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June 26, 2015

Hon. Peter Velis (retired)  
Special Assistant Attorney General  
Office of the Attorney General  
One Ashburton Place  
Boston, MA 02108

**Re: Commonwealth v. Rolando Penate, Hampden County Indictment No. 12-083**

Dear Judge Velis:

My name is Jennifer Appleyard and I represent the defendant in the above-referenced matter. Mr. Penate was convicted of Distributing a Class A Substance on December 13, 2013, and is currently serving a 5-7 year state prison sentence. My purpose in writing today is to request an investigation into the circumstances surrounding the suppression of *Brady* evidence Mr. Penate had pursued in the context of litigating a pre-trial motion to dismiss.

It is my understanding that other attorneys – including Mr. Penate's trial counsel, Luke Ryan – have recently made this same request on behalf of other post-conviction defendants and the Attorney General's Office (AGO) has yet to settle on a response. It is also my understanding that if such an investigation is ultimately undertaken – either voluntarily or pursuant to a court order – leading it would be among your responsibilities as a Special Assistant Attorney General.

The pages that follow begin with a summary of the events that precipitated Attorney Ryan's discovery of undisclosed documentary evidence in the possession of the AGO on October 30, 2014. This evidence could hardly have been more exculpatory with respect to Mr. Penate. Among other things, it included a written admission by Sonja Farak (Farak) that she used drugs at work on one of the days she purportedly analyzed a sample Mr. Penate was charged with distributing.

It is my hope that after reviewing this account – and taking into consideration the evidentiary value of the materials Attorney Ryan found – you will agree that justice requires the inquiry I am seeking. Also, my hope is that AGO will therefore assent to the Motion To Compel Discovery Of Any Items, Records, Emails, Communications, Internal and External Memos, and Documents Relating to Sonja Farak which I intend

to file before the next hearing date on July 12, 2015, to support my Motion For A New Trial..

\* \* \* \*

At the time of Farak's arrest on January 19, 2013, Mr. Penate was charged with various drug and gun related offenses. After moving to compel certain discovery in the possession of the Hampden County District Attorney's office, Attorney Ryan filed a motion to dismiss the drug charges based on egregious government misconduct. A copy of the memorandum of law in support of that motion is attached as Exhibit A.<sup>1</sup> As you will see, Farak purportedly performed testing on samples allegedly distributed and/or possessed by Mr. Penate on December 22, 2011, January 6, 2012, and January 9, 2012. (*Id.* at ¶¶ 31-38.)

On July 23, 2013, the Honorable Mary-Lou Rup issued an order stating that:

an evidentiary hearing must be conducted on the following issues: (i) if Ms. Farak and/or the Amherst drug lab engaged in egregious misconduct in the handling, storage, and analysis of suspected narcotics during the time period between November 2011 and January 2012, when the Amherst drug lab had custody and control of the alleged substances related to the defendant's case; (2) if such misconduct has substantially prejudiced the defendant or irreparably harmed his right to a fair trial; or (3) if such egregious misconduct was deliberate and intentional, warranting a prophylactic sanction of dismissal.

(Ex. B, pg. 2.)<sup>2</sup>

In preparation for that evidentiary hearing, Attorney Ryan sent Assistant Attorney General (AAG) Kris Foster two e-mails attempting to arrange for an inspection of the evidence seized from Farak's car. (*See* Exs. C & D.)<sup>3</sup> The sole police report

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<sup>1</sup> The exhibits to this memorandum are available upon request.

<sup>2</sup> Judge Rup also reminded the Commonwealth of "its obligation to seek from government agencies (including the Office of the Attorney General) and to produce exculpatory evidence that may be favorable to this defendant's case, and not simply turn a blind eye to what is not in its immediate control." (*Id.*)

<sup>3</sup> Prior to sending these e-mails, efforts on the part of First Assistant District Attorney Frank Flannery to arrange for such an inspection had been unsuccessful. This led to the following exchange between Attorney Ryan and lead Farak investigator MSP Sergeant Ballou at an evidentiary hearing on September 9, 2013:

documenting that search and seizure was written by Massachusetts State Police (MSP) Trooper Randy Thomas. (*See Ex. E.*) As you can see, Trooper Thomas repeatedly noted the presence in Farak's car of "assorted lab paperwork," but did not describe what these purported lab papers contained.

On September 17, 2013, AAG Foster sent Attorney Ryan an email stating: "Our position is that viewing the seized evidence is irrelevant to any case other than Farak's." (*Ex. F.*) Attorney Ryan subsequently filed a motion to inspect. (*See Ex. G.*) Among other things, he stated that:

the Hampden County District Attorney's office has adopted the position taken by the Attorney General's office that the physical evidence in its possession only supports an inference that her misconduct began in the fall of 2012. To date, defendants like Mr. Penate have been forced to accept representations concerning the nature of this critical evidence from an agency that has consistently turned a blind eye toward

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Q. Sir, we've been talking quite a bit now about the evidence that was in Ms. Farak's car, correct?

A. Yes.

Q. And what we've been talking about is how you described that evidence in various reports you wrote, correct?

A. Yes.

Q. And we've been looking at photographs of this particular evidence?

A. Yes.

Q. And the reason we're doing that is because this evidence no longer exists, right?

A. No. It still exists.

Q. Oh, where is it?

A. It's in a drug storage locker -- I mean, excuse me, evidence storage locker.

Q. And can you tell me why none of the counsel for none of the defendants have been permitted to look at any of this evidence?

MR. FLANNERY: Objection.

THE COURT: Sustained.

anything suggesting that the target of its prosecution committed other crimes with which she has not been charged.

Attorney Ryan also filed a separate Rule 17(a)(2) motion to compel the production of evidence in the possession of the AGO, including, but not limited to: "any and all evidence suggesting that a third party may have been aware of Farak's evidence tampering . . . prior to her arrest." (Ex. H, pg. 3.) In opposing this motion, AAG made the following representation:

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

(Ex. I, pg. 8.) In retrospect, it is apparent that this statement was not responsive to Mr. Penate's request. His attorney had asked for "any and all evidence" of third party knowledge: instead of declaring that no such evidence existed, AAG Foster informed the Court that there was no evidence of third party knowledge in the records her office had previously furnished.

AAG Foster also moved to quash subpoenas issued to two law enforcement witnesses. These pleadings took the position that, if nothing else, the AGO ought to be relieved from any obligation to produce "[i]nformation concerning the health or medical or psychological treatment of individuals." (Ex. J, pg. 10) At the time, the true reason for this request was impossible to discern. AAG Foster did not acknowledge that her office possessed any such information – let alone identify any individual known to be receiving health or medical or psychological treatment.

On October 2, 2013, the parties appeared before the Honorable C. Jeffrey Kinder for a hearing on these motions. A transcript of that hearing is attached as Exhibit K; pages 11-23 memorialize the arguments advanced for and against a defense inspection of the evidence seized from Farak's car.

As you can see, AAG Foster took the position that what Attorney Ryan wanted to inspect was "just irrelevant evidence." (*Id.* at 14-15.) Assistant District Attorney Eduardo Velazquez and MSP Counsel Sean Farrell joined AAG Foster in objecting to a defense inspection of the so-called "assorted lab paperwork," which, they maintained, could "open the floodgates" to requests of defense attorneys seeking access to evidence in the then-pending criminal prosecution of Farak.

The objections voiced by these three law enforcement agencies ultimately persuaded Judge Kinder to deny Mr. Penate's motion to inspect. A copy of his decision is attached as Exhibit L.

Judge Kinder subsequently denied Mr. Penate's motion to dismiss. (*See* Ex. P.) Based on the body of evidence before him, Judge Kinder found that Farak's "misconduct, while deplorable, postdate[d] the testing in [Mr. Penate's] case." (*Id.* at 12.) As noted above, Mr. Penate was convicted of one of the drug charges against him on December 13, 2013, and was sentenced to no less than five and no more than seven years in state prison. A notice of appeal has been filed; the matter is stayed because a Motion For A New Trial was filed in the Hampden County Superior Court.

\* \* \* \*

On January 6, 2014, Farak pled guilty to the charges against her and was herself sentenced to a term of incarceration. On July 21, 2014, Attorney Ryan filed another motion to inspect the evidence seized from her car on behalf of a different Hampshire County defendant. (*See* Ex. M) This time, the motion was allowed. On October 30, 2014, Attorney Ryan and his investigator went to the AGO's Boston office and inspected the evidence while under the supervision of a MSP Trooper. Two days later, he sent AAC Patrick Devlin the attached 11-page letter documenting what he discovered. (*See* Ex. N.) The AGO subsequently produced "289 pages of documentary evidence . . . pursuant to this Office's continuing obligation to provide potentially exculpatory information." (Ex. O.)

Dozens of pages of the so-called "assorted lab paperwork" consisted of documentation concerning "the health or medical or psychological treatment" of Farak for the drug addiction that eventually ended her career as a forensic chemist. Many of these records *strongly suggested* that that identified third parties had knowledge of Farak's evidence tampering at the Amherst Drug Lab prior to her arrest. For present purposes, it will suffice to draw your attention to two particular pages.

First, investigators seized a number of "ServiceNet Diary Cards," which directed diarists to rate the intensity of urges to engage in certain behaviors, including the urge to "take drugs." These cards also instructed diarists to document whether they "acted on an urge." One such card had the following handwritten dates at the top of the form: "12-20, Mon; 12-20, Tues; 12-21, Wed; 12-22, Thurs; 12-23, Fri; 12-24, Sat; and 12-25, Sun." At the bottom of the card, handwritten notes for Saturday, December 24 state: "mad about missing part of Pats game." A review of old schedules for the New England Patriots indicate that the team played the Miami Dolphins on Saturday, December 24, 2011. The Patriots did not play a game on December 24, 2012 or on December 24, 2010. They also did not play a game on any Saturday in the month of December in 2012 or December in 2010.

According to this ServiceNet card, Farak consumed marijuana on Monday and some other drug(s) on both Thursday and Friday. With respect to that Thursday, December 22, 2011 – *the very same day she purportedly conducted testing in Mr. Penate's case –*

Farak stated: "tried to resist using @ work, but ended up failing (I know I should have called, but had thoughts about the last time I called)".

Second, on a separate page, Attorney Ryan found the following handwritten note: "Anna Kogan, MSW, LICSW." Next to Kogan's name was a telephone number and office address in Amherst, along with the question: "do you accept EAP"?

Upon discovering this evidence, Attorney Ryan sought, on behalf of another post-conviction client, the production of treatment records in possession of ServiceNet and Kogan, as well as the Western Mass. Women's Correctional Center in Chicopee where Farak was confined following her conviction. Judge Kinder issued summonses to these record holders and the documentation they produced constitutes clear and convincing proof that, beginning no later than 2005, Farak regularly stole and abused a wide variety of narcotics at the Amherst Drug Lab.

\* \* \* \* \*

In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court created an affirmative obligation on the part of law enforcement to disclose exculpatory evidence based on the principle that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Id.* at 87. The Court went on to explain that failing to furnish favorable material evidence<sup>4</sup> "casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice." *Id.* at 87-88.<sup>5</sup>

More recently, in *Cone v. Bell*, 556 U.S. 449 (2009), the Court distinguished standards under which a court must evaluate *Brady* claims from the "obligation to disclose evidence favorable to the defense [that] may arise more broadly under a prosecutor's

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<sup>4</sup> "Evidence is material if there is a 'reasonable probability' that, had it been disclosed, the result of the proceeding would have been different." *Drumgold v. Callahan*, 707 F.3d 28, 38-39 (1st Cir. 2013) (citation omitted). This analysis does not ask "whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* at 39. Having clarified this distinction, the First Circuit explained that "a reasonable probability exists when the withholding of evidence undermines confidence in the outcome of the trial." *Id.*

<sup>5</sup> As the *Drumgold* Court observed, "[a]lthough the responsibility for obtaining and disclosing evidence remains the duty of the prosecutor, law enforcement officers have a correlative duty to turn over to the prosecutor any material evidence that is favorable to a defendant." 707 F.3d at 38 (internal quotations and citations omitted). This also extends to other public officials, including the AGO and state crime lab technicians. *See Brown v. Miller*, 519 F.3d 231, 237-38 (5th Cir. 2008) (holding that a state crime lab technician's misconduct amounted to a *Brady* violation); *see also Commonwealth v. Cotto*, 471 Mass. 97, 108-10 (2014) (specifically imputing Farak's misconduct to the government).

ethical or statutory obligations.” *Id.* at 470 n.15 (emphasis added) (citing Standard 3-3.11(a) of the Prosecution Function Standards and Rule 3.8(d) of the ABA Model Rules).

Rule 3.8 provides: “The prosecutor in a criminal case shall: (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense.” In conjunction with Massachusetts Rule of Professional Conduct 5.1, this Rule imposes a corresponding duty on former and present supervisors in prosecuting offices. *See, e.g.*, ABA Comm. on Ethics & Prof. Responsibility, Formal Op. 09-454 (2009), at 8 (explaining, among other things, that supervising lawyers in prosecutor’s office “are subject to discipline for ordering, ratifying or *knowingly failing to correct* discovery violations”) (emphasis added).<sup>6</sup>

Viewed against this backdrop, the obligation of the AGO to investigate the circumstances surrounding the *Brady* violations in this case ought to be apparent. For it is hard to imagine a set of circumstances that more directly illustrates the notion of state actors designing and building criminal proceedings in a manner inconsistent with standards of justice.

First, the failure to disclose information in response a specific request has long been regarded as a much more serious transgression than failing to disclose information in response to a general “*Brady* request” (or no request at all). *See Commonwealth v. Collins*, 386 Mass. 1, 9 (1982). As noted above, Attorney Ryan specifically asked for “any and all evidence” suggesting that a third party had knowledge of Farak’s malfeasance prior to her arrest. Unsatisfied with the AGO’s non-responsive answer, he sought to inspect the evidence in the AGO’s possession. AAG Foster subsequently told him (and Judge Kinder) that what he wanted to see was “just irrelevant evidence.” As it turned out, this supposedly irrelevant evidence included a written admission that Farak used drugs at work on the same day she supposedly tested a substance his client was charged with distributing.

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<sup>6</sup> These rules “reflect[] the legal community’s long-standing consensus, first expressed in the ABA’s 1908 Canons of Professional Ethics that it would be ‘highly reprehensible’ to allow prosecutors to withhold evidence that might establish a defendant’s innocence.” Brief of the American Bar Association as Amicus Curiae in Support of Petitioner at 7, *Smith v. Cain*, 132 S. Ct. 627 (2012) (No. 10-8145) (“ABA Smith Br.”). As suggested by the Court in *Cone*, and confirmed by the ABA’s amicus brief in *Smith*, Rule 3.8(d) imposes a broader responsibility to disclose information than the obligation imposed by *Brady*. This stems from the bedrock principle that prosecutors have “special obligations as representatives ‘not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all.’” ABA Formal Op. 09-454 at 3 (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)).

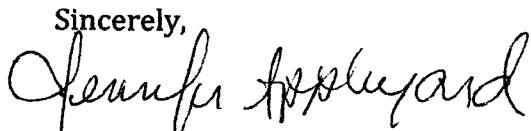
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Second, in a typical *Brady* violation, the underlying exculpatory evidence does not implicate any government wrongdoing. Here, the underlying question was not whether there was government misconduct but how much government misconduct there was, who participated, and how did the events unfold.

Attorney Ryan sought to inspect the evidence seized from Farak's car not simply in preparation for trial, but for purposes of litigating a motion to dismiss for egregious government misconduct. Although Farak's behavior was undeniably "deplorable," the motion to dismiss was denied – and Mr. Penate was later convicted at trial – because Attorney Ryan could not prove that Farak's misdeeds antedated her involvement in his client's case. Additionally, Attorney Ryan was limited in his questioning of three witnesses on this subject. This failure to present this to the jury was not for a lack of trying by Attorney Ryan, he was precluded from any information, because of the misconduct of the AGO.

Although the evidence that this misconduct was intentional is overwhelming (and mounting),<sup>7</sup> Mr. Penate deserves to know how and when this cover-up was orchestrated and who its participants included. Assuming he is successful in obtaining Rule 30 relief, this information will be critically important in litigating a second motion to dismiss for egregious government misconduct. For in cases where the misconduct in question is "egregious, deliberate, and intentional," the SJC has found that there are "prophylactic considerations" which may "assume paramount importance." *Commonwealth v. Cronk*, 396 Mass. 194, 199 (1985) (citation omitted).

I appreciate your thoughtful attention to this request and look forward to your response.

