

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

TRIAL COURT OF THE
COMMONWEALTH
SUPERIOR COURT DEPT.
INDICTMENT NOS. 0979CR01068,
0979CR01069; 0779CR00770;
0979CR00097; 1279CR00226;
0579CR01159; 1279CR00624;
1279CR00083; 0779CR01072,
0979CR01072, 1079CR00253

Commonwealth

v.

JERMAINE WATT
ERICK COTTO
LIZARDO VEGA
GLENDA APONTE
OMAR BROWN
FIORI LIQUORI
ROLANDO PENATE
BRYANT WARE

DEFENDANTS' REPLY TO OFFICE OF THE ATTORNEY GENERAL'S PROPOSED FINDINGS OF
FACT

On January 31, 2017, undersigned counsel filed pleadings asking this Court to find certain facts regarding the investigation of Sonja Farak (Farak) by the Attorney General's Office (AGO) and that office's non-disclosure of exculpatory evidence. On February 17, 2017, the AGO submitted its own proposed findings but did not specifically address the findings proposed by defense counsel. This pleading offers defense responses to paragraphs 12-452

and 601-605 of the AGO's submission.¹ Its purpose is to identify the places where the parties agree and pinpoint the factual disputes this Court must resolve.

AGO Proposed Findings of Fact and Defense Responses

12. While undertaking the investigation and prosecution of Farak, a state chemist at the Amherst Lab, the AGO and State Police were also investigating and prosecuting Dookhan, who had been a chemist at the Hinton Lab. That investigation had begun approximately six months earlier. *Commonwealth v. Scott*, 467 Mass. 336, 339 (2014).

Response: Undisputed.

13. The investigation of Dookhan by State Police assigned to the AGO began in July 2012, sometime after the Legislature transferred operation of the Hinton Lab to the State Police. In the Dookhan investigation, the State Police were made aware of an incident dating back to 2011 which raised questions about Dookhan's breach of lab protocols involving ninety (90) cases. The State Police asked its detectives assigned to the AGO to launch a broader formal investigation to determine if more than ninety (90) cases were affected. *Scott*, 467 Mass. at 339.

Response: Undisputed.

14. The State Police/AGO investigation of Dookhan was "broad" and resulted in evidence of the scope and timing of Dookhan's misconduct and led to the finding of numerous improprieties; the ninety (90) cases were just the "tip of the iceberg." *Scott*, 467 Mass. at 339.

Response: Undisputed.

15. In September 2012, in relation to the AGO's investigation and prosecution of Dookhan, (former) Governor Patrick asked the AGO to conduct a larger independent investigation of the Drug Analysis Unit of the Hinton Lab. Tr. IV:105; Ex. 239.

Response: Undisputed.

¹ The first eleven numbered paragraphs feature "a summary of proposed factual and legal conclusions without citations)." AGO Proposed Findings of Fact, pg. 1. This response does not address these eleven paragraphs or paragraphs 453-600, which consist of "Case Overviews and Pending Motions." *Id.* at 62-75. Except as otherwise noted, this response also omits footnotes found in the AGO's submission.

16. Initially, the Committee for Public Counsel Services (“CPCS”), the Massachusetts Bar Association, leaders of the defense bar (including Attorney Max Stern) and the ACLU also “pushed” the AGO to expand its investigation beyond Dookhan’s conduct and into a larger investigation of the Hinton Lab. The AGO had discussions about this larger investigation with Lisa Hewitt (CPCS), Marty Healy (Massachusetts Bar Association), and Max Stern. Tr. IV:115; 117-118; Ex. 242.

Response: Undisputed.

17. In relation to the Dookhan prosecution, the AGO spent considerable resources, time, and effort organizing a larger investigation into the Hinton Lab. Within a period of several weeks, the AGO designated Hélène Kazanjian, the Chief of the AGO’s Trial Division, to lead a team; assembled a team of three full time Assistant Attorneys General and support staff; considered the potential hiring of contract help and experts; set up a conflict screen between the team handling the criminal prosecution of Dookhan and the team that would handle the larger investigation of the Hinton Lab; and hired a database company to handle the voluminous records that the AGO would need to review. In addition, the AGO held discussions with private attorneys, including David Meier and Marty Murphy, to work as consultants and determined how much money it would need to conduct the investigation. Tr. IV:107-117.

Response: Undisputed.

18. On September 20, 2012, First Assistant Attorney General Edward Bedrosian, Jr. (“Bedrosian”) sent a letter to Worcester County District Attorney Early and the Chief Counsel of CPCS indicating that the Governor had asked the AGO to conduct an independent investigation of the Drug Analysis Unit of the Hinton Lab. Mr. Bedrosian wrote that the review would focus on whether any systemic failures at the Hinton Lab had an impact on the reliability of the results on cases beyond those handled directly by Dookhan. The broader review of the Hinton Lab would be led by the Chief of the (civil) Trial Division at the AGO, who had been a federal prosecutor. Ex. 239. Mr. Bedrosian acknowledged that determining the impact of any systemic failures was critically important to persons previously charged and convicted of crimes in part based on the scientific test results from the Hinton Lab. Tr. IV:105-06; Ex.239.

Response: Undisputed.

19. Mr. Bedrosian drafted a memorandum (dated October 20, 2012) outlining

the AGO's plan to conduct the larger investigation of the Hinton Lab and the AGO's planned commitment of resources. Tr. IV:107-08; Ex. 240. In the memorandum, Mr. Bedrosian confirmed that the Governor had asked the AGO to conduct a review of the Hinton Lab and that the AGO would conduct a comprehensive review of the day-to-day operations, procedures, and administration of the Hinton Lab, including whether there existed any facts or circumstances that impacted the reliability of the test results on drug samples that had been submitted to the Hinton Lab; and that Ms. Kazanjian would lead the AGO's investigation team. Ex. 240.

Response: Undisputed.

20. The defense bar maintained contact with Mr. Bedrosian about the AGO's plan to conduct the investigation of the Hinton Lab. *See, e.g.,* Ex. 242.

Response: Undisputed.

21. As the conversations with the defense bar continued, however, Mr. Bedrosian learned for the first time – when the AGO Press Office received an inquiry from the Boston Globe concerning a letter that had been circulated – that the same group of defense attorneys who had initially asked the AGO to conduct a larger investigation, were questioning whether the AGO was independent enough to undertake that investigation. Tr. IV:118- 119.

Response: Undisputed.

22. The Globe was inquiring about a letter dated October 24, 2012, which the defense bar – the Massachusetts Bar Association, CPCs, defense attorney Max Stern, and the ACLU – had written to Attorney General Coakley. In the letter, the defense bar expressed their concerns with the possibility that the AGO would conduct the broader investigation of the Hinton Lab and its drug analysis unit. Ex. 243. In essence, the defense bar stated that the AGO could not be trusted to conduct the investigation. Tr. V:182; *see also* Tr. IV:120; Ex. 243.

Response: Undisputed.

23. Mr. Bedrosian was very surprised by the letter because, up until that point, the AGO had been working somewhat collaboratively with the defense bar. Tr. IV:119-120.

Response: Undisputed.

24. After the defense bar sent the letter to Attorney General Coakley taking the

position that the AGO could not be trusted to conduct the larger investigation of the Hinton Lab, the AGO decided that it would not undertake the larger investigation of the Hinton Lab after all. Tr. IV:120.

Response: Undisputed.

25. On October 30, 2012, after receiving the defense bar's letter and consulting with the District Attorneys' Offices and defense counsel, Mr. Bedrosian wrote to the Governor's Office asking that the Governor appoint an independent investigator to conduct the larger investigation of the Hinton Lab. Tr. IV:121; Ex. 244.

Response: Undisputed.

26. Subsequently, the Governor referred the larger investigation of the Hinton Lab to the Inspector General's Office and the Inspector General's Office eventually handled the larger investigation of the Hinton Lab. Tr. V:182; Tr. IV:121-122.

Response: Undisputed.

27. In January 2013, the AGO began an investigation into allegations of Farak's misconduct at the Amherst Lab. Tr. II:8; see ¶¶ 59-99, *infra*.

Response: Undisputed.

28. This was a high-priority investigation involving allegations of misconduct, including the theft of controlled substances. Tr. II:59, 61, 138.

Response: Undisputed.

29. The investigation began on January 17, 2013, when the evidence officer at the Amherst Lab, Sharon Salem, was attempting to match certificates of drug analysis with the corresponding samples when she realized that she was missing the samples in two cases. Lab records indicated that one of the chemists, Farak, had completed testing on those samples earlier in the month and had confirmed that the substances were cocaine. *Cotto*, 471 Mass. at 100.

Response: Undisputed.

30. On January 18, 2013, Ms. Salem reported the missing evidence to her supervisor, James Hanchett ("Hanchett"). Mr. Hanchett searched Farak's work station and found a manila envelope containing the packaging for the

two missing samples, which had been cut open. Although Farak's analysis was that the samples were cocaine, the samples now tested negative for cocaine. *Cotto*, 471 Mass. at 100.

Response: Undisputed.

31. Mr. Hanchett contacted the State Police. Tr. I:100. The State Police shut down the Amherst Lab and began an investigation. The State Police found two additional case envelopes in a temporary storage locker used by Farak, a location where evidence was not allowed to be stored overnight. These envelopes were supposed to have contained suspected cocaine but neither did and the cocaine could not be found. *Cotto*, 471 Mass. at 100.

Response: Undisputed.

32. After receiving the call from Mr. Hanchett, State Police detectives interviewed Farak's colleagues. They reported that they had observed a change in Farak's behavior beginning in September 2012, including frequent unexplained absences from her work station and a decrease in her productivity. *Cotto*, 471 Mass. at 100.

Response: Undisputed.

33. On that same date, January 18, 2013, the detectives interviewed Farak at the Springfield Courthouse. Ex. 10. Farak ended the interview after a short time and declined to consent to a search of her car. Ex. 10.

Response: Undisputed.

34. On January 19, 2013, forensic services personnel at the Amherst Lab conducted an inventory of all drug evidence at the lab. Only the four above-described samples were missing. A similar inventory conducted approximately four months earlier had not uncovered any missing samples, either. *Cotto*, 471 Mass. at 100-101.

Response: Undisputed.

35. On January 19, 2013, the State Police searched Farak's car pursuant to a search warrant. See ¶¶ 68-99, *infra*. The State Police seized manila envelopes marked with case numbers, paperwork relating to the Amherst Lab, a plastic bag containing a white powdery substance and a brown tar-like substance, a plastic bag containing assorted pills, and photocopies of three newspaper articles about individuals who had been investigated, charged, or sentenced for the illegal possession or theft of controlled

substances. Attached to one of the articles was a handwritten note stating, "Thank[G]od I'm not a law enforcement *officer* (emphasis in original)." *Cotto*, 471 Mass. at 101.

Response: Undisputed. They also seized personal papers, K-PAC bags with "JH", and a paper with the initials "RP" written repeatedly. Ex. 225, Bates #406, 410; Ex. 223, Bates #531-32.

36. On January 19, 2013, the State Police arrested Farak at her home. Tr. V:109.

Response: Undisputed.

37. On January 25, 2013, the State Police, pursuant to a warrant, searched a tote bag that had been seized from Farak's work station. "The bag contained a variety of substances that could be used to dilute or replace cocaine (soap, baking soda, soy candleflakes, and oven-baked clay), other items commonly used in the drug trade (plastic laboratory dishes, waxed paper, and fragments of copper wire), and several evidence bags that had been cut open. The evidence bags bore diverse dates from December 16, 2012, to January 6, 2013." *Cotto*, 471 Mass. at 101.

Response: Undisputed.

38. At the same time that the AGO was investigating and had begun the prosecution of Farak, the AGO was continuing its investigation and prosecution of Dookhan and therefore, had two cases involving state lab chemists ongoing at the same time. Tr. IV:92-93; see ¶¶ 12-26, *supra*.

Response: Undisputed.

39. At various times, the AGO staff involved in the separate investigations of the two chemists included Mr. Bedrosian; Sheila Calkins ("Calkins"), a Deputy Attorney General; John Verner ("Verner"), the Chief of the AGO's Criminal Bureau; Dean Mazzone ("Mazzone"), the Chief of the AGO's Enterprise and Major Crime Division within the Criminal Bureau; and Anne Kaczmarek ("Kaczmarek"), an Assistant Attorney General in the Enterprise and Major Crimes Division. Tr. IV:88-90; Tr. VI:36, 67; Tr. V:106.

Response: Undisputed.

40. The weekend of Farak's arrest, Mr. Bedrosian and Mr. Verner agreed that Ms. Kaczmarek, as a result of her experience as the lead Assistant Attorney General in the Dookhan case, Tr. V:107, would also be assigned as the lead in the Farak case. Tr. V:125- 126.

Response: Undisputed.

41. Ms. Kaczmarek was an experienced prosecutor who, at the time she was assigned to prosecute Dookhan and Farak, already had extensive experience in drug cases. Tr. V:126; Tr. VI:150-151. She began her career as a prosecutor in July 2000 in Suffolk County, where she served as a general District Court prosecutor in Dorchester District Court and handled a variety of cases, including guns, drugs, assault and batteries, and miscellaneous District Court misdemeanors. Tr. VI:150. Ms. Kaczmarek was later assigned to the General Felony Team in Superior Court, handling drug and burglary cases, and to the Safe Neighborhood Initiative, concentrating on gang cases that involved guns and drugs. Tr. VI:150.

Response: Undisputed.

42. While the Farak case was ongoing and pending, there was an open issue whether there would be, beyond the investigation of Farak, a larger investigation of the Amherst Lab itself and, if so, who would conduct the larger investigation. Tr. V:181.

Response: Undisputed.

43. The open question regarding the larger investigation of the Amherst Lab itself was similar to the open question regarding the larger investigation of the Hinton Lab that the AGO had faced less than one year earlier in the Dookhan case. Tr. V:182-183; Tr. IV:110.

Response: Undisputed.

44. The discussions at the AGO regarding the possible larger investigation into the Amherst Lab itself centered around the fact that in relation to the Dookhan/Hinton Lab case, the CPCs, Massachusetts Bar Association, Max Stern, and the ACLU had decided that the AGO did not have the impartiality necessary to undertake the larger investigation of the Hinton Lab. The AGO believed that a similar tack would be taken by the defense bar in the Farak case. Tr. IV:109-110.

Response: Undisputed.

45. As a result of what had happened in relation to the Dookhan-related Hinton Lab investigation – the AGO gearing up for a larger Hinton Lab investigation, the defense bar taking the position that the AGO was not independent enough to conduct the investigation, and in the end, the Governor's Office

referring the larger investigation to the Inspector General – Mr. Bedrosian believed that the Executive Branch would take responsibility for the larger Amherst Lab investigation related to Farak, just as it had the Hinton Lab investigation related to Dookhan. Tr. IV:111-122.

Response: Disputed. See Tr. IV:136 (“Q. . . . Was it your expectation that anybody else was going to step into that role? A. I don’t know if -- I don’t know.”); *see also* Vega Proposed Findings ¶¶ 88-94.

46. Mr. Bedrosian did not receive any direction from anyone at the AGO indicating that the scope of the investigation of Farak should be limited to the evidence found in her car and desk, Tr. IV:128, and the AGO did not make a decision not to fully investigate the case against Farak or to investigate the case in a way that it would be kept small and “look like it was not a big scandal.” Tr. IV:124.

Response: Disputed insofar as the proposed findings suggests the AGO conducted an adequate investigation. The Supreme Judicial Court (SJC) has already determined the AGO’s “investigation into the timing and scope of Farak’s misconduct [was] cursory at best.” *Commonwealth v. Cotto*, 471 Mass. 97, 111 (2015); *see also Commonwealth v. Ware*, 471 Mass. 85, 96 (2015) (citing “the failure of the Commonwealth to pursue a thorough investigation into the matter”).

47. The AGO’s intention was to go to wherever the facts of the investigation into Farak’s misconduct took it. Tr. IV:122-123. The AGO hoped that focusing on Farak’s misconduct would result in the ability to identify the scope of her misconduct at the Amherst Lab, but the AGO was not going to undertake a larger investigation into any systemic problems within the Amherst Lab. Tr. IV:111.

Response: Disputed. As noted in the paragraph 48 below, investigators and prosecutors in the AGO decided to “do what was in front of [them], the car, things that were readily apparent.” Tr. V:205. They did not follow-up on leads like the 2005 cocaine case where a Hampden County prosecutor expressed concerns about possible tampering. *See* Vega Proposed Findings ¶¶ 100-114. Rather than go where the facts led, it was Kaczmarek’s intention to keep things from “get[ting] more complicated.” Vega Proposed Finding ¶ 106 (citing Ex. 231).

48. This thinking was conveyed to the AGO Criminal Bureau team handling the investigation and prosecution of Farak. Tr. IV:111, 122-124. Mr. Verner had no expectation that the AGO would conduct the larger investigation of the

Amherst Lab. Tr. V:204. The AGO would “do what was in front of [them], the car, things that were readily apparent. And then the bigger investigation was going to be someone else[’s.]” Tr. V:205. Mr. Verner did not know who, if anyone, was going to conduct the larger investigation of the Amherst Lab, but he knew, at least, that it was not going to be the AGO. Tr.V:181.

Response: Undisputed.

49. Although she was the lead Assistant Attorney General in the Dookhan case, Ms. Kaczmarek had no role in determining whether the AGO would do a wider investigation of the Hinton Lab. She was not involved in the conversations between the AGO and the Governor’s Office, between the AGO and the defense bar, or in any conversations or decisions that led to the possible investigation of the Hinton Lab that would have been done by the Trial Division in the AGO. Tr. VI:85-86, 142. Ms. Kaczmarek did not know how the matter of the wider investigation of the Hinton Lab actually came to be handled by the Inspector General’s Office. Tr. VI:85, 142-143.

Response: Undisputed.

50. Ms. Kaczmarek was also under the impression that the larger investigation of the Amherst Lab would be conducted by someone other than the AGO. Ms. Kaczmarek knew that the larger investigation of the Hinton Lab was being conducted independently of the AGO’s criminal investigation of Dookhan, and assumed that the investigation of the Amherst Lab would be conducted in the same way, that is, that someone other than the AGO would handle the larger investigation of the systemic flaws in the Amherst Lab. Tr. VI:85-86.

Response: Disputed. As will be discussed below, Kaczmarek lobbied against a larger investigation of the systemic flaws in the Amherst Lab by falsely portraying Amherst as a “professional lab.” Vega Proposed Findings ¶ 168 (citing Ex. 270).

51. On February 26, 2013, Ms. Kaczmarek sent a January 29, 2013, news article about Farak and the Amherst Lab to her friend Audrey Mark (“Mark”) at the Inspector General’s Office. The Hampshire County Assistant District Attorney quoted in the article stated that, “[his office was] [a]waiting word on whether the Amherst [Lab] would be subject of an investigation by the Inspector General.” Tr. VI:90.

Response: Disputed insofar as the date of the article is incorrect. January 29, 2013 was the day Kaczmarek received a copy of the audit report that led her to comment that the Amherst Drug Lab had an

"embarrassing" lack of quality control. Vega Proposed Findings ¶¶ 164-65 (citing Exs. 268-69).

52. Ms. Kaczmarek and Ms. Mark had known each other since about 2001 or 2002, having worked together in the Suffolk County District Attorney's Office. Tr. VI:172.

Response: Undisputed.

53. In her email, Ms. Kaczmarek pointed out that the Amherst Lab was different than the Hinton Lab, meaning that it looked to her at the time that Farak (not the Amherst Lab itself) was the "bad actor" and that in contrast to the Hinton Lab, there was not a breakdown of quality control and managerial oversight. Tr. VI:91; Ex. 163.

Response: Disputed. Kaczmarek's email, Ex. 270, speaks for itself. In it, she described Amherst as "a professional lab," despite having previously told Verner it was "a little embarrassing how little quality control they had." See Vega Proposed Findings ¶¶ 164-68 (citing Exs. 268-70).

54. Ms. Kaczmarek also wrote, "Audrey, when they ask you to do this audit say no." Knowing Ms. Mark was currently in the middle of the Hinton Lab investigation, had young children, and worked part-time, when she said "you," Ms. Kaczmarek meant that Audrey, personally, should say "no" to any request that she do the investigation and that someone in the Inspector General's Office other than Ms. Mark should do the investigation. Tr. VI:91, 173. She did not mean that the Inspector General's Office should not do the investigation. Tr. VI:91; 173.

Response: Disputed. Kaczmarek's email speaks for itself. In it, she did not suggest anyone from the IGO conduct an investigation of the Amherst Lab. Moreover, by describing Amherst as a "professional lab," Kaczmarek implied no such investigation was warranted.

55. Ms. Mark wrote back: "Am I allowed to say no ????" and inserted a smiley face. Tr. VI:173. Ms. Kaczmarek understood Ms. Mark to mean that if Ms. Mark was asked to work on the investigation, she was not sure she could refuse – in other words, she was joking. Tr. VI:173.

Response: Undisputed.

56. The AGO informed the Executive Branch that the AGO was not going to conduct the larger investigation of the Amherst Lab in three specific ways:

(1) the AGO alerted the Governor's Office and the District Attorneys that the AGO was not going to conduct an investigation into the Amherst Lab, Tr. IV:111; (2) Mr. Verner told Major James Connolly, who was the head of the State Police Crime Laboratory in Maynard, Tr. V:204, that the AGO was not going to conduct an investigation into the Amherst Lab, Tr. V:183, 204-05; and (3) Ms. Calkins told Andrea Cabral, the Secretary of Public Safety, that the AGO was not going to conduct an investigation into the Amherst Lab. Tr. V:183.

Response: The defendants do not dispute these communications occurred. The problem is this information was not conveyed to undersigned counsel or any other members of the defense bar. Instead, on September 9, 2013, Ballou testified Connolly was spearheading an ongoing "independent investigation" at the Amherst Drug Lab. Ex. 80, Tr. 148-49 (Sept. 9, 2013).

57. The Court finds that the AGO did not fail to comply with any alleged duty it had to search for exculpatory evidence or act with any intention to deprive any defendant of any right to exculpatory evidence when it determined that it would keep its investigation focused on Farak and would not undertake a larger investigation of the Amherst Lab, but that it would leave that investigation to other Executive Branch agencies. The Court finds that the AGO informed other agencies that it would not undertake a wider investigation of the Amherst Lab.

Response: Disputed. First, the AGO had a duty to investigate the timing and scope of Farak's misconduct. See *Ware*, 471 Mass. at 95 ("It is well established that the Commonwealth has a duty to learn of and disclose to a defendant any exculpatory evidence that is held by agents of the prosecution team. . . . Such agents include not only prosecutors and police, but also chemists working in State drug laboratories . . ." (quotation marks and citations omitted)). Second, the SJC has already determined the AGO failed to comply with this duty to search for exculpatory evidence. *Id.* at 95-96. The AGO did not look any further than the information in their possession within four days of starting their investigation and no one at the AGO ever looked at the evidence in its possession during the pendency of Farak's case. *Id.* at 96; Tr. IV:44-45.

58. In January 2013, State Police Detective Lieutenant, now Major, Robert Irwin served as the general supervisor to all State Police troopers assigned to the AGO. Tr. II:94; Tr. III:138. Mjr. Irwin has been a member of the State Police for over thirty (30) years. Tr. II:144.

Response: Undisputed.

59. Mjr. Irwin was based out of the AGO's Boston office and was heavily involved in the Dookhan investigation when the Farak investigation began in January 2013. Tr. II:99, 142.

Response: Undisputed.

60. On an ongoing basis, the State Police has troopers embedded in the AGO's Springfield and Boston offices. Tr. II:138-139. The State Police unit assigned to the AGO's Springfield office was comprised of only a sergeant and two troopers, so the troopers in the unit had to perform many different types of investigations, unlike troopers assigned to the AGO's Boston office, who are typically assigned to specific divisions (e.g., White Collar or Enterprise and Major Crimes). Tr. II:138-139.

Response: Undisputed.

61. In January 2013, Sgt. Joseph Ballou ("Sgt. Ballou") was the ranking trooper embedded in the AGO's Springfield office. Tr. II:58; Tr. III:137-139. Sgt. Ballou has been a member of the State Police for over twenty-three (23) years. Tr. III:137.

Response: Undisputed.

62. Mjr. Irwin assigned troopers to investigations on a case-by-case basis. Tr. II:139.

Response: Undisputed.

