July 22, 2015

Hon. Peter Velis (Ret.)
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VIA E-Mail & U.S. Mail

Dear Judge Velis:

Thank you again for taking the time to meet with us after the last status conference and encouraging us to share our views as to what your investigation of government misconduct ought to entail. Without further adieu, here is what would be on our "List of Things to Do" if we were in your shoes:

1. Enlist the services of an Information Technology (IT) specialist.
2. Identify government computer servers likely to contain relevant electronic evidence of official misconduct. (E.g., file servers, email servers, servers with deleted emails and documents supporting work performed by the Massachusetts State Police (MSP) at 1350 Main Street, 4th Floor, Springfield and One Ashburton Place, Room 1910, Boston, and the Criminal Bureau of the Attorney General's Office (AGO) at One Ashburton Place).
3. Identify the custodians of said servers to whom requests for electronic evidence should be directed.
4. Formulate particularized requests for such evidence. (E.g., any and all e-mails to and from kris.foster@state.ma.us containing the words: "Sonja," "Farak," "Amherst," "Lab," "car," "vehicle," "Volkswagon," "servicenet," "treatment," "subpoena," "quash," "Penate," "Rodriguez," "Watt," etc.; any and all drafts of the police report submitted by Trooper Randy Thomas on January 24, 2013).[1]
5. Review the electronic evidence you receive with the assistance of legal support staff if necessary.[2]

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[1] By citing former Assistant Attorney General Kris Foster's work email address, we do not mean to suggest she is the only individual whose electronic communications should be scrutinized. The same sort of scrutiny ought to be given to emails sent to and from joseph.ballou@state.ma.us, as well a number of others. *See infra* note 3.

[2] It is our understanding that Massachusetts law requires the retention of e-mails and other electronic documents for a period of at least seven years. If it appears that electronic evidence has been deleted, it may be appropriate to request copies of any pertinent AGO or MSP policies. If any deletions were inconsistent with an individual's regular practices and/or in contravention of such policies, this could help answer the question as to whether the destruction of electronic evidence was intentional and therefore exhibited a consciousness of guilt.

6. Obtain the digital equipment used by Trooper Christopher Dolan to photograph the search of Sonja Farak's car.
7. Enlist the services of a forensic examiner to search said equipment in the hopes of recovering each and every photograph taken, or at least the dates/times that each photograph was taken or deleted.
8. Compare the digital properties of each photograph found on the equipment with the digital properties of photographs provided by the MSP/AGO to the Hampden County District Attorney's Office.
9. Issue subpoenas to appropriate private communication providers.[3]
10. Obtain the chain of command/organizational flow charts from for the MSP and AGO from July 1, 2012 through April 8, 2015.
11. Conduct interviews of persons of interest, including but not necessarily limited to: Randy Thomas (Thomas), Christopher Dolan (Dolan), Robert Irwin (Irwin), Joseph Ballou (Ballou), Frank Flannery (Flannery), Elaine Pourisnki (Pourinski), Kris Foster (Foster), Anne Kaczmarek (Kaczmarek), Ryan Ferch (Ferch), Patrick Devlin (Devlin), and John Verner (Verner).

* * * * *

What follows now are thoughts on some particular leads we believe it would be wise to pursue.[4] As you will see, not all of them appear equally promising or important. Some will no doubt strike you as obvious and essential paths that must be taken if there is any hope of repairing the damage this scandal has done. Others reflect our collective intuition and might be best described as nothing more than questions.

A number of these questions concern the actions of high-ranking government officials. We want to make it clear that, in posing them, we are not accusing these officials of any wrongdoing. The purpose of an investigation like the one you are undertaking is not simply to identify the perpetrators of misconduct but to clear the names of persons who have done nothing wrong. Unless someone like you makes certain inquiries, clouds of suspicion will be apt to linger where they do not belong.

As critical as the quest for electronic evidence is, we believe that it can and should be supplemented by a more traditional search for individuals willing to take responsibility for their misconduct and give accounts detailing the misdeeds of others. Obtaining these kinds of admissions is rarely easy. We have therefore taken the liberty of providing you with information

[3] During the course of this litigation, former AAG Foster sent one e-mail to defense counsel from a private e-mail account with this address: kriscfoster@gmail.com. She also indicated that her cell phone number was: (617) 733-3036. It certainly seems possible that pertinent evidence pertaining to the suppression of exculpatory evidence could exist in the forms of e-mails sent to or from this g-mail account or texts to or from the number above.

[4] Copies of the transcripts, police reports, and other materials referenced herein are available upon request.

that might be used to persuade certain individuals to come clean regarding their respective roles in this cover-up.

We take it for granted that the non-disclosure of records reflecting the treatment of Sonja Farak (Farak) was improper.[5] From August 29 to October 2, 2013, defense attorneys made a series of informal requests and formal demands for the inspection/production of materials recovered from Farak's car by sending emails, serving subpoenas, and filing motions. In response, government officials repeatedly mischaracterized the Farak treatment records as inconsequential "lab paperwork" and portrayed efforts to obtain access to them as a misguided "fishing expedition" for "irrelevant evidence" destined to "compromise the prosecution of Farak."

When these treatment records finally came to light over a year later, their highly exculpatory nature was immediately apparent to Judge Kinder.[6] As it turned out, these records not only contained admissions substantially expanding the timing and scope of Farak's misconduct; they identified treatment providers in possession of other records featuring admissions from Farak that have now established a problem of systemic proportions.

