

Addendum

Massachusetts Rule of Civil Procedure

Rule 11 – Appearances and Pleadings

(a). Signing. Every pleading of a party represented by an attorney shall be signed in his individual name by at least one attorney who is admitted to practice in this Commonwealth. The address of each attorney, telephone number, and e-mail address if any shall be stated. A party who is not represented by an attorney shall sign his pleadings and state his address, telephone number, and e-mail address if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney to a pleading constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is a good ground to support it; and that it is not interposed for delay. If a pleading is not signed, or is signed with intent to defeat the purpose of this Rule, it may be stricken and the action may proceed as though the pleading had not been filed. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

(b) Appearances. (1) The filing of any pleading, motion, or other paper shall constitute an appearance by the attorney who signs it, unless the paper states otherwise. (2) An appearance in a case may be made by filing a notice of appearance, containing the name, address and telephone number of the attorney or person filing the notice. (3) No appearance shall, of itself, constitute a general appearance.

(c) Withdrawals. An attorney may, without leave of court, withdraw from a case by filing written notice of withdrawal, together with proof of service on his client and all other parties, provided that (1) such notice is accompanied by the appearance of successor counsel; (2) no motions are then pending before the court; and (3) no trial date has been set. Under all other circumstances, leave of court, on motion and notice, must be obtained.

(d) Change of Appearance. In the event an attorney who has heretofore appeared, ceases to act, or a substitute attorney or additional attorney appears, or a party heretofore represented by attorney appears without attorney, or an attorney appears representing a heretofore unrepresented party, or a heretofore stated address or telephone number is changed, the party or attorney concerned shall notify the court and every other party (or his attorney, if the party is represented) in writing, and the clerk shall enter such cessation, appearance, or change on the docket forthwith. Until such notification the court, parties, and attorneys may rely on action by, and notice to, any attorney previously appearing (or party heretofore unrepresented), and on notice, at an address previously entered. (e) Verification Generally. When a pleading is required to be verified, or when an affidavit is required or permitted to be filed, the pleading may be verified or the affidavit made by the party, or by a person having knowledge of the facts for and on behalf of such party.

Massachusetts Rule of Criminal Procedure

Rule 14 – Pretrial Discovery

(a) Procedures for Discovery. (1) Automatic Discovery.

(A) Mandatory Discovery for the Defendant. The prosecution shall disclose to the defense, and permit the defense to discover, inspect and copy, each of the following items and information at or prior to the pretrial conference, provided it is relevant to the case and is in the possession, custody or control of the prosecutor, persons under the prosecutor's direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in the case: (i) Any written or recorded statements, and the substance of any oral statements, made by the defendant or a co-defendant. (ii) The grand jury minutes, and the written or recorded statements of a person who has testified before a grand jury. (iii) Any facts of an exculpatory nature. (iv) The names, addresses, and dates of birth of the Commonwealth's prospective witnesses other than law enforcement witnesses. The Commonwealth shall also provide this information to the Probation Department. (v) The names and business addresses of prospective law enforcement witnesses. (vi) Intended expert opinion evidence, other than evidence that pertains to the defendant's criminal responsibility and is subject to subdivision (b)(2). Such discovery shall include the identity, current curriculum vitae, and list of publications of each intended expert witness, and all reports prepared by the expert that pertain to the case. (vii) Material and relevant police reports, photographs, tangible objects, all intended exhibits, reports of physical examinations of any person or of scientific tests or experiments, and statements of persons the party intends to call as witnesses. (viii) A summary of identification procedures, and all statements made in the presence of or by an identifying witness that are relevant to the issue of identity or to the fairness or accuracy of the identification procedures. (ix) Disclosure of all promises, rewards or inducements made to witnesses the party intends to present at trial.

(B) Reciprocal Discovery for the Prosecution. Following the Commonwealth's delivery of all discovery required pursuant to subdivision (a)(1)(A) or court order, and on or before a date agreed to between the parties, or in the absence of such agreement a date ordered by the court, the defendant shall disclose to the prosecution and permit the Commonwealth to discover, inspect, and copy any material and relevant evidence discoverable under subdivision (a)(1)(A)(vi), (vii), and (ix) which the defendant intends to offer at trial, including the names, addresses, dates of birth, and statements of those persons whom the defendant intends to call as witnesses at trial.

(C) Stay of Automatic Discovery; Sanctions. Subdivisions (a)(1)(A) and (a)(1)(B) shall have the force and effect of a court order, and failure to provide discovery pursuant to them may result in application of any sanctions permitted for non-compliance with a court order under subdivision 14(c). However, if in the judgment of either party good cause exists for declining to make any of the disclosures set forth above, it may move for a protective order pursuant to subdivision (a)(6) and production of the item shall be stayed pending a ruling by the court.

(D) Record of Convictions of the Defendant, Codefendants, and Prosecution Witnesses. At arraignment the court shall order the Probation Department to deliver to the parties the record of prior complaints, indictments and dispositions of all defendants and of all witnesses identified pursuant to subdivisions (a)(1)(A)(iv) within 5 days of the Commonwealth's notification to the Department of the names and addresses of its witnesses.

(E) Notice and Preservation of Evidence. (i) Upon receipt of information that any item described in subparagraph (a)(1)(A)(i)-(viii) exists, except that it is not within the possession, custody or control of the prosecution, persons under its direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in the case, the prosecution shall notify the defendant of the existence of the item and all information known to the prosecutor concerning the item's location and the identity of any persons possessing it. (ii) At any time, a party may move for an order to any individual, agency or other entity in possession, custody or control of items pertaining to the case, requiring that such items be preserved for a specified period of time. The court shall hear and rule upon the motion expeditiously. The court may modify or vacate such an order upon a showing that preservation of particular evidence will create significant hardship, on condition that the probative value of said evidence is preserved by a specified alternative means.

(2) Motions for Discovery. The defendant may move, and following its filing of the Certificate of Compliance the Commonwealth may move, for discovery of other material and relevant evidence not required by subdivision (a)(1) within the time allowed by Rule 13(d)(1).

(3) Certificate of Compliance. When a party has provided all discovery required by this rule or by court order, it shall file with the court a Certificate of Compliance. The certificate shall state that, to the best of its knowledge and after reasonable inquiry, the party has disclosed and made available all items subject to discovery other than reports of experts, and shall identify each item provided. If further discovery is subsequently provided, a supplemental certificate shall be filed with the court identifying the additional items provided.

(4) Continuing Duty. If either the defense or the prosecution subsequently learns of additional material which it would have been under a duty to disclose or produce pursuant to any provisions of this rule at the time of a previous discovery order, it shall promptly notify the other party of its acquisition of such additional material and shall disclose the material in the same manner as required for initial discovery under this rule.

(5) Work Product. This rule does not authorize discovery by a party of those portions of records, reports, correspondence, memoranda, or internal documents of the adverse party which are only the legal research, opinions, theories, or conclusions of the adverse party or its attorney and legal staff, or of statements of a defendant, signed or unsigned, made to the attorney for the defendant or the attorney's legal staff.

(6) Protective Orders. Upon a sufficient showing, the judge may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is

appropriate. The judge may alter the time requirements of this rule. The judge may, for cause shown, grant discovery to a defendant on the condition that the material to be discovered be available only to counsel for the defendant. This provision does not alter the allocation of the burden of proof with regard to the matter at issue, including privilege.

(7) Amendment of Discovery Orders. Upon motion of either party made subsequent to an order of the judge pursuant to this rule, the judge may alter or amend the previous order or orders as the interests of justice may require. The judge may, for cause shown, affirm a prior order granting discovery to a defendant upon the additional condition that the material to be discovered be available only to counsel for the defendant

(8) A party may waive the right to discovery of an item, or to discovery of the item within the time provided in this Rule. The parties may agree to reduce or enlarge the items subject to discovery pursuant to subsections (a)(1)(A) and (a)(1)(B). Any such waiver or agreement shall be in writing and signed by the waiving party or the parties to the agreement, shall identify the specific items included, and shall be served upon all the parties.

(b) Special Procedures.

(1) Notice of Alibi.

(A) Notice by Defendant. The judge may, upon written motion of the Commonwealth filed pursuant to subdivision (a)(2) of this rule, stating the time, date, and place at which the alleged offense was committed, order that the defendant serve upon the prosecutor a written notice, signed by the defendant, of his or her intention to offer a defense of alibi. The notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defense intends to rely to establish the alibi.

(B) Disclosure of Information and Witness. Within seven days of service of the defendant's notice of alibi, the Commonwealth shall serve upon the defendant a written notice stating the names and addresses of witnesses upon whom the prosecutor intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.

(C) Continuing Duty to Disclose. If prior to or during trial a party learns of an additional witness whose identity, if known, should have been included in the information furnished under subdivision (b)(1)(A) or (B), that party shall promptly notify the adverse party or its attorney of the existence and identity of the additional witness.

(D) Failure to Comply. Upon the failure of either party to comply with the requirements of this rule, the judge may exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from or presence at the scene of the alleged offense. This rule shall not limit the right of the defendant to testify. (E) Exceptions. For cause shown, the judge may grant an

exception to any of the requirements of subdivisions (b)(1)(A) through (D) of this rule. (F)
Inadmissibility of Withdrawn Alibi. Evidence of an intention to rely upon an alibi defense, later withdrawn, or of statements made in connection with that intention, is not admissible in any civil or criminal proceeding against the person who gave notice of that intention.

(2) Mental Health Issues.

(A) Notice. If a defendant intends at trial to raise as an issue his or her mental condition at the time of the alleged crime, or if the defendant intends to introduce expert testimony on the defendant's mental condition at any stage of the proceeding, the defendant shall, within the time provided for the filing of pretrial motions by Rule 13(d)(2) or at such later time as the judge may allow, notify the prosecutor in writing of such intention. The notice shall state: (i) whether the defendant intends to offer testimony of expert witnesses on the issue of the defendant's mental condition at the time of the alleged crime or at another specified time; (ii) the names and addresses of expert witnesses whom the defendant expects to call; and (iii) whether those expert witnesses intend to rely in whole or in part on statements of the defendant as to his or her mental condition. The defendant shall file a copy of the notice with the clerk. The judge may for cause shown allow late filing of the notice, grant additional time to the parties to prepare for trial, or make such other order as may be appropriate.

(B) Examination. If the notice of the defendant or subsequent inquiry by the judge or developments in the case indicate that statements of the defendant as to his or her mental condition will be relied upon by a defendant's expert witness, the court, on its own motion or on motion of the prosecutor, may order the defendant to submit to an examination consistent with the provisions of the General Laws and subject to the following terms and conditions: (i) The examination shall include such physical, psychiatric, and psychological tests as the examiner deems necessary to form an opinion as to the mental condition of the defendant at the relevant time. No examination based on statements of the defendant may be conducted unless the judge has found that (a) the defendant then intends to offer into evidence expert testimony based on his or her own statements or (b) there is a reasonable likelihood that the defendant will offer that evidence. (ii) No statement, confession, or admission, or other evidence of or obtained from the defendant during the course of the examination, except evidence derived solely from physical examinations or tests, may be revealed to the prosecution or anyone acting on its behalf unless so ordered by the judge. (iii) The examiner shall file with the court a written report as to the mental condition of the defendant at the relevant time. Unless the parties mutually agree to an earlier time of disclosure, the examiner's report shall be sealed and shall not be made available to the parties unless (a) the judge determines that the report contains no matter, information, or evidence which is based upon statements of the defendant as to his or her mental condition at the relevant time or which is otherwise within the scope of the privilege against self-incrimination; or (b) the defendant files a motion requesting that the report be made available to the parties; or (c) after the defendant expresses the clear intent to raise as an issue his or her mental condition, the judge is satisfied that (1) the defendant intends to testify, or (2) the defendant intends to offer expert testimony based in whole or in part on statements made by the defendant as to his or her mental condition at the relevant time. At the time the report of the Commonwealth's examiner is disclosed to the parties,

the defendant shall provide the Commonwealth with a report of the defense psychiatric or psychological expert(s) as to the mental condition of the defendant at the relevant time. The reports of both parties' experts must include a written summary of the expert's expected testimony that fully describes: the defendant's history and present symptoms; any physical, psychiatric, and psychological tests relevant to the expert's opinion regarding the issue of mental condition and their results; any oral or written statements made by the defendant relevant to the issue of the mental condition for which the defendant was evaluated; the expert's opinions as to the defendant's mental condition, including the bases and reasons for these opinions; and the witness's qualifications. If these reports contain both privileged and nonprivileged matter, the court may, if feasible, at such time as it deems appropriate prior to full disclosure of the reports to the parties, make available to the parties the nonprivileged portions. (iv) If a defendant refuses to submit to an examination ordered pursuant to and subject to the terms and conditions of this rule, the court may prescribe such remedies as it deems warranted by the circumstances, which may include exclusion of the testimony of any expert witness offered by the defense on the issue of the defendant's mental condition or the admission of evidence of the refusal of the defendant to submit to examination.

(C) Discovery for the purpose of a court-ordered examination under Rule 14(b)(2)(B). (i) If the judge orders the defendant to submit to an examination under Rule 14(b)(2)(B), the defendant shall, within fourteen days of the court's designation of the examiner, make available to the examiner the following: (a) All mental health records concerning the defendant, whether psychological, psychiatric, or counseling, in defense counsel's possession; (b) All medical records concerning the defendant in defense counsel's possession; and (c) All raw data from any tests or assessments administered to the defendant by the defendant's expert or at the request of the defendant's expert. (ii) The defendant's duty of production set forth in Rule 14(b)(2)(C)(i) shall continue beyond the defendant's initial production during the fourteen-day period and shall apply to any such mental health or medical record(s) thereafter obtained by defense counsel and to any raw data thereafter obtained from any tests or assessments administered to the defendant by the defendant's expert or at the request of the defendant's expert. (iii) In addition to the records provided under Rule 14(b)(2) (C)(i) and (ii), the examiner may request records from any person or entity by filing with the court under seal, in such form as the Court may prescribe, a writing that identifies the requested records and states the reason(s) for the request. The examiner shall not disclose the request to the prosecutor without either leave of court or agreement of the defendant. Upon receipt of the examiner's request, the court shall issue a copy of the request to the defendant and shall notify the prosecutor that the examiner has filed a sealed request for records pursuant to Rule 14(b)(2)(C)(iii). Within thirty days of the court's issuance to the defendant of the examiner's request, or within such other time as the judge may allow, the defendant shall file in writing any objection that the defendant may have to the production of any of the material that the examiner has requested. The judge may hold an ex parte hearing on the defendant's objections and may, in the judge's discretion, hear from the examiner. Records of such hearing shall be sealed until the report of the examiner is disclosed to the parties under Rule 14(b)(2)(B)(iii), at which point the records related to the examiner's request, including the records of any hearing, shall be released to the parties unless the court, in its discretion, determines that it would be unfairly prejudicial to the defendant to do so. If the judge grants any part of the examiner's request, the judge shall indicate

on the form prescribed by the Court the particular records to which the examiner may have access, and the clerk shall subpoena the indicated record(s). The clerk shall notify the examiner and the defendant when the requested record(s) are delivered to the clerk's office and shall make the record(s) available to the examiner and the defendant for examination and copying, subject to a protective order under the same terms as govern disclosure of reports under Rule 14(b)(2)(B)(iii). The clerk's office shall maintain these records under seal except as provided herein. If the judge denies the examiner's request, the judge shall notify the examiner, the defendant, and the prosecutor of the denial. (iv) Upon completion of the court-ordered examination, the examiner shall make available to the defendant all raw data from any tests or assessments administered to the defendant by the Commonwealth's examiner or at the request of the Commonwealth's examiner.

(D) Additional discovery. Upon a showing of necessity, the Commonwealth and the defendant may move for other material and relevant evidence relating to the defendant's mental condition.

(3) Notice of Other Defenses. If a defendant intends to rely upon a defense based upon a license, claim of authority or ownership, or exemption, the defendant shall, within the time provided for the filing of pretrial motions by Rule 13(d)(2) or at such later time as the judge may direct, notify the prosecutor in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, a license, claim of authority or ownership, or exemption may not be relied upon as a defense. The judge may for cause shown allow a late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(4) Self Defense and First Aggressor.

(A) Notice by Defendant. If a defendant intends to raise a claim of self defense and to introduce evidence of the alleged victim's specific acts of violence to support an allegation that he or she was the first aggressor, the defendant shall no later than 21 days after the pretrial hearing or at such other time as the judge may direct for good cause, notify the prosecutor in writing of such intention. The notice shall include a brief description of each such act, together with the location and date to the extent practicable, and the names, addresses and dates of birth of the witnesses the defendant intends to call to provide evidence of each such act. The defendant shall file a copy of such notice with the clerk.

(B) Reciprocal Disclosure by the Commonwealth. No later than 30 days after receipt of the defendant's notice, or at such other time as the judge may direct for good cause, the Commonwealth shall serve upon the defendant a written notice of any rebuttal evidence the Commonwealth intends to introduce, including a brief description of such evidence together with the names of the witnesses the Commonwealth intends to call, the addresses and dates of birth of other than law enforcement witnesses and the business address of law enforcement witnesses.

(C) Continuing Duty to Disclose. If prior to or during trial a party learns of additional evidence that, if known, should have been included in the information furnished under subdivision (b)(4)(A) or (B), that party shall promptly notify the adverse party or its attorney of such evidence.

(D) Failure to Comply. Upon the failure of either party to comply with the requirements of this rule, the judge may exclude the evidence offered by such party on the issue of the identity of the first aggressor. (c) Sanctions for Noncompliance. (1) Relief for Nondisclosure. For failure to comply with any discovery order issued or imposed pursuant to this rule, the court may make a further order for discovery, grant a continuance, or enter such other order as it deems just under the circumstances. (2) Exclusion of Evidence. The court may in its discretion exclude evidence for noncompliance with a discovery order issued or imposed pursuant to this rule. Testimony of the defendant and evidence concerning the defense of lack of criminal responsibility which is otherwise admissible cannot be excluded except as provided by subdivision (b)(2) of this rule. (d) Definition. The term "statement", as used in this rule, means: (1) a writing made, signed, or by a person having percipient knowledge of relevant facts and which contains such facts, other than drafts or notes that have been incorporated into a subsequent draft or final report; or (2) a written, stenographic, mechanical, electrical, or other recording, or transcription thereof, which is a substantially verbatim recital of an oral declaration except that a computer assisted real time translation, or its functional equivalent, made to assist a deaf or hearing impaired person, that is not transcribed or permanently saved in electronic form, shall not be considered a statement.

Rule 48 – Sanctions (Applicable to District Court and Superior Court)

A wilful violation by counsel of the provisions of these rules or of an order issued pursuant to these rules shall subject counsel to such sanctions as the court shall deem appropriate, including citation for contempt or the imposition of costs or a fine.

Massachusetts Rule of Professional Conduct

Rule 3.3 – Candor Toward the Tribunal. (July 1, 2015, current)

(a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (3) offer evidence that the lawyer knows to be false, except as provided in Rule 3.3(e). If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the

proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding including all appeals, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(e) In a criminal case, defense counsel who knows that the defendant, the client, intends to testify falsely may not aid the client in constructing false testimony, and has a duty strongly to discourage the client from testifying falsely, advising that such a course is unlawful, will have substantial adverse consequences, and should not be followed. (1) If a lawyer discovers this intention before accepting the representation of the client, the lawyer shall not accept the representation. (2) If, in the course of representing a defendant prior to trial, the lawyer discovers this intention and is unable to persuade the client not to testify falsely, the lawyer shall seek to withdraw from the representation, requesting any required permission. Disclosure of privileged or prejudicial information shall be made only to the extent necessary to effect the withdrawal. If disclosure of privileged or prejudicial information is necessary, the lawyer shall make an application to withdraw ex parte to a judge other than the judge who will preside at the trial and shall seek to be heard in camera and have the record of the proceeding, except for an order granting leave to withdraw, impounded. If the lawyer is unable to obtain the required permission to withdraw, the lawyer may not prevent the client from testifying. (3) If a criminal trial has commenced and the lawyer discovers that the client intends to testify falsely at trial, the lawyer need not file a motion to withdraw from the case if the lawyer reasonably believes that seeking to withdraw will prejudice the client. If, during the client's testimony or after the client has testified, the lawyer knows that the client has testified falsely, the lawyer shall call upon the client to rectify the false testimony and, if the client refuses or is unable to do so, the lawyer shall not reveal the false testimony to the tribunal. In no event may the lawyer examine the client in such a manner as to elicit any testimony from the client the lawyer knows to be false, and the lawyer shall not argue the probative value of the false testimony in closing argument or in any other proceedings, including appeals.

Rule 3.3 – Candor Toward the Tribunal (Prior)

(a) A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal; (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, except as provided in Rule 3.3.(e); (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (4) offer evidence that the lawyer knows to be false, except as provided in Rule 3.3(e). If a lawyer has offered, or the lawyer's client or witnesses testifying on behalf of the

client have given, material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures.

- (b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, including all appeals, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
- (c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
- (d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.
- (e) In a criminal case, defense counsel who knows t hath the defendant, the client, intends to testify falsely, advising that such a course is unlawful, will have substantial adverse consequences, and should not be followed. If a lawyer discovers this intention before trial, the lawyer shall seek to withdraw from the representation, requesting any required permission. Disclosure of privileged or prejudicial information shall be made only to the extent necessary to effect the withdrawal. If disclosure of privileged or prejudicial information is necessary, the lawyer shall make an application to withdraw *ex parte* to a judge other than the judge who will preside at the trial and shall seek to be heard in camera and have the record of the proceeding, except for an order granting leave to withdraw, impounded. If the lawyer is unable to obtain the required permission to withdraw, the lawyer may not prevent the client from testifying. If a criminal trial has commenced and the lawyer discovers that the client intends to testify falsely at trial, the lawyer need not file a motion to withdraw from the case if the lawyer reasonably believes that seeking to withdraw will prejudice the client. If, during the client's testimony or after the client has testified, the lawyer knows that the client has testified falsely, the lawyer shall call upon the client to rectify the false testimony and, if the client refuses or is unable to do so, the lawyer shall not reveal the false testimony to the tribunal. In no event may the lawyer examine the client in such a manner as to elicit any testimony from the client the lawyer knows to be false, and the lawyer shall not argue the probative value of the false testimony in closing argument or in any other proceedings, including appeals.

Rule 5.1 – Responsibilities of Partners, Managers and Supervisory Lawyers

- (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
- (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if: (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 8.3 – Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the Bar Counsel's office of the Board of Bar Overseers.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the Commission on Judicial Conduct.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6.

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

**SUPERIOR COURT
INDICTMENT NO. 2007-770**

COMMONWEALTH

vs.

**ERICK COTTO
and related cases¹**

**MEMORANDUM OF DECISION AND ORDER ON
MOTIONS FOR POST-CONVICTION RELIEF**

¹*Commonwealth v. Glenda Liz Aponte*, 1279CR00226; *Commonwealth v. Omar Brown*, 0579CR01159; *Commonwealth v. Omar Harris*, 1079CR01233; *Commonwealth v. Fiori Liquori*, 1279CR00624; *Commonwealth v. Rolando Penate*, 1279CR00083; *Commonwealth v. Wendell Richardson*, 1279CR00399; *Commonwealth v. Bryant Ware*, 0779CR01072, 0979CR01072 & 1079CR00253; and *Commonwealth v. Lizardo Lee Vega*, 0979CR00097. The list of pending drug lab matters before me has recently been reduced. Earlier this year, the Commonwealth withdrew its opposition to a motion to dismiss by Jermaine Watt, to a motion to withdraw a guilty plea in the Harris case, and to motions for new trial filed by John Sanchez (1079CR0004) and Rolando Penate. Accordingly, those matters are no longer before me.

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HAMPDEN, ss.

COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT
INDICTMENT NO. 2007-770

COMMONWEALTH

vs.

ERICK COTTO
and related cases¹

MEMORANDUM OF DECISION AND ORDER ON
MOTIONS FOR POST-CONVICTION RELIEF

I. Introduction

These cases emanate from the scandal at the Amherst drug lab and are before me on the defendants' motions to dismiss their indictments, to withdraw guilty pleas, and/or for a new trial, pursuant to Mass. R. Crim. P. 30(b).² The defendants were convicted in Hampden Superior Court between May of 2006 and September of 2014 of drug offenses based on substances tested, mostly by chemist Sonja Farak, at the Amherst drug lab.

Following news in January 2013 that Farak was being prosecuted by the Attorney General's Office (AGO) on charges of drug theft and tampering at the lab, many defendants whose drug analysis certificates had been issued by Farak moved for post-conviction discovery

¹Commonwealth v. Glenda Liz Aponte, 1279CR00226; Commonwealth v. Omar Brown, 0579CR01159; Commonwealth v. Omar Harris, 1079CR01233; Commonwealth v. Fiori Liquori, 1279CR00624; Commonwealth v. Rolando Penate, 1279CR00083; Commonwealth v. Wendell Richardson, 1279CR00399; Commonwealth v. Bryant Ware, 0779CR01072, 0979CR01072 & 1079CR00253; and Commonwealth v. Lizardo Lee Vega, 0979CR00097. The list of pending drug lab matters before me has recently been reduced. Earlier this year, the Commonwealth withdrew its opposition to a motion to dismiss by Jermaine Watt, to a motion to withdraw a guilty plea in the Harris case, and to motions for new trial filed by John Sanchez (1079CR0004) and Rolando Penate. Accordingly, those matters are no longer before me.

²By order dated December 7, 2015, Superior Court Chief Justice Judith Fabricant specially assigned me to hear these and all cases arising from Farak's misconduct.

from the AGO, for relief under Rule 30(b), and/or to dismiss their indictments. In 2013 and most of 2014, the AGO successfully opposed most of the discovery motions. After hearings, the Superior Court (Kinder, J.) ruled on the Rule 30(b) motions and motions to dismiss in accordance with his finding, on the basis of the evidentiary record before him, that Farak's misconduct was limited to stealing and tampering with cocaine for approximately six months, from July 2012 until January 18, 2013. Many defendants sought appellate review.

On January 4, 2014, Farak pled guilty to indictments for drug tampering and theft. Nearly ten months later, on October 30, 2014, drug lab defendants finally obtained access to the rest of the Farak investigation evidence possessed by the AGO and learned that the AGO had withheld exculpatory evidence about the scope of Farak's misconduct. On November 13, 2014, the AGO turned over to district attorneys, who gave drug lab defendants, 289 pages of documentary evidence not previously turned over, including seven pages of mental health worksheets and other papers supporting a strong inference that Farak's misconduct began before 2012.

This occurred as the Supreme Judicial Court considered the drug lab defendants' appeals from Judge Kinder's rulings on drug lab defendants' motions. In those cases, the Supreme Judicial Court called for a more thorough investigation into Farak's misconduct. See *Commonwealth v. Cotto*, 471 Mass. 97, 112, 115 (2015). Subsequently, two investigative reports were issued. In the first, Assistant Attorney General Thomas Caldwell investigated the scope of Farak's misconduct, and flaws in the operation of the Amherst lab and issued a report (the Caldwell Report). In the second investigative report, retired Superior Court Justice and Special Assistant Attorney General Peter A. Velis and retired District Court Justice and Special Assistant District Attorney Thomas T. Merrigan oversaw an investigation that resulted in a report

rejecting the drug lab defendants' claim that the AGO had withheld exculpatory evidence.

Based on an expanded record, the defendants now allege that the following types of government misconduct warrant post-conviction relief: (1) Farak's drug tampering and theft; (2) the AGO's failure to disclose exculpatory evidence, particularly seven pages of Farak's mental health worksheets; (3) the AGO's failure to conduct an adequate investigation in 2013 on the nature and scope of Farak's misconduct; and (4) misconduct by former Springfield Police Department (SPD) narcotics evidence officer Kevin Burnham, who was indicted for stealing money from the SPD's evidence room.³ Many defendants further contend that serious flaws in the operation of the Amherst drug lab render unreliable the drug analysis performed in their cases.

In their Joint Proposed Findings of Fact, the parties have stipulated to 520 facts and 154 exhibits. In December 2016, I conducted a six day evidentiary hearing on the scope of governmental misconduct. At that hearing, 17 witnesses⁴ testified and 132 more exhibits were admitted, bringing the total number of exhibits to 286. Subsequently, through March 2017, each of the defendants was heard on his or her motions and some continued to file briefs through May 2017. Based on the credible evidence presented and after consideration of the parties' written and oral submissions, I make the following findings of fact and then undertake an individualized analysis of the defendants' motions for post-conviction relief.⁵

³Those charges were dropped after Officer Burnham was tragically found dead from an apparent suicide on the day he was to have pled guilty.

⁴The witnesses were Anne Kaczmarek, Kris Foster, John Verner, Dean Mazzone, Randall Ravitz, Suzanne Reardon, Edward Bedrosian, Sheila Calkins, Joseph Ballou, John Irwin, Randy Thomas, Frank Flannery, Elaine Pourinski, James Hanchett, Sharon Salem, Rebecca Pontes, Timothy Woods, Healther Harris, and Robert Powers.

⁵The Commonwealth has now turned over much of the discovery requested by the defendants. I commend the level of professional cooperation and courtesy between defense counsel, the AGO, and the local prosecutors in the proceedings before me.

II. Subsidiary Findings of Fact

A. The Amherst Drug Lab

Sonja Farak worked as a chemist at the Amherst drug lab from August 2004 until its closure on January 18, 2013. The lab was located on the campus of the University of Massachusetts at Amherst in a building shared with the university. It was operated by the Massachusetts Department of Public Health (DPH) from its inception in the 1960s until July of 2012, when it was transferred to the Massachusetts State Police (MSP), which ran it until January 18, 2013. By 1987, the lab's primary function was the analysis of suspected controlled substances for law enforcement agencies involved in the prosecution of criminal cases in western Massachusetts.

