

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT  
No. 12-624

COMMONWEALTH

v.

FIORI T. LIQUORI

DEFENDANT'S MEMORANDUM IN SUPPORT OF  
MOTIONS TO DISMISS AND FOR NEW TRIAL

I. INTRODUCTION

This Court should allow the Defendant's "Motion to Dismiss Based on Prosecutorial Misconduct" and "Motion for New Trial" because the Attorney General's failure to turn over exculpatory evidence was illegal and unconscionable. This failure was the result of intentional misconduct by two different assistant attorneys general: one who disobeyed a court order and a subpoena and another who intentionally withheld exculpatory evidence. This failure violated the Defendant's constitutional rights to due process of law and to a fair trial.

Alternatively, the Defendant is entitled to a new trial based on newly-discovered evidence of Farak's misconduct. The difference in this evidence from the evidence adduced at the Defendant's trial was so dramatic that it cannot be said that it would have had no effect or only a slight effect on the jury.

II. FACTS

On June 28, 2012, the Defendant was indicted by a Hampden County Grand Jury on charges of Distribution of a

Class B Controlled Substance (Counts 1 thru 3), Possession With Intent to Distribute a Class B Controlled Substance (Counts 4 & 5), Possession With Intent to Distribute a Class E Controlled Substance (Counts 6 & 7), Possession of a Class E Controlled Substance (Count 8), Possession of a Class B Controlled Substance (Count 9, and Possession of a Firearm Without an FID Card (Count 10).<sup>1</sup>

On May 18, 2012, the suspected drug samples in the Defendant's case were submitted to the Massachusetts Department of Public Health drug laboratory in Amherst [hereinafter "the lab"]. The samples were assigned to chemist Sonja J. Farak [hereinafter "Farak"] and were purportedly analyzed by her on June 22, 2012.

On January 18, 2013, the lab evidence officer, Sharon Salem, and the lab supervisor, James Hanchett, discovered that Farak had tampered with or stolen two drug samples that were submitted to the lab for testing. After Hanchett notified the Massachusetts State Police, which had taken over operation of the lab as of July 1, 2012, two additional samples were discovered to be adulterated or missing. On the same date, investigators seized Farak's personal vehicle and applied for a search warrant to search it.

On January 19, 2013, at 3:23 A.M., Massachusetts State Police Lieutenant Captain Robert Irwin, Sergeant Joseph Ballou [hereinafter "Ballou"], and Trooper Randy Thomas searched Farak's personal vehicle at the State Police barracks in Northampton. They seized hundreds of documents

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<sup>1</sup> On May 8, 2013, the Commonwealth proceeded to trial against the Defendant on Count 10, charging Possession of a Firearm Without an FID Card. On May 9, 2013, this Court (Ford, J.) allowed the Defendant's "Motion for Required Finding of Not Guilty" at the close of the Commonwealth's evidence.

from the trunk of the vehicle and identified them in the search warrant return and in police reports as "Assorted Lab Paperwork." The search lasted approximately an hour and a half. None of the investigators reviewed the contents of the paperwork in detail at that time.<sup>2</sup>

It was not until approximately two weeks after the search of Farak's vehicle (ostensibly February 2, 2013) that Ballou, whose responsibility as the "case officer" was to review the documents seized from the search, went through each of the documents in detail. At that time, Ballou discovered *inter alia* two documents titled "ServiceNet Diary Card," two documents titled "Emotion Regulation Worksheet," and a document featuring handwritten notes about the "pros" and "cons" of "resisting." It was clear to Ballou that these documents contained admissions by Farak regarding her drug abuse and theft of drugs from the lab.<sup>3</sup> On February 14, 2013, Ballou wrote an e-mail to the Assistant Attorney General who was prosecuting Farak, Anne Kaczmarek [hereinafter "Kaczmarek"], that stated as follows:

Anne,

Here are those forms with the admission of drug use I was talking about. There are also news articles with handwritten comments about other officials being caught with drugs. All of these were found in her car inside of the lab manila envelope.

Joe

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<sup>2</sup> On January 19, 2013, Farak was arrested charged in connection with the four samples in Eastern Hampshire District Court. She was later indicted in Hampshire County Superior Court and pled guilty on January 6, 2014. She was sentenced to eighteen months in the house of correction and five years of probation.

<sup>3</sup> Although Sergeant Ballou knew that the documents contained admissions regarding Farak's drug abuse and theft of drugs from the lab, he did not know when the documents were created.