In our view, restoring the integrity of the criminal justice system requires an accounting as to how and why the suppression of this exculpatory evidence occurred. In layman's terms, someone needs to get to the bottom of this. That someone, it would appear, is you. Here is how we think you might get where you need to go.

The Police

MSP investigators began executing the search warrant for Farak's car at approximately 3:23 am on January 19, 2013. (DA Discovery 2586, Thomas Report (Jan. 24, 2013).) "The search was conducted by Detective Lieutenant Robert Irwin, Sergeant Joseph Ballou, and . . . Trooper Randy Thomas . . . ." (*Id.*) "Trooper Christopher Dolan . . . photographed the vehicle and evidence before and after the search." (*Id.*)

We believe that Irwin, Ballou, Thomas, and Dolan all ought to be interviewed in the early stages of your investigation.

A. *Randy Thomas*

As part of the search warrant application he submitted earlier that night, Thomas furnished an affidavit stating that he had participated in "numerous . . . fraud investigations" and "assisted in the execution of search warrants, including the seizure and preservation of evidence." (DA

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[5] We also take it as proven that this non-disclosure came in the context of a larger failure on the part of law enforcement to adequately investigate the timing and scope of Farak's misconduct. *See Commonwealth v. Cotto*, 471 Mass. 97, 111 (2015).

[6] Upon receiving renewed motions for Rule 30 relief, he set deadlines for the filing of discovery motions and ultimately ordered the production of records in the possession of third party treatment providers identified in the newly discovered car evidence.

Discovery 3072, Thomas Search Warrant Affidavit ¶ 3 (Jan. 19, 2013).) Thomas also made a point of noting that he possessed a Masters of Science in Criminal Justice and had attended many courses during his career as a Trooper, including "Fraudulent document training." (*Id.* at ¶ 4.) In terms of what he sought to acquire, Thomas asked for permission to "seize any and all evidence related to Sonja Farak's crimes including but not limited to: . . . Records of purchases of lighters, substances that could be used as adulterants/dilutents, plastic bags, pipes/smoking implements" and "Records or paperwork associated with controlled substances." (DA Discovery 3073, Thomas Aff. at ¶ 15.)

These assertions make it clear that although Thomas was the lowest ranking member of the search team, he was well-educated and experienced. Not only had he executed numerous search warrants in the past, he had participated in multiple fraud investigations which, by their nature, tend to involve the acquisition and analysis of a high volume of paper. In the course of doing this work, Thomas had even received specific training he saw fit to mention in his affidavit, related to fraudulent documents. When the time came to tell the clerk what he wanted to seize, he referenced various kinds of records.

The idea that a trooper with this background and document-centered focus could overlook and/or inadvertently misidentify dozens of pages of drug treatment records as "assorted lab paperwork" appears highly unlikely to us.[7] It also seems highly unlikely that the junior member of the search team would unilaterally (and surreptitiously) mischaracterize such highly probative evidence as innocuous lab paperwork.[8]

Yet, four days later, on January 23, 2013, Thomas filed a return with the Eastern Hampshire District Court which did exactly that. (*See* DA Discovery 3070-71, Thomas Return (Jan. 23, 2013).) This return, it should be noted, contained a sworn affirmation by Thomas that the "inventory" he provided was a "true and detailed account of all the property taken by [him] on this search warrant." (DA Discovery 3071.) The following day, Thomas filed a police report which contained the same misrepresentations of drug treatment records as "assorted lab paperwork" as set forth in the search warrant return. (DA Discovery 2586-88.)

Under the circumstances, we think that there is a reasonable possibility that Trooper Thomas might be willing to cooperate with your investigation. The basis for this hunch is twofold. First,

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[7] Take, for example, the Dimitry Bogo envelope Thomas referred to in item 6 of his police report. While thirteen (13) of the pages within it could fairly be described as "paperwork," ten (10) clearly could not. Amidst the non-lab paperwork were: two (2) pages of journal entries detailing hardships Farak experienced in her marriage; two (2) completed Servicenet Diary Cards containing admissions of drug use *at the lab*; and one (1) Emotion Regulation Worksheet documenting an "urge to use" Farak experienced upon getting "a 'good' sample @ work."

[8] It bears noting the drug treatment records were not only highly probative/exculpatory in the pre-trial and post-conviction cases of individuals charged with possessing and/or distributing substances submitted to the Amherst Lab for analysis; they were also highly probative/ inculpatory in the government's case against Farak.

if he does not cooperate, Thomas could be held accountable for actions he almost certainly did not initiate on his own but performed at the direction of superior officers. Second, any impulse he might have to "fall on his sword" or "take one for the team" will likely be short-lived once Thomas realizes that there is too much evidence of wrongdoing on the part of others for the buck to actually stop with somebody like him.

Here, we think it might be helpful for you to explain your intention to search his computer for earlier drafts of the report Thomas filed five days after the execution of the search warrant. You might also want to make it clear you will not only be combing through his e-mails, but the e-mails of Irwin and Sergeant Ballou, as well as AAGs Foster and Kaczmarek. If any of these other individuals exhibit, in their correspondence, an awareness as to what the "assorted lab paperwork" actually contained, then getting himself in even more trouble will be the only thing Thomas accomplishes by pretending that he was solely responsible for the suppression of the treatment records.[9]

In the event that Thomas is willing to cooperate, he should be asked to produce any electronic or paper evidence that corroborates his account as to what took place. Again, we can only guess as to what his account might be. The only assumptions we feel comfortable in making are that these treatment records were not overlooked and the plot to hide them was not hatched by the low man on search team totem pole.