Sincerely,  
  
Jennifer Appleyard

Enc. Addendum

Cc: Luke Ryan  
Rebecca Jacobstein  
Kim West  
Jane Montori

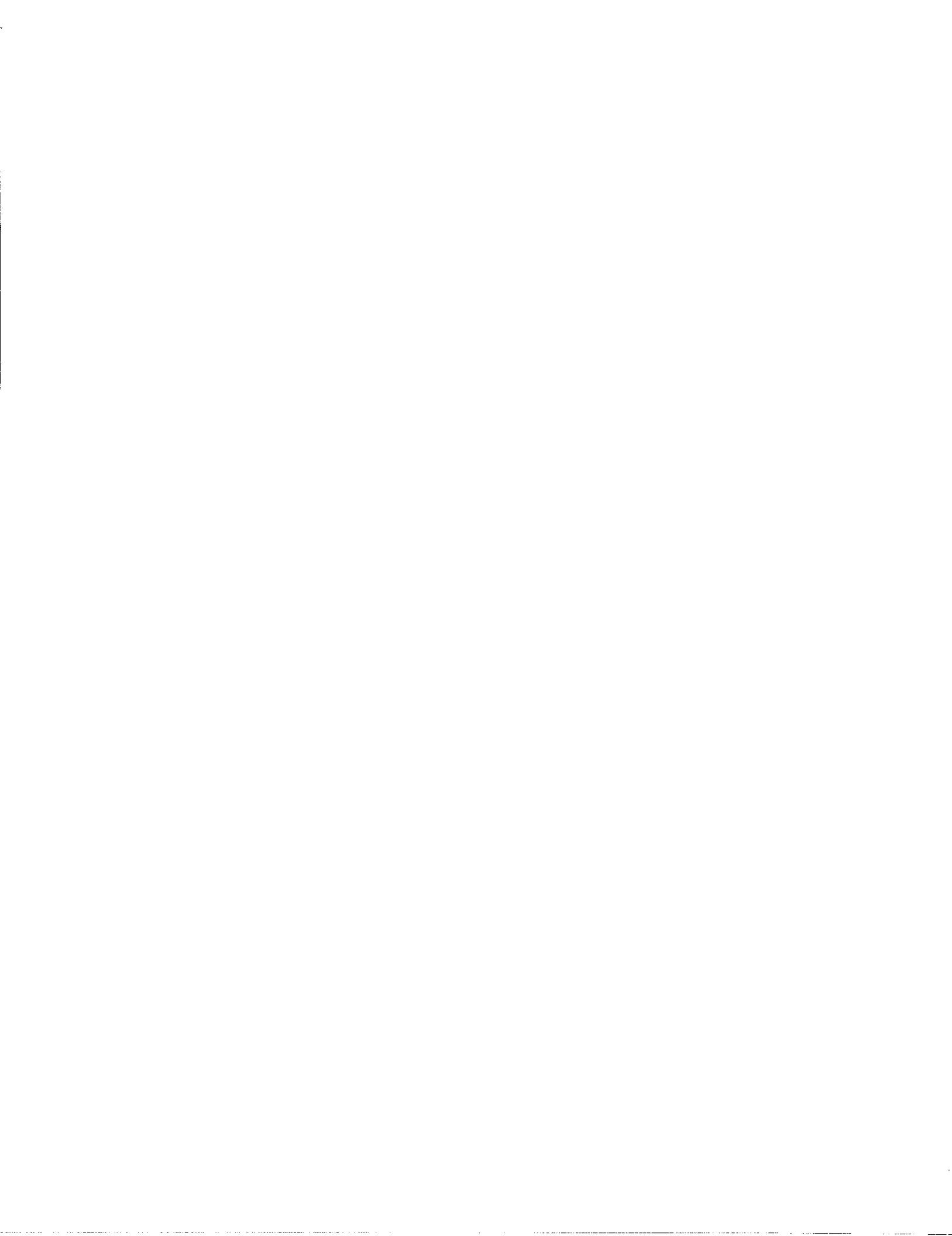
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<sup>7</sup> On June 12, 2015, Farak's attorney filed an affidavit that contained this assertion: "At the time of [Farak's] arrest, privileged treatment records were found in Ms. Farak's car. These records consisted of treatment sheets. I was informed by the prosecutor handling Ms. Farak's case that these sheets were considered by the Attorney General's office to contain privileged information and thus were not included as part of discovery to those seeking new trials."

# **ADDENDUM**

**Commonwealth  
v.  
Penate  
HDCR2012-00083**

**EXHIBITS IN SUPPORT OF LETTER**



## **Exhibits**

- A Memorandum of Law For Motion to Dismiss Drug Charges on Egregious Government Conduct
- B Judge Rup's Order
- C Emails with Kris Foster(AAG) and Attorney Ryan
- D Emails with Kris Foster
- E Police Report of Trooper Randy Thomas
- F September 17, 2013 Email
- G Motion To Inspect
- H Motion To Compel 17(a)(2)
- I AG Opposition To Motion to Compel
- J Motion To Quash Subpoena and Memorandum of Law In Support
- K Transcript of October 2, 2013 hearing
- L Judge Kinder's Decision Motion to Inspect
- M Burston Motion
- N Letter to the Attorney General
- O Farak Discovery
- P Memorandum of Judge's Order on Motion to Dismiss







**COMMONWEALTH OF MASSACHUSETTS**

**HAMPDEN, ss.**

**TRIAL COURT OF THE  
COMMONWEALTH  
SUPERIOR COURT DEPT.  
HAMPDEN DIVISION  
INDICTMENT NO. 12-0083**

**Commonwealth**

**v.**

**ROLANDO PENATE**

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO  
DISMISS COUNTS ONE THROUGH TEN AND THIRTEEN**

***Introduction***

“In a case charging a narcotics offense, the Commonwealth must prove beyond a reasonable doubt that a substance is a particular drug because such proof is an element of the crime charged.” *Commonwealth v. Vasquez*, 456 Mass. 350, 361 (2010) (quotation marks and citations omitted). In the case at bar, the Commonwealth initially sought to satisfy this burden by submitting the substances it acquired to a chemist for what it previously characterized as “neutral scientific testing.” *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 317 (2009) (citing Brief for Respondent at 29). That chemist was later arrested on charges of evidence tampering in a scandal that has exposed systemic flaws at a laboratory law enforcement had misrepresented as immune to the risks of manipulation or error. In the pages that follow, undersigned counsel will demonstrate why dismissal of the above-referenced charges is the only appropriate response to conduct which has fallen “below standards, to which common feelings respond, for the proper use of governmental

power.” *Commonwealth v. Monteagudo*, 427 Mass. 484, 485 (1998) (quotation marks and citations omitted).

### ***Background***

#### **A. The Seizure and Submission of Substances to the Amherst Crime Laboratory.**

1. In the fall of 2011, Detective John Wadlegger (“Wadlegger”) of the Springfield Police Department (“SPD”) purportedly began utilizing a confidential and reliable informant (“CRI”) to make a number of controlled purchases from the defendant of substances purported to be heroin. (Ex. A, Narrative for Vice Control.)
2. On October 21, 2011, Wadlegger then enlisted the assistance of an undercover police officer who allegedly purchased a substance also purported to be heroin from the defendant. (*Id.*)
3. On October 25, 2011, Detective Kevin Burnham (“Burnham”) transported substances purportedly obtained in the course of approximately two dozen investigations to the State Police Crime Laboratory at 687 North Pleasant Street in Amherst for chemical analysis. (Ex. B, Drug Receipt (Oct. 25, 2011).)
4. Among the items Burnham brought with him were two (2) glassine bags containing “powder” with a gross weight of 4.5 grams. (*Id.*)
5. This submission was purportedly obtained by the CRI during one of the aforementioned controlled buys; it was assigned Laboratory Number A11-04049. (*Id.*)
6. Burnham also submitted two (2) other glassine bags containing a powder with a gross weight of 4.4 grams. (*Id.*)

7. This submission was purportedly purchased from the defendant by the undercover officer on October 21, 2011; it was assigned a Laboratory Number of A11-04063. (*Id.*)
8. On November 9, 2011, the undercover police officer allegedly made a second purchase of a substance purported to be heroin from the defendant. (Ex. A, Narrative for Vice Control.)
9. Two days later, on November 11, 2011, Wadlegger applied for and obtained a search warrant for the defendant's residence. (*Id.*)
10. On November 15, 2011, following a final purchase by the undercover officer of a substance purported to be heroin, Narcotics Detectives executed the warrant and seized certain other substances alleged to be cocaine and heroin. (*Id.*)
11. The following day, the substances allegedly sold by the defendant on November 9 and November 15, 2011, were sent to the Amherst Laboratory, along with the substances seized by law enforcement during the execution of the warrant. (Ex. C, Drug Receipt (Nov. 16, 2011).)
12. These substances were received by Laboratory Evidence Officer Sharon Salem ("Salem") and assigned Laboratory Numbers of A11-04263 and A11-04280-04290. (*Id.*)
13. Laboratory Number A11-04263 consisted of two (2) glassine bags containing a powder with a gross weight of 4.5 grams. (*Id.*)
14. Laboratory Number A11-04280 consisted of three (3) glassine bags containing a powder with a gross weight of 4.5 grams. (*Id.*)

15. Laboratory Number A11-04281 consisted of one (1) glassine bag containing a powder with a gross weight of 4.1 grams. (*Id.*)
16. Laboratory Number A11-04282 consisted of ten (10) glassine bags containing a powder with a gross weight of 7.0 grams. (*Id.*)
17. Laboratory Number A11-04283 consisted of thirteen (13) glassine bags containing a powder with a gross weight of 7.6 grams. (*Id.*)
18. Laboratory Number A11-04284 consisted of one (1) glassine bag containing a white powder with a gross weight of 4.1 grams. (*Id.*)
19. Laboratory Number A11-04285 consisted of one (1) glassine bag containing a white powder with a gross weight of 4.2 grams. (*Id.*)
20. Laboratory Number A11-04286 consisted of nine (9) glassine bags containing a white powder with a gross weight of 5.5 grams. (*Id.*)
21. Laboratory Number A11-04287 consisted of two (2) glassine bags containing a powder with a gross weight of 4.7 grams. (*Id.*)
22. Laboratory Number A11-04288 consisted of ten (10) glassine bags containing a powder with a gross weight of 6.9 grams. (*Id.*)
23. Laboratory Number A11-04289 consisted of one (1) glassine bag containing a white powder with a gross weight of 4.8 grams. (*Id.*)
24. Laboratory Number A11-04290 consisted of one (1) paper fold containing a white powder with a gross weight of 4.4 grams. (*Id.*)
25. It is undisputed that none of the substances seized by law enforcement during the course of this investigation were field tested prior to being submitted to the

Amherst Laboratory for analysis. (Ex. D, Expert Disclosure for Jaime Bruno (Apr. 9, 2013).)

B. *The Analysis of Substances at the Amherst Crime Laboratory.*

26. On December 19, 2011, Salem assigned for analysis a batch of fifteen (15) samples to Chemist Rebecca Pontes (“Pontes”). (Ex. E, Sample to Lab (Dec. 19, 2011).)
27. Included in this batch was Laboratory Number A11-04049 – two (2) glassine bags containing a powder with a gross weight of 4.5 grams allegedly obtained from the defendant during a controlled buy. (*Id.*)
28. In the Laboratory notebook, Pontes recorded a gross weight of 4.44 grams for this sample. (Ex. F, Notes Re: A11-4049 (Dec. 20, 2011).)
29. The total gross weight as recorded by Pontes was thus .06 grams less than the gross weight recorded when Burnham submitted A11-04049 for analysis.
30. On December 20, 2011, Salem returned A11-04049 and the other fourteen (14) samples she had assigned to Pontes back to the evidence safe. (Ex. G, Samples Returned to Safe (Dec. 20, 2011).)
31. On that same date, Laboratory Supervisor James Hanchett assigned for analysis a batch of nineteen (19) samples to Chemist Sonja Farak (“Farak”). (Ex. H, Sample to Lab (Dec. 20, 2011).)
32. Included in this batch was Laboratory Number A11-04063 – two (2) glassine bags containing a powder with a gross weight of 4.4 grams allegedly obtained from the defendant by the undercover officer on October 21, 2011. (*Id.*)

33. In the Laboratory notebook, Farak recorded a gross weight of 0.5885 grams for this sample. (Ex. I, Notes Re: A11-04063 (Dec. 22, 2011).)
34. The total gross weight as recorded by Farak was thus approximately 3.8 grams less than the gross weight recorded when Burnham submitted A11-04063 for analysis.
35. On December 22, 2011, Hanchett returned A11-04062 and the other eighteen (18) samples he had assigned to Farak back to the evidence safe. (Ex. J, Samples Returned to Safe (Dec. 22, 2011).)
36. On January 4, 2012, Salem assigned for analysis a batch of fifteen (15) samples to Farak. (Ex. K, Sample to Lab (Jan. 4, 2011).)
37. Included in this batch were Laboratory Numbers A11-04280 – A11-04290. (*Id.*)
38. On January 6 and January 9, 2012, Farak recorded in the Laboratory notebook the gross weights of these eleven samples, which were allegedly sold by the defendant to the undercover officer on November 9 and November 15, 2011, or seized during a search of the defendant's residence. (Ex. L, Notes Re: A11-04262 (Jan. 6, 2012); Ex. M, Notes Re: A11-04280-A11-04290 (Jan. 9, 2011).)
39. The following chart compares the gross weights of these samples as recorded by Farak on January 9, 2012, with the gross weights recorded on November 16, 2012, when the samples were submitted by Burnham:

	Weight in Grams on January 9, 2012	Weight in Grams on November 16, 2011
A11-04280	0.6376	4.5
A11-04281	0.2998	4.1
A11-04282	3.0783	7.0
A11-04283	3.7552	7.6
A11-04284	0.1809	4.1
A11-04285	0.1941	4.2
A11-04286	1.529	5.5
A11-04287	0.6222	4.7
A11-04288	3.0230	6.9
A11-04289	0.9868	4.8
A11-04290	0.5872	4.4
Total	14.8941	57.8

C. *The Defendant's First Motion to Compel*

40. On February 1, 2012, the Grand Jury returned a thirteen count indictment against the defendant charging him with: possessing Class A and Class B substances with the intent to distribute as a second offender (Counts 1 and 3); three counts of distributing a Class A substance as a second offender (Counts 5, 7, and 9); five school zone violations (Counts 2, 4, 6, 8, and 10); possessing a firearm without a valid FID card (Count 11); possessing ammunition without a valid FID card (Count 12); and possessing a firearm during the commission of a felony (Count 13). (Ex. N, Indictment No. 12-083.)

41. On August 8, 2012, the defendant filed a motion to compel evidence in the possession of the Amherst Laboratory. (Ex. O, Def.'s First Motion to Compel (Aug. 8, 2012).)

42. Among other things, he sought the production of approximately two dozen items pertaining to any evidence that might be offered related to the visual identification

of the substances as narcotics or any field or presumptive testing done in addition to the testing conducted at the Amherst Laboratory. (*Id.*)

43. In footnote 4 to his memorandum of law filed in support of his motion to compel, the defendant stated his willingness to waive the requests related to the visual identification of the substances at issue as narcotics in exchange for a stipulation that no such testimony would be offered. (Ex. P, Mem. in Supp. Def.'s First Motion to Compel.)

44. The Commonwealth, in opposing the motion, characterized it as overbroad and recognized that it had an obligation, under Rule 14, to disclose all documents related to expert testimony and chain of custody. (Ex. Q, Comm'n Opp'n.)

45. The motion was heard on August 30, 2012, by the Honorable Tina Page.

46. At this hearing, the prosecution agreed to turn over all relevant documents in possession of the Amherst Laboratory and stated that it had no intention to have any officers opine that the substances in question were cocaine or heroin, thereby making these requests by the defendant moot. (Ex. R, Affidavit of Attorney Luke Ryan.)

47. The Commonwealth also represented that no presumptive testing had been or would be done in this case. (*Id.*)

D. *Representations Regarding the Amherst Laboratory in the Media*

48. On the same day that the parties appeared for a hearing on Mr. Penate's first motion to compel, Governor Deval Patrick ordered the state police to shut down the State Police Crime Laboratory in Jamaica Plain based on the improper handling of drug evidence and breached procedures by Chemist Annie Dookhan.

(Ex. S, State House News Service, “Improper Drug Testing Leads To Closure of State Crime Lab” (Aug. 30, 2012).)

49. On September 22, 2012, an article appeared in the *Daily Hampshire Gazette* entitled, “Amherst crime lab passes muster, no ties to Jamaica Plain scandal found.” (Ex. T, Dan Crowley, “Amherst crime lab passes muster, no ties to Jamaica Plain scandal found,” DAILY HAMPSHIRE GAZETTE (Sept. 22, 2012).)
50. According to State Police Spokesman David Procopio, the Amherst Laboratory had recently “been placed under state police authority for reasons of efficiency, including streamlining and consolidating the state’s testing of drugs in criminal cases.” (*Id.*)
51. Although Procopio claimed that the Amherst Laboratory had been “follow[ing] the national standards of the Scientific Working Group for the Analysis of Seized Drugs,” he said that “it lacked the resources to fulfill the national accreditation standards that the Massachusetts State Police (MSP) lab system has achieved.” (*Id.*)
52. Procopio predicted that transferring authority over the Amherst Laboratory to the State Police would result in its accreditation, as “[t]he integrity of the MSP lab system is beyond reproach.” (*Id.*)

#### E. *The Quality Assurance Audit*

53. On October 10, 2012, a “Quality Assurance Audit” was conducted at the Amherst Laboratory. (Ex. U, MSP Crime Laboratory – Quality Assurance Audit Amherst Drug Laboratory (Oct. 10, 2012).)

54. Notwithstanding the aforementioned representations, Audit Team Members noted a number of discrepancies between the procedures employed at the Amherst Laboratory and those utilized at accredited laboratories. (*Id.*)

55. Among other things, Audit Team Members discovered that:

- Unit staff did “not have a quality manual”;
- Unit staff did not “comply with MSPFSG QA procedures”;
- “[T]he instrument logs [were not] current and complete”;
- “[N]o documented policies existed prior to [September 2012]” with regard to doing checks, running standards or performing auto tunes;
- “[E]vidence in the Unit [was] [im]properly secured” insofar as “the short term/overnight safe storage” often “contain[ed] unsealed evidence which all staff [could] access”;
- “[E]vidence [was] [im]properly marked and sealed” as “no initials/dates [were placed] on the seals”;
- “[N]ew procedures [were not] properly validated”;
- “[T]he Unit [did not] routinely check the reliability of its reagents”;
- No “records [were] kept of commercial reagents, in house reagents and supplies, which identify, where appropriate, lot number or batch number, manufacturer’s specifications, internal evaluations and shelf life”;
- “[C]ritical reagents [were not] checked against known material prior to being placed into service”;
- “[T]he results of critical reagent Quality Control checks [were not] documented”;
- When “reagents [we]re used as received from the manufacturer, . . . records [were not] maintained of the manufacturer-supplied Quality Control data sheets for each reagent”; and
- “Submittal and Chain-of-Custody forms [were neither] completely and accurately filled out [nor] . . . establish[ed] custody of [each] sample at all times.”

(*Id.*)

56. It does not appear that Procopio or any other law enforcement officer made any effort to correct the misconceptions created by the *Gazette* article regarding the supposedly “great professionalism and integrity” found the Amherst Laboratory.

F. *The Chemist Discovery Packet*

57. On November 18, 2012, Farak furnished a “Chemist Discovery Packet” with a cover letter to Assistant District Attorney (“ADA”) Eduardo Velazquez. (Ex. V, Letter from Sonja Farak to Eduardo Velazquez (Nov. 18, 2012); Ex. W, Chemist Discovery Packet.)

58. Notwithstanding the findings of Audit Team Members thirty-nine days before, Farak repeated Procopio’s now-discredited claim that although the Amherst Laboratory was “not accredited at this time, . . . [a]ll of our testing procedures performed are the same as in any accredited Drug Analysis Laboratory.” (Ex. W.)

G. *Evidence Tampering at the Amherst Laboratory.*

59. On January 19, 2013, Farak was arrested based on allegations that she had tampered with drug evidence at the Amherst Laboratory. (Ex. X, Report of MSP Sgt. Joseph Ballou (Feb. 6, 2013).)