63. On January 18, 2013, at approximately 7:00 PM, Mjr. Irwin called Sgt. Ballou and informed him that two drug samples had been discovered to be missing from the Amherst Drug Lab. Tr. III:138.

Response: Undisputed.

64. Mjr. Irwin assigned Sgt. Ballou as the case officer on the Farak case, and instructed him to proceed immediately to the District Attorney's Office in Hampshire County (the Amherst Lab is located in Hampshire County). Tr. II:58; Tr. III:138-139.

Response: Undisputed.

65. Within the State Police, when a trooper is assigned to be the case officer, the trooper is responsible for obtaining search warrants, reviewing the evidence seized, writing the case report, providing the Assistant Attorney

General with a report on the evidence in order to assist the AGO in determining whether to prosecute, and communicating with the Assistant Attorney General about the case. Tr. II:58; 66; Tr. III:140.

Response: Undisputed.

66. The main line of communication in an AGO criminal investigation is, typically, between the case officer and the Assistant Attorney General assigned to prosecute the case. Tr. II:59. In the Farak investigation, this was Sgt. Ballou and Ms. Kaczmarek.

Response: Undisputed.

67. The Court finds that Sgt. Ballou, the case officer, was based in the AGO's Springfield Office. The Assistant Attorney General, Ms. Kaczmarek, was based in the AGO's Boston Office.

Response: Undisputed.

68. On January 18, 2013, following the call from Mr. Hanchett, the interviews of Farak's co-workers, and the brief interview of Farak, State Police troopers worked into the night drafting a search warrant affidavit to obtain a warrant to search Farak's car. The troopers applied for and were granted the warrant at approximately 1:00 AM the following morning. Tr. III:175; Tr. V:123.

Response: Undisputed.

69. The warrant authorized a search for: (1) white powdery substances that could be used as adulterants/dilutants; (2) records of purchases of lighters, substances that could be used as adulterants/dilutants, plastic bags, pipes/smoking implements; (3) cocaine and other controlled substances; (4) records of ownership or access/possession/control of the car; and (5) records or paperwork associated with controlled substances. Ex. 172.

Response: Undisputed.

70. Upon receipt of the search warrant, State Police troopers immediately executed a search on Farak's car, starting at approximately 3:23 AM. Tr. II:9-10.

Response: Undisputed.

71. Mjr. Irwin, the highest ranking officer on the scene, directed the other State

Police troopers during the search. Tr. II:80. Over the course of his career, Mjr. Irwin has executed hundreds of search warrants. Tr. II:144.

Response: Undisputed.

72. Mjr. Irwin, State Police Trooper Randy Thomas, and Sgt. Ballou conducted the carsearch, and Trooper Christopher Dolan (from State Police Crime Scene Services) took photographs during the search. Tr. II:9, 13, 92-93; Tr. III:141.

Response: Undisputed.

73. The State Police troopers involved in the search worked a long day and night. On January 18, 2013, Tpr. Thomas worked his regular shift from 8:30 AM to 5:00 PM, Tr. II:10, 59, received a call about the Farak investigation at around 7:00 PM or 8:00 PM, and stayed awake the whole night before actually executing the warrant. Tr. II:10, 59. Similarly, Mjr. Irwin had been awake for approximately twenty-four (24) hours by the time the car search concluded. Tr. II:102.

Response: Undisputed.

74. After participating in the search of Farak's car, Mjr. Irwin was not directly involved in the Farak investigation other than in his role as the general supervisor of the State Police unit assigned to the AGO. Tr. II:94.

Response: Disputed. Irwin was the lone MSP representative at a meeting in early September 2013 to discuss the AGO's response to subpoenas issued on behalf of Farak defendants. See Vega Proposed Findings ¶¶ 246-51, 330-31.

75. Tpr. Thomas has been a trooper for 16-1/2 years, and has been assigned to the AGO for 8-1/2 years. Tr. II:55. He has received various trainings with the State Police and the AGO, including several trainings regarding the seizure, documentation, and inventory of evidence. Tr. II:55-56.

Response: Undisputed

76. Tpr. Thomas was assigned as the evidence officer at the scene of Farak's car search. Tr. II:56-57. As such, he collected evidence that was found and labelled by other troopers, put it in an evidence bag, and secured it from the scene to the AGO's Springfield office for review at a later time. Tr. II:56-57.

Response: Undisputed.

77. The Northampton barracks is the location for the State Police "B" troop headquarters, and consists of, among other things, a three-story building with a lower level consisting of four (4) or five (5) garage bays. Tr. II:77.

Response: Undisputed.

78. There was a State Police cruiser in one of the bays and Farak's car in another, leaving the troopers two (2) or three (3) empty garage bays with which to work. Tr. II:77-78.

Response: Undisputed.

79. The search of Farak's car took place in the garage at the Northampton barracks, which was not heated, and it was very cold during the search. Tr. II:12, 76-77; Tr. III:141.

Response: Disputed. Ballou testified the garage "had heat." Tr. II:205.

80. The search of Farak's car took approximately 1-1/2 hours to execute. Tr. II:82.

Response: Undisputed.

81. Tpr. Dolan first took photographs of the overall scene and then photographed items as the other troopers took them out of the car. Tr. III:141.

Response: Undisputed.

82. The troopers divided up the car into areas for each to search. Tr. II:61, 142.

Response: Undisputed.

83. There were no tables in the garage and so the troopers had to lay evidence out on the floor as they removed it from the car. Tr. II:62, 78; Tr. III:175.

Response: Undisputed.

84. In executing the search warrant, the State Police troopers searched Farak's car for, and ultimately seized, any items that were clearly or possibly relevant and that fell within the parameters of the search warrant's authorization. Tr. II:21.

Response: Undisputed.

85. After securing any evidence or possible evidence from the car, the State Police troopers transported it back to the AGO's Springfield office for a more thorough review at a later date. Tr. II:22, 145.

Response: Undisputed.

86. In executing a search warrant, law enforcement officers often do not know the true significance of the items they seize. Tr. II:63. Rather, the significance may become apparent later as they are reviewed and considered in the context of the investigation. Tr. II:15.

Response: Undisputed.

87. Tpr. Thomas's initial observation of Farak's car was that it appeared as if someone lived out of it – it was a complete mess, full of trash, papers, stuff everywhere, with junk and garbage amongst the paperwork. Tr. II:60, 82-83. Tpr. Thomas had never executed a search warrant on a car in such condition. Tr. II:61.

Response: Undisputed.

88. Mjr. Irwin's initial observation of Farak's car was that it was disgusting, completely unkempt, with paper and debris everywhere. Tr. II:142-143.

Response: Undisputed.

89. Sgt. Ballou observed that Farak's car was in deplorable condition, absolutely full of stuff. Tr. III:141.

Response: Undisputed.

90. Hundreds of pieces of paper were found in Farak's car during the search. Tr. II:50, 68.

Response: Undisputed.

91. Most of the papers seized as physical evidence from Farak's car were found inside lab folders. Tr. III:142.

Response: Undisputed.

92. While executing the search of the car, Sgt. Ballou scanned through papers that he found inside lab folders, and these papers appeared to be lab-related paperwork; he did not go through every single piece of paper found at the time of the search. Tr.III:143.

Response: Undisputed.

93. Due to the circumstances of the search, including the volume of physical evidence, which included hundreds of pieces of paper, it would have been unreasonable for the troopers to review every piece of paper in detail at the time of its seizure. Tr. II:68, 95; Tr. III:143; Tr. IV:10-11.

Response: Undisputed.

94. At the time of the car search, the investigation into Farak's misconduct was in its infancy. Tr. II:102. Therefore, in searching Farak's car, State Police troopers seized everything they thought might have any connection to the theft of controlled substances, including papers they later labelled as "assorted lab paperwork," because these items could have some significance to her prosecution. Tr. II:64-65.

Response: Undisputed.

95. The night the search warrant was executed, Mjr. Irwin was in contact with Mr. Verner, then Chief of the AGO's Criminal Bureau. Tr. II:94. Mr. Verner was out of state at the time and Mjr. Irwin kept him apprised with updates throughout the night. Tr.V:123-124.

Response: Undisputed.

96. Mr. Verner, in turn, updated Mr. Bedrosian and Ms. Kaczmarek throughout the weekend regarding the ongoing and developing case. Tr. V:124-126.

Response: Undisputed.

97. Based on the physical evidence seized from the car and information obtained from interviews, Farak was arrested at approximately 10:30 PM on Saturday, January 19, 2013, Tr. II:97-98, and was arraigned in Belchertown District Court on January 22, 2013. Tr. V:126.

Response: Undisputed.

98. The Court finds that the State Police obtained the warrant to search Farak's car in accordance with standard practices.

Response: Undisputed.

99. The Court finds that the State Police conducted the search in accordance with standard practices, including labeling the papers as “assorted lab paperwork” and setting them aside for further review later.

Response: Undisputed.

100. Where a search warrant is involved, time is of the essence; the failure to file a search warrant return in a timely manner could result in suppression of the evidence. Tr. II:70.

Response: Disputed. See *Commonwealth v. Kaupp*, 453 Mass. 114-15 (2009) (“The ‘required warrant return procedures are ministerial, and failure to comply therewith is not ground for voiding an otherwise valid search.’” (quoting *Commonwealth v. Cromer*, 365 Mass. 519 (1974))). In contrast, the failure to note the seizure of items in a return has resulted in court orders prohibiting the introduction of such evidence. See *Commonwealth v. Aldrich*, 23 Mass. App. Ct. 157 (1986) (citing *Commonwealth v. Ierardi*, 17 Mass. App. Ct. 297, 302 (1983)).

101. On January 23, 2013, Tpr. Thomas timely filed the search warrant return for the items seized from Farak’s car within the seven (7) days required by law. Tr. II:22-23; Ex. 172.

Response: Undisputed.

102. When Tpr. Thomas filed the search warrant return, the Farak investigation was ongoing and there were “moving parts.” Tr. II:34-35, 53. For example, the AGO was preparing an affidavit for a search warrant for a duffel bag that was found at Farak’s work station. Tr. II:34-35, 53.

Response: Undisputed. Hours before Thomas filed the return, Verner sent an email to him, Ballou, and Kaczmarek referencing the “personal papers” found in Farak’s car. See Vega Proposed Findings ¶¶ 41-47 (citing Ex. 261). During the recent evidentiary hearing, Thomas and Verner acknowledged the mental health records containing Farak admissions of drug use had been discovered and discussed by then. *Id.*

103. Tpr. Thomas did not review each of the hundreds of pieces of paper seized prior to drafting the search warrant return. Tr. II:51, 68. On the search

warrant return, Tpr. Thomas listed twenty (20) items, or in some cases, groups of items, which had been seized from Farak's car by number. Tr. II:23; Ex. 172. Some items on the search warrant return were singled out and itemized in more detail because they were readily identifiable and immediately appeared important and relevant, such as an envelope that was marked and appeared to be related to a specific case. Tr. II:26-28, 69; Ex. 172 (Item 11).

Response: Undisputed. Thomas was aware these pieces of paper contained admissions to drug use by Farak. Tr. I:39.

104. Items numbered four (4), five (5), and eight (8) were listed on the return as "[a]ssorted lab paperwork." Tr. II:23; Ex. 172.

Response: Undisputed. It should be noted, however, that items numbered 11, 14, and 15 were listed on the return as manila envelopes containing "assorted lab paperwork," and item 12 was a manila envelope containing "assorted paperwork."

105. Tpr. Thomas did not recall whether Mjr. Irwin, Sgt. Ballou, or anyone specifically instructed him to use the phrase "assorted lab paperwork," Tr. II:29, but use of the phrase "assorted lab paperwork" is a common practice in a situation such as this one, given all the circumstances of the search, including the voluminous papers seized and the need to secure items for more thorough review at a later time. Tr. II:24-26.

Response: Disputed. There is nothing common about using the word "lab" to modify the word "paperwork" when a significant portion of the paperwork has nothing to do with the lab. The defendants have no issue with the troopers' use of the term "assorted lab paperwork" when they were securing evidence at the scene. They do contend it was inappropriate for Thomas to use the term in the warrant return once he and his colleagues realized it mischaracterized the "personal papers" that were discovered and discussed before Thomas filed the return. *See supra* Response to ¶ 102. It was also inappropriate for Thomas to continue to use the term in the report he submitted the next day summarizing the results of the car warrant execution. Ex. 11.

106. Mjr. Irwin confirmed that in his more than thirty (30) years of writing and viewing search warrant returns for the State Police, the use of phrases such as "assorted paperwork" and "assorted lab paperwork" on a warrant return to describe papers seized was extremely common, because officers do not have time to go through and itemize every piece of paper seized

that might have evidentiary value. Tr. II:101-102, 144-145.

Response: Disputed. See response to paragraph 105.

107. Tpr. Thomas testified that the difference between the three groups of assorted lab paperwork was likely just packaging, because only so many papers would fit into an evidence bag. Tr. II:26. Sgt. Ballou testified that the three groups of assorted lab paperwork were designated separately because they were in separate lab manila folders. Tr. III:205; Tr. IV:9-10.

Response: It is undisputed that this was their testimony. However, when documents were found in a manila envelope, this was stated specifically in the warrant return. Ex. 172.

108. On January 24, 2013, Tpr. Thomas wrote a search warrant execution report, which is a synopsis or summary of what occurred during the search warrant execution. Tr. II:29; Ex.11. Typically, details regarding what was found during the execution of the warrant are provided at a later time by the case officer. Tr. II:71.

Response: Undisputed. That said, there is a difference between writing a report with few details and writing one that is inaccurate. One would hope troopers typically do not knowingly mischaracterize the nature of evidence they seize in their official reports.

109. Tpr. Thomas did not personally review the papers that were described as "assorted lab paperwork" prior to writing his search warrant execution report. Tr. II:31.

Response: Undisputed.

110. After executing the warrant for the search of Farak's car and writing the search warrant return and search warrant execution report, Tpr. Thomas did very little, if any, work on the Farak case. Tr. II:67. Tpr. Thomas never reviewed Sgt. Ballou's file on the Farak investigation, Tr. II:71, and does not recall having any conversations with Ms. Kaczmarek about the paperwork found in Farak's car. Tr. II:73.

Response: Undisputed.

111. The Court finds that there was nothing unusual or untoward about Tpr. Thomas's description of the contents of the trunk as "assorted lab paperwork" where the papers were voluminous, the items were being secured for review at a later time, and the troopers were required to file

the search warrant return within seven days.

Response: Disputed. Thomas conceded he was aware personal papers were found in Farak's car before he filed his return. *See supra* Response to ¶ 102. Yet, his return mischaracterized these papers as lab paperwork. This was both unusual and untoward.

112. The Court finds that the State Police submitted the search warrant return in accordance with standard practice.

Response: Disputed. One would hope it is not the standard practice of the State Police to submit returns that purposefully misrepresent the evidence seized pursuant to warrants.

113. The State Police assigned to the AGO have a separate, secure, alarmed, and locked evidence room in the AGO's Springfield office. Tr. II:83, 85; Tr. III:144-145.

Response: Undisputed.

114. Evidence is secured in the State Police evidence room in the AGO's Springfield office until an Assistant Attorney General or case officer takes the evidence out to examine it in more detail. Tr. II:85.

Response: Undisputed.

115. The evidence officer is responsible for maintaining the chain of custody from the crime scene to the evidence room, and the case officer then takes over responsibility for the evidence going forward. Tr. II:85.

Response: Undisputed.

116. In accordance with their training and customary practice, after securing the physical evidence seized from Farak's car pursuant to the search warrant, Tpr. Thomas and Sgt. Ballou transported the evidence to the AGO in Springfield in a cruiser, and then secured the evidence in the State Police evidence room. Tr. II:83-84; Tr. III:144-145, 165-166, 211-212; Tr. IV:22.

Response: Undisputed.

117. Consistent with standard practice, Sgt. Ballou, the case officer, was responsible for turning over reports, evidence logs, and photographs of the physical evidence to the Assistant Attorney General. The Assistant

Attorney General would then be responsible for providing any discovery to the defendant. All physical evidence would remain in the evidence room in the AGO's Springfield office. Tr. III: 211-212.

Response: Undisputed.

118. On February 6, 2013, Sgt. Ballou wrote a police report covering the initial stages of the investigation and the obtaining and execution of a search warrant, and referencing the physical evidence seized from Farak's car, including notes, papers, packaging, and lab test results. Tr. III:152-154; Ex. 10.

Response: Undisputed. That said, Ballou submitted this report two weeks after receiving the email from Verner noting the existence of "personal papers." *See supra* Response to ¶ 102. His use of the terms "notes" and "papers" demonstrates his understanding that not all of the documents seized from the trunk constituted "assorted lab paperwork." Rather than acknowledge the existence of admissions on mental health records or personal papers, Ballou utilized language that was purposefully vague, at best, and intentionally misleading, at worst.

119. In mid-February 2013 and in preparation for testimony at the grand jury, Sgt. Ballou reviewed in more detail the physical evidence that had been seized from the car and was being stored in the boxes and bags in the evidence room, including the three groups of envelopes which had previously been described as "assorted lab paperwork." Tr. II:31; Tr. III:145, 175, 206, 209.

Response: Disputed insofar as this paragraph suggests investigators were unaware of the mental health records prior to this more detailed mid-February review. *See supra* Responses to ¶ 102 and 118.

120. In separate envelopes among the boxes and bags of physical evidence seized from Farak's vehicle were news articles with handwritten comments about officials who had been caught with drugs and a few papers arguably containing admissions of drug use, including: (1) one page titled, "ServiceNet diary card;" (2) one page containing a handwritten chart with a column labelled "Pros," a column labelled "Cons," a row labelled "resisting," and a row labelled "TB;" (3) one page containing handwritten charts that appeared to list emotions and days of the week; (4) a Quest Diagnostics lab report; (5) two pages titled, "Emotion Regulation Worksheets;" and (6) one page with a chart labelled "Skills" and a column on the left-hand side labelled "Notes." Tr. IV:17-18, 41; Ex. 205. (For ease

of reference, these papers are collectively referred to as “mental health records.”)

Response: Disputed insofar as this paragraph suggests the mental health records identified were the only mental health records seized from the car. During the recent evidentiary hearing, Ballou conceded there was a second ServiceNet Diary Card reflecting Farak’s consumption of the lab supply of phentermine he neglected to pass along to Kaczmarek. See Vega Proposed Findings ¶¶ 126-27, 148-51. Also disputed insofar as the paragraph states that the papers only “arguably” contained admissions. There was no testimony that anyone read these records and did not realize they contained an admission to drug use. In fact, the email from Ballou with these documents was entitled, “FARAK admissions.” Ex. 205.

121. Sgt. Ballou thought these specific pieces of paper, which suggested Farak’s drug use, might be useful evidence for the grand jury hearing. Tr. III: 208.

Response: Undisputed.

122. Sgt. Ballou called Ms. Kaczmarek after he identified the papers, “scanned them to Boston,” then returned the papers to the evidence room. Tr. III: 166, 208.

Response: Undisputed.

123. Sgt. Ballou considered these papers to be “physical evidence,” not “documents.” Tr. III: 122.

Response: Undisputed.

124. Per Sgt. Ballou’s training and experience as a State Police Officer, an item seized by a police officer that remains in his custody for the purpose of preserving its integrity for use in a court of law is “physical evidence;” something that is written to document a police investigation, such as a police report or evidence log, is a “document,” and is “much different” than physical evidence. Tr. IV: 22-23.

Response: Undisputed. An email written to memorialize a police investigation is also a “document.”

125. Because the news articles and mental health records were physical evidence, Sgt. Ballou did not keep them in his case file. Tr. III: 165-166. After taking the physical evidence out of the evidence room for review, he

then returned all of it to the evidence room. Tr. III:166.

Response: Disputed. Ballou did not keep the original news articles and mental health records in his file; however, electronic copies of this physical evidence did become a part of his file when he saved them to his computer and sent them as email attachments to Kaczmarek, Verner, and Irwin. The email entitled "FARAK Admissions" also became a part of his file. See Vega Proposed Findings ¶¶ 228-29 (citing Tr. IV:25-26, Tr. V:167-68); Ex. 247.

126. The Court finds that there is a distinction between "physical evidence" kept in an evidence room and "documents" kept in a police file.

Response: Undisputed.

127. The Court finds under the circumstances of this case that the mental health records were "physical evidence."

Response: Disputed. The original mental health records were physical evidence; the copies were electronic documents in Ballou's file. See Vega Proposed Findings ¶¶ 228-29 (citing Tr. IV:25-26, Tr. V:167-68); Ex. 247.

128. The Court finds that although the mental health records were in documentary form, they were papers seized from Farak's car and therefore, they were physical evidence and were kept as physical evidence in the evidence room at the AGO's Springfield office.

Response: Undisputed insofar as this refers only to the original documentation.

129. The Court finds that the State Police at the AGO kept the mental health records as physical evidence in its evidence room and that they were not kept as part of Sgt. Ballou's "file."

Response: Disputed. The original mental health records were physical evidence; the copies were electronic documents in Ballou's file. See Vega Proposed Findings ¶¶ 228-29 (citing Tr. IV:25-26, Tr. V:167-68); Ex. 247.

130. The Court finds that the fact that the mental health records were, at one time, scanned and sent to Ms. Kaczmarek, does not change their character from physical evidence to something that would be kept as part of Sgt. Ballou's file.

Response: Disputed. The original mental health records continued to be physical evidence; the copies of them Ballou scanned became a part of his file. See Vega Proposed Findings ¶¶ 228-29 (citing Tr. IV:25-26, Tr. V:167-68); Ex. 247.

131. The Court finds that the State Police and the AGO maintained the physical evidence, including the mental health records, in secure storage in the evidence room at the AGO's Springfield Office in accordance with standard practice.

Response: Undisputed.

132. Prior to viewing the mental health records in connection with the Farak investigation, Sgt. Ballou had never seen a ServiceNet diary card or an Emotion Regulation worksheet, and he did not know what they were. Tr. III:146, 149. But, he thought that the mental health records contained possible admissions of drug use by Farak and he believed that the diary card and worksheet were something that a psychiatrist or counselor might have asked her to fill out. Tr. III:148, 150.

Response: Undisputed.

133. Sgt. Ballou was "excited" when he found these papers suggestive of admissions of drug use and he notified Ms. Kaczmarek about them right away. Tr. III:159. At the same time, Sgt. Ballou was concerned that the papers might be "privileged" due to a doctor/patient relationship and he wondered whether the papers could be admitted into evidence at the grand jury. Tr. III:159. When Sgt. Ballou called Ms. Kaczmarek to tell her about the evidence, she asked him to email the papers to her so that she could take a look at them herself. Tr. III:158-159, 166, 208; Tr. IV:14.

Response: Disputed insofar as the paragraph suggests Ballou discovered these papers on or about February 14, 2013. See *supra* Response to ¶ 102, 118.

134. On February 14, 2013, Sgt. Ballou sent an email to Ms. Kaczmarek, copying Mjr. Irwin and Mr. Verner. Tr. II:152; Tr. III:157-158; Ex. 205. The body of the email read:

Anne,

Here are those forms with the admissions of drug use I was talking about. There are also news articles with handwritten comments about other officials being caught

with drugs. All of these were found in her car inside of the lab manila envelopes.

Joe

Ex. 205.

Response: Undisputed.

135. Sgt. Ballou attached to his February 14, 2013 email the ServiceNet diary card and the six(6) other pages of mental health records, *see ¶ 120*, which he thought might be admissions. He also included scanned copies of news articles that had been found in the trunk. Tr. II:152-154; Ex. 205.

Response: Disputed. Ballou included scanned copies of *some* news articles that had been found in the trunk. Among the articles he did not include were: (i) a 2011 article listing the locations where users of controlled medications could dispose of drugs during a "Prescription Drug Take Back Day," Vega Brief ¶ 125 (citing Ex. 224, Bates # 000602); (ii) a 2009 article in Farak's dossier on a UMass communications specialist, *id.* ¶ 139 (citing Ex. 228, Bates # 000697); and (3) articles pertaining to 2009 and 2011 efforts to close the Amherst Drug Lab, *see, e.g.*, Ex. 220, Bates #000421-422.

136. The ServiceNet diary card indicated drug activity between Tuesday, December 20 and Monday, December 26, without any reference to the year. Ex. 205.

Response: Undisputed.