From 2008 until the lab's closure, four employees worked at the lab: the supervisor, James Hanchett; the evidence officer, Sharon Salem, who received and documented evidence submitted to the lab by police; and chemists Farak and Rebecca Pontes. I credit the testimony of Hanchett, a highly trained, experienced supervisor who began working as an analyst at the lab in 1977 and was promoted to supervisor in 2008. I also credit the testimony of Salem and Pontes, who, like Hanchett, were competent and committed employees.

While under DPH, the Amherst lab was a satellite lab which received only minimal financial support and oversight from DPH or the Commonwealth's main drug lab, the Hinton lab, located in the Jamaica Plain section of Boston. Between 2006 and July of 2012, DPH visited the Amherst lab only once or twice, and no money was made available to the Amherst lab for continuing education or for the training and imposition of protocols and record keeping needed for accreditation. The lab never obtained accreditation. Due to its small staff and low overhead

costs, with free use of the state building housing it and operating at an annual budget of approximately \$300,000, the lab was able to avoid repeatedly threatened closures between 2004-2013. The Amherst lab survived those threats, thanks to the vigorous advocacy of the western Massachusetts law enforcement community, which argued that the Amherst lab was cost effective and productive. The lab even took on testing of backlogged samples from the Hinton lab. The lab was essentially a financially strapped state entity with--apart from Farak--dedicated employees doing the best they could in difficult circumstances.

The chemists tested for authenticity various controlled substances submitted by law enforcement agencies, issued drug analysis certificates, and testified in criminal proceedings regarding their analysis. Many substances, such as cocaine and heroin, were tested chemically by running small samples through a Gas Chromatograph (GC) and then through a Mass Spectrometer (MS),⁶ and comparing the results to reference standards, which are known controlled substances, as explained below.

Between at least 2002 to October of 2012, the Amherst lab failed to adhere to some best practices recognized by that time. In April of 2002, a team from the National Forensic Science Technology Center (NFSTC) visited the Amherst lab to evaluate the sufficiency of forensic services in the Commonwealth. The NFSTC expressed concern over the condition of the lab's physical plant and its lack of formal quality systems consistent with the standards set by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board

⁶The GC and MS are separate machines which work together. GC splits the mixtures into their component parts and then MS produces an individualized breakdown of each substance being tested, like a fingerprint. Once the GC/MS completes the testing, the chemist writes up the results and gives them to the evidence officer. A detailed description of the GC/MS analysis is set forth in the Caldwell Report (CR) at p. 7, n.8.

(ASCLD/LAB)⁷ or those of the Scientific Working Group for the Analysis of Seized Drugs (SWGDRUG), which recommends the minimum standards for the forensic examination of seized drugs. (Jt. Proposed Finding 54).

The 2002 NFSTC report urged the Amherst lab to develop quality assurance safeguards, such as written protocols for the analysis of substances, peer reviews of reports, and a proficiency testing program. (Jt. Proposed Findings 288-292). The 2002 NFSTC report concluded that although the lack of those safeguards had not produced "a knowledgeable effect on the outcome of chemical analysis as of yet, in the future reducing quality might jeopardize correct, error-free results" as the lab's caseloads increased. (Jt. Proposed Finding 293).⁸

Until October of 2012, the Amherst lab practices did not measure up to the SWGDRUG recommendations in several concerning respects. First, the lab lacked written protocols for testing procedures. Second, chemists occasionally left samples unsealed in the temporary safe. Third, chemists were not required to run "blanks" between each GC/MS test in order to clean the testing equipment. Instead, each chemist determined when to run a blank. Chemists usually ran blanks after every 5 to 10 tests, although at times, they performed over a dozen tests before running blanks. The failure to decontaminate the GC/MS after every test would frequently result in "carry over" or residue remaining from the previous tests, which would have to be distinguished by the individual chemists. (CR 29 fn. 27).

⁷The ASCLD/LAB is a not-for-profit corporation specializing in the accreditation of public and private crime laboratories. (Exh. 80, p. 30).

⁸Similarly, the 2003 Governor's Commission on Criminal Justice Innovation recommended that "all forensic drug testing laboratories demonstrate compliance with the national [SWGDRUG] standards through external audits and the subcommittee favored ASCLD/LAB accreditation." (Joint Proposed Finding 294 & Exh. 13, p. 43). Among those standards are work practices that prevent contamination which could occur from improper storage, packaging, and sealing of drug samples.

The AGO's expert credibly testified at the evidentiary hearing that the risk of contamination from not running a blank after each sample was not likely to prejudice defendants except in cases involving minuscule samples. Although the risk of contamination rose with the more samples that were run after a blank, I find that, with the exception of Farak, other chemists at the Amherst lab would have detected the need to run a blank and did so as necessary to ensure reliable test results. I further find that the defendants' expert, forensic chemistry consultant Heather Harris, did not provide any persuasive testimony supporting an inference that the risk of contamination posed an unacceptable risk of prejudice to any of the defendants here.

Another questioned practice at the Amherst lab until October of 2012 concerns lab standards. Lab standards are drug substances against which police-submitted suspected drug samples are compared in analysis. There are two types of standards: primary standards, which labs purchase from pharmaceutical companies and bear a certificate of analysis, and secondary standards, which are manufactured in the lab using police-submitted drug samples.

Manufacturing standards in the lab, rather than purchasing them from pharmaceutical companies, was a widely accepted practice in State forensic laboratories well before Hanchett's arrival at the Amherst lab in 1977. The manufacture and use of secondary standards was justified at the Amherst lab until mid-2012 on several grounds. Few pharmaceutical companies manufactured standards for some of the substances, such as heroin, in the early years of the Amherst lab. Some substances could be easily and cost-effectively created in the labs. In the 1970's, the Drug Enforcement Agency (DEA) taught lab analysts, including Hanchett, how to manufacture standards and recommended that practice to help labs cut costs. It was not unusual for other State labs to make and use secondary standards up until 2012.

Between 2008 and October of 2012, due to the Amherst lab's financial straits, Hanchett replaced depleted primary standards of heroin, cocaine, LSD and methamphetamine with ones he had manufactured in accordance with the DEA's instructions. He used small amounts of substances originally submitted by police departments for analysis and which had been analyzed to be heroin or cocaine. The manufacture and use of secondary standards at the Amherst lab ended in October of 2012, pursuant to a directive of the MSP.

I find that the secondary standards Hanchett manufactured yielded sufficiently accurate analytical results. I generally credit Hanchett's testimony that, apart from Farak: (1) analysts using secondary standards at the Amherst lab were able to determine through testing when those standards were no longer accurate or operational; and (2) upon detecting that secondary lab standards had degraded to the point of being non-operational, analysts took appropriate measures to ensure reliable test results, such as cleaning out the equipment and using different standards. (Hanchett 146). Although the use of primary standards had become the "gold" standard by 2012, the use of secondary standards manufactured by Hanchett at the lab was acceptable, reliable, and consistent with the lab's goal of identifying controlled substances. Despite the fact that by 2012, the use of secondary lab standards was no longer permitted at the Amherst lab, the defendants were not prejudiced by the use of them at the Amherst lab by chemists other than Farak.

The employees at the Amherst lab had full access to the drug standards, all of which were kept in a refrigerator and in a locked cabinet to which the employees had a key. Although Hanchett was responsible for ordering, receiving and inventorying the standards, there were no audits of the standards until July of 2012. The lab was locked but accessible 24 hours a day, seven days a week, to all lab employees by a swipe card and a key, the latter of which recorded

no information about who entered and exited the lab or when. The lab had no cameras or other security monitoring equipment.

Police-submitted drug lab samples were generally stored in a vault across the hall from the lab. All lab employees could open the vault with either a key or a swipe card, and the lab had no policy restricting chemists' access to the vault. Employees also used a safe in the middle of the lab for overnight storage of samples on which testing was incomplete. The safe was secured with a lock with a combination known to all of the lab employees.

The evidence room, where police delivered drug samples from criminal cases, had a computer in which the lab's evidence officer, Salem, documented the weights of the samples. The lab employees all knew the pass code to access the computer, so any employee could log on to the computer and alter the weights of the samples typed into the computer record. Moreover, because every lab employee had 24/7 access to the lab, all the workstations, the vault, the computer inventory system, and the standards kept in the cabinet and refrigerator, chemists could assign samples to themselves. The complete lack of security at the Amherst lab was a fundamental flaw which enabled Farak to tamper with drugs without detection.

In her years of employment at the Amherst lab, Farak received no continuing education, proficiency testing, or real supervision. Although Hanchett spent much of his time in the lab, rather than in his separate office across the hall from the lab, he testified that he never reviewed Farak's testing, as she had been trained at the Hinton lab and he believed that she seemed to be doing a good job until the last half of 2012. Salem's office was also across the hall from the lab, where Farak and Pontes worked. The extent to which anyone but Pontes worked regularly in

close proximity to Farak is unclear.⁹

Due to the deficiencies identified above and others, the Amherst lab was never accredited, although some steps were taken in late 2012 toward accreditation. While I credit testimony that the practices of the Amherst lab until July of 2012 were generally poor and that security gaps throughout the operation of the lab were highly problematic with respect to Farak's conduct, I find in all other respects those practices have not been shown to have materially prejudiced the defendants.¹⁰ Notwithstanding the flaws in the Amherst lab, its employees, apart from Farak, correctly used accepted, scientifically-valid practices with the GC/MS to arrive at reliable analyses of suspected substances. With the exception of Farak's work, I credit the conclusion of the MSP's report based on its October 10, 2012, quality assurance audit (discussed below) that the Amherst lab was free from any deficiency in analytical procedure, was kept in an orderly fashion, and that work flowed through the lab smoothly. (Exh. 1).

B. Farak's Mental Health Challenges and Early Use of Controlled Substances

Much of the evidence of Farak's addiction and drug tampering as set forth in the Caldwell Report is derived from the records of Farak's mental health treatment providers and Farak's

⁹The Caldwell Report describes the layout of the Amherst lab as follows: "The offices of both Hanchett and Salem were located across the hall from the lab and there was no way they could monitor the testing (4 at 91)." (CR 30). This is consistent with Farak's testimony that Salem worked across the hall from her. (Jt. Proposed Finding 206). On the other hand, the Caldwell Report states that Hanchett told the grand jury that he worked alongside Farak after she transferred to the Amherst lab in 2004. (CR 22). At the December 2016 hearing, Salem likewise testified that she worked "side by side" Farak in the lab for nine years.

¹⁰Nothing in the evidence supports an inference that the physical condition of the lab precluded accurate analysis. There was always at least one operative fume hood, which was sufficient, as fume hoods are rarely needed, only to test highly toxic reagents. In the 5-6 years before the lab's closure, improvements were made in its storage areas, offices, benches, and in other respects. (Hanchett 121).

testimony before a Hampshire County Grand Jury in September 2015.¹¹

Farak was born in 1978 and at age 16 was diagnosed with depression. She was treated with Wellbutrin. She excelled academically and was co-valedictorian of her high school class. In the spring of 1997, as a freshman in college, she had a five day psychiatric hospitalization. During college, she took four types of medication: Wellbutrin, Remeron, Effexor and Zoloft. She performed well in college, graduated in the spring of 2000, and in her first and only year of doctoral studies (2000-2001), she began regularly using alcohol and marijuana and experimented with cocaine, ecstasy (methylenedioxymethamphetamine, also known as MDMA), and heroin.

From January of 2002 until May of 2003, Farak worked for DPH where she conducted testing to detect HIV. During that 16 month period, she continued and perhaps increased her consumption of alcohol and recreational drugs, including MDMA and marijuana, and she first tried methamphetamine.¹²

C. Farak's Misconduct at Amherst Lab

1. Farak's Use of Lab Standards (Beginning in 2004/2005)

In August of 2004, Farak transferred to the Amherst lab. By early 2005, she was stealing and consuming methamphetamine standards from the lab every morning. Between 2005-2009,

¹¹On May 3, 2016, I vacated the non-dissemination order previously covering the sources cited in this decision, including the Caldwell Report and minutes from Farak's grand jury testimony. Farak's testimony before the grand jury was under a grant of immunity and was generally candid. I do not credit some aspects of her testimony which is not entirely consistent with what she reported to her therapists about her addiction and use of police-submitted samples at the lab. It is now known that at times, Farak lied to her therapists to downplay her substance abuse. There is no reason to believe that Farak did not also minimize her substance abuse in her grand jury testimony. I also do not credit her testimony that her chemical analysis was reliable. I do, however, I credit other aspects of her testimony, including that she never succeeded in forging any other chemist's initials on evidence bags. No party attempted to call her to testify during the December 2016 hearing.

¹²See Exh. 6, pp. 37-38 and Exh. 9 para.14.

that consumption grew to several times per day. I credit her testimony that, aside from a few days or a week of sobriety during that four year period, she was under the influence of methamphetamine (and, at times, other controlled substances) at the lab nearly every day, all day, and that when she did not take methamphetamine, she experienced severe lethargy, irritability, and the inability to focus and be productive, to the point where she would call in sick from work.

By the beginning of 2009, Farak had stolen nearly the lab's entire methamphetamine standard and she began stealing and using the amphetamine and phentermine lab standards. Throughout 2009, she used amphetamine and phentermine, which she claims gave her increased energy, alertness and focus.¹³ She denies that her productivity and accuracy in testing suffered while she was using those stimulants, but her testimony is undercut by her report to her therapist that at times, stimulants caused her to experience visual disturbances.

2. Farak's Use of Standards and Police-Submitted Samples (2009-2013)

In January of 2009, Farak began receiving substance abuse counseling. On January 15, 2009, she had her first meeting with therapist Sarah Hawrylak. On April 28, 2009, Farak confided to Hawrylak that she had been using illegal substances, primarily methamphetamine, for a long period of time, and that she had been using drugs from her State drug lab job by taking portions of samples that had been submitted for testing. (Jt. Proposed Findings 145-147). By at least April of 2009, Farak was using police-submitted samples from the lab to feed her addiction.¹⁴

¹³Stimulants are often taken to produce a sense of exhilaration, enhance self-esteem, improve mental and physical performance, increase activity, reduce appetite, extend wakefulness, and "get high." (CR 9, n.11).

¹⁵As explained below, precisely when Farak began stealing and consuming police-submitted samples at the Amherst lab, the full panoply of drugs she took and used, and the extent to which she was impaired at work, all remain unknown.

In 2009, in conjunction with using amphetamine standards, Farak was also using standards of ketamine, MDMA, MDEA, and LSD (including police-submitted samples) and cocaine while she was working. Farak claims that in 2009, she did not use the cocaine standard daily. I credit the Caldwell Report that

"in early 2009, Farak took for her personal use a relatively small amount from police-submitted samples--what she termed 'acceptable loss' . . . [which was] approximately five percent of the sample that would take into account the testing and moisture loss due to evaporation in storage."

(CR 11-12). In early July of 2009, Farak told her therapist that she had reduced her alcohol consumption but had been engaging daily in "other risky behavior." Farak's treatment records support an inference that she was suffering from physical and emotional withdrawal symptoms on July 23, 2009, but that she relapsed on August 14, 2009, and resumed daily usage. On August 25, 2009, Farak told her therapist that she was almost out of her drug supply and wanted to stop using drugs. (Jt. Proposed Finding 153). Between late August and September 8, 2009, Farak reportedly had six days of sobriety.

In early September of 2009, Farak began to use the lab's cocaine standard, but not daily. (Jt. Proposed Findings 156-158). Farak admitted that at the end of 2009, she took a few grams from a 500 grams cocaine sample which had been submitted by police in a case involving the United States Postal Service, and she used the cocaine at the lab and at home. (CR 12; Jt. Proposed Findings 162-163).

In late 2009, Farak reported to her therapist a worsening depression. The therapist referred Farak to a psychiatrist, Barry Federman, M.D., and asked him if the Lamictal, a medication prescribed to treat depression, was working properly. Federman met with Farak,

described her mood as "great," and increased her Lamictal dosage. On January 5, 2010, Farak told her therapist that she had stopped taking Lamictal during the last week of December and in its place took LSD. In late January, 2010, Farak admitted to her therapist that, contrary to her prior reports, she had been using cocaine for several weeks and ketamine occasionally.

In 2010, Farak performed all of her lab work while she was under the influence of narcotics. On February 23, 2010, Farak expressed concern to her therapist that her co-workers might know about her taking drug samples. Farak testified before the grand jury that throughout 2010, she used lab standards heavily but generally abstained from siphoning from police-submitted samples, except LSD. (CR 12). Farak admitted to her therapist that in late February and all of March of 2010, she used cocaine, alcohol, and marijuana, and that by late March, she was using LSD in addition to cocaine and alcohol. (Jt. Proposed Findings 174-176). On April 19, 2010, Farak told her therapist that she had not taken illegal substances for three weeks in early April, but then relapsed and took cocaine, ketamine and MDMA.

On May 13, 2010, Farak told a ServiceNet clinician that, as reported by the clinician, "Starting in about 2005, she has a history of abusing a number of different classes of drugs, including cocaine, cannabis, methamphetamine, and fen fen. She had a week long cocaine binge in March. . . . She admits to stealing drugs from the . . . lab She has episodes of spacing out for hours at home, and admits to worrying about what others are thinking about her at work."

(Jt. Proposed Finding 177). The ServiceNet clinician's notes also reveal that Farak reported that "when abusing stimulants, she has had perceptual disturbances in the past, including paranoia and auditory hallucinations." (Jt. Proposed Finding 185). Because on almost a daily basis Farak abused narcotics in 2005 to 2009 while she was working, there is no assurance that she was able to perform chemical analysis accurately or to detect when the equipment for testing drugs needed

adjustments to work properly.

In 2011, Farak's use of cocaine ramped up, as she used lab standards, police-submitted powder cocaine, and she began to smoke rocks of crack cocaine. The latter practice quickly led to her becoming very heavily addicted. By the fall of 2011, she had exhausted the lab standards of methamphetamine, amphetamine and ketamine, and the lab's cocaine standards were substantially diminished. At that time Farak used crack cocaine during work hours in the lab. She was totally controlled by her addiction, which gave her what she described as "ridiculously intense" cravings. She nonetheless testified that she believed that there were no inaccuracies in her testing, a belief which defies logic.

In early 2012, Farak used drugs from the lab while she was at work and at home. She smoked crack cocaine during work hours in a bathroom and after work hours in the lab. On January 9, 2012, Farak was extremely impaired. That morning she smoked crack cocaine, and at lunchtime, she consumed a police-submitted sample of LSD. (Jt. Proposed Findings 203-205). She later recalled that the sensation of colors in the wind left her unable to function well at work, to drive her car, or to attend therapy. Despite her grand jury testimony that she did not recall running any tests that day, the record shows that on January 9, 2012, Farak endorsed certificates of analysis, including in the Penate case, and that she used the GC/MS that day.

Farak's attempts at sobriety failed. By April of 2012, her theft and consumption of police-submitted samples rapidly increased. On four occasions during the last half of 2012, Farak manufactured crack cocaine at the lab by removing and cooking cocaine when large quantities of powdered cocaine had been submitted. At that point, Farak was smoking crack cocaine ten to twelve times a day. She would do so at the lab, at home, and while driving. In

2012, Farak attended individual and group therapy sessions while under the influence of crack cocaine and did not disclose her intoxication to her therapists or the group.

Farak testified that she began taking other chemists' samples in the summer of 2012. (Jt. Proposed Finding 226). She took approximately six of Hanchett's samples of crack cocaine, including a sample of 3.5 grams submitted by the Northampton Police Department, and a 24.5 gram sample from the Pittsfield Police Department, and repackaged them in Hanchett's pre-initialed evidence bags. Farak also took 30 grams of a 73 gram SPD submission of cocaine assigned to Pontes, used it to make crack cocaine at the lab when she was not scheduled to work, later replaced the cocaine with a counterfeit substance, and put the sample into a bag pre-initialled by Pontes.

At times, Farak removed narcotics after the police-submitted samples had been analyzed so that any certificates originally generated by other chemists were still accurate, even though a retesting of those samples would likely yield different results showing counterfeit substances, such as baking soda, soap, wax, clay, or water. Farak frequently removed from the drug vault cocaine samples that she had already tested, then she ingested the cocaine and resealed the evidence bags. At other times, Farak removed portions of samples that had not yet been tested and manipulated the samples so that she would receive them for testing and other chemists would not notice the inaccuracies in the weights.

In late 2012, Farak hid her drug tampering by manipulating the lab inventory list on the evidence computer. She altered the documented weights on the computer and in her lab notebook, changed the order of assigned samples so she would be assigned the samples she preferred, and replaced original drug receipts with ones reflecting the samples' weight after her

tampering. (Jt. Proposed Finding 255). On July 8, 2012, Farak assigned herself a batch of twenty samples submitted by Westfield police. In late 2012, Farak took 100 grams from a one kilogram sample of powder cocaine submitted by the Chicopee Police Department and used it to manufacture crack cocaine at the lab. She also took 200 grams of powder cocaine from a Holyoke case.

Farak's scheme was at times facilitated by the submission of evidence by SPD narcotics evidence officer Kevin Burnham, who held that position from 1984 until his retirement on July 25, 2014. (Jt. Prop. Finding 492-496). On most Wednesdays, Burnham brought in samples which were often unsealed. When Farak anticipated the arrival of SPD submissions, she occasionally turned down the heat sealers to prevent a good seal. (Jt. Proposed Findings 492-498). Subsequently, Farak removed those submissions for her own use and resealed them over the original seal mark so her tampering would go unnoticed. There is no evidence that Burnham tampered with any of the samples of suspected drugs he submitted to the Amherst lab.

Despite her impairment, Farak tried to do her job well for three reasons: to obtain accurate, fair results; to know what the substances were in case she wanted to use them herself; and to draw less attention to herself by correctly performing testing. In her grand jury testimony, Farak credibly explained:

"I never did that [dry labbing]. You want the accurate result. If there was a question if something was positive or negative, you called it negative. And, like I said, for my sake and towards that end, yeah, I wanted it for possible use. I wanted to know what it was, but I also thought that it would draw less attention if I also tested everything correctly."

(Exh. 56, pp. 173-174).

In 2012, co-workers sensed changes in Farak. Hanchett noticed in the late summer or

early fall that Farak's productivity had dropped, that her work station had become messy, that stacks of paper were not being filed properly, that her physical appearance had deteriorated, and that she was nosy about large samples submitted in drug trafficking cases. (CR 23). In September or October of 2012, Hanchett approached Farak to discuss her decline in productivity, as her analysis numbers had fallen by half. Hanchett did not believe Farak's excuse, that she had spent a lot of time in court, and he asked her to focus on testing. (Prosecution memo at 7, citing Hanchett's grand jury testimony). Salem noticed in the last months of 2012 that Farak had lost weight and was moody. (CR 37). Salem and Pontes observed in those months that Farak was leaving the lab frequently during the day. (CR 42).

Nonetheless, Farak's co-workers praised her work. Salem, an entirely credible witness, described Farak as an excellent chemist who was very intelligent and knew her chemistry, and that she was meticulous in her note taking and work.¹⁵ (Salem 199-200). Pontes also characterized Farak's lab notes as very good. Hanchett testified that he viewed Farak as a meticulous employee who was dedicated to her work. (CR 23). Hanchett never watched Farak test a sample and had testified that he had never retested any of her samples. While the Amherst lab was under DPH control, Farak was not required to take a proficiency test to confirm that her analytical steps were proper. (Hanchett 141, 150; Salem 200, 206-207). In contrast to analysis performed in the Hinton lab, where each sample was tested by a primary chemist and later by a

¹⁵ Salem's opinion was that Farak was an excellent chemist based on Salem's review of Farak's notes. Those notes were required only between July 2012 and January 18, 2013. According to Salem,

"[Farak] was very intelligent. She knew her chemistry. She was meticulous in her note-taking and in her work. Once the State police took us over, we started doing technical reviews and coming up to snuff with all of their extra paperwork and how they wanted us to handle things and I would be reviewing [Farak's] notes as well as everybody else's notes. I rarely found a mistake or an error in any of her work."

different confirmatory chemist, in the Amherst lab, only one chemist performed all the analysis. Therefore, the accuracy of Farak's chemical analysis, cannot be assumed, much less confirmed.

3. Scrutiny of Amherst Drug Lab (July-October of 2012)

On July 1, 2012, as the Annie Dookhan scandal was unfolding, control of the Amherst lab passed from DPH to the MSP. The discovery of Dookhan's improper testing methods at the Hinton lab led to her resignation as an analyst in early 2012, her arrest in September of 2012, her arraignment on December 17, 2012, on 27 charges, and her conviction and sentencing on November 11, 2013. In contrast to the Dookhan case, there is no evidence that Farak engaged in "dry labbing"¹⁶ or that she intentionally contaminated samples to turn negative ones into positive ones. Whereas Dookhan's misconduct was motivated by a desire to increase her apparent productivity and to further what she perceived to be the mission of the Commonwealth of getting criminals off the streets rather than to advance her own individual unlawful scheme, Farak's motive was simply to feed her drug addiction. See *Commonwealth v. Scott*, 467 Mass. 336, 339 (2014); *Commonwealth v. Cotto*, 471 Mass. 97, 109 (2015). In a sense, the Dookhan cases are principally evidence tampering cases, whereas the Farak cases are principally drug theft cases, with evidence tampering being a collateral consequence. The two scandals coincide, however, in their potential impact on many drug lab defendants' convictions.

On August 7, 2012, Hanchett hosted a meeting in which MSP's quality assurance staff, including Sergeant Joseph Ballou, visited the Amherst lab. Ballou did not detect anything unusual or suspicious about Farak during their encounter. Hanchett told MSP staff that day how

¹⁶"Dry labbing" is when a chemist groups together multiple samples (from various cases) that look alike, tests only a few of the samples, and reports the results as if each sample had been tested individually. *Commonwealth v. Scott*, 467 Mass. 336, 339 (2014).

he manufactured the lab's standards, and he was told to discontinue that practice and to inventory the lab standards. He did so and discovered that they were more depleted than he had expected. He voiced his concern to Salem, and said he was unsure whether the depletion in standards was due to normal usage or from wrongdoing. Hanchett told Pontes and Farak and mentioned that it looked like somebody had been using a lot of standards.

On October 10, 2012, the MSP inspected and audited the Amherst lab and interviewed the chemists to assess the lab work and to move the lab toward accreditation. Farak later testified that she had smoked crack cocaine that morning and again at lunchtime, just before her 1 p.m. interview, which lasted 15-20 minutes. Her behavior raised no suspicions. (CR 19). Nothing in that process led MSP to shut down the lab. The MSP issued its report on the audit months later, days after Farak's arrest, and mandated changes in lab protocol, such as requiring the use of forms for technical and testimony reviews, keeping balance calibration logs, and implementing a system to address narcotic inventory and/or weight variances. (Jt. Prop. Finding 453). Significantly, notwithstanding the many recommended changes in lab practices, as noted above, the 2012 MSP report concluded that the lab was free from any deficiencies in analytical procedure, was kept in an orderly fashion, and that work flowed through it smoothly. (Exh. 1).

As part of the investigation and prosecution related to the Dookhan scandal, Assistant Attorney General Anne Kaczmarek met briefly with Farak in the fall of 2012 at another drug lab. Kaczmarek, like Ballou, did not detect anything suspicious about Farak during their meeting. During the same period, Farak told her therapists that she was nervous that her misconduct would be discovered. She started covering her tracks more and, likely after Hanchett spoke to her about the depleted standards, Farak ceased tampering with standards. As described below, all of

Farak's stealing, tampering and covering up would end on January 18, 2013, when her evidence tampering and addiction were discovered.

Based on the credible evidence presented, I find, regarding the scope and nature of Farak's misconduct, that: (1) from 2004 until January 18, 2013, while working at the Amherst lab, Farak was, on almost a daily basis, under the influence of narcotics, and at other times was suffering the effects of withdrawal; (2) those narcotics included, but were not necessarily limited to, methamphetamine, amphetamine, phentermine, ketamin, MDMA, MDEA, LSD, and cocaine; (3) Farak was acutely addicted to cocaine from at least January of 2009 to January 19, 2013; (4) Farak's use of narcotics while at the lab caused her, at unknown times, to experience hallucinations and other visual distortions, to experience what she described as "ridiculously intense cravings," to feel like her mind was racing, and to take frequent breaks from work to use drugs; (5) Farak's drug use impaired her ability to test and analyze controlled substances and to check the equipment and instruments used to analyze suspected drugs on occasions which cannot be identified; (6) by 2009, and possibly earlier, Farak began to steal and consume police-submitted drug samples of cocaine; (7) by at least late 2009, and possibly earlier, until her arrest in January 2013, Farak regularly stole, tampered with, and used police-submitted cocaine samples; (8) some of the tampered drug samples had been assigned to Farak while others in the last half of 2012 had been assigned to and already tested by Hanchett and Pontes; (9) the drug certificates issued by Hanchett and Pontes are reliable and accurate, despite Farak's possible tampering with some of those samples after they were tested; (10) Farak altered the weights recorded in the lab's computer inventory system of some samples; and (11) Farak replaced some drugs with counterfeit substances. Farak's theft, tampering, and use of narcotics at the lab created

a problem of systemic magnitude.

D. Discovery of Farak's Misconduct (January 18, 2013)

On January 17, 2013, Sharon Salem was attempting to match drug analysis certificates with corresponding samples when she realized that she was missing samples in two cases. She determined in the two missing cases that Farak had done the testing and had confirmed that they were cocaine. The next morning, January 18, Salem told Hanchett about the missing samples. Hanchett searched the lab and found at Farak's work station an envelope containing the cut open packaging for the two missing samples. The substances in the packaging were retested and determined not to contain cocaine. Hanchett also discovered counterfeit drug paraphernalia under Farak's work station. He notified the lab director, MSP Major James Connolly, of these discoveries. Connolly instructed Hanchett to close the lab immediately so a second lab audit could commence.