60. According to a report authored by State Police Sergeant Joseph Ballou, on January 17, 2013, Salem was unable to locate two samples the laboratory had received from the SPD. (*Id.*)

61. The following day, Salem enlisted Hanchett in the search, and the two of them discovered approximately twelve (12) grams of a substance that subsequently tested positive for cocaine in a plastic bag at Farak’s work station. (*Id.*)

62. According to Hanchett, “no laboratory labels or defendant names [were] associated” with these twelve (12) grams and “the sandwich bag was not something they used in the laboratory.” (*Id.*)
63. As he and Salem continued their search, Hanchett looked in the drawers of Farak’s work area and discovered a manila envelope containing packaging for the evidence Salem had been unable to locate the day before. (*Id.*)
64. The two samples in question had been assigned numbers A12-04791 and A12-04793. (*Id.*)
65. Although Farak had previously signed drug certifications attesting that both samples were cocaine, Hanchett decided to re-test the samples and discovered that neither contained cocaine. (*Id.*)
66. At this point, Hanchett contacted the State Police to report the missing evidence. (*Id.*)
67. Investigators subsequently found one empty case envelope in temporary locker shared by Farak that should have contained 13.6 grams of crack cocaine; under her work bench, they discovered another empty case envelope that should have contained 28.5 grams of crack cocaine. (*Id.*)
68. The following day, investigators conducted a search of Farak’s car and recovered “[n]umerous items of packaging used by the drug lab to store analyzed controlled substances” that had been open and were empty. (*Id.*)
69. Law enforcement also found white powder that field tested positive for cocaine and a brownish tar substance that field tested positive for heroin. (*Id.*)

70. In a storage bin inside the driver's side door was a sheet of paper with the initials "RP" repeatedly scribbled on it, as if Farak had been attempting to replicate the handwriting of Pontes. (*Id.*)
71. On January 22, 2013, Farak was arraigned in the Eastern Hampshire District Court on two counts of withholding evidence from a criminal proceeding, one count of possession of a Class A substance, and one count of possession of a Class B substance. (*Id.*)<sup>1</sup>

H. *The Ramifications of Farak's Prosecution on the Commonwealth's Case.*

72. Following Farak's arrest and arraignment, undersigned counsel contacted ADA Velazquez to ascertain his position on the viability of the drug charges pending against Mr. Penate. (Ex. R, Ryan Aff.)
73. ADA Velazquez responded with a voicemail, stating that his office could not go forward on these charges due to Farak's arrest.<sup>2</sup> (*Id.*)
74. In light of this representation, undersigned counsel initially made no effort to obtain discovery pertaining to the investigation of Farak or her prosecution. (*Id.*)
75. On March 14, 2013, six days before this case was scheduled for trial, undersigned counsel happened to see ADA Velazquez in Springfield District Court. (*Id.*)
76. During a short conversation, ADA Velazquez advised undersigned counsel that he was reconsidering his decision to voluntarily dismiss the drug-related charges. (*Id.*)

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<sup>1</sup> She currently faces a ten-count Hampshire County indictment for evidence tampering, larceny of drugs and possession of cocaine.

<sup>2</sup> ADA Velazquez also stated that he intended to pursue Counts Eleven and Twelve – the firearm and ammunition related charges.

77. On March 18, 2013, ADA Velazquez confirmed that he intended to have an experienced narcotics officer testify that the substances seized and/or obtained during the course of the investigation were, in fact, cocaine or heroin. (*Id.*)
78. The following day, at what was scheduled to be a final pretrial conference, ADA Velazquez agreed to produce by April 10, 2012, twenty-two discovery items he had previously characterized as irrelevant during the hearing on the defendant's motion to compel. (Ex. Y, Agreement on Discovery Motions (Mar. 19, 2013).)
79. For its part, the defense indicated that it would be filing a second motion to compel discovery related to the Farak prosecution and upon receiving such discovery would be moving to dismiss the drug charges and/or prevent the visual identification of the substances in question as narcotics. (Ex. R, Ryan Aff.)
80. The Commonwealth eventually identified Springfield Police Officer Jaime Bruno as an "expert" prepared to offer opinion testimony regarding the chemical composition of the substances obtained by law enforcement during the course of its investigation. (Ex. D, Expert Disclosure for Jaime Bruno (Apr. 9, 2013).)<sup>3</sup>

I. *The Defendant's Second Motion to Compel.*

81. On May 14, 2013, the defendant filed a second motion to compel requesting an order for the production of the following items:

- i. Copies of all reports generated by law enforcement personnel in conjunction with the investigation of Chemist Sonja Farak and the pending criminal charges against her;

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<sup>3</sup> According to Officer Bruno, he "learned the appearance, texture, and feel of illegal narcotics" and became "familiar with counterfeit or 'fake' items used as narcotics" during his training and experiences as a narcotics officer. (Ex. D, Expert Disclosure for Jaime Bruno (Apr. 9, 2013), DA DISCOVERY 423.) Officer Bruno maintains that he can tell "the difference between illicit narcotics and 'fakes' appearing to be used as narcotics" based on the "appearance and texture" of the substances. (*Id.*)

- ii. Copies of all search warrant applications, affidavits, and returns generated in conjunction with the investigation of Chemist Sonja Farak and the pending criminal charges against her;
- iii. Chemical analysis results for any and all substances tested subsequent to seizure by State Police during execution of search warrant for automobile registered to Sonja Farak on January 19, 2013;
- iv. Chemical analysis results for any and all substances tested prior to discovery by State Police during execution of search warrant for automobile registered to Sonja Farak on January 19, 2013;
- v. Chemical analysis results for any and all substances tested subsequent to seizure by State Police during execution of search warrant for turquoise colored nylon tote bag on January 25, 2013;
- vi. Results of any and all searches of computers to which Sonja Farak had access, including but not limited to e-mails sent and received by Ms. Farak from Nov. 15, 2011 to January 19, 2013;
- vii. Results of any and all searches of cellular telephones to which Sonja Farak had access, including but not limited to text messages sent and received by Ms. Farak from Nov. 15, 2011 to January 19, 2013;
- viii. Copies of video recording and photographs of Amherst Laboratory produced Massachusetts State Police Crime Scene Services on February 14, 2013;
- ix. Copies of any and all Technical Audits undertaken at the Amherst Drug Laboratory from January 1, 2009 through January 20, 2013; and
- x. Copies of all records documenting the treatment and handling of evidence in the case at bar, from the initial point of collection up to its current disposition.

(Ex. Z, Def.'s Second Motion to Compel.)

82. At a hearing on this motion on May 20, 2013, ADA Velazquez offered no opposition to any of the defendant's requests; instead, he advised undersigned counsel and the Court that the information sought was in the possession of the

Attorney General's office and that he would provide it as soon as he received it.

(Ex. R, Ryan Aff.)

83. ADA Velazquez subsequently produced a DVD disc labeled "Farak Discovery."

(Ex. AA, Photocopy of DVD labeled Farak Discovery, with Table of Contents.)

84. The items contained on the disc are not directly responsive to the requests set forth in the defendant's second motion to compel.<sup>4</sup>

85. To date, the Commonwealth has furnished a total of six narrative reports generated by State Troopers in conjunction with the Farak investigation. (See Ex. X, Ballou Report (Feb. 6, 2013); Ex. BB, Trp. Randy Thomas Report (Jan. 24, 2013); Ex. CC, Tpr. Geraldine Bresnahan Report (Jan. 18, 2013); Ex. DD, Sgt. Joseph Ballou Report Re: Visit to Amherst Lab (Feb. 15, 2013); Ex. EE, Sgt. Joseph Ballou Report (Mar. 8, 2013); Ex. FF, Sgt. Joseph Ballou Report Re: Search of Tote Bag (Feb. 15, 2013).)

86. The Commonwealth has not furnished any reports generated by personnel at the Attorney General's office or any of the District Attorneys' offices serving the four western counties.

87. Nor has the Commonwealth furnished copies of any search warrant applications, affidavits, or returns, or the results of any testing conducted on any substances seized in the course of the Farak investigation.

88. To date, the Commonwealth has neither produced any of Farak's e-mails or phone records nor certified that it has no such records in its possession.

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<sup>4</sup> One Department Case Report indicates that at the time of her arrest Farak had in the hatchback of her automobile paperwork and evidence bags for several cases predating the defendant's. (Ex. GG, Dep't Case Report.)

89. To date, the Commonwealth has neither furnished the results of any technical audits at the Amherst Laboratory nor certified that none were conducted.

90. By July 22, 2013, the defendant will have been held 616 days.

### ***Pertinent Legal Principles***

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

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

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<sup>5</sup> “Where the conduct is not egregious, the burden to show prejudice lays with the defendant.” *Commonwealth v. Chavez*, Essex County No. 2007-0079, (Mass. Super. May

The “alternative principle” focuses on “prophylactic considerations” which “may assume paramount importance” in cases where the misconduct is “egregious, deliberate, and intentional.” *Cronk*, 396 Mass. at 199 (citations omitted). As the Supreme Judicial Court (“SJC”) noted in *Commonwealth v. Lewin*, 405 Mass. 566 (1989), trial judges have the power to dismiss criminal charges “because of nonprejudicial but egregious . . . misconduct” if such action is required to “create a climate adverse to repetition of that misconduct that would not otherwise exist.” *Id.* at 587.

When the trial judge declined to exercise this power in *Commonwealth v. Manning*, 373 Mass. 438 (1977), the SJC reversed and dismissed a two-count indictment for distribution of cocaine. According to the *Manning* court, such a decision was required due to the “aggravated nature” of the official misconduct and the need for a “strong[] deterrent.” *Id.* at 439, 444.<sup>6</sup> Reflecting on this ruling seven years later, Justice Lynch stated: “The purpose of the sanction [in *Manning*] was not to rectify harm done to the defendant, because there had been none; the point was to discourage government agents from such deliberate and insidious [misconduct].” *Commonwealth v. Jackson*, 391 Mass. 749, 754 (1984).

In short, “dismissal with prejudice is appropriate in cases of egregious prosecutorial misconduct or upon a showing of prejudice or substantial threat thereof.” *Commonwealth v. Hurst*, 39 Mass. App. Ct. 603, 604 (1996) (emphasis added) (citations

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23, 2008), available at 2008 WL 2415268, \*2 (citing *Commonwealth v. Lewin*, 405 Mass. 566, 584 (1989); *Commonwealth v. Fossa*, 40 Mass. App. Ct. 563, 568 (1996)).

<sup>6</sup> In *Manning*, the misconduct at issue stemmed from conversations with the defendant initiated by law enforcement at a time when the law enforcement agents knew the defendant was represented by counsel. See 373 Mass. at 439-40.

omitted);<sup>7</sup> see also *Commonwealth v. Mason*, 72 Mass. App. Ct. 1102, \*4 (2008) (Table) (noting that “the test for dismissal with prejudice has been articulated in the disjunctive” (citation omitted)), aff’d 453 Mass. 873 (2009). “It cannot be asserted too often that the [government] must take care to behave itself.” *Commonwealth v Felton*, 16 Mass. App. Ct. 63, 66 (1983) (quotation marks and citation omitted).

With respect to the Commonwealth’s non-compliance “with its discovery obligations,” it is clear that “a judge is afforded considerable discretion.” *Commonwealth v. Brien*, 67 Mass. App. Ct. 309, 310 (2006) (quotation marks and citations omitted). Indeed, once a defendant demonstrates prejudice as a result of the Commonwealth’s (in)action, “the judge may impose appropriate sanctions, which may include dismissal of the criminal charge.” *Commonwealth v. Lam Hue To*, 391 Mass. 301, 314 (1984) (citation omitted); see also *Commonwealth v. Silva*, 10 Mass. App. Ct. 784, 790 (1980) (finding Commonwealth’s noncompliance “warranted an order of dismissal”).

### ***Argument***

- A. *This Court Should Dismiss the Drug Charges against the Defendant with Prejudice as a Prophylactic Remedy Designed to Prevent the Reoccurrence of Egregious Misconduct on the Part of Sonja Farak and her Supervisors.*

Based on the facts set forth above, this Court has all the information it needs to conclude that Sonja Farak was engaged in the practice of evidence tampering at the time she came into contact with the substances giving rise to eleven of the thirteen charges in

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<sup>7</sup> There is no question that Farak was a member of the prosecution team. See *Commonwealth v. Rodriguez*, Essex County Indictment No. 07–875, (Mass. Super. Ct. May 29, 2013), available at 2013 WL 2420416, \*3 n.5 (“Ms. Dookhan was an agent of the Commonwealth.”); see also *id.* (explaining that laboratory where Ms. Dookhan worked was part of Massachusetts Department of Public Health which, in turn, is statutorily required, “upon request from law enforcement authorities, to perform chemical analyses of drugs”).

this case.<sup>8</sup> The Court can also conclude that such egregious misconduct could not have occurred but for the failure of laboratory supervisors to promulgate, and require adherence to, the national standards that a State Police spokesman (and Farak) claimed were in place. Once law enforcement learned of the serious shortcomings at the Amherst Laboratory in need of immediate remediation, it had an obligation to inform the defense bar, as well as the public, that its earlier praise of the laboratory was unwarranted and that the protocols there did not, in fact, pass muster. By dismissing the drug charges against Mr. Penate, this Court can take action designed to prevent the reoccurrence of Farak's crimes and the cover-up of the systemic flaws that allowed her crimes to go undetected.

This Court can also use the pending motion as an opportunity to disentangle the judicial branch from the kind of reprehensible conduct which calls into question the integrity of the entire criminal justice system. Of course, when the clerk authorized the search of the defendant's residence he was unaware of the pattern of evidence tampering that subsequent events would bring to light. Nor could he have foreseen how a warrant ostensibly sought to thwart criminal activity would lead to the commission of illegal acts. Nevertheless, the fact remains that this Court authorized the seizure of evidence that otherwise would not have fallen into Ms. Farak's hands. Unless this Court dismisses the charges against the defendant with prejudice, it runs the risk of becoming complicit in, if not condoning, criminal wrongdoing perpetrated by a Commonwealth agent.

B. *If this Court is Presently Unwilling to Dismiss the Charges Against the Defendant as a Prophylactic Measure, an Evidentiary Hearing is Required to Determine the Scope of the Prejudice he has Suffered and/or his Ability to Obtain a Fair Trial.*

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<sup>8</sup> As will be discussed in greater detail below, the evidence strongly suggests that Farak tampered with each and every sample allegedly possessed by Mr. Penate.

Should this Court permit the prosecution of the defendant to proceed, an evidentiary hearing will be necessary to establish the extent of the prejudice he has suffered as a result of the aforementioned misconduct. As noted above, the evidence strongly suggests that Farak tampered with each and every sample allegedly possessed by Mr. Penate. Whereas these samples had a combined gross weight of over sixty-two (62) grams when they arrived at the laboratory, their combined weight was less than sixteen (16) grams when Farak weighed them. Given irregularities like this and Farak's track record of falsifying the results of her analyses, the facts of this case give rise to a presumption of prejudice and the onus should be placed upon the prosecution to demonstrate that, in fact, no prejudice resulted, or that its harm can be offset.

C. *This Court Should Dismiss the Drug-Related Charges Against the Defendant Based on the Commonwealth's Failure to Abide by its Discovery Obligations.*

Once it elected to press ahead with the drug-related charges notwithstanding the criminal activity of its chemist, the prosecution's obligation under Rule 14 to disclose "Any facts of an exculpatory nature" became an enormous undertaking. To date, the Commonwealth does not appear to have come to grips with this reality and has simply passed along whatever materials the Attorney General's office has seen fit to furnish without any regard as to whether said materials are responsive to requests made by the defendant in his second (assented-to) motion to compel.

Lest there be any confusion as to the scope of the discovery to which the defendant now feels entitled, he will offer the following examples. If e-mails or internal memoranda exist detailing the insufficient safeguards in place at the Amherst Laboratory at the time the substances at issue were entrusted there, then defendant maintains that this correspondence must be disclosed even if it was generated by lawyers in the Attorney

General's office or the Hampden County District Attorney's office. Alternatively, if e-mails exist reflecting bias or unprofessionalism on the part of Ms. Farak, they too must be disclosed pursuant to Rule 14, *Brady v. Maryland*, 373 U.S. 83 (1963), and S.J.C. Rule 3:07, R.P.C. 3.8(d).<sup>9</sup>

Having failed to make these and other required disclosures sufficiently in advance of trial, the prosecution should not be permitted to go forward with Counts One through Ten and Thirteen of the above-referenced indictment.

***Conclusion***

Based on the foregoing, the defendant respectfully requests that this Honorable Court allow his Motion to Dismiss. Alternatively, the defendant requests an evidentiary hearing on this motion.

THE DEFENDANT

By \_\_\_\_\_  
His Attorney  
Luke Ryan, Esq.  
SASSON, TURNBULL, RYAN & HOOSE  
100 Main Street, 3<sup>rd</sup> Floor  
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BBO# 664999

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<sup>9</sup> It has been reported that Annie Dookhan sent an e-mail to a prosecutor in which she disclosed that it was her goal in working as an ostensibly disinterested chemist to get drug dealers "off the streets." Andrea Estes, "Indicted drug analyst Annie Dookhan's e-mails reveal her close personal ties to prosecutors" (Dec. 20, 2012), available at <http://www.boston.com/news/local/massachusetts/2012/12/20/indicted-drug-analyst-annie-dookhan-mails-reveal-her-close-personal-ties-prosecutors/A37GaatHLKfW1kphDjxLXJ/story.html> (last visited July 11, 2013). The defense strongly suspects that law enforcement searched any computer that Farak used in the course of her work as a chemist.





COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT  
CRIMINAL ACTION  
No. 12-083

COMMONWEALTH

HAMPDEN COUNTY  
SUPERIOR COURT  
**FILED**

vs.

JUL 23 2013

ROLANDO PENATE

  
CLERK OF COURTS

**MEMORANDUM ON DEFENDANT'S MOTION TO DISMISS  
AND MOTION IN LIMINE TO PRECLUDE EVIDENCE OF EXPERT VISUAL  
IDENTIFICATION OF PURPORTED NARCOTICS**

A Hampden County Grand Jury returned indictments charging the defendant with narcotics and firearms offenses. Sonja Farak, an assistant analyst at the Massachusetts Department of Public Health Drug Analysis Laboratory at Amherst ("Amherst drug lab"), certified that items submitted to the drug lab by Officer Burnham of the Springfield Police Department related to the present case contained heroin and cocaine. Documents submitted in support of the defendant's motions indicate Ms. Farak conducted her analysis of the substances on dates between late December 2011 and early January 2012. On or about January 18, 2013, the Massachusetts State Police began an investigation of the Amherst drug lab which later resulted in the arrest and indictment of Ms. Farak for evidence tampering, larceny of narcotics and possession of cocaine.