Ballou attached four files to the e-mail: "Articles and Notes.pdf," "Emotion Regulation Homework.pdf," "Positive Morphine Test.pdf," and "Emotion Regulation Worksheet.pdf." These files contained *inter alia* the two documents titled "ServiceNet Diary Card," the two documents titled "Emotion Regulation Worksheet," and the document featuring handwritten notes about the "pros" and "cons" of "resisting."

In March 2013, Kaczmarek drafted a document titled "Prosecution Memo," in which she outlined her case against Farak and specifically referenced "items of note" that were recovered from Farak's personal vehicle, including "mental health worksheets describing how Farak feels when she uses illegal substances and the temptation of working with "urge-ful samples" (Exhib. 163). Kaczmarek concluded that sentence with a footnote, in which she stated, "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." Kaczmarek circulated her "Prosecution Memo" to her supervisors for review.<sup>4</sup> In a handwritten edit claimed by the Attorney General's Criminal Bureau Chief and Kaczmarek's superior, John Verner, he wrote, "This paperwork NOT turned over to DA's offices yet" (emphasis in original).

On April 22, 2013, Kaczmarek provided discovery to Farak's attorney, Elaine Pourinski (Exhib. 168). That discovery included a CD labeled "Discovery #2," which included a seven-page file titled "Paperwork recovered from

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<sup>4</sup> The "Prosecution Memo" indicates that at least two supervisors signed-off on the document with their initials on March 27, 2013, and March 28, 2013.

M/V." This paperwork included the two documents titled "ServiceNet Diary Card," the two documents titled "Emotion Regulation Worksheet," and the document featuring handwritten notes about the "pros" and "cons" of "resisting" (Exhib. 169). In a face-to-face discussion regarding these very documents, Kaczmarek told Pourinski that she (Kaczmarek) would not be turning over these documents to "defense counsel," referring to the several attorneys seeking post-conviction relief as a result of Farak's misconduct.

On June 7, 2013, the Commonwealth retested the suspected drug samples in the Defendant's case at the Massachusetts State Police Forensic Services Group in Sudbury, Massachusetts. On July 8, 2013, the Defendant filed a "Motion to Dismiss for Egregious Government Conduct" and a "Motion to Suppress Evidence." The grounds for both of the motions were twofold: that Farak's conduct at the lab was egregious and had irreparably tainted the evidence in the case and that the substandard conditions and protocols at the lab had created an environment that facilitated Farak's misconduct. The motions were heard before the Honorable C. Jeffrey Kinder at a consolidated hearing involving several other defendants seeking post-conviction relief based on the same grounds.

On August 30, 2013, Attorney Jared Olanoff, on behalf of a defendant seeking post-conviction relief in the consolidated hearing, served a subpoena *duces tecum* on Ballou that compelled his appearance to testify at the consolidated hearing and his production of "a copy of all documents and photographs pertaining to the investigation of Sonja J. Farak and the Amherst drug laboratory" [hereinafter "Ballou subpoena"] (Exhib. 183). On September

9, 2013 - the first day of the consolidated hearing, the assistant attorney general assigned to address the Ballou subpoena, Kris Foster [hereinafter "Foster"], argued a motion to quash the subpoena on the grounds *inter alia* that the items in Ballou's file were privileged (Exhib. 80, p. 15-19). Judge Kinder asked Foster if she had reviewed Ballou's file, to which she replied, "No." Thereafter, Judge Kinder instructed Foster to review Ballou's file and ascertain what items, if any, she believed might be privileged, at which time he (Judge Kinder) would review them *in camera* and make a determination as to their discoverability.

On September 16, 2013, Foster wrote a letter to Judge Kinder on Attorney General stationary, in which she stated, in pertinent part:

After reviewing Sergeant Ballou's file, every document in his possession has already been disclosed. This includes grand jury minutes and exhibits, and police reports. Therefore, there is nothing for the Attorney General's Office to produce for your review on September 18, 2013.

(Exhib. 193).

After a three-day hearing that concluded on October 23, 2013, the Defendant's motions to dismiss and to suppress were denied. The Court found that although Farak's misconduct dated back to the "summer of 2012," which was exactly when the Defendant's samples were purportedly analyzed by Farak at the lab, she had only tampered with or stolen cocaine samples, not prescription medications.