B. *Christopher Dolan*

Depending on what information Thomas provides, we believe that Dolan might be an appropriate subject for your next interview. Dolan works in Crime Scene Services and his job on the night in question was to take photographs before and during the search. Seventy-one (71) digital pictures taken by Dolan were eventually disclosed to defendants by the Hampden County District Attorney's Office. (DA Discovery 3343-3413.) At this point in the investigation, we have no reason to believe that the AGO or the MSP provided any photographs of the car search that were not turned over by former First Assistant District Attorney Flannery to defense counsel. We are far less confident that Flannery received copies of all the photographs that Dolan took.

We believe that Dolan should be interviewed regardless of whether a forensic examination of his equipment unearths undisclosed photographs of the suppressed exculpatory evidence. Finding any such photographs would not necessarily mean that Dolan participated in the suppression of this evidence. However, it would necessitate, in our view, the same sort of search of his e-mails that we believe must be performed with respect to the emails of individuals like Thomas, Ballou, Irwin, Kaczmarek, and Foster. At a minimum, Dolan must be regarded as a witness to the cover-up and should be asked to recall any conversations that took place between the investigators as they encountered the treatment records law enforcement took extraordinary measures to conceal.

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[9] Taking this tact may pay dividends because while Thomas may recall the emails he sent and received about the "assorted lab paperwork," it's unlikely he has any clue as to the content of communications involving his superiors and/or lawyers in the AGO.

C. *Robert Irwin*

Aside from being the officer who recovered the Dimitry Bogo envelope, *see supra* note 7, all we know about Irwin's role in this case is that he participated in the car search and was the recipient of all the reports written by Thomas and Ballou. A review of Hinton Discovery reveals that Irwin played a larger role in that investigation and authored the majority of the police reports, which were directed to Lieutenant Colonel Francis Matthews, the Commander of the MSP's Division of Investigative Services.[10] Given Irwin's participation in the Dookhan probe, it may be useful to have him describe all the steps that were taken in that case, then ask why similar steps were not taken in the Amherst investigation.[11] It would, of course, also be helpful to know whether Irwin communicated with Matthews or anyone else concerning what he and his subordinates found during the search of Farak's car.

D. *Joseph Ballou*

Ballou is another individual who may see the wisdom of cooperating once confronted with baggage he acquired during the first, "cursory" Farak investigation. In advance of the consolidated evidentiary before Judge Kinder, Ballou received a subpoena *duces tecum* directing him to appear on September 9, 2013, with all notes, memoranda, logs and records concerning the investigation of Farak. Had he complied with this subpoena, Ballou would have arrived at the Hampden County Hall of Justice with the banker's box containing the suppressed treatment records. Instead, he showed up empty-handed. Judge Kinder was not amused.

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[10] (*See* http://www.massbar.org/media/1295687/ago%20investigation%20documents.pdf (last visited July 21, 2015).)

[11] As will be discussed in greater detail below, Ballou met Farak during the Dookhan investigation. A review of AGO investigative reports indicates that he and Thomas were tasked with interviewing three former employees of the Amherst Lab even though: (i) they never worked at the Hinton Drug Lab; (ii) Dookhan never worked at the Amherst Drug Lab; and (iii) the former employees each retired before Dookhan began her career as a chemist. (*See id.* pp. 61-62, Thomas Report Re: Gerald Giguere Interview; pp. 65-66, Thomas Report Re: Paul Jaszek Interview; pp. 66-67, Thomas Report Re: Donna Lacrouix Interview.) Conversely, no one interviewed any of Farak's former co-workers at Hinton, even though Farak purportedly "outperformed" Dookhan during the time they worked together. *See* Brian Ballou, "State chemist allegedly used crime drugs," Boston Globe (Jan. 22, 2013), http://www.bostonglobe.com/metro/2013/01/22/state-chemist-pleads-not-guilty-charges-tampering-with-drugs-being-tested/YaC09bhANjpi8BTjQGo74I/story.html ("So far there is evidence suggesting that Farak allegedly corrupted only two cases, but an investigation by State Police is ongoing. That investigation may lead authorities back to Boston and the Hinton lab, where both chemists worked in 2003 and 2004. Though Farak spent most of her career in Amherst, she analyzed more than 11,000 drug samples from Boston cases, according to records from the Jamaica Plain lab. As a result, questions about the integrity of her work could have an impact in Boston. While working at the Jamaica Plain lab, records show Farak analyzed more than 9,000 samples, frequently producing more test results per month than Dookhan, who is now facing criminal indictment for allegedly falsifying test results.").

Asked "whether or not the file [wa]s present," AAG Foster tried to explain that "Attorney Olanoff told me he actually wasn't seeking documents or photographs, that he's only seeking Sergeant Ballou's testimony." (Ev. Hr'g Tr. 18 (Sept. 9, 2013).)