I. Motion to Dismiss

The defendant has filed a motion to dismiss those counts of the indictment (one through ten and thirteen) charging narcotics offenses, arguing that: (1) egregious government misconduct (at the Amherst drug lab) has caused a substantial threat of prejudice to the defendant or irreparable harm to his ability to obtain a fair trial; (2) such a prophylactic measure is appropriate

for egregious, deliberate and intentional misconduct; and (3) the Commonwealth has failed to comply with its obligation to furnish the defendant with exculpatory evidence.

With regard to the dismissal motion, an evidentiary hearing must be conducted on the following issues: (1) if Ms. Farak and/or the Amherst drug lab engaged in egregious misconduct in the handling, storage, and analysis of suspected narcotics during the time period between November 2011 and January 2012, when the Amherst drug lab had custody and control of the alleged controlled substances related to the defendant's case; (2) if such misconduct has substantially prejudiced the defendant or irreparably harmed his right to a fair trial; or (3) if such egregious misconduct was deliberate and intentional, warranting a prophylactic sanction of dismissal.

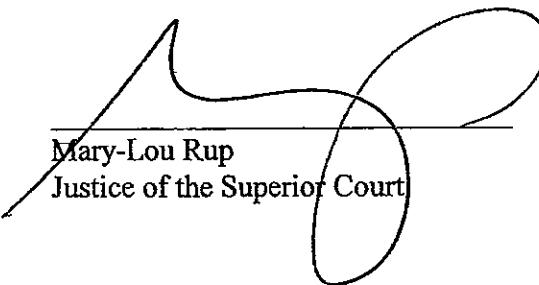
With regard to the defendant's claim that the Commonwealth has failed to produce exculpatory evidence of the nature that the defendant asserts, the defendant makes a sweeping claim that the Commonwealth "does not appear to have come to grips with [the] reality" of its decision to continue its prosecution of the defendant on the narcotics offenses, and has produced only such discovery as the Office of the Massachusetts Attorney General (which handles the prosecution of Ms. Farak) has produced. The Commonwealth is reminded of its obligation to seek from government agencies (including the Office of the Attorney General) and to produce exculpatory evidence that may be favorable to this defendant's case, and not simply turn a blind eye to what is not in its immediate control.

II. Motion in Limine to Preclude Introduction of Expert Visual Identification of Alleged Narcotics

In prosecutions of narcotics offenses, the Commonwealth must prove beyond a reasonable doubt, as an element of the offense charged, that a substance is the particular

controlled substance alleged in the indictment. *Commonwealth v. Vasquez*, 456 Mass. 350, 361 (2010). When, in *Commonwealth v. Dawson*, 399 Mass. 465 (1987), the Supreme Judicial Court accepted that substances can be identified as controlled substances through testimony of experienced police officers rather than through laboratory analysis or testimony of a qualified chemist,<sup>1</sup> it stated that before permitting such testimony, the judge must first determine if the officer has sufficient narcotics experience to give an opinion as to the identity of a particular substance. *Id.* at 467.

It appears that, in this case, the Commonwealth may seek to prove the identity of the alleged narcotics through police testimony. Before permitting a jury to receive such opinion evidence, the judge as “gatekeeper” must determine if such opinion meets the five requirements for admissibility of expert testimony in criminal trials set forth in *Commonwealth v. Barbosa*, 457 Mass. 773, 783 (2010). See also, *Commonwealth v. Lanigan*, 419 Mass. 15, 25-26 (1994). In my view, that evidentiary hearing may be conducted at any time prior to trial. However, because the Commonwealth may offer other circumstantial evidence of the identity of the alleged narcotics during the trial, it appears that, in the interest of judicial economy, the trial judge ought to hear and decide this motion.



Mary-Lou Rup  
Justice of the Superior Court

Dated: July 23, 2013

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<sup>1</sup> The court also noted: “We suspect it would be a rare case in which a witness’s statement that a particular substance looked like a controlled substance would alone be sufficient to support a conviction.” *Id.*







## Luke Ryan

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**From:** Luke Ryan  
**Sent:** Thursday, October 10, 2013 12:04 PM  
**To:** 'Foster, Kris (AGO)'  
**Subject:** RE: Commonwealth v. Rolando Penate, 12-083

The mail just came and there is nothing in it from you. Before agreeing to forgo the view, I would obviously like to review the video to see if it serves my purposes. Under the circumstances, I intend to file the motion to expand the time one week and note, in the motion, your representation that the video has been mailed to me and my desire to view it to determine whether my trip to Amherst is necessary.

-----Original Message-----

From: Foster, Kris (AGO) [<mailto:kris.foster@state.ma.us>]  
Sent: Thursday, October 10, 2013 9:10 AM  
To: Luke Ryan  
Cc: Velazquez, Eduardo (DAA)  
Subject: RE: Commonwealth v. Rolando Penate, 12-083

On the 8th I sent you the dvd of the lab tour. Please let me know if you get it and if you'll still want a personal tour

---

From: Luke Ryan [[LRyan@strhlaw.com](mailto:LRyan@strhlaw.com)]  
Sent: Wednesday, October 09, 2013 7:11 PM  
To: Foster, Kris (AGO)  
Cc: Velazquez, Eduardo (WES)  
Subject: RE: Commonwealth v. Rolando Penate, 12-083

Thanks. Please know that if my visit cannot take place tomorrow, I am going to have to file an emergency motion to expand the time permitted to allow the view to occur.

From: Foster, Kris (AGO) [<mailto:kris.foster@state.ma.us>]  
Sent: Wednesday, October 09, 2013 9:04 AM  
To: Luke Ryan  
Cc: Velazquez, Eduardo (DAA)  
Subject: RE: Commonwealth v. Rolando Penate, 12-083

I'm waiting to hear back from my supervisors regarding how to handle this ruling. I'll keep you posted.

Kris C. Foster  
Assistant Attorney General  
Appeals Division, Criminal Bureau  
One Ashburton Place  
Boston, Massachusetts 02108  
(617) 963-2833

From: Luke Ryan [<mailto:LRyan@strhlaw.com>]  
Sent: Tuesday, October 08, 2013 3:55 PM  
To: Foster, Kris (AGO)  
Cc: Velazquez, Eduardo (WES)  
Subject: Commonwealth v. Rolando Penate, 12-083

Greetings,

I am writing in the hopes of making arrangements to view the Amherst Laboratory. As you know, Judge Kinder gave me a relatively small window in which to go on this view. I am available to do so on Thursday at 4 pm. Is this time/date available?

Sincerely,

Luke

[cid:image001.jpg@01CEC523.5BE2A3B0]

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*The Commonwealth of Massachusetts  
Massachusetts State Police  
Office of the Attorney General - West  
1350 Main Street, Fourth Floor  
Springfield, Massachusetts 01103*

January 24, 2013

**To:** Detective Lieutenant Robert M. Irwin  
SPDU AG, Commanding

**From:** Trooper Randy Thomas #2935  
SPDU AG West

**Subject:** 13-034-4804-1003  
Search warrant execution  
Vehicle of Sonja FARAK

1. On 01-19-13 at 0323 hours, a search warrant was executed on a vehicle owned by Sonja FARAK of 37 Laurel Park in Northampton. The search was of a 2002 Volkswagen Golf, color black, VIN: 9BWGK61J524069609, and bearing MA registration 80WJ06 registered to Sonja J. FARAK. The search was conducted at the State Police Barracks in Northampton at 555 North King St. in Northampton where the vehicle had been secured the previous day. The search was conducted by Detective Lieutenant Robert Irwin, Sergeant Joseph Ballou and I, Trooper Randy Thomas, all assigned to the State Police Detective Unit of the Attorney General's Office. Trooper Christopher Dolan from the State Police Crime Scene Services Section photographed the vehicle and evidence before and during the search.

2. The search commenced at 0323 hours. The following items were found in the vehicle and were secured and seized into evidence:

- 1 1 manila envelope "A08-02990 + 0289" containing evidence bag & unknown paper
- 2 1 envelope "For Jim Hanchett"
- 3 1 Zip lock baggie containing (34) white capsules
- 4 Assorted lab paperwork
- 5 Assorted lab paperwork

BUREAU OF INVESTIGATIVE SERVICE

MASS. STATE POLICE

Year/Dist/Crime/Case

13-034-4804-1003

Serial # 001

Captain

Supervisor  
JB

FARAK DISCOVERY

PAGE: 00002586

**13-034-4804-1003**  
**Search warrant execution**  
**Vehicle of Sonja FARAK**

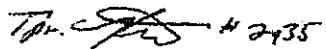
- 6 Envelope "A11-03020 -> A1103022, 2-29-12 SFD V. Dimitry Bogo"  
containing lab paperwork
- 7 2 manila envelopes "A12-01204" and "A11-04545 -> A11-04546"
- 8 Assorted lab paperwork
- 9 1 Zip lock bag containing white powder substance
- 10 1 Zip lock bag containing (10) assorted pills
- 11 1 Envelope "A11-01848-01849" "To Joseph Wentworth Northampton  
District ADA Michael Russo" containing assorted lab paperwork  
& positive morphine test
- 12 1 Manila envelope "A10-04462" "To do" containing paperwork and  
multiple clear plastic bags (some cut open).
- 13 1 large Manila mailing envelope with Hinton State Lab return address  
containing 3 clear plastic bags (all cut open) & 1 knife
- 14 1 Manila mailing envelope labeled 'return to sender' contains assorted lab  
paper work
- 15 1 Manila envelope "A09-01405" containing assorted lab paperwork
- 16 1 CVS pill bottle containing (19) orange pills & 1 CVS empty pill bottle  
labeled "Sonja Farak"
- 17 1 Clear glass beaker
- 18 Metal mesh, 1 metal rod, clear plastic baggie containing dark colored  
substance, wax paper containing white chunk substance, and 1  
clear, knotted, plastic baggie containing white chunk substance  
(That bag was inside of 2 outer baggies.)
- 19 1 CVS pill bottle labeled "Sonja Farak" "IC LAMOTRIGINE 150  
MG" containing (41.5) white pills & 1 CVS pill bottle labeled  
"Sonja Farak" "IC ESCITALOPRAM 20 MG" containing (55)  
white pills

**13-034-4804-1003**  
**Search warrant execution**  
**Vehicle of Sonja FARAK**

20      1 MA DOT Certificate of Registration for MA Reg 80WJ06, 2002  
          Volkswagen Golf, Black to Sonja Farak

3.           The search of the vehicle was completed at 0456 hours. A copy of the search warrant was left in the vehicle.
4.           The car was re-secured at the Northampton Barracks and the evidence was transported by Sergeant Ballou and Trooper Thomas to the Attorney General's Office at 1350 Main St. 4<sup>th</sup> Floor in Springfield where it was secured.

Respectfully submitted,

 4-2435

Randy Thomas  
Trooper, Massachusetts State Police  
Office of the Attorney General







**Luke Ryan**

---

**From:** Foster, Kris (AGO) <kris.foster@state.ma.us>  
**Sent:** Tuesday, September 17, 2013 9:28 AM  
**To:** Luke Ryan  
**Subject:** RE: Motion for Access to the Amherst Lab

Hi Luke,  
Our position is that viewing the seized evidence is irrelevant to any case other than Farak's.

Kris

*Kris C. Foster  
Assistant Attorney General  
Appeals Division, Criminal Bureau  
One Ashburton Place  
Boston, Massachusetts 02108  
(617) 963-2833*

---

**From:** Luke Ryan [mailto:[LRyan@strhlaw.com](mailto:LRyan@strhlaw.com)]  
**Sent:** Monday, September 16, 2013 4:45 PM  
**To:** Foster, Kris (AGO)  
**Subject:** RE: Motion for Access to the Amherst Lab

Hi Kris,

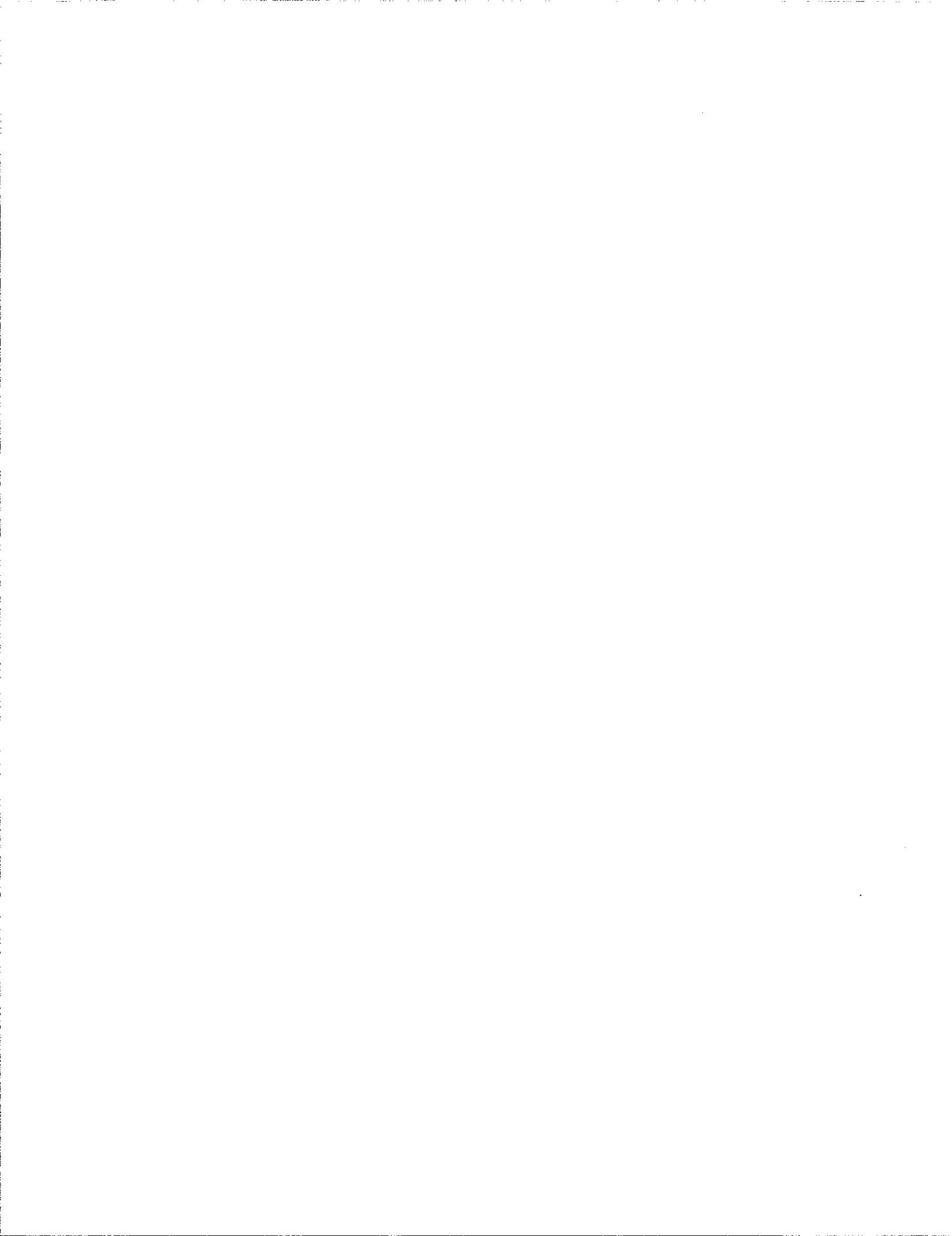
Has your office determined what it's position will be with respect to viewing the seized evidence?

Best,

Luke







COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

TRIAL COURT OF THE  
COMMONWEALTH  
SUPERIOR COURT DEPT.  
INDICTMENT NO. 12-083

HAMPDEN COUNTY  
SUPERIOR COURT  
**FILED**

OCT - 2 2013

Commonwealth

HAMPDEN COUNTY  
SUPERIOR COURT  
**FILED**

OCT - 4 2013

*Devin Shaffer*  
CLERK OF COURTS

v.  
ROLANDO PENATE

*Devin Shaffer*  
CLERK OF COURTS

**DEFENDANT'S MOTION TO INSPECT PHYSICAL EVIDENCE**

Now comes the defendant in the above-entitled action and respectfully requests that this Honorable Court issue an order, pursuant to Mass. R. Crim. P. 17(a)(2), *Commonwealth v. Lampron*, 441 Mass. 265 (2004), and *Commonwealth v. Matis*, 446 Mass. 632 (2006), compelling the Attorney General's Office and/or the Massachusetts State Police to permit undersigned counsel, an investigator and/or expert to conduct an inspection/examination of physical evidence recovered during searches conducted in the course of the investigation and prosecution of Sonja Farak. (See Ex. A, Report of Trooper Randy Thomas re: Search Warrant Execution of Farak vehicle (Jan. 24, 2013; Ex. B, Report of Sgt. Joseph Ballou re: Search Warrant Execution of Tote Bag Recovered from Amherst Lab (Feb. 15, 2013); Ex. C, Report of Sgt. Joseph Ballou re: Visit to the Amherst Laboratory (Feb. 15, 2013); Ex. D, Office of the Attorney General Department Case Report (Jan. 29, 2013).)

The Supreme Judicial Court (SJC) has made clear that Rule 17(a)(2) governs these circumstances,

*DENIED. I am not persuaded that Rule 17(a)(2) permits a third-party to inspect evidence held in a pending criminal case. Particularly where the physical evidence has been described in detail for the defendant and where the physical evidence has been provided.*

*10/2/13 JKL*

*63*

as it provides for the summonsing of documentary evidence and other "objects" from third parties for use at trial, and permits the judge to order that they be produced prior to trial for purposes of inspection. Such inspection can include inspection by experts who may be called as witnesses to testify at trial regarding the import or significance of the objects.

*Matis*, 446 Mass. at 634.

The defendant states that disgraced chemist Sonja Farak originally analyzed the alleged cocaine and heroin he is charged with distributing and possessing with the intent to distribute. Recently furnished discovery reveals that, following Farak's arrest and indictment, the Commonwealth had these substances "re-tested" at the State Police Crime Laboratory in Sudbury.

The defendant states that, in order to effectively defend his case at trial, and at pretrial motions – where he has sought dismissal and will likely seek to exclude the results of any "re-testing" should his motion to dismiss be denied – his counsel requires a full understanding of the items seized by law enforcement in the course of its investigation. Such an understanding can only be achieved by means of a personal inspection of the evidence.