On September 9, 2014, the Commonwealth proceeded to trial against the Defendant on the remaining charges, save Counts 6 and 7, which it dismissed prior to jury empanelment. During the trial, the Defendant presented all

of the evidence regarding Farak's misconduct that was available to him at the time. This included evidence of the four missing or adulterated samples discovered at the lab on January 18, 2013, and evidence of an unrelated case, in which suspected oxycodone pills purportedly analyzed by Farak at the lab were returned different in both number and appearance. On September 12, 2014, the jury found the Defendant guilty of Counts 1, 3, 4, 5 and 8.<sup>5</sup> On the same date, this Court (Rup, J.) sentenced the Defendant to two and one-half years in the house of correction and two years of probation on and after.

On October 30, 2014, Attorney Luke Ryan, on behalf of a defendant named Rolando Penate, was granted court-approval to view the evidence seized from the trunk of Farak's personal vehicle, after requesting such approval for more than a year. Upon his review of this evidence, he discovered the two documents titled "ServiceNet Diary Card," the two documents titled "Emotion Regulation Worksheet," and the document featuring handwritten notes about the "pros" and "cons" of "resisting."

On April 8, 2015, the Supreme Judicial Court decided Commonwealth v. Cotto, 471 Mass. 97 (2015), in which it held that the Commonwealth failed to investigate the full scope of Ms. Farak's misconduct and ordered the Attorney General to conduct further investigation. In May 2016, the Attorney General completed its further investigation, which revealed that Ms. Farak committed egregious misconduct at the lab from the inception of her employment there in 2004 to the date of her arrest on January 19, 2013.

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<sup>5</sup> The jury found the Defendant not guilty of Count 2.

### III. ARGUMENT

A. THE DEFENDANT IS ENTITLED TO DISMISSAL BECAUSE THE ATTORNEY GENERAL'S FAILURE TO DISCLOSE FARAK'S ADMISSIONS OF DRUG ABUSE AND THEFT WAS ILLEGAL AND UNCONSCIONABLE.

1. The Attorney General's Failure To Disclose Farak's Admissions Of Drug Abuse And Theft Violated A Court Order And A Subpoena.

Dismissal with prejudice is appropriate in cases of egregious prosecutorial misconduct or on a showing of prejudice (or a substantial threat thereof), or "irremediable harm" to the defendant's opportunity to obtain a fair trial. See Commonwealth v. Jacobsen, 419 Mass. 269, 276 (1995) ("egregious misconduct or at least a serious threat of prejudice"), quoting Commonwealth v. Cinelli, 389 Mass. 197, 210 (1983); accord Commonwealth v. Connelly, 418 Mass. 37, 38 (1994); see also Commonwealth v. Lewin, 405 Mass. 566, 579 (1989) ("showing of irremediable harm" or "prosecutorial misconduct that is egregious, deliberate, and intentional"), quoting Commonwealth v. Cronk, 396 Mass. 194, 198-99 (1985). In such cases, the Supreme Judicial Court has held that, before dismissing the indictment, the judge needs to make a finding as to "whether the prosecutor's...response to discovery orders caused such irreparable prejudice that the defendant could not receive a fair trial if the [indictment] were reinstated." Cronk, 396 Mass. at 201.

a. Kris Foster.

The egregiousness of the prosecutorial misconduct in this case was extreme. On the first day of the consolidated hearing in 2013, in which the Defendant was



joined as a party, Judge Kinder explicitly ordered Foster to review Ballou's file and identify which documents, if any, she believed were privileged and discoverable by the defense (Exhib. 80, p. 15-19). In a letter to Judge Kinder dated September 16, 2013, Foster wrote that she had reviewed Ballou's file and determined that everything in the file had already been turned over to the defense (Exhib. 193). Both of Foster's representations were completely false. On December 13, 2016, Foster testified that, despite Judge Kinder's order, she never reviewed Ballou's file. And in actuality, everything in Ballou's file had NOT been turned over. The items that had not been not turned over were the most significant and exculpatory evidence in the investigation: Farak's "mental health worksheets."

Foster testified that her supervisor, Appeals Division Chief Randall Ravitz, told her that everything in Ballou's file had already been turned over. She further claimed that Ravitz and two other superiors, Criminal Bureau Chief John Verner and Chief of the Enterprise and Major Crimes Unit Dean Mazzone, told her there was no need to look at the file. However, Ravitz, Verner, and Mazzone all denied saying any such things to Foster. If this Court were to credit Foster's testimony that Ravitz, Verner, and Mazzone all told her that she did not have to review Ballou's file, then this Court would *ipso facto* have to find that Ravitz, Verner, and Mazzone all committed perjury when they testified that they never said any such things to her. Therefore, it is highly likely that Foster testified falsely when she claimed that all of her superiors told her that she did not have to review the file.

