking permission to withhold them.²⁵⁸
265. Reardon said some documents fell under the investigatory privilege and she believed the CORI privilege might have been applicable as well.²⁵⁹
266. When asked whether her office “possessed some documents that would fall under” the “privilege against disclosing information related to health or psychological or medical treatment,” Reardon answered: “I believe so.”²⁶⁰
267. Reardon was under the impression that when the office “invoked this privilege,” this was done “to prevent the dissemination of these documents.”²⁶¹
268. During her cross-examination, Reardon backtracked somewhat and said it was Foster’s use of “specific language referencing the psychological documents at the end of [the] Watt memo” that led her to surmise such documents existed.²⁶²

²⁵² Hr’g Tr. 189 (Dec. 15, 2016) (testimony of Verner).

²⁵³ Hr’g Tr. 34 (Dec. 15, 2016) (testimony of Ravitz).

²⁵⁴ *Id.* at 80-81.

²⁵⁵ Hr’g Tr. 172-73 (Dec. 14, 2016) (testimony of Reardon).

²⁵⁶ *Id.* at 174-75.

²⁵⁷ *Id.* at 175.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* at 176.

²⁶² *Id.* at 203.

269. Ironically, the participant who purported to have the clearest memories of the first two meetings was Foster.
270. During the recent evidentiary hearing, she recalled being told: (1) "everything had already been turned over"; and (2) she therefore "didn't need to see the file."²⁶³
271. When asked who told her everything had been turned over, Foster pointed fingers at Ravitz, Verner, and Mazzone and conveyed her belief that Kaczmarek was an additional source of this information.²⁶⁴
272. Foster's testimony was not credible.
273. Kaczmarek testified she "wouldn't . . . have said that" because she "knew the mental health records hadn't been disclosed."²⁶⁵
274. Ravitz maintained this did not "sound like something" he would say,²⁶⁶ and Reardon was "certain" she "instructed Kris Foster to look through the file."²⁶⁷
275. Although Foster did not "work closely with [Reardon] in these Farak-related issues,"²⁶⁸ Reardon supervised her from the evening of September 4 through September 6, 2013.²⁶⁹
276. After the second meeting, Foster sent Reardon a draft of a memorandum in support of a motion to quash the Watt subpoena.²⁷⁰
277. Reardon responded by attaching a red-lined version of the document in an email she sent back to Foster.²⁷¹
278. In that email, Reardon said if Foster "could get any more information about what was already given to defense counsel that might help."²⁷²
279. Reardon also said "she would be more comfortable knowing what documents are at issue or what had already been turned over before we raised the CORI privilege."²⁷³

²⁶³ Hr'g Tr. 15, 87 (Dec. 13, 2016) (testimony of Foster); *see also id.* at 89 ("Q. Why didn't you look at the file? A. Because I had been told there was -- by my superiors -- there was no need to, and that everything had already been turned over.").

²⁶⁴ Hr'g Tr. 86-87 (Dec. 13, 2016) (testimony of Foster); *see also id.* at 15 ("In a meeting prior to September 9, with Randy Ravitz, John Verner, Dean Mazzone, and I'm not sure who else was there, I was told everything had already been turned over."); *id.* at 96 ("I had representations from my superiors, who I had no reason to disbelieve, and an AAG who was working on the prosecution of Ms. Farak, with a representation that everything had been turned over.").

²⁶⁵ Hr'g Tr. 133 (Dec. 16, 2016) (testimony of Kaczmarek).

²⁶⁶ Hr'g Tr. 70 (Dec. 15, 2016) (testimony of Ravitz).

²⁶⁷ Hr'g Tr. 201 (Dec. 14, 2016) (testimony of Reardon).

²⁶⁸ Hr'g Tr. 32 (Dec. 13, 2016) (testimony of Foster).

²⁶⁹ Hr'g Tr. 61 (Dec. 15, 2016) (testimony of Ravitz).

²⁷⁰ Hr'g Tr. 46 (Dec. 13, 2016) (testimony of Foster).

²⁷¹ *Id.*

²⁷² *Id.*

280. These statements by Reardon, encouraging her subordinate to figure out what had been turned over, refute Foster's claim that her "superiors . . . told [her] that everything had been produced."²⁷⁴
281. Of course, Foster's credibility on this point is further undercut by exchanges she had with Judge Kinder.
282. At the start of the evidentiary hearing on September 9, 2013, Judge Kinder asked whether Foster had "actually personally reviewed the file to determine that there are categories of documents in the file that fit the description of those that [she] wish[ed] to be protected."²⁷⁵
283. After indicating that she had not reviewed the file, Foster conveyed Kaczmarek's position that "several documents, emails, correspondence, would be protected under work product mostly."²⁷⁶
284. Later, when asked if it was a "fairly narrow universe of documents . . . the Attorney General had an objection to turning over," Foster told Judge Kinder this was "correct."²⁷⁷
285. During the recent evidentiary hearing, Foster actually started to explain why Kaczmarek did not want to turn over certain documents when she apparently remembered that her story was everything had already been disclosed.
286. This resulted in the following disjointed account: "AAG Kaczmarek told me that those documents, she didn't want turned over -- she didn't want produced, they'd already -- everything already had been produced."²⁷⁸
287. Overwhelming evidence compels the conclusion that Kaczmarek was not the only participant in the first two Farak subpoena meetings who knew mental health records that had not been disclosed.
288. Four of the seven participants were familiar with these "forms" containing Farak admissions.
289. Kaczmarek, Verner, and Irwin received copies of them from Ballou on Valentine's Day.²⁷⁹

²⁷³ *Id.* at 46-47.

²⁷⁴ Hr'g Tr. 16 (Dec. 13, 2016) (testimony of Foster).

²⁷⁵ Ex. 80, Transcript from Amherst Drug Lab Evidentiary Hearing 15 (Sept. 9, 2013).

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 244.

²⁷⁸ Hr'g Tr. 16 (Dec. 13, 2016) (testimony of Foster).

²⁷⁹ Ex. 205, Email from Ballou to Kaczmarek, Verner & Irwin (Feb. 14, 2013; 3:31 pm).

290. Verner and Mazzone also consulted with Kaczmarek about whether to introduce these documents at the grand jury, then approved a prosecution memo noting they had not been introduced.²⁸⁰
291. As of March 27, 2013, Verner knew that these mental health worksheets had not been disclosed to the District Attorneys.²⁸¹
292. That was the date he placed the handwritten note on the prosecution memo reminding Kaczmarek that this was something she would eventually have to do.²⁸²
293. Mazzone and two of the three other participants – Ravitz and Reardon – had considerable experience responding to subpoenas.²⁸³
294. They knew this task required determining what documents Ballou and/or the office possessed and what documents had already been disclosed.²⁸⁴
295. They also knew office protocols required the AAG assigned to respond to the subpoena to personally conduct this document review.
296. When she was asked about the contents of Ballou’s file after the September 9 hearing, Kaczmarek referenced “her mental health worksheets.”
297. If the existence of these documents did not come up during earlier discussions, it stands to reason that Kaczmarek would have used this occasion to explain what these worksheets were or at least one recipient of the email would have requested such an explanation.
298. Because Kaczmarek misjudged the year the Decemeber Servicenet Diary Card was completed, she did not “realize [it] expanded the scope.”²⁸⁵
299. In her view, this was one of a number of highly sensitive documents with limited, if any, probative value – at least with respect to questions litigants in the post-conviction hearing were seeking to answer.
300. Once Kaczmarek conveyed her flawed understanding of this evidence, it would have made perfect sense for the office to invoke a privilege “concerning the health or medical or psychological treatment of individuals” – particularly since Kaczmarek had told Pourinski these documents would not be disclosed.

²⁸⁰ Ex. 163, Prosecution Memo with Handwritten Notes.

²⁸¹ Hr’g Tr. 170-71 (Dec. 15, 2016) (testimony of Verner).

²⁸² *Id.*

²⁸³ Hr’g Tr. 42 (Dec. 16, 2016) (testimony of Mazzone) (“I used to work in the Attorney General’s Office in the Appeals Division, and we handled subpoena responses.”).

²⁸⁴ See Hr’g Tr. 170 (Dec. 14, 2016) (testimony of Reardon); see also *id.* at 177 (acknowledging the same steps applied in responding to subpoenas Kaczmarek received).

²⁸⁵ Hr’g Tr. 126 (Dec. 16, 2016) (testimony of Kaczmarek).

301. Any alternative scenario hinges on a case of collective amnesia.

M. The AGO's Explanation for Section V of the Watt Memo Ignores Subsequent Efforts to Seek Relief from the Obligation to Produce Information Concerning the Health or Medical or Psychological Treatment of Individuals.