137. One of the newspaper articles, dated March 29, 2011, was a story about the illegal possession of steroids by law enforcement officers and had been printed from a computer on September 20, 2011. Another newspaper article, dated October 25, 2011, was a story about a Pittsfield pharmacist who was sentenced to three years in prison for stealing OxyContin from her workplace, and had been printed from a computer on October 28, 2011. Another newspaper article, dated December 2, 2011, was a story about a former San Francisco police department drug laboratory technician who had stolen cocaine from her workplace and had been printed from a computer on December 6, 2011. One of the articles bore the handwritten note, "Thank [G]od I'm not a law enforcement *officer* (emphasis in original)." Ex. 205.

Response: Undisputed.

138. Sgt. Ballou sent the ServiceNet diary card, worksheets, and news articles to Ms. Kaczmarek (with a cc to John Verner) because he thought those were the papers that were "potentially inculpatory or potentially relevant to the case." Tr. IV:19.

Response: Undisputed. He also cc'ed Irwin. See Ex. 205.

139. When Ms. Kaczmarek received Sgt. Ballou's email with the mental health records attached, it was first time she had seen them. Tr. VI:97.

Response: Disputed. During the recent evidentiary hearing, Kaczmarek acknowledged having an email exchange with Nancy Brooks (Brooks) some five hours before receiving the email from Ballou. Tr. VI:103-04. During this exchange, Kaczmarek said she had encountered the initials "TB" while reviewing "[s]ome of Farak's notes." Tr. VI:104. These initials would figure prominently in the "Pros" and "Cons" list Ballou attached to his email later that afternoon. Tr. VI:104-05 (citing Ex. 205, AGOFRK001812). Kaczmarek conceded this list "could have been" the "notes" that prompted her exchange with Brooks. Tr. VI:105. Kaczmarek also conceded she could not remember whether she received any materials in the case from Irwin. Tr. VI:105-06. As previously noted, on the morning of January 23, 2013, Verner sent an email to Kaczmarek (and others) referencing the existence of "personal papers" containing admissions of drug use by Farak. See *supra* Response to ¶ 102. Based on the foregoing, it seems more likely than not that Kaczmarek had seen at least some of the mental health worksheets before receiving Ballou's Valentine's Day email.

140. As Chief of the AGO's Criminal Bureau, Mr. Verner received such a large volume of emails per day that he only dealt immediately with emails directed at him, not to emails in which he was only copied. With regard to Sgt. Ballou's email regarding Farak's admissions, he had only been copied. Tr. V:120. Mr. Verner never actually looked at the attachments to Sgt. Ballou's email dated February 14, 2013. Tr. V:120; Ex. 205.

Response: Disputed. Verner testified that he "opened them after Attorney Ryan wrote the letter to Pat [Devlin]." Tr. V:214.

141. Ms. Kaczmarek put the mental health records aside, segregating them in a separate folder in her file because, like Sgt. Ballou, she thought they might be privileged and was concerned about potential violations of Dwyer and HIPAA if she were to handle the records improperly. Tr. VI:167-168; 181.

Response: Undisputed.

142. Ms. Kaczmarek and Mr. Verner discussed Farak's admissions of drug use and, more specifically, her concerns regarding whether the records containing her admissions of drug use might be privileged, and whether she should introduce the records into evidence in the grand jury. Tr. V:120, 133-134, 214-215; Tr. VI:181.

Response: Undisputed.

143. Mr. Verner asked Ms. Kaczmarek if she needed to introduce the admissions of drug use in order to get the indictments; Ms. Kaczmarek said no. Tr. V:133.

Response: Undisputed.

144. With regard to the grand jury, Mr. Verner and Ms. Kaczmarek decided together, out of an abundance of caution, that there was no need to introduce the admissions of drug use into evidence against Farak and risk causing a *McCarthy/O'Dell* issue later. Tr. V:134, 215.

Response: Undisputed.

145. Ms. Kaczmarek understood that Dwyer set forth a protocol for releasing mental health records, which she believed the papers containing Farak's admissions might be. Ms. Kaczmarek also understood that the violation of that protocol could have resulted in disbarment. Tr. VI:167.

Response: Undisputed.

146. That Ms. Kaczmarek and Sgt. Ballou's were concerned that the mental health records raised potential privilege and Dwyer issues was corroborated by the fact that after the papers were viewed by Attorney Luke Ryan ("Ryan"), who represented defendant Rolando Penate ("Penate"), and Attorney Ryan moved for an order to disseminate the records further (to the attorneys for defendants Rafael Rodriguez ("Rodriguez"), Jermaine Watt ("Watt"), and Erick Cotto ("Cotto"))), Farak's defense counsel Attorney Elaine Pourinski ("Pourinski") objected on the grounds the AGO had allowed Mr. Ryan to view the mental health records without giving Farak an opportunity to object and in violation of *Commonwealth v. Dwyer* and Farak's privacy rights. Ex. 192.

Response: Disputed. Kaczmarek told Pourinski the AGO considered the mental health records privileged. Tr. VI:21-22, 25; see also Ex. 192, Pourinski

Aff. ¶ 2. The AGO cites no law that they are privileged and even recognized that they probably were not privileged in the March 2013 prosecution memo. Ex. 163, pg. 5 n.7. Pourinski's subsequent repetition of what Kaczmarek told her does not corroborate any unfounded concerns Kaczmarek may have had.

147. The Court finds that Ms. Kaczmarek was concerned about what she perceived as the privileged nature of Farak's mental health records.

Response: Disputed. See Ex. 163, Prosecution Memo pg. 5 n.7 ("Case law suggests . . . that the paperwork is not privileged.").

148. The Court finds that Ms. Kaczmarek did not introduce the mental health records into the grand jury out of respect for Farak's privacy and because she did not need the records to secure an indictment.

Response: Undisputed.

149. The Court finds that after discussion with Mr. Verner and out of an abundance of caution, Ms. Kaczmarek did not present the mental health records to the grand jury in her prosecution of Farak, but that this was as the result of a mistake as to their character and their significance, not as the result of an intentional or deliberate design to withhold exculpatory evidence from the third party defendants. The Court finds that Ms. Kaczmarek acted responsibly in this regard.

Response: Disputed. The preceding paragraph acknowledged the choice to keep the mental health records from the grand jury had nothing to do with their probative value. While Kaczmarek may not have known just how exculpatory the records were, she did know they contained 1) an admission to drug use (significant because there were no other admissions) Tr. III:178; 2) evidence Farak used drugs at work (also significant because there was no other evidence of use at work) Tr. III:178; 3) an implicit acknowledgment that Farak suffered from a substance use disorder (as she was in treatment for it); and 4) that Farak was in treatment (also not previously known). Thus, their character and significance in this regard was both known and readily apparent and was not a mistake.

Kaczmarek claimed that if she "had realized . . . what [the ServiceNet Diary Card] really meant," she "would've gotten an order" permitting her to disseminate this evidence "like [she] did for the Grand Jury minutes." Tr. VI:113; see also *infra* ¶ 161. She did not claim she would have introduced any of the mental health records at the grand

jury. Kaczmarek made no effort to evaluate the information contained in the mental health records to determine a time frame for Farak's admissions. This was irresponsible. While Kaczmarek may not have kept the mental health records from the grand jury in an effort to withhold exculpatory evidence from third party defendants, she later made the deliberate choice not to disclose this evidence to anyone but Farak. This, too, was irresponsible, as well as a violation of due process and her ethical responsibilities. See, e.g., *Cone v. Bell*, 556 U.S. 449, 470 n.15 (2009). Members of a prosecution team must furnish all exculpatory evidence. They cannot take it upon themselves to withhold some exculpatory evidence on the ground it is cumulative. *Id.*

150. Although Ms. Kaczmarek had set aside the mental health records and had not presented them to the grand jury, Ms. Kaczmarek, pursuant to her obligations under Mass. R. Crim. P. Rule 14, disclosed the mental health records to Farak's own defense attorney, Ms. Pourinski. Tr. VI:111, 113, 168.

Response: Undisputed.

151. In accordance with AGO standard practice, Farak and her attorney, Ms. Pourinski, visited the AGO's Springfield office to examine all of the physical evidence associated with the Farak case that was held in the evidence room, which included the mental health records. Tr. III:167; Tr. IV:20-21.

Response: Undisputed.

152. The Court finds that Ms. Kaczmarek discharged her obligations under Rule 14 to the defendant Farak, the sole defendant she was prosecuting, by making the mental health records available to her.

Response: Undisputed.

153. The ServiceNet diary card contained handwritten notes about Christmas time and the dates December 20 through 26 were listed, but without any corresponding year. When Sgt. Ballou reviewed the mental health records and discovered what appeared to be admissions of Farak's drug use, he presumed that the worksheets were prepared just a few weeks prior to her January 2013 arrest. Tr. III:151, 195-197; Ex. 176.

Response: Undisputed. Suffice it to say, this was a reckless and unwarranted presumption. The car contained dozens of items that were clearly generated or printed out prior to 2012 including emails, news

articles, letters, manila envelopes, receipts, travel authorization forms, a hotel reservation, an NFL schedule from 2011 (which contained a December 2011 calendar), a Quest Diagnostics laboratory report, a "Homework" assignment dated "11-16-11," actual assorted lab paperwork, and a 2009 dossier on a UMass communications specialist. Vega Proposed Findings ¶ 139.

154. Ms. Kaczmarek had seen photos taken of Farak's car at the time of the search, and given its condition, Ms. Kaczmarek presumed that Farak had just recently tossed the papers into the pile of stuff. As Ms. Kaczmarek testified, she could not imagine someone keeping something in her car for over a year. Tr. VI:165-166.

Response: Disputed. According to the AGO, Farak's car contained "news articles printed on [sic] September, October, and December 2011" that "may have served as a basis for concluding that Farak engaged in misconduct at the Amherst drug lab earlier than the summer of 2012." *See infra* ¶ 233. If "the ability to draw that inference was equally available to all parties, including the defendants," Kaczmarek was certainly capable of imagining Farak kept things in her car for over a year. *See also Ware*, n.13 ("[T]he 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.").

155. Consequently, when Ms. Kaczmarek reviewed the mental health records that Sgt. Ballou had emailed her, she did not realize, either, that the dates on the ServiceNet diary card referred to anything other than the Christmas that had just recently occurred, December 2012. Tr. VI:85.

Response: Undisputed. *See supra* Responses to ¶¶ 153-54.

156. Ms. Kaczmarek's working theory of the Farak case was that Farak had been using drugs over the course of only the past six months, particularly given the grand jury testimony from Farak's supervisor at the Amherst Lab, Mr. Hanchett, who testified that Farak was a great performer up until about four or five months prior to her arrest and that she did not miss work, and from Farak's wife, who testified that she had only seen Farak use drugs prior to her working as a chemist. Tr. VI:126-127, 144-145.

Response: Disputed. When asked if she had seen Farak use any controlled substances since 2000, Lee answered: "Yes." Before Kaczmarek could change the subject to Farak's "daily habits," Lee volunteered that she had seen Farak smoke marijuana. Kaczmarek did not ask when Lee saw this or if/when she observed Farak use other controlled

substances. Vega Brief ¶¶ 118-22 (citing Ex. 3, pg. 10).

157. This working theory of the case was also supported by Ms. Kaczmarek's own personal observations of Farak. Ms. Kaczmarek had first met Farak while investigating the Dookhan matter in early fall 2012 and when she saw Farak again at her arraignment in the beginning of 2013, Farak looked like a completely different human being. Tr. VI:128, 143-144. Further, in Ms. Kaczmarek's experience as a prosecutor, drug users stick to one drug. Tr. V:101.

Response: Disputed. There is no support for the notion Farak's physical appearance underwent some radical transformation. At the 2013 grand jury, Salem said she "noticed that [Farak] was losing a little bit of weight, but that's about it." Ex. 4, Pg. 6. The defendants are in no position to admit or deny Kaczmarek's experience as a prosecutor. However, Farak's diagnosis of "polysubstance dependence" illustrates the use of multiple illicit substances is hardly uncommon. Ex. 54, pg. 9.

158. Sgt. Ballou had the same working theory. As a result of interviews with Farak's co-workers, who had noted a recent decline in Farak's production, and his personal observations of Farak, Sgt. Ballou also believed that her misconduct began just a couple of months prior to her arrest. Tr. III:194-195; Tr. IV:31-32.

Response: Disputed insofar as this implies his working theory was reasonable. In addition to overlooking when several of the mental health records were generated, Ballou ignored the possibility Farak was tampering with oxycodone pills in May 2012 and had tampered with a powder cocaine sample in 2005. *See supra* Response to ¶ 47 (citing Vega Proposed Findings ¶¶ 100-114).

159. Specifically, when Sgt. Ballou personally observed Farak in September 2012, she appeared healthy, and did not appear like someone who was addicted to crack cocaine. Tr. IV:30.

Response: Disputed insofar as this paragraph suggests Farak's physical appearance changed significantly and/or that drug addicts can be identified based on their physical characteristics. *See Commonwealth v. Horne*, 476 Mass. 222 (Jan. 10, 2017) (reversing conviction based on admission of testimony "concerning the physical characteristics of crack cocaine addicts"). Furthermore, Ballou did not testify Farak appeared healthy; he told grand jurors he found her "somewhat pretty." Tr. III:195.

160. Ms. Salem worked side by side with Farak for nine years at the Amherst Lab and she never noticed any decline in Farak's productivity until July or August 2012, when the State Police took over control of the lab and there was a resulting increase in their paperwork requirements. It had never occurred to Ms. Salem that Farak was under the influence of narcotics or anything else while at work. Tr. II:199-201.

Response: Undisputed. As noted above, Salem did not observe any significant change in Farak's physical appearance, either. See *supra* Response to ¶ 157.

161. Ms. Kaczmarek conceded at the recent evidentiary hearing that she had misjudged the dates on the ServiceNet diary card and had made a mistake as to their significance in terms of the duration of Farak's drug use. If Ms. Kaczmarek had realized that the information written on the ServiceNet diary card was actually written a year earlier, she would have realized that the scope of Farak's misconduct was greater than she thought, and when she asked the Court to let her share grand jury transcripts with the District Attorneys' Offices, she would have sought an order that would have permitted her to share arguably privileged mental health records to the District Attorneys' Offices at the same time. Tr. VI:113, 166-167.

Response: Disputed insofar as this paragraph characterizes the mental health records as "arguably privileged." The records were not, and are not, privileged. The AGO has cited no legal authority supporting such an argument. See Ex. 163, pg. 5 n.7.

162. Indeed, as late as September 10, 2013, Ms. Kaczmarek had not realized that Farak's drug use stretched back further than her working theory allowed. In a September 10, 2013 email to Sharon Salem (at the Amherst Lab), she wrote: "Can you think of anything else that came up in court yesterday that I need to get for the defense attorneys? I feel like they're seeking answers for how long Sonja was doing this when there is no way to tell." Ex. 208.

Response: Disputed. The email to Salem acknowledges the absence of any foundation for Kaczmarek's so-called working theory.

163. The Court finds that in early 2013 when Ms. Kaczmarek saw the ServiceNet diary card and other worksheets, she did not realize their significance, specifically, that she did not realize that the dates on Farak's ServiceNet diary card referred to December 2011, not December 2012 and that especially in light of other information she had, such as that there had

been no change in her appearance or her productivity at the Amherst Lab and that her car was full of other papers, she made an honest mistake in thinking that the entries related to Christmas 2012, which had just passed.

Response: Disputed. The dictionary defines an “honest mistake” as “something that anyone could be wrong about.” Merriam-Webster, “honest mistake,” <https://www.merriam-webster.com/dictionary/honest%20mistake> (last visited Mar. 7, 2017). The mistake Kaczmarek admitted making was jumping to the conclusion the ServiceNet Diary Card Ballou forwarded memorialized misconduct perpetrated by Farak in December 2012. Had Kaczmarek examined the contents of this document and/or bothered to review other materials seized from the car, she would have learned her assumption was incorrect. In short, a conscientious prosecutor would not have made Kaczmarek’s mistake; consequently, it cannot be characterized as an “honest” one.

164. The Court finds that Ms. Kaczmarek’s working theory of the case was reasonable and she proceeded according to her working theory.

Response: Disputed. *See supra* Responses to ¶¶ 162-63; *see also* Vega Brief ¶¶ 97-131 (discussing evidence Kaczmarek disregarded pertaining to Farak’s longstanding polysubstance disorder).

165. The Court finds that Ms. Kaczmarek’s failure to recognize the significance of the ServiceNet diary card was unintentional and was not a deliberate intention to withhold the information from the District Attorneys, these defendants, or others.

Response: The defendants do not contend Kaczmarek intentionally failed to recognize the significance of the ServiceNet Diary Card as to the dates. They do contend she deliberately withheld this evidence, which she knew to be exculpatory for other reasons from the District Attorneys and defendants based, in part, on this failure. *See Tr. VI:113 (“ . . . I see now that I totally misjudged the dates, and I see where that was a mistake on my part. If I had realized that, like, what it really meant, I would have -- I would have turned it over.”).*

166. Per AGO Policy, before indicting someone on criminal charges, an Assistant Attorney General was required to prepare a prosecution memorandum (“pros memo”) detailing the facts of the case, the evidence, the charges the Assistant Attorney General planned to seek, and any possible problems with the case. *Tr. IV:96; Tr. VI:107-108.*

Response: Undisputed.

167. The pros memo would be submitted to the Division Chief, Bureau Chief, and then to the Executive Bureau (either to the First Assistant Attorney General or Deputy Attorney General) for approval. Tr. IV:96; Tr. V:169-170; Tr. VI:108-109.

Response: Undisputed.

168. When Mr. Verner served as Chief of the Criminal Bureau and was approving a particular pros memo, he would do “some issue spotting” and write notes on the memorandum in order to provide his additional thoughts about the case to the First Assistant or Deputy Attorney General. Tr. IV:158-159; Tr. V:170; Tr. VI:169.

Response: Undisputed.

169. If Mr. Verner had questions for the Assistant Attorney General who drafted the document or if he did not approve the pros memo, he would return the memorandum to the Assistant Attorney General or the Division Chief, and say, “you’ve got to fix some stuff.” Tr. V:170.

Response: Undisputed.

170. Mr. Verner’s comments for the Assistant Attorney General were relayed in person or by email and the Assistant Attorney General corrected any problems in the memorandum before it was forwarded to the Executive Bureau (either the First Assistant Attorney General or Deputy Attorney General). Tr. VI:169-170.

Response: Undisputed.

171. Once approved by Mr. Verner, the pros memo would go “upstairs” (meaning, to the Executive Bureau) to Mr. Bedrosian (the First Assistant Attorney General) or Ms. Calkins (the Deputy Attorney General) and, once either Mr. Bedrosian or Ms. Calkins gave final approval of the pros memo, it was sent back to the Assistant Attorney General to be placed in the file. Tr. V:170.

Response: Undisputed.

172. In March 2013, Ms. Kaczmarek prepared and circulated a pros memo about the arrest and investigation of Farak (the “Farak Pros Memo”). Ex. 163.

Response: Undisputed.

173. In the Farak Pros Memo, Ms. Kaczmarek outlined the facts of the case and listed various "items of note" that the State Police had recovered from Farak's car, including "manila envelopes with sample numbers; news article involving an indicted chemist out in San Francisco; and mental health [records] describing how Farak feels when she uses illegal substances and the temptation of working with 'urge-ful samples.'" Ex. 163.

Response: Undisputed.

174. After discussing the matter with Mr. Verner and out of an abundance of caution, Ms. Kaczmarek decided not to introduce the ServiceNet diary card or other mental health records into evidence at the grand jury because they were not needed to establish probable cause in the case against Farak and there was a concern that the evidence could potentially be privileged. Tr. III:161-162; Tr. IV:15; Tr. VI:111, 188. In footnote seven (7) of the Farak Pros Memo, Ms. Kaczmarek wrote that the mental health records were not submitted to the grand jury out of an abundance of caution in order to protect possibly privileged information," but noted that case law suggested it was not privileged. Ex. 163.

Response: Undisputed.

175. On March 27, 2013, Ms. Kaczmarek's supervisor, Mr. Mazzone, then Chief of the Enterprise and Major Crimes Division, approved the Farak Pros Memo and forwarded it to the Bureau Chief, Mr. Verner, for his review. Tr. V:171; Tr. V:56; Tr. VI:40.

Response: Undisputed.

176. When Mr. Verner reviewed the Farak Pros Memo, he circled footnote seven (7) (see ¶174) and added his own note: "this paper[work] NOT turned over to DA's Office yet." Tr. V:169; Ex. 163.

Response: Undisputed.

177. At the same time, Mr. Verner was in the process of sending Farak-related information to the District Attorneys' Offices (see ¶ 211, *infra*) and so these mental health records were, at that time, on his mind. Tr. V:229.

Response: Undisputed.

178. The Farak Pros Memo outlined “Potential Issues” with the case, noting that “[t]he most significant issue that is outstanding is the scope of Farak’s drug abuse. We are charging her with the tampering of the four [4] known cases but there is likely more. I believe that we should indict the known cases now in order to remove the case from district court. A review of all crack cases from July 1, 2012 until January 18, 2013 has been requested.” Ex. 163.

Response: Undisputed.

179. Mr. Verner, Mr. Mazzone, and Ms. Kaczmarek decided to move forward and indict Farak based on the four samples they had and determined that if they later found evidence of more tampering, they would convene a new grand jury. Tr. V:207; Tr. VI:163.

Response: Undisputed.

180. The basis for the AGO’s decision to proceed on the indictment of Farak on the four charges of tampering was that these charges were supported by the evidence they had at the time, the additional reports of tampering they had investigated had not changed their theory of the case, and an additional count or two would not have an impact on Farak’s sentence. Tr. V:207-208; Tr. VI:157, 163-164.

Response: Disputed. Officials in the AGO did not investigate these additional reports prior to indicting Farak. Ballou did not meet with the narcotics detective who reported the pill discrepancy until May, 2013, *see* Ex. 15A, and no effort was made to re-analyze the 2005 cocaine sample to determine whether tampering might have occurred, *see* Vega Proposed Findings ¶¶ 104-114.

181. The AGO’s thinking remained the same as the case progressed: while every new report was investigated, nothing changed the theory of the case or justified convening a new grand jury. Tr. V:207.

Response: Disputed. Every new report was not investigated. *See supra* Response to ¶ 180.

182. The Farak Pros Memo noted how the Farak case was unlike the Dookhan case, including “there was not a breakdown of quality control and managerial oversight.” Ex. 163.

Response: Disputed insofar as a handwritten note on the document stated: “still

a problem w/QC." Ex. 163.

183. The Farak Pros Memo also referenced the possibility of that Farak might make a "proffer." Tr. IV:148-149; Tr. VI:164; Ex. 163. A proffer is an agreement between a criminal defendant or suspect and a prosecutor pursuant to which the defendant provides information that cannot be used against him. Tr. IV:98.

Response: Undisputed.

184. In noting the possibility of a proffer, Ms. Kaczmarek was indicating that a proffer might be worth considering, but she did not yet have sufficient details to know if it would ultimately make sense in the case. Tr. VI:164.

Response: Undisputed.

185. Mr. Verner approved the Farak Pros Memo. Ex. 163.

Response: Undisputed.

186. The Farak Pros Memo was sent to the Executive Bureau. Mr. Bedrosian's name was listed on the cover page, but was crossed out and Ms. Calkins's name is to the right of it. Mr. Bedrosian has no memory now of having seen the Farak Pros Memo at the time it was sent upstairs for approval. Tr. IV:96.

Response: Undisputed.

187. Ms. Calkins's name is handwritten next to the other reviewers at the top of the Farak Pros Memo. Tr. IV:96; Ex. 163. Ms. Calkins recalls receiving the Farak Pros Memo and made a note on it on page two. However, Ms. Calkins did not sign the Farak Pros Memo (although that would be her normal practice) and she does not remember either reviewing it or meeting about it. Tr. IV:140; 159-160; Ex. 163.

Response: Undisputed.

188. Ms. Kaczmarek did not review the approved Farak Pros Memo when it was returned to her. Consequently, Ms. Kaczmarek never saw Mr. Verner's handwritten note to the effect that the mental health records had not been turned over "yet." Tr. VI:170.

Response: Undisputed.

189. On April 1, 2013, the grand jury indicted Farak on four (4) counts of tampering with evidence, four (4) counts of theft of a controlled substance (cocaine) from a dispensary, and two (2) counts of unlawful possession of a class B substance (cocaine). Tr. VI:112; *Cotto*, 471 Mass. at 98.