On the morning of January 18, Farak had been at the Springfield District Court to testify in a case in which she had issued a drug certificate. During the court's midday recess, Farak went to her car, where she ate lunch and used crack cocaine before returning to court. Just before entering the courtroom to testify, two MSP detectives, who had tracked down Farak, asked to speak with her. She agreed, and Trooper Robin Whitney interviewed Farak in a conference room in the District Attorney's office in the courthouse. The recorded interview began at 2:07 p.m. At approximately 2:29 p.m., Whitney asked Farak whether there would be any reason that a crack pipe would be under her work station. At that point, Farak said, "I think I'm going to hold off talking and talk to my MOSES [union] representative, if that's alright." Whitney immediately terminated the interview. (Exh. 5A). Farak refused to consent to a search of her car. Police then

seized her vehicle and had it towed to the MSP barracks' garage in Northampton. Farak was given a ride to her home. MSP alerted the AGO and launched a coordinated investigation into Farak's suspected misconduct.

E. Roles of AGO Employees in Farak Matter

With respect to the Farak case in 2013, the AGO had three major tasks: the investigation of Farak's misconduct, the prosecution of Farak, and the disclosure of evidence which could be used by drug lab defendants whose convictions were placed in question by Farak's misconduct. In order to address the drug lab defendants' key claim that the AGO withheld from them exculpatory evidence, it is useful at this point to outline the roles, relative authority and responsibilities of each of the AGO employees involved.

In 2013, the AGO was led by Attorney General Martha Coakley. The First Assistant AG was Edward Bedrosian and the Deputy AG was Sheila Calkins. The AGO is comprised of four bureaus, one being the Criminal Bureau which was in charge of the prosecutions of Farak and Dookhan. The Chief of the Criminal Bureau in 2013 was John Verner. Within the Criminal Bureau at that time were up to 11 divisions and/or units, two of which are relevant here. The first is the Enterprise and Major Crimes Division, whose chief for the first nine or ten months of 2013 was Dean Mazzone.¹⁷ The Enterprise and Major Crimes Division is staffed with prosecutors, including "line prosecutor" AAG Anne Kaczmarek, who was assigned to prosecute Dookhan and Farak. The Enterprises and Major Crimes Division was also staffed with MSP Detective Lieutenant Robert Irwin and Sergeant Joseph Ballou, who directed and/or conducted

¹⁷In October of 2013, Mazzone became Senior Trial Counsel to the Criminal Bureau, and Cara Krysil became Chief of the Enterprise and Major Crimes Division of the Criminal Bureau.

investigations and turned over evidence to the prosecutors in the Dookhan and Farak cases.

A second division within the Criminal Bureau and pertinent to this matter is the Appeals Division, which, *inter alia*, represents State officers and agencies who are served with subpoenas and summonses in discovery. In 2013, the Chief of the Appeals Division was Randall Ravitz and the Deputy Chief was Suzanne Reardon. Within the Appeals Division, all of the Farak discovery matters were assigned to a new AAG , Kris Foster, whose supervisors were (from lower to higher levels of seniority) Reardon, Ravitz, Verner, Calkins, Bedrosian and Coakley.

First Assistant AG Bedrosian learned of the Farak investigation from its inception. During the initial stages, Bedrosian attended high level meetings concerning the Farak matter. (Bedrosian 131-132). "Any major decisions [regarding the Farak case] were with the consent of the Attorney General based on advice given to her, probably by me, [Verner], and even [Kaczmarek]." (Bedrosian 132). When asked who was calling the shots in the Farak matter, Bedrosian named Kaczmarek, Verner, himself and Calkins. Calkins acknowledged that the Farak matter was considered "a big deal" in the AGO.

Verner, although responsible for the Farak prosecution due to his position as chief of the Criminal Bureau, was also responsible for supervising 110 individuals through 11 different divisions and/or units and over 50 lawyers. Verner, in his words, did not micro-manage "experienced lawyers on discovery." (Verner 190). I credit that testimony. Verner also credibly testified that "after that weekend [of the search of Farak's car], I [was] not intimately involved in the Farak investigation. I'm the Bureau Chief, so I'm getting updated on the case like all the other cases . . ." (Verner 130).

F. Search Warrant for Farak's Vehicle

Late on Friday, January 18, 2013, Hampshire County Assistant District Attorney Jeremy Bucci telephoned Mazzone to inform him that there was a problem with the Amherst lab. (Mazzone 50). Over that weekend of January 19-20th, Verner, Kaczmarek, and Bedrosian learned of the investigation. (Mazzone 51). On the evening of January 18, 2013, investigators met at the Northwestern District Attorney's Office to prepare an application for a warrant to search Farak's car. At 1 a.m. on January 19th, that application was granted. It authorized a search for substances that could be used as drug adulterants, controlled substances, and paperwork associated with controlled substances. (Exh. 172).

As noted earlier, Farak's car had been towed to a garage bay at the MSP barracks in Northampton. Most of the other garage bays there were empty, leaving the troopers several empty bays in which to work. On January 19, 2013, at 3:32 a.m., Detective Lieutenant Robert Irwin, Sergeant Joseph Ballou, and Trooper Randy Thomas began executing the warrant. All three were MSP troopers assigned to the AGO. Irwin, who worked out of the Boston AGO, was the senior ranking officer directing the search of Farak's vehicle. Ballou and Thomas were assigned to the Springfield AGO. Geographical considerations led to Ballou soon becoming the case officer, tasked with organizing search warrants, reviewing seized evidence, and working with the prosecutor to communicate what had been found and what else should be done. (Thomas 58, 66). The case officer is also responsible for turning over reports, evidence logs, and photographs of the physical evidence to the prosecuting AAG. In addition to Irwin, Ballou and Thomas, a crime scene services officer was present to photograph the interior and exterior of the car and the evidence.

The execution of the search warrant lasted approximately 90 minutes. During that period, Irwin communicated with Verner by telephone or email. (Irwin 93-94; Verner 124). Verner, in turn, emailed Bedrosian about the search at 4:07 a.m. and again at 5:38 a.m.

Execution of the search warrant was challenging. In addition to the early hour and the officers being tired from being awake for nearly 24 hours, Farak's car was filthy and in complete disarray, with stacks of bags, boxes, papers, manila envelopes marked with lab or case numbers, and junk everywhere.¹⁸

Irwin, Ballou, and Thomas each searched a different section of the vehicle. As they came across items they believed might have evidentiary value, they moved them to the ground outside the car but within the garage. Irwin and Ballou then brought the evidence to Thomas, the evidence officer, who noted the evidence in the evidence log.

Inside Farak's car, officers found envelopes and documents bearing information concerning cases and substances tested at the Amherst lab and K-pack bags marked with Hanchett's initials.¹⁹ They also discovered a paper with Pontes' initials written repeatedly, supporting an inference that Farak had been practicing writing them in order to learn to forge them. Farak's car contained plastic bags with assorted pills, a white powdery substance which appeared to be cocaine, and a brown tar-like substance which resembled heroin. Detectives

¹⁸Photographs of the trunk area show piles of boxes, cloth items, paper bags, stacks of colored plastic bags, and shoes. Strewn about the trunk were used and unused manila envelopes, some bearing case numbers from the Amherst lab, and large red rolled up papers. The front of the car was filthy with dirt and clutter. On the floor of the driver's seat were ragged shoes. The central console had cups with drinks. The front passenger seat was covered with a coat. On the dashboard and floor were more papers and manila envelopes. The back seat had only a broom on it, but the floor of the back seat was full of additional papers, bags, a cup, leaves and a large white cloth. (Dec. 2016 Hrg. Exh. 8).

¹⁹K-pack bags were used to seal drug samples after they were tested. (Prosecution Memo p. 7).

found crack cocaine weighing 5.6 grams and a separate rock of crack cocaine. (Prosecution Memo p. 9).

Detectives found hundreds of papers, most of which were inside lab folders. (Ballou 142). Among the papers was a 2011 NFL game schedule and copies of news articles printed in 2011 and which reported on persons who had been investigated, charged or sentenced for illegal possession or theft of controlled substances.²⁰ Attached to one of the articles was a handwritten note reading, "Thank [G]od I'm not a law enforcement officer" (emphasis in original).

Detectives also seized from Farak's car what is at the crux of most of the drug lab defendants' motions for relief: seven pages now referred to as "mental health worksheets," including: (a) ServiceNet diary cards with handwritten notes by Farak, (b) Emotion Regulation worksheets with Farak's handwritten notes, (c) a Distress Tolerance Worksheet, and (d) various other sheets relating to Farak's therapy, including a page with handwriting and titled "Homework," dated November 16, 2011.

The ServiceNet diary cards are used by therapy clients to document the intensity of their urges to engage in certain behaviors such as taking drugs and to report whether they acted on an urge. One of the ServiceNet diary cards found in Farak's car has no name but covers the week of Tuesday, December 20th through Monday, December 26th without referencing a year. In connection with each of those days, Farak described her emotions and whether she felt and acted

²⁰One article was dated March 29, 2011, and printed from a computer on September 20, 2011. It was a report about law enforcement officers' illegal possession of steroids. Another article was dated October 25, 2011, printed from a computer on October 28, 2011, and was about a pharmacist sentenced to 3 years in prison for stealing oxycontin from her workplace. A third article was dated December 2, 2011, printed six days later, and was about a San Francisco drug lab technician who had stolen cocaine from her workplace. (Dec. 2016 Hrg. Exhs. 5B, 5C and 5D). The Supreme Judicial Court later commented that, "The[se] newspaper articles could serve as a basis for concluding that Farak engaged in misconduct at the Amherst drug lab earlier than the summer of 2012." *Commonwealth v. Ware*, 471 Mass. 85, 94 n.13 (2015).

on urges to use drugs. That card bears notations that Farak took drugs on many of those days. Her entry for Thursday was that she "tried to resist using @ work, but ended up failing. (I know I should have called, but had thoughts about the last time I called." For the following day, Friday, she wrote, "@ work use w/out debating doing it --my thought about it = identity issue (i.e., wavering back and forth about whether I want to use)." On Saturday, December 24th, Farak noted that she was mad because she had missed watching part of a Patriots football game.²¹

The other ServiceNet diary card has Farak's first name but no dates. That card contains several references to Christmas and to a football game on that Sunday. The entries indicate that Farak either drank alcohol or took drugs every day that week. The entry for that Friday was that she was "going to use phentermine, but when I went to take it I saw how little (v. little) there is left and ended up not using."

With the mental health worksheets were two undated Emotion Regulation worksheets. In one of them, Farak described the "prompting event" as: "got good sample @ work & having urges to use (& knowing that I will be the only one here after lunch)." She continued in the next entry:

"I know I should call Anna [Kogan, her therapist], but I don't want to. I can lie on my homework. I'm a bad person for having urges. I'm a bad person for not wanting to try to stop them. It doesn't matter -- I won't get caught."

She further wrote that her "head is running 100 m/h" and she "can't sit still." She described the urge: "Hurry up and prepare fuse (my mind says to get it out of way, but I don't think that will be the end of it). Give in and go with urge." The second Emotion Regulation worksheet contains

²¹The New England Patriots rarely have games on Saturdays. They played a game on Saturday, December 24, 2011. They did not play a game on any Saturday in December 2012 or December 2010.

notes that Farak will "call Anna to commit to not using" and that Farak had "12 urge-ful samples to analyze out of next 13." Another page in what appears to be Farak's handwriting reads at the top "Homework 11-16-11." On that page, Farak wrote that she would lie to her prescriber in order to not be taken off one of her medications.

The mental health worksheets were significant because they: (1) disclosed Farak's admission of drug use and theft of police-submitted samples while she was working at the lab; (2) supported inferences that Farak's misconduct occurred as early as 2011; and (3) revealed that Farak was receiving treatment for drug addiction and that her treatment providers likely would have more information about the scope of Farak's drug use and theft at the lab.

A thorough review of each piece of evidence seized was not feasible at the search warrant execution scene due to the condition of Farak's car, the number of items in the car, the early morning hour, and the search location. A closer review of the evidence is typically undertaken by the case officer following the search. I find that on January 19, 2013, the detectives did not have the opportunity to review carefully the mental health worksheets and did not then recognize their significance. After searching Farak's vehicle, detectives placed the evidence in boxes and transported the boxes to a secure evidence locker in the Springfield AGO.

G. The Arrest and Initial Arraignment of Farak

Later on Saturday, January 19, 2013, at 10:30 p.m., Farak was arrested and charged by criminal complaint with two counts of tampering with evidence, possession of cocaine and possession of heroin. That weekend, Kaczmarek was assigned to prosecute Farak.

On Monday, January 21, 2013, at 8:32 a.m., Bedrosian emailed Irwin, saying he wanted to speak with Kaczmarek, Calkins, and Verner about the Farak case. (Irwin 99-100). On

Tuesday, January 22, 2013, Kaczmarek appeared at Farak's initial arraignment in Eastern Hampshire District Court.

H. Vehicle Search Warrant Return and Police Report

On January 23, 2013, Trooper Randy Thomas filed the search warrant return, listing numerically the items found during the search of Farak's vehicle. Item one is described on the return as a manila envelope with letters and numbers containing an evidence bag and unknown papers. Item two is described as an envelope for Hanchett. Items four, five and eight are all described as "assorted lab paperwork." (Thomas 23). Farak's mental health worksheets were placed together in item four and were not identified in the search warrant return.

Thomas explained that the use of the label of "assorted lab paperwork" is "a common practice we use with search warrants when we have voluminous documents, to be able to secure that and get away from the scene, so that it can be reviewed more thoroughly later," and that "it looked to us at first look it was lab paperwork and that's why it was titled as such and it was secured." (Thomas 25). When asked by defense counsel, "when you write down 'assorted lab paperwork' on your search warrant return, you may not have ever seen what was seized, correct?" to which Thomas replied, "I probably did not go through it in detailed fashion before the warrant return was done, yes." (Thomas 25-26). Thomas acknowledged that search warrant returns also sometimes categorize seized documents as "personal papers," but stated that he personally did not recall seeing personal papers in the search of the vehicle. (Thomas 28-29). I credit Thomas' testimony that he identified the items on the search warrant return as "assorted lab paperwork" (numbered four, five and eight) because he did not look carefully at each of the papers and because they were inside lab folders, so he assumed that they were assorted lab paperwork.

On January 25, 2013, Thomas filed a police report on the execution of the vehicle search warrant certifying that it represented an accurate and detailed inventory of all the property taken from the car. Notwithstanding that representation, Thomas testified that he probably did not look at the evidence seized before finalizing that report. (Thomas 30). The police report, like the search warrant return, did not reference the mental health worksheets.

I. Searches for Evidence at Amherst Lab in Late January 2013

1. Search of Farak's Duffle Bag

On January 25, 2013, police executed the search of the duffle bag from Farak's work station and found substances that could be used to dilute or replace cocaine: a bar of soap with a razor blade, baking soda, candle wax, off-white flakes, and oven-baked clay. The bag also contained items commonly used in the drug trade, such as plastic lab dishes, a plastic bag containing a wax paper fold, and fragments of copper wire.

The duffle bag also held several laboratory "K-pack" lab evidence bags, one with the initials "RP" for Pontes and two (which had been cut open) with the initials "SF" for Farak. The various K-pack evidence bags were dated between December 16, 2012, to January 6, 2013. This evidence supported an inference that in December 2012 and/or January 2013, Farak had been tampering with evidence previously tested by and assigned to Pontes. As mentioned above, Farak had testified that in 2012, she began taking other chemists' samples, including a submission of cocaine assigned to and already tested by Pontes. Farak later replaced the cocaine with a counterfeit substance and put the sample into a bag pre-initialled by Pontes.

2. Inventory of Drug Evidence

On January 19, 2013, the MSP had conducted an inventory of all drug evidence at the Amherst lab and learned that four drug samples were missing. This was in contrast to the inventory completed four months earlier which revealed no missing samples. The discovery of four missing samples was the basis of Farak's indictments as discussed below.

3. Search of Farak's Workstation

On January 28, 2013, the MSP searched the lab and recovered a vial of white powder from the top of Farak's desk. The vial was tagged as "Item Number 56." (Exh. 14). It was analyzed and found to contain acetaminophen and oxycodone. (Exh. 6A). Investigators found a total of 11.7 grams of cocaine at Farak's desk. (Prosecution Memo p. 9).

J. The First Wave of Drug Lab Defendants' Motions

Farak's misconduct was discovered within a year of the Dookhan scandal. It was expected that, as in the Dookhan cases, a wave of defendants whose drug certificates were signed by Farak would soon file motions for discovery and post-conviction relief. By late January of 2013, that expectation became a reality. Superior Court Regional Administrative Justice C. Jeffrey Kinder was specially assigned to handle those motions, and Hampden County Assistant District Attorney Frank Flannery was placed in charge of responding to such motions on behalf of the Commonwealth. Because the AGO was prosecuting Farak, it had a duty to disclose to district attorneys' offices handling the drug lab cases all exculpatory evidence it gathered in the investigation and prosecution of Farak. Flannery and other ADAs across Massachusetts relied upon the AGO to fulfill its responsibility to provide them with Farak-related discovery which those ADAs in turn were required to provide to defendants potentially affected by Farak's

misconduct. That is what the AGO did in the Dookhan cases and what was expected in the Farak cases.

During the December 2016 evidentiary hearing before me, Kaczmarek, Mazzone, Calkins, and Verner all testified that they were aware that the drug lab defendants were entitled to receive all exculpatory evidence held by the AGO. Both Verner and Kaczmarek sent letters to district attorneys identifying some of the exculpatory evidence held by the AGO in the investigation of Farak. In his letters dated March 27, 2013, to district attorneys, Verner listed potentially exculpatory evidence found in the AGO's Farak investigation and Verner recognized in those letters that the AGO had an obligation to provide such evidence to district attorneys. (Verner 129, Exh, 165).

When Kaczmarek was asked whether she thought she had any obligation to turn over evidence to district attorneys handling Farak's cases, she first replied, "Yes. I suppose I had a certain obligation in the interest of, you know, public interest and this investigation." (Kaczmarek 190-191). When asked if she understood that it was her job to give the Hampden ADA the Farak discovery, she replied, "I don't know if I'd use the word 'obligation,' but we were providing information to the DA's offices, yes." (Kaczmarek 191). When asked who had the duty to turn over discovery to the drug lab defendants (through the district attorneys), Kaczmarek responded that it was the AGO, but "I don't think it was my specific obligation . . . I don't think that goes part and parcel with prosecuting Sonja Farak, but we were doing -- the Attorney General's Office was, and there was a breakdown." (Kaczmarek 192).

K. Initial Concerns About the Scope of Farak's Misconduct

A major question in the AGO from the time of the first suspicion of Farak's drug

tampering was the scope of her misconduct and how many drug lab convictions it may have undermined. The prosecution initially assumed that Farak's drug tampering was limited to the time period of the last half of 2012, and solely to cocaine, because police found cocaine in Farak's car. That assumption was at odds with the evidence uncovered even at that early juncture. By late January 2013, the evidence recovered by investigators from Farak's car, work station, duffle bag and the lab supported reasonable inferences that: (1) Farak was addicted to and had stolen from the lab cocaine, phentermine, oxycodone and possibly heroin; (2) her misconduct occurred as early as 2011; and (3) she may have tampered with samples assigned to Pontes and Hanchett, as she inexplicably had K-pack bags with their initials on them.

First, investigators found in Farak's car several documents which linked Farak's drug use to 2011. These included Farak's therapy "homework" dated November 16, 2011, and her mental health worksheets which, if considered with prior calendars and/or the 2011 NFL schedule found in her car, showed that she used drugs in December 2011.

In addition to investigators' discovery of cocaine, heroin, oxycodone and phentermine in conducting searches, the AGO had received information from prosecutors signalling that Farak's misconduct may not have been limited to cocaine in the four months before her arrest. On January 23, 2013, Ballou informed Kaczmarek, Verner, and Irwin that he had received a call from a Hampden County prosecutor about a Springfield drug case involving two samples tested by Farak in 2012. Ballou was told that one sample reportedly had signs of tampering and the other was returned after testing with fewer pills than were originally seized. Ballou wrote, "I'm inclined to go seize the evidence and take statements, but I'm also concerned that this may be the first of many such calls." Kaczmarek responded,

"I think this is the tip of the iceberg. . . . [Y]our idea of statements and seizing evidence is good. We might also want to start with Springfield PD to see if they can start an inventory of their drug evidence -- whether Farak was chemist or not."

Verner agreed, "I think we should look into it." Ballou replied that he would call the ADA and get more information, and Irwin wrote, "Agree. Joe make sure you document everything." Ballou wrote, "I'll get all of this in writing."

Ballou's investigation revealed that on March 16, 2012, Springfield narcotics officer Greg Bigda had seized 51 pills while executing a search warrant. After he counted them, and a second officer recounted them to confirm that there were 51 pills, Bigda identified them as oxycodone by referring to an online pill identifier. To his surprise, Farak had issued a certificate stating that the pills contained no illegal drugs, and when he retrieved them, there were 61 pills rather than 51, and that they were different in color and markings than the ones he had seized.

When informed of the pill discrepancy, Kaczmarek dismissively replied in an email to Ballou, "Please don't let this get more complicated than we thought. If she was suffering from back injury, maybe she took the oxies." (Exh. 231). When asked to explain that reply, Kaczmarek testified in December 2016 that she feared that if Farak's drug tampering turned out to be more complicated than they had thought, "an avalanche of work" would hit "us."

In contrast to what transpired with respect to Dookhan and the Hinton lab, which were the subject of broad investigations,²² no full fledged investigation into the scope of Farak's

²²The Commissioner of Public Health commenced a formal inquiry in the wake of the Dookhan scandal. In July of 2012, once the MSP took control of the Hinton lab, the officers assigned there asked the MSP detective unit of the AGO to launch a broader investigation into lab practices and Dookhan. In that investigation, Dookhan admitted to "dry labbing" for two to three years, contaminating samples intentionally, and deliberately violating lab protocols by removing samples from the evidence locker without following proper procedures, as well as post-dating evidence log book entries, falsifying another chemist's initials on reports intended to verify the proper functioning of the GC/MS. See *Commonwealth v. Scott*, 467 Mass. at 339-340. In the fall of 2012, the defense bar questioned the

misconduct began until long after her conviction. In January of 2013, Verner expressed interest in Ballou investigating the scope of Farak's misconduct. In contrast to Kaczmarek, nothing in the record suggests that Verner was then worried that a broader investigation would trigger an "avalanche of work" for his office. Verner's responsibilities as chief of the Criminal Bureau required him to delegate the Farak prosecution to Kaczmarek and trust that the appropriate investigations were being conducted. At some point during the prosecution of Farak, Verner viewed the Farak criminal investigation and prosecution as limited to "what was in front of us, the car, things that were readily apparent" and the "bigger investigation was going to be [by] somebody else." (Verner 205). Likewise, also at some unspecified point, Irwin told two other MSP captains that the directive from the AGO's Criminal Division was that the investigation into Farak was to focus on Farak's wrongdoings associated with her arrest. (Irwin 123).

Verner informed Major James Connolly, the head of MSP crime lab in Maynard, that the AGO was not doing a full investigation on the Amherst lab, that the district attorneys' offices needed their Farak drug samples to be retested at another lab, and that the AGO was not going to be involved with the results of those tests. The record is silent as to whether the Office of the

AGO's ability to perform an impartial investigation. In response, in November 2012, Governor Deval Patrick asked the OIG to perform a comprehensive investigation into the operation and management of the Hinton lab from 2002-2012 to determine if, apart from Dookan, any malfeasance had occurred and its impact on the reliability of drug analysis. In 2014, the OIG issued a 121 page report covering the first 15 months of its investigation, followed by a supplemental report issued in February 2016 concerning its review of over 15,000 drug samples tested at the Hinton lab and the retesting of 609 of those samples. The Supreme Judicial Court acknowledged that "although the full extent to Dookhan's misconduct may never be known, the investigation into her wrongdoing has had an enormous impact on the criminal justice system in Massachusetts." *Commonwealth v. Scott*, 467 Mass. 336, 341 (2014). By the spring of 2017, district attorneys agreed to drop charges against thousands of defendants, and a single justice of the Supreme Judicial Court ordered the dismissal of over 20,000 cases in connection with the Dookhan matter.

Inspector General conducted an investigation into Farak or the Amherst drug lab.²³ Kaczmarek improperly discouraged such an investigation. In February of 2013, Hampshire County Assistant District Attorney Jeremy Bucci was quoted in a local news report as saying that his office was waiting to hear whether the Amherst drug lab would be investigated by the OIG. On February 26, 2013, Kaczmarek sent an email to then Senior Counsel at OIG, Audrey Mark, a friend, who was leading the investigation at the Hinton lab. Kaczmarek attached the news report and wrote, "Audrey--when they ask you to do this audit - say no. Actually, it's very different than [the Hinton lab in Jamaica Plain]. A professional lab." (Kaczmarek 90). Mark replied, "Am I allowed to say no ????" and Kaczmarek then wrote, "I should have. It's pretty far."

L. Ballou Emailed Mental Health Worksheets to Kaczmarek, Verner and Irwin

Approximately a week or two after the search of Farak's car, Ballou, the now established "case officer" in the Farak investigation, started "going through each piece of paper and tr[ied] to review it in more detail." (Ballou 145). A few days before February 14, 2013, Ballou examined carefully all the evidence seized from Farak's vehicle and realized that the mental health worksheets constituted evidence of Farak's admissions and, therefore, that they carried considerable evidentiary significance. (Ballou 12/13/2016, 208-209). As he was in the process of making that discovery, he telephoned Kaczmarek. He was uncertain whether they spoke that day or the next, but when they did speak, he described for her the mental health worksheets.

Significantly, on February 14th at 3:31 p.m., Ballou emailed scanned copies of some of

²³In 2016, drug lab defendants served a summons upon former OIG Senior Counsel Audrey Mark to appear and testify during the evidentiary hearing on what role, if any, the OIG played in the Farak investigation. The OIG successfully moved to quash that summons in reliance upon 945 Code Mass. Regs. § 1.04(2)(b), which broadly mandates that "Complaints, information or referrals received, including the identity of the complainant or informant or referral source, are records of the [OIG] . . . and shall be kept confidential unless disclosure is deemed necessary in the performance of the duties of the Office."

the mental health worksheets to Kaczmarek, Verner and Irwin. (Exh. 205; Irwin 154).²⁴ At that point, the mental health worksheets became not only physical evidence stored at the Springfield AGO, but documentary copies in the email accounts of Ballou, Kaczmarek, Verner and Irwin. The emailed copies of the mental health worksheets then became parts of their files.

Ballou did not send all of the mental health worksheets, but sent only those which he believed were the most important and potentially inculpatory or relevant to the Farak case which Kaczmarek needed to see. (Ballou 12/14/16 19). Ballou also sent in the same email copies of some of the news articles found in Farak's car and printed out in 2011. The subject line of Ballou's email reads "Farak Admissions." In the body of the email, Ballou wrote, "Here are the forms of the admissions of drug use that I was talking about." It was clear that such evidence constituted important exculpatory evidence for drug lab defendants and that such evidence supported a finding that the scope of Farak's misconduct warranted further investigation.

M. Prosecution Memorandum for Presentation to Grand Jury; Verner's First Distribution to District Attorneys Regarding Potentially Exculpatory Information (March 2013)

In late March of 2013, after reviewing the evidence against Farak and in preparation for the presentation to the grand jury, Kaczmarek drafted the prosecution memorandum (prosecution memo) and submitted it to Mazzone for his review and approval. Mazzone was aware that Kaczmarek had worked on that document with Verner. (Mazzone 53).

The prosecution memo lists among the "items of note" recovered from Farak's vehicle

²⁴Kaczmarek had known about at least one of the mental health worksheets before Ballou sent her the afternoon email. At 10:44 a.m. on February 14th, Kaczmarek sent an email to MSP chemist Nancy Brooks asking what the initials "TB" mean regarding drugs and possibly a chemist's abbreviation. Kaczmarek told Brooks that she had seen those initials on some of Farak's notes. One of the mental health worksheets is a chart in which Farak wrote the pros and cons of resisting and "TB." (Kaczmarek 103-105).

"mental health worksheets describing how Farak feels when she uses illegal substances and the temptation of working with urgeful samples." (Exh. 163). In a footnote to that list, the prosecution memo states, "These worksheets were not submitted to the grand jury out of an abundance of caution, in order to protect possibly privileged information. Case law suggests, however, that the paperwork is not privileged." (Exh. 163).

Mazzone did not see the mental health worksheets, but discussed them with Kaczmarek and recognized that (1) even if they were HIPPA-protected, they could be presented to the grand jury under an exception, but (2) they were not relevant or necessary to the presentation of the crimes for which Farak was charged. (Mazzone 54). Mazzone reviewed the prosecution memo, approved it on March 27, 2013, and sent it to his superior, Verner, for his review and approval. (Mazzone 53).

Verner and Kazcmarek discussed the potential problems of presenting to the grand jury evidence of Farak's admissions in the mental health worksheets. (Verner 167). The prosecution memo contains a notation by Verner regarding the mental health worksheets as follows: "Paperwork not turned over to DA's Office yet." (Verner 169; Mazzone 57). Verner's notation supports an inference that he expected that the mental health worksheets would be turned over to the district attorneys.²⁵

At that time, the extent of Farak's drug tampering remained an unanswered question, as can be inferred by the conclusion of the prosecution memo:

²⁵On March 27, 2013, Verner emailed Bedrosian and Calkins to say that he wanted to meet with them in an hour to discuss the prosecution memo, as Kaczmarek hoped to get indictments against Farak the following Monday. Calkins did not sign the prosecution memo, but she acknowledged that she was the last person to review and approve of it. (Calkins 141, 147, 159).

"We are also hoping that the defendant, once indicted, will detail how long she has been abusing drugs and how many cases are affected. Farak would expect some consideration in sentencing for that information."

(Exh. 163).