302. Foster filed her memorandum in support of the motion to quash the Watt subpoena on Friday, September 6, 2013.²⁸⁶

303. Section V of the final draft contained the following heading: "As an alternative to quashing the subpoena, this Court should restrict its scope."²⁸⁷

304. The pleading asked the Court to relieve the AGO of the obligation to produce seven categories of information.²⁸⁸

305. The third category was: "Information concerning the health or medical or psychological treatment of individuals."²⁸⁹

306. During the recent evidentiary hearing, Foster claimed that "at the time [she] wrote that, [she] didn't know that the office had information concerning the health and medical or psychological treatment of individuals it had not yet turned over."²⁹⁰

307. Foster went on to explain that she essentially copied this section from a passage she found in the Vaughn pleading, which Ravitz had given to her to use as a template.²⁹¹

308. Foster and Ravitz testified that this was not the only time she did this.²⁹²

309. On September 12, 2013, Ravitz sent Foster red-lined versions of memos she had drafted seeking to quash subpoenas in the case of *Commonwealth v. Secreast*.²⁹³

310. Each Foster draft contained a Section with the same heading and seven categories of information she had placed in Section V of her Watt memo.

311. Each red-lined version contained this comment from Ravitz: "This list should be tailored to what's at issue here and the kinds of information that you say is protected in the sections above and to the fact that what is sought is testimony and not documentation."²⁹⁴

²⁸⁶ Ex. 250, AG's Motion to Quash Watt Subpoena (Sept. 6, 2013).

²⁸⁷ *Id.* at 9.

²⁸⁸ *Id.* at 9-10.

²⁸⁹ *Id.* at 9.

²⁹⁰ Hr'g Tr. 50 (Dec. 13, 2016) (testimony of Foster).

²⁹¹ *Id.* at 98-100.

²⁹² *Id.* at 50-51, 98-100; Hr'g Tr. 58-63 (Dec. 15, 2016) (testimony of Ravitz).

²⁹³ See Ex. 255, Email from Ravitz to Foster (Sept. 12, 2013; 11:21 am); Ex. 256, Email from Ravitz to Foster (Sept. 12, 2013; 1:38 pm).

²⁹⁴ Hr'g Tr. 59 (Dec. 15, 2016) (testimony of Ravitz).

312. During his testimony, Ravitz explained that if he had been available to edit the Watt memorandum he “would have noticed that it was . . . very, very similar to what [he] wrote in Vaughn, if not identical to what [he] wrote in Vaughn, which would suggest that it was unlikely that there was much tailoring to the case.”²⁹⁵

313. According to Ravitz, if he had seen the draft of this pleading Foster showed Reardon, he would have “questioned [Foster] as to whether she had gone back to that part of the section and really put substantial effort into it.”²⁹⁶

314. Viewed in isolation, this explanation makes sense.

315. The problem is, *after* Ravitz caught Foster copying the Vaugh memo in Secreast, he signed off on *five* Penate pleadings requesting relief from the obligation to produce “information concerning the health or medical or psychological treatment of individuals.”²⁹⁷

316. One can infer Ravitz permitted the use of such language because he knew it covered documents the office did not wish to disseminate.

N. The AGO Offered No Innocent Explanation for Foster’s Representations Regarding Third-Party Knowledge.

317. As previously noted, the Rodriguez discovery motion sought the production of “any and all evidence suggesting that a third party may have been aware of Farak’s evidence tampering at the Amherst Drug Laboratory prior to Farak’s arrest in January, 2013.”²⁹⁸

318. The opposition Foster filed on September 6, 2013, contained this representation:

The AGO has turned over all grand jury minutes, exhibits, and police reports in its possession to the District Attorney’s office. Based on these records, to which the defendant has access, there is no reason to believe that a third party had knowledge of Farak’s alleged malfeasance prior to her arrest.²⁹⁹

319. What Foster wrote was technically true; it also happened to be non-responsive.

320. The motion requested “any and all evidence.”

²⁹⁵ *Id.* at 62-63.

²⁹⁶ *Id.* at 63.

²⁹⁷ See Ex. 198, Mem. of Law in Supp. of Att’y Gen.’s Mot. to Quash Summons Served on Sergeant Joseph Ballou 10 (Nov. 25, 2013); Ex. 199, Mem. of Law in Supp. of Att’y Gen.’s Mot. to Quash Summons Served on AAG Anne Kaczmarek 11 (Nov. 25, 2013); *see also Commonwealth v. Penate*, Hampden County No. 12-00083, Paper No. 69, Mem. of Law in Supp. of Att’y Gen.’s Mot. to Quash Summons Served on AAG Anne Kaczmarek 13-14 (Oct. 1, 2013); Paper No. 72, Mem. of Law in Supp. of Att’y Gen.’s Mot. to Quash Summons Served on Sergeant Joseph Ballou 10-11 (Oct. 1, 2013); Paper No. 76.1, Mass. Att’y Gen.’s Office’s Mot. for Clarification of Order for Production Dated Oct. 2, 2013, pp. 8-9 (Oct. 22, 2013).

²⁹⁸ Hr’g Tr. 36 (Dec. 13, 2016) (testimony of Foster).

²⁹⁹ Ex. 212, AGO’s opposition to Defendant Rodriguez motion for discovery 9 (Sept. 6, 2013).

321. Foster chose to address only those items within the whole body of evidence that had already been provided.
322. Her pleading neither admitted nor denied the existence of undisclosed evidence exhibiting third party knowledge.
323. Although this brief was filed on a day when Ravitz was out of the office, he permitted her to use of this passage a second time when undersigned counsel made an identical request for “any and all evidence” of third party knowledge in the Penate case.³⁰⁰
324. Weeks after receiving the email from Kaczmarek explicitly referencing the mental health worksheets, Foster filed another brief stating “evidence of . . . third party knowledge” was not in Kaczmarek’s “care, custody or control.”³⁰¹
325. When asked “whether or not those mental health worksheets might display some third-party knowledge of Ms. Farak’s misconduct,” Foster delivered this non-sequitur: “No. Because I was told everything that needed to be turned over was turned over.”³⁰²
326. During the recent hearing, Ravitz conceded that at least one of these third party knowledge statements not was “inaccurate” – not “knowingly inaccurate or deliberately inaccurate, but just inaccurate.”
327. This assessment ignores the care Foster took in crafting a deliberately vague letter to a Superior Court Judge.³⁰³
328. The words Foster selected in response to requests for evidence of third-party knowledge were equally inscrutable.
329. Sowing confusion seems to have been the point.

O. Ballou Gave an Intentionally Incomplete Account of the Evidence Recovered from Farak’s Car.

330. Hours after Irwin attended the first “Farak Subpoena meeting,” he and Kaczmarek received an email from Ballou reminding them “he was still on target to testify at the motion on Monday” and expressing his desire “to talk about it before then.”³⁰⁴
331. Irwin wrote back two minutes later to say he would give Ballou a call the next morning.³⁰⁵

³⁰⁰ Hr’g Tr. 11 (Dec. 15, 2016) (testimony of Ravitz); *see also* Ex. 251, Email from Ravitz to Foster (Sept. 18, 2013).

³⁰¹ Mem. of Law in Supp. of Att’y Gen.’s Mot. to Quash Summons Served on Ass’t AG Anne Kaczmarek, Paper No. 69, pg. 4, *Commonwealth v. Penate*, Hampden County Superior Court No. 12-00083, Paper No. (Oct. 4, 2013).

³⁰² Hr’g Tr. 75-6 (Dec. 13, 2016) (testimony of Foster).

³⁰³ *See infra*

³⁰⁴ Hr’ Tr. 132 (Dec. 12, 2016) (testimony of Irwin).

³⁰⁵ *Id.*

332. During the recent evidentiary hearing, Irwin claimed to have no memory of: making this call; informing Ballou of the forthcoming motion to quash; or discussing how to deal with the mental health worksheets.³⁰⁶
333. Ballou said the only advice he got was “to tell the truth and talk about what happened during the case.”³⁰⁷
334. According to him, there was no discussion about “whether or not [he] would talk about the mental health and drug use worksheets.”³⁰⁸
335. When it was his turn to testify on September 9, 2013, Ballou was asked to reveal “the results” of the car search.
336. His answer began with an acknowledgment that investigators “found a lot of evidence” but made no mention of mental health worksheets.³⁰⁹
337. As previously noted, it is undisputed that Kaczmarek had instructed Ballou to make no mention of these documents when he testified at the grand jury.³¹⁰
338. The following evidence compels the conclusion Ballou followed this instruction and/or adhered to the similar guidance when he appeared before Judge Kinder.
339. First, testimony by Ballou about the potentially privileged worksheets would have made it impossible for Kaczmarek to keep her pledge to Pourinski.³¹¹
340. Such testimony would have also wasted efforts to relieve the AGO of the “obligation . . . to produce [certain] types of information,” including “Information concerning the health or medical or psychological treatment of individuals.”³¹²
341. Given the possibility this request might be granted, Ballou needed to know how to take advantage of a favorable ruling.
342. As it so happened, Judge Kinder deferred ruling on the request for a protective order.³¹³
343. The next day in an email to five colleagues, Foster reported that “Ballou only testified to what was in the grand jury,” and “Judge Kinder did not allow any kind of questioning anywhere near anything privileged.”³¹⁴

³⁰⁶ *Id.* at 134.