Response: Undisputed.

190. The Court finds that at the time the Farak Pros Memo was written, the issue of the privileged nature of the mental health records was still under review and in the Assistant Attorneys' General minds; Mr. Verner noted that the mental health records had not been turned over to the District Attorneys' Offices "yet;" the AGO had the intention of sending the mental health records to the District Attorneys' Offices; and that Ms. Kaczmarek did not see Mr. Verner's note to that effect.

Response: Disputed. First, by the time the Pros Memo was written, Kaczmarek had determined the case law did not support the idea the mental health records were privileged. Ex. 163, pg. 5 n.7. Second, while it may have been Verner's intention to send these records to the District Attorneys, Kaczmarek did not have the same intention. In fact, when asked whether it was her "intention that [this evidence] eventually should be turned over," she did not say she intended to turn this evidence over. Instead, Kaczmarek answered:

I was really nervous about those records at the time. And now, because of -- I see now that I totally misjudged the dates, and I see where that was a mistake on my part. If I had realized that, like, what it really meant, I would have -- I would have turned it over. What I would have done is I would've gotten an order, like I did for the Grand Jury minutes, and have the judge relieve me of any sort of -- any issues that could have come up with privilege and released it. I made a mistake.

Tr. VI:112-13. Moreover, she told Attorney Pourinski that she was not going to turn the records over to defense attorneys.

191. The Court finds that the AGO did not turn the mental health records over to the District Attorneys' Offices at the time of indictment, but intended to turn them over once they resolved the issue whether they were privileged or obtained a court order for their release. The Court finds that while, ultimately, the AGO did not turn over the mental health records until much later, there was no deliberate intent not to disclose them, only oversights.

Response: Disputed. Kaczmarek never intended to turn the records over. Her alleged “oversight” was misinterpreting the dates on the records, not losing track of them or their status as undisclosed evidence. See Tr. VI:133 (“I think that I knew the mental health records hadn’t been disclosed [as of September 2013].”). And, Kaczmarek deliberately told Foster that the evidence from the car was not relevant, knowing these representations would be made to this Court.

192. The Court finds that at the time the Farak Pros Memo was written and approved, the AGO did not have a sense of the extent of her drug use, but, while focusing on the evidence at hand, the AGO recognized that a proffer would be worth considering in order to determine the scope of her drug use, and was also willing to investigate other cases in which it was suspected she may have tampered with the samples submitted to her for analysis.

Response: Undisputed. The fact that Kaczmarek and her colleagues “did not have a sense of the extent of [Farak’s] drug use” made their myopic focus on crack cocaine samples during a six month window all the more unreasonable.

193. The State Police/AGO Farak investigation was focused upon any criminal actions that the AGO could prove beyond a reasonable doubt. Tr. II:120, 122-123. The AGO’s initial plan was to seek indictments from the grand jury with the evidence the AGO had from the initial investigation and, if evidence of additional tampering or other crimes came to light after the grand jury ended in April 2013, to consider convening a new grand jury. Tr. V:207; Tr. VI:153-155.

Response: Disputed. When questioned in 2015, Irwin told investigators “the directive from the Criminal Division was that the investigation was to focus on Farak’s wrong doings associated with her arrest.” Tr. II:123.

194. Early in the investigation and after Farak was arrested, Ms. Kaczmarek and Sgt. Ballou started to receive emails and information concerning other cases in which Farak had issued drug analysis certificates and there was a question whether she had tampered with the tested samples. Tr. V:180, 205. The AGO, primarily Ms. Kaczmarek, followed up on that information. Tr. V:206.

Response: Disputed insofar as it is alleged the AGO followed up on all information received. As previously noted, neither Kaczmarek nor Ballou made any effort to determine whether Farak tampered with the 2005 cocaine sample that was light by 4 grams. See Vega

Proposed Findings ¶¶ 100-114. And by the time Ballou met with the narcotics detective who alleged tampering in an oxycodone case, Kaczmarek had already filed an affidavit in court asserting that the Farak investigation was complete. Cotto & Watt Appendix for Briefs in Supp. of Mot. to Dismiss & Mot. for New Trial pp. 38, 39.

195. For example, an Assistant District Attorney from Hampden County reported to Sgt. Ballou that she had had a case in which Farak had been the chemist who had done the testing and that after the testing was finished, the number of pills was "off." Ms. Kaczmarek told Sgt. Ballou to follow up and investigate the report in order to determine whether there was enough evidence to establish tampering. In the follow up, Sgt. Ballou learned that a police officer had submitted some pills to the Amherst Lab for testing and when they were returned, the quantity of pills was not the same and what was returned was not an illegal substance. Tr. VI:98.

Response: Undisputed.

196. In another example, an Assistant District Attorney reported to Sgt. Ballou that in a case where Farak was the chemist, the tested sample had come back four (4) grams lower than the 100-gram threshold required for a more significant charge. The Assistant District Attorney was disappointed in the quantity certified and she was insinuating that Farak could have tampered with it. Tr. VI:99.

Response: Undisputed.

197. Sgt. Ballou displayed some skepticism about the two cases because neither the pill nor 100-gram case seemed to fit the tampering scheme that Ms. Kaczmarek was starting to fashion as a working theory, namely, that Farak was using crack cocaine. Tr. VI:100.

Response: Undisputed. Ballou also expressed skepticism about these cases because they went "back a lot further than the cases [they were] looking at." TR. III:183.

198. In an email to Sgt. Ballou about the two cases, Ms. Kaczmarek made a "throw away comment" to the effect of, "Please don't let this get more complicated than we thought. If she was suffering from back injury maybe she took the oxies." By this statement, Ms. Kaczmarek wasn't saying that it was outside of the realm of possibility that it was Farak who tampered with the sample. Instead, she was "almost pleading to G-d" that an "avalanche" of work would not hit the AGO. She explained that by the "oxie" comment she meant that in her experience, people with drug habits

use one drug and in this case, Farak would not go “outside to the oxies.” Tr. VI:101-102.

Response: Disputed. Prior to receiving Kaczmarek’s plea, Ballou had been told by Irwin to “document everything.” Ex. 231. After receiving Kaczmarek’s plea, Ballou did not write “a police report . . . documenting Diane Dillon’s concern about a 2005 cocaine case being light by 4 grams.” Tr. III:184. In short, Ballou did not treat Kaczmarek’s statement as a “throw away comment.” Rather, it had the effect of circumscribing his investigative activities. With respect to her comment about a possible back injury, Kaczmarek said she thought “maybe [Farak] did take the oxies” and she “was coming up with some sort of explanation for her.” Tr. VI:149. Even if this speculation by Kaczmarek was somehow accurate, it would not have justified evidence tampering and warranted broadening the scope of the investigation to include oxycodone samples.

199. The AGO’s initial plan was to seek indictments from the grand jury with the evidence the AGO had and, if a tip came in after the grand jury ended in April 2013, to present the information to a new grand jury, Tr. V:207; Tr. VI:153-55, but the tips did not pan out. Although, in the beginning, Ms. Kaczmarek was receptive to the idea of indicting Farak on more charges, after Farak was indicted in April 2013 and as time progressed, she started to have less interest in pursuing additional charges. In her experience as a prosecutor, doing so would not have changed the sentence the judge would impose.

Response: Disputed. At least one tip “did not pan out” because no one bothered to see if it had merit. See Vega Proposed Findings ¶¶ 100-114.

200. Although Mr. Verner and Mr. Bedrosian discussed whether to indict Farak on additional charges, they, too, believed that additional charges would not affect the sentence that Farak would receive, and so, although the AGO followed up on the tips, the AGO determined that no additional charges would be sought. Tr. V:181.

Response: Disputed insofar as this paragraph suggests the AGO followed up on all tips. See Vega Proposed Findings ¶¶ 100-114.

201. The Court finds that there was no plan on the part of the AGO to limit the investigation or prosecution of Farak so as to keep the impact of Farak’s misconduct contained.

Response: Disputed. The SJC has already determined the AGO’s “investigation

into the timing and scope of Farak's misconduct [was] cursory at best." *Cotto*, 471 Mass. at 111. The individuals responsible for this cursory investigation were not only "experienced," *see, e.g., supra ¶ 41*; they had recently conducted a very thorough investigation of a chemist at another drug lab. It appears Kaczmarek's motivation to keep the impact of Farak's misconduct contained stemmed from a desire to avoid an "avalanche of work." Tr. VI:102. It does not appear Kaczmarek was invested in preserving potentially tainted drug convictions. *See infra* Response to ¶ 392 (discussing Kaczmarek's willingness to entertain a proffer). Nevertheless, there is no question she took steps to limit the investigation. Five days after Farak's arrest, Kaczmarek sent an email to Ballou pleading with him not to let the case get more complicated. When Kaczmarek later learned retesting revealed evidence of tampering, she kept this information from Flannery. Vega Proposed Findings ¶¶ 218-21.

202. The "Farak cases" were unusual because the AGO was prosecuting Farak but the District Attorneys' Offices, which were prosecuting defendants on the basis of Farak's testing of the drug evidence in their cases, were responsible for identifying and disclosing any potentially exculpatory evidence to the defendants they were prosecuting. Tr. V:102.

Response: Undisputed. That said, the situation was hardly unprecedented. *See infra* ¶ 204.

203. When Farak was arrested, the AGO was considering how to communicate with the District Attorneys' Offices about the arrest and the implications thereof on their prosecutions. Tr. VI:58-59; Tr. V:210.

Response: Undisputed.

204. In the Dookhan case, the AGO had provided notice to the District Attorneys' Offices about potentially exculpatory information, namely, her arrest and its possible impact on cases pending in their jurisdictions. In the Farak case, the AGO was going to provide this information to the District Attorneys' Offices, just like it had done in the Dookhan case. Tr. IV:125; Tr. V:132-133, 210-211; Tr. VI:176-177; Ex. 263; Ex. 285.

Response: Undisputed.

205. Mr. Mazzone and Mr. Verner felt they had an ethical obligation to provide the information to the District Attorneys so that they could prepare certificates of discovery and answer discovery requests from any potentially affected defendants they were prosecuting. Tr. V:210; Tr.

VI:58-59.

Response: Undisputed.

206. In the Dookhan case, the AGO had started to send the District Attorneys' Offices investigation and case information even before the chemists were indicted. In Farak, the AGO did the same thing; before she was even indicted, the AGO had started to send information to the District Attorneys' Offices. Tr. V:211; Tr. VI:58-59.

Response: Undisputed.

207. And so at about the same time that the Farak Pros Memo was being written and submitted for approval, Mr. Verner was sending initial case material, including State Police reports, to the District Attorneys' Offices. Tr. V:216.

Response: Undisputed.

208. Normally, a prosecutor has direct access to discovery through his investigators. But the Farak case was unusual. The District Attorney's Office was not prosecuting Farak, so Assistant District Attorneys at the District Attorneys' Offices, including Frank Flannery in the Hampden County District Attorney's Office, were going to get information from the AGO and disseminate exculpatory information to defense counsel in cases being prosecuted by the District Attorney's Office. Tr. II:158-160.

Response: Undisputed.

209. In the beginning, Mr. Flannery did not know "how big of a problem it was going to be or how to handle it." Tr. II:159. Part of Mr. Flannery's job was to develop a policy or protocol for handling the cases and providing discovery to defense counsel in cases the Hampden County District Attorney's Office was prosecuting. Tr. II:159.

Response: Undisputed.

210. Based on information about the Farak investigation, the Hampden County District Attorney's Office itself had had some of the Farak-related drug samples re-tested. The District Attorney's Office was not trying to investigate the Amherst Lab on its own, but rather it wanted to go forward on some of the potentially affected cases. Tr. II:162.

Response: Undisputed.

211. On March 27, 2013, in a letter prepared by an administrative assistant and signed by Mr. Verner, the AGO provided seven (7) police reports, photographs, four (4) witness interview transcripts, an evidence log, a 2012 audit of the Amherst Lab, and a 2012 State Police safety assessment report on the Amherst Lab to the District Attorneys' Offices pursuant to what Mr. Verner characterized as "obligation to provide potentially exculpatory information to the 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 [L]aboratory." Tr. V:98-99, 129; Ex. 165; Ex. 260.

Response: Undisputed.

212. According to Mr. Verner, because Ms. Kaczmarek was the Assistant Attorney General assigned to the case, it was her responsibility to provide the potentially exculpatory information to the District Attorneys. Tr. V:129.

Response: Undisputed.

213. Ms. Kaczmarek never intentionally withheld the mental health records from the named defendants in this case or any other defendant potentially impacted by Farak's misconduct. Tr. VI:176.

Response: Disputed. Kaczmarek admitted intentionally withholding the mental health records. Tr. VI:113. According to her, she did so because "totally misjudged the dates" and therefore did not realize how exculpatory they were. *Id.* In addition to the named defendants in this case, Kaczmarek intentionally withheld the mental health records from the defendant in the Berkshire County case of *Commonwealth v. Manson*. Ex. 233.

214. The fact that Ms. Kaczmarek did not disclose the mental health records to the District Attorneys' Offices was an honest mistake on her part. Tr. VI:176, 191.

Response: Disputed. See *supra* Response to ¶ 163. Furthermore, Kaczmarek told Berkshire ADA John Bosse "that all relevant discovery from the Farak prosecution had already been provided to Berkshire County District Attorney's office." Ex. 233. At the time she made this representation, Kaczmarek knew the mental health records were relevant and she knew they had not been disclosed. Tr. VI:133.

215. The Court finds that on March 27, 2013, Ms. Kaczmarek and Mr. Verner were in the process of obtaining indictments of Farak. As of that day, they had not finally settled the issue whether the mental health records were privileged but had decided that since the records were not needed to secure an indictment, they would not be introduced as an exhibit in the grand jury. Ms. Kaczmarek noted this on her Farak Pros Memo.

Response: Disputed. There is nothing in the Pros Memo (or anywhere else) indicating an ongoing effort to determine whether the mental health records were privileged.

216. The Court finds that on the same day, March 27, 2013, Mr. Verner was in the process of having a letter prepared that he would send to the District Attorneys, in which the AGO would make an initial disclosure of Farak-related information. This information was potentially exculpatory evidence in cases they were prosecuting.

Response: Undisputed.

217. The Court finds that Mr. Verner, who had in mind the initial disclosure to the District Attorneys, noted on the Farak Pros Memo that the "paperwork" was not being turned over to the District Attorneys "yet." The Court finds that it was Mr. Verner's intention that the AGO would provide the "paperwork" after the privilege issue was settled.

Response: Disputed with respect to the phrase: "after the privilege issue was settled." Verner testified it was his "intention that the stuff [was] going over." Tr. V:171; *see also* Tr. V:229 ("So I'm issue spotting, and I'm pointing out these haven't been turned over yet; meaning these need to go over . . .").

218. The Court finds that although Mr. Verner signed the letter to the District Attorneys, he believed it was Ms. Kaczmarek's responsibility to provide potentially exculpatory information to the District Attorneys.

Response: Undisputed.

219. The Court finds that it is not clear whose responsibility it was to follow up with sending the records to the District Attorneys' Offices or how or when that would take place, but that the lack of clarity is due to inadvertence or a failure of communication, not to any deliberate intent to withhold the information from the District Attorneys, these defendants, or others.

Response: Disputed. It was the responsibility of the AGO to send potentially

exculpatory information to the District Attorneys' Offices, to respond accurately to Court orders, and to not mischaracterize the nature of evidence in the possession of prosecutors and troopers assigned to the office. As previously noted, Kaczmarek did intend to withhold the mental health records from the District Attorneys, and told Attorney Pourinski this. Tr. VI:133; VI:21-22, 25; *see also* Ex. 192, Pourinski Aff. ¶ 2. Moreover, Attorney Ryan made specific requests for this information, and Attorney Olanoff summonsed this information, so even if the previous failure to disclose had been inadvertent – which it was not –it certainly was not inadvertent by the time of the hearing in September.

220. The Court finds that neither Mr. Verner nor Ms. Kaczmarek deliberately or intentionally withheld the mental health records from the District Attorneys, these defendants, or others.

Response: Disputed. Kaczmarek admitted deliberately and intentionally withholding the mental health records. Tr. VI:133.

221. In early 2013, the AGO presented evidence of Farak's drug tampering to a statewide grand jury, which was sitting in Suffolk County. See Tr. VI:112.

Response: Undisputed.

222. Ms. Kaczmarek subpoenaed Farak's wife to testify at the grand jury. Tr. VI:141.

Response: Undisputed.

223. In her testimony, Farak's wife spoke candidly about her own mental health issues. Tr. VI:141.

Response: Undisputed.

224. After Farak was indicted, Ms. Kaczmarek asked the Court for an order so that she could disseminate the grand jury minutes to the District Attorneys' Offices. Tr. VI:111.

Response: Undisputed.

225. Ms. Pourinski, Farak's lawyer, knew that Ms. Kaczmarek was planning to ask the Court to allow her to release the grand jury minutes to the District Attorneys and asked Ms. Kaczmarek to redact Farak's wife's testimony about her own mental illness, which Ms. Kaczmarek agreed to do. Tr.

VI:141-142.

Response: Undisputed.

226. In the summer of 2013, the Court approved the AGO's request to release the redacted transcripts, and the AGO sent the grand jury minutes and exhibits to the District Attorneys' Offices. Tr. V:98, 111. Included within the information sent to the District Attorneys' Offices were news articles that had been admitted as exhibits to the grand jury. These were the news articles that had been among the papers seized from Farak's car and had been sent by Sgt. Ballou to Ms. Kaczmarek on February 14, 2013. The mental health records (ServiceNet diary card, worksheets, etc.), which the AGO had thought were privileged and which had been segregated by Ms. Kaczmarek, were not sent to the District Attorneys' Offices. Tr. VI:168.

Response: Disputed. The AGO did not think the mental health records were privileged. Three supervisors in the office approved a prosecution memo referencing "case law" suggesting they were not and Verner wrote a note on the memo reminding Kaczmarek the records had to be turned over to the District Attorneys. Kaczmarek unilaterally decided to treat the records as privileged based on her misconception concerning their probative value.

227. Had Ms. Kaczmarek recognized the significance of the dates on the ServiceNet diary card at the time, she would have taken the records in with her at the same time she sought an order to release the grand jury minutes and would have asked the judge to review the records in camera and "release [her] from any sort of privilege." Tr. VI:167.

Response: Undisputed that this is her testimony.

228. The Court finds that as a result of Ms. Kaczmarek's not having introduced Farak's mental health records into the grand jury and as a result of her segregating them, those mental health records were not sent to the District Attorneys' Offices.

Response: Disputed. The records were not sent to the District Attorneys' Offices because Kaczmarek chose not to send them. She told Attorney Pourinski she would not be sending them. Tr. VI:21-22, 25; *see also* Ex. 192, Pourinski Aff. ¶ 2. When asked whether she told Foster in September 2013, that everything in her possession had been disclosed, Kaczmarek testified she would not have said this because she "knew the mental health records hadn't been disclosed." Tr. VI:133.

229. The Court finds that as a result of Ms. Kaczmarek's (or for that matter, Sgt. Ballou's or Mr. Verner's) failure to realize that the ServiceNet diary card entries referred to 2011, not 2012, and consequent failure to realize that they indicated Farak was using drugs for a longer time frame than was initially supposed, Ms. Kaczmarek did not realize that the mental health records might have been exculpatory to the defendants in this case in the sense that they suggested Farak might have been using drugs while employed as a chemist and while conducting drug analysis tests at the Amherst Lab at least as far back as 2011 and possibly longer.

Response: Disputed. Putting aside the dates of the entries on the diary card, the document was exculpatory to the defendants in this case insofar as it established Farak was not just stealing drugs from the lab but was using them "while conducting drug analysis tests," i.e. "at work." Ex. 210. The only other evidence suggesting the possibility Farak might have been using drugs during the course of her work days was a statement from a refrigeration technician who saw Farak exit a bathroom in the basement of the lab the morning of her arrest. *See* Ex. 13. In addition, the diary card indicated Farak was receiving drug treatment from ServiceNet. One could reasonably infer Farak did not immediately begin treatment the moment she started using. One could also reasonably infer ServiceNet (like most, if not all, drug treatment providers) kept documentation reflecting her treatment, which likely included a history of Farak's illicit drug use. This diary card was therefore exculpatory, in and of itself, and reasonably likely to lead to additional exculpatory evidence.

230. The Court finds that when the AGO made its initial disclosure of case material to the District Attorneys' Office in March 2013, that it had every intention of following up with the mental health records once the issue of their privileged nature was resolved and a release from the Court was obtained.

Response: Disputed. Again, it was Verner's intention to follow up with the mental health records. Period. He did not testify that the privilege issue needed to be resolved or a court order obtained. Kaczmarek said it *would have been* her intention to get a court order if she realized the significance of the ServiceNet Diary Card Ballou forwarded. *See supra* ¶ 227. Because she did not realize the significance, it was her intention to treat the records as privileged. It was never her intention to seek a court order releasing her from any potential privilege.

231. The Court finds that the AGO made an honest oversight – caused by different individuals having some understanding of what had been disclosed and what still needed to be disclosed, but no one having the whole picture – when no one followed up to resolve the privilege issues and ensure the mental health records were disclosed to the District Attorneys' Offices.

Response: Disputed. Again, Kaczmarek "knew the mental health records hadn't been disclosed." Tr. VI:133. This was not an oversight, but a deliberate choice.

232. The Court finds that the AGO's failure to disclose the mental health records to the District Attorneys' Offices during this time frame was due to inadvertence, not to any deliberate intent to withhold the information from the District Attorneys, these defendants, or others.

Response: Disputed. Again, Kaczmarek testified it was her deliberate intention to withhold the mental health records because she "misjudged" their probative value. Tr. VI:133. This misjudging may have been inadvertent; withholding the documentation was not.

233. The Court finds that news articles printed on September, October, and December 2011 were, however, sent to the District Attorneys' Offices. The Court finds further that the newspaper articles may have served as a basis for concluding that Farak engaged in misconduct at the Amherst drug lab earlier than the summer of 2012. See *Commonwealth v. Ware*, 471 Mass. 85, 94 n.13 (2015), and that the ability to draw that inference was equally available all parties, including the defendants.

Response: Disputed. The ability to draw that inference was not equally available to all parties. If the AGO had chosen to draw this inference, it could have cited undisclosed mental health records revealing drug abuse at the lab by Farak in December 2011. When defendants like Rolando Penate attempted to draw this inference, AAG Kris Foster filed a pleading stating "[t]here is nothing to indicate that the allegations against Farak date back to the time she tested the drugs in the defendant's case." Commonwealth v. Penate, Hampden County Indictment No. 12-083, Mem. of Law in Supp. of Att'y Gen.'s Mot. to Quash Summons Served on AAG Kaczmarek pg. 9 (Oct. 1, 2013). Indeed, the SJC noted that "[t]he motion judge was not persuaded that it was reasonable to infer from Farak's possession of the newspaper articles that were printed in the fall of 2011 ... that she was stealing controlled substances at that time. We conclude that the judge did not abuse his discretion in making this determination."

Commonwealth v. Cotto, 497 Mass. 97, 111 n.13 (2015).

234. Farak was arrested on January 19, 2013, Tr. II:97-98, and arraigned on April 22, 2013. Tr. VI:114.

Response: Undisputed insofar as she was arraigned in Superior Court on April 22, 2013. She was arraigned in the Eastern Hampshire District Court on January 22, 2013.

235. On April 22, 2013, the AGO filed in the Farak case, pending in Hampshire County Superior Court, a First Certificate of Discovery, listing the discovery material that was provided to Farak. The list of items on the Certificate included CD # 2, Item 4, seven pages of "paperwork recovered from M/V." Ex. 168.

Response: Undisputed.

236. The discovery provided to Farak included seven (7) pages of "Paperwork recovered from M/V," which were the mental health records. Tr. VI:19, 114-115; Exs. 168, 169.

Response: Undisputed that it was seven pages of mental health records. It was not all of the mental health records in the car.

237. Ms. Pourinski and Ms. Kaczmarek did not discuss whether the mental health records (which were kept as physical evidence) might be privileged. Tr. VI:115, 141.

Response: Disputed. First, Pourinski and Kaczmarek did explicitly discuss the fact that the AGO considered these records privileged and would not be disclosing them to defense counsel. See *infra* Response to FN10. Tr. VII:22, 27, 33. Second, the original mental health records may have been kept as physical evidence, but Kaczmarek admitted that she had a file with these records. Tr. VI:167.