Also on March 27, 2013, the same day that Verner noted on the prosecution memo that the mental health worksheets had not yet been turned over to the district attorneys, he sent a letter to all eleven district attorneys in the Commonwealth informing them that in its investigation of Farak, the AGO had acquired potentially exculpatory information and materials which it was obligated to provide to the district attorneys and that the AGO was meeting that obligation.

(Verner 111). That letter reads as follows:

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

(Exhs. 165 & 260; Verner 160-161). The 16 items listed in Verner's letter refer to reports by Ballou and Thomas, transcripts of interviews of Amherst lab chemists, an evidence report form, evidence recovery log with photos, a 13 page evidence log, and other reports. There was no reference to the mental health worksheets. Kaczmarek also sent district attorneys a similar communication in the Farak case, but omitted the mental health worksheets.

In late March of 2013, Kaczmarek, Mazzone, Verner and Calkins all knew that the mental health worksheets containing Farak's drug admissions would not be presented to the grand jury

and had not been turned over to the district attorneys. Although the AGO had reason not to present the evidence to the grand jury, there was no explanation as to why it had not been turned over to district attorneys on March 27, 2013.

Thus, by the end of March 2013, the mental health worksheets had been: (1) identified within the AGO as significant and exculpatory; (2) the sole subject of Ballou's February 14, 2013 email; (3) sent by Ballou via email to Kaczmarek, Verner, and Irwin, and thus became a part of their files; (4) intentionally excluded from presentation to the grand jury; (5) expressly identified in the prosecution memo with Verner's handwritten notation that, "This paperwork not turned over to DA's offices yet"; and (6) not turned over to district attorneys' offices across the Commonwealth.

N. Farak's Indictment and Second Arraignment (April 2013)

On April 1, 2013, a Statewide Grand Jury indicted Farak on charges of evidence tampering, theft of a controlled substance, and unlawful possession of cocaine. Whereas Farak had originally been charged by criminal complaint with two counts of tampering with evidence and possession of heroin and cocaine, her indictment was on four counts of tampering with evidence, four counts of stealing cocaine from the lab, and two counts of unlawful possession of cocaine. *Commonwealth v. Ware*, 471 Mass. 85, 88 (2015).²⁶ The indictments were transferred to Hampshire County Superior Court, where Farak was arraigned on April 22, 2013. Kaczmarek appeared for the AGO and Attorney Elaine Pourinski appeared for Farak.

²⁶ At some point while Superior Court proceedings were underway with respect to these indictments, four additional cases surfaced in which it seemed, based on retesting, that Farak had stolen and tampered with police-submitted cocaine samples between June 15, 2012, and October 10, 2012. *Commonwealth v. Ware*, 471 Mass. at 88. Farak was not charged with respect to those four additional cases. *Id.* at 88-89.

O. Kaczmarek Told Pourinski That Mental Health Worksheets Would Not Be Given to Drug Lab Defendants

On April 22, 2013, Pourinski received from Kaczmarek a certificate of discovery and discovery materials on CDs, including the mental health worksheets in which Farak admitted to using drugs. Subsequently, most likely in the summer of 2013, Kaczmarek informed Pourinski at the Hampshire Superior Court that the AGO considered the mental health worksheets to be privileged and that the AGO was not going to turn them over to the drug lab defendants. (Pourinski 21-22).²⁷

I find that by the summer of 2013, Kaczmarek had determined that the AGO was not going to give the mental health worksheets to the drug lab defendants. Kaczmarek was accorded significant deference in leading the Farak prosecution. She had the trust of her superiors and she circumscribed the scope of Ballou's investigation into Farak's misconduct. As explained below, Kaczmarek's view and statements largely controlled the AGO's responses to the drug lab defendants' discovery motions insofar as that discovery would have led to the mental health worksheets.

P. Drug Lab Defendants' Discovery Motions And Scheduling of Consolidated Evidentiary Hearing

While Farak's prosecution was pending, drug lab defendants whose certificates of analysis had been signed by Farak filed motions for post-conviction relief and discovery. One of those defendants, Penate, had not yet been tried and had moved for discovery. On May 14, 2013,

²⁷Pourinski could not recall the exact date of this exchange, but testified that it occurred in the Northampton courthouse just after 2 p.m. while waiting for a conference, not the plea hearing. (Pourinski 36). The docket sheet in Farak's case, HSCR13-00061, discloses that, apart from the arraignment and plea change hearing, court events occurred only on June 24, 2013, for a hearing on discovery motions, on August 26, 2013, for a pre-trial hearing, and on December 23, 2013, on a motion to revoke bail.

Penate moved to compel discovery of items relating to Farak's arrest and prosecution. The discovery was not forthcoming. On July 15, 2013, Penate moved to dismiss most of the indictments against him based in part upon the government's noncompliance with its obligation to turn over evidence requested by the defense. On July 22, 2013, Judge Mary-Lou Rup heard that motion, determined that in order to rule upon it, an evidentiary hearing was necessary regarding the scope of Farak's misconduct, and she reminded the Hampden District Attorney's office of its

"obligation to seek [evidence] from government agencies (including the Office of the Attorney General) and to produce exculpatory evidence that may be favorable to this defendant's case, and not simply turn a blind eye to what is not in its immediate control."

At that point, neither the drug lab defendants, the district attorneys, nor Judge Rup knew that the AGO possessed the mental health worksheets but had not turned them over to the district attorneys.

On July 25, 2013, Judge Kinder consolidated 16 unrelated post-conviction Farak cases involving 15 defendants²⁸ for an evidentiary hearing to be conducted on September 9, October 7, and October 23, 2013. Judge Kinder limited the hearing to: (1) the timing and scope of Farak's misconduct; (2) the timing and scope of the negative findings in the MSP's October 2012 quality assurance audit of the Amherst lab; and (3) how the alleged criminal conduct and audit findings might have impacted the drug testing in the drug lab defendants' cases.

Judge Kinder designated as lead counsel for the defendants Attorneys Luke Ryan and

²⁸The cases consolidated for purposes of that evidentiary hearing were those of Jose Garcia (0679CR0064), Erick Cotto (0779CR0770), Jermaine Watt (0979CR1068 & 0979CR1069), Alfred Andrews (1079CR1060), Rafael Rodriguez (1079CR1181), Emilio Martinez (1079CR1220), Omar Harris (1079CR1233), Hector Vargas (1179CR0290), Deon Charles (1179CR0461), Marie Vargas (1179CR0801), William Guzman (1279CR00055), Jorge Diaz (1279CR0365), Kathleen Carter (1079CR0115), Jose Torres (1079CR0554), and Nathan Berube (1179CR0355).

Jared Olanoff. The Commonwealth and Penate, then in pre-trial proceedings, agreed that the evidence to be taken in the consolidated evidentiary hearing would be used to resolve Penate's motion to dismiss, upon which Judge Kinder conducted an additional hearing on October 2, 2013.

Q. Drug Lab Discovery (August through October 2013)

In August through October of 2013, the drug lab defendants sought discovery through multiple avenues, including: (1) subpoenas duces tecum served on Ballou (in Penate and Watt cases); (2) a subpoena duces tecum served on Kaczmarek (in the Penate case); (3) a motion by Penate and Rodriguez to inspect the evidence seized from Farak's car; (4) a motion by Penate to compel the AGO to produce, *inter alia*, inter and intra-office correspondence relating to the scope of Farak's misconduct; and (5) Rodriguez's motion for discovery of evidence that a third party had knowledge of Farak's alleged malfeasance prior to her arrest.²⁹

1. Subpoenas Duces Tecum to Ballou

On August 22, 2013, Ballou and Kaczmarek received subpoenas duces tecum in the Penate case. The subpoenas commanded the production of "Copies of any and all inter-office correspondence pertaining to the scope of evidence tampering and/or deficiencies at the Amherst Drug Laboratory from January 18, 2013, to the present." (Exhs. 198, 199).

In late August of 2013, Ballou also received a subpoena in the Watt case (0979CR1068) summoning him to appear and testify at the evidentiary hearing beginning on September 9th,

²⁹Although Rodriguez is deceased and the Commonwealth no longer opposes the dismissal of the Watt case, at issue is whether the AGO's response to discovery requests in 2013 were part of a pattern of conduct to shield the mental health worksheets from the drug lab defendants. Therefore, the discovery proceedings in the Rodriguez and Watt cases are pertinent.

and to bring with him "all documents and photographs pertaining to the investigation of Sonja J. Farak and the Amherst Drug Laboratory." (Exh. 183). That subpoena had the force of a court order to Ballou to bring to court on September 9th all documents pertaining to the Farak investigation. Among the documents responsive to the subpoenas to Ballou and Kaczmarek were copies of the mental health worksheets as scanned and sent by Ballou in his email dated February 14, 2013, which email and attachments became a part of Ballou's and Kaczmarek's files.

Verner and Ravitz, with agreement by Reardon, assigned AAG Kris Foster the job of preparing and filing motions to quash the subpoenas and arguing motions before Judge Kinder on September 9, 2013. (Ravitz 13; Foster 13-14; Reardon 211). Foster had just begun her employment with the AGO in July of 2013 after working as an ADA for several years.³⁰ In late August 2013, Ravitz met with Foster to go through the steps of preparing motions to quash. Ravitz does not recall telling Foster to review the files. (Ravitz 50-51).

The fundamental first step in preparing a motion to quash, after reading the subpoena, is to examine the materials sought. Foster should have collected the files from Ballou and Kaczmarek, reviewed their contents, and either asked Ballou and Kaczmarek to find responsive documents in their emails or she ought to have asked the IT department to check electronically stored information (ESI) to see what evidence responsive to the subpoenas existed. (Reardon 177). Had Foster reviewed either of their files or the physical evidence or had she arranged for IT to check Ballou's and Kaczmarek's ESI, Foster would have seen the mental health worksheets.

(a) AGO Communications Regarding Ballou Subpoenas

The Ballou subpoenas prompted a flurry of emails and meetings in the AGO before and

³⁰Foster left the AGO in February of 2015.

after the September 9th hearing. On Tuesday, September 3, 2013, at 8:42 a.m., Kaczmarek emailed Ravitz and Reardon, and copied Verner, informing them that, "This is the subpoena we were expecting." Minutes later, Kaczmarek continued,

"[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, and I am confident that Ballou will be pretty unhelpful in what the judge is trying to do, do we just let Ballou go?"

An hour later, Ravitz emailed Irwin, Mazzone, Reardon, and Meghan Scafati, Verner's administrative assistant, to set up a meeting regarding the subpoena to Ballou. Ravitz wrote, "One thing we can talk about is that sometimes, even if we can't quash the subpoena, we will get its scope limited, so as to preclude certain types of questions." (Irwin 131).

(b) Foster Was Told That She Did Not Need to See Ballou File

On September 3, 2013, Foster met with her superiors regarding the Ballou subpoena. (Foster 43-44). This was the first in a series of five to fifteen minute meetings in Verner's office about the Farak discovery. When asked about that meeting, Foster testified,

"I don't remember much more other than being told I didn't need to see the file, that there was nothing in it. This was before the September 9th hearing, but I don't remember what the date was. [I remember] being told that everything had been turned over, there's no need to see the trial file. It was an ongoing prosecution so I should just go with that."

(Foster 87). Foster took this to mean that she should "take them for their word that everything had been turned over. They were my superiors, so that's what I did." (Foster 87-88). Although Foster did not say that Kaczmarek attended that meeting, Foster testified that at some point, "Kaczmarek told me that those documents, she didn't want turned over, she didn't want produced, they'd already --everything had been produced." (Foster 16). Kaczmarek testified that when Ballou received his subpoena duces tecum, "at that time I don't know if I even realized that those

worksheets hadn't been turned over." (Kaczmarek 182-183). She contradicted herself, however, as she also testified that she would not have told Foster in September 2013 that everything in her file had already been disclosed because "I think that I knew the mental health records hadn't been disclosed up until that point." (Kaczmarek 133). I find that Kaczmarek intentionally gave Foster, Reardon, at least one ADA, and likely her supervisors, the misimpression that everything in Ballou's file had been turned over to the District Attorneys' Offices³¹ Kaczmarek was accorded and exerted significant control over the Farak matters, including discovery, the scope of the AGO's investigation, and the prosecution of Farak.

Foster never reviewed the evidence sought under any of the subpoenas or discovery motions in the Farak matter. There is no merit to her excuse that she made no independent decisions about this case because the AGO protocol gave line AAGs like herself very little discretion. (Foster 91-92). Foster chose to follow instructions and information received from Kaczmarek while ignoring established protocol, common sense, and, as explained below, subsequent unambiguous directives from her superior, Reardon, and more importantly court orders from Judge Kinder.

(c) Foster's Preparation of Motions to Quash

³¹On October 2, 2013, Berkshire ADA John Bosse opposed drug lab defendants' discovery requests on the grounds that Kaczmarek had told him that the AGO had provided the Berkshire District Attorney's Office all relevant discovery from the Farak investigation. Bosse told defense counsel:

"On September 4, 2013, AAG Anne Kaczmarek informed me that all relevant discovery from the Farak prosecution has been provided to the Berkshire District Attorney's Office. Thus, the Commonwealth would object to the additional discovery inquiries on the grounds that the AAG has released all relevant discovery in the Farak prosecution."

(Exh. 179). I find that Kaczmarek made those misrepresentations to ADA Bosse just as she had made them to Foster and Reardon.

From September 3rd to 6th, 2013, Foster prepared the motion to quash the Ballou subpoena in the Watt case. To guide her, Ravitz gave Foster a sample motion which sought relief from the obligation to produce information concerning the psychological treatment of individuals. Foster incorporated that language in the final, filed version of the motion to quash. In another case, Foster copied the same language in a draft but Ravitz instructed her to delete it because it was irrelevant and to tailor her arguments to the types of information claimed to be protected. (Foster 50-51).

Foster's draft motion to quash Watt's subpoena to Ballou argued that the documents and information sought were privileged because there was an ongoing investigation and/or because the documents were protected work product. Alternatively, the motion drafted by Foster sought a protective order to restrict the scope of the subpoena by not requiring the AGO to produce seven types of information, including "emails responsive to the subpoena, but not already contained in the case file specifically listed therein" and "information concerning the health or medical or psychological treatment of individuals." Foster later used this exact language in drafts approved by Ravitz in several memoranda aimed at limiting discovery in the Penate case.³² This wording and these grounds were not inadvertent but deliberately intended to relieve the AGO from having to produce the mental health worksheets.

Foster had no reasonable basis to believe that any of these arguments had merit. She had not seen the evidence and was therefore unable to determine what it was and whether the drug lab defendants already had obtained what they were requesting. The second basis, that the

³²Those writings asked the court to quash summonses on Ballou and Kaczmarek (two each) and sought clarification of Judge Kinder's October 2, 2013, order.

documents were privileged, was questioned even by Kaczmarek in the prosecution memo, and in any event could not have been evaluated by Foster without her having seen the evidence.

Equally untenable was Foster's third argument for quashing the subpoena. When pressed to explain during the December 2016 evidentiary hearing why an ongoing investigation constituted grounds for quashing the subpoena, Foster's illogical response had nothing to do with any investigation, but instead was that Kaczmarek did not want the documents to be produced and that they had already been turned over. (Foster 16).

On September 5th, Foster asked Reardon to review her draft motion to quash. Reardon testified that she learned from reading that draft that the AGO possessed psychological or medical documents which it sought to shield from discovery by claiming that they were protected by a privilege against disclosing information related to psychological or medical treatment. Reardon never saw the mental health work sheets. (Reardon 175-176). I find Reardon credible and credit her testimony.

Reardon returned Foster's draft with instructions that she review the Ballou file pertinent to the Farak matter and obtain more information about what had been turned over already to the drug lab defendants. Where the draft represented that nearly all of the documents responsive to the subpoena would constitute CORI, Reardon asked Foster if that were true. Reardon noted that she would be more comfortable knowing what documents were at issue and what had been turned over before raising the CORI privilege. Reardon urged Foster to confirm the accuracy and truth of her representations about the contents of the documents at issue. (Foster 49). When Reardon asked Foster if she had reviewed the Ballou files, Foster falsely responded that she had done so. (Reardon 178, 210).

(d) Evidentiary Hearing on September 9, 2013

At the September 9th hearing, Judge Kinder denied the AGO's motion to quash the Ballou subpoena in the Watt case insofar as it related to Ballou's testimony at the evidentiary hearing. Judge Kinder then heard Foster's request for a protective order that the AGO not be required to produce all of Ballou's file, which, stunningly, neither Ballou nor Foster had brought to the hearing.

Judge Kinder: "My first question is, have you actually personally reviewed the file to determine that there are categories of documents in the file that fit the description of those that you wish to be protected?"

Foster: "I have been talking with AAG Kaczmarek who has been doing the investigation for the Attorney General's Office. She has indicated that several documents, emails, correspondence, would be protected under work product mostly."

Judge Kinder: "But you don't know, having never even looked at the file, what those documents are?"

Foster: "I -- correct."

Judge Kinder: "There are seven subcategories, documents you wish to have protected. . . ."

....

Judge Kinder: "First of all, can I ask you whether or not the file is present?"

Foster: "I don't believe it is."

Judge Kinder: "It has been subpoenaed. 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. What I'm going to do with respect to your request for a protective order is ask you to submit to me copies of all of these documents that you believe fit into one of these categories that should be protected. I will review it *in camera*, and make a determination, after hearing from you, both, all, if necessary, whether or not it needs to be protected further. But I must say I am a little bit disturbed that a court order for the production of a file has not been produced absent a determination by me as to whether it should or should not be produced."

(Exh. 80 9/9/13 hrg. pp 15- 19).

Ballou took the stand during the September 9th hearing and was questioned by Ryan.

Ryan: "Have you had any role to play in deciding what documentation is provided to the defendants in this case?"

Ballou: "No, I've --everything in my case file has been turned over."

Ryan: "And to your knowledge, [has] everything in Ms. Kaczmarek's case file been turned over?"

Judge Kinder: "You're asking this witness whether something in Ms. Kaczmarek's case file has been turned over?"

Atty. Ryan: "I'm just trying to find out what we have and don't have. And if he knows that she's maintaining a file that reflects the investigation that he just referenced by Major Connolly."

Judge Kinder: "If, for some reason you know the answer to that question, you may answer it."

Ballou: "I believe everything pertaining to the Farak investigation has been turned over. I am not aware of anything else."

(Exh. 80, Trans. of Hrg. 9/9/13, 150-151).

During the December 2016 evidentiary hearing, Ballou was asked about his 2013 testimony that everything in his file had been turned over. In 2016, Ballou said that what he meant was that he had turned over everything in his case file to Kaczmarek. (Ballou 167, 202). I credit Ballou's testimony in this regard.

After the last witness had testified on September 9th, Foster asked Judge Kinder about his earlier order that she produce documents for his *in camera* review.

Judge Kinder: "And I'm assuming, Ms. Foster, I'm going to give you a deadline to comply with whatever other discovery obligations you have. You had referred specifically to something that you wanted additional time for. What was that?"

Foster: "You had mentioned that you wanted to see all documents that the Attorney

General believed would be confidential or privileged and you would review them *in camera*. And I was just wondering the scope of that, if that's --"

Judge Kinder: "Well, obviously, I don't want to see what's already been turned over."

Foster: "Correct."

Judge Kinder: "And I don't want to see anything that you've agreed should be turned over."

Foster: "But as to those documents that you believe are somehow privileged or otherwise not discoverable, and I understand many of them you are saying you don't have, so I had assumed, based on what you told me earlier, that we were talking about a fairly narrow universe of documents where you had -- you on behalf of the Commonwealth, and the Attorney General had an objection to turning over those documents."

Foster: "It's -- that's correct. It's just language of the subpoena was for all documents and photographs for the whole investigation, so I was wondering since the subpoena was for Sergeant Ballou, the documents he has or the documents the Attorney General's Office has?"

Judge Kinder: "The subpoena duces tecum, as I understood it, went to Sergeant Ballou and that was the subpoena that you sought to quash."

Foster: "Correct."

Judge Kinder: "So that's what we are talking about."

(Exh. 80 & Foster 244).

(e) AGO's Follow-Up To Judge Kinder's Order for *In Camera* Review

On September 10, 2013, at 9:43 a.m., Foster emailed Verner, Kaczmarek, Mazzone, Ravitz and Reardon to report on the prior day's hearing.

"So at yesterday's hearing, my motion to quash was flat out rejected Judge Kinder has given us until September 18 to go through Sergeant Ballou's file and anything in it we think is privileged [and] shouldn't be disclosed. We have to give it to Judge Kinder to review *in camera*. Sergeant Ballou only testified to what was in the grand jury, what he found in Farak's car, work station, etc. Judge Kinder did not allow any kind of questioning anywhere near anything privileged."

(Exh 20, Reardon 179-180).

Three minutes after Foster sent that email, Verner wrote to the group and asked Kaczmarek, "Can you get a sense from [Ballou] what is in his file, emails, etc.?" Kaczmarek replied, "[Ballou] has all reports and reports generated in the case, . . . copies of the paperwork seized from her car regarding news articles and her mental health worksheets."

Verner asked Foster in an email chain on September 10, 2013, "did the judge say his file or did he indicate [that Ballou] had to search his emails, etc.?" Both of Verner's questions in this thread -- one to Kaczmarek and the other to Foster--specifically asked about Ballou's emails. At that point, the mental health worksheets were both within Ballou's emails and in his file, as the file included Ballou's scanned and emailed copies of the mental health worksheets.

At some point between September 10th and September 16th, one or more meetings were held in Verner's office to discuss the September 9th hearing and Judge Kinder's order to produce all purportedly privileged documents sought pursuant to the Ballou subpoena. At the first meeting after the September 9th hearing were Verner, Ravitz, Mazzone, Kaczmarek and Reardon. (Reardon 212). Reardon did not name Foster as an attendee. Reardon testified that in that meeting,

"I believe we were asking [Kaczmarek] about what was in Sergeant Ballou's file, and whether she knew what had already been turned over from that file. And I believe my memory is that [Kaczmarek] thought that everything in his file, I think, had been turned over."

(Reardon 213). During that meeting, Kazcmarek deliberately misled Verner, Ravitz, Mazzone, and Reardon into believing that everything in Ballou's file, including the mental health worksheets, had been turned over to Flannery. According to Reardon, it was discussed at that

meeting or at a subsequent meeting that the response to be given to Judge Kinder would be the sentence, or something close to it, that, "After reviewing Sergeant Ballou's file, every document in his possession has already been disclosed." (Reardon 213).

On September 16, 2013, Foster responded to Judge Kinder with a letter which reads as follows:

"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 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 your [sic] require anything further.

Sincerely,
Kris C. Foster
Assistant Attorney General"

(Exh. 193). At the December 2016 hearing, Foster conceded that the wording of this letter was intentionally vague. (Foster 94). She testified that the letter "doesn't say I reviewed the file. It says, '*after reviewing.*'" (Emphasis added). Incredulously, Foster testified that she did not want to misrepresent that she had personally reviewed the file and she had no idea who had reviewed it. (Foster 20, 92. 94). This letter was intended to, and did, give Judge Kinder the false impression that Foster had personally reviewed Ballou's file. Foster testified that she wrote this letter because, in part, "Kaczmarek, in an email said that she believed everything had been turned over." (Foster 20).³³ The docket sheet in the Watt case shows that after Judge Kinder received Foster's letter dated September 16, 2013, no further action was taken as to the protective order.

³³The record contains no email by Kaczmarek representing that she believed that everything had been turned over.

During the October 2, 2013, hearing in the Penate case, Judge Kinder asked Foster follow up questions about that her September 16th letter.

Judge Kinder: "For example, you have filed -- Ms. Foster, if you could stand, please -- a motion to quash the subpoena issued to Sergeant Ballou, which appears to be identical to the one you previously filed expressing concern about the contents of Mr. Ballou's file, only to disclose to me that you hadn't reviewed the file; and then when I asked you to submit to me those parts of the file that you were objecting to producing, I received a letter from you saying that, in fact, the entire file had already been produced."

Foster: "It has, Your Honor. I mostly filed this motion to quash because there is this outstanding subpoena for Sergeant Ballou to testify."

Judge Kinder: "Do you agree that the motion is identical to the one you filed in the other case?"

Foster: "I believe it is, yes."

Judge Kinder: "And you, therefore agree that all of the contents of Mr. Ballou's file have already been turned over?"

Foster: "They have, Your Honor."

(Trx. Hrg. 10/2/13 p 8).

2. Penate and Rodriguez Motions to Inspect Evidence

In late August 2013, Ryan asked Foster if he could inspect the evidence seized in the Farak investigation. Foster consulted Kaczmarek, who shot down the idea. On August 30, Foster replied to Ryan that "because of the ongoing investigation, I cannot give you access to the main evidence room."

On September 3, 2013, Ballou emailed Irwin and Kaczmarek that ADA Flannery wanted Ballou to schedule a day that week for Ryan to review the Farak evidence before the September 9th hearing. (Irwin 132). Flannery had agreed to arrange for Ryan to view the evidence seized

from Farak's vehicle. Kaczmarek responded, "No. This is still an open criminal case. I do not want defense attorneys going through evidence on a fishing expedition." (Irwin 133). Irwin replied, "Agreed."

At the end of the hearing on September 9th, Ryan asked Judge Kinder for an order granting him access to the evidence seized from Farak's car. Ryan informed Judge Kinder that Flannery had attempted to facilitate such an inspection but the AGO opposed it. Judge Kinder instructed Ryan and the AGO to work something out and that if that were unsuccessful, Ryan could file a motion.

On September 11, Ryan emailed Foster asking if there had been any decision as to whether he would be permitted to view the evidence seized from Farak's car. (Exh. 211, Foster 66). Foster responded by asking whether Ryan wanted to view evidence seized from Farak's car or to have access to the evidence locker. (Foster 66). Ryan replied on September 12th that he wanted to inspect the evidence seized from the car and from Farak's drawer and the white bucket at the lab. (Foster 67). When no response came, on September 16, 2013, Ryan emailed Foster again to ask if the AGO had determined what its position would be with respect to his request to see the evidence. Foster forwarded Ryan's email to Kaczmarek for her response with the comment, "Thoughts?" Kaczmarek replied, "No. Why is that evidence relevant to his case? I really don't like him." (Exh. 215). Kaczmarek had already determined that the mental health worksheets would not be turned over to the drug lab defendants. On September 17, Foster responded to Ryan, "Our position is that viewing the seized evidence is irrelevant to any case other than Farak's." (Foster 67; Exh. 214).

Ryan then filed a written motion to inspect physical evidence. Judge Kinder heard it on

October 2, 2013, and asked Foster, "As a practical matter, if Mr. Ryan were to show up with his investigator and simply say, I would like an opportunity to physically view, without physically handling the exhibits, what is the prejudice to the Commonwealth?" Foster answered,

"I think the problem is that this is just irrelevant evidence. I think the prejudice would be the fact that every single defendant who has ever had an Amherst case will all of a sudden be asking for access to the lab [sic] to look at, essentially irrelevant evidence."

That assertion, which originated with Kaczmarek, was patently false. Kaczmarek knew that the mental health worksheets were relevant to the Penate case. As early as February 14, 2013, some seven months earlier, Ballou had alerted Kaczmarek to Farak's "admissions" contained in the mental health worksheets. Foster had not seen the evidence and therefore had no basis upon which to tell Judge Kinder that it was irrelevant. At that point, Foster and Kaczmarek piled misrepresentation upon misrepresentation to shield the mental health worksheets from disclosure to the drug lab defendants.

On October 2, 2013, Judge Kinder denied the motion to inspect on the margin, writing

"I'm not persuaded that Rule 17(a)(2) permits a third party to inspect evidence held in a pending criminal case, particularly under the circumstances of this case where the physical evidence has been described in detail for the defendant and photographs of that evidence have been provided."

(Exh. 217). Judge Kinder's ruling was based in part on Ballou's testimony on September 9, 2013, as set out above, which left the impression that the photographs taken during the execution of the warrant to search Farak's car had documented all of the evidence. None of those 71 photographs included images of the mental health worksheets or of hundreds of other papers received from Farak's car. Further, the evidence had not been "described in detail for the defendant." In fact, it had been hidden from the defendant and Judge Kinder.

3. Penate's Motion to Compel

On September 6, 2013, Penate moved pursuant to Mass. R. Crim. P. 17(a)(2) for the AGO to produce 11 categories of documentary evidence in connection with Penate's motion to dismiss or, alternatively, for Penate's use in his then upcoming trial. The AGO opposed, *inter alia*, the motion insofar as it sought "copies of all inter and intra-office correspondence from 1/18/13 to present pertaining to the scope of evidence tampering and/or deficiencies at the Amherst drug lab."

Ravitz assigned Foster the job of drafting the opposition and arguing it at the October 2nd hearing. (Ravitz 10, 13). On September 18, 2013, Ravitz reviewed and made written comments on Foster's draft opposition. (Ravitz 11). One of the grounds asserted in it was that the correspondence sought was protected by the work product doctrine. Neither Foster nor Ravitz ever examined the AGO's correspondence to determine whether any of it was, in fact, work product. Ravitz claims that he thought that Foster would have done that review. (Ravitz 24).

At the October 2, 2013, hearing, Judge Kinder asked Foster about the opposition.

Foster: "I think that a lot of what is going to, almost all of that is going to be work product preparation."

Judge Kinder: "Let me ask you 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?"

Foster: "I haven't, Your Honor. The office has not compiled every email that mentions the word 'Farak' in it from this time period that he's requesting."

Judge Kinder: "All right. Have you looked at any of the correspondence or other documents that would arguably qualify in these paragraphs?"

Foster: "I have talked to Assistant Attorney General Anne Kaczmarek and she says the correspondence, which would pretty much all be in email form,

would be work product, or part of the ongoing investigation."

Judge Kinder: "And other than talking to Ms. Kaczmarek, have you actually looked at any of the emails?"