³⁰⁷ Hr’g Tr. 164 (Dec. 13, 2016) (testimony of Ballou).

³⁰⁸ *Id.* at 164-65.

³⁰⁹ Ex. 80, Transcript from Amherst Drug Lab Evidentiary Hearing 129 (Sept. 9, 2013).

³¹⁰ Hr’g Tr. 194 (Dec. 13, 2016) (testimony of Ballou).

³¹¹ Hr’g Tr. 21-22 (Dec. 16, 2016) (testimony of Pourinski).

³¹² Hr’g Tr. 50 (Dec. 13, 2016) (testimony of Foster).

³¹³ Ex. 80, Transcript from Amherst Drug Lab Evidentiary Hearing 19 (Sept. 9, 2013).

³¹⁴ Ex. 210, Email thread with Verner, Foster & Kaczmarek (Sept. 10, 2013).

344. This assessment evinced an understanding by Foster that Ballou did not divulge information the AGO had deemed “privileged.”
345. During the recent evidentiary hearing, Ballou suggested this was unintentional.
346. According to him, by the time the hearing before Judge Kinder got underway, he “had forgotten” about the mental health worksheets.³¹⁵
347. This assertion is inconsistent with other testimony by Ballou, not to mention common sense.
348. His discovery of the mental health worksheets was an undeniable “eureka” moment.³¹⁶
349. Ballou was understandably “excited” to find these worksheets because they constituted “powerful evidence of Sonja Farak’s guilt.”³¹⁷
350. Prior to making this discovery, Ballou agreed that his team possessed “circumstantial evidence that suggested [Farak] had broken the law,” but they “didn’t have any admissions that she was stealing and using drugs at work.”³¹⁸
351. While this new evidence generated enthusiasm, it also inspired caution.
352. A number of the worksheets appeared to be forms “a psychiatrist or counselor may have asked [Farak] to fill out.”³¹⁹
353. Ballou was therefore “concerned [the documents] might be privileged”³²⁰ and told Kaczmarek he “wasn’t sure we would be able to use them.”³²¹
354. It is practically inconceivable that an experienced lead detective in a pending, high-profile, circumstantial case could forget about possibly privileged documentary evidence establishing a suspect’s guilt.

P. Ballou Misrepresented the Extent of Disclosures Made to Defendants.

355. During the hearing on September 9, 2013, Ballou was asked whether he was aware of disclosures his office had made to defense counsel “in the course of *this proceeding* that you’ve been called here *today*.”³²²

³¹⁵ Hr’g Tr. 202 (Dec. 13, 2016) (testimony of Ballou).

³¹⁶ Hr’g Tr. 207-08 (Dec. 13, 2016) (testimony by Ballou).

³¹⁷ *Id.* at 176.

³¹⁸ *Id.* at 177-78.

³¹⁹ *Id.* at 148.

³²⁰ *Id.* at 159.

³²¹ *Id.* at 14 (Dec. 14, 2016) (testimony of Ballou).

³²² Ex. 80, Transcript from Amherst Drug Lab Evidentiary Hearing 150 (Sept. 9, 2013) (emphasis added).

356. Ballou said “yes,” then was asked whether he had “any role to play in deciding what documentation is provided to the *defendants* in this case.”³²³
357. These two questions focused attention squarely on what had been given to counsel for post-conviction defendants, as opposed to what Kaczmarek had provided to Pourinski or what Ballou had provided to Kaczmarek.
358. In response to the second question, Ballou indicated that he did not have such a decision-making role.³²⁴
359. This portion of his answer was correct; deciding what discovery to furnish was the job of prosecutors in the Office of the Attorney General.
360. Unfortunately, Ballou went on to volunteer that “everything in [his] case file ha[d] been turned over.”³²⁵
361. During the recent evidentiary hearing, Ballou initially tried to take the position that this statement was technically true because he did not happen to print out hard copies of the mental health worksheets and put them in the binder he brought to court.³²⁶
362. “[T]hose are not in my case file,” he testified. “They’re in the evidence room, and they’re still in the evidence room to this day.”³²⁷
363. At this point, Attorney Olanoff pointed out that Ballou scanned certain items of physical evidence, gave these PDFs names, and attached them to the email he sent to Kaczmarek, Verner, and Irwin.³²⁸
364. This process transformed pieces of physical evidence into “documents” the Watt subpoena commanded Ballou to produce.
365. Faced with this reality, Ballou sought to ascribe a new meaning to his words.
366. According to him, when he said, “everything in my case file has been turned over,” what he meant was: *he* had turned over everything in his case file to *Kaczmarek*.³²⁹
367. If the exchange on September 9, 2013 went no further, it might be possible to accept this explanation and chalk up Ballou’s testimony on this subject as an unfortunate miscommunication.

³²³ *Id.* (emphasis added).

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ Hr’g Tr. 165-66 (Dec. 13, 2016) (testimony of Ballou).

³²⁷ *Id.* at 165-66.

³²⁸ Hr’g Tr. 167 (Dec. 13, 2016) (testimony of Ballou).

³²⁹ *Id.*

368. However, Ballou was subsequently asked whether “everything in Ms. Kaczmarek’s case file [had] been turned over.”³³⁰
369. This question should have made it clear that undersigned counsel was seeking information about what had and had not been turned over to post-conviction defendants.
370. Before Ballou could answer, a question from Judge Kinder led undersigned counsel to make this desire explicit: “I’m just trying to find out what we have and don’t have.”³³¹
371. During the recent evidentiary hearing, Ballou conceded he did not know the contents of the discovery packets he delivered to the District Attorneys.³³²
372. Instead of stating this on September 9, 2013, Ballou proclaimed his belief that “everything pertaining to the Farak investigation has been turned over. I am not aware of anything else.”³³³
373. When he offered this testimony, Ballou must have known it was incorrect.
374. Ballou was present in the courtroom at the start of the hearing³³⁴ when Foster conveyed Kaczmarek’s position that “several documents, emails, [and] correspondence” were protected under recognized privileges.³³⁵
375. While this exchange made it clear Kaczmarek had not turned over everything she possessed, Ballou also knew that Kaczmarek did not possess everything.
376. Once he assumed the role of case officer, Ballou became custodian of the physical evidence.³³⁶
377. Ballou knew Kaczmarek never bothered to review the banker’s box containing the items seized from the car.³³⁷

³³⁰ Ex. 80, Transcript from Amherst Drug Lab Evidentiary Hearing 150 (Sept. 9, 2013). During the recent evidentiary hearing, Ravitz testified that he received a call from Foster as Ballou was on the witness stand and took notes reflecting what she reported. Hr’g Tr. 65 (Dec. 15, 2016) (testimony of Ravitz). According to Ravitz, Foster told him that Ballou was asked about the contents of Kaczmarek’s file but “the Judge didn’t allow that questioning.” *Id.* A review of the transcript of the proceeding reveals that this questioning was not prohibited. Instead, Judge Kinder advised Ballou: “If, for some reason you know the answer to that question, you may answer it.” Ex. 80, Transcript from Amherst Drug Lab Evidentiary Hearing 151 (Sept. 9, 2013). It is possible that Ravitz misinterpreted an accurate report from Foster. However, as noted above, Foster she sent an email the following day stating that “Judge Kinder did not allow any kind of questioning anywhere near anything privileged,” when, in fact, no such objections were lodged by the Hampden County District Attorney’s office – let alone sustained.

³³¹ *Id.*

³³² Hr’g Tr. 37-38 (Dec. 14, 2016) (testimony of Ballou).

³³³ Ex. 80, Transcript from Amherst Drug Lab Evidentiary Hearing 151 (Sept. 9, 2013).

³³⁴ *See id.* at 141 (testimony of Ballou) (referencing a discussion between counsel and the Court “at the start of this hearing this morning”).

³³⁵ *Id.* At the end of the hearing, when Judge Kinder asked if it was a “fairly narrow universe of documents . . . the Attorney General had an objection to turning over,” Foster said this was “correct.” *Id.* at 244.

³³⁶ Hr’g Tr. 85 (Dec. 12, 2016) (testimony of Thomas).

³³⁷ Hr’g Tr. 44 (Dec. 14, 2016) (testimony of Ballou).

378. Consequently, Kaczmarek could only have turned over to post-conviction defendants (by way of the District Attorneys) what Ballou had turned over to her.