"It has been subpoenaed," Judge Kinder said. "So there is a court order that it be present here today. I haven't yet ruled on it. My advice to you is to get that file here." (*Id.* at 18-19.) Judge Kinder went on to instruct Foster submit for an *in camera* review "copies of all of the[] documents that [she] believe[d] fit into one of these categories that should be protected." (*Id.* at 19.) Before moving forward with the hearing, Judge Kinder felt compelled to "say I am a little bit disturbed that a court order for the production of a file has not been produced absent a determination by me as to whether it should or should not be produced." (*Id.*)

Once the hearing got underway, Ballou more or less scoffed at the notion that there was anything in the file from the car that defense counsel might want to see.

> Q. (By Mr. Ryan) Well, there's this physical evidence that we've been discussing from the car, correct?
>
> A. Yes.
>
> Q. And you would agree that your reports regarding what was in the car are summary notes?
>
> A. Summary, yes.
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> Q. You didn't write paragraph after paragraph about what assorted lab paperwork was found, right?
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> A. As you mentioned, we also took pretty detailed photos, yes.
>
> Q. Well, how many photos did you take?
>
> A. I didn't take any. This was from -- the crime scene services took these.
>
> Q. And whatever is in that book, is that a fair representation of how many photographs were taken?
>
> A. From the car, sir, yes; vehicle search warrant, yes.
>
> Q. A couple dozen?
>
> A. Yes.
>
> Q. And about how many items of evidentiary interest were there?

MR. FLANNERY: Objection, Your Honor. This is not to the scope of the direct.

THE COURT: Sustained as to what has evidentiary interest.

Q. (By Mr. Ryan) Well, you did an evidence log, correct?

A. Yes.

Q. And that had some 67 items on it?

A. Yes.

Q. And a number of those items were from the car?

A. Yes. That included all of the evidence seized in the case.

Q. Did you photograph every piece of evidence that was seized from the automobile?

A. As I said, I didn't photograph anything. But yeah, crime scene services photographed the evidence as we seized it, yes.

(*Id.* at 173-76.)

Ballou also played a prominent role in the effort to restrict the scope of Farak's misconduct. During the evidentiary hearing, he indicated that "cocaine was the only substance that it appeared that Ms. Farak had any interest in tampering with." (*Id.* at 177; *see also id.* at 171.)

Amidst the so-called "assorted lab paperwork" Ballou participated in seizing was an undated Servicenet Diary Card. After congratulating herself in a Wednesday diary entry for not "using @ work," Farak apparently consumed drugs on Thursday and attempted to do so again on Friday. According to this undisclosed treatment record, Farak experienced "shame @ work" on that day because she was "going to use phentermine, but when [she] went to take it, [she] saw how little (v. little) there [wa]s left" and "ended up not using."[12]

[12] Also undisclosed was one "Emotion Regulation Worksheet" in which Farak attributed her "vulnerability" to her experience the night before "w/Molly" and another (seized by Ballou himself) where Farak indicated that she had "12 urge-ful samples to analyze out of next 13." While it is possible that her reference to "Molly" was to a person and not MDMA/ecstasy and all twelve of the urge-ful samples contained cocaine, contrary inferences would certainly have been reasonable and would not have supported Ballou's claim "cocaine was the only substance that it appeared that Ms. Farak had any interest in tampering with." Defense counsel was obviously denied the opportunity to ask the Court to make such inferences due to the suppression of this evidence.

Prior to portraying cocaine as Farak's sole drug of choice, Ballou offered this testimony: "I believe everything pertaining to the Farak investigation has been turned over. I am not aware of anything else." (*Id.* at 151.) In addition to the suppressed items noted above, the following is a *partial* list other of car evidence that had not been turned over:

- Four (4) blank worksheet pages bearing the title, "The Four Responses," and asking for reflections of a personal nature;
- Handwritten notes reflecting on how "to ride out an urge, which can be a hellish process . . . .";
- More handwritten notes under the heading "Homework 11-16-11," detailing Farak's anxiety about an upcoming appointment with a medication prescriber and her willingness to "lie about certain things" in an attempt to continue taking a particular medication;
- A handwritten chart listing the "Pros & Cons" of using and "resisting," which, among other things, juxtaposed the "crash" following use with the "decreased productivity" during moments of "wanting" to use;
- Two (2) charts labeled, "DBT-S States of Mind," contrasting the characteristics of an "Addict Mind" and a "Clean Mind";
- Two (2) pages discussing "The Path to Clear Mind";
- One (1) blank "Emotional Regulation Worksheet";
- Three (3) blank " Servicenet Diary Cards";
- Three (3) blank "Skills" worksheets aimed at fostering personal growth (as opposed to one's proficiency as a forensic chemist);
- One (1) blank "Distress Tolerance Work Sheet";
- Ten (10) pages providing instructions on "How to Check the Facts" leading to emotions; and
- Ten (10) blank "DBT Behavioral Chain Analysis Worksheets."

Following Ballou's testimony, First Assistant Flannery was forced to confess that he had "not been, apparently, in the loop, so to speak as much as [he] should have been." (*Id.* at 243.) The impetus for this confession seems to have been claims by Ballou pertaining to a separate, "independent investigation" supposedly taking place at the MSP's Sudbury Lab under the direction of "Major James Connolly and a captain" whose name Ballou couldn't remember. (*Id.* at 148.) Although Ballou said that he was "not privy to what they're investigating," he insisted that "[w]hen [he] ha[d] things, [he] ha[d] sent them to them." (*Id.* at 149.)