Regardless of whether or not her supervisors told her

that she did not have to review the file, the bottom line is that a judge ordered her to. At the end of the day, the onus was on her, not her supervisors, to comply with the judge's order. She was the one who was appearing in court and making written representations regarding Ballou's file in a letter to the judge. Foster's defiance of the court order, which the Commonwealth attempts to excuse due to inexperience, is inexcusable. Regardless of how long one has been practicing law, any diligent and competent attorney knows that the blatant disregard of a judge's order is unlawful.

In addition to violating a court order, Foster failed to comply with the subpoena, which also carries the full effect of the law. Her defiance was intentional. That is, she consciously and deliberately decided not to review Ballou's file and nonetheless make knowingly false representations to the Court about having done so and about how the entire file had already been turned over. Had Foster not defied this Court's order, she would have likely discovered the "mental health worksheets" that were in Ballou's file and which he had specifically earmarked as being significant to the case.

b. Anne Kaczmarek.

Foster was not the only assistant attorney general who committed egregious misconduct with respect to the exculpatory evidence in this case. Anne Kaczmarek intentionally withheld the "mental health worksheets" from defense lawyers who were seeking redress based on Farak's misconduct. There are two pieces of evidence that prove the intentional nature of her conduct. The first is her "Prosecution Memo," in which she specifically references

the "mental health worksheets" and her legal conclusion that they were probably not privileged. A handwritten edit by John Verner, which she ostensibly reviewed before writing her final draft, clearly states that the "mental health worksheets" had "NOT" been turned over to the district attorneys (emphasis in original).

The second piece of evidence that proves Kaczmarek's failure to disclose the worksheets was intentional was her conversation with Farak's attorney, Elaine Pourinski, in which she explicitly stated that she (Kaczmarek) would not be turning them over to "defense counsel," referring to those lawyers representing defendants who were potentially aggrieved by Farak's misconduct.

Kaczmarek's responsibility with respect to providing discovery to district attorneys regarding the Farak scandal was the same as it was in the Annie Dookhan scandal. On December 16, 2016, Kaczmarek admitted that she was the sole person in charge of furnishing the Farak discovery to the district attorneys and, by extension, the defense lawyers representing affected clients.

Kaczmarek's refusal to turn over the mental health worksheets constituted prosecutorial misconduct. It was so egregious that there is no appropriate remedy other than dismissal.

2. The Attorney General's Failure To Disclose Farak's Admissions Of Drug Abuse And Theft Violated Brady v. Maryland.

Due process requires that the prosecution disclose evidence favorable to the accused. Brady v. Maryland, 373 U.S. 83, 87 (1963). A prosecutor's duty to disclose exculpatory evidence extends to information in the 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. Commonwealth v. Scott, 467 Mass. 336, 349 (2014). "[W]here a prosecutor fails to disclose evidence that the defendant is entitled to receive and the defendant is prejudiced by the failure to disclose, a motion to dismiss with prejudice should be allowed only where there is a 'showing of irreparable harm to the defendant's opportunity to obtain a fair trial.'" Commonwealth v. Bridgeman, 476 Mass. 298, 316-17 (2017), quoting Commonwealth v. Cronk, 396 Mass. 194, 198 (1985).

There is no dispute that the Massachusetts State Police and, by extension, the Attorney General's Office possessed Farak's "mental health worksheets" once they were seized from her vehicle pursuant to a search warrant on January 19, 2013. Further, there is no dispute that these documents were highly exculpatory. See Commonwealth v. Murray, 461 Mass. 10 (2011) (evidence is exculpatory if it could have impeached a witness for bias or challenged the credibility of key prosecution witnesses). The "worksheets" contained explicit admissions by Farak regarding her drug abuse and drug theft at the lab that, upon diligent review, revealed years of misconduct. Finally, there is no dispute that the Attorney General failed to provide this evidence to the Defendant in advance of his trial on September 9, 2014.<sup>6</sup>

The Attorney General's failure to provide this evidence to the Defendant in advance of trial constituted a monumental constitutional violation in and of itself. The practical consequences of this violation were severe. The

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<sup>6</sup> On cross-examination, Kaczmarek agreed that it was her responsibility to provide discovery relating to the Farak prosecution to the various district attorney's offices across the state, just as she had in the Dookhan case and in the Farak case.