Police reports generated as a result of the search of Farak's car indicate that it contained lab materials related to cases dating back to 2008, as well as plastic bags containing substances believed to be narcotics. While pictures were taken during the execution of the warrant, neither the quantity nor quality of these photographs is sufficient to resolve what the evidence in Farak's car means in terms of the timing and scope of her criminal conduct and the timing and scope of the deficiencies at the

laboratory where she was employed. These are among the very issues the evidentiary hearing in this case has been scheduled to resolve.<sup>1</sup>

During a recent evidentiary hearing in parallel post-conviction proceedings, Sgt. Joseph Ballou was questioned extensively regarding the physical evidence in the possession of law enforcement. (*See Ex. E, Transcript of Testimony of Jospgeh Ballou (Sept. 9, 2013).*) While the defendants in these proceedings have argued that such evidence suggests that Farak was engaged in evidence tampering years before her arrest, the Hampden County District Attorney's office has adopted the position taken by the Attorney General's office that the physical evidence in its possession only supports an inference that her misconduct began in the fall of 2012. To date, defendants like Mr. Penate have been forced to accept representations concerning the nature of this critical evidence from an agency that has consistently turned a blind eye toward anything suggesting that the target of its prosecution committed other crimes with which she has not been charged.<sup>2</sup>

---

<sup>1</sup> On July 23, 2013, following the argument of counsel, the Honorable Mary-Lou Rup issued an order finding that

[A]n evidentiary hearing must be conducted on the following issues: (1) if Ms. Farak and/or the Amherst drug lab engaged in egregious misconduct in the handling, storage, and analysis of suspected narcotics during the time period between November 2011 and January 2012, when the Amherst drug lab had custody and control of the alleged controlled substances related to the defendant's case; (2) if such misconduct has substantially prejudiced the defendant or irreparably harmed his right to a fair trial; or (3) if such egregious misconduct was deliberate and intentional, warranting a prophylactic sanction of dismissal.

(Mem. on Def.'s Mot. to Dismiss 2 (July 23, 2013).)

<sup>2</sup> For example, on May 10, 2013, Sgt. Ballou conducted an interview with Springfield Police Officer Gregory Bigda. According to Officer Bigda, at some point in early 2012, he seized 51 pills suspected of being oxycodone. These 51 pills were submitted to the

Following the presentation of evidence at aforementioned post-conviction proceeding, undersigned counsel made an oral motion for the relief sought by this written motion. When the Attorney General's office objected, the Honorable Jeffrey Kinder directed the parties to confer with an eye towards reaching an agreement. Ultimately, discussions with the Attorney General's office concluded on September 17, 2013, when an Assistant Attorney General conveyed the position of her office that "viewing the seized evidence is irrelevant to any case other than Farak's." (Ex. F, E-mail correspondence between AAG Kris Foster and Attorney Luke Ryan.)

Based on the foregoing, the defendant respectfully requests that this Honorable Court allow this motion and issue an order permitting counsel for the defendant (including an investigator and/or expert) to:

1. Access the location where the physical evidence pertaining to the prosecution of Sonja Farak is currently being stored and, while under the supervision of the State Police, conduct a visual inspection of said physical evidence;
2. Take photographs, video recordings, measurements, notes, and/or drawings of said physical evidence; and
3. Make available to other defense attorneys handling cases involving the Amherst laboratory the results of the inspection, including access to any

---

Amherst Laboratory for analysis on March 8, 2012. On May 8, 2012, Farak analyzed the pills and certified that the 61 pills submitted for analysis did contain any narcotics or illegal drugs. When asked whether these facts raised concerns regarding the possibility that Farak tampered with additional evidence, Ballou stated that they did. However, neither he nor anyone else involved in the Farak investigation made any effort to determine how many pills were logged into evidence when Springfield Police relinquished custody of them to the Amherst lab.

photographs, video recordings, measurements, notes, and/or drawings made  
during the inspection.

Respectfully Submitted,  
**ROLANDO PENEATE**

By \_\_\_\_\_

His Attorney

**LUKE RYAN**

BBO#664999

SASSON, TURNBULL, RYAN & HOOSE  
100 Main Street, 3<sup>rd</sup> Floor  
Northampton, MA01060  
(413) 586-4800  
(fax) (413) 582-6419

Ex. A



**The Commonwealth of Massachusetts  
Massachusetts State Police  
Office of the Attorney General - West  
1350 Main Street, Fourth Floor  
Springfield, Massachusetts 01103**

January 24, 2013

To: Detective Lieutenant Robert M. Irwin  
SPDU AG, Commanding

From: Trooper Randy Thomas #2935  
SPDU AG West

Subject: 13-034-4804-1003  
Search warrant execution  
Vehicle of Sonja FARAK

1. On 01-19-13 at 0323 hours, a search warrant was executed on a vehicle owned by Sonja FARAK of 37 Laurel Park in Northampton. The search was of a 2002 Volkswagen Golf, color black, VIN: 9BWGK61J524069609, and bearing MA registration 80WJ06 registered to Sonja J. FARAK. The search was conducted at the State Police Barracks in Northampton at 555 North King St. in Northampton where the vehicle had been secured the previous day. The search was conducted by Detective Lieutenant Robert Irwin, Sergeant Joseph Ballou and I, Trooper Randy Thomas, all assigned to the State Police Detective Unit of the Attorney General's Office. Trooper Christopher Dolan from the State Police Crime Scene Services Section photographed the vehicle and evidence before and during the search.

2. The search commenced at 0323 hours. The following items were found in the vehicle and were secured and seized into evidence:

- 1 1 manila envelope "A08-02990 + 0289" containing evidence bag & unknown paper
- 2 1 envelope "For Jim Hanchett"
- 3 1 Zip lock baggie containing (34) white capsules
- 4 Assorted lab paperwork
- 5 Assorted lab paperwork

BUREAU OF INVESTIGATIVE SERVICE

MASS. STATE POLICE

Year/Dist/Crime/Case

13-034-4804-1003

Serial # 001

Captain

Supervisor

13-034-4804-1003

Search warrant execution  
Vehicle of Sonja FARAK

- 6 Envelope "A11-03020 -> A1103022, 2-29-12 SFD V. Dimitry Bogo" containing lab paperwork
- 7 2 manila envelopes "A12-01204" and "A11-04545 -> A11-04546"
- 8 Assorted lab paperwork
- 9 1 Zip lock bag containing white powder substance
- 10 1 Zip lock bag containing (10) assorted pills
- 11 1 Envelope "A11-01848-01849" "To Joseph Wentworth Northampton District ADA Michael Russo" containing assorted lab paperwork & positive morphine test
- 12 1 Manila envelope "A10-04462" "To do" containing paperwork and multiple clear plastic bags (some cut open).
- 13 1 large Manila mailing envelope with Hinton State Lab return address containing 3 clear plastic bags (all cut open) & 1 knife
- 14 1 Manila mailing envelope labeled 'return to sender' contains assorted lab paperwork
- 15 1 Manila envelope "A09-01405" containing assorted lab paperwork
- 16 1 CVS pill bottle containing (19) orange pills & 1 CVS empty pill bottle labeled "Sonja Farak"
- 17 1 Clear glass beaker
- 18 Metal mesh, 1 metal rod, clear plastic baggie containing dark colored substance, wax paper containing white chunk substance, and 1 clear, knotted, plastic baggie containing white chunk substance (That bag was inside of 2 outer baggies.)
- 19 1 CVS pill bottle labeled "Sonja Farak" "IC LAMOTRIGINE 150 MG" containing (41.5) white pills & 1 CVS pill bottle labeled "Sonja Farak" "IC ESCITALOPRAM 20 MG" containing (55) white pills

13-034-4804-1003  
Search warrant execution  
Vehicle of Sonja FARAK

20 I MA DOT Certificate of Registration for MA Reg 80WI06, 2002  
Volkswagen Golf, Black to Sonja Farak

3. The search of the vehicle was completed at 0456 hours. A copy of the search warrant was left in the vehicle.

4. The car was re-secured at the Northampton Barracks and the evidence was transported by Sergeant Ballou and Trooper Thomas to the Attorney General's Office at 1350 Main St. 4<sup>th</sup> Floor in Springfield where it was secured.

Respectfully submitted,



Randy Thomas  
Trooper, Massachusetts State Police  
Office of the Attorney General

Ex. B



*The Commonwealth of Massachusetts  
Massachusetts State Police  
Office of the Attorney General - West  
1350 Main Street, Fourth Floor  
Springfield, Massachusetts 01103*

February 15, 2013

To: Detective Lieutenant Robert M. Irwin  
SPDU AG, Commanding

From: Sergeant Joseph F. Ballou #2302  
SPDU AG West

Subject: Search Warrant Execution of Tote Bag Recovered from Amherst Lab  
CS #13-034-4804-1003

1. On Friday, January 25, 2013, at the Office of the Attorney General in Springfield, I executed a search warrant of a turquoise colored nylon tote bag. The bag was recovered from the workstation of Sonja FARAK at the Amherst Drug Laboratory by Detective Lieutenant Robin Fabry of State Police Crime Scene Services on Friday January 18, 2013. Trooper Evan Breeding was also present for the search warrant execution and took digital pictures.

2. We began the search at approximately 4:15 PM. The following is an inventory of the property taken pursuant to the search warrant:

1. Turquoise colored nylon tote bag with gold colored handles and "Academy Broadway" patch
2. Square cardboard box, yellow and blue in color, labeled "J&W Scientific"
3. 16oz box of "Baking Soda" in clear plastic bag
4. 10oz canister of "Double Acting Baking Powder"
5. Ziploc bag containing bar of Dove soap and razor blade

BUREAU OF INVESTIGATIVE SERVICE

MASS. STATE POLICE

Year/Dist/Crime/Case

13-034-4804-1003

Serial # 003

Captain

Supervisor

DLT Rm I 2 PAGES 2833

**Subject:** Search Warrant Execution of Tote Bag Recovered from Amherst Lab  
CS #13-034-4804-1003

6. Green glass bottle
  7. Various clear plastic bags, one contains a white chunk
  8. 1 clear plastic bag containing K-Pack lab evidence bag with initials "RP", dated 12-13-12
  9. 7 K-Pack lab evidence bags cut open with various dates, and 2 with initials "SF"
  10. 1 K-Pack lab evidence bag containing white powder and initials "SF"
  11. Various plastic bags including one with white powder residue
  12. Ziploc bag containing opened 1lb container of "Soy Candle Wax" off-white colored flakes
  13. 2 hexagonal plastic lab dishes, orange plastic cap
  14. Plastic bag containing wax paper fold
  15. 8oz bar of "Oven Baked Clay" and empty bag of "Oven Baked Clay"
  16. 1 sheet of paper with sequence table
  17. Piece of red rubber, wooden toothpick, and copper colored wire fragments
  18. Hair brush in plastic bag
  19. Deodorant
  20. Sports bra
3. We completed the search at approximately 5:00 PM and secured the listed property in the evidence room. Interestingly, I found the copper colored wire fragments in Item #17 were consistent in appearance with the copper colored wire fragments we found in the baggie of drugs in the driver's side door of FARAK's vehicle. We stored the drug evidence, Items 7, 10, 11, and 14, in the temporary drug locker and submitted them for analysis on Thursday, January 31, 2013.
4. I filed the return of service at the Eastern Hampshire District Court on January 29, 2013.



*The Commonwealth of Massachusetts  
 Massachusetts State Police  
 Office of the Attorney General - West  
 1350 Main Street, Fourth Floor  
 Springfield, Massachusetts 01103*

February 15, 2013

**To:** Detective Lieutenant Robert M. Irwin  
 SPDU AG, Commanding

**From:** Sergeant Joseph F. Ballou #2302  
 SPDU AG West

**Subject:** Visit to the Amherst Laboratory on Thursday, February 14, 2013  
 CS #13-034-4804-1003

1. On Thursday, February 14, 2013, at approximately 8:30 AM, I met with Troopers Laura Cary and Christopher Baron from Crime Scene Services and Supervisor Bruce Cranstoun of the State Police Forensic Services Group at the Amherst Laboratory. State Police had secured the lab as a crime scene since January 18, 2013. Detective Lieutenant Robert Irwin assigned me to have the scene photographed and videotaped before the scene was released to lab personnel.
2. We found the lab properly secured and alarmed and Mr. Cranstoun opened the rooms as needed. Troopers Cary and Baron took overall video and photographs of the lab office area, Room N251; the drug locker, Room 251B; the office of lab supervisor James HANCHETT, Room N247; the lab, Room N236; and the second lab, Room N245.
3. I contacted Chemist Sharon SALEM for information regarding the second lab, Room N245. She explained that the second lab was newer and had a ventilation hood. This lab with the hood was used to test marijuana and chemicals to provide protection for the chemists from harmful fumes. She said the chemists did not have

BUREAU OF INVESTIGATIVE SERVICE  
 MASS. STATE POLICE  
 Year/Div/Crime/Case  
 13-034-4804-1003  
 Serial # 004

**Subject:** Visit to the Amherst Laboratory on Thursday, February 14, 2013  
CS #13-034-4804-1003

designated desks or storage areas within this lab. I searched this second lab in the presence of Mr. Cranstoun and found it to be very orderly. I did not locate any controlled substances or items of evidentiary value.

4. At approximately 10:20 AM, Mr. Cranstoun then brought me to the drug locker and showed me five items that he had retrieved and secured when he assisted the Narcotics Inspection Unit in conducting an inventory of the Amherst Lab on Saturday, January 19, 2013. Mr. Cranstoun had sealed each of the items in heat sealed clear plastic bags, marked them with the date and his initials, and secured them in the drug locker. Three of the items were glass beakers containing white powders and marked as control samples. Mr. Cranstoun said he found these on the counters of the lab and that they would have been used by chemists during their testing. Since they appeared to contain controlled substances, he had secured these three items for safekeeping. Mr. Cranstoun said he found the two other items in the desk drawer of Sonja FARAK's work station. He showed me the drawer he had retrieved these two items from and I found it was the fourth drawer from the left at FARAK's work station. Mr. Cranstoun also told me that he found the objects in the second package inside the "Fisherbrand" weighing paper box cover sealed in the first package. He had separated the controlled substances from the other objects located inside the box cover. I seized these two items into evidence and secured them at the State Police Detective Unit at the Office of the Attorney General in Springfield. The two items are described as follows:

1. "Fisherbrand" weighing paper box cover containing a glass rod, glass beaker, rubber stopper, and 2 paper clips.
2. Three smaller clear plastic bags that appear to have been sealed and marked by FARAK. The three smaller bags are described as follows:
  - i. Initialed "SF" and marked "found 3-16-12 @ end of bench. = A12-00403? Hadley" and containing a glassine bag stamped "Rolex" with brownish residue.
  - ii. Initialed "SF" and marked "found on 2-8-11 under Explorer Pro on

Subject: Visit to the Amherst Laboratory on Thursday, February 14, 2013  
CS #13-034-4804-1003

bench 2A" and containing a small green pill.

III. Initialed "SF" and containing a watch type battery.

Detective Lieutenant Robin Whitney previously reported to me that, when she asked FARAK if there would be any reason for drugs to be stored in her work station, FARAK replied that she had found a heroin packet on the floor and put it in her drawer. The glassine bag found by Mr. Cranstoun in FARAK's workstation appears to be the heroin packet FARAK referred to in her interview.

5. At approximately 10:50 AM, we secured the Amherst Lab and departed.

INDEX BY NAME:

Amherst Drug Lab, 637 North Pleasant Street, Amherst, MA 01003.  
413-545-2608

FARAK, Sonja J., WF, DOB [REDACTED]  
SSN [REDACTED]

HANCHETT, James, WM, DOB 9/8/1949, 637 North Pleasant St, Amherst, MA 01003.  
413-545-2606

SALEM, Sharon, WF, DOB 11/22/1961, 637 North Pleasant St, Amherst, MA 01003  
413-545-2601

Respectfully submitted,



Joseph F. Ballou  
Sergeant, Massachusetts State Police  
Office of the Attorney General

Ex.D

1/29/2013

## Office of the Attorney General Department Case Report

Department Case Number: 13-034-4804-1003

Related Case #'s: AMHERST, FARAK, LAB, SONIA, SONJA, SONJA FARAK

### Case Information

Case Officer: 2302 - Joseph Ballou  
Offense Date/Time: 01/18/2013 - 10:00Hrs  
Offense Location: 637 North Pleasant St Amherst  
Offense Type: 35A - Drug / Narcotic Violation  
Expiration Date:  
Jurisdiction:  
Court Date:  
Disposition:  
Disposition Date:  
Case Comments:

### Case Names

Name/Type: Suspect	Sex: F	Race: W	DOB: 01/13/1978	Home Phone#:
Name: FARAK, SONJA, J				ID#: S15024987
Address: 37 Laurel Park Northampton, MA 01060				SSN#: 037-56-9138
Additional Name Information:				

### Case Items

Item Number: 001  
Container #:  
Status/Location: Stored in Location - Western SP-Main Evidence Room -Shelf A11  
Collection Date/Time: 01/19/2013 - 03:23Hrs  
Collected By: 1230 - Robert Irwin  
Collection Location: Hatchback Of Vehicle Of Sonja Farak  
Packaging/Quantity/Item Type: One plastic evidence bag containing - 1 - Papers (Misc)  
Detail Description: (1) Manilla envelope "A08-02990 + 0289" containing evidence bag & unknown paper  
Owner: SONJA FARAK

#### Item Notes:

Item Number: 002  
Container #:  
Status/Location: Stored in Location - Western SP-Main Evidence Room -Shelf A11  
Collection Date/Time: 01/19/2013 - 03:23Hrs  
Collected By: 2302 - Joseph Ballou  
Collection Location: Hatchback Of Vehicle Of Sonja Farak  
Packaging/Quantity/Item Type: One plastic evidence bag containing - 1 - Papers (Misc)  
Detail Description: (1) Envelope "FOM: Jim Hanchett please give to Sonja thx Annie"  
Owner: SONJA FARAK

#### Item Notes:

Item Number: 003  
Container #:  
Status/Location: Stored in Location - Western SP-Main Evidence Room-Contraband  
Collection Date/Time: 01/19/2013 - 03:23Hrs  
Collected By: 1230 - Robert Irwin  
Collection Location: Hatchback Of Vehicle Of Sonja Farak  
Packaging/Quantity/Item Type: One plastic evidence bag containing - 1 - Pills / Tablets/ Capsules  
Detail Description: (1) Ziploc baggie containing (34) white capsules  
Owner: SONJA FARAK