Suffice to say, we are skeptical that any sort of separate, independent investigation ever got off the ground. *See Commonwealth v. Ware*, 471 Mass. 85, 96 (2015) (discussing how "the Commonwealth never conducted a thorough investigation of the Amherst drug lab"). A search of Ballou's emails and a conversation with Major Connelly ought to reveal the truth.

Our reasons for reviewing Ballou's performance so closely are perhaps obvious: while we regard him as a potentially critical witness, he appears to have been less than truthful. In order to obtain an accurate account of what took place, we suspect it will first be necessary to demonstrate your familiarity with his history of dissembling and/or confront him with incriminating electronic

evidence. If/when Ballou recognizes that it's in his best interest to cooperate, he may be willing and able to share how and when the initial choice to conceal the treatment records was made.

The Prosecutors

Before contacting lawyers who worked in the AGO, it may be a good idea to speak with Flannery and Pourinski. Flannery made no secret during post-conviction proceedings that the AGO and MSP were unresponsive to his requests for information and did not, as he put it, keep him "in the loop." We believe that Flannery fully complied with his ethical obligations under *Brady* and Rule 3.8 and gave defense counsel every bit of discovery AGO investigators and attorneys were willing to provide to him. We suspect he may welcome the opportunity to discuss the frustrations he experienced dealing with these law enforcement officials during this litigation.

As you know, on June 11, 2015, Pourinski signed an affidavit alleging that she was informed that treatment records were found in her client's car prior to Farak's change of plea. Pourinski's affidavit also alleges that she was told the AGO deemed these records "privileged" and therefore elected not to disclose them to defendants seeking Rule 30 relief.

The importance of Pourinski's allegations cannot be overstated. If corroborated, they would prove that government officials did not overlook the treatment records but deliberately suppressed them. Although it appears that the information Pourinski received regarding the records was not reduced to writing, it is possible that Pourinski made a contemporaneous written account memorializing her receipt of the information and/or disclosed it to her client.

As you explore such possibilities, it may help to be mindful of the larger context of Pourinski's allegations. Earlier this year, post-conviction defendants sought a court order requiring the treatment providers identified in the car evidence to furnish any records they possessed pertaining to Farak's treatment for a drug addiction. Pourinski lodged an objection on behalf of Farak. At this stage of the process, Pourinski did not argue that there was anything improper about a defense attorney being permitted to inspect the treatment records in Farak's car. Rather, she maintained that the contents of those records failed to establish a good faith basis for believing that the documentation requested either existed or would demonstrate misconduct prior to December, 2011.

Judge Kinder obviously disagreed and issued an order compelling the production of the presumptively privileged records under the *Dwyer* protocol. That protocol required defense counsel to execute a protective order to view the records that were produced. Defense counsel subsequently moved to vacate the protective order due, in part, to the potential impact the new records might have for thousands, if not tens of thousands, post-conviction defendants. On June 9th, following a hearing that neither Pourinski nor Farak attended, Judge Kinder vacated the order but gave Farak a week to file a written objection. Pourinski submitted her June 11th affidavit as part of a last ditch effort to salvage the protective order.

Given the significance of what Pourinski's alleged, we believe she ought to be asked to explain why she did not make this allegation in February when she opposed the defendants' *Dwyer*

motions. Just so we are clear: we believe that Pourinski told the truth about in the second paragraph of her affidavit. That said, just because her accusations are consistent with what we think happened doesn't mean that they should be blindly accepted.

Pressing Pourinski for such an explanation may also have the salutary effect of impressing upon her the seriousness of what she's claimed. In the objection she lodged to Judge Kinder's June 9th order, Pourinski seemed to take the position that there was nothing improper about the AGO hiding the treatment records. Indeed, she argued – and may even believe – that the AGO only acted improperly when it failed to take additional measures to prevent defense counsel from inspecting the sensitive materials seized from her client's car.

Attorney Pourinski may eventually find herself on a witness stand being questioned about the assertions in her affidavit. Instilling an early appreciation for the importance of such questions will likely improve the quality and accuracy of her answers.

A. *Kris Foster*

Much ink has already been devoted here and elsewhere[13] to chronicling the many misrepresentations of Ms. Foster. But for her deceptive conduct, the highly exculpatory car evidence would have come to light well over a year before it did. While Foster deserves to be held accountable for this delay, it seems highly unlikely that she was responsible for concocting the cover-up. Indeed, we believe the proverbial die was cast long before she arrived on the scene.

Foster's first contact with defense counsel occurred after Judge Rup and Judge Kinder issued separate orders on or about July 22, 2013, finding that certain defendants were entitled to an evidentiary hearing to ascertain the timing and scope of Farak's misconduct. When defense counsel subsequently starting serving subpoenas, Foster, a new attorney in the AGO's Criminal Appeals Unit,[14] entered the fray.

By this point, over seven months had passed since Thomas filed his search warrant return and police report documenting the seizure of so-called "assorted lab paperwork," and it had been over five months since Ballou neglected to tell grand jurors about the treatment records when asked about what investigators found in Farak's car. *See infra* note 14. In short, we believe that

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[13] *See, e.g.*, Evan Allen & John Ellement, "State launches probe into handling of drug cases: AG's office accused of witholding facts," Boston Globe (July 8, 2015), *available at* https://www.bostonglobe.com/metro/2015/07/08/investigation-into-amherst-drug-lab-could-include-look-whether-office-withheld-evidence/dBgnaYKBlY4vHIG6drdIRP/story.html (last visited July 19, 2015). These misrepresentations were also featured prominently in the Watt/Rodriguez motion for discovery of prosecutorial misconduct and the letter Jennifer Appleyard wrote you shortly after your appointment as Special Assistant Attorney General.