Attorney General's failure to provide this evidence eviscerated the Defendant's defense at trial. The Defendant presented every piece of evidence pertaining to Farak's misconduct that was available to him at that time. This included very limited evidence of misconduct (*i.e.*, tampering or theft of four drug samples) that dated back only as far as "the summer of 2012." Moreover, the Commonwealth fervently argued that Farak's misconduct did not extend to prescription pills, which were the only type of drugs recovered in the Defendant's case.

In light of the more thorough investigation conducted pursuant to Cotto, we now know that all of this was untrue. First, we now know that Farak's misconduct took place on an almost-daily basis for eight years, not six months. Second, we now know that Farak ingested, tampered with, or stole drug samples other than just cocaine, including oxycodone<sup>7</sup>, methamphetamine, ketamine, ecstasy, phentermine, LSD, and marijuana. Indeed, oxycodone was the primary drug at issue in the Defendant's case.

The impact that this newly-discovered evidence would have had on the jury cannot be understated. The jury received a mere fraction of the evidence relating to the true timing and scope of Farak's misconduct. But it wasn't just the evidence that was corrupted. It was also the parties' arguments. The Defendant attempted to argue a pattern of misconduct based on a limited number of samples. The Commonwealth argued that Farak's misconduct was limited

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<sup>7</sup> On January 28, 2013, the Massachusetts State Police searched the lab and recovered a vial of white powder from the top of Farak's desk. This item was tagged as "Item Number 56" (Exhib. 14). The vial was submitted to the Massachusetts State Police Crime Laboratory for analysis, where it was assigned the label "Item 17" and was found to contain Acetaminophen and Oxycodone, the latter being a derivative of opium (Exhib. 6A).

to a short period of time and did not involve prescription pills. Ultimately, every Farak-related argument made by either party was proven to be factually false. To say that the Defendant received a fair trial or that justice was done is absurd.

B. THE DEFENDANT IS ENTITLED TO A NEW TRIAL BECAUSE THE NEWLY-DISCOVERED EVIDENCE REGARDING THE NATURE AND SCOPE OF FARAK'S MISCONDUCT WOULD HAVE HAD MORE THAN A SLIGHT EFFECT ON THE JURY.

The Commonwealth has conceded the first prong of the Scott analysis - that Farak committed "egregious government misconduct." See Commonwealth v. Scott, 467 Mass. 336 (2014). As to the second prong - the "prejudice standard" - the standard of review is different for those defendants who were convicted after a trial, as opposed to a guilty plea. In Commonwealth v. Francis, 474 Mass. 816, 825 (2016), the Supreme Judicial Court adopted the "preserved error standard," which requires reversal of a conviction unless the court is "sure that the error did not influence the jury, or had but very slight effect." Commonwealth v. Vinnie, 428 Mass. 161, 163 (1998), quoting Commonwealth v. Flebotte, 417 Mass. 348, 353 (1994).

As discussed above, it cannot be said that the newly-discovered would have had either no effect or only a slight effect on the jury. During the trial, the jury heard that Farak tampered with only four samples during a span of only six months. Indeed, this was the only evidence available to the Defendant at that time. However, the newly-discovered evidence shows that Farak committed misconduct at the lab on an almost-daily basis for eight years. The difference in this evidence is dramatic.

Moreover, during the trial, the jury heard that Farak

tampered with only cocaine samples. Again, this was essentially the only evidence available at the time. However, the newly-discovered evidence shows that Farak ingested, tampered with, or stole drug samples other than just cocaine, including oxycodone, methamphetamine, ketamine, ecstasy, phentermine, LSD, and marijuana. Indeed, oxycodone was the primary drug at issue in the Defendant's case.

As discussed above, the evidence presented at the Defendant's trial had virtually no basis in reality. The evidence presented by both parties was so far afield from what is now known to be true that the trial itself was nothing more than an academic exercise featuring "alternative facts." In light of the Defendant's constitutional right to present evidence that is favorable to him - and to not be convicted based on evidence that is proven to be false - justice dictates that he receive a new trial.

#### IV. CONCLUSION

For all the reasons set forth above, the Defendant requests that his "Motion to Dismiss for Egregious Prosecutorial Misconduct" and his "Motion for New Trial" be allowed.

FIORI T. LIQUORI  
By his attorney,

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Dated: February 3, 2017

CERTIFICATE OF SERVICE

I, Jared Olanoff, hereby certify that on February 3, 2017, a true copy of the foregoing "Defendant's Memorandum in Support of Motions to Dismiss and For New Trial" was served upon Assistant District Attorney Deborah Ahlstrom by leaving a copy with her secretary at her office on 50 State Street, Springfield, MA 01103.

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Jared L. Olanoff  
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