The obvious purpose of this parenthetical is to avoid contradicting the untenable claim that the mental health records "were not kept as part of Sgt. Ballou's 'file.'" *Supra* ¶ 129.

FN10 Although Ms. Pourinski testified that Ms. Kaczmarek said that the AGO was considering mental health records relating to Farak to be privileged, it is more likely that, as Ms. Kaczmarek remembers the conversation, Ms. Pourinski's concern was about the release of the grand jury minutes, which contained testimony from Farak's wife about her own mental health

issues. As Ms. Kaczmarek remembers the conversation, they spoke about redacting the grand Jury minutes. Tr. VI:141. There is no evidence to corroborate Ms. Pourinski's memory that their conversation concerned a privilege surrounding Farak's mental health records.

Response: Disputed. Pourinski testified Kaczmarek's statement stood out because "it affected [her] thinking about the case" insofar as Pourinski "wanted to put an end to [Farak's] exposure. Tr. VI:35. Redacting the grand jury minutes to remove references to Lee's mental health issues had no impact on Farak's exposure. As for the supposed absence of corroboration, Kaczmarek testified that if she "recognized that these dates" on the ServiceNet Diary Card "were from 2011," she would have "asked a court to do an in camera review and release [her] from any sort of privilege." Tr. 116-67. In other words, the fact that Kaczmarek treated the records as privileged corroborates Pourinski's assertion that Kaczmarek told her the AGO considered the records privileged. On the other hand, there is no evidence to corroborate Kaczmarek's testimony that their conversation concerned privilege surrounding Lee's grand jury testimony.

238. Ms. Pourinski and Farak reviewed all of the physical evidence that was kept in the evidence room at the AGO's Springfield office. Tr. III:178; Tr. IV:33-34; Tr. VI:133.

Response: Undisputed. It should be noted Kaczmarek did not review this evidence. Tr. IV:44.

239. The Court finds that the AGO listed on its Certificate of Discovery, which was filed in Court, seven (7) pages of "paperwork recovered from [Farak's] M/V."

Response: Undisputed.

240. The Court finds that the AGO provided Farak, through Ms. Pourinski, with digital copies of seven (7) pages of "paperwork recovered from [Farak's] MV/," which were her mental health records and which were being maintained as physical evidence at the AGO's Springfield Office.

Response: Undisputed insofar as the originals were in physical evidence and the copies were in Kaczmarek's file.

241. The Court finds that the AGO provided Farak and Ms. Pourinski with an opportunity to inspect all the physical evidence that had been seized in

relation to her case.

Response: Undisputed.

242. The Court finds that Ms. Pourinski and Ms. Kaczmarek did not discuss any privileges Farak had in regards to her mental health records but rather, discussed any privileges Farak's wife may have had in relation to her own mental health.

Response: Disputed. See *supra* Response to ¶ 237, FN10.

243. As the Farak case developed, the Hampden County District Attorney's Office received, and Mr. Flannery, then First Assistant District Attorney, handled, motions for new trial filed by convicted defendants who were seeking post-conviction relief based on alleged misconduct on the part of Farak and based on questions that had been raised as to the integrity of the Amherst Lab. Tr. V:97.

Response: Undisputed.

244. The AGO, as the relevant prosecuting authority in the Dookhan and Farak cases, began to receive and to respond to third party subpoenas and discovery requests related to those cases and based on either Mass. R. Crim. P. 17 (the AGO was served with subpoenas for trial in pending cases) or Mass. R. Crim. P. Rule 30 (the AGO was served with Rule 30(c)(4) discovery requests in relation to motions for new trial). The AGO's Appeals Division handled these motions. Tr. II: 130; Tr. III:9-10, 31; Tr. V:9-13.

Response: Undisputed.

245. In general, the Appeals Division is responsible for: (1) federal habeas cases brought by criminal defendants who have exhausted state remedies and are seeking federal relief, Tr. VI:63-64; (2) direct criminal appeals in state court; and (3) responses to third party subpoenas served on state public safety agencies or on any other state agency in a criminal matter. Tr. III:82; Tr. IV:164-165, 185; Tr. V:42.

Response: Undisputed.

246. Assistant Attorneys General who work in the Appeals Division are expected to work on each type of case the Division handles—habeas cases, direct criminal appeals, and third party subpoenas. Tr. IV:187; Tr. V:47.

Response: Undisputed.

247. Habeas cases make up the largest area of practice in the Appeals Division and generally involve serious felonies such as rape, murder, and child sexual assault. Tr. VI:63-64.

Response: Undisputed.

248. The volume of cases in the Appeals Division is high and a great number of the cases they handle are “extremely consequential.” Tr. VI:65.

Response: Undisputed.

249. Over the past four years, the Appeals Division has handled nearly 120 subpoenas, approximately half of which were related to the Farak or Dookhan matters. Tr. V:43.

Response: Undisputed.

250. Assistant Attorney General Randall Ravitz (“Ravitz”) has been Chief of the Appeals Division for four (4) years and has been employed by the AGO for twelve (12) years. Tr. V:41. As Chief of the Appeals Division, Mr. Ravitz is often in the position of legal adviser, suggesting any legal issues that might need to be addressed or protections that might be applicable in a given situation. Tr. V:56.

Response: Undisputed.

251. From January 2013 to the summer of 2015, Assistant Attorney General Suzanne Reardon (“Reardon”) served as Deputy Chief of the Appeals Division. Tr. IV:161-162. Since that time, Ms. Reardon has served as an Assistant Attorney General in the Appeals Division. Tr. IV:161; Tr. V: 41-42.

Response: Undisputed.

252. As Deputy Chief of the Appeals Division, Ms. Reardon was responsible for monitoring work flow, assigning cases, and checking and editing the work of Assistant Attorneys General. Tr. IV:184.

Response: Undisputed.

253. In 2013, Mr. Ravitz and Ms. Reardon were each responsible for supervising approximately half of the attorneys in the Appeals Division. Tr. IV:162. As supervisors, Mr. Ravitz and Ms. Reardon reviewed pleadings, motions, and briefs before they were filed with the courts by the Assistant Attorneys

General they supervised. Tr. IV:178.

Response: Undisputed.

254. Kris Foster (“Foster”) served as an Assistant Attorney General in the Appeals Division from July 2013 to February 2015. Tr. III:81; Tr. V:43.

Response: Undisputed.

255. During that time, Ms. Reardon served as Ms. Foster’s supervisor. Tr. IV:162.

Response: Disputed. Foster testified that Ravitz was her “direct supervisor.” Tr. III:13, 20. Although Reardon was also “one of [her] supervisors,” Foster said she did not “work closely with [Reardon] in these Farak-related issues.” Tr. III:32.

256. Prior to joining the AGO, Ms. Foster had spent approximately four (4) years in the Suffolk County District Attorney’s Office Appeals Division where she handled a substantial number of appeals in the Supreme Judicial Court and the Appeals Court as well as post- trial motions and proceedings in the Single Justice Session of the Supreme Judicial Court, worked on trial teams and drafted pre-trial motions, and was part of the Narcotics Case Integrity Unit that the office established to deal with Dookhan-related drug lab matters. Tr. IV:186-187; Tr. V:43-44.

Response: Undisputed.

257. When Ms. Foster started working at the AGO, she had no experience with motions to quash. Tr. III:84.

Response: Undisputed.

258. All new Assistant Attorneys General are required to complete an internal new hire training. Tr. V:83-84.

Response: Undisputed.

259. The AGO has a formal requirement that all Assistant Attorneys General take at least twelve (12) hours of continuing legal education each year and has an in-house training program, the AG Institute. Tr. V:48.

Response: Undisputed.

260. The AGO provides training to Assistant Attorneys General in at least three

ways: through formal training; through informal training; and by providing written materials. Tr. V:48; *see also* Tr. IV:163. There is an internal new hire training. Tr. V:83. Assistant Attorneys General also have the opportunity to receive training through the National Association of Attorneys General and "CAAAP." Tr. V:48-49. In addition, there are often informal presentations at division and bureau meetings, Tr. V:49; Bureau Chiefs will go over cases with the Assistant Attorneys General, Tr. V:50; and an experienced Assistant Attorney General will often accompany a new Assistant Attorney General to court, Tr. V:84.

Response: Undisputed.

261. In spring 2013 and again in 2015, the AG Institute conducted a training on responding to subpoenas. Tr. V:48.

Response: Undisputed.

262. Ms. Foster, the Assistant Attorney General who handled the third party subpoenas at issue in this case, was not present at this training, but had been given sample motions to quash from her supervisor, Ms. Reardon. Tr. III:33.

Response: Disputed. Ravitz gave Foster the sample motions. *See infra ¶ 268.*

263. The AGO has a manual on responding to third party subpoenas. Tr. V:9; Ex. 247.

Response: Undisputed.

264. Every subpoena must be considered on a case-by-case basis, including whether the subpoena is a request for testimony, a request to look at original physical evidence, or a request for documents from a state employee's file. Tr. V:56-57.

Response: Undisputed.

265. Typically, the following things need to be done to determine how to respond to a third party subpoena: (1) contact the counsel who served it; (2) contact the client and collect files if the subpoena calls for documents; and (3) analyze the subpoena, the facts of the case, and any relevant documents to determine which privileges and protections might apply. Tr. V:25, 57.

Response: Undisputed.

266. Certain types of protections or objections that might be asserted by the client agency or the AGO are apparent from the face of the subpoena. Tr. V:85.

Response: Undisputed.

267. When handling third party subpoenas on behalf of client state agencies whose files have been subpoenaed, the Appeals Division insists that the agency provide access to agency files, V:52, which files may include relevant emails. Tr. V:36.

Response: Undisputed.

268. When Ms. Foster started working at the AGO and before she was assigned a third party subpoena matter to handle, Mr. Ravitz gave her an informal training on motions to quash during which he showed her samples and discussed the steps and process involved in filing a motion to quash. Tr. V:50-51, 79.

Response: Undisputed.

269. In addition, Mr. Ravitz sent Ms. Foster a Memorandum in Support of a Motion to Quash Subpoena that he filed in one of his own cases, *U.S. v. Vaughan*, in order to give Ms. Foster a sample to review as she drafted similar motions (the "Vaughan Memo"). Tr. V:58; Ex. 254.

Response: Undisputed.

270. The Court finds that the AGO provides formal and informal training to Assistant Attorneys General. Specifically, the Court finds that the AGO provided training on handling third party subpoenas and discovery to Assistant Attorneys General in the Appeals Division and that although she did not attend the formal training on handling subpoenas, Ms. Foster received at least some guidance about third party subpoenas, including sample motions to quash.

Response: Undisputed.

271. In August 2013, the AGO became aware that Farak-related third party subpoenas and discovery motions were likely to be filed in post-conviction and pre-trial proceedings pending before this Court, which had been specially assigned to the Honorable Jeffrey A. Kinder. Tr. IV:169.

Response: Disputed insofar as Judge Kinder's name is C. Jeffrey Kinder.

272. By the time third party subpoenas or other discovery requests seeking case material related to the Farak prosecution were served on the AGO, substantial case material had already been sent to the District Attorneys' Offices, for further dissemination to the defendants, in two separate disclosures: in March 2013, Mr. Verner had sent to the District Attorneys' Offices the initial police reports, witness interviews, etc., Tr. I:110; V:98-99; 129; Ex. 165; Ex. 260; in the summer of 2013, Mr. Verner had sent the grand jury transcripts and exhibits, Tr. V:98, 111. Because the mental health records were not submitted to the grand jury, they were not part of the disclosures sent to the District Attorneys' Offices and instead remained with the rest of the physical evidence. Tr.III:165-166; Tr. V:134, 215.

Response: Disputed. Kaczmarek was responsible for drafting the cover letter that accompanied the Farak grand jury minutes and "sending out" the minutes "to various District Attorneys' Offices." Tr. V:111. Kaczmarek had the mental health records in a file and purposefully did not disclose them. Tr. VI:167, 113.

273. Ms. Kaczmarek's principal focus was to preserve the integrity of the evidence for purposes of prosecuting Farak. Ms. Kaczmarek and Mr. Verner were concerned about the chain of custody and integrity of the evidence. Tr. V:212-214; VI:178-179.

Response: The defendants do not dispute that Kaczmarek and Verner were concerned about the chain of custody and integrity of the evidence. The defendants are in no position to admit or deny whether this constituted Kaczmarek's "principal focus."

274. In fact, Ms. Kaczmarek had previously had a trial, a case involving the violation of a restraining order and stalking, in which the defendant had presented letters from the victim in order to show she had been contacting him while he was under a restraining order. Tr. VI:179. When Ms. Kaczmarek showed the letters to the victim, however, the victim told Ms. Kaczmarek that she had dated the letters. Tr. VI:179. It turned out that the defense attorney had cut the dates off the letters so as to be able to pass the letters off as contemporary when in fact they had been written long ago. Tr. VI:179. As a result of this experience and her training, Ms. Kaczmarek was concerned about the integrity of the Farak evidence. Tr. VI:178-179.

Response: The defendants are in no position to admit or deny the veracity of this claim.

275. Because the Farak investigation was an ongoing criminal investigation and the AGO attorneys involved thought that non-privileged case material had already been disclosed to third party defendants through the District Attorneys' Offices, the Appeals Division decided it would move to quash the subpoenas seeking testimony and to oppose the discovery motions seeking access to the physical evidence. Tr. IV:173-174; Tr. V:34, 212- 213.

Response: Disputed. Kaczmarek knew the mental health records had not been disclosed and that the case law suggested they were not privileged. She instructed Foster to oppose a motion seeking access to the physical evidence on relevance grounds. See Ex. 211. Foster followed this instruction. See Vega Br. ¶ 441 (citing Ex. 216, pp. 14-15). Neither Foster nor Kaczmarek actually reviewed the physical evidence. See Vega Br. ¶ 139 (citing Tr. IV:44); Vega Br. ¶ 442 (citing Tr. III:72).

276. The investigators and Assistant Attorneys General involved in the Farak cases were not concerned about providing Sgt. Ballou's file to the defendants and believed that everything from Sgt. Ballou's file already had been disclosed to the District Attorneys' Offices. Tr. III:201; Tr. V:213; Tr. VI:184.

Response: Disputed. The AGO filed a motion to quash the subpoena Ballou received. Kaczmarek believed Ballou's file contained the mental health records. See Ex. 210 ("Joe has all his reports and all reports generated in the case. . . . Copies of the paperwork seized from her car regarding new [sic] articles and *her mental health worksheets*.") (emphasis added). These documents made her "nervous." Tr. VI:112. She did not believe they had already been disclosed. Tr. VI:133.

277. The investigators and the Assistant Attorneys General involved in the Farak cases reasonably believed that the material the defendants were seeking had been provided to the defendants through the District Attorneys' Offices. Tr. III:201; Tr. IV:37-39; Tr. V:211- 213.

Response: Disputed. Again, Kaczmarek testified that when Foster relayed Judge Kinder's order to produce any undisclosed documents, she "knew the mental health records hadn't been disclosed up until that point." Tr. VI:133. The beliefs of any other AAGs would only have been reasonable if they formed them after investigating what had and had not been disclosed. Furthermore, Kaczmarek knew that the defendants wanted to inspect the evidence from the car, see Ex. 211, and that she had not turned over everything from the car, see Tr. VI:133 (stating she was present when Pourinski and Farak went

"through the box of evidence from which the mental health worksheets were taken"). Also, the very fact that the AGO filed a motion to quash indicates they believed the defendants were seeking material that had not yet been disclosed.

278. Notwithstanding that Sgt. Ballou had emailed to Ms. Kaczmarek a copy of the mental health records, Ms. Kaczmarek did not know that the mental health records were not kept in Sgt. Ballou's file but instead, were in the evidence room. Tr. VI:175.

Response: Disputed. Documents Ballou scanned, named, saved to his hard drive, and sent as attachments to an email were a part of his "file," and Kaczmarek would know that. *See Vega Br. ¶ 229* (citing Tr. V:26-27).

279. Ms. Foster believes that one of her supervisors told her there was no need to look at the file. Tr. III:96. But this does not sound like something Mr. Ravitz would say, Tr. V:70; Ms. Reardon told Ms. Foster to look at the file, Tr. IV:201; Mr. Mazzone never told her not to look at the file, Tr. VI:66-67; and Mr. Verner did not tell her not to bother looking in the file. Tr. V:224.

Response: The statements in this paragraph are consistent with the testimony offered during the recent hearing. Defendants dispute Foster's claim she was instructed – or genuinely "believes" she was instructed – not to look at the file. In addition to the testimony of her former colleagues cited (with approval) by the AGO, Foster's version of events is at odds with an email she received from Reardon. Tr. III:46-47.

280. The Court finds that the relevant AGO staff, Sgt. Ballou, Mr. Verner, and Ms. Kaczmarek all believed that the mental health records had been turned over to the District Attorneys' Offices and that Ms. Foster had no knowledge specifically about mental health records, but believed that everything had been turned over to the District Attorneys' Offices.

Response: Disputed. During the recent hearing, Ballou conceded he did not know the contents of the discovery packets he delivered to the District Attorneys. Tr. IV:37-38. Ballou also acknowledged providing Kaczmarek with only the "most important" mental health records he felt she "need[ed] to see." Tr. IV:18-19. He knew other mental health records could not have been turned over because nobody from the AGO ever reviewed them prior to Farak's plea. Tr. IV:43-44. With respect to Kaczmarek, see the Response above to ¶ 277. As for Foster's knowledge, she was present in the courtroom during

Ballou's examination and knew he had not been questioned about any mental health records. Tr. III:56. On the morning after the hearing, she sent an email to five colleagues stating "Judge Kinder did not allow any kind of questioning anywhere near anything privileged." Ex. 210. Later that same morning, Foster received an email from Kaczmarek specifically mentioning Ballou's possession of "mental health worksheets." *Id.* In the letter she eventually wrote to Kinder, Foster listed things in Ballou's file that had already been turned over but did not list the mental health worksheets. See Ex. 193. Accordingly, Foster could not have reasonably believed "everything had been turned over." And again, why would the AGO file a motion to quash if there was nothing to quash?

281. The Court finds that it was reasonable for the AGO investigators and Assistant Attorneys General to believe that the material the defendants were seeking in this case had already been provided to the District Attorneys' Offices (and, in turn, to the defendants), even if that belief turned out to be mistaken.

Response: Disputed. *See supra* Responses to ¶¶ 276-80.

282. Ms. Reardon and Mr. Ravitz assigned Ms. Foster to handle the third party subpoenas and Rule 30(c)(4) discovery motions in these cases for several reasons: (1) Ms. Foster was available because she had only recently started at the AGO; (2) the Farak matter involved a state criminal case, and Ms. Foster had considerable experience in state criminal matters; and (3) Ms. Foster expressed interest in expanding her range of experience and she did not have prior experience filing motions to quash. Tr. IV:172-173; Tr. V:46-47.

Response: Undisputed.

283. On August 26, 2013, Mr. Ryan sent an email to Ms. Foster in which he indicated that he represented a defendant named Rodriguez who was one of fifteen (15) post-conviction defendants scheduled for a hearing in this Court on Farak-related matters on September 9, 2013, Rodriguez Dkt., No. 36, and asked Ms. Foster about inspecting sixty (60) items seized during the Farak investigation. Tr. III:33-36.

Response: Undisputed.

284. Ms. Foster responded that she could not give Mr. Ryan access to the main evidence room because the Farak investigation was ongoing. Tr. III:38-39.

Response: Undisputed.

285. On August 29, 2013, Rodriguez filed a post-conviction motion for discovery pursuant to Mass. R. Crim. P. 30(c)(4) in *Commonwealth v. Rodriguez*, HDCR2010-01181. Ex. 212¹¹; see also Rodriguez Dkt., No. 42.

Response: Undisputed.

286. In Rodriguez's Rule 30(c)(4) motion, Rodriguez sought several categories of documents from the Hampden County District Attorney's Office, the State Police, the Department of Public Health, and the AGO. Ex. 212.

Response: Undisputed.

287. On September 6, 2013, Ms. Foster filed the AGO's opposition to Rodriguez's Rule 30(c)(4) motion. Ex. 212. In the opposition, the AGO argued that the documents Rodriguez requested could only be used to impeach Farak and therefore, were an insufficient basis upon which to satisfy his burden of establishing a *prima facie* case that his plea had not been entered into voluntarily and intelligently, Ex. 212, and argued additional grounds for denying each of the twelve (12) specific requests made in the motion. Ex. 212. For eight (8) of the requests, the AGO argued that the AGO did not have access, control, or possession of anything responsive. Ex. 212. For the remaining requests, other specific arguments were made. Ex. 212. Specifically, in response to Rodriguez's request for "inter- and intra- office correspondence at the AGO" and "AGO correspondence with DAs' offices," the motion was opposed on the ground that such correspondence would be protected by the work product doctrine and law enforcement investigative privilege. Ex. 212. In response to defendant Rodriguez's request for "[a]ccomplice evidence" and evidence of "third party knowledge," the motion was opposed on the ground that "[t]he AGO has turned over all grand jury minutes, exhibits, and police reports in its possession to the DA's office. Based on these records, to which the defendant has access, there is no reason to believe that an accomplice was involved" or "that a third party had knowledge of Farak's alleged malfeasance prior to her arrest." Ex. 212.

Response: Undisputed.

288. The Court considered the Rodriguez Rule 30(c)(4) motion during a hearing on September 9, 2013, and ultimately allowed the motion in part. See ¶¶ 297-316, *infra*.

Response: Undisputed.

289. The Court finds that Ms. Foster had no knowledge that the mental health records existed, or were exculpatory evidence, or had not been turned over when she filed the AGO's opposition to Rodriguez's motion for discovery.

Response: Disputed. Foster attended two meetings about Farak subpoenas and/or discovery issues prior to filing this pleading. Vega Br. ¶¶ 246-55. Four of the seven participants in these meetings either possessed copies of the mental health records or at least knew of their existence. Vega Br. ¶¶ 288-90. Two other participants had considerable experience responding to subpoenas and were aware this task entailed determining what documents Ballou and/or the office possessed and what documents had already been disclosed. Vega Br. ¶¶ 293-94. When Kaczmarek was asked about the contents of Ballou's file on September 10, 2013, she referenced Farak's "mental health worksheets." Ex. 210. If the existence of these documents did not come up in the either of the meetings Foster attended, it stands to reason Kaczmarek would have used this occasion to explain what these worksheets were or at least one recipient of the email would have requested such an explanation. Furthermore, as noted above, Foster's pleading maintained the AGO did not have access, control, or possession of anything responsive to eight categories of requested evidence. See *supra* ¶ 287. She did not make such a claim with respect to evidence evincing third party knowledge. Instead, Foster addressed this request with a statement that was technically correct but non-responsive. See Vega Br. ¶¶ 318-22. Given the care Foster later took in crafting a deliberately vague letter to Judge Kinder, one can infer she was aware of the existence of records evincing third-party knowledge of Farak's misdeeds and filed a pleading designed to avoid the disclosure of this information.

290. Sgt. Ballou received a subpoena dated August 30, 2013, commanding him to appear before this Court on September 9, 2013, to give evidence relating to *Commonwealth v. Watt*, HDCR2009-01068 (the "Watt Subpoena") and to "bring with [him] a copy of all documents and photographs pertaining to the investigation of Sonja J. Farak and the Amherst drug laboratory." Ex. 249.

Response: Undisputed.

291. On September 5, 2013, Ms. Foster, who was assigned to handle the response to the subpoena, sent her supervisor, Ms. Reardon, a first draft

of a motion to quash the Watt Subpoena. Tr. IV:195; Ex. 248. Mr. Ravitz did not review Ms. Foster's draft motion because he was out of the office for a religious holiday. Tr. V:61-62.

Response: Undisputed.

292. In response later that afternoon, Ms. Reardon provided comments on the draft and made additional recommendations in the body of the email returning the draft. Tr. IV:196-197; Ex. 248. She wrote:

I also wonder if we would be able to make an argument like the attached memo (related to Dookhan subpoena) on pp. 5-6 that because this defendant plead guilty, this impeachment information won't help him. And if we could get any more information about what was already given to defense counsel that might help Because the judge has scheduled this hearing for several cases in one day, we may be less likely to get the subpoena quashed altogether but it never hurts to make him aware of the privileges involved. Looking back at motions to quash that were filed in the Dookhan cases, it looks like [we] only raised the investigative privilege. Although CORI might be relevant, I would be more comfortable knowing what documents are at issue or what was already turned over before we raise that privilege.