#### Item Notes:

1/29/2013

## Office of the Attorney General Department Case Report

Department Case Number: 13-034-4804-1003

### Case Items

Item Number: 004

Container #:

Status/Location: Stored in Location - Western SP-Main Evidence Room -Shelf A11

Process: Hold for investigative purposes

Collection Date/Time: 01/19/2013 - 03:23Hrs

Collection Purpose: Evidence

Collected By: 1230 - Robert Irwin

Collection Location: Sunkist Box In Hatchback Of Vehicle Of Sonja Farak

Packaging/Quantity/Item Type: One plastic evidence bag containing - 1 - Papers (Misc)

Detail Description: Assorted lab paperwork

Owner: SONJA FARAK

Item Notes:

Item Number: 005

Container #:

Status/Location: Stored in Location - Western SP-Main Evidence Room -Shelf A11

Process: Hold for investigative purposes

Collection Date/Time: 01/19/2013 - 03:23Hrs

Collection Purpose: Evidence

Collected By: 1230 - Robert Irwin

Collection Location: Sunkist Box In Hatchback Of Vehicle Of Sonja Farak

Packaging/Quantity/Item Type: One plastic evidence bag containing - 1 - Papers (Misc)

Detail Description: Assorted lab paperwork

Owner: SONJA FARAK

Item Notes:

Item Number: 006

Container #:

Status/Location: Stored in Location - Western SP-Main Evidence Room -Shelf A11

Process: Hold for investigative purposes

Collection Date/Time: 01/19/2013 - 03:23Hrs

Collection Purpose: Evidence

Collected By: 1230 - Robert Irwin

Collection Location: Front Passenger Floor Of Vehicle Of Sonja Farak

Packaging/Quantity/Item Type: One plastic evidence bag containing - 1 - Envelope

Detail Description: (1) Envelope "A11-03020 -> A11-03022, 2-29-12, SFD, V. Dimitry Bogo" containing lab paperwork

Owner: SONJA FARAK

Item Notes:

Item Number: 007

Container #:

Status/Location: Stored in Location - Western SP-Main Evidence Room -Shelf A11

Process: Hold for investigative purposes

Collection Date/Time: 01/19/2013 - 03:23Hrs

Collection Purpose: Evidence

Collected By: 1230 - Robert Irwin

Collection Location: Front Passenger Floor Of Vehicle Of Sonja Farak

Packaging/Quantity/Item Type: One plastic evidence bag containing - 1 - Envelope

Detail Description: (2) Manilla envelopes marked "A12-01204" and "A11-04545 -> A11-04546"

Owner: SONJA FARAK

Item Notes:

Item Number: 008

Container #:

Status/Location: Stored in Location - Western SP-Main Evidence Room -Shelf A11

Process: Hold for investigative purposes

Collection Date/Time: 01/19/2013 - 03:23Hrs

Collection Purpose: Evidence

Collected By: 2302 - Joseph Ballou

Collection Location: Blue Bag In Hatchback Of Vehicle Of Sonja Farak

Packaging/Quantity/Item Type: One plastic evidence bag containing - 1 - Papers (Misc)

Detail Description: Assorted lab paperwork

Owner: SONJA FARAK

Item Notes:

1/29/2013

## Office of the Attorney General Department Case Report

Department Case Number: 13-034-4804-1003

### Case Items

Item Number: 009

Container #:

Status/Location: Stored in Location - Western SP-Main Evidence Room-Contraband

Collection Date/Time: 01/19/2013 - 03:23Hrs

Collection Purpose: Evidence

Collected By: 2302 - Joseph Ballou

Collection Location: In Blue Bag In Hatchback Of Vehicle Of Sonja Farak

Packaging/Quantity/Item Type: One plastic evidence bag containing - 1 - suspected Cocaine

Detail Description: (1) Ziplok baggie containing white powder substance

Owner: SONJA FARAK

Item Notes:

Item Number: 010

Container #:

Status/Location: Stored in Location - Western SP-Main Evidence Room-Contraband

Collection Date/Time: 01/19/2013 - 03:23Hrs

Collection Purpose: Evidence

Collected By: 2302 - Joseph Ballou

Collection Location: In Blue Bag In Hatchback Of Vehicle Of Sonja Farak

Packaging/Quantity/Item Type: One plastic evidence bag containing - 1 - Pills / Tablets/ Capsules

Detail Description: (1) Ziplok baggie containing (10) assorted pills

Owner: SONJA FARAK

Item Notes:

Item Number: 011

Container #:

Status/Location: Stored in Location - Western SP-Main Evidence Room-Shelf A.11

Collection Date/Time: 01/19/2013 - 03:23Hrs

Collection Purpose: Evidence

Collected By: 2302 - Joseph Ballou

Collection Location: Sunkist Box In Hatchback Of Vehicle Of Sonja Farak

Packaging/Quantity/Item Type: One plastic evidence bag containing - 1 - Envelope

Detail Description: (1) Envelope "A11-04848 > 01849, Joseph Wentworth, Northampton District, ADA Michael Russo" containing assorted lab paper work & positive morphine test paperwork

Owner: SONJA FARAK

Item Notes:

Item Number: 012

Container #:

Status/Location: Stored in Location - Western SP-Main Evidence Room-Shelf A.11

Collection Date/Time: 01/19/2013 - 03:23Hrs

Collection Purpose: Evidence

Collected By: 2302 - Joseph Ballou

Collection Location: In Hatchback Of Vehicle Of Sonja Farak

Packaging/Quantity/Item Type: One plastic evidence bag containing - 1 - Envelope

Detail Description: (1) Manilla Envelope "A10-04462, To Do" containing paperwork & multiple clear plastic bags (some cut open)

Owner: SONJA FARAK

Item Notes:

Item Number: 013

Container #:

Status/Location: Stored in Location - Western SP-Main Evidence Room-Shelf A.11

Collection Date/Time: 01/19/2013 - 03:23Hrs

Collection Purpose: Evidence

Collected By: 2302 - Joseph Ballou

Collection Location: In Hatchback Of Vehicle Of Sonja Farak

Packaging/Quantity/Item Type: One plastic evidence bag containing - 1 - Envelope

Detail Description: (1) Large Manilla Envelope with Hinton State Lab return address containing (3) clear plastic bags all cut open, & (1) knife

Owner: SONJA FARAK

Item Notes:

1/29/2013

## Office of the Attorney General Department Case Report

Department Case Number: 13-034-4804-1003

### Case Items

Item Number: 014  
Container #: Process: Hold for investigative purposes  
Status/Location: Stored in Location - Western SP-Main Evidence Room -Shelf A11  
Collection Date/Time: 01/19/2013 - 03:23Hrs Collection Purpose: Evidence  
Collected By: 2302 - Joseph Ballou  
Collection Location: In Hatchback Of Vehicle Of Sonja Farak  
Packaging/Quantity/Item Type: One plastic evidence bag containing - 1 - Envelope  
Detail Description: (1) Manilla Mailing Envelope labelled "Return to sender" containing assorted lab paperwork  
Owner: SONJA FARAK  
Item Notes:

Item Number: 015  
Container #: Process: Hold for investigative purposes  
Status/Location: Stored in Location - Western SP-Main Evidence Room -Shelf A11  
Collection Date/Time: 01/19/2013 - 03:23Hrs Collection Purpose: Evidence  
Collected By: 2302 - Joseph Ballou  
Collection Location: In Hatchback Of Vehicle Of Sonja Farak  
Packaging/Quantity/Item Type: One plastic evidence bag containing - 1 - Envelope  
Detail Description: (1) Manilla Envelope "A09-01405" containing assorted lab paperwork  
Owner: SONJA FARAK  
Item Notes:

Item Number: 016  
Container #: Process: Hold for investigative purposes  
Status/Location: Stored in Location - Western SP-Main Evidence Room-Contraband  
Collection Date/Time: 01/19/2013 - 03:23Hrs Collection Purpose: Evidence  
Collected By: 2302 - Joseph Ballou  
Collection Location: In Hatchback Of Vehicle Of Sonja Farak  
Packaging/Quantity/Item Type: One plastic evidence bag containing - 1 - Pills / Tablets/ Capsules  
Detail Description: (1) CVS Pill bottle containing (19) orange pills, (1) empty CVS pill bottle labelled "Sonja Farak"  
Owner: SONJA FARAK  
Item Notes:

Item Number: 017  
Container #: Process: Hold for investigative purposes  
Status/Location: Stored in Location - Western SP-Main Evidence Room -Shelf A11  
Collection Date/Time: 01/19/2013 - 03:23Hrs Collection Purpose: Evidence  
Collected By: 2302 - Joseph Ballou  
Collection Location: In Hatchback Of Vehicle Of Sonja Farak  
Packaging/Quantity/Item Type: One plastic evidence bag containing - 1 - Envelope  
Detail Description: (1) Clear beaker (glass)  
Owner: SONJA FARAK  
Item Notes:

Item Number: 018  
Container #: Process: Hold for investigative purposes  
Status/Location: Stored in Location - Western SP-Main Evidence Room-Contraband  
Collection Date/Time: 01/19/2013 - 03:23Hrs Collection Purpose: Evidence  
Collected By: 2302 - Joseph Ballou  
Collection Location: In Driver's Door Compartment Of Vehicle Of Sonja Farak  
Packaging/Quantity/Item Type: One plastic evidence bag containing - 1 - suspected Cocaine  
Detail Description: (1) clear plastic bag with other plastic baggies containing white chunk substance, metal mesh, metal rod and clear plastic baggie w/ dark colored substance and wax paper containing white chunk substance  
Owner: SONJA FARAK  
Item Notes:

1/29/2013

## Office of the Attorney General Department Case Report

Department Case Number: 13-034-4804-1003

### Case Items

Item Number: 019  
Container #:  
Status/Location: Stored in Location - Western SP-Main Evidence Room-Contraband  
Collection Date/Time: 01/19/2013 - 03:23Hrs  
Collected By: 2302 - Joseph Ballou  
Collection Location: In Center Arrest In Vehicle Of Sonja Farak  
Packaging/Quantity/Item Type: One plastic evidence bag containing - 1 - suspected Cocaine  
Detail Description: (1) CVS Pill Bottle Labelled Sonja Farak 150 Mg IC LAMOTRIGINE, Containing (41.5) White Pills, (1) CVS Pill Bottle labelled Sonja Farak IC ESCITALOPRAM 20 MG, containing (55) white pills  
Owner: SONJA FARAK  
Item Notes:

Item Number: 020  
Container #:  
Status/Location: Stored in Location - Western SP-Main Evidence Room -Shelf A11  
Collection Date/Time: 01/19/2013 - 03:23Hrs  
Collected By: 2302 - Joseph Ballou  
Collection Location: In Glovebox Of Vehicle Of Sonja Farak  
Packaging/Quantity/Item Type: One plastic evidence bag containing - 1 - Papers (Misc)  
Detail Description: (1) MA DOT Certificate of Registration for MA Reg 80WJ06, 2002 Volkswagen Golf, black VIN: 96WGK61J524069609 to Sonja Farak, 37 Laurel Park Northampton, MA  
Owner: SONJA FARAK  
Item Notes:

Item Number: 021  
Container #:  
Status/Location: Stored in Location - Western SP-Main Evidence Room-Contraband  
Collection Date/Time: 01/19/2013 - 14:55Hrs  
Collected By: 2302 - Joseph Ballou  
Collection Location: SPDU AGO- Springfield  
Packaging/Quantity/Item Type: One plastic evidence bag containing - 1 - Test  
Detail Description: (1) Cocaine reagent test- Positive for Cocaine [For Item #18]  
Owner: SONJA FARAK  
Item Notes:

Item Number: 022  
Container #:  
Status/Location: Stored in Location - Western SP-Main Evidence Room-Contraband  
Collection Date/Time: 01/19/2013 - 14:55Hrs  
Collected By: 2302 - Joseph Ballou  
Collection Location: SPDU AGO- Springfield  
Packaging/Quantity/Item Type: One plastic evidence bag containing - 1 - Test  
Detail Description: (1) Modified reagent test- Positive for Heroin [For Item #18]  
Owner: SONJA FARAK  
Item Notes:

Item Number: 023  
Container #:  
Status/Location: Stored in Location - Western SP-Main Evidence Room-Contraband  
Collection Date/Time: 01/19/2013 - 14:55Hrs  
Collected By: 2302 - Joseph Ballou  
Collection Location: SPDU AGO- Springfield  
Packaging/Quantity/Item Type: One plastic evidence bag containing - 1 - Test  
Detail Description: (1) Cocaine reagent test- Negative for Cocaine (for ITEM #9)  
Owner: SONJA FARAK  
Item Notes:

1/29/2013

## Office of the Attorney General Department Case Report

Department Case Number: 13-034-4804-1003

### Case Items

Item Number: 024

Container #:

Status/Location: Stored in Location - Western SP-Main Evidence Room-Contraband

Process: Hold for investigative purposes

Collection Date/Time: 01/19/2013 - 14:55Hrs

Collection Purpose: Evidence

Collected By: 2302 - Joseph Ballou

Collection Location: SPDU AGO- Springfield

Packaging/Quantity/Item Type: One plastic evidence bag containing - 1 - Test

Detail Description: (1) Modified reagent test- Negative for Heroin (for ITEM #9)

Owner: SONJA FARAK

Item Notes:

Item Number: 025

Container #:

Status/Location: Stored in Location - Western SP-Main Evidence Room -Shelf A9

Process: Hold for investigative purposes

Collection Date/Time: 01/18/2013 - 14:07Hrs

Collection Purpose: Evidence

Collected By: SPOLD - Misc Trooper

Collection Location: Springfield District Court

Packaging/Quantity/Item Type: NO Packaging - 1 - MISC RECORDS/PAPERS/DOCS

Detail Description: (1) Black court binder of Sonja Farak

Owner: SONJA FARAK

Item Notes: Seized by Sgt John Cummings #0846

Item Number: 026

Container #:

Status/Location: Item Submitted Into Property - Western SP-Main Evidence Room-Contraband

Process: Hold for investigative purposes

Collection Date/Time: 01/18/2013 - 15:32Hrs

Collection Purpose: Evidence

Collected By: SPOLD - Misc Trooper

Collection Location: Amherst Drug Lab, 637 North Pleasant St Amherst, Cabinet Of Work Bench Of Sonja Farak

Packaging/Quantity/Item Type: One medium paper bag containing - 1 - suspected Cocaine

Detail Description: Baggie with white substance [CSSS #1]

Owner: SONJA FARAK

Item Notes: Seized by DLt Robin Fabry #0973

Item Number: 027

Container #:

Status/Location: Item Submitted Into Property - Western SP-Main Evidence Room-Contraband

Process: Hold for investigative purposes

Collection Date/Time: 01/18/2013 - 15:32Hrs

Collection Purpose: Evidence

Collected By: SPOLD - Misc Trooper

Collection Location: Amherst Drug Lab, 637 North Pleasant St Amherst, White Bin In Cabinet Of Work Bench Of Sonja Farak

Packaging/Quantity/Item Type: One medium paper bag containing - 1 - suspected Cocaine

Detail Description: White paper fold with white powder substance[CSSS #2]

Owner: SONJA FARAK

Item Notes: Seized by DLt Robin Fabry #0973

Item Number: 028

Container #:

Status/Location: Item Submitted Into Property - Western SP-Main Evidence Room-Contraband

Process: Hold for investigative purposes

Collection Date/Time: 01/18/2013 - 15:36Hrs

Collection Purpose: Evidence

Collected By: SPOLD - Misc Trooper

Collection Location: Amherst Drug Lab, 637 North Pleasant St Amherst, Tub In Cabinet Of Work Bench Of Sonja Farak

Packaging/Quantity/Item Type: One medium paper bag containing - 1 - suspected Cocaine

Detail Description: (1) Weigh dish w/ off white substance [CSSS #3]

Owner: SONJA FARAK

Item Notes: Seized by DLt Robin Fabry #0973

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## Office of the Attorney General Department Case Report

Department Case Number: 13-034-4804-1003

### Case Items

Item Number: 029.

Container #:

Process: Hold for investigative purposes

Status/Location: Item Submitted Into Property - Western SP-Main Evidence Room-Contraband

Collection Date/Time: 01/18/2013 - 15:38Hrs

Collection Purpose: Evidence

Collected By: SPOLD - Misc Trooper

Collection Location: Amherst Drug Lab, 637 North Pleasant St Amherst, Bin In Cabinet Of Work Bench Of Sonja Farak

Packaging/Quantity/Item Type: One medium paper bag containing - 1 - suspected Cocaine

Detail Description: (1) Bag white chunky substance [CSSS #4]

Owner: SONJA FARAK

Item Notes: Seized by DLt Robin Fabry #0973

Item Number: 030.