379. According to Ballou, he did not pass along everything pertaining to the Farak investigation.

380. Rather, he only produced what he considered the “most important” pages of the “assorted lab paperwork,” i.e., items that Kaczmarek “need[ed] to see.”³³⁸

381. One of the items Ballou felt Kaczmarek did not need to see was the second Servicenet Diary Card containing the phentermine admission.

382. While may not have felt this item warranted inclusion in his “file,” Ballou plainly knew it pertained to the Farak investigation and was aware it had not been turned over.

Q. Ballou Overstated the Detail Depicted in Dolan’s Car Photographs.

383. The contents of the “assorted lab paperwork” came up at the end of Ballou’s testimony.

384. After agreeing that “reports regarding what was in the car” only provided a “summary” of what was seized, Ballou was asked to acknowledge that he did not “write paragraph after paragraph about what assorted lab paperwork was found.”³³⁹

385. Instead of answering the question, Ballou claimed Crime Scene Services “took pretty detailed photos.”³⁴⁰

386. In response to a later question inquiring whether he “photograph[ed] every piece of evidence that was seized from the automobile,” Ballou implied that this is exactly what Crime Scene Services did: “As I said, I didn’t photograph anything. But yeah, crime scene services photographed the evidence as we seized it, yes.”³⁴¹

387. Ballou knew none of the photographs taken by Crime Scene Services depicted any of the mental health worksheets he attached to the email he sent on February 14, 2013.³⁴²

388. Ballou also knew, or should have known, that few of these photographs depicted what could fairly be called “assorted lab paperwork.”

389. During the recent hearing, Ballou acknowledged “seeing . . . graphs with squiggly lines,” which he “assumed . . . were some type of lab tests.”³⁴³

³³⁸ Hr’ Tr. 18-19 (Dec. 14, 2016) (testimony of Ballou).

³³⁹ Ex. 80, Transcript from Amherst Drug Lab Evidentiary Hearing 174-75 (Sept. 9, 2013).

³⁴⁰ *Id.* at 175.

³⁴¹ *Id.* at 176.

³⁴² Hr’g Tr. 197 (Dec. 13, 2016) (testimony of Ballou).

³⁴³ Hr’g Tr. 42 (Dec. 14, 2016) (testimony of Ballou).

390. Although he possessed “no training in training in forensic drug analysis,” Ballou did not consult with any chemists to ascertain the evidentiary value of this paperwork.³⁴⁴

391. As it turned out, Farak’s trunk contained documentation reflecting: contaminants in lab standards; carryover in blanks; undetected, misidentified, and inexplicably absent peaks; the appearance of missing samples; and an unusual result on a date Farak when recorded using drugs at work.³⁴⁵

392. Farak’s car also contained dozens of pages related to DPH efforts to shut down the Amherst Drug Lab and the suspiciously high volume Farak, Pontes, and Hanchett reported testing.³⁴⁶

393. Weeks later, Judge Kinder relied on Ballou’s representations concerning the comprehensiveness of the car evidence photographs in denying the Penate motion to inspect.³⁴⁷

R. Kaczmarek Reported that Every Document in Ballou’s File Had Already Been Turned Over.

394. The morning after the hearing, Foster returned to the office and told Reardon “she got yelled at by Judge Kinder.”³⁴⁸

395. This was a “big deal,” at least to Foster.³⁴⁹

396. That same morning, she sent a group email explaining how the office had “until September 18th (next Wed) to go through Sgt. Ballou’s file” and give Judge Kinder “anything in it we think is privileged/shouldn’t be disclosed.”³⁵⁰

397. Verner responded by posing one question to Kaczmarek and another to Foster.³⁵¹

398. “Anne,” he wrote, “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?”³⁵²

399. Kaczmarek answered:

Joe has all his reports and all reports generated in the case. All photos and videos taken in the case. His search warrants and returns. Copies of the

³⁴⁴ *Id.*

³⁴⁵ See Hr’g Tr. 51-64 (Dec. 14, 2016) (testimony of Pontes) (citing Bates#s 000505, 000542, 000485, 000511, 000688, 000690, 000692).

³⁴⁶ See Ex. 220, State Police Evidence Receipt, 004, Bates# 000419-462.

³⁴⁷ See Ex. 189, Order Denying Motion to Inspect Physical Evidence, *Commonwealth v. Rolando Penate*, Hampden County Number 12-00083 (Oct. 2, 2013).

³⁴⁸ Hr’g Tr. 209 (Dec. 14, 2016) (testimony of Reardon).

³⁴⁹ *Id.*

³⁵⁰ Ex. 210, Email thread with Verner, Foster & Kaczmarek (Sept. 10, 2013).

³⁵¹ *Id.*

³⁵² *Id.*

paperwork seized from her car regarding new[s] articles and *her mental health worksheets*.³⁵³

400. Foster said while it was unclear “what [Judge Kinder’s] looking for . . . [,] Sergeant Ballou did testify that he thinks everything in his file has already been turned over.”³⁵⁴
401. Later, Kaczmarek compared Ballou’s file to a “trial binder,”³⁵⁵ and told Verner she had “asked Ballou to come to Boston sometime this week so we/I can look at his file.”³⁵⁶
402. Although Kaczmarek professed to have no “recollection of going through Joe Ballou’s file with him,” there is no reason to doubt the parties kept this appointment.
403. The mental health worksheets she expected to find there were not, in her estimation, “particularly relevant or exculpatory as to other . . . defendants, but she knew [they] might be privileged documents that needed to be treated gingerly.”³⁵⁷
404. As it turned out, Ballou’s case file did not contain hard copies of these documents.³⁵⁸
405. At some point after September 10 and before September 16, 2013, there was a “summit meeting” in Verner’s office.³⁵⁹
406. “[Q]uestions were asked of Anne as to what was in the file” and “what had [they] already turned over.”³⁶⁰
407. According to Reardon, Kaczmarek “thought that everything in [Ballou’s] file . . . had been turned over.”³⁶¹
408. None of the other participants in the Farak subpoena meetings remembered anything or offered as plausible a version of events.
409. Although the electronically stored mental health worksheets were unquestionably a part of Ballou’s “file,” the fact that they were not in his binder offered a solution to what had become something of a dilemma for Ballou.
410. As Foster reported in response to Verner’s question, he testified that everything in his file had been turned over.

³⁵³ *Id.* (emphasis added).

³⁵⁴ Hr’g Tr. 62 (Dec. 13, 2016) (testimony of Foster).

³⁵⁵ Hr’g Tr. 132 (Dec. 16, 2016) (testimony of Kaczmarek).

³⁵⁶ *Id.*

³⁵⁷ Hr’g Tr. 181 (Dec. 16, 2016) (testimony of Kaczmarek).

³⁵⁸ Hr’g Tr. 165-66 (Dec. 13, 2016) (testimony of Ballou).

³⁵⁹ Hr’g Tr. 212 (Dec. 14, 2016) (testimony of Reardon).

³⁶⁰ Hr’g Tr. 212 (Dec. 14, 2016) (testimony of Reardon).

³⁶¹ Hr’g Tr. 213 (Dec. 14, 2016) (testimony of Reardon).

411. Foster clearly understood this to mean that everything had been turned over to post-conviction defendants – not that he had turned over everything to Kaczmarek.
412. If the office produced any documents for the *in camera* review, it could have made things difficult for Ballou – even if all they produced were inconsequential mental health worksheets showing drug abuse by Farak a few weeks before her arrest.
413. Based on her failure to comprehend when the worksheets were generated, Kaczmarek embraced an unduly restrictive interpretation of the term “file” and Foster got the message there was nothing to produce.

S. Foster Sent Judge Kinder a Deliberately Vague Letter Misrepresenting the Contents of Ballou’s File.

414. On September 16, 2013, Foster sent Judge Kinder the following letter:

Dear Judge Kinder:

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

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

Sincerely,

Kris C. Foster
Assistant Attorney General³⁶²

415. Foster claimed she wrote the letter at the direction of Ravitz,³⁶³ and he reviewed it before she signed it and put it in the mail.³⁶⁴
416. Both Ravitz and Reardon believed this letter was “something that should have been subjected to review” by one of them.³⁶⁵

³⁶² Ex. 193, Letter from Foster to Judge Kinder (Sept. 16, 2013).

³⁶³ Hr’g Tr. 20 (Dec. 13, 2016) (testimony of Foster); *see also id.* at 21, 94.

³⁶⁴ *Id.* at 64.

³⁶⁵ Hr’g Tr. 39 (Dec. 15, 2016) (testimony of Ravitz); Hr’g Tr. 208 (Dec. 14, 2016) (testimony of Reardon).