Tr. IV:196-197; Ex. 248.

Response: Undisputed.

293. The next day, September 6, 2013, Ms. Foster filed a Motion to Quash the Summons served on Sgt. Joseph Ballou (the "Watt Motion to Quash"). Ex. 213; Ex. 250.

Response: Undisputed.

294. In the Memorandum of Law in Support of Attorney General's Motion to Quash Summons Served on Sgt. Joseph Ballou (the "Watt Memo of Law"), the AGO argued that the court should quash the subpoena because: (1) it was unreasonable in light of the scope of the evidentiary hearing; (2) documents and information regarding an ongoing criminal investigation are privileged; (3) the AGO had not waived the privilege by providing information to the District Attorneys; and (4) certain testimony and documentary evidence would be protected by work product. Ex. 250.

Response: Undisputed.

295. As an alternative to quashing the subpoena, the AGO's memorandum asked the Court to restrict its scope by not requiring the AGO to produce a list of seven (7) specific types of information, including "Emails responsive to the subpoena, but not already contained in the case files specifically listed therein; and "[i]nformation concerning the health or medical or psychological treatment of individuals." Ex. 250, at p. 9. This section of the Watt Memo of Law was a direct cut-and-paste from the Vaughan Motion that Mr. Ravitz had provided to Ms. Foster to use as a sample. Tr. V:62; Ex. 254.

Response: Undisputed.

- FN12 Similarly, on September 12, 2013—after Ms. Foster filed the Watt Motion to Quash—Mr. Ravitz sent Ms. Foster comments to two motions to quash she drafted in an unrelated case, Commonwealth v. Secreast-Velasquez. Tr. V:58-59; Exs. 255, 256. In those comments, Mr. Ravitz notes that the section on alternatives to quashing the subpoena should be tailored to the issues in the specific case, the kinds of information that may be protected, and to whether the subpoena seeks testimony or documents. Tr. V:59. Mr. Ravitz made this comment to Ms. Foster's drafts because in both draft motions, she had cut and paste that section directly from the Vaughan Memo and he wanted her to tailor the sections to the facts of the specific cases she was handling. Tr. V:60. Ms. Foster made the adjustments suggested by Mr. Ravitz in the final Motion to Quash that she filed in the Secreast-Velasquez case. Tr. V:61.

Response: Undisputed. However, Ravitz approved five pleadings Foster subsequently filed in the Penate case where she cut and pasted this section from the Vaughn memo. See Vega Br. ¶ 315 (citing Ex. 198, Mem. of Law in Supp. of Att'y Gen.'s Mot. to Quash Summons Served on Sergeant Joseph Ballou 10 (Nov. 25, 2013); Ex. 199, Mem. of Law in Supp. of Att'y Gen.'s Mot. to Quash Summons Served on AAG Anne Kaczmarek 11 (Nov. 25, 2013); *Commonwealth v. Penate*, Hampden County No. 12-00083, Paper No. 69, Mem. of Law in Supp. of Att'y Gen.'s Mot. to Quash Summons Served on AAG Anne Kaczmarek 13-14 (Oct. 1, 2013); Paper No. 72, Mem. of Law in Supp. of Att'y Gen.'s Mot. to Quash Summons Served on Sergeant Joseph Ballou 10-11 (Oct. 1, 2013); Paper No. 76.1, Mass. Att'y Gen.'s Office's Mot. for Clarification of Order for Production Dated Oct. 2, 2013, pp. 8-9 (Oct. 22, 2013)).

296. The Court finds that Ms. Foster had no knowledge that the mental health records existed, or were exculpatory evidence, or had not been turned over when she filed the Watt Motion to Quash.

Response: Disputed. See *supra* Response to ¶ 289.

297. On September 9, 2013, this Court (Kinder, J.) held an evidentiary hearing for sixteen (16) defendants, each of whom had filed a motion for a new trial because of Farak's conduct (the "September 9 Hearing"). Ex. 80. The defendants Rodriguez and Watt were among the defendants included in the hearing. Ex. 80. This was the hearing to which Sgt. Ballou had been subpoenaed. Ex. 249.

Response: Undisputed, except that there were sixteen cases, but only fifteen defendants.

298. The scope of the hearing was limited to: (1) "the timing and scope of Farak's alleged criminal conduct and how it might relate to the testing in the cases before me;" and (2) "the timing and scope of the negative findings in the October 2012 administration audit of the Amherst laboratory and how those negative findings might relate, if at all, to Farak's testimony in these cases." Ex. 80, at p. 10 (transcript).

Response: Undisputed.

299. Ms. Foster was under the impression that everything in Sgt. Ballou's file had been turned over. Her understanding that everything had been turned over was based on a meeting she had had with Mr. Verner, Mr. Mazzone, and Mr. Ravitz sometime prior to the September 9 Hearing. Tr. III:15.

Response: Disputed. See *supra* Response to ¶ 279 (citing Vega Br. ¶¶ 275-286).

300. Ms. Foster remembers that she was told she did not "need to see the file, that there was nothing in it . . . Being told that everything had been turned over, there's no need to see the trial file." Tr. III:89.

Response: Disputed. This testimony was contradicted by every other AAG who testified. See *supra* ¶ 279 & Response to ¶ 279.

301. She did not review the file herself and she met with Sgt. Ballou only briefly right before the hearing. Tr. III:10, 14.

Response: Undisputed.

302. During the September 9 Hearing, the Court denied the Watt Motion to Quash Sgt. Ballou's testimony, but then addressed the "*duces tecum*" part of the subpoena, inquiring about the AGO's alternative request to limit the

alternative a motion for protective order as to (the seven (7)) certain categories of documents the AGO asserted should be protected. Ex. 80 at p. 15-19 (transcript).

THE COURT: We have been addressing various administrative matters, one of which is the motion you have filed to quash the subpoena issued to Sergeant Ballou. I have read your pleading carefully. I do not need to hear additional argument on the motion to quash. I understand it is in the alternative a motion for a protective order as to certain categories of documents. The motion to quash the subpoena duces tecum and to quash – the extent that your motion seeks to quash a subpoena to Sergeant Ballou for his appearance and testimony here today, it is denied. With respect to the request for protective order. 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?

MS. FOSTER: I have been talking with Assistant Attorney General 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.

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

MS. FOSTER: I – correct. Ex. 80, at pp. 15-16 (transcript).

Response: Undisputed.

303. The Court ordered Ms. Foster "to submit . . . 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 . . . whether or not it needs to be protected further." Ex. 80, at p. 19 (transcript).

Response: Undisputed.

304. The Court expressed frustration that Ms. Foster had not reviewed the file and that Sgt. Ballou failed to bring his file as ordered by the subpoena: "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." Ex. 80, at p. 19 (transcript); Tr. V:13.

Response: Undisputed.

305. During the September 9 Hearing, Sgt. Ballou was asked on direct examination by defense counsel if he “had any role to play in deciding what documentation is provided to the defendants in this case.” Ex. 80, at p. 150 (transcript). Sgt. Ballou responded that “No . . . everything in my case file has been turned over.” Ex. 80, at p. 150 (transcript). When asked if everything in Ms. Kaczmarek’s case file had been turned over, Sgt. Ballou responded, “I believe everything pertaining to the Farak investigation has been turned over. I am not aware of anything else.” Ex. 80, at pp. 150-151 (transcript).

Response: Undisputed. Ballou was first asked whether he was aware of disclosures his office had made to defense counsel “in the course of *this proceeding* that you’ve been called here *today*.” Ex. 80, pg. 150 (emphasis added).

306. By “everything,” Sgt. Ballou meant reports, evidence logs, and pictures; not physical evidence. Tr. III: 211-212.

Response: Ballou chose to define “everything” this way at the recent hearing. He did not offer any qualifications when he used this term on September 9, 2013. See Ex. 80, pp. 150-51.

307. Sgt. Ballou turned over everything from his Farak investigation file for production to the District Attorneys’ Offices and retained all of the physical evidence – including the mental health records – in the evidence room. Tr. III: 211-212; Tr. IV:20.

Response: Disputed insofar as this proposed finding suggests documents Ballou scanned, named, and attached to an email were not a part of his file. This part of his file had, however, been turned over to the AGO.

308. Sgt. Ballou’s testimony that everything in his file had been turned over was consistent with what Ms. Foster had been told, that everything in his case file had been turned over. Tr. III:91.

Response: Disputed. Although Foster testified her “superiors” told her “everything had been turned over,” Tr. III:87-88, none of her superiors corroborated this claim and several implicitly or explicitly refuted it. See, e.g., Tr. IV:174, 196 (Reardon); Tr. V:70 (Ravitz); Tr. V:230 (Verner).

309. At the end of the September 9 Hearing, Ms. Foster asked the Court to clarify the scope of the potential additional discovery she had been ordered to produce. Ex. 80, at p. 244 (transcript). The Court (Kinder, J.), referring to the list of possible privileges Ms. Foster had listed at the end of her memorandum, indicated he did not want to see what had already been provided, or what would be provided, but that Ms. Foster should identify what documents were privileged and present those documents to him for in camera review. Ex. 80, at pp. 244-245 (transcript).

Response: Undisputed.

310. Ms. Foster inquired further. “[T]he 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?” Ex. 80, at pp. 244-245 (transcript). The Court responded, “[t]he subpoena duces tecum, as I understood it, went to Sergeant Ballou and that was the subpoena you sought to quash.” Ex. 80, at p. 245 (transcript).

Response: Undisputed.

311. Because the Watt Subpoena was for Sergeant Ballou and documents and photographs he had pertaining to the Farak investigation, the Court’s inquiry during the September 9 focused on Sergeant Ballou and his “file.” Ex. 80.

Response: Disputed. The day after the hearing on September 9, 2013, Foster wrote an email stating: “Judge Kinder unfortunately did not give too much insight into what he’s looking for. I kept asking him to clarify and the best he would do is say, quote, the subpoena for Sergeant Ballou is what he has, end quote, or something along those lines.” Tr. III:62. When asked if she had “a clear understanding of what Judge Kinder had ordered [her] to turn over,” Foster answered: “At the time, no, evidently.” Tr. III:62-63. Instead of seeking clarification from the Court, the AGO elected to adopt the most restrictive interpretation possible.

312. Mr. Ryan, who represented the defendant Rodriguez, then made a separate request to see all evidence seized from Farak’s car. Ex. 80 at p. 246 (transcript). The Court encouraged the parties to work together to come to some “sort of agreement about viewing the evidence” and if no agreement could be reached, then the defendant could file a motion to compel. Ex. 80, at p. 246 (transcript).

Response: Undisputed.

313. During the September 9 Hearing, the Court took the Rodriguez Rule 30(c)(4) motion under advisement to consider whether there would be a need for additional discovery or evidence after the hearing. Ex. 80, at p. 20 (transcript).

Response: Undisputed.

314. Ms. Foster left the September 9 Hearing with the impression that Sgt. Ballou was ordered to produce anything he had in his file that had not already been turned over. Tr. III:61, 95-96.

Response: Disputed. *See supra* Response to ¶ 311.

315. The Court finds that Ms. Foster attempted to clarify what additional discovery she was being asked to provide and that she left the September 9 Hearing reasonably thinking that she had been ordered to identify and produce for an in camera inspection by Judge Kinder, anything from Sergeant Ballou's file that had not been produced or would not be produced that she believed was privileged, and to indicate the basis for the privilege.

Response: Disputed. *See supra* Response to ¶ 311.

316. The Court finds that there was no order to provide access to physical evidence issued at the September 9 Hearing.

Response: Undisputed.

317. After the September 9 Hearing, Ms. Foster called Mr. Ravitz and told him that "there was repetition of the grand jury testimony, that the witness Ballou was asked if Anne Kaczmarek has anything that he doesn't have, and that the Judge didn't allow that questioning." Tr. V:65.

Response: The defendants do not dispute Foster made this report. The transcript of the hearing makes it clear this report was inaccurate, as defense counsel was permitted to ask if Kaczmarek had anything Ballou did not and Ballou answered that he believed everything pertaining to the Farak investigation had been turned over. *See* Ex. 80, p. 150-51.

318. Ms. Foster did not tell Mr. Ravitz that the Court had asked her specifically if she had looked at Sgt. Ballou's file, either then, Tr. V:65, or during a

conversation they had the next day, September 10, 2013. Tr. V:66. Had Mr. Ravitz known what Judge Kinder had said to Ms. Foster, he would have told her to look at the file. Tr. V:68.

Response: Undisputed.

319. Ms. Foster did not tell any of her supervisors that the Court questioned her about whether she had personally looked at the file. Tr. V:68, 218; Ex. 210.

Response: Undisputed.

320. Had Mr. Verner known what Judge Kinder had said to Ms. Foster, he would have been upset and would have talked to Mr. Ravitz about it. Tr. V:218-219.

Response: Undisputed.

321. The Court finds that Ms. Foster did not tell her supervisors or anyone else at the AGO that Judge Kinder had ordered her personally to look at Sgt. Ballou's file.

Response: Undisputed.

322. Ms. Foster testified that if she were presented with this situation again, she would personally look at the file. Tr. III:96. But she does not believe it was bad practice not to look at the file at the time because she relied on her supervisors and had no reason to disbelieve Ms. Kaczmarek, who had said everything had been turned over. Tr. III:97.

Response: It is undisputed that this is what Foster said. Defendants dispute the veracity of her explanation. Foster's supervisors did not tell her not to look at the file. See *supra* ¶¶ 279, 318. And Kaczmarek did not tell her everything had been turned over. Tr. VI:133.

323. In the days following the September 9 Hearing, AGO attorneys considered the scope of the Court's order to determine what they needed to do in response to the Court's order. Ex. 210.

Response: Undisputed.

324. The need for consideration about the scope of the Court's order stemmed from a disconnect between what was articulated in the subpoena *duces tecum* that had been served on Sgt. Ballou by defendant Watt ("a copy of all documents and photographs pertaining to the investigation of Sonja J.

Farak and the Amherst drug laboratory"), Ex. 290; what Ms. Foster thought the Court had ordered at the end of the September 9 Hearing ("You[r Honor] 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"), Ex. 80, at p. 244 (transcript); and what the Court ordered ("[t]he subpoena duces tecum, as I understood it, went to Sergeant Ballou and that was the subpoena you sought to quash."). Ex. 80, at p. 245 (transcript).

Response: Disputed insofar with respect to use of the word "disconnect." Judge Kinder never told Foster to produce only those documents in Ballou's possession; rather Judge Kinder stated it was her obligation to furnish documents responsive to the subpoena he received. Ex. 80, pg. 245.

325. Ms. Foster had left the September 9 Hearing under the impression that the Court had ordered review of files in the possession of Sgt. Ballou, not files in the possession of the AGO. Tr. III:95-96.

Response: Disputed. See *supra* Response to ¶ 311.

326. In an email dated September 10, 2013, Mr. Verner asked Ms. Foster what had happened at the hearing, and she replied:

So at yesterday's hearing, my motion to quash was flat out rejected. Judge Kinder has given us until September 18th (next Wed) to go through Sgt. Ballou's file and anything in it we think is privileged/shouldn't be disclosed, we have to give it to Judge Kinder to review in camera along with a memo explaining why we think each document is privileged. The evidentiary hearing is continued until October 7th. The defendants have reserved calling Sgt. Ballou again on the 7th.

Sgt. Ballou only testified to what was in the grand jury – i.e., what he found in Farak's car, work station, etc. Judge Kinder did not allow any kind of questioning anywhere near anything privileged. Although Anne, I would not be surprised if you get subpoenaed for the next date – defense counsel was frustrated by Sgt. Ballou's lack of memory and kept indicating that maybe you'd have a better memory.

Regarding the Rule 30 discovery motion, Judge Kinder denied it as untimely and refused to rule on the merits of it, saying something

along the lines of 'I'm permitting myself to revisit this if need be at a later time.'

Ex. 210.

Response: Undisputed.

327. Mr. Verner then asked Ms. Kaczmarek, "can you get a sense from Joe what is in his file? Emails etc? Kris, did the judge say his "file" or did he indicate Joe had to search his emails etc?" Ex. 210.

Response: Undisputed.

328. Ms. Kaczmarek responded via email that "Joe has all his reports and all reports generated in the case. His search warrants and returns. Copies of paperwork seized from her car regarding new[s] articles and her mental health worksheets." Ex. 210.

Response: Undisputed.

329. Ms. Foster did not know what Ms. Kaczmarek was talking about when she wrote "mental health worksheets" because Ms. Foster had not reviewed the file but had been told that everything had been turned over. Tr. III:26-27, 57. When she testified at the evidentiary hearing on this matter in December 2016, Ms. Foster had still never seen the mental health records. Tr. III:26.

Response: Disputed. Foster was not told that everything had been turned over. This proposed fact is not only inconsistent with the body of evidence; it directly contradicts statements made by other AAGs this pleading has asked this Court to credit. *See supra* Response to ¶ 308. Foster's testimony that she still has never seen the mental health records was not credible. On November 5, 2014, Foster sent an email to AAG Patrick Devlin (Devlin) stating: "Hey, Pat, have you been able to get copies of the papers Luke Ryan references? If so, could I get a copy of them? I'd like to see them, and I'm sure whatever judge we're in front of may want a copy too." Tr. III:78. This Court can and should infer Devlin provided copies of the mental health records to Foster so she could prepare for a hearing the following day.

330. The term "mental health worksheets" did not stick in Ms. Foster's memory at all and did not strike her as unusual because the way she understood it, the mental health worksheets were just part of Ms. Kaczmarek's list of what had been turned over. Tr. III:90-91.

Response: Disputed. When Foster wrote her letter to Judge Kinder, she identified items that had been turned over and did not put the mental health worksheets on this list. See Ex. 193.

331. Mr. Verner was not focused on the mental health worksheets. He was concerned about protecting the AGO's work product, emails, and notes, and therefore was trying to determine whether the Court was asking the AGO to disclose these types of records. Tr. V:188; Ex. 210.

Response: Undisputed.

332. Ms. Kaczmarek also remembers discussing AGO emails and that the concern was whether the AGO's own emails would be discoverable: "I think that was the great concern, is that our emails would be discoverable." Tr. VI:184.

Response: Undisputed.

333. Mr. Verner and Ms. Kaczmarek assumed that everything from Sgt. Ballou's file had been turned over. Tr. V:189; Tr. VI:184.

Response: Disputed. Kaczmarek assumed Ballou's file contained the mental health records. See Ex. 210. These documents made her "nervous." Tr. VI:112. She did not believe they had already been disclosed. Tr. VI:133. During the recent hearing, Kaczmarek testified that she thought Ballou "was taking his file to court" and its contents "would have been discovered or turned over." Tr. VI:184. This testimony makes no sense. The morning after the hearing, Kaczmarek received the Foster email conveying Judge Kinder's order "to go through Sgt. Ballou's file." Ex. 210. This exercise would have been pointless if Ballou was compelled to share the contents of the file during the hearing.

334. Ms. Kaczmarek has no recollection of personally reviewing Sgt. Ballou's case file. Tr. VI:175, 187. However, Ms. Kaczmarek believed that everything in Sgt. Ballou's file had been turned over to the District Attorneys' Offices, including the mental health records. Tr. VI:175; 184.

Response: Disputed. When Verner asked what was in Ballou's file, Kaczmarek made arrangements for Ballou to bring his file to Boston so she could review it and told Verner she had made this appointment. Tr. VI:132. There is no reason to doubt the parties kept it. Kaczmarek knew the mental health records had not been turned over before the

September 9 hearing. VI:133. According to Reardon, after meeting with Ballou, Kaczmarek said everything in his file had already been turned over. Tr. IV:212. Ballou's paper file did not include the mental health records, as Ballou did not print out copies of these documents and place them in what Kaczmarek described as akin to a "trial binder." Tr. III:165-66.

335. Ms. Foster did not go through Sgt. Ballou's file herself and she did not believe that Judge Kinder had ordered her to review the file personally. Tr. III:19-21.

Response: It is undisputed that Foster did not go through Ballou's file. If Foster did not believe Judge Kinder ordered her to personally review the file, it seems doubtful she would have drafted a deliberately vague letter to Judge Kinder designed to make it appear as though she did.

336. After discussion about the September 9 Hearing and what the AGO was supposed to do, the AGO concluded that: (1) the court had ordered production of documents responsive to the Watt Subpoena, which was limited to Sgt. Ballou's "file," Tr. III:96; (2) Sgt. Ballou's file had been provided to the District Attorneys' Offices, Tr. V:189, 193; Tr. VI:184; (3) the District Attorneys' Offices provided relevant information to the defendants they were prosecuting, Tr. I:110; V:98-99, 111, 129; Exs. 165, 260; and, therefore (4) there was nothing that the Court needed to review to determine whether there was anything to withhold on account of any privilege.

Response: Disputed. As to 1), AAGs may have concluded the Watt Subpoena was limited to Ballou's file; however, the Watt subpoena plainly commanded the production of all documents pertaining to the Farak investigation. Ex. 249. As to 2) While Verner may have been "assuming that all the stuff is turned over, all the documents are turned over," Tr. V:189, Kaczmarek knew the mental health records had not been disclosed, Tr. VI:133. And as to 4), Foster's letter advised Judge Kinder that there was nothing the Court needed to review. Ex. 193. Foster claimed Ravitz told her to write this. Tr. III:20. Ravitz denied doing so or even reviewing the letter prior to its submission. Tr. V:38-40. This proposed finding fails to identify any AAGs who actually came to conclusion number 4.

337. The Court finds that when Sgt. Ballou testified at the September 9 Hearing that he turned over everything to Ms. Kaczmarek, he meant his case file, not what was in the evidence room, and that the mental health records were not in his case file.

Response: Disputed. Ballou did not testify he turned everything over to Kaczmarek. Rather he testified that everything had been turned over. Ex. 80, pg. 150. This testimony was in response to questions about what had been turned over to post-conviction defendants, not what had been turned over to Kaczmarek. See Vega Br. ¶¶ 355-72. Ballou now claims that when he said "everything," what he really meant was "not everything." This claim is unworthy of credence.

338. The Court finds that for her part, Ms. Kaczmarek believed that Sgt. Ballou had the mental health records in his file and that when she said everything had been turned over to the District Attorneys' Offices, she mistakenly believed that the mental health records had been included.

Response: Disputed. Kaczmarek did believe Ballou had the mental health records in his file, but she knew the mental health records had not been turned over. See Vega Br. ¶¶ 403-413.

339. The Court finds that Ms. Foster believed the judge had ordered review of Sgt. Ballou's files, not the AGO's files.

Response: Disputed. *See supra* Response to ¶ 311.

340. The Court finds that for her part, Ms. Foster had no knowledge about the mental health records. The Court finds further that Ms. Foster believed that the contents of Sgt. Ballou's file were turned over to the District Attorneys' Offices. The Court finds further that Ms. Kaczmarek's reference to mental health records in her email regarding Sgt. Ballou's file being turned over meant nothing to Ms. Foster because she had never reviewed any file and assumed that Ms. Kaczmarek's reference was just part of a list of "everything" that had been turned over to the District Attorneys' Offices.

Response: Disputed. *See supra* Response to ¶ 330.

341. The Court finds that even if Ms. Foster had reviewed Sgt. Ballou's file, she would not have found the mental health records, including the ServiceNet diary card, which he had emailed to Ms. Kaczmarek in February 2013, because they were in the evidence room, not in his file.

Response: Disputed. Ballou's "file" included electronically stored information (ESI) like emails. Tr. V:25-26, Tr. IV:167-68. If she had followed the instructions in the AGO's own internal manual for responding to subpoenas, Foster would have discovered the mental health records,

including the ServiceNet diary card, which Ballou emailed to Kaczmarek in February 2013. See Ex. 247.

342. The Court finds that the attorneys in the AGO each knew a part of what had been disclosed to the District Attorneys' Offices but no one person knew the sum of the parts and that, as a result, they individually and collectively made mistakes as to what had actually been turned over to the District Attorneys' Offices.

Response: Disputed. Kaczmarek knew what had been disclosed to the District Attorneys and she knew the mental health records had not been disclosed. Tr. VI:133.

343. The Court finds, however, that there was no deliberate, intentional withholding of evidence.

Response: Disputed. Kaczmarek "didn't realize" the mental health records "were particularly relevant or exculpatory as to other potential defendants," but did believe they "might be privileged documents that needed to be treated gingerly." Tr. VI:181. Based on these views, she deliberately withheld this evidence. Tr. VI:133.