[14] According to her "Linked In" profile, Foster joined the AGO in July, 2013, after working for five years an Assistant District Attorney in Suffolk County.

when Foster first refused a defense request to inspect the physical evidence in an email dated August 29, 2013, she did something she had been told to do.

If we are correct, then determining the identity of the individual(s) who instructed Foster to take such action ought to be among your highest priorities.

B. *Anne Kaczmarek*

We would be surprised if Kaczmarek turned out to be the source of Foster's marching orders. This is not to say that we think Kaczmarek was in the dark as to the actual contents of the "assorted lab paperwork." Quite the contrary: we suspect that she learned about the treatment records soon after they were seized.

Kaczmarek, after all, had just spent the past three months working closely with Irwin as they presented evidence against Dookhan to a Suffolk County Grand Jury. Upon being assigned to this second Drug Lab case, Kaczmarek had an obvious and immediate need to know what Irwin and his subordinates found in Farak's car. *See* Dan Crowley, "Crime lab chemist Sonja Farak denies evidence, drug charges," *Daily Hampshire Gazette* (Jan. 22, 2013) ("Assistant Attorney General Anne Kaczmarek sought to have Farak held on $10,000 cash bail . . . ."), http://www.gazettenet.com/home/3975735-95/farak-lab-case-according.

Once grand jury proceedings got underway, Kaczmarek quickly demonstrated that she had little interest in exploring the possibility that Farak might have been apprehended in the midst of a long-standing evidence-tampering scheme. Support for this assertion can be found in her examination of the very first witness.

Farak's wife, Nikki Lee (Lee), had cognitive limitations Kaczmarek apparently felt an obligation to reveal, given their potential impact on her testimonial faculties. (DA Discovery 2800-01.) After learning that Lee frequently consumed alcohol and marijuana and had previously used cocaine, Kaczmarek asked if Lee had ever seen Farak use cocaine. (DA Discovery 2801-02.) When Lee responded that she had, Kaczmarek asked when that was ("In 2000 in Philadelphia"), whether she'd seen Farak use cocaine since then ("No"), and whether she'd seen her wife use any other controlled substances ("Yes"). (DA Discovery 2802.) At this point, Kaczmarek decided to move on to Farak's daily routine and pressed ahead with this line of questions even after Lee injected that she'd seen Farak smoke marijuana. (*Id.*) This exchange, which covered a grand total of ten lines, is the one and only place in the transcript where Farak's history of using illegal drugs was a topic of conversation.[15]

If prosecuting Farak did not create an incentive for Kaczmarek to review all the evidence seized by AGO investigators, the subpoenas she started receiving certainly should have done so. While

[15] Three weeks later, when the time came time to elicit testimony concerning the fruits of the car search, Kaczmarek posed a question that now appears to have been crafted to make sure Ballou stuck to the script. (*See* DA Discovery 2665 ("Can you tell the Grand Jurors *some of the things* that were recovered from Ms. Farak's vehicle.") (emphasis added)).

Foster signed the pleadings seeking to quash the subpoenas, it is doubtful they went out the door without Kaczmarek's input and approval. This is an assumption we feel safe in making since the pleadings purported to represent what Kaczmarek's truthful testimony would be. (*See* Mem. of Law in Supp. of AG's Mot. to Quash Summons Served on AAG Anne Kaczmarek, Commonwealth. Penate, Dkt. No. HDCR-2012-00083, pg. 9 ("It appears that the defendant is going to argue that Farak may have tampered with the drugs in his case, by attempting to elicit from AAG Kaczmarek that the allegations against Farak date back much further than the roughly four months before Farak's arrest that the AGO alleges. This is merely a fishing expedition. There is nothing to indicate that the allegations against Farak date back to the time she tested the drugs in the defendant's case."). In short, we strongly suspect Kaczmarek was well aware of what Foster went to extraordinary lengths to keep under wraps.

Our doubts that Kaczmarek ordered the cover-up stem largely from a sense that she lacked the authority to do so. Kaczmarek, as far as we can tell, was more or less a line prosecutor at the AGO. She was not a Bureau or Division Chief and did not work in the same unit as Foster.[16] While she may well have passed along to Foster the office's position regarding defense inspections of the evidence, formulating that position seems to have been an undertaking above her paygrade.

We also have a hard time believing that Kaczmarek would have been inclined to conceal evidence of criminal activity. Her job was to convict Farak. Suppressing handwritten admissions of drug use at the lab made it harder to achieve her objective.

There is no question investigators quickly acquired compelling evidence of Farak's guilt. However, when interrogated, Farak adamantly denied any wrongdoing. As you know from your years on the bench, prosecutors will frequently contest meritorious motions to suppress statements – thereby creating appellate issues – no matter how convincing other evidence of a defendant's guilt may be. They do this because experience has taught them that admissions and confessions are the stuff of proof beyond reasonable doubt. In short, we believe that a prosecutor in Kaczmarek's position would have been hard-wired to do the exact opposite of what she did.