Container #:

Process: Hold for investigative purposes

Status/Location: Item Submitted Into Property - Western SP-Main Evidence Room-Contraband

Collection Date/Time: 01/18/2013 - 15:40Hrs

Collection Purpose: Evidence

Collected By: SPOLD - Misc Trooper

Collection Location: Amherst Drug Lab, 637 North Pleasant St Amherst, Bin In Cabinet Of Work Bench Of Sonja Farak

Packaging/Quantity/Item Type: One medium paper bag containing - 1 - suspected Cocaine

Detail Description: (1) Watch glass w/ white chunky substance [CSSS #5]

Owner: SONJA FARAK

Item Notes: Seized by DLt Robin Fabry #0973

Item Number: 031

Container #:

Process: Hold for investigative purposes

Status/Location: Stored in Location - Western SP-Main Evidence Room -Shelf A9

Collection Date/Time: 01/18/2013 - 15:42Hrs

Collection Purpose: Evidence

Collected By: SPOLD - Misc Trooper

Collection Location: Amherst Drug Lab, 637 North Pleasant St Amherst, Bin In Cabinet Of Work Bench Of Sonja Farak

Packaging/Quantity/Item Type: One medium paper bag containing - 1 - Glass Bottle

Detail Description: Broken glass tube [CSSS #6]

Owner: SONJA FARAK

Item Notes: Seized by DLt Robin Fabry #0973

Item Number: 032

Container #:

Process: Hold for investigative purposes

Status/Location: Stored in Location - Western SP-Main Evidence Room -Shelf A9

Collection Date/Time: 01/18/2013 - 15:45Hrs

Collection Purpose: Evidence

Collected By: SPOLD - Misc Trooper

Collection Location: Amherst Drug Lab, 637 North Pleasant St Amherst, Bin In Cabinet Of Work Bench Of Sonja Farak

Packaging/Quantity/Item Type: One medium paper bag containing - 1 - Tool

Detail Description: Pestic [CSSS #7]

Owner: SONJA FARAK

Item Notes: Seized by DLt Robin Fabry #0973

Item Number: 033

Container #:

Process: Hold for investigative purposes

Status/Location: Stored in Location - Western SP-Main Evidence Room -Shelf A9

Collection Date/Time: 01/18/2013 - 15:50Hrs

Collection Purpose: Evidence

Collected By: SPOLD - Misc Trooper

Collection Location: Amherst Drug Lab, 637 North Pleasant St Amherst, Inside Of Cabinet Of Work Bench Of Sonja Farak

Packaging/Quantity/Item Type: One large paper bag containing - 1 - Other

Detail Description: White plastic bin [CSSS #8]

Owner: SONJA FARAK

Item Notes: Seized by DLt Robin Fabry #0973

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## Office of the Attorney General Department Case Report

Department Case Number: 13-034-4804-1003

### Case Items

Item Number: 034

Container #:

Process: Hold for investigative purposes

Status/Location: Item Submitted Into Property - Western SP-Main Evidence Room-Contraband

Collection Date/Time: 01/18/2013 - 16:06Hrs

Collection Purpose: Evidence

Collected By: SPOLD - Misc Trooper

Collection Location: Amherst Drug Lab, 637 North Pleasant St Amherst, Inside Manila Folder In Drawer Of Work Bench Of Sonja Farak

Packaging/Quantity/Item Type: One medium paper bag containing - 1 - suspected Cocaine

Detail Description: White substance in baggie labeled "A12-04793" [CSSS #9]

Owner: SONJA FARAK

Item Notes: Seized by DLt Robin Fabry #0973

Item Number: 035

Container #:

Process: Hold for investigative purposes

Status/Location: Item Submitted Into Property - Western SP-Main Evidence Room-Contraband

Collection Date/Time: 01/18/2013 - 16:10Hrs

Collection Purpose: Evidence

Collected By: SPOLD - Misc Trooper

Collection Location: Amherst Drug Lab, 637 North Pleasant St Amherst, Inside Manila Folder In Drawer Of Work Bench Of Sonja Farak

Packaging/Quantity/Item Type: One medium paper bag containing - 1 - suspected Cocaine

Detail Description: Plastic baggie containing white substance labeled "A12-04791" [CSSS #10]

Owner: SONJA FARAK

Item Notes: Seized by DLt Robin Fabry #0973

Item Number: 036

Container #:

Process: Hold for investigative purposes

Status/Location: Stored In Location - Western SP-Main Evidence Room -Shelf A9

Collection Date/Time: 01/18/2013 - 16:15Hrs

Collection Purpose: Evidence

Collected By: SPOLD - Misc Trooper

Collection Location: Amherst Drug Lab, 637 North Pleasant St Amherst, Inside Manila Folder In Drawer Of Work Bench Of Sonja Farak

Packaging/Quantity/Item Type: One medium paper bag containing - 1 - Bag

Detail Description: (4) Plastic bags with initials and dates [CSSS #11]

Owner: SONJA FARAK

Item Notes: Seized by DLt Robin Fabry #0973

Item Number: 037

Container #:

Process: Hold for investigative purposes

Status/Location: Item Submitted Into Property - Western SP-Main Evidence Room

Collection Date/Time: 01/18/2013 - 16:19Hrs

Collection Purpose: Evidence

Collected By: SPOLD - Misc Trooper

Collection Location: Amherst Drug Lab, 637 North Pleasant St Amherst, Lab Night Storage Safe

Packaging/Quantity/Item Type: One medium paper bag containing - 1 - Bag

Detail Description: Empty plastic bag labeled "A12-4793" [CSSS #12]

Owner: SONJA FARAK

Item Notes: Seized by DLt Robin Fabry #0973

Item Number: 038

Container #:

Process: Hold for investigative purposes

Status/Location: Item Submitted Into Property - Western SP-Main Evidence Room-Contraband

Collection Date/Time: 01/18/2013 - 16:25Hrs

Collection Purpose: Evidence

Collected By: SPOLD - Misc Trooper

Collection Location: Amherst Drug Lab, 637 North Pleasant St Amherst, Cardboard Box In Cabinet Of Work Bench Of Sonja Farak

Packaging/Quantity/Item Type: One medium paper bag containing - 1 - suspected Cocaine

Detail Description: Empty torn plastic bag w/ white powder residue [CSSS #13]

Owner: SONJA FARAK

Item Notes: Seized by DLt Robin Fabry #0973

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## Office of the Attorney General Department Case Report

Department Case Number: 13-034-4804-1003

### Case Items

Item Number: 039

Container #:

Process: Hold for investigative purposes

Status/Location: Item Submitted Into Property - Western SP-Main Evidence Room

Collection Date/Time: 01/18/2013 - 16:32Hrs

Collection Purpose: Evidence

Collected By: SPOLD - Misc Trooper

Collection Location: Amherst Drug Lab, 637 North Pleasant St Amherst, Cardboard Box In Cabinet Of Work Bench Of Sonja Farak

Packaging/Quantity/Item Type: One medium paper bag containing - 1 - Glass Bottle

Detail Description: Plastic baggie containing (7) glass tubes & plastic bag material [CSSS #14]

Owner: SONJA FARAK

Item Notes: Seized by DLT Robin Fabry #0973

Item Number: 040

Container #:

Process: Hold for investigative purposes

Status/Location: Stored in Location - Western SP-Main Evidence Room -Shelf A9

Collection Date/Time: 01/18/2013 - 16:35Hrs

Collection Purpose: Evidence

Collected By: SPOLD - Misc Trooper

Collection Location: Amherst Drug Lab, 637 North Pleasant St Amherst, Cardboard Box In Cabinet Of Work Bench Of Sonja Farak

Packaging/Quantity/Item Type: One medium paper bag containing - 1 - Bag

Detail Description: Plastic bag containing (3) paper folds and glass material [CSSS #15]

Owner: SONJA FARAK

Item Notes: Seized by DLT Robin Fabry #0973

Item Number: 041

Container #:

Process: Hold for investigative purposes

Status/Location: Stored in Location - Western SP-Main Evidence Room -Shelf A9

Collection Date/Time: 01/18/2013 - 16:38Hrs

Collection Purpose: Evidence

Collected By: SPOLD - Misc Trooper

Collection Location: Amherst Drug Lab, 637 North Pleasant St Amherst, Cardboard Box In Cabinet Of Work Bench Of Sonja Farak

Packaging/Quantity/Item Type: One medium paper bag containing - 1 - Bag

Detail Description: Empty plastic evidence bag with label "A13-00156" [CSSS #16]

Owner: SONJA FARAK

Item Notes: Seized by DLT Robin Fabry #0973

Item Number: 042

Container #:

Process: Hold for investigative purposes

Status/Location: Stored in Location - Western SP-Main Evidence Room -Shelf A9

Collection Date/Time: 01/18/2013 - 16:45Hrs

Collection Purpose: Evidence

Collected By: SPOLD - Misc Trooper

Collection Location: Amherst Drug Lab, 637 North Pleasant St Amherst, Rear Of Cabinet Of Work Bench Of Sonja Farak

Packaging/Quantity/Item Type: One large paper bag containing - 1 - Bag

Detail Description: (1) Turquoise gym bag [CSSS #17]

Owner: SONJA FARAK

Item Notes: Seized by DLT Robin Fabry #0973

Item Number: 043

Container #:

Process: Hold for investigative purposes

Status/Location: Item Submitted Into Property - Western SP-Main Evidence Room-Contraband

Collection Date/Time: 01/18/2013 - 17:00Hrs

Collection Purpose: Evidence

Collected By: SPOLD - Misc Trooper

Collection Location: Amherst Drug Lab, 637 North Pleasant St Amherst, Top Desk Drawer Of Desk Of Sonja Farak

Packaging/Quantity/Item Type: One medium paper bag containing - 1 - Pills / Tablets/ Capsules

Detail Description: Various pills [CSSS #18]

Owner: SONJA FARAK

Item Notes: Seized by DLT Robin Fabry #0973

1/29/2013

## Office of the Attorney General Department Case Report

Department Case Number: 13-034-4804-1003

### Case Items

Item Number: 044  
Container #:  
Status/Location: Stored in Location - Western SP-Main Evidence Room -Shelf A9  
Collection Date/Time: 01/18/2013 - 17:10Hrs  
Collected By: SPOLD - Misc Trooper  
Collection Location: Amherst Drug Lab, 637 North Pleasant St Amherst, Countertop Of Work Bench Of Sonja Farak  
Packaging/Quantity/Item Type: One large paper bag containing - 1 - Other  
Detail Description: Green record log book [CSSS #19]  
Owner: SONJA FARAK  
Item Notes: Seized by DLT Robin Fabry #0973

Item Number: 045  
Container #:  
Status/Location: Stored in Location - Western SP-Main Evidence Room -Shelf A9  
Collection Date/Time: 01/18/2013 - 17:10Hrs  
Collected By: SPOLD - Misc Trooper  
Collection Location: Amherst Drug Lab, 637 North Pleasant St Amherst, Top Shelf Of Work Bench Of Sonja Farak  
Packaging/Quantity/Item Type: One cardboard box containing - 1 - MISC RECORDS/PAPERS/DOCS  
Detail Description: Log books & lab records [CSSS #20]  
Owner: SONJA FARAK  
Item Notes: Seized by DLT Robin Fabry #0973

Item Number: 046  
Container #:  
Status/Location: Stored in Location - Western SP-Main Evidence Room -Shelf A9  
Collection Date/Time: 01/18/2013 - 17:10Hrs  
Collected By: SPOLD - Misc Trooper  
Collection Location: Amherst Drug Lab, 637 North Pleasant St Amherst, Top Shelf Of Work Bench Of Sonja Farak  
Packaging/Quantity/Item Type: One cardboard box containing - 1 - MISC RECORDS/PAPERS/DOCS  
Detail Description: Log books [CSSS #21]  
Owner: SONJA FARAK  
Item Notes: Seized by DLT Robin Fabry #0973

Item Number: 047  
Container #:  
Status/Location: Item Submitted Into Property - Western SP-Main Evidence Room-Contraband  
Collection Date/Time: 01/25/2013 - 16:15Hrs  
Collected By: 2302 - Joseph Ballou  
Collection Location: Attorney General's Office-1350 Main Street, 4th Floor, Springfield, MA  
Packaging/Quantity/Item Type: One cardboard box containing - 1 - Miscellaneous  
Detail Description: J&W scientific box: 1 16oz box of pure baking soda in a clear plastic bag, a 10oz canister double acting baking powder, 1 ziploc bag containing bar of Dovo soap & razor blade, 1 gm glass bottle, plastic bags, 1 w/piece of white chunk [see item# 58]  
Owner: SONJA FARAK  
Item Notes: Box was within turquoise duffle bag

Item Number: 048  
Container #:  
Status/Location: Item Submitted Into Property - Western SP-Main Evidence Room-Contraband  
Collection Date/Time: 01/25/2013 - 16:15Hrs  
Collected By: 2302 - Joseph Ballou  
Collection Location: Attorney General's Office-1350 Main Street, 4th Floor, Springfield, MA  
Packaging/Quantity/Item Type: One plastic evidence bag containing - 1 - Miscellaneous  
Detail Description: 1 plastic bag with K pack bag dated 12-13-12 initialed by RP  
Owner: SONJA FARAK  
Item Notes: Box was within turquoise duffle bag

1/29/2013

## Office of the Attorney General Department Case Report

Department Case Number: 13-034-4804-1003

### Case Items

Item Number: 049

Container #:

Process: Hold for investigative purposes

Status/Location: Item Submitted Into Property - Western SP-Main Evidence Room-Contraband

Collection Date/Time: 01/25/2013 - 16:15Hrs

Collection Purpose: Evidence

Collected By: 2302 - Joseph Ballou

Collection Location: Attorney General's Office-1350 Main Street, 4th Floor, Springfield, MA

Packaging/Quantity/Item Type: One plastic evidence bag containing - 1 - Miscellaneous

Detail Description: 7 plastic K pack bags cut open dated 12-16-12, 12-18-12, 12-31-12, 1-4-13 (two), 1-6-13 (two) initialed by SF

Owner: SONJA FARAK

Item Notes:

Item Number: 050

Container #:

Process: Hold for investigative purposes

Status/Location: Item Submitted Into Property - Western SP-Main Evidence Room-Contraband

Collection Date/Time: 01/25/2013 - 16:15Hrs

Collection Purpose: Evidence

Collected By: 2302 - Joseph Ballou

Collection Location: Attorney General's Office-1350 Main Street, 4th Floor, Springfield, MA

Packaging/Quantity/Item Type: One plastic evidence bag containing - 1 - Miscellaneous

Detail Description: 1 heat sealed plastic bag with residual white powder with initials SF

Owner: SONJA FARAK

Item Notes:

Item Number: 051

Container #:

Process: Hold for investigative purposes

Status/Location: Item Submitted Into Property - Western SP-Main Evidence Room-Contraband

Collection Date/Time: 01/25/2013 - 16:15Hrs

Collection Purpose: Evidence

Collected By: 2302 - Joseph Ballou

Collection Location: Attorney General's Office-1350 Main Street, 4th Floor, Springfield, MA

Packaging/Quantity/Item Type: One plastic evidence bag containing - 1 - Miscellaneous

Detail Description: Misc. plastic bags

Owner: SONJA FARAK

Item Notes:

Item Number: 052

Container #:

Process: Hold for investigative purposes

Status/Location: Item Submitted Into Property - Western SP-Main Evidence Room-Contraband

Collection Date/Time: 01/25/2013 - 16:15Hrs

Collection Purpose: Evidence

Collected By: 2302 - Joseph Ballou

Collection Location: Attorney General's Office-1350 Main Street, 4th Floor, Springfield, MA

Packaging/Quantity/Item Type: NO Packaging - 1 - Miscellaneous

Detail Description: 1 lb. container of soy candle wax containing ziploc bag of off-white flakes

Owner: SONJA FARAK

Item Notes:

Item Number: 053

Container #:

Process: Hold for investigative purposes

Status/Location: Item Submitted Into Property - Western SP-Main Evidence Room-Contraband

Collection Date/Time: 01/25/2013 - 16:15Hrs

Collection Purpose: Evidence

Collected By: 2302 - Joseph Ballou

Collection Location: Attorney General's Office-1350 Main Street, 4th Floor, Springfield, MA

Packaging/Quantity/Item Type: One plastic evidence bag containing - 1 - Miscellaneous

Detail Description: 2 plastic tubs, plastic bag w/ wax paper fold [see item #59], deodorant, red rubber, hairbrush in plastic, wooden toothpick, orange button, empty wrapper of oven baked clay and partial 8oz bar of clay, plastic bag w/ pc of white chunk [see item #60]

Owner: SONJA FARAK

Item Notes:

1/29/2013

## Office of the Attorney General Department Case Report

Department Case Number: 13-034-4804-1003

### Case Items

Item Number: 054

Container #:

Process: Hold for investigative purposes

Status/Location: Item Submitted Into Property - Western SP-Main Evidence Room-Contraband

Collection Date/Time: 01/25/2013 - 16:15Hrs

Collection Purpose: Evidence

Collected By: 2302 - Joseph Ballou

Collection Location: Attorney General's Office-1350 Main Street, 4th Floor, Springfield, MA

Packaging/Quantity/Item Type: One plastic evidence bag containing - 1 - Paper

Detail Description: 1 sequence table

Owner: SONJA FARAK

Item Notes:

Item Number: 055

Container #:

Process: Hold for investigative purposes

Status/Location: Item Submitted Into Property - Western SP-Main Evidence Room

Collection Date/Time: 01/25/2013 - 16:15Hrs

Collection Purpose: Evidence

Collected By: 2302 - Joseph Ballou

Collection Location: Attorney General's Office-1350 Main Street, 4th Floor, Springfield, MA

Packaging/Quantity/Item Type: NO Packaging - 1 - Bag

Detail Description: 1 turquoise duffle bag containing 1 XL sports bra

Owner: SONJA FARAK

Item Notes:

Item Number: 056

Container #:

Process: Hold for investigative purposes

Status/Location: Item Submitted Into Property - Western SP-Main Evidence Room-Contraband

Collection Date/Time: 01/28/2013 - 11:37Hrs

Collection Purpose: Evidence

Collected By: 2302 - Joseph Ballou

Collection Location: Amherst Drug Lab, 637 North Pleasant St Amherst, Countertop Of Work Bench Of Sonja Farak

Packaging/Quantity/Item Type: One plastic evidence bag containing - 1 - suspected Cocaine

Detail Description: 1 paper bag containing vial of white powder from top of Farak's desk, labeled #879

Owner: SONJA FARAK

Item Notes:

Item Number: 057

Container #:

Process: Hold for investigative purposes

Status/Location: Item Submitted Into Property - Western SP-Main Evidence Room

Collection Date/Time: 01/25/2013 - 16:15Hrs

Collection Purpose: Evidence

Collected By: 2302 - Joseph Ballou

Collection Location: Attorney General's Office-1350 Main Street, 4th Floor, Springfield, MA

Packaging/Quantity/Item Type: One envelope containing - 1 - Miscellaneous

Detail Description: Copper colored wire fragments (2)

Owner: SONJA FARAK

Item Notes:

Item Number: 058

Container #:

Process: Hold for investigative purposes

Status/Location: Item Submitted Into Property - Western SP-Main Evidence Room-Contraband

Collection Date/Time: 01/25/2013 - 16:15Hrs

Collection Purpose: Evidence

Collected By: 2302 - Joseph Ballou

Collection Location: Attorney General's Office-1350 Main St 4th Fl, Springfield, MA

Packaging/Quantity/Item Type: One plastic evidence bag containing - 1 - suspected Cocaine

Detail Description: Plastic bag containing piece of white chunk [FROM ITEM #47]

Owner: SONJA FARAK

Item Notes:

1/29/2013

**Office of the Attorney General  
Department Case Report**

Department Case Number: 13-034-4804-1003

**Case Items**

Item Number: 059

Container #:

Process: Hold for investigative purposes

Status/Location: Item Submitted Into Property - Western SP-Main Evidence Room-Contraband

Collection Date/Time: 01/25/2013 - 16:15Hrs

Collection Purpose: Evidence

Collected By: 2302 - Joseph Ballou

Collection Location: Attorney General's Office-1350 Main St 4th Fl, Springfield, MA

Packaging/Quantity/Item Type: One plastic evidence bag containing - 1 - suspected Cocaine

Detail Description: Plastic bag w/ wax paper fold [FROM ITEM # 53]

Owner: SONJA FARAK

Item Notes:

Item Number: 060

Container #:

Process: Hold for investigative purposes

Status/Location: Item Submitted Into Property - Western SP-Main Evidence Room-Contraband

Collection Date/Time: 01/25/2013 - 16:15Hrs

Collection Purpose: Evidence

Collected By: 2302 - Joseph Ballou

Collection Location: Attorney General's Office-1350 Main St 4th Fl, Springfield, MA

Packaging/Quantity/Item Type: One plastic evidence bag containing - 1 - suspected Cocaine

Detail Description: Plastic bag w/ piece of white chunk [FROM ITEM # 53]

Owner: SONJA FARAK

Item Notes:

Case Officer Signature

Date

Supervisor Signature

Suffolk County District Attorney's Office  
AGO - March 27, 2013 200

FARAK DISCOVERY

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1 THE COURT: You may proceed, Mr. Olanoff.