344. At the end of the September 9 Hearing, the Court (Kinder, J.) scheduled another hearing for October 7, 2013, and gave Ms. Foster until September 18 to provide allegedly privileged documents for his *in camera* review. Ex. 80, at pp. 244-245(transcript).

Response: Undisputed.

345. On September 12, 2013, the Court allowed the defendant Rodriguez's Rule 30(c)(4) motion to the extent it sought: (1) copies of police reports, chain of custody reports and drug certificates related to the drug samples in Farak's possession at the time of her arrest; (2) copies of any documents related to the field testing of substances seized from Farak's car; and (3) copies of any documents relating to a search of Farak's workstation computer or cellular telephone. Ex. 190. The Court denied the motion in all other respects and therefore did not require the AGO to provide evidence of third party knowledge of Farak's alleged misconduct. Ex. 190. This ruling did not change the AGO's analysis of how to respond to the Court's order at the end of the September 9 Hearing because the categories of discovery that the Court allowed related to information that the District Attorneys' Offices, not the AGO, controlled, while the categories of allegedly privileged discovery the AGO would submit to the Court for *in camera* review related to the categories of privileged

information suggested by the AGO in its motion to quash. Tr. III:40.

Response: This proposed finding accurately reflects the Court's ruling. The defendants contend the Court did not require the AGO to provide evidence of third party knowledge of Farak's alleged misconduct because Foster submitted a misleading pleading suggesting no such evidence existed.

346. The Court's continuance of the matter and its ruling on defendant Rodriguez's Rule 30(c)(4) motion left open the question how the AGO would respond to the outstanding issues.

Response: Undisputed.

347. According to Ms. Foster, Mr. Ravitz told her to draft a letter "saying there was nothing to turn over." Tr. III:20. Mr. Ravitz does not recall ever seeing the letter until he started preparing for the hearing that took place in December 2016 and there is no red-lined copy of the document saved in his computer, as is his practice when he reviews drafts. Tr. V:38, 40, 69. In his view, the letter was something substantive that should have been reviewed before it was sent to the Court and because there were grammatical errors in it, he would not have signed off on the letter. Tr. V:38-40.

Response: This proposed finding accurately reflects the contradictory testimony offered at the recent hearing by two AAGs. Because the proposed finding does not suggest a resolution to this credibility contest, there is nothing for the defendants to admit or deny.

348. In a letter addressed to Judge Kinder dated September 16, 2013, Ms. Foster reported to the Court that "[a]fter reviewing Sergeant Ballou's file, every document in his possession has already been disclosed" (the "September 16 Letter"). Ex. 193. In the September 16 Letter, Ms. Foster specifically used the words "after reviewing" and specifically left who had done the review vague because, not knowing who had reviewed the file, she did not want to misrepresent that she herself had looked at the file. Tr. III:93-94. She "draft[ed] [her] letter to the Court leaving open to the fact that [she] did not review the file. Tr. III:20, 80, 92.

Response: This proposed finding accurately reflects the contradictory testimony offered at the recent hearing. The defendants maintain that if Foster did not want to misrepresent that she herself had looked at the file, she could have reported she did not look at the file instead of making her letter "vague." Better yet, she could have identified who looked

at the file or even looked at the file herself.

349. Ms. Foster believes Mr. Ravitz reviewed the September 16 Letter before she signed it. Tr. III:64.

Response: Disputed. Foster's testimony on this point was unequivocal. She did not say she "believed" Ravitz reviewed the letter; she said he did so. Tr. III:64. Neither the defendants nor the AGO believe this testimony is worthy of credence. *See infra ¶¶ 349-50.*

350. Mr. Ravitz, does not remember reviewing the September 16 Letter. Tr. V:39-40, 69. If he had reviewed it, Mr. Ravitz is sure he would have fixed a grammatical error and capitalized the "Y" in "your Honor (sic)," consistent with his drafting practice. Tr. V:39- 40, 69. In addition, Mr. Ravitz searched his computer system and could not find any red- lined copy of the letter, which, if he had reviewed the letter, would have been consistent with his practice. Tr. V:39-40, 69, 87.

Response: Undisputed.

351. The Court finds that, given the grammatical errors and the absence of any indication (such as a red-lined version) that Mr. Ravitz received it, that it is unlikely that Mr. Ravitz reviewed the letter before it went out.

Response: Undisputed.

352. However, the Court finds that Ms. Foster did not deliberately misrepresent to Judge Kinder that she herself had looked at the file and when she wrote the letter and that she was trying to respond to the Court's order without making any such misrepresentation.

| Response: Disputed. *See supra* Response to ¶ 348._

353. On September 11, 2013, Mr. Ryan followed up with the AGO on the request he had made at the end of the September 9 Hearing and to which the Court deferred his ruling, asking whether the AGO had made any decision "as to whether I'll be permitted to view the evidence seized from Farak's car." Ex. 211.

Response: Undisputed.

354. Ms. Foster asked Mr. Ryan to clarify whether he was asking to access the evidence room or inspect the evidence seized from Farak's car. Ex. 211.

Response: Undisputed.

355. Mr. Ryan confirmed that he was “interested in inspecting the evidence seized from Farak’s [sic] car & from her drawer & white bucket at the lab.” Ex. 211.

Response: Undisputed.

356. On September 16, 2013, Mr. Ryan sent Ms. Foster an email, asking whether the AGO had “determined what it’s position will be with respect to viewing the seized evidence.” Ex. 211.

Response: Undisputed.

357. Ms. Foster asked Ms. Kaczmarek for her thoughts about Mr. Ryan’s request to inspect the seized evidence. Ex. 211.

Response: Undisputed.

358. Ms. Kaczmarek responded, “No. Why is that evidence relevant to his case?” Ex. 211.

Response: Disputed. Actually, Kaczmarek responded: “No. Why is that evidence relevant to his case? I really don’t like him.” Tr. VI:79.

359. On September 17, 2013, Ms. Foster responded to Mr. Ryan’s request to inspect the seized evidence, saying “[o]ur position is that viewing the seized evidence is irrelevant to any case other than Farak’s.” Ex. 214.

Response: Undisputed.

360. The Court finds that the AGO had a valid reason not to assent to a third party defendant’s request to view the physical evidence that had been seized from Farak’s car because at the time the request was made, the Farak prosecution was open and ongoing. The Court finds that the defendant’s appropriate recourse was to press his motion for the inspection of physical evidence upon the Court, as the Court had indicated he should do if agreement could not be reached.

Response: Disputed. When Mr. Ryan pressed his motion, Foster told the Court the seized evidence was “irrelevant,” Ex. 170, pp. 14-15, even though not a single AAG had reviewed it, Tr. IV:44. Moreover, the AGO could have just made copies of the papers in the car if the integrity of the evidence was an issue.

361. In the fall of 2013, the defendant Penate served the following subpoenas and motions related to the AGO's investigation of Farak: (1) on August 22, 2013, Sgt. Ballou and Ms. Kaczmarek received subpoenas compelling their testimony at an evidentiary hearing in *Commonwealth v. Penate*, HDCR2012-00083, Tr. IV:169; (2) on September 6, 2013, Penate filed a motion to compel production of documentary evidence pursuant to Mass. R. Crim. P. 17(a)(2) (the "Penate Motion to Compel"), seeking production of eleven different (11) categories of documentary evidence in connection with a motion to dismiss or, in the alternative, to be used at Penate's trial, Penate Dkt. No. 55; Ex. 216, at pp. 4-5 (transcript); Ex. 252; (3) Penate filed a motion pursuant to Mass. R. Crim. P. 17(a)(2) to inspect physical evidence recovered during searches conducted in the course of the Farak investigation and prosecution (the "Penate Motion to Inspect Physical Evidence"); and (4) Penate filed a motion to inspect the Amherst Lab (the "Penate Motion to Inspect the Lab"), Ex. 189; Ex. 216 at p. 23 (transcript).

Response: Undisputed.

362. Ms. Foster filed an opposition to the Penate Motion to Compel (production of eleven (11) different categories of documentary evidence), which motion was also directed at the State Police, the Executive Office of Public Safety and Security, and the Department of Public Health. Penate Dkt. No. 65, 66; Ex. 216, at p. 5 (transcript).

Response: Undisputed.

363. On October 2, 2013, the Court (Kinder, J.) held a hearing to consider the Penate Motion to Compel and the Penate Motion to Inspect (the "October 2 Penate Hearing"). Tr. V:13; Ex. 216, at p. 4 (transcript).

Response: Undisputed.

364. At the October 2 Penate Hearing, Ms. Foster filed motions to quash the subpoenas that had been served on Ms. Kaczmarek and Sgt. Ballou. Ex. 216, at p. 5. The Court asked Ms. Foster if she agreed that motion to quash the subpoena issued to Sgt. Ballou was moot because the subpoena and the motion to quash were identical to those filed in the Watt case and, in connection with that case, the AGO had represented that "all of the contents of Mr. Ballou's file have already been turned over." She agreed. Ex. 216, at pp. 8-9 (transcript).

Response: Undisputed.

365. With respect to the subpoena issued to Ms. Kaczmarek, the Court denied the motion to quash as moot because the parties agreed that no evidence would be taken from Ms. Kaczmarek at that time. Penate Dkt. The Court decided that rather than take testimony and evidence that was likely to be largely repetitive of the September 9 Hearing, he – with the parties' agreement – would admit the transcript from the September 9 Hearing into evidence in the Penate case. Ex. 216, pp. 6-11.

Response: Undisputed.

366. During the October 2 Penate Hearing, the Court questioned Mr. Ryan and Ms. Foster about the Motion to Inspect. Ex. 216, at pp. 11-22(transcript).

Response: Undisputed.

367. During the October 2 Penate Hearing, Hampden County Assistant District Attorney Eduardo Velazquez reminded the Court that the Penate evidence that was initially tested by Farak had been re-tested by another chemist and found to be the same substance identified in the original test. Ex. 216, at p. 18(transcript).

Response: Undisputed.

368. With respect to the Penate Motion to Compel, the parties notified the Court during the October 2 Penate Hearing that of the eleven (11) categories, there remained three areas of disagreement: (1) Farak's personnel file; (2) copies of Amherst Lab employees' performance evaluations; and (3) inter or intra-agency communications regarding the scope of misconduct at the Amherst Lab. Ex. 216, at p. 26(transcript).

Response: Undisputed. It should be noted Foster had once again filed a pleading stating: "there is no reason to believe that a third party had knowledge of Farak's alleged malfeasance prior to her arrest." Penate Dkt. No. 65, pg. 8. This misleading account of the documentation in the AGO's possession kept the defendant's request for third party knowledge from becoming an additional area of disagreement.

369. During the October 2 Penate Hearing, Ms. Foster argued that any AGO inter- or intra- agency communications would be protected by the work product doctrine. Ex. 216, pp. 27-28 (transcript). The Court asked Ms. Foster if she had reviewed the potentially responsive documents, and Ms. Foster responded that she had not. Ex. 216, at p. 27 (transcript).

Response: Undisputed.

370. The Court asked whether Ms. Foster thought that emails regarding the scope of Farak's conduct could be exculpatory to the defendant Penate's case. Ex. 216, at p. 35-36 (transcript). Ms. Foster responded that emails could be exculpatory and told the Court, as well, that no one at the AGO had compiled the communications and that the attorneys involved said that nothing in their communications was outside what had already been disclosed or would be protected by the work product doctrine. The Court again expressed frustration that Ms. Foster had not reviewed the materials at issue. Ex. 216, pp. 36-37 (transcript).

THE COURT: Let me just say in the future, it would be helpful for me, in attempting to resolve these matters and deciding them, if you actually looked at the information you were talking about other [sic] than making bold pronouncements about them being privileged or the content of them.

MS. FOSTER: I agree, Your Honor, but again, we don't have this in some type of database. I think the fact that I don't think there's even been a *prima facie* showing on this being relevant to the defendant's guilt or innocence, I think requiring the Attorney General's Office to compile possibly thousands of emails, voice mails, letters, requiring everyone who has been related to that unit to go through all their work to find these documents, I think that's asking a lot.

THE COURT: Well, I agree that compiling it all in a database may be time consuming. Picking up a phone and talking to the lead investigators about what might exist and whether or not any of it has been reviewed doesn't seem, to me, to be asking too much.

MS. FOSTER: I have done that, Your Honor. I have talked to Assistant Attorney General Kaczmarek. I talked to Sergeant Joe Ballou and both of them has said there's nothing – there's no smoking gun, as I think Attorney Ryan is looking for other than what's already been disclosed in grand jury minutes, grand jury exhibits, police reports and the like, other than just office conversation about thought processes.

Ex. 216, at p. 38 (transcript).

Response: Undisputed.

371. Following the October 2 Penate Hearing, the Court denied the Penate Motion to Inspect Physical Evidence, noting, "I am 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." Ex. 189.

Response: Undisputed.

372. The Court allowed the Penate Motion to Compel "only insofar as it seeks production of drug testing administered to Farak by her employer, and any correspondence related directly to drug use or evidence tampering by Farak" (the "October 2 Order"). Ex. 252.

Response: Undisputed.

373. Following the October 2 Penate Hearing, the AGO filed a motion for clarification of the Court's October 2 Order (to the extent that the Court was allowing the Penate Motion to Compel, insofar as it sought production any correspondence related directly to drug use or evidence tampering by Farak). Tr. V:22.

Response: Undisputed.

374. Mr. Ravitz reviewed the motion for clarification before it was filed and, among other things, added a footnote supporting the proposition that it would be appropriate for the Court to accept the AGO's representation as to the existence of work product within its materials. Tr. V:22-23. In doing so, Mr. Ravitz thought that Ms. Foster would have examined any responsive AGO correspondence to determine that it was, in fact, work product. Tr. V:24.

Response: The defendants are in no position to admit or deny what Ravitz thought. No evidence was offered suggesting Ravitz asked Foster to confirm she had examined any responsive AGO correspondence. Of course, Ravitz himself was the author and recipient of a number of Farak-related emails. *See, e.g.*, Ex. 253. Foster's failure to review his correspondence should have alerted Ravitz that her review of responsive AGO correspondence was incomplete, at best.

375. On October 23, 2013, the Court clarified the October 2 Order: "It was my intention to order the production of any correspondence that shows knowledge by any state employee of [] Farak's drug use or evidence tampering before the criminal investigation of Farak was initiated on

January 18, 2013. That is to say, any correspondence which reflects that state employees were aware of alleged misconduct by Farak prior to the criminal investigation . . . it was not my intention to order that any agency of the Commonwealth produce work product related to the criminal investigation, Criminal Offender Record Information or grand jury information, not already disclosed.” Ex. 188.

Response: Undisputed.

376. The AGO did not produce any documents in response to the October orders because it had no such responsive documents. The defendant was seeking employment-related information, for example, what supervisors knew about Farak’s drug use before the criminal investigation got underway. Ex. 188; Ex. 216, at p. 26(transcript).

Response: Undisputed.

377. Even if Ms. Foster had reviewed the evidence and found the mental health records, those records would not have been responsive to what was ordered to be produced. See Ex. 188.

Response: Disputed. If Foster had reviewed the evidence and found the mental health records, she could not have filed a pleading claiming the attachments to Ballou’s Valentine’s Day email “constitute legal work product.” Penate Dkt., No. 65, pg. 5. She also could not have filed a pleading that there was no evidence of third party knowledge.

Moreover, these records were plainly exculpatory to Penate – particularly the ServiceNet Diary Card reflecting drug use at the lab by Farak on the same day she purportedly conducted testing in Penate’s case. See Tr. VI:79-85. During the hearing on October 2, 2013, Judge Kinder made it clear that “the Commonwealth would have an obligation to turn . . . over” any “exculpatory evidence” in the AGO’s correspondence and Foster acknowledged her office had this responsibility. Ex. 80, pp. 35, 36.

378. On November 4, 2013, the Court denied defendant Penate’s motion to dismiss. Penate Dkt. 81.

Response: Undisputed.

379. On November 13, 2013, defendant Penate served subpoenas on Sgt. Ballou and on Ms. Kaczmarek, seeking testimony from both at a pre-trial hearing scheduled for November 22, 2013 (the “Second Penate

Subpoenas"). Exs. 198, 199.

Response: Undisputed.

380. On December 2, 2013, Ms. Foster filed motions to quash the Second Penate Subpoenas. Ex. 198; Penate Dkt. Nos. 98, 99, 100, 101. The Penate docket does not indicate how the Court ruled on these motions. The proceedings that followed in the Penate case are detailed below. See ¶¶ 587-600, *infra*.

Response: Undisputed. The memoranda Foster filed in support of these motions continued to seek relief from the obligation to produce “[i]nformation concerning the health or medical or psychological treatment of individuals.” Vega Br. ¶ 315 (citing Ex. 198 & 199).

381. The Court finds that Ms. Foster acknowledged to the Court that she had not reviewed the AGO’s inter- and intra- office communications, that no one had compiled a database of emails, and that such communications about an ongoing investigation could be privileged.

Response: Undisputed.

382. The Court finds that to the extent Ms. Foster agreed when the Court asked her if everything in Sgt. Ballou’s file was turned over, that she was merely restating her understanding and the position the AGO had taken at the September 9 Hearing, and that she did not intentionally make any misrepresentations.

Response: Disputed. At the September 9 hearing, the AGO took the position it possessed documents responsive to the Watt subpoena that were “protected.” Ex. 80, pg. 15. Foster made misrepresentations in the deliberately vague letter she sent on September 16, 2013. Ex. 193. For example, she deliberately omitted Farak’s “mental health worksheets” from the list of items Ballou possessed. Restating those misrepresentations at the start of the October 2 hearing constituted additional misrepresentations.

383. The Court finds that the AGO was not required to produce work product related to the criminal investigation, Criminal Offender Record Information, or grand jury information, not already disclosed.

Response: Undisputed.

384. The Court finds that in relation to the orders issued after the October 2

Hearing, the AGO did not produce additional documents because it did not have responsive documents. The subpoena sought the production of documents showing what Farak's employers or supervisors knew about Farak's drug use before the criminal investigation got underway. The AGO did not have responsive documents.

Response: Disputed. During the hearing, Foster acknowledged the AGO's obligation to disclose exculpatory evidence in its possession. Ex. 80, pp. 35-36. Judge Kinder's clarification order did not relieve the AGO of this obligation. The mental health records were exculpatory; the AGO had these records and did not disclose them.

385. The Court finds that the mental health records that are the focus of these motions to dismiss would not have been responsive to the Court's October Orders.

Response: Disputed. See *supra* Responses to ¶¶ 377, 384

386. At about the same time as the AGO Appeals Division was responding to the third party subpoenas and discovery motions, Ms. Kaczmarek continued to move forward on the prosecution of Farak and she and Ms. Pourinski discussed the possibility of Farak's making of a proffer. Ex. 267.

Response: Undisputed.

387. At that time, Mr. Verner, the Chief of the AGO's Criminal Bureau, had initial authority to determine whether a proffer was appropriate in a given case. Tr. IV:98.

Response: Undisputed.

388. As Mr. Verner testified, proffers are one of the hardest decisions for prosecutors to make because of the judgment calls involved in determining whether someone is going to tell the truth and how gaining access to the truth should be balanced against sentencing goals. Tr. V:178.

Response: Disputed. When asked if he had ever turned down a defendant's request to proffer, Bedrosian answered: "Boy, maybe there's one out there, but generally, if someone wanted to talk, I saw all the value in the world at least take in a proffer." Tr. IV:127.

389. On September 10, 2013, Ms. Kaczmarek approached Ms. Pourinski about the possibility of a proffer in the Farak case. Tr. VI:30; Ex. 267.

Response: Undisputed.

390. On September 10, 2013, Ms. Pourinski sent Ms. Kaczmarek an email inquiring whether the AGO “intend[s] to bring further charges against [Farak].” Ex. 267; Tr. VI:30-32.

Response: Undisputed.

391. Ms. Kaczmarek responded the same day, noting that she was not sure what the AGO would do because District Attorneys’ Offices could “be finding these cases for years” and asked if Sonja would “think about doing a proffer to determine the scope of [Farak’s] alleged misconduct.” Ex. 267.

Response: Undisputed.

392. Ms. Kaczmarek was considering a proffer because she did not have evidence to show that Farak had used drugs outside of the six-month window she was investigating and she knew it was a big issue for third party defendants. Tr. VI:159.

Response: Disputed. Throughout the litigation, Kaczmarek exhibited little concern for third party defendants. For example, thirteen days before the consolidated evidentiary before Judge Kinder, Kaczmarek learned that retesting of certain samples revealed evidence of tampering. Vega Proposed Findings ¶ 217. Post-conviction Farak defendants had a right to this information. Rather than disclose it to Flannery, Kaczmarek kept the retesting evidence to herself. Vega Proposed Findings ¶¶ 218-20. Kaczmarek’s interest in a proffer appears to have been motivated by a desire to decrease the amount of time she had to devote to her other chemist case. A full confession by Farak would have relieved Kaczmarek of the burden of proving the crimes charged and figuring out the extent of her wrongdoing.

393. On September 22, 2013, Ms. Pourinski responded that she was “thinking about the possibility of a proffer” but “[i]t would have to include complete immunity for any possible additional charges in State and/or Federal court.” Ex. 267.

Response: Undisputed.

394. On October 2, 2013, Ms. Pourinski sent Ms. Kaczmarek an email asking her to “please respond one way or the other” to her last email regarding “the proffer.” Ex. 265.

Response: Undisputed.

395. Ms. Kaczmarek forwarded the email to Mr. Verner, noting that "Farak is willing to do a proffer regarding the scope of her drug use in exchange for state and federal immunity against future charges. The DAs in Western MA would love this. Not sure its viable but worth a discussion?" Ex. 265.

Response: Undisputed.

396. Mr. Verner responded, "Interesting. Let me talk to [Mr. Bedrosian]." Ex. 265. Mr. Bedrosian does not remember discussing a possible proffer in the Farak case specifically. Tr. IV:98-99.

Response: Undisputed.

397. On October 7, 2013, Ms. Kaczmarek responded to Ms. Pourinski, letting her know that she was "still waiting to hear what my bosses think about the immunity idea." Tr. VI:160; Ex. 282.

Response: Undisputed.

398. Generally, Mr. Bedrosian and Mr. Verner had discussed proffers together for years. They would consider whether the defendant was going to be honest, how to determine if the defendant were going to be honest, and what the sentencing goals were for the particular case. Tr. V:176-177.

Response: Undisputed.

399. Making decisions about proffers is extremely difficult and the AGO did the best it could with the information it had at the time. Tr. V:179.

Response: Disputed. *See supra* Response to ¶ 388.

400. The Dookhan case was "right on the heels of this," and Mr. Verner applied the same proffer analysis in both cases. Tr. V:177.

Response: Disputed. It would have made no sense to apply the same analysis in both cases. Dookhan made a number of detailed admissions about her criminal behavior during an interview with Irwin prior to her arrest. She was in no position to proffer after she was charged because there was very little, if any, information she possessed that she had not already shared with investigators. In contrast, during her interview with the MSP, Farak professed innocence. Investigators had much more to gain (in terms of information) in entertaining a

proffer from her.

401. In both the Dookhan and Farak cases, Mr. Verner was concerned about the defendant's ability to tell the truth about the scope of her misconduct. Tr. V:177.

Response: Undisputed.

402. Mr. Verner felt strongly that both Dookhan and Farak should serve significant prison sentences, so he was also concerned about any reduction in sentence that would result from a proffer. Tr. V:177.

Response: Disputed. Verner approved a Prosecution Memo which ended with these two sentences: "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." Ex. 163.

403. Mr. Verner was particularly concerned about the likelihood of Farak's giving an honest proffer because she had not cooperated with the prosecution up to that point: "There was nothing about the situation that led us to believe that she was going to be 100 percent honest. Again, we have all these drug samples. We didn't believe she was going to be able to tell us she used from this one, or used from that one, or on [what] date this was." Tr. V:179.

Response: Disputed. Farak, through counsel, sought immunity from any future state or federal charges. If the AGO had granted this request, Farak would have had a significant incentive to be as truthful as possible – particularly where "re-testing" could expose her to new prosecutions for years to come.

404. Consistent with his prior practice, Mr. Verner did not attempt to negotiate a proffer with Ms. Pourinski once he decided not to accept the offer. Tr. V:180.