Based on the body of evidence currently available, we can think of only one thing that *might* have inspired Kaczmarek to act contrary to her natural instincts (and in contravention of her ethical duties): a desire to prevent her boss and other very important people from looking bad.

The Politicians

Martha Coakley (Coakley) was elected Attorney General in 2006. Two years later, when the United State Supreme Court granted the *certiorari* petition of Luis Melendez-Diaz, Coakley

[16] The grand jury minutes for the Farak case indicate that Kaczmarek was a member of the Enterprise and Major Crimes Division. (*See, e.g.,* DA Discovery 2653.) The Dookhan grand jury minutes identify her the same way, except for one occasion where they indicate that she worked in the Fraud and Financial Crimes Division. As previously noted, Foster worked in the Appeals Division of the Criminal Bureau.

chose to argue the case. In her brief, Coakley took the position that criminal defendants had no constitutional right to confront chemists like Annie Dookhan and Sonja Farak because they engaged in "neutral scientific testing." A majority of the Justices disagreed.

In the aftermath of *Melendez-Diaz*, chemists in Massachusetts labs began spending more time in court and less time at the lab. This caused their production to suffer and created backlogs that slowed the pace of drug prosecutions. During an interview with Irwin on August 28, 2012, Dookhan confessed that she began "dry labbing" at about at this time.[17]

To their credit, law enforcement officials immediately recognized the implications of her admission. At a press conference two days later, MSP Colonel Timothy Alben (Alben) acknowledged the distinct possibility "that people have been wrongly convicted on tainted evidence." Milton J. Valencia, "Chemist at state drug lab probed; authorities fear people have gone to prison on flawed evidence," BOSTON GLOBE (Aug. 30, 2012), http://www.boston.com/metrodesk/2012/08/30/problems-uncovered-with-state-drug-lab-jamaica-plain-state-police-plan-news-conference/puCrdsFQeWyjysLYgSaHnI/story.html (last visited July 21, 2015). Dealing with the fallout from Dookhan's dry labbing admission would soon prove to be an enormous burden for taxpayers.[18]

Two months later, Governor Deval Patrick (Patrick) unveiled a plan to "seek $30 million to cover the initial costs stemming" from the Hinton Drug Lab scandal. Bob Salsberg, "Gov. Patrick Seeks $30M For Costs of Mass. Drug Lab Scandal," BOSTON GLOBE (Oct. 31, 2012), *available at* http://boston.cbslocal.com/2012/10/31/gov-patrick-seeks-30m-for-costs-of-mass-drug-lab-scandal/ (last visited May 23, 2015). In a conference call that day with reporters, Secretary of Administration and Finance Jay Gonzalez explained where this money would come from and why the government had an "obligation . . . to fund the costs that agencies are going to incur" in addressing "[t]his . . . very unique situation." *Id.*[19]

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[17] More specifically, Dookhan said that she engaged in this practice for about two or three before she was relieved from testing duties on June 21, 2011. *Melendez-Diaz* was decided on June 25, 2009.

[18] For a discussion of the burden on the courts, see *Commonwealth v. Charles*, 466 Mass. 63, 74 (2013).

[19] Four weeks later, the Committee for Public Counsel Services ("CPCS") reported that it "need[ed] $12.5 million right now to deal with Dookhan-related litigation," and "Michael O'Keefe, the incoming president of the Massachusetts District Attorneys Association, said prosecutors . . . need[ed] $12.7 million for more prosecutors, support staff, and in some cases, office space and computers, for all Dookhan-related cases." John R. Ellement, "Cost soars in Mass. drug lab scandal," BOSTON GLOBE (Nov. 28, 2012), *available at* http://www.bostonglobe.com/metro/2012/11/28/official-says-state-lab-scandal-has-impacted-people-probe-expand/ItlPg8txh2EDrWPSMeq7FN/story.html (last visited May 23, 2015).

When Farak was arrested on January 19, 2013, it suddenly appeared possible that the Dookhan situation was not quite so unique.[20] At a press conference the following day, Coakley and Alben sought to downplay this possibility.

> The allegations in the case against Sonja Farak, 35, of Northampton, are vastly different than those in the Dookhan matter, Attorney General Martha Coakley told reporters this afternoon. While Dookhan is accused of falsely certifying that she completed tests of suspected drug samples after a mere visual examination, Farak allegedly tested two samples—one believed to be heroin and one cocaine—early this month and then replaced the drugs with counterfeit substances, Coakley said. . . And while the Dookhan scandal could affect thousands of cases and has already resulted in the release of scores of convicted drug dealers and defendants awaiting trial, Coakley said today that authorities have found no evidence that defendants' due process rights were violated in the Amherst cases. . . . Coakley could not say how much contraband Farak allegedly stole. "They're fairly small [quantities], and we are still determining what the size was," she said. . . . Massachusetts State Police Colonel Timothy P. Alben said during the news conference . . . "There is a clear distinction between [Dookhan] and [Farak] . . . [.] We think that those practices that the State Police put in play, if you will ... actually contributed to the early detection of this particular case over the last few days."[21]

Despite the fact that one of the samples Farak was accused of stealing had yet to be assigned to her or anyone else for analysis, the Massachusetts District Attorneys Association put out a press release stating that the "evidence indicates that the chemist stole already tested illegal drugs." Statement from Massachusetts District Attorneys (Jan. 20, 2013), *available at* http://northwesterndistrictattorney.org/news/statement-da-sullivan-amherst-drug-lab-allegations (last visited July 21, 2015). Two days later, on January 22, 2013, the governor told reporters that "he, like the public, was surprised that another chemist has been charged with a crime." Ballou, *supra* note 11.