Foster: "I have not, Your Honor. I know the office has not gathered them in one database."

Judge Kinder next asked if anybody had even looked at the correspondence, to which Foster replied, "Not that I know of."

Judge Kinder: "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?"

Foster: "I know the lead investigators and the 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."

Judge Kinder: "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 rather than making bold pronouncements about them being privileged or the content of them."

Foster then told Judge Kinder that Kaczmarek and Ballou had assured her that "there's no smoking gun." (Exh. 216, 10/2/13, Foster 36).

On October 2, 2013, Judge Kinder allowed Penate's motion to compel the production of the correspondence sought. The AGO responded with a 27 page motion captioned as one for clarification, but essentially requesting Judge Kinder to reconsider his order on the grounds that Penate had not shown entitlement under Mass. R. Crim. P. 17(a)(2) to privileged materials. The motion asked Judge Kinder to "clarify" his order as follows: that correspondence does not include work product which is privileged, or confidential investigative information, material related to an ongoing prosecution, or information that should be obtained directly from the

district attorney's office.

Foster drafted the motion for clarification and Ravitz added a footnote asserting, "It is appropriate for this Court to accept the AGO's representation as to the existence of work product within its materials." (Ravitz 12/15/16, 23). On October 23, 2013, Judge Kinder issued an order relieving the AGO of the obligation to produce the internal correspondence sought. (Exh. 188).

4. Rodriguez' Motion to Compel Production of Evidence Suggesting That a Third Party Knew of Farak's Malfeasance Prior to Her Arrest

In late August 2013, Rodriguez moved for post-conviction discovery under Mass. R. Crim. P. 30(c)(4) asking the AGO to produce, among other things, "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." Without having reviewed any documents related to Farak, Foster prepared and filed the opposition on September 6, 2013, asserting that:

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

(Foster 40; Exh. 212).

That assertion did not squarely or honestly address the request for documents suggesting that a third party had knowledge of Farak's malfeasance. The mental health worksheets were responsive to Rodriguez's discovery motion and, if produced, would have disclosed that Farak's mental health care providers knew of her drug tampering and that Farak was stealing and using drugs at work as early as 2011. On September 12, 2013, Judge Kinder denied Rodriguez's motion insofar as it sought evidence of third-party knowledge of Farak's misconduct. Again,

Judge Kinder was relying upon misrepresentations. When Foster was asked in the December 2016 hearing whether Kaczmarek's reference to the mental health worksheets in her September 10th email to Foster and others might be evidence of third-party knowledge, Foster replied, "No, because I was told everything that needed to be turned over was turned over." (Foster 75-76).

5. Judge Kinder's Conclusions About the Scope of Farak's Misconduct

The evidentiary hearing before Judge Kinder concluded on October 23, 2013, without the disclosure of the mental health worksheets. On November 4, 2013, Judge Kinder found, understandably, on the basis of the misrepresentations made by Foster and the limited evidence before him, that Farak's misconduct began in July 2012. He then denied the motions for post-conviction relief for those who pled guilty before the summer of 2012. In the Penate case, then still in its pre-trial phase, Judge Kinder denied the motion to dismiss.

R. Discussion of a Proffer

On September 10, 2013, Kaczmarek emailed Pourinski that "we could be finding these cases for years. Will you think about doing a proffer to determine the scope of Sonja's alleged misconduct?"³⁴ Pourinski replied that Farak would do a proffer if she were given immunity from possible additional State and Federal charges and get probation. Kaczmarek responded that she would have to speak with someone else. Pourinski understood that Kaczmarek could not make that decision for the AGO by herself. (Pourinski 30). Kaczmarek communicated Farak's proffer terms to Verner. The proposed proffer was not approved. On November 6, 2013, Kaczmarek emailed Verner to inform him that, "The gym teacher [referring to Pourinski] called and wants a

³⁴Bedrosian explained that a proffer is "where a criminal defendant and/or suspect would come in to give information on a subject matter under terms at which the information they used couldn't be used against them." (Bedrosian 98).

recommendation for Farak since we're no longer willing to proffer." (Verner 135).

S. Farak's Conviction (January 2014)

On January 6, 2014, Farak pled guilty to four counts of evidence tampering (G. L. c. 268, § 13E), four counts of larceny of controlled substances from a dispensary (G. L. c. 94C, § 37), and two counts of unlawful possession of a Class B substance (G. L. c. 94C, § 34).

T. Ryan Finds the Mental Health Worksheets (October 30, 2014)

With Farak's conviction, the AGO could no longer claim that the Farak matter was under investigation to justify shielding evidence from the drug lab defendants, who resumed their quest for Farak investigatory materials. In March of 2014, one of the drug lab defendants, Vega, moved to inspect the physical evidence seized in the Farak investigation. The AGO did not assent. On June 23, 2014, Ryan, representing another drug lab defendant, Wayne Burston, emailed Foster a request to inspect the Farak evidence. Foster forwarded the email to Kaczmarek, Ravitz and Reardon, inviting their input. There was no response. On July 21, 2014, Burston moved for an order allowing Ryan to inspect the evidence seized from Farak's car. That was also Kaczmarek's last day working at the AGO. On July 31, 2014, Ryan's motion to inspect was allowed. Ryan made arrangements for the inspection with AAG Patrick Devlin. On October 30, 2014, five days short of the one-year anniversary of Judge Kinder's decision founded on the deception and misrepresentations of the AGO, Ryan conducted the inspection, reviewing three boxes of evidence, and found a number of documents which had not been previously disclosed. Among them were the mental health worksheets.

The next day, November 1, 2014, Ryan sent a 10 page letter to Devlin captioned "Newly Discovered Evidence." In that letter, Ryan transcribed the mental health worksheets and

explained that he reviewed past calendars to determine that the undated mental health worksheet must have been completed by Farak in 2011, and therefore that Farak took drugs on December 22 and 23, 2011. (Exh. 166). Ryan pointed out that Judge Kinder had determined that there was no evidence of misconduct by Farak prior to July of 2012, yet, in these records, it appears clear that Farak was being treated for an "addiction," that she was working on "homework [on] November 16, 2011," and that a reasonable inference from a close review of the records would be that the documents memorialize actions which show that Farak took drugs from the Amherst lab on December 22, 23, and 26th of 2011, some six months before the date Judge Kinder found any evidence that she had engaged in criminal behavior. Attorney Ryan correctly noted that "It would be difficult to overstate the significance of these documents." (Exh. 166).

Ryan asked Devlin to assent to an emergency motion to amend a protective order which Ryan intended to file so Ryan could reveal the newly discovered documents to other counsel for the drug lab defendants. Ryan also asked for permission to provide copies of the mental health worksheets to every defendant who had moved for post-conviction relief based on Farak's misconduct.

On November 5th, Foster emailed Devlin to ask him for a copy of the mental health worksheets. She wrote, "I'd like to see them, and I'm sure whatever judge we're in front of will want a copy, too." After some discussion between Verner, Ravitz, and others, by letter dated November 13, 2014, the AGO sent a letter in Verner's name notifying district attorneys that, pursuant to a court order allowing a motion to inspect physical evidence, the AGO was sending them 289 pages of documentary evidence not previously turned over. Among those papers were the mental health worksheets.

U. *Cotto* Mandate for Investigation Into Scope of Farak's Misconduct

By 2015, some of the defendants appeals' from Judge Kinder's denial of post-conviction motions reached the Supreme Judicial Court. On April 8, 2015, the Supreme Judicial Court pointed out in two separate decisions that the Commonwealth had not conducted a thorough investigation of the Amherst drug lab and Farak's misconduct. In *Commonwealth v. Cotto*, 471 Mass. 97 (2015), the court described the Commonwealth's investigation into the timing and scope of Farak's misconduct as "cursory at best" and emphasized that

"It is imperative that the Commonwealth thoroughly investigate the timing and scope of Farak's misconduct at the Amherst drug lab in order to remove the cloud that has been cast over the integrity of the work performed at that facility, which has serious implications for the entire criminal justice system."

Id. at 115.

"Clearly, the scope of Farak's misconduct was wider than the ten charges to which she pleaded guilty, given that at least four additional cases have surfaced in which it appears that she tampered with evidence, but with respect to which no charges were filed."

Id. at 111, 114. Likewise, in *Commonwealth v. Ware*, 471 Mass. 85, 96 (2015), the court noted:

"As far as can be gleaned from the record, the Commonwealth never conducted a thorough investigation of the Amherst drug lab. The State police spent a few days looking for missing evidence, searching Farak's vehicle, interviewing colleagues, and searching a tote bag that had been seized from Farak's work station. The inquiry appeared to end there, until it came to light several months later that Farak might have tampered with evidence in four other cases. Drug samples were tested in those additional cases and the results indicated that at least some of the cocaine had been replaced with a counterfeit substance. It is apparent that the Commonwealth clearly had information suggesting that Farak had engaged in misconduct at the Amherst drug lab, but the magnitude and implications of the problem have not been ascertained."

The court left no doubt that the Commonwealth had a duty to "thoroughly investigate the timing and scope of Farak's misconduct at the Amherst drug lab." See *Cotto, supra* at 115. "The Commonwealth's obligation to conduct an investigation is premised on a prosecutor's duty to

learn of and disclose to a defendant any exculpatory evidence that is held by agents of the prosecution team." *Id.* at 112, quoting *Commonwealth v. Ware*, 471 Mass. at 95 (internal quotations omitted).

In response to *Cotto*, the AGO directed AAG Thomas Caldwell to investigate the timing and scope of Farak's misconduct and the deficiencies in the operation of the Amherst lab. During that investigation, the AGO convened two grand juries and called as witnesses Farak, Hanchett, Salem, Pontes, Brooks, and Dookhan. On April 1, 2016, Caldwell filed his 54 page report (the Caldwell Report).

With respect to flaws in the operation of the lab, the Caldwell Report covered several issues described above: the lack of security, the unacceptable use of secondary standards, the lack of accreditation, the lack of oversight, and the inadequate cleaning of the GC/MS.³⁵

The evidence set forth in the Caldwell Report regarding Farak's misconduct is almost entirely credited, apart from minor inconsistencies, and it is incorporated into these findings without the need for repetition here. It presents an organized and troubling chronological account, mostly from Farak, of her addiction, theft of lab standards, theft of police-submitted samples assigned to her and some to others, and her manipulation of the lab's computer inventory

³⁵ Additionally, the Caldwell Report questioned the Amherst lab practice of visually classifying Class E substances rather than performing chemical testing. Chemists identifying Class E substances under G. L. c. 94C, § 32, usually did so without actual chemical testing, but visually, in reliance upon the colors and markings of the pills and comparing them to reference materials. Only if the police-submitted pills bore no identifying features would chemists conduct a chemical analysis by running a portion of the samples through the GC/MS and then compare the results to reference materials to try to identify the pills. (CR 49). Occasionally, chemists would categorize a pill as a Class E drug based upon conversations with other chemists or based upon a belief that the pill may have been, or was, a prescribed drug under G. L. c. 94C, § 31(1)(d). Because there are approximately 10,000 Class E drugs in existence, it would be impossible to list all of them covered by the statute, and visual identifications were easier, necessary as a practical matter, and ultimately authorized. (CR 32). Nothing in the record supports an inference that in these cases currently before me, any defendant has been prejudiced by the visual classification practice.

system, all then unbeknownst to her co-workers.³⁶

III. Ultimate Findings of Fact

Most salient among the types of government misconduct alleged in these cases are: (1) Farak's drug theft and evidence tampering and being under the influence of drugs (or withdrawal) while at work during her entire period of employment at the Amherst lab; (2) the AGO's withholding of exculpatory evidence; and (3) the AGO's failure to investigate adequately in 2013 the scope of Farak's misconduct. Other claims of misconduct by government actors, including Burnham, and failings, such as the deficiencies in operating the Amherst lab, have not been shown by themselves to merit post-conviction relief for the reasons explained above.

A. Farak's Egregious Government Misconduct.

The Commonwealth has conceded that Farak committed egregious government misconduct in all cases in which she signed drug lab certificates at the Amherst lab. That concession is appropriate, in light of evidence that Farak was under the influence of drugs for most days while she was working at the lab, suffering the effects of withdrawal on other days, and tampered with many police-submitted drug samples. .

Farak tampered with some samples assigned to and already tested by Hanchett and Pontes, and then repackaged them using their pre-initialed evidence bags. The original testing by Hanchett and Pontes is not cast into doubt by Farak's subsequent theft and tampering. I credit Farak's testimony that although she tried to learn to forge other chemists' initials, she never actually did so. I find that the accuracy of drug analysis certificates signed by chemists other than

³⁶Some of the defendants take issue with the investigation's failure to ascertain the extent to which Farak compromised the integrity of the lab's computer inventory system and failure. In *Cotto*, the court mandated an expeditious investigation. I commend what Caldwell has accomplished in a reasonable period.

Farak is not in question and that even if Farak stole from those samples and replaced them with counterfeit substances, the test results would not have exposed those defendants to greater criminal liability, but rather to less criminal liability.

B. Withholding of Exculpatory Evidence as Egregious Government Misconduct

The defendants' more controversial allegation is that the AGO committed egregious governmental misconduct by withholding from them exculpatory evidence about the scope of Farak's misconduct. The mental health worksheets found in Farak's car were among the evidence to which the drug lab defendants were constitutionally entitled.

A defendant has an "unquestioned right, under the Sixth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of rights, to obtain relevant evidence that bears on the question of his guilt or innocence or which otherwise will help his defense." *Commonwealth v. Mitchell*, 444 Mass. 786, 795 (2005). Due process requires that the government disclose to criminal defendants favorable evidence in its possession that could materially aid the defense against pending charges. See *Commonwealth v. Laguer*, 448 Mass. 585, 593 (2007); *Commonwealth v. Bresilla*, 470 Mass. 422, 431 (2015) ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution").

The prosecution's duty of disclosure extends to "information in possession of a person who has participated in the investigation or evaluation of the case and has reported to the prosecutor's office concerning the case." See *Commonwealth v. Martin*, 427 Mass. 816, 824 (1998). "Such a person is sufficiently subject to the prosecutor's control that the duty to disclose

applies to information in that person's possession." *Id.* See *Commonwealth v. Smith*, 90 Mass. App. Ct. 261, 268 (2016) (where prosecutors from two counties and police communicated with each other regarding their various investigations involving defendant, exculpatory information communicated among them should have been disclosed to defendant).

The AGO offers patently baseless defenses for its withholding of exculpatory evidence. Most recently and surprisingly, in 2017, the AGO denies having had any legal obligation to turn over the mental health worksheets to district attorneys because the AGO had not prosecuted the drug lab defendants. That position is at odds with the fundamental principles of fairness. "[T]he duties of a prosecutor to administer justice fairly, and particularly concerning requested or obviously exculpatory evidence, go beyond winning convictions." *Commonwealth v. Ware*, 471 Mass. at 95, quoting *Commonwealth v. Tucceri*, 412 Mass. 401, 408 (1992).

The AGO's latest argument also contradicts (1) testimony by Kazcmarek, Calkins, Verner and Mazzone acknowledging that duty; (3) letters sent by Verner and Kaczmarek to district attorneys with discovery gathered in the Farak matter; (3) the purpose of Judge Kinder's evidentiary hearing and discovery orders in 2013; and (4) the subpoenas duces tecum served by the defendants upon Ballou and carrying the force of a court order to produce materials which included the mental health worksheets.

Equally groundless are the AGO's assertions that it had a good faith basis for believing that the mental health worksheets were privileged. Were that true, the AGO should have given them to Judge Kinder, as ordered, in September 2013 for his *in camera* review and determination of what should have been disclosed to the defendants. Instead, the AGO deceived Judge Kinder into believing that there were no privileged documents for him to review on the ruse that the

AGO had turned over all of the documents. Foster's letter essentially violated Judge Kinder's order. See *Commonwealth v. Washington W.*, 462 Mass. 204, 214 (2012) ("no party is entitled to disregard a court order on its contention that the order is no longer necessary, especially where, as here, the judge rejected the contention"). The AGO's contention that it had a good faith basis for believing that the mental health records were privileged is further belied by Kaczmarek's notation in her prosecution memo that case law suggested that the mental health worksheets were not privileged. Finally, the AGO has never pointed to any case law or other authority supporting an argument that the mental health worksheets were privileged.

Despite the drug lab defendants' diligent discovery efforts, Kaczmarek and Foster managed to withhold the mental health worksheets through deception. They tampered with the fair administration of justice by deceiving Judge Kinder and engaging in a pattern calculated to interfere with the court's ability impartially to adjudicate discovery in the drug lab cases and to learn the scope of Farak's misconduct. Kaczmarek's and Foster's misconduct improperly influenced and distorted Judge Kinder's fact finding and legal conclusions and it unfairly hampered the defendants' presentation of defenses. Their conduct constitutes a fraud upon the court. See *Rockdale Management Co., Inc. v. Shawmut Bank, N.A.*, 418 Mass. 596, 598 (1994).

Moreover, the misrepresentations did not stop in 2013. I do not credit Kaczmarek's 2016 testimony, relied upon by the AGO, feigning that she forgot about the mental health worksheets and erroneously assumed that they had been turned over. The mental health worksheets were the subject of repeated communications to which Kaczmarek was a party in 2013 and were the chief reason that she sought to block the defendants' discovery. Kaczmarek knew that the mental health worksheets were exculpatory admissions by Farak, that the drug lab defendants were

entitled to them, that the AGO had not turned them over to the drug lab defendants, and that it had no intention of doing so.³⁷

At every opportunity, Kaczmarek and Foster foreclosed the defendants' access to the mental health worksheets. Compounding Kaczmarek's misconduct and Foster's misrepresentations was Foster's inexcusable failure to undertake any review of the discovery despite unequivocal directives to do so by Judge Kinder and by Reardon. Foster's denial in December 2016 of having made any mistakes underscores her lack of a moral compass. As attorneys, officers of the court, and agents of the Commonwealth of Massachusetts, Kaczmarek's and Foster's conduct is reprehensible and magnified by the fact that it was not limited to an isolated incident, but a series of calculated misrepresentations. The ramifications from their misconduct are nothing short of systemic. Had the AGO made timely disclosures of the mental health worksheets, many of the defendants before me now, as explained below, would have obtained discovery to support their claims for relief and would not have spent as much time incarcerated.

C. The Failure to Conduct an Adequate Investigation in 2013 into Farak's Misconduct

The defendants assert as an additional type of egregious government misconduct, the AGO's failure in 2013 to conduct an adequate investigation into the scope of Farak's drug theft

³⁷Those communications occurred in 2013 at least on January 23 (Verner's email to Kaczmarek and others), February 14 (Ballou's email to Kaczmarek and Verner regarding Farak's admissions), March 27 (the prosecution memo with Kaczmarek's footnote on privileges and Verner's notation that the mental health worksheets had not yet been turned over to the defendants, and contemporaneous conversations in the AGO that the mental health worksheets need not be presented to the grand jury), the summer of 2013 (when Kaczmarek told Pourinski that the AGO would not give the mental health worksheets to the drug lab defendants), and September 10 (when Kaczmarek emailed Verner, Foster, Reardon, and others that the mental health worksheets were in Ballou's file, and in meetings that month in Verner's office). Kaczmarek's disregard for her duty as an officer of the court and for the defendants' right to potentially exculpatory evidence was further aggravated by her email encouraging OIG Senior Counsel Audrey Mark to decline any request to investigate the Amherst lab.

and tampering. In 2015, the Supreme Judicial Court emphasized in two decisions that the Commonwealth had a duty to conduct a thorough investigation into the timing and scope of Farak's misconduct at the Amherst lab "in order to remove the cloud that has been cast over the integrity of the work performed at that facility, which has serious implications for the entire criminal justice system." *Commonwealth v. Cotto*, 471 Mass. at 112.

"The Commonwealth's obligation to conduct an investigation is premised on a prosecutor's duty to learn of and disclose to a defendant any exculpatory evidence that is held by agents of the prosecution team, who include chemists working in State drug laboratories. . . . It is incumbent upon the Commonwealth to perform this duty in a timely fashion. The burden of ascertaining whether Farak's misconduct at the Amherst drug lab has created a problem of systemic proportions is not one that should be shouldered by defendants in drug cases."

Id.

"When personnel at the Amherst drug lab notified the State police in January, 2013, that Farak may have compromised the evidence in two drug cases, the Commonwealth had a duty to conduct a thorough investigation to determine the nature and extent of her misconduct, and its effect both on pending cases and on cases in which defendant already had been convicted of crimes involving controlled substances that Farak had analyzed."

Commonwealth v. Ware, 471 Mass. at 95. The prosecutor's duty to disclose known, favorable evidence rising to a material level of importance has been recognized as encompassing the duty to investigate. See *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (prosecutorial discretion in determining materiality of potentially exculpatory evidence imposes responsibility "to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached. This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police").

There is no evidence that a comprehensive, adequate, or even reasonable investigation by

any office or agent of the Commonwealth had been attempted, concluded, or disclosed prior to issuance of the Caldwell Report.

IV. Legal Standards

Pending are (1) motions to dismiss indictments with prejudice by Aponte, Brown, Cotto, Harris, Liquori, Penate, Richardson, Vega, and Ware; and (2) motions for relief under Mass. R. Crim. P. 30(b) by Aponte, Brown, Cotto, Liquori, Richardson, Vega and Ware. As explained below, in some of these cases, dismissal of indictments with prejudice is warranted. This court is aware that such a drastic remedy is rare and that our appellate courts have to date only allowed dismissal of indictments with prejudice in exceptional cases and where a defendant has suffered irreparable harm. Resolution of the factual and legal matters here has required protracted proceedings concerning investigations, discovery, evidence, and oral and written arguments on a wide range of issues. These findings and legal conclusions may impact a large number of other cases in which substances were analyzed at the Amherst lab. In these circumstances, and in the event that an appellate court should disagree with some of these conclusions and determine that the drastic remedy of dismissal is inappropriate, I also consider, alternatively, the defendants' motions for a new trial or to withdraw guilty pleas under Mass. R. Crim. P. 30(b). Consequently, what follows are the legal standards for each type of relief sought, then the analysis under the alternative principles.

A. Legal Standard for Motions to Dismiss Indictments With Prejudice

It follows from the findings above that the sole possible basis for granting any of the defendants' motions to dismiss is the AGO's misconduct in withholding exculpatory evidence. At issue with respect to those motions is whether and in which cases the AGO's misconduct

constitutes the type and degree of egregious government misconduct which warrants dismissal of indictments with prejudice.

"Two parallel principles govern the resolution of cases involving prosecutorial misconduct where dismissal is contemplated . . . [Under the first, where] the prosecutor fails to disclose evidence the defendant is entitled to receive and the defendant is prejudiced by the failure to disclose, a motion to dismiss should not be allowed absent a showing of irremediable harm to the defendant's opportunity to obtain a fair trial . . . Under the alternative principle, prosecutorial misconduct that is egregious, deliberate, and intentional, or that results in a violation of constitutional rights may give rise to presumptive prejudice. In such instances prophylactic considerations may assume paramount importance and the 'drastic remedy' of dismissal of charges may become an appropriate remedy."

Commonwealth v. Cronk, 396 Mass. 194, 198-199 (1985) (internal citations omitted). See also *Bridgeman v. District Attorney for Suffolk District*, 476 Mass. 298, 316-317 (2017). Where the claimed misconduct is prosecutorial failure to comply with discovery orders in a timely manner, the judge's dismissal of criminal charges must rest either on "findings that the delayed disclosure was due to deliberate and egregious action by the prosecutor or unintentional conduct resulting in irremediable harm to the defendant." *Commonwealth v. Cronk*, 396 Mass. at 199. See also *Commonwealth v. Viverito*, 422 Mass. 228, 230 (1996) (dismissal of criminal charges with prejudice is appropriate where government misconduct has been egregious or where defendant has shown that misconduct was prejudicial, that it created a substantial threat of prejudice, or that it caused irremediable harm to defendant's opportunity to obtain a fair trial).

"There is no question that a judge may in his discretion order discovery of information necessary to the defense of a criminal case . . . and that, on failure of the Commonwealth to comply with a lawful discovery order, the judge may impose appropriate sanctions, which may include dismissal of the criminal charge . . ."

Commonwealth v. Douzanis, 384 Mass. 434, 436 (1981). See also *Commonwealth v. Lam Hue To*, 391 Mass. 301, 313 (1984) (court can dismiss indictments when the Commonwealth fails to

comply with a lawful discovery order).

"Where prosecutorial misconduct constitutes a deliberate and intentional undermining of constitutional rights or where the prejudicial effect of the misconduct cannot be remedied by granting a new trial, the drastic remedy of dismissal of charges may be appropriate."

Commonwealth v. Light, 394 Mass. 112, 114 (1985). Although rare, dismissal of charges is appropriate where "the prosecutor's conduct is . . . so egregious that dismissal is warranted to deter similar future misconduct." *Commonwealth v. Texeira*, 76 Mass. App. Ct. 101, 108 (2010), quoting *Commonwealth v. Merry*, 453 Mass. 653, 666 (2009). Where the egregious government misconduct has resulted in the denial of a defendant's fundamental constitutional right, courts need not "indulge in nice calculations as to the amount of prejudice arising from its denial." See *Commonwealth v. Manning*, 373 Mass. 438, 443 (1977).

"Prophylactic considerations assume paramount importance in fashioning a remedy for deliberate and intentional violations of constitutional rights. Such deliberate undermining of constitutional rights must not be countenanced."

Id., 373 Mass. at 444.

A parallel principle is that the court has broad discretion to fashion a judicial response warranted by fraud on the court. See *Rockdale Management Co., Inc. v. Shawmut Bank, N.A.*, 418 Mass. at 598. "Fraud on the court occurs where a party tampers with the fair administration of justice by deceiving the institutions set up to protect and safeguard the public, or otherwise abusing or undermining the integrity of the judicial process." *Id.* (internal quotations omitted). Fraud on the court occurs where

"it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense."

Rockdale Management Co., Inc. v. Shawmut Bank, NA, 418 Mass. at 598, quoting *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989). Dismissal of an entire action may be warranted on a finding of fraud on the court. See *Rockdale Management Co., Inc. v. Shawmut Bank, NA*, 418 Mass. at 598; *Commissioner of Probation v. Adams*, 65 Mass. App. Ct. 725, 729-730 (2006).

Where the misconduct does not justify dismissal based on prophylactic considerations, defendants seeking dismissal with prejudice must show that the government misconduct caused them irremediable harm in obtaining a fair trial. See *Commonwealth v. Cronk*, 396 Mass. at 198-199. In determining whether a prosecutorial delay in disclosing exculpatory evidence is so prejudicial so as to order dismissal,

"it is the consequences of the delay that matter, not the likely impact of the nondisclosed evidence, and we ask whether the prosecution's disclosure was sufficiently timely to allow the defendant 'to make effective use of the evidence in preparing and presenting his case.'"

Commonwealth v. Lam Hue To, 391 Mass. at 309 (where prosecutor failed to disclose material exculpatory evidence to defense counsel until several days before trial, in violation of parties' discovery agreement which had force of court order, court remanded matter for trial judge to determine whether defendant suffered irremediable harm or could possibly have a fair trial), quoting *Commonwealth v. Wilson*, 381 Mass. 90, 114 (1980).

Where the government's delayed disclosure of exculpatory evidence occurred while or after defendants had served sentences of incarceration, it cannot be said that the disclosure did not cause irremediable harm or that it was sufficiently timely to allow the defendant to make effective use of the evidence in preparing and presenting his case. See *Commonwealth v. Lam*

Hue To, 391 Mass. at 309. The prejudicial effect of spending more time incarcerated due to prosecutorial withholding of exculpatory evidence cannot be cured by a new trial. See *Commonwealth v. Light*, 394 Mass. at 114. Contrast *Commonwealth v. Cronk*, 396 Mass. at 201 (dismissal not appropriate where prosecutor's noncompliance with discovery orders was unintentional and where compliance occurred before trial date had been scheduled); *Commonwealth v. Baldwin*, 385 Mass. 165, 172-176 (1982) (disclosure of evidence during trial did not prejudice defendant). "The opportunity eventually to present [a claim based on the exculpatory evidence] would not cure the loss of the earlier opportunity to present it." *Commonwealth v. Washington W.*, 462 Mass. at 217 (where prosecutor deliberately and repeatedly violated court orders to disclose relevant exculpatory evidence during discovery, judge was warranted in dismissing with prejudice indictments against juvenile; renewed prosecution would have caused juvenile anxiety and uncertainty and passage of time would result in serving time in prison rather than in juvenile facility).

Courts must tailor remedies for prosecutorial misconduct to the injury suffered and balance the defendants' rights against the need to preserve society's interest in the administration of justice. See *Commonwealth v. Cronk*, 396 Mass. at 199. "Absent egregious misconduct or at least a serious threat of prejudice, the remedy of dismissal infringes too severely on the public interest in bringing guilty persons to justice." *Commonwealth v. Cinelli*, 389 Mass. 197, 210 (1983) (dismissal of charges improper where misconduct occurred once during post-arrainment interview and lacked high degree of deliberateness; detectives who did not try to locate defendant's lawyer after defendant asked where his lawyer was and suggested that his lawyer be present). Compare *Commonwealth v. Manning*, 373 Mass. at 443-444 (dismissal proper where

government agents deliberately attacked defendant's relationship with his counsel by twice disparaging defense attorney and attempting to coerce defendant into abandoning his defense; right to assistance of counsel is too fundamental and absolute to weigh prejudice from such egregious misconduct; court concluded that a stronger deterrent against this misconduct was necessary). Contrast *Commonwealth v. Light*, 394 Mass. at 114-115 (absent evidence that police knew that defendant was entitled to exculpatory test results, "there was no indication that the conduct was intentional," so defendant was entitled to new trial, not dismissal).