Response: The defendants are in no position to admit or deny that this was consistent with his prior practice.

405. The Court finds that it was within the AGO's discretion, and that the AGO exercised its discretion reasonably, to not negotiate a proffer from Farak, particularly given her uncooperativeness in the past.

Response: Disputed. The AGO effectively gave Farak the immunity she desired

without getting any of the information she was ready to divulge. This was not a reasonable use of the AGO's discretion – particularly since the information Farak possessed had the potential to affect thousands, if not tens of thousands, of cases.

406. Farak pleaded on January 6, 2014. Tr. VI:60; Ex. 180.

Response: Undisputed.

407. On July 21, 2014, Ms. Kaczmarek left the AGO. Tr. V:230-231.

Response: Undisputed.

408. In the summer of 2014, Mr. Ryan approached the AGO to see if he could inspect the physical evidence that had been seized in the Farak case. Tr. V:70.

Response: Disputed insofar as this proposed finding suggests this was the first time Ryan sought to inspect the physical evidence after the Farak criminal case was closed. *See infra* ¶ 472 (“In March 2014, Vega filed . . . a motion to inspect physical evidence related to the Farak investigation.”); *see also* Ryan Aff.

409. Because the Farak criminal case was now closed, the AGO did not have any objection to counsel for third party defendants viewing the evidence. Tr. V:71, 223-224.

Response: Disputed. The AGO did not assent to the motion to inspect Vega filed two months after the Farak criminal case was closed. *See supra* Response to ¶ 408.

410. The emails among the Assistant Attorneys General indicate that all readily and immediately agreed that they would assent to the inspection. See Ex. 257.

Response: Disputed. On June 23, 2014, Ryan sent Foster the following email:

Hi Kris,

Hope this finds you well. I am writing today because I represent a Hampshire County client charged with narcotics offenses and the substances at issue were deposited at the Amherst lab in December, 2012, never assigned to anybody, then brought to a state police lab where they were tested. I

am moving to dismiss the drug charges and would like to take a look at the evidence seized during the Farak investigation.

I know that the last time I sought to do this, your office objected on the ground that the charges against Ms. Farak were pending and you did not want to introduce the possibility of a chain of custody defense by giving defense counsel access to it.

Now that Ms. Farak has pled guilty and been sentenced, would it be possible for me to view the evidence seized from, among other places, her car?

Sincerely,

Luke

Ryan Aff., Ex. C. Foster passed the email along to Ravitz, Reardon and Kaczmarek asking for their thoughts. Ryan Aff. ¶¶ 18-21. When a month passed and Foster did not respond to Ryan, he filed the motion to inspect in the Hampshire County case. Ryan Aff. ¶¶ 22-24.

411. As evidenced by Mr. Ryan's discovery upon performing the inspection of physical evidence, *see* Ex. 166, the AGO made all of the evidence from the Farak case available for inspection once its case against Farak had completed – no one at the AGO tried to hide anything. Tr. V:71.

Response: Disputed. As noted above, the AGO did not assent to the Vega motion to inspect in March 2014 and did not respond to Ryan's informal efforts to arrange an inspection three months later. The defendants further dispute that no one at the AGO tried to hide anything – they were hiding the smoking gun they told the court did not exist for eighteen months.

412. On July 31, 2014, Mr. Ryan and the AGO filed an assented-to motion to inspect physical evidence in *Commonwealth v. Burston*, HSCR2013-00113, a case pending in Hampshire County. Ex. 196.

Response: Undisputed.

413. Patrick Devlin ("Devlin"), an Assistant Attorney General in the AGO's Enterprise and Major Crimes Division who was responsible for dealing with the "collateral consequences" in the Dookhan and Farak cases, arranged for Mr. Ryan to inspect the physical evidence. Tr. V:70-71; Tr. VI:74.

Response: Undisputed.

414. On October 30, 2014, Mr. Ryan went to the Attorney General's office in Springfield to inspect the boxes and bags of physical evidence seized in the Farak investigation. Tr. V:71. Sgt. Ballou took all of the evidence out of the evidence room and placed it on the table reserved for reviewing evidence and supervised as Mr. Ryan reviewed all of the evidence in a controlled environment. Tr. IV:43, 47-48.

Response: Undisputed. Investigator Philip Kass was also present for this inspection.

415. The Court finds that the AGO immediately and readily agreed to the defendant's request to inspect the physical evidence once the Farak case was over.

Response: Disputed. *See supra* Responses to ¶¶ 408-411.

416. The Court finds that the readiness with which the AGO agreed to the request to inspect the physical evidence further corroborates the fact that the AGO did not know, up until that time, that the mental health records had not been provided to the District Attorneys' Offices.

Response: Disputed. *See supra* Responses to ¶¶ 408-411. The AGO did not agree to the request to inspect the evidence until Kaczmarek stopped being a part of that decision-making process. She knew the mental health records had not been provided to the District Attorneys' Offices.

417. The Court finds that the readiness with which the AGO agreed to the request to inspect the physical evidence further corroborates that the AGO did not intentionally withhold any evidence from the defendants but rather, simply made a mistake.

Response: Disputed. *See supra* Responses to ¶¶ 408-411, 416. Moreover, as previously noted, Kaczmarek admitted to intentionally withholding the mental health records based on her failure to figure out the dates of Farak's diary entries. Tr. VI:113.

418. On November 1, 2014, Mr. Ryan sent a letter to Mr. Devlin (the "November 1 Letter") regarding the results of his inspection of the physical evidence. Tr. V:71; Tr. VI:74-75; Ex. 166.

Response: Undisputed.

419. In the November 1 Letter, Mr. Ryan notified Mr. Devlin that during the October 30 inspection of physical evidence, he discovered papers seized from Farak's car at the time of her arrest that he believed supported his theory that Farak's misconduct predated July 2012. Ex. 166.

Response: Undisputed.

420. Specifically, the ServiceNet diary card contained dates that corresponded with days of the weeks – 12-26/Monday, 12-20/Tuesday, 12-21/Wednesday, 12-22/Thursday, 12-23/Friday, 12-24/Saturday, 12-25/Sunday. Tr. VI:82-83; Ex. 205.

Response: Undisputed.

421. The ServiceNet diary card contained a chart and handwritten notes about drug and alcohol use on December 22. Ex. 166. There was no year, only month and day dates, on the paper. Ex. 166. Mr. Ryan determined that the month and day dates matched the days of the week in the year 2011. Ex. 166. *See also ¶¶ 120, 136, 153-155, supra.*

Response: Undisputed.

422. Mr. Ryan asked the AGO to: (1) assent to an emergency motion he planned to file to amend the protective order in *Commonwealth v. Burston* (the Hampshire County case in which the AGO assented to the motion to inspect physical evidence) so that he could disclose the results of his inspection to other defense attorneys; and (2) provide copies of the papers in question to each defendant who had moved for post-conviction relief based on misconduct on the part of Farak. Ex. 166.

Response: Undisputed.

423. Mr. Devlin forwarded Mr. Ryan's letter via email to Mr. Verner, Mr. Ravitz, and Mr. Mazzone. Tr. V:118, 220-221.

Response: Undisputed.

424. When Mr. Verner, Mr. Ravitz, and Mr. Mazzone learned about the issues raised in the November 1 Letter, they were shocked and upset because they thought this type of information had been provided to the defendants through the District Attorneys' Offices. Tr. V:75, 119, 221.

Response: Undisputed. This reaction was appropriate. It is shocking and upsetting this information was not provided to the defendants through the District Attorneys' Offices.

425. When Mr. Ryan sent the letter to Mr. Devlin, Mr. Verner was "angry," "upset," "shocked," and "frustrated," particularly when he looked at the mental health records and realized he had never seen them before. Tr. V:196.

Response: Undisputed.

426. Mr. Verner assumed that Ms. Kaczmarek had provided the mental health records to the District Attorneys' Offices at some point during the investigation. Tr. V:189-190, 191, 193, 227-230.

Response: Undisputed.

427. Because the AGO policy in the Dookhan and Farak matters was to provide the District Attorneys' Offices with any information that may impact the cases they were prosecuting, Mr. Mazzone and Mr. Ravitz assumed that anything potentially relevant to those cases had been provided. *See, e.g.,* Tr. V:72, 211; Tr. VI:57-58.

Response: Undisputed.

428. On November 3, 2014, Mr. Verner, Mr. Mazzone, and Mr. Ravitz started to try to re-create what happened with the goal of sending anything that had not been disclosed to the District Attorneys and third party defendants. Tr: V:73-74, 221-222, 227; Tr.VI:76.

Response: Undisputed.

429. Mr. Ravitz searched his emails to try to piece together why the defendants had not received the mental health records such as the ServiceNet diary card (that Mr. Ryan had found within the papers stored in the evidence room) from the District Attorneys when the AGO had given the District Attorneys voluminous documents, at first, police reports from Sgt. Ballou's file when Farak was arrested, and then additional documents such as grand jury minutes and exhibits after she was indicted. Tr. V:73; *see also ¶¶ 211, 226, 272, supra.*

Response: Undisputed.

430. Mr. Ravitz found "an email where Anne [Kaczmarek] references mental

health worksheets and appears to say those are in Ballou's file, and then there was something else to suggest that everything in Ballou's file was turned over already. So the two emails, taken together, would mean that the mental health [records] were turned over already." Tr. V:73-74; Ex. 258.

Response: This proposed finding accurately quotes the email referenced and succinctly explains what should have happened. It does not accurately depict what actually happened.

431. Mr. Verner had a conversation with Ms. Foster to try to determine what had happened. Tr. V:200-203.

Response: Undisputed.

432. Mr. Verner took notes about that meeting on a printed copy of an email chain from September 10, 2013. Ex. 266.

Response: Undisputed.

433. Mr. Verner's notes reflect: Ms. Foster's statement to him that according to Sgt. Ballou, everything from his file had been turned over to defense counsel; Ms. Foster had not looked at Sgt. Ballou's file; and, after the Court had issued an order, she had gone back to ask Ms. Kaczmarek and Sgt. Ballou again about the production of Sgt. Ballou's file to the District Attorneys. Ex. 266.

Response: Undisputed.

434. Mr. Ravitz determined that the "wrong that had occurred" related to the representation made to the Court by Ms. Foster that "there's no evidence that a third party had knowledge" of Farak's conduct when, in the evidence room at the AGO's Springfield Office, among bags of papers that had been removed from Farak's car, the AGO had the mental health records that suggested otherwise. Tr. V:90-91.

Response: Disputed insofar as this paragraph suggests this was the only wrong.

435. Ms. Kaczmarek's "best guess" as to what happened "is that when discovery was being turned over, no one went through the trial box that I had, and simply went based on what I had submitted to the grand jury, like an electronic form and of my discovery certs that I had sent to Ms. Pourinski. And . . . I lost focus on the mental health records. I really didn't even contemplate them, because to look at them, . . . it looks like what I

thought was that she had been using a week prior to her arrest, and so . . . when I initially received them, [I thought] I don't need this for the grand jury." Tr. VI:186.

Response: Disputed. After Verner made the initial disclosure to the District Attorneys in March 2013, Kaczmarek assumed responsibility for distributing the grand jury minutes and other materials. Tr. V:111. In other words, when discovery was being turned over, she was the one who was turning it over. There is no support for Kaczmarek's claim she lost focus on the mental health records. Kaczmarek testified the documents made her "really nervous" and she was worried that if they fell into the wrong hands she could be "disbarred." Tr. VI: 112, 167. The idea that she "didn't even contemplate them" or somehow lost track of them is belied by the fact that she immediately identified them when asked, on September 10, 2013, what Ballou's file contained. Ex. 210. Significantly, this was right after she told ADA Bosse that everything relevant had been turned over. Ex. 233.

436. Upon receipt of the November 1 Letter, Mr. Mazzone, Mr. Ravitz, and Mr. Verner all immediately agreed that the mental health records should be sent to the District Attorneys right away (for further disclosure by the District Attorneys to the defendants) and that the AGO should assent to any motion that Mr. Ryan filed in that regard (including the motion to amend the protective order and allow Mr. Ryan to provide copies of the mental health records to other defense attorneys with relevant cases). Tr. V:72, 223-24; Tr. VI:61; Ex. 257.

Response: Disputed. Ravitz first wrote an email stating "it would be good to confirm [Ryan's] take on the matter is correct, i.e. that Farak prepared these materials, that she did so around December 11, that they say what he says they say, and that they weren't turned over previously." Tr. V:91. During the recent evidentiary hearing, he refused to admit the mental health records had not been previously provided. Tr. V:92-94.

437. Mr. Verner asked Mr. Devlin to put everything together so they could provide it to the District Attorneys' Offices to provide to other third party defendants as appropriate. Tr. V:221-222.

Response: Undisputed.

438. At some point while the AGO was assembling additional information to be sent to the District Attorneys, Mr. Verner reviewed the case file boxes himself and realized that Mr. Devlin had not included everything in what he

was putting together for the District Attorneys' Office. Tr. V:222.

Response: Undisputed.

439. Mr. Verner went over to the other side of the office where the EMC Division was and went into the evidence room, looked at the boxes, and realized that the papers in the evidence room is not what had gone out to the District Attorneys. He asked the Division Chief, Cara Krysil, to deal with the situation. It took some time to harness all the correct documents, but it was done and they were sent out. Tr. V:222.

Response: Undisputed.

440. Mr. Verner was anxious to get this information to the District Attorneys' Office and did so without waiting for any discovery motions: "I'm not quibbling or thinking about different rules. I'm thinking about, we have this stuff, and if its' affecting someone, it needs to go out." Tr. V:222.

Response: Undisputed.

441. By letter dated November 13, 2014, Mr. Verner notified the District Attorneys' Offices that pursuant to the Court's order allowing a motion to inspect all physical evidence, the AGO was sending the District Attorneys 289 pages of "documentary evidence" that was not previously turned over to them but that had been "listed in the police report of Trooper Randy Thomas," such police report having been forwarded to the District Attorneys in March 2013. Ex. 167. The 289 pages consisted of copies of the papers that were among the physical evidence seized during the Farak investigation, including the mental health records. Ex. 167.

Response: Undisputed.

442. The Court finds that after the AGO attorneys realized that the mental health records had not been provided to the District Attorneys' Offices and therefore, not to the defendants, that the AGO attorneys were genuinely individually and collectively taken aback, surprised, and upset. Mr. Verner was shocked and angry. The Court finds that the AGO attorneys immediately set about trying to determine how the nondisclosure could have possibly happened, and that tempers flared.

Response: Disputed insofar as Ravitz is an AGO attorney who refuses to acknowledge the mental health records were not provided to the District Attorneys' Office. *See supra* Response to ¶ 436. And disputed insofar as Foster was an AGO attorney who claims not to have "seen

any of the documents in this matter" and refuses to acknowledge any of her representations were inaccurate. Tr. III:80.

443. The Court finds that the AGO attorneys realized for the first time that photocopies of the papers held in the evidence room, including the mental health records, had not been sent to the District Attorneys' Offices, and that they had wrongly assumed, and therefore wrongly stated, that everything had been turned over to the District Attorneys' Offices.

Response: Undisputed insofar as this paragraph acknowledges representatives of the AGO wrongly stated that everything had been turned over to the District Attorneys' Offices. Disputed insofar as Ravitz is an AGO attorney who refuses to acknowledge the mental health records were not provided to the District Attorneys' Office. *See supra* Response to ¶ 436. And disputed insofar as Foster was an AGO attorney who claims not to have "seen any of the documents in this matter" and refuses to acknowledge any of her representations were inaccurate. Tr. III:80. And also disputed insofar as Kaczmarek knew that she had copies of the mental health records and that they were not disclosed. Tr. VI:133.

444. The Court finds that the AGO attorneys then acted expeditiously to assemble all of the papers and photocopy them so that they could be turned over to the District Attorneys, and that this was done within about ten (10) days of realizing a mistake had been made.

Response: The defendants do not contend there was an inordinate delay in furnishing the assorted lab paperwork after the AGO received the November 1 letter. By the same token, it took twelve days for the office to assemble and photocopy 289 pages. This was hardly expeditious – particularly since Ryan needed the documentation in order to complete and submit an amicus brief in the Cotto case, which the SJC had scheduled for oral argument on December 4, 2014.

445. The Court finds that the original nondisclosure was unintentional and, when the AGO attorneys discovered their mistake, they immediately responded in order to rectify it.

Response: Disputed. Again, Kaczmarek admitted deliberately withholding the mental health records. Tr. VI:113. Moreover, rectifying the non-disclosure required informing Judge Kinder that Foster had made misrepresentations in her pleadings and in the personal letter she sent him. Rectifying the non-disclosure also required the AGO to

inform the SJC that Judge Kinder had decided the Cotto case based on an incomplete body of evidence. Neither of these things occurred.

446. The Court finds that there was no intentional, deliberate withholding of evidence, only a series of mistakes.

Response: Disputed. Again, Kaczmarek admitted deliberately withholding the mental health records. Tr. VI:113.

447. In April 2015, the Supreme Judicial Court, in the context of its decision in *Commonwealth v. Cotto*, 471 Mass. 97 (2015), ruled that “it is imperative that the Commonwealth thoroughly investigate 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. Within one month of the issuance of this opinion, the Commonwealth shall notify the judge below whether it intends to undertake such an investigation. If so, the investigation shall begin promptly and shall be completed in an expeditious manner.” *Cotto*, 471 Mass. at 115.

Response: Undisputed. This decision speaks for itself. Other portions of the opinion, not cited by the AGO, were extremely critical of the cursory nature of the investigation it conducted.

448. In April 2015, in the companion case of *Commonwealth v. Ware*, 471 Mass. 85 (2015), the Supreme Judicial Court ruled that “[g]iven that the matter of Farak’s misconduct at the Amherst drug lab involves defendants in multiple counties, the State police detective unit of the Attorney General’s office might be best suited to lead an investigation.” *Ware*, 471 Mass. at 96, 96 n. 14.

Response: Undisputed. This decision speaks for itself. Other portions of the opinion, not cited by the AGO, were extremely critical of the cursory nature of the investigation it conducted.

449. After the Supreme Judicial Court ruled in *Cotto*, 471 Mass. at 115, and *Ware*, 471 Mass. at 96, that the Commonwealth should conduct an investigation to determine the timing and scope of Farak’s misconduct at the Amherst Lab and that the State Police at the AGO were best suited to do the investigation, the AGO undertook that investigation on behalf of the Commonwealth.

Response: Undisputed.

450. The AGO conducted an investigation into the scope and extent of Farak's misconduct and on April 1, 2016, filed its report with the Court, *Investigative Report Pursuant to Commonwealth v. Cotto*, 471 Mass. 97 (2015) ("Cotto Report"). In the course of that investigation, the AGO convened two grand juries and called as witnesses Farak, three other chemists who worked in the state drug laboratories in the Amherst Lab and elsewhere, and Nancy Brooks, a State Police chemist who presently works for the two State Police drug labs. AGO investigators interviewed Dookhan, who, herself in 2013 was convicted on charges of misleading investigators, filing false reports, and tampering with drug evidence. Thousands of pages of evidence were reviewed. See *Affidavit of Heather A. Valentine* ("Valentine Aff."), at Ex. J (Cotto Report).

Response: Undisputed.

451. In addition, on June 15, 2015, the Attorney General appointed Hon. Peter A. Velis (Ret.) to work as an independent investigator to address concerns articulated by the Supreme Judicial Court in *Cotto*, 471 Mass. at 115. On August 6, 2015, Northwestern District Attorney David E. Sullivan appointed Judge Thomas T. Merrigan (Ret.) "in the matter of the investigation and prosecution of the conduct of the Massachusetts Attorney General['s] Office relating to the case of *Commonwealth v. Sonja Farak*." The Judges submitted their report to this Court on March 31, 2016 ("Velis/Merrigan Report"). The Judges concluded, "After our thorough review of the investigative activities and their recommendations, we agree [with the conclusion of the State Police assigned to assist with the investigation] that there is no evidence of prosecutorial misconduct or obstruction of justice by the Assistant Attorney Generals and [State Police] officers in matters related to the Farak case." See *Valentine Aff.*, at Ex. K (Velis/Merrigan Report)).

Response: The defendants do not dispute this paragraph accurately recites the conclusion of the Velis/Merrigan Report, though they do dispute that the investigation was thorough. The defendants would note the Special Assistants acknowledged entrusting the actual investigation to two state police captains. The defendants contend that this investigation was itself "cursory," insofar as the captains failed to question critical witnesses like Ballou, Foster, Verner, Ravitz, and Reardon. Their finding regarding the alleged absence of prosecutorial misconduct was based on the mistaken belief that Ryan was never denied access to the physical evidence while the case against Farak was pending.

452. The Court finds that the AGO conducted a comprehensive investigation

into the scope and extent of Farak's misconduct and has complied with the Supreme Judicial Court's directive in *Cotto and Ware*. The Court finds that the AGO not only complied with the Court's directive, but also took the additional step of inviting an investigation into its own conduct in connection with the prosecution of Farak and its effect on third party defendants, in which investigation it fully cooperated.

Response: Disputed. The AGO did not invite an investigation into its own conduct; it responded to a demand by members of the defense bar. Furthermore, Kaczmarek did not fully cooperate with the investigation. During her interview, she did not admit that she "totally misjudged the dates" on the ServiceNet Diary Card and therefore withheld a document containing admissions of drug use at the lab by Farak thirteen months before her arrest. Instead, she adamantly denied any wrongdoing.

601. Mr. Flannery, a seasoned prosecutor, testified that if there were a retrial and Farak testified, the defendants would be able to impeach Farak. Tr. V:103.

Response: This paragraph accurately summarizes testimony the AGO elicited during the recent hearing. The defendants do not deny they now possess material that could be used to impeach Farak. Whether she could be called as a witness at any future trials would require the resolution of legal issues that have yet to be litigated.

602. Mr. Flannery also testified that if there were a retrial, the results of retesting the defendant's drug samples would be admitted. Tr. V:103.

Response: This paragraph accurately summarizes testimony the AGO elicited during the recent hearing. The defendants do not deny the Government purports to possess samples it might seek to admit at retrials. Whether this evidence could be introduced would require the resolution of legal issues that have yet to be litigated.

603. The drug samples of seven (7) of the nine (9) defendants have been re-tested and they can get a fair trial based on those results. See ¶¶ 461-462, 494-495, 514-515, 528-529, 545-546, 564-565, 572-573, 595-596, *supra*.

Response: Disputed. The defendants do not admit, as a matter of fact, that the samples subjected to "re-testing" are the same (uncontaminated) samples they were originally charged with possessing and/or distributing. The defendants do not admit, as a matter of law, that they can receive fair trials based on the misconduct that took place

at the Amherst Drug Lab and on the part of prosecutors and troopers in the AGO.

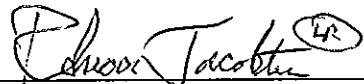
604. If a drug sample no longer exists or has otherwise been compromised, the defendant can introduce the new evidence to impeach the reliability of the analysis done by Farak and thereby get a fair trial.

Response: Disputed. See *supra* Responses to ¶¶ 602-03.

605. The Court finds that the defendants have not been prejudiced, let alone irremediably prejudiced, because they now have the evidence they need to proceed with their motions for new trial or motions to withdraw their guilty pleas.

Response: Disputed. The defendants would cite arguments to the contrary set forth in the memoranda they have filed.

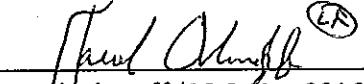
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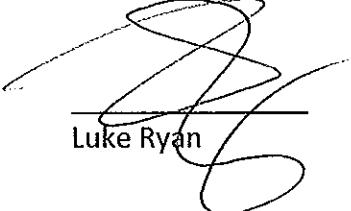
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CERTIFICATE OF SERVICE

I, Luke Ryan, hereby state that one (1) true copy of the foregoing has been sent via email and first-class mail to Assistant Attorneys General Judy Zeprun Kalman and Kimberly West at Judy.Zeprun@massmail.state.ma.us and Kimberly.West@massmail.state.ma.us, Office of the Attorney General, One Ashburton Place, Boston, MA, 02108, and Assistant Attorney General Heather Valentine at Heather.Valentine@massmail.state.ma.us, Office of the Attorney General, 1350 Main Street, Springfield, MA 01103, and Assistant District Attorney Deborah Alstrom, at deborah.ahlstrom@state.ma.us and 50 State Street, 3rd floor, Springfield, MA, on March 17, 2017.


Luke Ryan