417. However, neither recalled seeing the letter prior to its submission³⁶⁶ or having any “input in terms of its content or the language used.”³⁶⁷ “
418. It is not difficult to discern why a witness would want to disclaim knowledge of this correspondence.
419. In addition to being factually false, Foster admitted the letter was “purposely . . . vague.”³⁶⁸
420. Foster intentionally left out the subject in the sentence discussing the review of Ballou’s file.
421. As she put it: “It doesn’t say I reviewed the file. It says ‘after reviewing’.”³⁶⁹
422. Foster used this language because she understood that she had been ordered to personally review the file³⁷⁰ and Judge Kinder had just yelled at her for conducting a personal review of the file prior to filing her motion to quash the Watt subpoena.³⁷¹
423. While Foster claimed she did not “want to misrepresent to the Court that [she] had looked at the file,”³⁷² she actually had no idea “who reviewed it.”³⁷³
424. During the recent evidentiary hearing, Foster was asked about Kaczmarek’s email noting the presence of the mental health worksheets in Ballou’s file.³⁷⁴
425. According to Foster, she believed Kaczmarek was furnishing a “list” of items that “had been turned over” – like “Grand Jury minutes” and “police reports” – and the worksheets were a “part of that list.”³⁷⁵
426. The problem with this supposed “list” is that it does not correspond with the list of documents Foster provided in her letter to Judge Kinder.
427. That list of items in Ballou’s possession included “grand jury minutes and exhibits, and police reports,” but did not include Farak’s mental health worksheets.
428. In fact, the list in Foster’s letter was almost identical to the one she used in responding to requests for evidence of third party knowledge.

³⁶⁶ Hr’g Tr. 38 (Dec. 15, 2016) (testimony of Ravitz).

³⁶⁷ Hr’g Tr. 201-02 (Dec. 14, 2016) (testimony of Reardon).

³⁶⁸ Hr’g Tr. 94 (Dec. 13, 2016) (testimony of Foster).

³⁶⁹ Hr’g Tr. 20 (Dec. 13, 2016) (testimony of Foster).

³⁷⁰ Hr’g Tr. 92 (Dec. 13, 2013) (testimony of Foster).

³⁷¹ *Id.* at 107.

³⁷² *Id.* at 94.

³⁷³ *Id.* at 20.

³⁷⁴ *Id.* at 90-91.

³⁷⁵ *Id.* at 91.

T. Foster Followed Kaczmarek's Instructions to Characterize the Physical Evidence as Irrelevant to Any Case But Farak's Even Though Neither AAG Ever Inspected the Physical Evidence.

429. On the night of August 29, 2013, undersigned counsel sent an email to Foster indicating that preparation for 9/9 hearing required an inspection of "the 60 items seized during the course of the Farak investigation, referenced in a Case Information report Sgt. Ballou generated on 1/29/13."³⁷⁶
430. Accordingly, undersigned counsel asked Foster for assistance "making arrangements to inspect this evidence."³⁷⁷
431. The next day, Foster sent undersigned counsel an email stating: "because of the ongoing investigation, I cannot give you access to the main evidence room."³⁷⁸
432. At the end of the first day of the hearing before Judge Kinder, undersigned counsel made an oral motion for "access to the evidence that was seized from Ms. Farak's car."³⁷⁹
433. Judge Kinder instructed the parties to "try to work through some agreement about viewing, physically, the evidence, if that can be done."³⁸⁰
434. Over the course of the next six days, undersigned counsel sent Foster three emails asking for permission to view the physical evidence.³⁸¹
435. On September 16, 2013, Foster forwarded the last of these requests to Kaczmarek.
436. In response, Kaczmarek wrote: "No. Why is this relevant to this case. I really don't like him."³⁸²
437. During the recent evidentiary hearing, Kaczmarek conceded that the physical evidence was, in fact, relevant to the Penate case, as the December Servicenet Diary Card reflected drug use by Farak at the lab on the same day she purportedly performed testing on a Penate sample.³⁸³
438. On the morning of September 17, 2013, Foster sent undersigned counsel an email stating: "Our position is that viewing the seized evidence is irrelevant to any case other than Farak's."³⁸⁴

³⁷⁶ Hr'g Tr. 34-35 (Dec. 13, 2016) (testimony of Foster)

³⁷⁷ *Id.* at 35.

³⁷⁸ *Id.*

³⁷⁹ Ex. 80, Transcript from Amherst Drug Lab Evidentiary Hearing 245 (Sept. 9, 2013).

³⁸⁰ *Id.* at 246.

³⁸¹ Hr'g Tr. 78-79 (Dec. 16, 2016) (testimony of Kaczmarek).

³⁸² *Id.* at 79.

³⁸³ *Id.* at 78-85.

³⁸⁴ Hr'g Tr. 67-68 (Dec. 13, 2016) (testimony of Foster).

439. Undersigned counsel subsequently filed a motion to inspect the physical evidence in the Penate case.

440. A hearing on several Penate discovery motions took place on October 2, 2013.

441. When asked to address the motion to inspect physical evidence, Foster characterized the undisclosed items in Farak's car as "just irrelevant evidence."³⁸⁵

442. During the recent evidentiary hearing, Foster acknowledged engaging in this advocacy without ever having "seen any of this evidence."³⁸⁶

443. Judge Kinder ultimately denied the motion based, in large part, on Ballou's representation that "the physical evidence ha[d] been described in detail for the defendant and photographs of that evidence have been provided."³⁸⁷

U. If Foster Collected Farak's Personnel File Prior to Opposing its Production, She Would Have Seen the Evidence of Insufficient Supervision She Claimed Did Not Exist.

444. During the hearing on October 2, 2013, the Court also heard argument on a Penate motion seeking the production of Farak's personnel file, as well as "performance evaluations and/or documentation reflecting the performance of Farak, Rebecca Pontes, and/or Sharon Salem from January 1, 2005 – January 18, 2013."³⁸⁸

445. In an affidavit in support of this motion, undersigned counsel stated:

29. Given the misconduct that occurred on Mr. Hanchett's watch, I believe that he has an obvious incentive to minimize the time period during which it occurred.

30. If the contents of Farak's personnel file paint a different picture as to Farak's performance (or no picture at all), I believe it will undermine the credibility of Mr. Hanchett and cast doubt on claims by the Commonwealth that there was no impropriety at the laboratory back in 2011 when the substance allegedly seized from Mr. Penate were submitted for analysis.³⁸⁹

³⁸⁵ Ex. 216, Penate Hr'g Tr. 14-15 (Oct. 2, 2013).

³⁸⁶ Hr'g Tr. 72 (Dec. 13, 2016) (testimony of Foster).

³⁸⁷ Ex. 217, Ruling on Penate Motion to Inspect Physical Evidence (Oct. 2, 2013).

³⁸⁸ Def.'s Mot. to Compel Production of Documentary Evidence Pursuant to Mass. R. Crim. P. 17(a)(2), *Commonwealth v. Penate*, Hampden Sup. Court No. 12-00083, Paper No. , pg. 5 (Sept. 6, 2013).

³⁸⁹ Aff. in Supp. of Def.'s Mot. to Compel Production of Documentary Evidence Pursuant to Mass. R. Crim. P. 17(a)(2), *Commonwealth v. Penate*, Hampden Sup. Court No. 12-00083, Paper No. , pg. 2 (Sept. 6, 2013).

446. In the opposition she filed on behalf of DPH, Foster mocked the notion that such documentation “*may* uncover inadequate supervision of Farak.”³⁹⁰

447. Foster also argued that the possibility of “James Hanchett perjuring himself” was “not enough to show the relevance of the personnel file.”³⁹¹

448. When Judge Kinder asked whether she had “looked at . . . the personnel files,” Foster admitted that she had not.³⁹²

449. Judge Kinder ultimately denied this request.³⁹³

450. Days after Foster successfully opposed the production of performance evaluations, Hanchett offered the following testimony:

Q. And at that laboratory did you keep any records reflecting the competencies of your subordinates?

A. I had to do an EPRS evaluation three times a year.

Q. What’s an EPRS?

A. It’s what the department used to track employees to see if they were proficient in their work. That’s what their raises are based on.³⁹⁴

451. Two years later, it came to light that this testimony was false.

452. Farak’s personnel file revealed that Hanchett stopped doing EPRS evaluations when he became the supervisor in 2008.³⁹⁵

453. Hanchett testified this was “due to budget constraints,”³⁹⁶ but Salem believed he was “just lackadaisical.”³⁹⁷

V. If Foster Had Reviewed Intra-Office Correspondence Prior to Opposing its Production, She Would Have Seen the “Smoking Gun” She Claimed Did Not Exist.

³⁹⁰ Opp’n to the Def.’s Rule 17(a)(2) Mot. for Production, *Commonwealth v. Penate*, Hampden Sup. Court No. 12-00083, Paper No. 65, pg. 3 (Oct. 4, 2013) (emphasis in original).