The nature and scope of governmental misconduct by Kaczmarek and Foster in withholding evidence was severe. It continued for a prolonged period, in violation of many drug lab defendants' constitutional rights. It was perpetrated in part through intentional misrepresentations to the court and was pursued to conceal the extent of underlying misconduct by another government actor, Farak. In these rare circumstances, at least with respect to selected drug lab defendants, the deliberate misconduct was so egregious that presumptive prejudice arises, so that dismissal with prejudice is the appropriate prophylactic remedy to deter similar future misconduct. See *Commonwealth v. Cronk*, 396 Mass. at 198-199; *Commonwealth v. Manning*, 373 Mass. at 444; *Commonwealth v. Texeira*, 76 Mass. App. Ct. at 108.

The drug lab defendants who are most clearly entitled to dismissal of indictments with prejudice are those who meet all three of the following requirements: (1) Farak signed their drug certificates; (2) they moved unsuccessfully for post-conviction relief and/or discovery between January 19, 2013, and November 1, 2014; and (3) their motions were denied on the basis of the contaminated evidentiary record established before Judge Kinder. With respect to those defendants, dismissal with prejudice is the appropriate remedy on some or all of three

independent grounds: (1) the government misconduct was so egregious that it created presumptive prejudice and justifies dismissal for prophylactic reasons; (2) the misconduct constituted a fraud on the court; and (3) the misconduct caused these defendants irreparable harm.

At the other end of the spectrum are defendants not entitled to dismissal of indictments with prejudice because the egregious government misconduct had no material connection with them. Those are the defendants (1) whose drug analysis certificates were not signed by Farak; (2) who did not move for discovery or relief between January 18, 2013, and November 1, 2014; or (3) who were granted post-conviction relief on the basis of the evidentiary record in 2013.

B. Legal Standard for Motions Under Mass. R. Crim. P. 30(b)³⁸

Both a motion for a new trial and a motion to withdraw a guilty plea, which is treated as a motion for new trial, are governed by Mass. R. Crim. P. 30(b). Rule 30(b) authorizes judges to grant a motion for a new trial any time it appears that justice may not have been done. See *Commonwealth v. Furr*, 454 Mass. 101, 106 (2009). A motion for new trial is committed to the judge's sound discretion. See *Commonwealth v. Resende*, 475 Mass. 1, 12 (2016).

In these drug lab cases, the analysis of a defendant's motion pursuant to Rule 30(b) based upon alleged egregious government misconduct follows a two prong framework, see *Commonwealth v. Resende*, 475 Mass. at 15, but varies slightly depending on whether the

³⁸The Commonwealth has agreed that in Farak cases in which convictions are set aside but remain subject to prosecution, the Commonwealth will only prosecute the indictments which had culminated in a conviction, and that on a second proceeding culminating in a conviction (by trial or guilty plea), the Commonwealth will not seek a sentence more severe than what the court originally imposed. See *Commonwealth v. Bridgeman*, 471 Mass. 465, 468 (2015) (holding that "a defendant who has been granted a new trial based on Dookhan's misconduct . . . cannot be charged with a more serious offense than that of which he or she initially was convicted under the terms of a plea agreement and, if convicted again, cannot be given a more severe sentence than that which originally was imposed").

conviction arose out of a guilty plea or a trial. A defendant moving to withdraw a guilty plea must show that (1) egregiously impermissible misconduct by a government agent antedated the entry of his or her plea, and (2) the misconduct occurred in the defendant's case, see *Commonwealth v. Cotto*, 471 Mass. at 116, or that it influenced his or her decision to plead guilty or was material to that choice, see *Commonwealth v. Francis*, 474 Mass. 816, 821 (2016). A successful showing on both prongs is needed to succeed on a motion to withdraw a guilty plea. See *Commonwealth v. Resende*, 475 Mass. at 3-4.

In *Commonwealth v. Scott*, the court announced a *sui generis* evidentiary rule applicable to Rule 30(b) motions in the Dookhan cases:

"[I]n cases in which a defendant seeks to vacate a guilty plea . . . as a result of the revelation of Dookhan's misconduct, and where the defendant proffers a drug certificate from the defendant's case signed by Dookhan, . . . the defendant is entitled to a conclusive presumption that egregious government misconduct occurred in the defendant's case."

467 Mass. 336, 347, 352 (2014). That presumption has been extended to defendants who were convicted after a trial at which Dookhan's certificates of analysis were in evidence. See *Commonwealth v. Francis*, 474 Mass. at 817.

The Commonwealth has conceded and stipulated that where Farak signed drug certificates setting forth the weight and identity of the substances (consistent with the basis of the conviction) and where the certificates were admitted at trial, if the conviction followed a trial, Farak's conduct constitutes egregious governmental misconduct and therefore that a conclusive presumption applies that Farak's misconduct occurred in the defendants' cases, that it was egregious misconduct, and that it is attributable to the Commonwealth. Cf. *Commonwealth v. Scott*, 467 Mass. at 352. No presumption of egregious government misconduct arises, however,

simply because Farak worked at the Amherst lab at the same time the drugs of that defendant were tested. See *Commonwealth v. Gardner*, 467 Mass. 363, 369 (2014).³⁹

The Commonwealth stipulates that Farak's egregious government misconduct occurred during the entire period in which she worked at the Amherst lab.⁴⁰ Therefore, where the conclusive presumption applies, the defendants need only prove the second prong of the *Ferrara-Scott* test. See *Commonwealth v. Resende*, 475 Mass. at 3.

In the second prong, the defendants must particularize Farak's misconduct to their decisions to plead guilty by demonstrating a reasonable probability that they would not have pled guilty had they known of the misconduct. See *Cotto*, 471 Mass. at 116. The judge must determine whether, in the totality of the circumstances, the defendants can demonstrate a reasonable probability that had they known of the misconduct, they would not have admitted to sufficient facts and would have insisted on taking their chances at trial. See *Commonwealth v. Scott*, 467 Mass. at 357.

Because each defendant's decision to plead guilty is an individualized one, the relevant factors to be taken into account vary from case to case. See *Commonwealth v. Resende*, 475

³⁹ Insofar as the defendants claim entitlement to Rule 30(b) relief on the grounds that the laboratory testing procedures were defective, no conclusive presumption of egregious government misconduct has been recognized as available to them. Cf. *Commonwealth v. Scott*, 467 Mass. at 354 (presumption of government misconduct "shall not apply in a trial in which the defendant seeks to impeach the testing process utilized at [the lab], including those new trials conducted following the grant of a defendant's motion to withdraw a guilty plea pursuant to our holding in this case").

⁴⁰ On August 24, 2016, the district attorneys for all of the districts in the Commonwealth filed in these drug lab cases the Commonwealth's Statement of Finding of "Egregious Governmental Conduct" informing the court that "where there is a certificate of drug analysis signed by . . . Farak as 'Assistant Analyst,' the Commonwealth will not contest a finding by the Court of 'egregious governmental conduct' on Farak's part in the performance of her duties while at the Department of Public Health Amherst Laboratory, pursuant to the first part of the two-prong analysis set out in the case of *Commonwealth v. Scott*, 467 Mass. 336 (2014)." The Commonwealth has since clarified that by "egregious governmental conduct," the Commonwealth refers to Farak's misconduct, and that the stipulation also covers the period between July 2012 and January 18, 2013, when the Amherst lab was under the control of the MSP.

Mass. at 16-17. "[T]he full context of the defendant's decision to enter a plea agreement will dictate the assessment of his claim that knowledge of [the chemist's] misconduct would have influenced the defendant's decision to plead guilty." *Commonwealth v. Scott*, 467 Mass. at 357. Factors which may be relevant to a defendant's showing under the second prong are: (1) whether evidence of government misconduct could have detracted from the factual basis used to support the guilty plea, (2) whether the evidence could have been used to impeach a witness whose credibility may have been outcome-determinative, (3) whether the evidence was cumulative of other evidence already in the defendant's possession, (4) whether the evidence would have influenced counsel's recommendation as to whether to accept a particular plea offer, (5) whether the value of the evidence was outweighed by the benefits of entering into the plea agreement, (6) whether the defendant was indicted on additional charges, (7) whether the defendant had a substantial ground of defense that would have been pursued at trial, and (8) whether other special circumstances, such as collateral immigration consequences arising from conviction of a particular crime, were present. *Commonwealth v. Resende*, 475 Mass. at 16-17, and cases cited. An additional possible relevant factor in some cases is whether the drug-related charges were a minor component of an over-all plea agreement. See *Commonwealth v. Scott*, 467 Mass. at 357. The reasonable probability test must be based on actual facts and circumstances surrounding the defendant's decision at the time of the guilty plea in light of the one hypothetical question of what the defendant reasonably may have done had he or she known of the misconduct. See *id.*

In this analysis, the

"motion judge may consider such relevant facts as the circumstances of the defendant's arrest and whether the Commonwealth possessed other circumstantial evidence tending to support the charge of drug possession, along with the generous terms of the sentence

reduction he received."

Commonwealth v. Scott, 467 Mass. at 357. Significant circumstantial evidence suggesting that the substances are, in fact, the suspected illegal drugs, include (1) controlled purchases from a defendant; (2) results of field testing; (3) police finding in a defendant's home supplies, tools, and instruments for cooking, processing, and packaging drugs; (4) the defendant pointing out drugs to police; and (5) the availability of an experienced narcotics detective to testify, based on his or her training and experience, that the substances at issue were the drugs. See *Commonwealth v. Antone*, 90 Mass. App. Ct. 810, 817 (2017).

In some of the cases before me, the Commonwealth has presented evidence that the substances originally tested by Farak were retested and that the results were consistent with Farak's analysis. Evidence of retesting is relevant in Rule 30(b) analysis if it was available to the defendant before his or her conviction.

"[I]n assessing the likelihood of whether the defendant would have tendered a guilty plea, a judge may not consider any assertion by the Commonwealth that it would have offered to retest the substances at issue in the defendant's case if the defendant had known of Dookhan's misconduct. The reasonable probability analysis must be based on the actual facts and circumstances surrounding the defendant's decision at the time of the guilty plea in light of the one hypothetical question of what the defendant reasonably may have done if he had known of Dookhan's misconduct. To permit further hypothetical arguments to factor into the analysis, such as the results of any retesting the Commonwealth might have offered to undertake, would require a court to heap inference upon inference and will bring the inquiry under this prong too far afield of the facts and circumstances actually known to the defendant at the time of his guilty plea."

See *Commonwealth v. Scott*, 467 Mass. at 357-358.

On the other hand, where at trial, the evidence of retesting was presented to the jury and the chemist who performed the retesting testified, the defense focus shifts from the original chemist's misconduct to the sufficiency of the evidence that the substances were what the

Commonwealth alleges. Cf. *Commonwealth v. Curry*, 88 Mass. App. Ct. 61, 63-64 (2015) (where drug samples were subject to testing by a chemist other than Dookhan, and jury heard evidence of that testing, the jury were entitled to rely on other chemist's testimony and to find that defendant possessed illegal drugs when he was arrested); *Commonwealth v. Pack*, 90 Mass. App. Ct. 1122, *2 (2016) (Rule 1:28 decision) (where Commonwealth had substances retested and defendant had opportunity to discredit drug evidence at trial, knowing of Dookhan's involvement in his case at the time of his trial, "the testimony and physical evidence presented by the chemist at trial was sufficient to allow a jury to find the defendant possessed heroin and cocaine" and there was no error in denial of defendant's motion for required findings of not guilty); *Commonwealth v. Martin*, 91 Mass. App. Ct. 1121, *2 (2017) (Rule 1:28 decision) (in Dookhan drug lab case, at defendant's trial, chemist testified that she retested substances and confirmed their identity as heroin; court affirmed conviction, concluding that retesting evidence was sufficient to prove that substance was heroin).

V. Conclusions of Law

A. Erick Cotto

1. Factual and Procedural Background

On June 14, 2007, a grand jury indicted Cotto on charges of trafficking in cocaine (28-100 grams) (count 1), and unlawful possession of ammunition without a firearms identification card, a subsequent offense (count 2). The evidence supporting the cocaine trafficking charge was that when police arrested Cotto, he had eight packages of what appeared to be cocaine packaged for street level distribution, and Cotto told police that he had additional drugs in his apartment. Police subsequently searched the apartment and found more apparent drugs, packaging materials,

scales and ammunition. Farak had tested the substances in Cotto's case and had signed the certificates of drug analysis the week before Cotto's indictment.

In exchange for a guilty plea, the Commonwealth agreed to reduce the trafficking charge from between 28-100 grams to between 14-28 grams and it waived the subsequent offender enhancement portion of the ammunition charge. Whereas Cotto could have been sentenced to up to 20 years without that agreement, according to the Commonwealth, the agreed-upon plea called for concurrent sentences and resulted in committed time of five years. On April 13, 2009, pursuant to that plea agreement, Cotto pled guilty to trafficking in cocaine (14-28 grams) and unlawful possession of ammunition, and he was sentenced by the court (Page, J.) to five years in State prison on the trafficking charge, and on the ammunition charge to one year in a house of correction to run concurrently with the sentence on the trafficking count.

On April 25, 2013, shortly after Farak's arraignment, Cotto moved to withdraw his guilty plea, asserting that Farak's criminal conduct was newly discovered evidence which would have been material to his decision to plead guilty, and that his guilty plea without knowledge of her misconduct was unknowing and involuntary. In September and October of 2013, Cotto participated in the consolidated evidentiary hearing, after which Judge Kinder denied Cotto's motion to withdraw his guilty pleas, concluding that Farak's cocaine tampering did not occur before July of 2012. That conclusion -- later shown to be faulty -- was the direct result of Kaczmarek's and Foster's intentional withholding of exculpatory evidence from the drug lab defendants and from Judge Kinder.

Cotto appealed. On May 11, 2015, the court vacated the order denying Cotto's motion to withdraw his guilty plea and remanded the matter for further proceedings, including a more than

cursory investigation into the scope and nature of Farak's misconduct. See *Commonwealth v. Cotto*, 471 Mass. at 115. The Supreme Judicial Court noted that the Cotto case was problematic because the defendant's drug samples had been destroyed. See *id.* at 115 & n.9 ("According to the Commonwealth, the drugs seized from [Cotto] have been destroyed"). In an about-face, the Commonwealth has recently filed a certificate of drug analysis representing that the Cotto substances had somehow been retested on January 20, 2017. The Commonwealth does not address this significant discrepancy in the record.

2. Cotto's Motion to Dismiss

Prophylactic considerations persuade me that the intentional withholding of exculpatory evidence by Kaczmarek and Foster constituted egregious government misconduct warranting dismissal with prejudice of Cotto's indictment for cocaine trafficking. See *Commonwealth v. Light*, 394 Mass. at 114; *Commonwealth v. Texeira*, 76 Mass. App. Ct. at 108. In contrast, the indictment for unlawful possession of ammunition without a firearms identification card is completely unrelated to any misconduct in these cases and there is no basis for allowing relief on that charge.

Cotto was presumptively prejudiced by Kaczmarek's and Foster's egregious misconduct. He participated in the discovery proceedings in 2013 while Kaczmarek and Foster deliberately used deceptive tactics to shield the mental health worksheets from disclosure, all in violation of the defendants' constitutional rights and a court order. See *Commonwealth v. Cronk*, 396 Mass. at 198-199. The same prophylactic considerations apply to deter future intentional withholding of exculpatory evidence, because Foster committed a fraud upon the court in her letter to Judge Kinder keep him from reviewing the AGO's documents. See *Comm'r of Probation v. Adams*, 65

Mass. App. Ct. at 729-730.

Independently of the need to allow Cotto's motion to dismiss to deter future misconduct, I conclude that Kaczmarek's and Foster's misconduct caused Cotto irreparable harm. Had Farak's mental health worksheets been disclosed in 2013 as they should have been, further discovery into her treatment records would have revealed much earlier that Farak's substance abuse went back to at least 2004 and that her theft of police-submitted samples started long before 2012. Based on these revelations, prosecutors have assented to new trial motions for some defendants with time served agreements. It is quite likely that Cotto would have benefitted from a similar agreement and thereby would have avoided serving seven more months in prison. Because Cotto cannot get back the time he served in prison, the prejudice to him is irremediable. Cf. *Commonwealth v. Washington W.*, 462 Mass. at 217. Accordingly, Cotto's motion to dismiss is allowed with prejudice as to the cocaine trafficking charge, but not the ammunition charge.

3. Cotto's Motion to Withdraw His Guilty Plea

Cotto also moves, alternatively, should dismissal ultimately not be allowed, to withdraw his guilty plea pursuant to Mass. R. Crim. P. 30(b), claiming that he did not knowingly or voluntarily tender a guilty plea because he was unaware of Farak's egregious misconduct. Because Farak signed Cotto's drug analysis certificate and the record shows that Farak was impaired by drugs or withdrawal throughout her tenure at the Amherst lab, the Commonwealth agrees that Cotto has satisfied the first prong of the two part test, and therefore to obtain a new trial, Cotto must particularize Farak's misconduct to his decision to plead guilty by demonstrating a reasonable probability that he would not have admitted to sufficient facts and pled guilty had he known of Farak's misconduct, and instead would have taken his chances at trial. See

Commonwealth v. Cotto, 471 Mass. at 116; *Commonwealth v. Scott*, 467 Mass. at 357-358.

There was strong circumstantial evidence that the substances seized in his case were cocaine: (1) after police found on Cotto eight packages of what appeared to be cocaine prepared for street level distribution, Cotto told police that he had additional drugs in his apartment, and (2) in Cotto's apartment, police not only found more suspected drugs as Cotto told them they would find there, but they also found drug trafficking paraphernalia and ammunition. See *Commonwealth v. Scott*, 467 Mass. at 357 (motion judge may consider as circumstantial evidence of identity of substance circumstances of defendant's arrest and whether Commonwealth possessed other circumstantial evidence tending to support charge of drug possession, along with generous terms of sentence reduction). Cf. *Commonwealth v. Antone*, 90 Mass. App. Ct. at 817 (judge may consider as circumstantial evidence suggesting that substances are suspected drugs a defendant's pointing out drugs to police). This is not, however, a case in which there is circumstantial evidence of the identity of the substances by field testing or controlled buys. See *Commonwealth v. Resende*, 475 Mass. at 16-17 (evidence against defendant was strong, consisting of field test results and five controlled buys).

A second factor weighing against Cotto is that he received a lighter sentence under the plea agreement than he would have faced at trial. The five year sentence of committed time under the plea agreement was quite favorable for a conviction of trafficking in 14-28 grams of cocaine. See *Commonwealth v. Scott*, 467 Mass. at 357.

On the other hand, Attorney Jennifer Johnson, who represented Cotto at the time of his plea, has credibly stated in an affidavit that she would not have advised Cotto to have pled guilty under the terms of the plea agreement he tendered had she known of Farak's misconduct.

Instead, she states, she would have advised Cotto to have negotiated for a better plea deal and, failing that, to go to trial.

It is an extremely close question whether, in all of these circumstances, Cotto has demonstrated a reasonable probability that he would not have admitted to sufficient facts and pled guilty under the terms then offered to him had he known of Farak's misconduct. Absent reliable chemical analysis confirming the identity of the substances in Cotto's case, the circumstantial evidence is strong but not quite strong enough. The damning evidence of Cotto telling police that he had more drugs in his apartment, and police finding those substances and drug distribution paraphernalia, are counterbalanced by the credible affidavit of Attorney Johnson stating that she would have advised Cotto to reject the plea agreement which he entered had they known of Farak's misconduct. With such knowledge, Cotto would have been able to reach a more favorable plea agreement. Consequently, in consideration of the full context of Cotto's decision to tender guilty pleas, I find that Cotto has met his burden of demonstrating a reasonable probability that he would not have admitted to sufficient facts and pled guilty under the terms then offered to him had he known of Farak's misconduct. *Commonwealth v. Cotto*, 471 Mass. at 116. Therefore, his motion under Rule 30(b) is allowed. See *Commonwealth v. Scott*, 467 Mass. at 357-358.

B. Omar Harris

1. Factual and Procedural Background

On November 18, 2010, Harris was indicted by a grand jury on charges of trafficking in cocaine (14 to 28 grams) as an habitual offender, in violation of G. L. c. 94C, § 32E(b)(1) (count 1); and violating a controlled substance law in a school or park zone, as an habitual offender, in

violation of G. L. c. 94C, § 32J (count 2). Two days earlier, on November 16, 2010, Farak had analyzed the seized substance and certified that it tested positive for cocaine.⁴¹ Harris and the Commonwealth reached a plea agreement in which the Commonwealth dropped the habitual offender and school zone charges. On September 21, 2011, Harris pled guilty to the trafficking charge and was sentenced to State prison for ten to twelve years.

Shortly after news of Farak's misconduct broke, on February 15, 2013, Harris moved to withdraw his guilty plea and moved for discovery. On April 24, 2013, he moved to stay the execution of his sentence pending resolution of his motion to withdraw his guilty plea. On May 17, 2013, the court (Page, J.) allowed that motion. On July 12, 2013, Harris moved to vacate his guilty plea and for more discovery. His case was consolidated with other drug lab cases before Judge Kinder for purposes of the fall 2013 evidentiary hearing into the nature and scope of Farak's misconduct. The Commonwealth opposed Harris's motion for post-conviction relief and on November 12, 2013, Judge Kinder denied Harris's motion to withdraw his guilty plea based on the limited record before him. Judge Kinder allowed Harris to suspend the expiration of his stay until January 2, 2014, at which point Judge Kinder ordered Harris to return to prison to serve the balance of his sentence.

Following Attorney Ryan's discovery of the mental health worksheets, on February 2, 2015, Harris filed successful motions for post-conviction discovery. In July 2015, Harris moved for reconsideration of Judge Kinder's denial of his motion to withdraw his guilty plea and again

⁴¹The drug lab certificate filed by the Commonwealth in Harris's case shows that one plastic bag of white chunks was submitted to the lab on October 6, 2010. Farak signed the drug certificate on November 16, 2010, certifying that the white chunks were found to contain cocaine and had a net weight of 20.71 grams. Retesting on the substance occurred in 2015 and confirmed that the substance contained cocaine but stated that the net weight had dropped to 17.03 grams.

moved to stay his sentence. The stay was allowed. In 2017, the Commonwealth withdrew its opposition to Harris's motion to withdraw his guilty plea. What remains is Harris's motion to dismiss.

2. Harris's Motion to Dismiss

This account leaves no doubt that Harris is entitled to dismissal of his indictments with prejudice as a prophylactic measure, to dissuade the AGO from withholding exculpatory evidence in other cases. Farak's egregious government misconduct had a particularly strong link to Harris's case. At the time she tested the substances in Harris's case, Farak was stealing and using police-submitted samples of cocaine. Had the AGO not deliberately withheld the mental health worksheets, Harris would have advanced a meritorious argument in 2013 that Farak's misconduct tainted his conviction. Dismissing Harris's indictments with prejudice will send a strong reminder that prosecutors must disclose potentially exculpatory evidence. See *Commonwealth v. Light*, 394 Mass. at 114; *Commonwealth v. Texeira*, 76 Mass. App. Ct. at 108.

Because Foster's egregious misconduct was effected in part by intentionally deceiving Judge Kinder into believing that the AGO had no privileged documents for his *in camera* review, she committed a fraud upon the court, which supplies another justification for resorting to the drastic sanction of dismissal with prejudice. See *Commissioner of Probation v. Adams*, 65 Mass. App. Ct. at 729-730.

The dismissal of indictments is also appropriate here because Harris was irremediably prejudiced as a result of the egregious government misconduct. By intentionally withholding exculpatory evidence from Harris, Kaczmarek and Foster denied him the opportunity to present a full and fair argument to Judge Kinder in 2013 as to why he was entitled to post-conviction

relief. Harris was further prejudiced by having to return to prison to serve a long sentence in January 2014, after having an opportunity to rebuild his life and relationships. The AGO's argument that Harris is none the worse off for spending more time in prison due to misconduct by Kaczmarek and Foster is baseless. See *Commonwealth v. Washington W.*, 462 Mass. at 217.

C. Rolando Penate

1. Factual and Procedural Background

On February 1, 2012, a grand jury indicted Penate on charges of possession of Class A and Class B substances (heroin and cocaine) with the intent to distribute as a second offender (counts 1 and 3); three counts of distributing a Class A substance (heroin) as a second offender (counts 5, 7 and 9); five school zone violations (counts 2, 4, 6, 8 and 10); possession of a firearm without a valid firearms identification card (count 11); possession of ammunition without a valid firearms identification card (count 12); and possession of a firearm during the commission of a felony (count 13).

The suspected heroin in Penate's case had been submitted to the Amherst lab in two batches. The first batch was submitted October 25, 2011, was analyzed by Farak on December 22, 2011, and was certified as heroin. The second batch (which was the basis of Penate's conviction) was delivered to the Amherst lab on November 16, 2011, was analyzed by Farak on January 9, 2012, and was certified as heroin. Both batches were retested on August 8, 2013, by chemist William Hebard, and again determined to be heroin.

While Penate's case was still in the pre-trial phase, he learned of Farak's indictment and promptly sought discovery. On May 14, 2013, Penate filed a motion to compel discovery. On July 15, 2013, he moved to dismiss counts one through ten and thirteen, arguing in part that the

prosecution had failed to turn over evidence obtained during the Farak investigation. Thereafter and through the fall of 2013, Penate filed additional discovery motions and a motion to dismiss the indictments, as detailed above. None met with success. After Judge Kinder's extensive evidentiary hearing in the fall of 2013, on November 4, 2013, Judge Kinder denied Penate's motion to dismiss on the grounds that Farak's misconduct began in July of 2012, which was six months after Farak tested the substances in Penate's case. Judge Kinder reasoned that although

"there was powerful evidence that Farak was stealing cocaine and replacing it with other substances, . . . there is insufficient evidence before me that she tampered with the samples in Penate's case or even that she was engaged in misconduct in November 2011 and January of 2012, when the samples in this case were tested."

Penate proceeded to trial, where a central tenet of his defense was Farak's misconduct. The trial judge, Page, J., allowed the prosecutor's motion *in limine* barring Penate from relitigating issues previously ruled upon, such as Judge Kinder's finding that Farak's misconduct occurred as early as July of 2012. The parties stipulated at trial that the jury would be told that Farak would not testify in Penate's trial, that no testimony would be offered concerning the results of any testing she may have performed, that Farak's evidence tampering occurred as early as July of 2012, and that the substances in Penate's case were tested by Farak in December of 2011 and January of 2012.

At trial, Penate's defense attorney, Ryan, was not allowed to elicit testimony from Springfield narcotics officer Greg Bigda who had complained of possible tampering by Farak in May of 2012 in an unrelated case. Ryan was also prohibited at trial from questioning Pontes regarding the unsecured nature of the Amherst lab. Ryan referred to Farak's misconduct in the closing argument. On December 13, 2013, Penate was convicted by the jury of a single count of

distributing heroin on November 15, 2011, in a sale to an undercover police officer. Penate pled guilty to the subsequent offender portion of count 5 and was sentenced by Judge Page to serve 5 to 7 years in State prison. He filed a motion for new trial but the Commonwealth has withdrawn its opposition to that motion.

2. Penate's Motion to Dismiss

The record compels the dismissal of Penate's conviction for distributing heroin. Kaczmarek's and Foster's deliberate withholding of exculpatory evidence was particularly egregious in the Penate case. In 2013 and much of 2014, Ryan employed every appropriate and available legal mechanism to challenge what he aptly sensed was the AGO's stonewalling. His requests and motions for discovery in the drug lab cases earned him the ire of Kaczmarek. Ultimately, Ryan's efforts proved crucial for the disclosure of the mental health worksheets. Kaczmarek's and Foster's misconduct was so egregious in the Penate case that it creates presumptive prejudice and qualifies as a fraud upon the court. See *Commonwealth v. Manning*, 373 Mass. at 443-434; *Comm'r of Probation v. Adams*, 65 Mass. App. Ct. at 729-730. Dismissal is eminently appropriate in this case to deter further misconduct of this unprecedented scope and nature. See *Commonwealth v. Light*, 394 Mass. at 114; *Commonwealth v. Texeira*, 76 Mass. App. Ct. at 108.

Furthermore, Penate was irretrievably prejudiced by the failure to disclose the exculpatory evidence of Farak's misconduct, including her severe impairment from LSD on January 9, 2012, the day she analyzed substances in this case. See *Commonwealth v. Cronk*, 396 Mass. at 198-199. Kaczmarek's and Foster's withholding of it deprived Penate of a key, meritorious defense. That constitutional deprivation resulted in Penate serving a longer prison

sentence than he would have otherwise. The egregious misconduct by Kaczmarek and Foster, therefore, caused Penate irremediable harm which supplies a third and independent ground for allowing Penate's motion to dismiss the indictments with prejudice. See *Commonwealth v. Lam Hue To*, 391 Mass. at 309.

D. Fiore Liquori

1. Factual and Procedural Background

On June 28, 2012, Liquori was indicted on ten charges: unlawful distribution of a Class B substance, oxycodone (counts 1 and 3); unlawful distribution of a Class B substance, oxymorphone (count 2), unlawful possession of a Class B substance, oxycodone, with intent to distribute (count 4); unlawful possession of a Class B substance, oxymorphone, with intent to distribute (count 5); unlawful possession of a Class E substance, zolpidem, with intent to distribute (count 6); unlawful possession of a Class E substance, carisoprodol, with intent to distribute (count 7); unlawful possession of a Class E substance, tramadol (count 8); unlawful possession of a Class E substance, suboxone (count 9); and unlawful possession of ammunition without an identification card, as an armed career criminal (count 10). The substances in Liquori's case were analyzed by Farak on June 22, 2012, and their classifications were confirmed after being retested by another analyst on June 7, 2013.