> "My first reaction was, you've got to be kidding me," he said. He said that after learning more about the case, he believes it is completely different from the scandal involving Dookhan. "The most important take-home I think is that no individual's due process rights were compromised" in the Amherst lab, he said.

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[20] It bears noting that Legislature had yet to authorize the "additional funding to help district attorneys and other agencies deal with the expense of relitigating [Dookhan] cases." Matt Murphy, "Budget Gaps Lurk Behind Patrick's Push For New Spending, Higher Taxes," WBUR (Jan. 23, 2013), *available at* http://www.wbur.org/2013/01/23/budget-gaps-behind-patricks-proposal (last visited May 23, 2015).

[21] Travis Andersen, Chemist at crime lab in Amherst charged with tampering with drug evidence," BOSTON GLOBE (Jan. 20, 2013), *available at* http://www.boston.com/metrodesk/2013/01/20/chemist-crime-lab-amherst-charged-with-tampering-with-drug-evidence/QGc9LE7DGUAPovq2RTXNZO/story.html

(*Id.*)

All of this brings us back to Kaczmarek, Irwin, Ballou, Dolan, and Thomas. On the day the Governor of Massachusetts declared that "no individual's due process rights were compromised," Thomas had yet to return the car warrant to the court or file a report documenting what was seized. If only four or five people knew about the existence of the treatment records at this point, the members of this small group could have decided that they would rather run the risks associated with concealing highly probative evidence than cause their superiors the embarrassment they would surely suffer if the public perceived them as sources of misinformation.

If this is what happened, then the hasty, uninformed proclamations of public officials minimizing Farak's misconduct became self-fulfilling prophecies. As Justice Spina noted: "Unlike the circumstances in *Scott* where the State police detective unit of the Attorney General's office conducted a broad formal investigation into Dookhan and her practices at the Hinton drug lab, . . . , the Commonwealth's investigation into the timing and scope of Farak's misconduct [was] cursory at best." *Commonwealth v. Cotto*, 471 Mass. 97, 111 (2015).

Of course, other, darker possibilities exist. As we said at the outset, we have no grounds to accuse Martha Coakley or Timothy Alben of any of the supervisors who worked directly under them of playing any part in the suppression of exculpatory evidence. While the aforementioned statements by Coakley and Alben about the timing and scope of Farak's misconduct turned out to be wrong, we have no reason to believe that they themselves engaged in any wrongdoing. All we feel comfortable requesting are answers to the questions that must posed in cases like this: what did persons in positions of power know and when did they know it?

The Postscript

On November 1, 2014, AAG Patrick Devlin (Devlin) received a lengthy letter from one of us regarding the existence of undisclosed exculpatory evidence in the possession of the AGO.[22] On November 13, 2014, Verner, the Chief of the AGO's Criminal Bureau, sent "289 pages of documentary evidence" to the Northwestern District Attorney, along with a cover letter stating: "This disclosure is pursuant to this Office's continuing obligation to provide potentially exculpatory information to the District Attorneys . . . ."

Assuming that he took no part in the suppression of the car evidence, we suspect that before sending this letter, Verner conducted an investigation to determine how and why evidence seized from Farak's car had not been disclosed. In addition to interviewing Verner, we think it would be prudent to obtain and review internal correspondence from the Criminal Bureau during this twelve day period.

Oral argument in the *Cotto* and *Ware* cases took place on December 4, 2015. Several weeks later, an article appeared in *Massachusetts Lawyers Weekly*, which attributed this quote to AGO

[22] Devlin does not appear to have done anything wrong. He was the recipient of the letter because he was the one who managed the logistics of the defense inspection.

spokesperson Brad Puffer (Puffer): "[The AGO] moved expeditiously to investigate and prosecute [Farak's] crimes, while also providing investigatory materials as soon possible so defendants and defense counsel were informed." Pat Murphy, "Defense bar presses for expanded remedies in lab cases," MASSACHUSETTS LAWYERS WEEKLY (Dec. 31, 2014) (emphasis added). Given the undisputed evidence that investigatory materials were withheld for almost two years, we think Puffer ought to be questioned about the circumstances surrounding this statement.

On the day the SJC released the *Cotto* and *Ware* opinions, Felix Browne (Browne), a spokesperson for the Executive Office of Public Safety and Security, made another statement worthy of similar scrutiny. In an attempt to deflect judicial criticism concerning the quality of the first Farak investigation, Browne claimed that "[a]ll available evidence indicated that Farak's crimes began around late 2012 . . . ." Evan Allen & John R. Ellement, "SJC says state's investigation of Amherst crime lab was lacking," BOSTON GLOBE (Apr. 8, 2015). Obviously, among the evidence available to MSP investigators – and unavailable to defense counsel – was a Servicenet Diary indicating that Farak was engaged in criminal activity in late 2011.

Puffer and Browne have important jobs. Both should be confronted with evidence that they misused their positions by disseminating distortions to the public. If it turns out they did so deliberately, they should be among those held accountable for their misconduct.

We appreciate your thoughtful attention to this correspondence and look forward to your response.

Sincerely,

Luke Ryan

Rebecca Jacobstein

Rebecca Jacobstein