³⁹¹ *Id.* at 5.

³⁹² Ex. 216, Penate Hr’g Tr. 28 (Oct. 2, 2013).

³⁹³ Ex. 190, Order on Defendant’s Motion to Compel Discovery, *Commonwealth v. Rolando Penate*, Hampden Superior Court No. 12-00083.

³⁹⁴ Ex. 95, Transcript from Amherst Drug Lab Evidentiary Hearing 134 (Oct. 7, 2013).

³⁹⁵ Ex. 5, Personnel File of Sonja Farak,

³⁹⁶ Parties Joint Proposed Findings of Fact ¶ 124 (citing Ex. 25, *Doe* GJ, pg. 105 (Feb. 1, 2016)).

³⁹⁷ Parties Joint Proposed Findings of Fact ¶ 126 (citing Ex. 33, *Doe* GJ, pg. 60 (Feb. 4, 2016)).

454. The discovery request that garnered the most attention at the October 2 hearing concerned the AGO's intra-office correspondence.

455. When Foster took the position that "almost all of that is going to be work-product preparation," Judge Kinder stated: "Well, let me ask the same question that I asked with respect to Mr. Ballou's file, are you saying that because you've actually looked at it or are you just guessing?"³⁹⁸

456. Foster said her office had "not compiled every email that mentions the word 'Farak' in it from this time period that he's requesting."³⁹⁹

457. After agreeing that "an email exchange" suggesting "this conduct has been ongoing for some time" would be exculpatory, Foster framed the request as "fishing expedition" based on the unwarranted presumption that the Attorney General's Office is hiding some type of exculpatory evidence."⁴⁰⁰

458. This inspired the following exchange:

THE COURT: My question is: Has anybody looked?

MS. FOSTER: Not that I know of. As I said, no one has compiled all of these correspondence because there could be letters, emails, voice mails.

THE COURT: So you agree that that kind of information would be exculpatory if it existed, but you don't believe anybody has even looked to determine whether it exists?

MS. FOSTER: I know the lead investigators and the lead prosecutor, they would naturally be the people who wrote the most correspondence on this and they have said that nothing in it is outside, really, what has already been disclosed other than work product.

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 than making bold pronouncements about them being privileged or the content of them.

459. The hearing concluded with Foster's representation that she had talked to Kaczmarek and Ballou and both assured her "there's no smoking gun."⁴⁰¹

460. As noted above, Ballou sent the December Servicenet Diary Card to Kaczmarek via email; this document memorialized misconduct in the lab over a year before Farak's arrest and

³⁹⁸ Ex. 216, Penate Hr'g Tr. 27 (Oct. 2, 2013).

³⁹⁹ *Id.*

⁴⁰⁰ *Id.* at 36.

⁴⁰¹ *Id.* at 37.

provided a good faith basis for to seek the production of third-party records demonstrating daily misconduct by Farak for close to a decade.

461. In the context of this litigation, it was a smoking gun.

462. Judge Kinder allowed the portion of the Penate that would have compelled this document's production.⁴⁰²

463. The AGO ended up filing a twenty-seven page motion for clarification.

464. Ravitz edited the pleading and proposed the inclusion of a footnote stating: "It is appropriate for this Court to accept the AGO's representation as to the existence of work product within its materials."⁴⁰³

465. This pleading persuaded Judge Kinder to issue an order relieving the AGO of the obligation to produce any of its internal correspondence.⁴⁰⁴

W. Foster Failed to Fulfill her Duty of Candor to a Tribunal by Rectifying Her Many Misrepresentations.

466. The evidentiary hearing for post-conviction defendants concluded on October 23, 2013.⁴⁰⁵

467. Based on the incomplete body of evidence before him, Judge Kinder determined that Farak's misconduct commenced in the summer of 2012; any defendants who pled guilty before then were not entitled to post-conviction relief.⁴⁰⁶

468. Farak pled guilty on January 6, 2014.⁴⁰⁷

469. On July 21, 2014, undersigned counsel filed a motion to inspect the physical evidence in the Hampshire County case of *Commonwealth v. Burston*.

470. The pleading acknowledged that Judge Kinder denied an identical motion in Penate; it stressed that the principle justification for that ruling – the pending criminal case against Farak – was no longer a concern.

471. The AGO received a copy of this motion on Kaczmarek's last day in the office.⁴⁰⁸

⁴⁰² Ex. 190, Order on Defendant's Motion to Compel Discovery, *Commonwealth v. Rolando Penate*, Hampden Superior Court No. 12-00083.

⁴⁰³ Hr'g Tr. 23 (Dec. 15, 2016) (testimony of Ravitz).

⁴⁰⁴ Ex. 188, Order Clarifying Partial Allowance of Defendant's Rule 17 Motion, *Commonwealth v. Penate*, Hampden Superior Court No. 12-00083.

⁴⁰⁵ Ex. 124, Transcript from Amherst Drug Lab Evidentiary Hearing (Oct. 23, 2013).

⁴⁰⁶ See Exs. 184-87.

⁴⁰⁷ See Ex. 197, Sentencing Memo filed by Attorney Elaine Pourinski, *Commonwealth v. Sonja Farak*, Hampshire Superior Court No. 13-00061.

⁴⁰⁸ Hr'g Tr. 230-31 (Dec. 15, 2016) (testimony of Verner).

472. Verner and Ravitz offered their perspectives on the motion in an email exchange and a consensus emerged that it would be appropriate to assent.⁴⁰⁹
473. When undersigned counsel finally inspected the evidence on October 30, 2014, the exculpatory nature of the undisclosed evidence was immediately apparent.
474. Two days later, undersigned counsel sent an eleven-page letter to AAG Patrick Devlin (Devlin) alerting him to the presence of these materials.⁴¹⁰
475. This correspondence inspired a “very uncomfortable meeting in [Verner’s] office.”⁴¹¹
476. It soon became apparent that the office had not disclosed the mental health worksheets and that Kaczmarek had, in fact, misjudged the dates on the December Servicenet Diary Card.
477. Ravitz saw this as “a big deal,” something “very upsetting.”⁴¹²
478. Verner was “angry,” “upset,” “shocked,” “frustrated,” and “pissed.”⁴¹³
479. According to him, “[t]he stuff was supposed to go out and it didn’t go out. And that’s not good.”
480. Foster was “very rattled.”⁴¹⁴
481. On November 5, 2014, at 11:12 am, she sent Devlin an email stating: “Hey, Pat, have you been able to get copies of the papers Luke Ryan references? If so, could I get a copy of them? I’d like to see them, and I’m sure whatever judge we’re in front of may want a copy too.”⁴¹⁵
482. When confronted with this email at the recent evidentiary hearing, Foster conceded that “what [she] wrote is [she] wrote.”⁴¹⁶
483. However, she continued to stick to her story that she has still “never seen the items that were seized by the State Police from Ms. Farak’s car.”⁴¹⁷
484. This testimony was not credible.

⁴⁰⁹ See Ex. 196, Assented to Motion to Inspect Physical Evidence, Commonwealth v. Burston, Hampshire Superior Court No. 13-00113.

⁴¹⁰ Ex. 166, Letter from Luke Ryan to Patrick Devlin (Nov. 1, 2014).

⁴¹¹ Hr’g Tr. 75 (Dec. 15, 2016) (testimony of Ravitz).

⁴¹² *Id.*

⁴¹³ Hr’g Tr. 196, 198 (Dec. 15, 2016) (testimony of Verner).

⁴¹⁴ Hr’g Tr. 75 (Dec. 15, 2016) (testimony of Ravitz).

⁴¹⁵ Hr’g Tr. 78 (Dec. 13, 2016) (testimony of Foster).

⁴¹⁶ *Id.* at 79-80.

⁴¹⁷ *Id.* at 78.

485. Foster did not ask for copies of the mental health worksheets to satisfy a fleeting curiosity; she was about to appear in court on an emergency motion to remove the protective order prohibiting undersigned counsel from revealing the results of the inspection.⁴¹⁸
486. The motivation for her feigned ignorance is not difficult to discern.
487. During the recent evidentiary hearing, she was asked if she had “any reason to believe, sitting here today, that some of the representations you made were inaccurate.”⁴¹⁹
488. “No,” she answered.⁴²⁰
489. Next came this question: “Sitting here today, do you believe that everything had been turned over as you told Judge Kinder back in September 19 of 2013?”⁴²¹
490. “I can’t say either way,” she testified. “To date, I haven’t seen any of the documents in this matter.”⁴²²
491. Verner prioritized getting the undisclosed documentation to the District Attorneys.
492. On November 13, 2014, he sent a discovery packet to the Northwestern District Attorney.⁴²³
493. A cover letter acknowledged items seized from Farak’s car had never before been disclosed and these previously undisclosed items contained “potentially exculpatory information” the AGO had an “obligation” to turn over.⁴²⁴
494. Participants in the litigation began the “act of looking back and analyzing it all and trying to recreate history and figure out what happened.”⁴²⁵
495. Kaczmarek realized there had been a “breakdown” related to discovery obligations.⁴²⁶
496. Verner maintained that because it was Kaczmarek’s case, it was her job to provide potentially exculpatory information to the District Attorneys.⁴²⁷
497. Kaczmarek did not think that went “part and parcel with prosecuting Sonja Farak.”⁴²⁸

⁴¹⁸ See Ex. 166, Letter from Luke Ryan to Patrick Devlin 10 (Nov. 1, 2014).