On May 8, 2013, the non-drug charge, count 10, was tried before Judge Ford, who allowed Liquori's motion for a required finding of not guilty. The Commonwealth entered a nolle prosequi on counts 6 and 7 prior to trial on the remaining counts. Several months before trial, on July 8, 2013, Liquori moved to dismiss his indictments due to Farak's egregious government misconduct. On October 30, 2013, Judge Kinder denied that motion after

concluding that Farak's misconduct commenced in July of 2012, was limited to cocaine, and did not involve prescription medications.

From September 9 through September 16, 2014, Liquori was tried by a jury before Rup, J. The jury heard testimony regarding Farak's misconduct which in 2012 amounted to cocaine use, tampering with cocaine, being high at work all the time, but not ingesting or tampering with the substances at issue in this case. The jury also heard testimony by MSP chemist Lisa Yelle that the drugs at issue had been retested on June 7, 2013, and that the retesting confirmed the results of Farak's analysis. Ballou testified on cross-examination by the prosecutor that investigators never found oxycodone in Farak's car or workstation. On September 12, 2014, Liquori was found guilty on six drug charges, counts 1, 3-5, and 8 (relating to oxycodone, oxymorphone, and tramadol). He was sentenced to serve 2 1/2 years in a house of correction on count 1, the same on count 3, to run concurrently with the sentence on count 1; and on counts 4, 5, and 8, he was placed on probation for 2 years from and after the sentence on count 1.

Weeks after Liquori's conviction, Ryan discovered the mental health worksheets and other evidence gathered in the AGO's limited investigation of Farak and the Amherst lab. Ryan's discovery led to drug lab defendants learning that: (1) in January of 2013, investigators had found and inventoried oxycodone at Farak's workstation, in contrast to Ballou's testimony; and (2) Farak had a longstanding addiction to and history of stealing prescription pills from the lab.

Liquori appealed from his conviction. On August 7, 2015, the Appeals Court ruled that Liquori be given leave to file, and that this court should consider, a motion for new trial. Liquori filed his motion for new trial and a motion to dismiss the indictments with prejudice.

2. Liquori's Motion to Dismiss

Liquori is entitled to dismissal of his indictments with prejudice. Although Liquori was not among the defendants before Judge Kinder in the evidentiary hearing in the fall of 2013, the same evidentiary record was the basis for Judge Kinder's denial of Liquori's motion to dismiss on October 30, 2013. Had Kaczmarek and Foster not withheld the exculpatory evidence, Judge Kinder and the drug lab defendants, including Liquori, would have realized in 2013 that Farak also had tampered with prescription pills and that misconduct began before July of 2012. As discussed repeatedly above, this deliberate egregious misconduct profoundly harms the administration of justice, constitutes a fraud upon the court, and calls for the drastic remedy of dismissal with prejudice of all of the charges against Liquori. See *Commonwealth v. Merry*, 453 Mass. at 666; *Commonwealth v. Douzanis*, 384 Mass. at 436; *Commonwealth v. Manning*, 373 Mass. at 443; *Comm'r of Probation v. Adams*, 65 Mass. App. Ct. at 729-730.

3. Liquori's Motion for a New Trial

Motions for new trial are only to be granted where it appears that justice may not have been done. *Commonwealth v. Furr*, 454 Mass. at 106. In drug lab cases challenging convictions based on a jury verdict, the *Ferrara-Scott* two-pronged test is clarified in *Commonwealth v. Francis*, 474 Mass. 816, 823-823 (2016). In *Francis*, the court reasoned that where Dookhan signed the drug certificate in a defendant's case and the defendant was found guilty at trial and later learned of Dookhan's misconduct, that defendant is entitled to a conclusive presumption of egregious government misconduct. *Id.* at 824. The analysis then proceeds to the second prong, in which the defendant "is entitled to a new trial if he or she can show prejudice resulting from the admission of that evidence." *Id.* at 824.

The parties first dispute whether Liquori is entitled to the conclusive presumption of egregious government misconduct because at his trial, it was disclosed that Farak had engaged in some misconduct, but not misconduct which extended to the pills at issue in Liquori's case. See *Commonwealth v. Curry*, 88 Mass. App. Ct. at 63-64 (presumption of chemist's egregious government misconduct applies only where misconduct unknown to defendant at trial or before pleading guilty). That debate need not be resolved here, because even if Liquori were accorded the presumption, he would nonetheless be unable to meet his burden on the second prong by showing that he was prejudiced by the evidence at trial that Farak had issued the original drug certificates. See *Commonwealth v. Francis*, 474 Mass. at 824. That is because the Commonwealth did not rely on Farak's drug certificates to prove the identity of the substances. Instead, the jury were presented credible evidence that the substances in Liquori's case were retested by another chemist. The jury were entitled to credit that retesting evidence and rely upon it as proof of the identity of those substances and as strong proof that Liquori committed the crimes for which he was convicted.

My finding that Liquori was not prejudiced at his trial stands regardless of whether the standard or type of prejudice Liquori must show to meet his burden on the second prong of the *Ferrara-Scott* test is that advocated by Liquori or the standard urged by the Commonwealth. Liquori argues that he is entitled to a new trial and can prove sufficient prejudice unless it is shown that the erroneously admitted evidence "did not influence the jury, or had but very slight effect." See *Commonwealth v. Francis*, 474 Mass. at 827. In *Francis*, the erroneously admitted evidence was a drug certificate issued by Dookhan, during a trial in which the defendant knew nothing about her misconduct. In contrast, in Liquori's trial, the Commonwealth's evidence of

the identity of the substances did not rest upon a drug certificate issued by Farak, but rather upon retesting evidence, because it was then known that Farak was being prosecuted for drug theft and tampering at the lab. I find, therefore, that any evidence presented to the jury concerning drug analysis performed in this case by Farak did not influence the jury, or had but very slight effect.

The fact that Liquori's jury did not know that Farak tampered with oxycodone and other prescription pills does not alter this conclusion. Even Ballou's inaccurate testimony that investigators did not find oxycodone in searching her workstation cannot be said to have influenced the jury in light of the strong evidence that the substances seized were the illegal narcotics as suspected.

It follows that Liquori cannot satisfy his burden under the Commonwealth's test for prejudice. The Commonwealth asserts that the applicable prejudice standard is a higher one for new trial motions based on newly discovered evidence: the newly discovered evidence of Farak's misconduct must be material and credible, must not be cumulative of other evidence admitted at trial, and it must be shown that it probably would have been a real factor in the jury's deliberations. See *Commonwealth v. Grace*, 397 Mass. 303, 305-306 (1986);⁴² *Commonwealth v. Gaston*, 86 Mass. App. Ct. 568, 573 (2014) (in either common law claim of newly discovered evidence or constitutional claim of prosecutorial nondisclosure, defendant must demonstrate that

⁴²"A defendant seeking a new trial on the ground of newly discovered evidence must establish both that the evidence is newly discovered and that it casts real doubt on the justice of the conviction The evidence said to be new not only must be material and credible . . . but also must carry a measure of strength in support of the defendant's position Thus newly discovered evidence that is cumulative of evidence admitted at trial tends to carry less weight than new evidence that is different in kind Moreover, the judge must find that there is a substantial risk that the jury would have reached a different conclusion had the evidence been admitted at trial. . . . The strength of the case against a criminal defendant, therefore, may weaken the effect of the evidence which is admittedly newly discovered The motion judge decides not whether the verdict would have been different, but rather whether the new evidence would probably have been a real factor in the jury's deliberations."

Commonwealth v. Grace, 397 Mass. 303, 305-306 (1986) (internal citations omitted).

there is substantial risk that jury would have reached a different conclusion had evidence been admitted at trial).

Although the newly discovered evidence of Farak's misconduct extending to oxycodone and other pills is credible and material to Liquori's case, and it is not merely cumulative of the evidence admitted in Liquori's trial, it is outweighed in this case by the far more relevant evidence of retesting. That retesting evidence, as noted above, reasonably permitted a jury to find that the substances in Liquori's case were what they were tested positive as being and that they strongly supported Liquori's convictions. Therefore, the newly discovered evidence that Farak's misconduct extended to pills would not have significantly aided Liquori's defense and would not have been a real factor in the jury's deliberations. See *Commonwealth v. Grace*, 397 Mass. at 305-306; *Commonwealth v. Gaston*, 86 Mass. App. Ct. at 573. Because the newly discovered evidence does not cast real doubt on the justice of the conviction, Liquori's motion for new trial is denied. See *Commonwealth v. Grace*, 397 Mass. at 306.

E. Lizardo Lee Vega

1. Factual and Procedural Background

On February 10, 2009, Vega was indicted on two counts of possession with intent to distribute a Class A substance (heroin), subsequent offense (counts 1 and 2), in a school zone (count 3); and possession with intent to distribute cocaine, subsequent offense (count 4), in a school zone (count 5). The factual basis for these indictments has not been presented by either Vega or the Commonwealth.

The substances involved in this case were submitted to the Amherst lab on January 29,

2009, and were analyzed by Farak, who issued the certificates of analysis on March 16, 2009.⁴³

On January 28, 2010, Vega pled guilty to lesser included offenses in count 1 (possession of heroin with intent to distribute), count 2 (distribution of heroin), and count 4 (possession of cocaine with intent to distribute), and a week later, the Commonwealth nolle prossed counts 3 and 5. Vega was sentenced on count 1 to a house of correction for 2 1/2 years, with 130 days direct (time served) and the balance suspended with two years of probation; on count 2, the same sentence was imposed as on count 1, to be served concurrently; on count 4, Vega was sentenced to 2 years of probation from and after the sentence on count 1.⁴⁴

In March 2014, Vega filed motions: (1) to conduct post-conviction discovery, which Judge Kinder denied on March 14, 2014; (2) to inspect physical evidence seized in the Farak investigation, which Vega withdrew in open court on August 12, 2014, because by that time, the AGO had agreed to allow Ryan to inspect the physical evidence; and (3) to compel discovery, which was allowed in part and denied in part by Judge Kinder on August 12, 2014. Vega has moved to dismiss his indictments on account of the AGO's egregious government misconduct and he alternatively moves to withdraw his guilty plea. The Commonwealth has not presented any analysis of retesting in Vega's case, despite representing many months ago that the substances in Vega's case had been submitted for retesting.

⁴³The Commonwealth has produced three drug lab certificates, all issued by Farak on March 16, 2009, and certifying that items from two of the submissions were heroin and that the substance in the third submission was cocaine. One submission consisted of 9 bags of heroin and the other consisted of 3 bags of heroin.

⁴⁴Vega would have been incarcerated for approximately 4 months had he complied with the conditions of probation. On August 22, 2012, Vega was found to be in violation of conditions of probation and ordered to serve the balance of his original suspended sentence on counts 1 and 2. On count 4, he was sentenced to prison for not more than 3 years and not less than 2 1/2 years concurrent with 1179CR001024.

2. Vega's Motion to Dismiss

Much of the legal analysis applied in the cases just discussed pertains to Vega. Although Vega was not among the defendants seeking discovery in the consolidated evidentiary hearing before Judge Kinder in 2013, he falls within the group of defendants who, during the period of January 19, 2013, to November 1, 2014, filed at least one unsuccessful motion for discovery to ascertain the scope of Farak's misconduct. Kazmarek's and Foster's deliberate withholding of exculpatory evidence led Judge Kinder to deny Vega's motion for post-conviction discovery on March 14, 2014 (#57). In these circumstances, and because the misconduct was intentional and egregious, presumptive prejudice arises and imposition of the extreme sanction of dismissal with prejudice is appropriate to deter such misconduct in the future. See *Bridgeman v. District Atty. for Suffolk District*, 476 Mass. at 316-317; *Commonwealth v. Cronk*, 396 Mass. at 199.

Foster's deliberately misleading letter dated October 16, 2013, materially aided the withholding of the mental health worksheets. Through that letter, Foster committed a fraud upon the court and violated a lawful discovery order, thereby supplying a further basis for dismissing Vega's indictments with prejudice. See *Rockdale Mgmt. Co., Inc. v. Shawmut Bank, N.A.*, 418 Mass. at 598; *Commonwealth v. Douzanis*, 384 Mass. at 313. I need not and do not reach the question of whether Vega was irreparably harmed by Kaczmarek's and Foster's misconduct.

3. Vega's Motion to Withdraw Guilty Pleas

Vega has not filed a separate motion pursuant to Mass. R. Crim. P. 30(b), but in his motion to dismiss, he asks to withdraw his guilty plea as an alternative remedy and asserts that justice was not done in his conviction. The Commonwealth has not submitted in writing any arguments or evidence in opposition to Vega's motion to withdraw his guilty plea.

On this sparse record, any *Ferrara-Scott* analysis does not get far. The record establishes that Farak committed egregiously impermissible conduct, that she signed Vega's drug analysis certificates, and that Farak's misconduct antedated the entry of Vega's plea. With that conclusive presumption of egregious government misconduct, the analysis turns to the second prong of the *Ferrara-Scott* test in which Vega must demonstrate a reasonable probability that he would not have pleaded guilty had he known of Farak's misconduct. See *Commonwealth v. Cotto*, 471 Mass. at 106. Vega has done nothing by way of argument or citing evidence to attempt to meet that burden. He has presented no information about the circumstances and factors attending his decision to plead guilty. This court cannot grant Rule 30(b) on speculation as to whether there is a reasonable probability that Vega would not have pled guilty and would not have accepted the plea agreement offered to him had he known of Farak's misconduct. Accordingly, Vega's motion for alternative relief under Rule 30(b) is denied.

F. Bryant Ware

Ware has before me three cases, based upon indictments issued in 2007, 2009, and 2010. In each, he has moved to dismiss the indictments and to withdraw his guilty pleas in what he calls motions to vacate. The procedural backgrounds for these three cases are intertwined.

1. Factual and Procedural Background

On August 29, 2007, Ware was indicted on charges of possession of cocaine with intent to distribute (count 1), possession of marijuana, a Class D controlled substance (count 2), violation of the controlled substances laws in proximity to a school (count 3), possession of a firearm without a firearm identification card (count 4), and conspiracy to violate the drug laws (count 5). These indictments arose out of a police investigation into suspected drug activity at

Ware's Springfield residence, which police had a warrant to search. Police arrested Ware as he drove away from the residence, searched him and found approximately \$1,300 in cash on him. Police then searched his residence, where they found, according to the police report, 11 rocks of cocaine, 1 bag of cocaine powder, 3 bags of marijuana, scales, drug packaging material, and ammunition.⁴⁵ Ware represents that the certificate of drug analysis for his 2007 is lost.

On May 21, 2008, Ware pleaded guilty to counts 1, 2 and 4. With respect to count 1, he was sentenced to 2 1/2 years in a house of correction, with one year to serve and the balance suspended with probation for two years. With respect to counts 2 and 4, Ware was sentenced to six months in a house of correction, to be served concurrently with the committed sentence on count 1.

Ware's 2009 case, docketed as 0979CR01072, arose from an incident on July 31, 2009, in which Ware sold two small off-white rock substances to an undercover police officer for \$20 after the officer asked for a "twenty," a common street term used to describe \$20 of crack cocaine. On September 14, 2009, Farak issued a drug certificate stating that the substance was cocaine. Recent retesting by another analyst confirmed that result.⁴⁶ On November 25, 2009, a grand jury indicted Ware on a single count of distributing cocaine as a subsequent offense. Ware was also charged with a violation of the probation conditions imposed on him when he pleaded guilty to the 2007 charges.

⁴⁵The police report refers to police recovering ammunition from Ware's residence, but does not mention a firearm, although Ware pled guilty to the charge of possession of a firearm without a firearm identification card. (Commonwealth's Appendix, hereinafter referred to as CA, at pp. 182-183)

⁴⁶The certificate for narcotics evidence assigned lab number A09-03096 describes the submission as one plastic bag with white chunks with a net weight of .13 grams which Farak certified as cocaine. The retesting certificate was issued on January 20, 2017, and described the substance in bag A09-03096 as one yellow rock like powder weighing .11 grams of material "found to contain cocaine."

Only four weeks after the 2009 indictment was issued, Ware had another run-in with police, leading to his 2010 case, 1079CR00253. On December 22, 2009, Springfield police attempted to stop Ware's vehicle and execute an arrest warrant. Ware responded by ramming his vehicle into three police cruisers while trying to flee the scene. Police stopped and searched Ware's vehicle, where they found eight bags of a powdery substance that appeared to be heroin and was labeled "Dynasty." On February 5, 2010, Farak analyzed the seized substance and certified it to be heroin. No retesting results have been submitted to date on that substance. On March 9, 2010, in connection with the December 22, 2009, events, Ware was indicted for possession of heroin with intent to distribute as a subsequent offense (count 1), a violation of the controlled substances laws in proximity to a school or park (count 2), five counts of assault and battery by means of a dangerous weapon, a vehicle (counts 3 through 7), and resisting arrest (count 8).

On February 4, 2011, Ware pled guilty to (1) the 2009 charge, (2) count 1 and counts 3 through 8 in the 2010 case, and (3) the violation of probation charge arising out of the 2007 conviction. He was sentenced to serve concurrent terms of five to seven years in State prison and probation.⁴⁷

⁴⁷With respect to the 2009 conviction, Ware was sentenced to State prison for a term of 5 to 7 years. On count 1 of the 2010 charges, Ware was sentenced to a term of five to seven years in the State prison, to run concurrently with his sentence on the 2009 charge. With respect to the 2010 charges, on count 2, the Commonwealth filed a nolle prosequi; on count 3, Ware was sentenced to 18 months of probation, to be served from and after his sentence on count 1; on counts 4 through 8, Ware was sentenced to 18 months of probation, to be served concurrently with his sentence of probation on count 3. As to the probation violation, Ware was committed to a house of correction for an 18 month suspended portion of his sentence on the 2007 charges, to run concurrently with his State prison sentence on the 2009 charge.

On August 12, 2013, Ware filed a motion for new trial in his 2009 case (#28).⁴⁸

On February 14, 2014, Ware filed a motion for post-conviction discovery with respect to his 2007, 2009, and 2010 cases. In that motion, he sought orders that: (1) all drug evidence maintained by the SPD in criminal cases during Farak's tenure be visually inspected to detect signs of tampering, and (2) testing occur on 100 randomly selected drug submissions from that evidence. Ware argued that there was no reason to believe that the full extent of Farak's misconduct had been ascertained. On March 12, 2014, Judge Kinder denied that motion in all three cases on the grounds, *inter alia*, that there was no evidence that Farak's misconduct occurred at the time Ware pled guilty on February 4, 2011. Judge Kinder further reasoned that Farak's misconduct would not have been material to Ware's decision to plead guilty, given the strength of the Commonwealth's cases and the significant benefit Ware had received from the plea agreements. Ware appealed. In 2015, the Supreme Judicial Court affirmed Judge Kinder's denial of Ware's motion for post-conviction discovery but remanded the matter to the Superior Court to afford Ware an opportunity to file a new motion limited to seeking the retesting of the substances in his 2009 case. See *Commonwealth v. Ware*, 471 Mass. at 96. That retesting occurred and confirmed that the substances were cocaine, as originally determined by Farak. In the same decision, the Supreme Judicial Court emphasized the inadequacy of the investigation into Farak's misconduct and the prosecutor's duty to investigate thoroughly and disclose to the defendants exculpatory evidence held by agents of the prosecution team. See *id.* at 95. That prompted investigations by AAG Caldwell and others, as set forth above.

⁴⁸The docket does not show that any action or hearings have occurred on that motion. Consequently, that motion is deemed waived. In any event, he has since filed several other motions for post-conviction relief under Mass. R. Crim. P. 30(b).

On June 1, 2015, Ware moved to vacate his convictions (to withdraw his guilty pleas) and to dismiss his indictments (#48) and the finding that he had violated probation terms imposed in connection with his 2007 case. He filed two additional motions to vacate on September 22, 2016 (#77) and on November 16, 2016 (#82).

2. Ware's 2007 Indictments

(a) Ware's Motion to Dismiss 2007 Indictments

As explained above, the drug lab defendants who are entitled to dismissal of their indictments because of the AGO's egregious government misconduct in withholding exculpatory evidence are those: (1) whose drug lab certificates were signed by Farak; (2) who moved unsuccessfully for post-conviction relief and/or discovery during the period of January 19, 2013, and November 1, 2014; and (3) whose motions for relief and/or discovery were denied on the basis of the evidentiary record established before Judge Kinder. With respect to his 2007 case, Ware meets the test on the second and third factors.

As to the first factor, it is not known whether Farak tested the substances in this case because, according to Ware, the drug analysis certificates have been lost. He does not seek to blame or shift the burden of producing the certificates to the Commonwealth. Instead, he assumes that a chemist other than Farak analyzed the substances in his 2007 case. Ware's generalized argument appears to be that the AGO committed egregious misconduct by failing to investigate the scope of Farak's misconduct and that Farak's misconduct occurred when the substances in his case were tested.

Kaczmarek's and Foster's egregious misconduct in 2013 and 2014 did impact Ware's case to the extent that Judge Kinder denied Ware's motion for post-conviction discovery in early 2014

as a result of the failure to disclose exculpatory evidence. But absent proof that Farak analyzed the substances in his 2007 case, Ware cannot show -- and does not argue -- that any of the discovery sought would have aided him or that he was impacted in any way by the misconduct. The disconnect between Ware's 2007 case and any government misconduct renders his motion to dismiss groundless. Cf. *Commonwealth v. Cronk*, 396 Mass. at 199 (remedies for prosecutorial misconduct must be tailored to the injury suffered and balance defendants' rights against need to preserve society's interest in administration of justice).

(b) Ware's Motions for Relief Under Mass. R. Crim. P. 30(b) in 2007 Case

A defendant moving to withdraw a guilty plea must show that (1) egregiously impermissible misconduct by a government agent antedated the entry of his or her plea, and (2) the misconduct occurred in the defendant's case, see *Commonwealth v. Cotto*, 471 Mass. at 116, or that it influenced his or her decision to plead guilty or was material to that choice, see *Commonwealth v. Francis*, 474 Mass. at 821.

Although Ware moves for Rule 30(b) relief in his 2007 case, he offers no specific supporting argument, in contrast to his 2009 and 2010 cases. Because he has not presented evidence that Farak signed his drug certificate and he does not assert that its loss is attributable to the Commonwealth, he cannot claim that he is entitled to the conclusive presumption of egregious government misconduct in satisfaction of the first prong of the *Ferrara-Scott* test. See *Commonwealth v. Gardner*, 467 Mass. at 369. Most importantly, he cannot show that Farak's misconduct occurred in his case. See *Commonwealth v. Cotto*, 471 Mass. at 116.

3. Ware's 2009 and 2010 Cases

(a) Ware's Motion to Dismiss 2009 and 2010 Cases

The 2009 indictment must be dismissed with prejudice. Ware falls squarely within the category of defendants directly victimized by Kaczmarek's and Foster's intentional withholding of exculpatory evidence. Ware sought post-conviction relief in his motion for new trial filed on August 12, 2013, and, due to the egregious government misconduct by those two AAGs, Ware failed in his motion for post-conviction discovery filed on February 14, 2014, to determine the scope of Farak's misconduct.

As for the 2010 case, the one drug-related charge upon which Ware was convicted, count 1, possession of heroin with intent to distribute as a subsequent offender, should also be dismissed with prejudice. In early 2014, the Commonwealth opposed Ware's motion for post-conviction discovery to learn the scope of Farak's misconduct and the AGO continued to block Ware's efforts while concealing the mental health worksheets to which Ware and other drug lab defendants were entitled. The intentional misrepresentations by Kaczmarek and Foster require the drastic remedy of dismissal with prejudice as to count 1. See *Commonwealth v. Cronk*, 396 Mass. at 199; *Commonwealth v. Manning*, 373 Mass. at 443-444.

On the other hand, Kaczmarek's and Foster's egregious misconduct has no bearing on the non-drug convictions in Ware's 2010 case, counts 3 through 8, for assault and battery with a dangerous weapon and one count of resisting arrest. Therefore, Ware's motion to dismiss those non-drug indictments is denied. See *Commonwealth v. Cinelli*, 389 Mass. at 210.

(b) Ware's Motions Under Mass. R. Crim. P. 30(b) in 2009 and 2010 Cases

The Commonwealth concedes that in Ware's 2009 and 2010 cases, he is entitled to a conclusive presumption of egregious government misconduct because Farak signed the pertinent drug lab certificates. Therefore, pursuant to the *Ferrara-Scott* framework, Ware can withdraw

his guilty pleas if he can demonstrate a reasonable probability that he would not have pled guilty and would have taken his chances at trial had he known of Farak's misconduct. See *Commonwealth v. Scott*, 467 Mass. at 354-355, 358.

With respect to the 2009 case, without Farak's certificate, the Commonwealth had only circumstantial evidence that the substance purchased by the undercover officer was \$20 of crack cocaine. There appears to have been no field testing. The Commonwealth does not point to other evidence such as an opinion by a seasoned narcotics investigator that, based on his or her experience, the substances sold appeared to be crack cocaine.

More importantly, Ware was sentenced on the 2009 charge to State prison for a term of 5 to 7 years for distribution of cocaine as a subsequent offense. The plea agreement did not significantly reduce Ware's sentencing exposure on that charge. I find that, in these circumstances, knowledge of Farak's misconduct would have persuaded Ware's defense counsel to have rejected the plea offer and either to have sought a better plea agreement, which would likely have been forthcoming, or to have taken his chances at trial. See *Commonwealth v. Resende*, 475 Mass. at 16-17. Ware has met his burden on the second prong of the *Ferrara-Scott* test of demonstrating a reasonable probability that he would not have pled guilty and would have taken his chances at trial had he known of Farak's misconduct. See *Commonwealth v. Scott*, 467 Mass. at 354-355, 358. Accordingly, should an appellate court reverse the order dismissing Ware's 2009 case, Ware would be allowed to withdraw his guilty plea.

Ware's 2010 case presents a closer question. Of the seven charges, one was for drugs (count 1, possession with intent to distribute heroin), whereas the others were five counts of assault and battery with a dangerous weapon and one charge of resisting arrest (counts 3 through

8). With respect to the drug charge only, Ware has the benefit of the conclusive presumption of egregious government misconduct, as Farak signed the drug analysis certificate. At issue is whether Ware has demonstrated a reasonable probability that, had he then known of Farak's misconduct, he would not have tendered the guilty plea to possession of heroin with the intent to distribute. See *Commonwealth v. Scott*, 467 Mass. at 354-355, 358.

As noted above, that plea agreement resulted in the Commonwealth nolle prossing the school zone violation and in Ware being sentenced to a term of five to seven years in the State prison, to run concurrently with his sentence on the 2009 charge. The Commonwealth asserts, and Ware does not deny, that had Ware not pled guilty, he would have faced at trial a minimum mandatory sentence of five years on the heroin charge, two and a half years on the school zone charge from and after a conviction on the drug charge, up to ten years in State prison for each of the assault and battery with a dangerous weapon charges, two and a half years on the charge of resisting arrest, and an 18 month sentence for his violation of probation. Ware has not shown or even argued that his plea agreement was not favorable to him.

In the 2010 case, without a drug certificate, there is no direct evidence that the eight bags of powdery substance seized from Ware's vehicle were heroin. Nor was there evidence of field testing, controlled buys, or police finding with Ware a large amount of cash or any instruments commonly associated with drug distribution. Compare *Commonwealth v. Antone*, 90 Mass. App. Ct. at 818 (significant circumstantial evidence that substances were cocaine were that police had conducted two controlled buys, both substances field tested positive for cocaine, defendant pointed out "drugs" to police, and police found in defendant's home supplies for cooking, processing and packaging cocaine for distribution). What the Commonwealth did have as strong

circumstantial evidence of guilt was Ware's violent flight to evade police by ramming them with his vehicle.

On balance, without chemical analysis, even that strong circumstantial evidence is insufficient to support a finding that, had Ware known of Farak's misconduct at the time he pled guilty to the 2010 charges, he likely would have accepted the plea offer. See *Commonwealth v. Resende*, 475 Mass. at 16-17. The Commonwealth notably does not argue to the contrary. I find that, with respect to his 2010 case, Ware has demonstrated a reasonable probability that he would not have pled guilty and would have taken his chances at trial had he known of Farak's misconduct. It follows that his motion for relief under Rule 30(b) is allowed. See *Commonwealth v. Scott*, 467 Mass. at 354-355, 358.

G. Omar Brown

1. Factual and Procedural Background

On November 21, 2005, Brown was indicted on charges of possession with intent to distribute cocaine, subsequent offense (count 1), trafficking in cocaine (count 2), possession of marijuana (count 3), resisting arrest (count 4) and committing a drug laws violation near a school or park (count 5). Two weeks earlier, on November 7, 2005, Pontes issued certificates of drug analysis stating that the substances were found to cocaine and marijuana. The results of retesting performed earlier this year raise no concerns about possible tampering in Brown's case.⁴⁹

On May 24, 2006, Brown pled guilty before Page, J. to counts 2, 3 and 4, with counts 3

⁴⁹Pontes' most significant certificate in this case relates to count 2, the cocaine trafficking charge to which Brown pled guilty and for which Brown was sentenced to three years of incarceration. In 2005, Pontes certified that the evidence marked 170609 contained in one bag had a net weight of 17.82 grams of powder which she found to contain cocaine. That substance was retested in 2017 and found to contain cocaine with a net weight of 17.62 grams.

and 4 being filed by the Commonwealth. The Commonwealth entered a nolle prosequi on counts 1 and 5. On count 2, Brown was sentenced to serve 3 years of incarceration at a State prison.

2. Brown's Combined Motion to Dismiss and to Vacate Convictions

Over nine years later, on November 30, 2015, Brown filed a motion seeking the dismissal of his indictments and to vacate his convictions. His arguments in his combined motion to dismiss and vacate (to withdraw his guilty pleas) overlap each other in key respects. In both, his premise is that because there has been a failure to investigate the scope of Farak's misconduct and we still do not know the full extent to which Farak compromised the integrity of the evidence tested by other chemists such as Pontes, Brown is entitled to a presumption that Farak tampered with all police-submitted samples at the Amherst lab while she worked there, including his.