⁴¹⁹ Hr’g Tr. 78 (Dec. 13, 2016) (testimony of Foster).

⁴²⁰ *Id.*

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ Ex. 167, Letter from Verner to David Sullivan (Nov. 13, 2014).

⁴²⁴ *Id.*

⁴²⁵ *Id.* at 76.

⁴²⁶ Hr’g Tr. 192 (Dec. 16, 2016) (testimony of Kaczmarek).

⁴²⁷ Hr’g Tr. 129 (Dec. 15, 2016) (testimony of Verner).

⁴²⁸ Hr’g Tr. 192 (Dec. 16, 2016) (testimony of Kaczmarek).

Memorandum of Law

I. Pertinent Legal Principles

A fundamental right of due process is to be heard “at a meaningful time and in a meaningful manner.” *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). See U.S. Const. amend. XIV; arts. 1, 10, and 12 of the Massachusetts Declaration of Rights. In *Bridgeman v. District Attorney for the Suffolk District*, 471 Mass. 465, 479 (2015) (*Bridgeman I*), the SJC reaffirmed the longstanding principle that the “deliberate blocking of appellate rights . . . may rise to the level of constitutional error.” *Id.* at 479 (citations omitted); see also *Commonwealth v. Lee*, 394 Mass. 209, 220-21 (1985) (recognizing post-conviction dismissal of charge might be an appropriate remedy” in the face of “extreme conditions”) (citation omitted).

When a government agent has engaged in egregious misconduct, “the government bears the burden of taking reasonable steps to remedy that misconduct.” *Bridgeman v. District Attorney for the Suffolk District*, 476 Mass. 298 (Jan. 18, 2017), 2017 WL 219091, at 9 (*Bridgeman II*). In fact, the SJC has explicitly held that when Farak’s misdeeds came to light in January 2013, “the Commonwealth had a duty to conduct a thorough investigation to determine the nature and extent of [Farak’s] misconduct, and its effect both on pending cases and on cases in which defendants already had been convicted.” *Commonwealth v. Ware*, 471 Mass. 85, 95 (2015).

In addition to its duty to investigate, the Commonwealth also had a constitutional obligation to disclose evidence of egregious government misconduct because it was both material and exculpatory. See *Commonwealth v. Francis*, 474 Mass. 816 (2016). This duty to disclose exculpatory evidence applies in the post-conviction context. See *Commonwealth v. Cotto*, 471 Mass. 97, 109, 112 (2015).

A prosecutor’s deliberate failure to disclose exculpatory evidence can be grounds for dismissal. See *Commonwealth v. Merry*, 453 Mass. 653, 664-665 (2009). “[W]hen the omission of

the prosecution is knowing and intentional or follows a specific request, a standard of prejudice more favorable to the defendant is justified in order to motivate prosecutors to be alert to defendants' rights to disclosure." *Commonwealth v. Tucceri*, 412 Mass. 401, 407 (1992). See also *Commonwealth v. Ellison*, 376 Mass. 1, 21 (1978) ("suppression by the prosecution of requested material evidence which is favorable to the accused is a denial of due process").

"In cases alleging egregious government conduct, the focus . . . is . . . on whether the . . . conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power." *Commonwealth v. Monteagudo*, 427 Mass. 484, 485 (1998) (quotation marks and citations omitted). "Two parallel legal principles govern the resolution of [such] cases . . . where dismissal is contemplated." *Commonwealth v. Cronk*, 396 Mass. 194, 198 (1985) (citation omitted).

Under the first principle, dismissal may serve as the proper remedy when the misconduct results in a "substantial threat" of prejudice to the defendant or "irremediable harm to his opportunity to obtain a fair trial." *Commonwealth v. Hernandez*, 421 Mass. 272, 277 (1995) (quotation marks and citation omitted). If the conduct in question is particularly outrageous, it may "give[] rise to a presumption of prejudice." Richard W. Bishop, *Criminal law--Prosecutorial misconduct--Presumption of prejudice*, 17B Mass. Prac. § 59.129 (5th ed. 2009) (citing *Commonwealth v. Cronk*, 396 Mass. 194, 198-199 (1985)). In such instances, it becomes the Commonwealth's burden to demonstrate that, "in fact, no prejudice resulted, or that its harm can be offset." *Commonwealth v. Perrot*, 38 Mass. App. Ct. 478, 481 (1995).

The "alternative principle" focuses on "prophylactic considerations" which "may assume paramount importance" in cases where the misconduct is "egregious, deliberate, and intentional." *Cronk*, 396 Mass. at 199 (citations omitted). As the Supreme Judicial Court ("SJC") noted in

Commonwealth v. Lewin, 405 Mass. 566 (1989), trial judges have the power to dismiss criminal charges “because of nonprejudicial but egregious . . . misconduct” if such action is required to “create a climate adverse to repetition of that misconduct that would not otherwise exist.” *Id.* at 587.

In short, “dismissal with prejudice is appropriate in cases of egregious prosecutorial misconduct or upon a showing of prejudice or substantial threat thereof.” *Commonwealth v. Hurst*, 39 Mass. App. Ct. 603, 604 (1996) (emphasis added) (citations omitted); *see also Commonwealth v. Mason*, 72 Mass. App. Ct. 1102, *4 (2008) (Table) (noting that “the test for dismissal with prejudice has been articulated in the disjunctive” (citation omitted)), *aff’d* 453 Mass. 873 (2009). “It cannot be asserted too often that the [government] must take care to behave itself.” *Commonwealth v. Felton*, 16 Mass. App. Ct. 63, 66 (1983) (quotation marks and citation omitted).

In *Commonwealth v. Washington W.*, 462 Mass. 204 (2012), the Commonwealth deliberately, willfully, and repeatedly failed to comply with a discovery order. *Id.* at 215. In that case, the SJC ruled that the Commonwealth’s failure to provide the necessary discovery denied the juvenile his right to develop a selective prosecution claim which prejudiced his right to a fair trial. *Id.* at 216. More significantly, the SJC further ruled that even if the Commonwealth decided to provide the requested discovery, dismissal with prejudice was still the appropriate outcome because “[t]he opportunity eventually to present this claim [does] not cure the loss of the earlier opportunity to present it.” *Id.* at 217. The SJC found that the delayed disclosure was prejudicial because the juvenile would have had to serve time in State prison, rather than at a juvenile facility. *Id.*

When the failure to turn over discovery forces a defenant to serve time in State prison that he would not otherwise have had to serve, “[t]he conviction may be reversible, but the time spent in

prison is not.” *Commonwealth v. Levin*, 7 Mass. App. Ct. 501, 512-13 (1979). This “irremediable unjust loss of liberty” requires dismissal. *Petition of Williams*, 378 Mass. 623, 626 (1979).

II. Argument

Dismissals for prosecutorial misconduct are rare because “the only reason to dismiss criminal charges because of non-prejudicial but egregious [government] misconduct would be to create a climate adverse to repetition of that misconduct that would not otherwise exist.” *Bridgeman II* at 10 (quoting *Lewin*, 405 Mass. at 587). Prophylactic considerations are paramount here where the Commonwealth had exculpatory information in its possession, knew it had exculpatory information in its possession, and purposefully did not disclose that information to the district attorneys, defense counsel, or the court. Moreover, depending on which witness this Court credits, the AGO filed pleadings that misrepresented either 1) what discovery they possessed; or 2) their knowledge of the discovery in their possession.

This Court should find that Kaczmarek deliberately and intentionally did not turn the mental health worksheets over to the district attorneys or defense counsel. It was her job to do so, and she had them in her possession. She led ADA Flannery to believe that he had all of the discovery. She told ADA Bosse that all relevant discovery had been turned over. And she told Kris Foster in an email that the seized evidence was not relevant to the Penate case knowing this would be the position of the office.

Kaczmarek was aware that the undisclosed mental health worksheets contained an admission that Farak was using drugs at work, but she claimed she did not think that information expanded the scope of the misconduct. She said that had she not misjudged the dates, she would have turned them over. Even assuming these statements to be true, she still had a constitutional obligation to turn over this evidence.

First, Kaczmarek had a constitutional obligation to disclose this evidence because prosecutors must disclose all exculpatory evidence in their possession. *See Commonwealth v. Bing Sial Liang*, 434 Mass. 131, 135 (2001). Prosecutors do not get to decide which exculpatory evidence to disclose. Even cumulative exculpatory evidence must be handed over to the defense.

Second, Kaczmarek had to disclose this evidence because it was uniquely exculpatory. It was Farak's only admission. It contained admissions to drug use, stealing drugs from the lab, and using drugs while at work. In addition to their being no other admissions, there was no other evidence that she was using drugs while testing samples. The extraordinary significance of the dates contained on the worksheets aside, the admissions themselves were extremely important. Contributing to the egregiousness of Kaczmarek's actions was the fact that the evidence was specifically requested. Undersigned counsel wanted access to the "assorted lab paperwork" and she knew that. Thus, Kaczmarek's failure to turn it over was egregious, deliberate, and intentional, and warrants dismissal.

Kaczmarek's other actions were similarly egregious. Kaczmarek told Foster that the evidence from the car was irrelevant. This was egregious for two reasons: 1) it was not true; and 2) Kaczmarek did not know what was seized from the car. She never went to look at what was in the box. By stating that the contents of the car were irrelevant, Kaczmarek was implicitly stating that she in fact knew what was found in the car. And Kaczmarek knew that this position would be represented not only to defense counsel, but to this Court. On multiple occasions and in multiple pleadings, in reliance on this statement, Foster told this Court that there was nothing relevant in the car, this was just a "fishing expedition."

The fact that Foster, rather than Kaczmarek, made the misrepresentations to this Court and to defense counsel does not matter. "The prosecutor's office is an entity and as such it is the

spokesman for the Government.” *Giglio v. United States*, 405 U.S. 150, 154 (1972). Foster’s ignorance is not a defense. *Santobello v. New York*, 404 U.S. 257 (1971) is instructive. In that case, the defendant agreed to plead guilty and the prosecutor agreed not to make a sentencing recommendation. *Id.* at 258. At sentencing, a different prosecutor, apparently unaware of the prior promise, requested the maximum sentence. *Id.* at 259. The Supreme Court vacated the judgment, holding that “[t]he staff lawyers in a prosecutor’s office have the burden of ‘letting the left hand know what the right hand is doing’ or has done. That the breach of agreement was inadvertent does not lessen its impact.” *Id.* at 262.

Kaczmarek’s failure to inform Foster or anyone else that these mental health worksheets had not been turned over was also egregious. Indeed, to hold otherwise would permit prosecutors to get away with making false statements so long as they do not make them to the court directly. For instance, after Judge Kinder explicitly required the AGO to submit anything that was considered privileged for in camera review, Kaczmarek was at a meeting with Verner, Mazzone, Ravitz, Foster, and Reardon. At that meeting, Kaczmarek said that everything had been turned over. She had to know that this misrepresentation would be put before the court; the purpose of the meeting was to respond to Judge Kinder’s request. If Kaczmarek knew that her statement was going to be put before a court, it should be treated as if it was before the court.

Kaczmarek’s interaction with ADA Bosse was egregious as well. He took great pains to ensure that he had all of the discovery. Kaczmarek told him that all relevant discovery had been provided and then approved of a letter he wrote with this misstatement to a defense attorney.

This Court should also find that Kaczmarek told Foster that there was no evidence of third-party knowledge and that this was an egregious misrepresentation, since the records indicated that her treatment providers had third-party knowledge. The reason this Court should so find is that the

pleading Foster filed states: “[t]he AGO has turned over all grand jury minutes, exhibits, and police reports in its possession to the District Attorney’s office.” Foster never reviewed the file and had no personal knowledge about what had been turned over. Kaczmarek was the person in charge of turning things over; she would know if the grand jury minutes were turned over.

Finally, Foster’s lack of candor to the court was egregious. Rule 3.4 to the Massachusetts Rules of Professional Conduct provides, in pertinent part: “If a lawyer has offered . . . material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures.” Mass. R. Prof. C. 3.4(a)(4).⁴²⁹ Foster admitted that she was purposefully vague in her letter to this Court. When she learned that this letter contained materially false statements, she took no remedial measures and feigned ignorance about her misstatements.

Moreover, Foster testified that she thought the mental health worksheets had been turned over like everything else, which is why she did not follow-up on Kaczmarek’s email stating that there were mental health worksheets in Ballou’s file. This Court should not credit that statement. The letter to Judge Kinder states: “After reviewing Sergeant Ballou’s file, every document in his possession has already been disclosed. This includes grand jury minutes and exhibits, and police reports.” It does not state “this includes grand jury minutes and exhibits, and police reports **and mental health worksheets.**”

It is well established that this Court has the inherent authority to dismiss a case upon a finding of fraud on the court. *See Rockdale Mgmt. Co. v. Shawmut Bank, N.A.*, 418 Mass. 596, 598-599 (1994); *see also O’Coins Inc. v. Treasurer of the County of Worcester*, 362 Mass. 507, 514 (1972) (courts of general jurisdiction have inherent powers). The court’s inherent powers may be invoked when an attorney knowingly makes misrepresentations to the court, intentionally misleads

⁴²⁹ A comment to this rule makes it clear that “the obligation to rectify the presentation of false evidence” extends to “the conclusion of the proceeding.” Mass. R. Prof. C. 3.4, Comment 13. This “includes all appeals.” Mass. R. Prof. C. 3.4(b).

the court, or knowingly conceals information that it has a duty to provide to the court. *See Wong v. Luu*, 472 Mass. 208, 219 (2015) (court may sanction attorney using inherent powers). All three happened here.

First, Foster made a misrepresentation to this Court when she wrote: “After reviewing Sergeant Ballou’s file, every document in his possession has already been disclosed.” As stated above, this was purposefully vague because Foster knew that the judge wanted her to review the materials personally, and knew that a representation from someone else would not suffice. Thus, she made a statement that one would reasonably interpret as indicating she had personally reviewed the file, and that she hoped Judge Kinder would interpret as indicating that she reviewed the file. Deliberate deception of a court is incompatible with “rudimentary demands of justice.” *See Giglio v. United States*, 405 U.S. 150, 153 (1972) (internal quotations and citations omitted).

This misrepresentation was fraudulent in its own right, but it also cast a pallor over everything else Foster said in court or submitted in pleadings. Whereas before the letter, the court questioned whether anyone knew about the existence of relevant evidence, after the letter, when Foster stated that Kaczmarek did not have “care, custody, or control” of any documents with evidence of third-party knowledge, and “[t]here is nothing to indicate that the allegations against Farak date back to the time she tested the drugs in the defendant’s case,” the court could reasonably presume that these statements were based on personal knowledge.

Second, the AGO made misleading arguments including their representation that there was no relevant evidence in the car when no one had looked to see what was in the car and their denial of third party knowledge. Misleading arguments impair the integrity of the judicial process. *See Avery v. Steele*, 414 Mass. 450 (1993). Indeed, the integrity of the judicial process is vitiated if an

attorney is not truthful with the court and opposing counsel. *See In re Neitlich*, 413 Mass. 416, 423 (1992). The AGO, through its representatives, was honest with neither.

Third, Kaczmarek knowingly concealed this exculpatory evidence. As discussed above, she told Pourinski that she would not turn it over to defendants seeking new trials. “Judges *must* exercise their inherent authority ‘as necessary to secure the full and effective administration of justice.’” *Commonwealth v. Charles*, 466 Mass. 63, 74 (2013), *quoting O’Coins Inc. v. Treasurer of the County of Worcester*, 362 Mass. 507, 514 (1972) (emphasis added). A court may exercise its inherent powers both to protect the integrity of the litigation and to send an appropriate message. *See Commissioner of Probation v. Adams*, 65 Mass. App. Ct. 725, 731 (2006). While this judicial power is invoked sparingly, its exercise is justified by exceptional circumstances present here. *See generally, Commonwealth v. Pagan*, 445 Mass. 315, 322 (2005).

Conclusion

Based on the foregoing, the defendant respectfully requests that this Honorable Court dismiss the above-referenced indictment with prejudice. In the alternative, the defendant would ask that this Court find that “justice was not done” and permit him to withdraw his plea.

CERTIFICATE OF SERVICE

I, Luke Ryan, hereby state that one (1) true copy of the foregoing has been sent via email and first-class mail to Assistant District Attorney Deborah Ahlstrom, at deborah.ahlstrom@state.ma.us, 50 State Street, 3rd floor, Springfield, MA, and Assistant Attorney General Thomas Caldwell, Thomas.Caldwell@MassMail.State.MA.US, One Ashburton Place, Boston, MA 02108, on January 31, 2016.

Luke Ryan