Brown has not pointed to a discernible link between his conviction and any type of governmental misconduct. As an initial matter, the possibility that Farak may have tampered with Brown's substances in 2005 is remote and purely speculative. Nothing in the evidence supports an inference that in 2005, Farak was tampering with cocaine assigned to Pontes.

Nor can Brown complain that the AGO withheld potentially exculpatory evidence from him or that a failure to investigate harmed him. Brown filed no motions for post-conviction relief or discovery between January 18, 2013, and November 1, 2014, and therefore he was not among the drug lab defendants denied relief due to the AGO's failure to learn of and disclose exculpatory evidence. Because Brown has not shown that the AGO's misconduct impacted his conviction in any material way, dismissal of his indictments is unwarranted. See *Commonwealth v. Cronk*, 396 Mass. at 199 (remedies for egregious government misconduct must be tailored to injury suffered); *Commonwealth v. Light*, 394 Mass. at 114; *Commonwealth v. Gardner*, 467

Mass. 363, 368-369 (2014).

Equally unavailing is Brown's argument that his guilty pleas should be vacated under Rule 30(b). He is not entitled to the conclusive presumption of egregious government misconduct, as Pontes signed his drug analysis certificate. As explained above, Brown cannot show that egregious government misconduct occurred in his case or, therefore, that it was material to his choice to plead guilty. Accordingly, he has not met his burden in seeking Rule 30(b) relief. See *Commonwealth v. Cotto*, 471 Mass. at 116; *Commonwealth v. Francis*, 474 Mass. at 821; *Commonwealth v. Resende*, 475 Mass. at 3-4.

H. Wendell Richardson

1. Factual and Procedural Background

In January of 2012, Richardson was approached by an undercover police officer who asked him for "a 20," meaning \$20 of crack cocaine. Richardson then walked to his co-defendant, Tony Murph, and asked him for the cocaine. Richardson testified that he knew that he could purchase the crack from Murph, although he claims that he had not previously done so. Richardson bought the crack from Murph and within minutes sold it to the undercover officer. Police arrested Richardson and Murph and subsequently submitted the two white chunks of suspected crack cocaine to the Amherst drug lab. On March 15, 2012, Farak analyzed them and certified them to be cocaine, each with a net weight of .05 grams.

On April 17, 2012, Richardson and Murph were indicted on charges of distribution of a Class B controlled substance, cocaine, subsequent offense (count 1), and violating controlled substance laws in a school or park zone (count 2). On November 5, 2012, both men pled guilty before Ferrara, J., to distribution of cocaine, the lesser included offense in count 1; the

Commonwealth nolle prossed count 2 in each case. Judge Ferrara sentenced Richardson to three years at a State prison, and he sentenced Murph to four years at a State prison.

On August 1, 2013, after learning of Farak's drug tampering, Murph moved to withdraw his guilty plea. The Commonwealth did not oppose that motion, which Judge Kinder allowed on December 18, 2013, and reduced Murph's prison sentence from 4 years to 2 1/2 years, to be served concurrently with Murph's sentence on a similar conviction in 1279CR00227 (also for distribution of cocaine), with the recommendation that the sentence be served at a house of correction.

In contrast to his co-defendant, Richardson did not move to withdraw his guilty plea until much later, February 26, 2015, and the Commonwealth opposed that motion. On June 8, 2015, each of the substances in this case were retested and certified to be cocaine with the net weight of .03 grams. In early 2017, Richardson filed a motion to dismiss the indictments against him.

2. Richardson's Motion to Dismiss

Richardson argues that he is entitled to dismissal of his indictments due to the AGO's egregious misconduct in withholding exculpatory evidence of Farak's misconduct. There is no question that Kaczmarek's and Foster's misconduct qualifies as egregious government misconduct and that in some cases, it justifies the dismissal of indictments on several grounds. The difficulty with Richardson's motion to dismiss is that he is not among the drug lab defendants most directly impacted by the egregious government misconduct. He did not file a motion for post-conviction discovery or relief while Kaczmarek and Foster were withholding the mental health worksheets between January 18, 2013, and November 1, 2014. Richardson cannot demonstrate that he was deprived of relief during that period due to the egregious government

misconduct. The drastic remedy of dismissal with prejudice must be reserved for particularly egregious cases of misconduct. See *Commonwealth v. Perrot*, 38 Mass. App. Ct. 478, 481 (1995). Richardson has not met his burden of showing why the dismissal of his criminal charges is warranted. See *Commonwealth v. Gardner*, 467 Mass. at 368; *Commonwealth v. Light*, 394 Mass. at 114; *Commonwealth v. Manning*, 373 Mass. at 443.

3. Richardson's Motion to Withdraw Guilty Pleas

Because Farak signed Richardson's drug certificate and the Commonwealth has conceded on the first prong of the *Ferrara-Scott* test that Farak's misconduct was egregious and antedated Richardson's guilty plea, the disposition of Richardson's motion turns on the second prong of the test, whether Richardson has demonstrated a reasonable probability that he would not have pleaded guilty had he known of Farak's misconduct. See *Commonwealth v. Antone*, 90 Mass. App. Ct. at 815. The Commonwealth asserts that Richardson cannot show that Farak's misconduct would have been material to his decision to plead guilty because: (1) Richardson admitted his guilt and that the substance was cocaine during the plea colloquy, and (2) he obtained a favorable agreed-upon sentence in that his school zone violation charge was dropped. Neither of these arguments overrides Richardson's showing on the second prong.

A defendant's admissions during a plea colloquy are not dispositive of his motion to withdraw his guilty pleas in this context. See *Commonwealth v. Scott*, 467 Mass. at 360-361 (inquiry is focused on prejudicial effect of defendant's decision whether to enter guilty plea, not analysis of voluntariness of guilty plea tendered). Had Richardson been aware of Farak's misconduct when he was deciding whether to plead guilty, he would have reasonably concluded that Farak's drug certificates could not have been used against him. Cf. *Commonwealth v.*

Antone, 90 Mass. App. Ct. at 817. Apart from those certificates, there was not then strong evidence that the substances at issue were cocaine. Richardson's conviction arose out of a single undercover buy, and there was no field testing of the substance which Richardson bought from Murph and immediately sold to the undercover officer. See *Commonwealth v. Resende*, 475 Mass. at 17-18 (evidence of field testing of substance was persuasive in identifying substance and made evidence against defendant strong); *Commonwealth v. Antone*, 90 Mass. App. Ct. at 818 (significant additional evidence that suggested that substances were cocaine was that police had conducted two controlled buys from defendant and in both instances, substances field tested positive for cocaine; also, a room in defendant's home had all supplies for cooking, processing and packaging cocaine for distribution, and defendant pointed out "drugs" to police).

Finally, the fact that Murph obtained a much better plea agreement in 2013, despite being more culpable than Richardson, leaves no doubt that Richardson would have fared even better, and likely would have had his charges nolle prossed had he known when he pled guilty what we now know about the scope of Farak's misconduct. See *Commonwealth v. Cotto*, 471 Mass. at 116. In sum, the value to Richardson of the evidence of Farak's misconduct would not have been outweighed by the benefits of entering into the plea agreement where there was only circumstantial evidence that the substances were cocaine. Contrast *Commonwealth v. Antone*, 90 Mass. App. Ct. at 819. Richardson has satisfied his burden of demonstrating a reasonable probability that he would not have pleaded guilty had he known of Farak's misconduct, and his motion to withdraw his guilty plea is allowed. See *Commonwealth v. Cotto*, 471 Mass. at 106; *Commonwealth v. Scott*, 467 Mass. at 361.

I. Glenda Liz Aponte

1. Factual and Procedural Background

On March 6, 2012, a grand jury indicted Aponte on three counts of distribution of cocaine, subsequent offenses, in violation of G. L. c. 94C, § 32A(d) (counts 1, 3, and 5), and three counts of committing those drug violations near a school zone or park, in violation of G. L. c. 94C, § 32J (counts 2, 4 and 6). These charges arose out of undercover officer purchases of crack cocaine from Aponte at her Springfield apartment on November 8, 2011, November 12, 2011, and February 15, 2012. Detective Garcia of the SPD conducted these cash transactions for a "twenty" on November 8, 2011, a "forty" on November 12, 2011, and for four off-white chunks on February 15, 2012.

The Commonwealth has submitted three certificates of drug analysis dated in 2012, and represents that the certificates are based upon Aponte's sales on November 8, 2011, November 12, 2011, and February 15, 2012. The first certificate, dated January 5, 2012, was signed by Hanchett. The latter two certificates, dated January 6, 2012, and April 24, 2012, were signed by Farak. None of these three certificates contains any reference to Aponte or her co-defendant, but instead each identifies the defendant or suspect as "under investigation."⁵⁰ On October 16, 2012,

⁵⁰With respect to the first undercover buy on November 8, 2011, the Commonwealth offers a drug analysis certificate which is dated January 5, 2012, signed by Hanchett, but contains no reference to Aponte or her co-defendant. Instead, the defendant is listed as "under investigation." The substance was assigned lab number A11-04217 and is described as white chunks in one bag with a net weight of .17 grams, determined to be cocaine. Nothing in that certificate shows that the analysis performed by Hanchett concerns the substances sold by Aponte on November 8, 2011. With respect to Aponte's sale on November 12, 2011, the Commonwealth has submitted a certificate signed by Farak on January 6, 2012, certifying that the substance was assigned lab number A11-04271, contained cocaine and had a net weight of .11 grams. That amount is odd because the second sale was for twice the amount of crack cocaine as the first sale, but the weight of the second substance was less than the amount submitted for testing from the first sale. Like the first certificate, the second one contains no reference to Aponte or her co-defendant; instead the certificate identifies the defendant as "under investigation."

The third drug analysis certificate, purportedly relating to Aponte's sale on February 15, 2012, is dated April 24, 2012. It identifies the substance as assigned laboratory number A12-00940 and describes it as white

Aponte pled guilty to counts 1, 3, and 5, and the court (Kinder, J.) sentenced her to concurrent sentences on counts 1 and 3 of 3 1/2 to 4 1/2 years at a State prison, followed by 2 years of probation from and after the incarceration on count 5. The Commonwealth entered a nolle prosequi on the school zone charges, counts 2, 4, and 6.

In May of 2013, once news of Farak's indictments for drug tampering broke, Aponte successfully moved for a stay of her sentence and she was released on bail. On June 26, 2013, Aponte moved to withdraw her guilty pleas. On November 12, 2013, within two weeks after Judge Kinder concluded the evidentiary hearing on the scope of Farak's misconduct with respect to other drug lab defendants' cases, and again on December 5, 2013, Aponte filed motions for post-conviction discovery. The Commonwealth did not oppose Aponte's motion to withdraw her guilty pleas.

On December 30, 2013, Judge Kinder allowed Aponte to withdraw her guilty pleas, and, under a plea agreement, she pled guilty to the lesser included offenses (without the subsequent offense portion) of cocaine distribution on counts 1, 3 and 5. Judge Kinder sentenced Aponte on count 1 to a house of correction for 2 1/2 years; on count 3 to six months to be served at a house of correction from and after the sentence on count 1; and on count 5, to probation for 2 years

chunks in one plastic bag with a net weight of .15 grams and certifies that the substance contains cocaine. Like the first two certificates, this third one does not refer to Aponte or her co-defendant or provide any information linking Aponte to the substances tested. It is not clear on what basis the Commonwealth asserts that these three 2012 certificates qualify as evidence in Aponte's case, although both the Commonwealth and Aponte appear to assume that they do.

Finally, the evidence of retesting offered by the Commonwealth is irrelevant, as it confirmed as cocaine four police-submitted samples in a 2007 (not 2011 or 2012) Aponte case. The substances retested had weights and previously assigned lab numbers quite distinct from the certificates described above. The retesting report states that the analyst tested four items, not three, submitted on December 28, 2016, in connection with an incident involving Aponte on May 4, 2007. The four items retested had been previously assigned laboratory numbers 183340 (weighing .04 grams), 18341 (weighing .04 grams), 18342 (weighing .49 grams), and 18343 (weighing .77 grams), and each was found to contain cocaine. Neither the Commonwealth nor Aponte addresses these evidentiary problems which are concerning but not controlling for purposes of the present motions.

from and after the sentence on count 3. I find that the basis of the 2013 plea agreement on all three counts was the assumption that Farak had tampered with the samples in Aponte's case.

In 2012, Farak tampered with at least six crack cocaine samples assigned to and already tested by Hanchett and she later repackaged them in Hanchett's pre-initialed evidence bags. Because those substances were first analyzed by Hanchett, the drug certificates he issued are accurate as to the identity of the substances he tested. Since December 11, 2015, Aponte has filed several motions to vacate her guilty pleas and for the sanction of dismissal.

2. Aponte's Motion to Dismiss

Aponte claims that she was harmed because her conviction rests on evidence handled by Burnham and Farak, and because the AGO's failure to investigate and its withholding of exculpatory evidence foreclosed drug lab defendants from being able to argue that the evidence in their cases was tainted. As noted above, nothing in the credible evidence supports an inference that Burnham's misconduct may have extended to tampering with the substances he submitted for analysis at the Amherst lab. Consequently, Aponte's motion to dismiss hinges on whether and how the AGO's egregious government misconduct may have affected her second set of guilty pleas.

The answer is that it did not. As repeatedly stated above, the drug lab defendants most obviously harmed by the AGO's egregious misconduct are those whose substances were tested by Farak at the Amherst lab, who filed motions for discovery or for post-conviction relief between January 19, 2013, and November 1, 2014, and whose motions were denied due to the AGO's misconduct. Aponte does not fall into that group. In contrast to other drug lab defendants here, in 2013, Judge Kinder allowed Aponte to withdraw her initial guilty pleas. No prosecutor denied

that Farak's misconduct impacted Aponte's case. In fact, the assumption that Farak's misconduct tainted Aponte's original conviction was the premise for the Commonwealth agreeing to Aponte's motion to withdraw all three of her guilty pleas and to allow her to plead guilty a second time and obtain a better plea bargain.

Aponte does not argue what, if any, evidence which was subsequently disclosed about the scope and nature of Farak's misconduct would have made a difference in her second set of guilty pleas. Her general argument that the AGO intentionally committed egregious government by withholding the mental health worksheets and failing to investigate does nothing to show how that misconduct prejudiced her when she pled guilty the second time in 2013, when the Commonwealth assumed that Farak's misconduct had tainted her first guilty pleas.

Although the AGO's misconduct was deliberate, egregious and intentional, it has not been shown to have violated Aponte's constitutional rights and does not give rise to presumptive prejudice. There is no basis upon which to conclude that such misconduct warrants the dismissal of Aponte's indictments. See *Commonwealth v. Cronk*, 396 Mass. at 198-199.

3. Aponte's Motion for Relief Under Mass. R. Crim. P. 30(b)

The same facts defeat Aponte's motion for Rule 30(b) relief. Assuming for the sake of argument only that she is entitled to the conclusive presumption of egregious government misconduct in satisfaction of the first prong of the *Ferrara-Scott* test as to two of the three cocaine distribution convictions, Aponte cannot meet the second prong of that test, which requires her to particularize Farak's misconduct to her decision to plead guilty the second time, in 2013. See *Cotto*, 471 Mass. at 116. Aponte must demonstrate in the totality of the circumstances a reasonable probability that, had she known of Farak's misconduct, she would not

have admitted to sufficient facts and would have insisted on taking her chances at trial. See *Commonwealth v. Scott*, 467 Mass. at 357. Where a defendant establishes that there was egregious government misconduct, but not that it prejudiced her ability to tender a valid guilty plea, Rule 30(b) relief is unavailable. See *Commonwealth v. Lewin*, 405 Mass. 566, 584-585 (1989).

The second prong of the *Ferrara-Scott* test hinges upon Aponte not knowing, at the time of her plea, about the egregious government misconduct by Farak. That is inapplicable here, where Aponte withdrew her first guilty pleas and was allowed to plead guilty a second time because she knew of the relevant aspects of Farak's misconduct and because it was assumed that the drug lab certificates underpinning the three charges against her were tainted by Farak's misconduct. Nothing that has been learned about Farak's misconduct since late 2013 would have made a difference in Aponte's case. Consequently, Aponte cannot demonstrate a reasonable probability that she would not have pled guilty in late 2013 had she known of the misconduct. See *Cotto*, 471 Mass. at 116.

CONCLUSION

The defendants before me were all convicted of drug offenses. The suspected narcotics tied to their respective cases were analyzed at the Amherst drug lab during Sonja Farak's time there as a chemist. Their motions to dismiss indictments and/or for relief under Mass. R. Crim. P. 30(b) are based on a series of alleged government failings causing serious damage to the administration of justice. This court has found that the two types of egregious government misconduct which have caused substantial havoc here are Farak's evidence tampering and drug theft at the Amherst lab, and the deliberate nondisclosure of exculpatory evidence of Farak's

misconduct by two assistant attorneys general, Anne Kaczmarek and Kris Foster.

The Commonwealth appropriately concedes that Farak's egregious government misconduct presumptively occurred in all cases in which Farak signed drug certificates at the Amherst lab. The court finds that Farak was, throughout her employment at the Amherst lab, under the influence of drugs or drug withdrawal symptoms on almost a daily basis. What began as theft from lab standards in 2004, evolved by 2009, to Farak's theft of police-submitted drug samples. Farak's addiction and tampering began principally with methamphetamine, then progressed to prescription drugs, LSD, powder cocaine, and eventually ramped up to an almost nonstop use of crack cocaine.

The court finds that, apart from Farak's misconduct, the deficiencies at the Amherst lab do not give the defendants grounds for post-conviction relief. There is no factual basis, as asserted by some defendants, that all testing performed at the Amherst lab during Farak's tenure is suspect. The lab chemists, other than Farak, were capable and diligent employees who worked under challenging conditions, without adequate security, supervision, mandatory protocols or optimal materials. Nonetheless, nothing in the evidence shows that their analysis was inaccurate in the cases before me.

The second type of egregious government misconduct underpinning the motions addressed here is Kaczmarek's and Foster's deliberate withholding of exculpatory evidence in violation of the defendants' right to due process. There is no merit to the AGO's contention that it had no duty to disclose the exculpatory evidence. Farak's mental health worksheets, revealed that Farak's addiction and drug tampering had a wider scope and an earlier start than previously known. The defendants were entitled to that evidence, and the AGO was duty bound to provide

it. Kaczmarek's and Foster's intentional, repeated, prolonged and deceptive withholding of that evidence from the defendants, the court, and local prosecutors, justifies dismissal of indictments with prejudice in many cases. The improper withholding of that evidence irremediably prejudiced an undetermined number of defendants by precluding them from asserting what would have been a powerful post-conviction or trial defense argument, namely, that Farak's certificate of drug analysis was fatally flawed, and therefore, inadmissible. Kaczmarek's and Foster's misconduct was so egregious and harmful to the administration of justice that it gives rise to presumptive prejudice. Additionally, their misconduct evinces a depth of deceptiveness that constitutes a fraud upon the court. Foster intentionally misled Judge Kinder into concluding that she had followed his order to review the AGO's Farak-related investigative materials.

Kaczmarek, through Foster, deliberately misrepresented to Judge Kinder that the AGO had turned over all those materials to the defendants (through the district attorneys). The drastic remedy of dismissal with prejudice must be reserved for extreme cases. Some of the cases here fall within that category. More specifically, that category contains those cases where motions for discovery, dismissal, and/or for post-conviction relief were filed and denied between January 18, 2013, and November 1, 2014; based upon the limited evidentiary record before Judge Kinder; and caused by Kaczmarek's and Foster's disregard for the defendants' constitutional rights and their violation of Judge Kinder's direct court orders.

Unlike the motions to dismiss, the defendants' motions under Mass. R. Crim. P. 30(b), to withdraw guilty pleas or for a new trial, require a more individualized factual inquiry into the circumstances of each case. A pivotal question is what would each defendant have done differently, if anything, at the time of the conviction, had that defendant known, at that time, of

the scope of Farak's misconduct. The dispositions of some Rule 30(b) motions may be moot in cases where I have allowed the motions to dismiss. However, even in those cases, in the interest of judicial economy, I have addressed the Rule 30(b) motions so as to provide the alternative disposition in the event that an appellate court determines dismissal with prejudice inappropriate.

Hopefully, this decision marks the beginning of the end of this sad chapter of Massachusetts legal history. It has been startling to see unveiled the amount of damage done by a single lab analyst, Sonja Farak, who placed her own selfish wants and needs before her duties as a public servant in a critically important role. It has been sad to see how that single analyst's betrayal dragged into suspicion her lab colleagues who, without exception, are extremely hard-working, ethical and competent public servants.

Similarly, but in many ways more damning, the conduct of two assistant attorneys general, Kaczmarek and Foster, compounded and aggravated the damage caused by Farak. Their intentional and deceptive actions ensured that justice would certainly be delayed, if not outright denied, and in the process, they violated their oaths as assistant attorneys general and officers of the court. In another parallel to Farak, Kaczmarek and Foster's betrayal of the public trust also dragged into suspicion their colleagues in the attorney general's office, who, like Farak's lab colleagues, the court finds to be committed and principled public servants.

ORDER

For all the foregoing reasons, it is hereby **ORDERED** that:

(1) Erick Cotto, 0779CR00770

- (a) Cotto's Motion to Dismiss Indictments (# 142) is **ALLOWED** with prejudice as to count 1 and **DENIED** as to count 2.
- (b) Cotto's Motion to Withdraw Guilty Plea (# 31) is **ALLOWED**.

(2) Omar Harris, 1079CR01233

Harris's Motion to Dismiss Based on Prosecutorial Misconduct (#86) is **ALLOWED** with prejudice.

(3) Rolando Penate, 1279CR00083

Penate's Motion to Dismiss Indictments and Alternatively for a New Trial (#142) is **ALLOWED** with prejudice.

(4) Fiori Liquori, 1279CR00624

(a) Liquori's Motion to Dismiss Based on Prosecutorial Misconduct (#113) is **ALLOWED** with prejudice.

(b) Alternatively, in the event the allowance of the motion to dismiss is reversed by an appellate court, Liquori's Motion for New Trial (#95) is **DENIED**.

(5) Lizardo Lee Vega, 0979CR00097

Vega's Motion to Dismiss and Alternative for Miscellaneous Relief (to Withdraw His Guilty Plea) (# 67) is **ALLOWED** with prejudice insofar as it seeks dismissal of the indictments. To the extent that the motion seeks the alternative relief of withdrawing his guilty plea, and in the event the allowance of the motion to

dismiss is reversed by an appellate court, the motion is **DENIED**.

(6) **Bryant Ware, 0779CR01072**

(a) Ware's Motion to Vacate Conviction and [for] Sanction of Dismissal (#48) is **DENIED**.

(b) Ware's Motions to Vacate (#77 and # 82) are **DENIED**.

(7) **Bryant Ware, 0979CR01072**

(a) Ware's Motion to Vacate Conviction and [for] Sanction of Dismissal (#44) is **ALLOWED**.

(b) Ware's Motion to Vacate (#73) is **ALLOWED**.

(8) **Bryant Ware, 1079CR00253**

(a) Ware's Motion to Vacate Conviction and [for] Sanction of Dismissal (#28) is **ALLOWED** insofar as it seeks the dismissal with prejudice as to count 1 and to withdraw all of his guilty pleas; it is **DENIED** insofar as it seeks the dismissal of counts 3 through 8.

(b) Ware's Motion to Vacate (#59) is **ALLOWED** insofar as it seeks to withdraw his guilty pleas.

(9) **Omar Brown, 0579CR01159**

Brown's Motion to Vacate Conviction and for Sanction of Dismissal (#40) is **DENIED**.

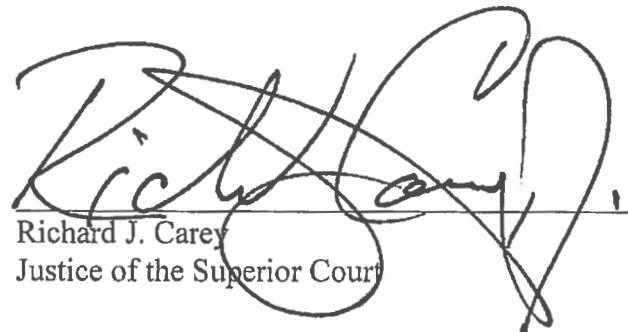
(10) **Wendell Richardson, 1279CR00399**

(a) Richardson's Motion to Dismiss (# 42) is **DENIED**.

(b) Richardson's Motion to Withdraw Guilty Plea (#17) is **ALLOWED**.

(11) Glenda Liz Aponte, 1279CR00226.

- (a) Aponte's Motion to Vacate Convictions and for the Sanction of Dismissal (#48) is DENIED.
- (b) Aponte's Motion to Vacate Convictions and for the Sanction of Dismissal of the Underlying Indictments (#59.1) is DENIED.
- (c) Aponte's Motion to Vacate Convictions (#63) is DENIED.
- (d) Aponte's Motion to Vacate Convictions (#65) is DENIED.



Richard J. Carey
Justice of the Superior Court

Dated: June 26, 2017

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK, ss.

No. SJ-12471

COMMITTEE FOR PUBLIC COUNSEL SERVICES,
and others

v.

ATTORNEY GENERAL,
and others

AFFIDAVIT OF CHRISTOPHER K. POST

I, Christopher K. Post, state the following based on knowledge, information, and belief:

1. I am a staff attorney with the Committee for Public Counsel Services ('C.P.C.S.'), Drug Lab Crisis Litigation Unit.
2. This affidavit is submitted to provide the Court with information regarding the estimated number of adverse drug dispositions tainted by the Amherst Drug Lab scandal.

Background

3. I was tasked with providing a similar estimate in the summer of 2016, while *Bridgeman v. District Attorney for the Suffolk District*, No. SJ-2014-005, was being litigated. At that time, C.P.C.S. had not been provided with data from the Amherst Drug Lab's evidence database for the years 2004 through approximately the first half of 2008. We had, however, been given spreadsheets covering the second half of 2008 through January 2013. These spreadsheets contained information corresponding to each evidence sample's

submission date, the assigned chemist, testing date, and result of analysis.

4. I used Microsoft Excel's built-in functions in order to tabulate the total number of samples processed by each chemist at the Amherst lab for the years that were available as well as each chemist's monthly testing average. I then used these averages to estimate the total number of samples each chemist would have analyzed during the missing years.
5. At that time, we considered these estimates to be conservative because the vast majority of available data covered the years that followed *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). In interviews with the State Police, numerous chemists from both the Amherst and Hinton labs noted that their productivity declined after the decision issued because they were required to appear in court. See *Investigation of the Drug Laboratory at the William A. Hinton State Laboratory Institute 2002 - 2012*, Office of the Inspector General, March 4, 2014, at 16.
6. C.P.C.S. had also been provided with data from the Hinton Drug Lab for the years 2003 through 2012. This second set of spreadsheets contained similar information and also showed the number of "overflow" samples that had been sent from Hinton to Amherst for processing.
7. I combined these figures and came to an approximate total of 54,288 samples assigned to chemists at the Amherst Drug Lab from the time that Farak began working there until her arrest.
8. I then attempted to estimate the number of adverse dispositions that would have been associated with these samples.

9. With no other metric to apply, we looked to the only available point of comparison: the number of adverse dispositions associated with the total number of samples that Annie Dookhan had analyzed over the course of her career. The number of adverse dispositions was tabulated using the lists that had been provided by the District Attorneys and the total number of Dookhan involved samples was computed using the Meier list. These figures yielded a sample-to-adverse-disposition ratio of 0.28448, or approximately twenty-eight percent.
10. I then applied this ratio to the estimated totals in order to approximate the number of potentially tainted dispositions. When applied to the estimated number of samples assigned to chemists at the Amherst Drug Lab during the period of time that Farak worked there, this yielded approximately 15,444 adverse dispositions. When applied to the estimated number of samples assigned solely to Farak, this yielded 5,552 such dispositions.
11. This estimate was not orders of magnitude off from the number of Farak related adverse dispositions recently reported by the District Attorneys. See Tom Jackman, *Massachusetts Prosecutors To Throw Out 8,000 Convictions in Second Drug Lab Scandal*, The Washington Post, December 28, 2017. Final lists are expected to be submitted later this year.

Estimate Based Upon New Data

12. C.P.C.S. was recently provided with Amherst Drug Lab data for the missing years, 2004 through the first half of 2008. Hinton Drug Lab overflow data was represented in these spreadsheets, unlike the ones covering the latter half of 2008 to 2013. I again used Microsoft Excel's built-in

functions to tabulate the total number of samples processed by each chemist, which resulted in the following:

- a. James Hanchett was assigned to 16,441 samples.
- b. Rebecca Pontes was assigned to 25,285 samples.
- c. Sonja Farak was assigned to 24,783 samples.
- d. Sharon Salem was assigned to 434 samples.
- e. Alan Stevenson was assigned to four samples.
- f. An additional 655 samples had been sent to the lab for analysis, but had not been assigned by the time Farak was arrested.¹

13. Combining these figures, a total of 67,602 samples were processed at the Amherst Drug Lab during the period in time in which Sonja Farak worked there.

14. Applying the same sample-to-adverse-disposition ratio to the total number of samples processed by Amherst chemists while Farak worked at the lab yields approximately 19,231 adverse dispositions, 7,050 of which were attributable to Farak.

15. This approximation therefore likely slightly underestimates the total number of adverse dispositions, as the District Attorneys have already agreed to vacate and dismiss with prejudice some 8,000 Farak tainted convictions.

Signed under the pains and penalties of perjury, on this, the
12th day of March, 2018.



Christopher K. Post, esq.

¹ These were included due to the fact that Farak admitted to opening unassigned evidence bags and tampering with their contents. She also admitted to smoking crack cocaine while she was in the evidence room. See Grand Jury Testimony of Sonja Farak, Sept. 16, 2015, at 143, 160-164.