2 MR. OLANOFF: Thank you.

3 (Joseph Ballou)

4 DIRECT EXAMINATION BY MR. OLANOFF:

5 Q. Good morning.

6 A. Good morning.

7 Q. Could you please state your full name.

8 A. Joseph Ballou, B-A-L-L-O-U.

9 Q. Are how are you employed?

10 A. By the Massachusetts State Police.

11 Q. And do you have a particular rank?

12 A. I hold the rank of sergeant.

13 Q. How long have you held that rank?

14 A. For about 3 1/2 years.

15 Q. Did you become involved in the investigation of drug  
16 tampering at the Amherst drug lab?

17 A. Yes, I did.

18 Q. How did you become involved?

19 A. Drug packaging that appeared to have been tampered with  
20 was discovered and an investigation had been started by the  
21 Hampshire County DA's Office, then it was decided to refer  
22 it to the Office of the Attorney General so I got a call and  
23 came in.

24 Q. So the Hampshire County DA's Office called you to come  
25 up and investigate?

- 1 A. I think it was the lab that called our office.
- 2 Q. Okay. And do you remember who called you?
- 3 A. It was Detective Lieutenant Robert Irwin called me.
- 4 Q. Okay. And someone from the lab called him?
- 5 A. Yes. I believe it was Major Connolly who's a major
- 6 from the State Police at our general headquarters.
- 7 Q. And so, can you tell us what you did?
- 8 A. The first thing I did is I went to the Hampshire County
- 9 DA's Office and I was told that they had kept Sonja Farak's
- 10 car and that we were going to write a search warrant to
- 11 search her car.
- 12 Q. Okay. What did you do next?
- 13 A. I wrote a search warrant to search her car.
- 14 Q. Had you been to the Amherst lab?
- 15 A. No.
- 16 Q. Okay. And how did you write a search warrant to search
- 17 her car before going to the lab?
- 18 A. All the investigators and troopers, many of the ones
- 19 that were involved at the lab, essentially told me what they
- 20 had seen.
- 21 Q. Okay. And so did you obtain that warrant?
- 22 A. I did.
- 23 Q. And did you execute it before going to the lab?
- 24 A. Yes.
- 25 Q. Okay. Well, let me then go backwards then. When did

1 you get to the Amherst lab?

2 A. The first -- I'm not sure when the first time was I  
3 went to the lab. I believe it was -- sometime after that.  
4 I think it was the following week.

5 Q. Well, do you know the date?

6 A. Not off hand.

7 Q. Okay.. The week after what?

8 A. After the search of the car and the arrest.

9 Q. Okay. What was your understanding though of what had  
10 happened up at that lab?

11 A. My understanding is that the Evidence Officer Sharon  
12 Salem had discovered a discrepancy, I believe it was the  
13 Thursday before. She -- there was evidence that two drug  
14 cases that should have been in the locker and they weren't  
15 there and she had looked in all of the places that she  
16 thought they could have been and then it was, I guess it was  
17 late until the following morning, Friday morning 18th of  
18 January, she notified her supervisor Jim Hanchett and they  
19 searched and they actually found the two items or packaging  
20 in Sonja Farak's desk and then they notified the State  
21 Police crime lab.

22 Q. Okay. I want to ask you about those particular  
23 samples.

24 A. First two that went missing, do you know -- do you  
25 remember what the lab number was for those samples?

1 A. I know they both started with A12 I don't remember the  
2 numbers exactly.

3 Q. And do you know who had submitted them to the lab,  
4 which law enforcement agency?

5 A. Springfield Police Department.

6 Q. Do you remember when they were submitted?

7 A. I believe they were submitted the end of November,  
8 early December.

9 Q. And were they assigned to a chemist to be analyzed?

10 A. They had been assigned to Sonja Farak, correct.

11 Q. And did Ms. Farak author drug certificates regarding  
12 those samples?

13 A. Yes, she had certified they were positive for cocaine.

14 Q. Okay. And are you familiar with the testing that Jim  
15 Hanchett did regarding those substances?

16 A. Yes.

17 Q. Okay. What were his findings?

18 A. I'll just say there were a lot of samples and there  
19 were a lot of numbers and I wasn't told ahead of time what  
20 the questions what would be.

21 Essentially, I do know there was one sample he tested  
22 where he saw what he thought was part of it was not cocaine,  
23 and he tested that and found that to be true. That the  
24 sample that she had previously certified to be cocaine, that  
25 part of it was not.

1 Q. And regarding the other sample was the same situation?

2 A. I -- again, without referring to reports and notes, I'm  
3 not sure.

4 Q. Okay.

5 A. I know one was less in weight, also, than what she had  
6 certified.

7 Q. Okay. Were there -- do you know what the results of  
8 those -- were those samples then sent to the State Police  
9 State Police lab in Sudbury to be retested?

10 A. Yes.

11 Q. Do you know what the results were there?

12 A. Yeah, I received an analysis of all of the items that  
13 we took, were retested, and I think those were consistent  
14 with what Mr. Hanchett had found.

15 Q. Okay. Were there any other samples that were missing  
16 from the lab?

17 A. Right. When the State Police came in that day they  
18 searched the entire lab and they found two other.  
19 Essentially, they had a temporary safe which Ms. Pontes,  
20 Rebecca Pontes and Sonja Farak shared and was a bin for  
21 Sonja Farak in there. And in there there was one empty  
22 evidence bag and then in her work bench they searched more  
23 thoroughly and they found another empty evidence bag.

24 Q. Okay. Do you know when those two samples had been  
25 submitted to the lab and by whom?

1 A. I just -- without looking, I don't want to make a  
2 mistake. I'm not sure exactly. I believe one of them -- I  
3 just don't know. I think one was Holyoke and one was  
4 Springfield.

5 Q. Do you have any notes that could refresh your  
6 recollection as to that?

7 A. I do.

8 THE COURT: You may review them if that would help you.

9 (Pause)

10 THE WITNESS: It would take me a long time to be sure.  
11 I'm not sure.

12 Q. (By Mr. Olanoff) Don't worry about it.

13 There was -- was there one from Holyoke ending in 156?

14 A. Yes.

15 Q. A12-0156?

16 A. Yes.

17 Q. And was anything in the sample when it was found?

18 A. The sample in the safe was empty, and it tested  
19 positive for a cocaine residue.

20 Q. Okay. Do you remember how much was originally in the  
21 sample?

22 A. No, I don't.

23 Q. Okay. And what about the other sample A12-4973 do you  
24 remember if that had been assigned to a chemist for testing?

25 A. Yes.

1 Q. Okay. And who was it assigned to?

2 A. I don't recall. I think it was assigned to Sonja Farak  
3 also, but I'm not sure.

4 Q. Okay. Did she author a drug certificate as to that  
5 sample?

6 A. I believe those two samples hadn't been certified yet,  
7 but I'm not sure.

8 Q. Were there any other items found in Sonja Farak's work  
9 station?

10 A. Yes.

11 Q. What was found?

12 A. There was a tub, like a -- I think of it like a dish  
13 tub, like a white tub. It had a lot of things I would call  
14 adulterants or filler-type materials. I know there was  
15 baking soda, a waxy like wax flakes and some lab  
16 instruments, tools, and there also was like a sandwich bag  
17 of white substance that appeared to be cocaine.

18 Q. Okay. And were those items sent to the Sudbury lab for  
19 testing?

20 A. Yes.

21 Q. And were they, in fact, adulterants and counterfeit  
22 substances in there?

23 A. Yes, except the baggie did contain -- tested positive  
24 for cocaine.

25 Q. Do you remember how much cocaine it was?

- 1 A. I don't -- I don't remember exactly.
- 2 Q. Well, do you remember what kind of cocaine it was; was
- 3 it crack or powder?
- 4 A. I believe it was crack cocaine.
- 5 Q. Okay. Did you eventually search a tote bag?
- 6 A. Yes.
- 7 Q. And to your knowledge, who did the tote bag belong to?
- 8 A. Sonja Farak.
- 9 Q. How long after the initial search of the lab was
- 10 that -- did that search of the bag occur?
- 11 A. It was about a week later.
- 12 Q. What -- and what kinds of things were found in the bag?
- 13 A. A lot of lab packaging. What I learned is something
- 14 called KPac bags. They are like the heat-sealed bags, a lot
- 15 of them sliced open, a lot of empty ones and a lot of,
- 16 again, adulterants or fillers like baking soda, soap, wax
- 17 shavings, things like that.
- 18 Q. Where was this bag found?
- 19 A. It was in her lab bench. There was, if you open the
- 20 cupboards, towards the back there was a hollow spot. There
- 21 was a space where the floor didn't continue, and it was kind
- 22 of tucked down behind there.
- 23 Q. Okay. And you mentioned that there were evidence bags
- 24 in there. Did you call them KPac bags?
- 25 A. Yes.

1 Q. What are those?

2 A. They're clear plastic bags that I've learned that the  
3 lab uses to put their evidence into and then seal.

4 Q. And those bags were in what condition when you found  
5 them?

6 A. I found some that had been sliced open and I found some  
7 that appeared to be, you know, unused, brand new.

8 Q. Did any of them have any residue in them?

9 A. Yes.

10 Q. Do you remember what kind?

11 A. Yeah, like a white powder residue.

12 Q. So cocaine residue?

13 A. That's what -- right, it tested for cocaine.

14 Q. And do you remember how many were in there?

15 A. I believe there was only one that tested positive for  
16 cocaine.

17 Q. Did any of the bags in there have any evidence numbers  
18 on them?

19 A. Again, I don't recall for sure. I would have to look  
20 that up.

21 Q. Well, did one of the evidence KPac -- did one of the  
22 KPac bags have the initials RP on it?

23 A. Yes.

24 Q. And is it your understanding that RP stand for Rebecca  
25 Pontes?

1 A. Yes. It looked like that's how she initialed her bags.

2 Q. So, and she's a -- she was a chemist at the lab at the  
3 time?

4 A. Yes.

5 Q. And do you remember that that was the packaging for the  
6 156 sample?

7 A. I don't remember that, no.

8 Q. Okay. There was -- you mentioned other items like  
9 baking soda and soap bar, baking powder and oven baked clay?

10 A. Yes.

11 Q. Were those items all found in the bag?

12 A. Yes.

13 Q. Were there also soy candle wax shavings?

14 A. Yes.

15 Q. Did you -- are you aware of when there was a search  
16 of Ms. Farak's desk at the lab?

17 A. Yes.

18 Q. And what were the results of that search?

19 A. I believe they found a bag of pills.

20 Q. And whose pills were they?

21 A. I believe hers.

22 Q. Do you remember what kind they were?

23 A. There was assorted pills. I know we sent them to the  
24 lab and I don't recall what the results were. We didn't  
25 charge her with that.

1 Q. Okay. And they had been prescribed to her, you think?

2 A. It seemed like a lot of them had been prescribed to  
3 her.

4 Q. Well, did they have her name on the bottle?

5 A. They weren't in a bottle.

6 Q. What were they?

7 A. Again, I'm not the one who found them and they were  
8 submitted not by me, but I understood they were just loose  
9 pills.

10 Q. Okay. Now, let me -- before we go any further, if you  
11 could turn to Exhibit J in that binder there?

12 A. Yup.

13 Q. Do you recognize that?

14 A. Yes.

15 Q. What is that?

16 A. It's my case report for the destruction of evidence by  
17 Sonja Farak.

18 Q. Okay. And does that report accurately reflect your  
19 knowledge of this investigation?

20 A. Yes.

21 Q. Okay. And does it have the details of the things that  
22 I was asking you about, all along, that you really haven't  
23 been able to remember contained in there?

24 A. Yeah, I'm sure my memory was more accurate back then  
25 than it is now, yes.

1 Q. Okay. And I also direct your attention to Exhibits L  
2 and M.

3 A. Yup.

4 Q. Are those your reports as well?

5 A. Yes.

6 Q. Okay. And are those accurate as to your knowledge of  
7 the investigation?

8 A. Yes.

9 Q. Now, you said that you executed the search warrants on  
10 Ms. Farak's vehicle, what were the results of that?

11 A. We found a lot of evidence. A lot of different types  
12 of lab packaging. We found, in the door pocket we found  
13 like a sandwich bag type of a bag with what appeared to be  
14 cocaine and actually appeared to be a kit, you know a kit  
15 for a drug user.

16 Q. And did you actually perform her -- help perform the  
17 search?

18 A. Yes.

19 Q. All right. So when you say lab evidence packaging,  
20 different kinds, what do you mean, sir?

21 A. Right. There were -- the first thing we found was a  
22 lot of Manila envelopes that had in black marker had lab  
23 number across the top, which I actually later found out that  
24 they used to put their own notes and certifications in. But  
25 then there were also, again, more of those KPac bags, some

1 of them that appeared to be sliced open.

2 Q. And did they put their lab notes and materials in those  
3 KPac bags?

4 A. No. No.

5 Q. What were those for?

6 A. Those were for storing drug evidence.

7 Q. And what was the condition of those bags?

8 A. They -- there was a lot of them, but they generally  
9 were sliced open, some of them had residue. One of them had  
10 something -- a residue, to me, that even to me didn't appear  
11 to be cocaine, and it tested to not be cocaine.

12 Q. And what -- how many of them were there, do you think?

13 A. Probably over a dozen.

14 Q. And were any of them labeled?

15 A. Yes, with initials.

16 Q. Whose initials?

17 A. Most of them had SF.

18 Q. Were there any case numbers on them?

19 A. On the K-Pacs, I don't believe there were case numbers.

20 Q. Were -- whose initials were there on those?

21 A. Most of them had SF, which I believe would be Sonja  
22 Farak. And I know at some point we saw an RP for Rebecca  
23 Pontes, but as I sit here, I can't remember if that was from  
24 her car or from the bag.

25 Q. So there may have been a bag in her car, a KPac bag in

1 her car with the initials RP?

2 A. There may have been, yes.

3 Q. Okay. Was there also a piece of paper with initials RP  
4 up and down it?

5 A. Yes.

6 Q. And where was that found?

7 A. That was found in one of those Manila envelopes that  
8 she had a lot of other papers mixed in with.

9 Q. Okay. And based on your investigation, what was that  
10 all about?

11 A. Well, my feeling was that she was trying to practice  
12 those initials to make them look as much like the initials  
13 of Rebecca Pontes as she could.

14 Q. Okay. The cocaine you said there was cocaine found in  
15 the door. Was it crack cocaine?

16 A. Yes.

17 Q. Do you remember how much it was?

18 A. No.

19 Q. And it was in, you said a baggie?

20 A. Yes.

21 Q. Was it labeled at all?

22 A. No.

23 Q. And then you said there were counterfeit substances in  
24 the car, correct?

25 A. Yes.

1 Q. How much and what kind?

2 A. Well, specifically, I just remember that one bag with  
3 just the residue.

4 Q. There were also newspaper articles in her car as well,  
5 correct?

6 A. Correct, copies.

7 Q. Copies. What do you mean by copies?

8 A. They were, like, printed copies of articles she may  
9 have found online.

10 Q. Right. So you mean that these were articles from the  
11 internet that somebody had printed out?

12 A. Yes.

13 Q. How many articles were there?

14 A. I think I remember three or four.

15 Q. Okay. And did any of the articles have anything in  
16 common with each other?

17 A. Yes.

18 Q. What did they have?

19 A. Generally, they were about people in law enforcement or  
20 in chem. labs that had stolen drugs or used drugs.

21 Q. What were the -- what publications were these articles  
22 from?

23 A. I remember at least a few of them were from newspapers  
24 that I recognized, but I don't know off hand.

25 MR. OLANOFF: Okay. If I could approach the witness

1 and show him the exhibits?

2 THE COURT: You may.

3 Q. (By Mr. Olanoff) Okay. I'm now showing you what has  
4 been marked as Exhibits E2, E3, and E4. Are those the  
5 articles that were found in Ms. Farak's vehicle?

6 A. Yes.

7 Q. So -- okay. So we have a Masslive article?

8 A. Yes.

9 Q. Pittsfield.com article?

10 A. Yes.

11 Q. And then an SFGate.com article?

12 A. Correct, yes.

13 Q. Okay. And?

14 THE COURT: I'm am sorry, Mr. Olanoff. I'm having a  
15 little trouble locating.

16 MR. OLANOFF: Sure. It's right after the transcript  
17 part of E.

18 (Pause)

19 THE COURT: Thank you.

20 MR. OLANOFF: Sure.

21 Q. (By Mr. Olanoff) And what did you mention that they all  
22 had in common?

23 A. It seemed like they were either law enforcement or lab  
24 people who had stolen drugs or used drugs.

25 Q. What were the dates of these articles?

- 1 A. As I look here, one is October 25, 2011.
- 2 Q. And do you know what date -- staying on that first one,  
3 you're referring to the Masslive article, correct?
- 4 A. Right. Right.
- 5 Q. "Pittsfield pharmacist Nicole Bombardier sentenced  
6 three years for stealing 200 plus Oxycontin pills."  
7 So the date of the article is October 25, 2011. What's  
8 the date that it was printed out?
- 9 A. It's covered by the exhibit number. It looks like  
10 October something, 2013 I believe.
- 11 Q. Okay. What about the second article, so that would be  
12 Exhibit E3?
- 13 A. Yes.
- 14 Q. What's the date of this article, approximately?
- 15 A. It's too small and faded. I can't read it.
- 16 Q. Okay. Is March 29, 2011 sound right?
- 17 A. Is that up on the top right?
- 18 Q. Top left under where it says staff report Tuesday,  
19 March 29, 2011?
- 20 A. Okay. Yes.
- 21 Q. Okay. And going to the bottom of the page, can you  
22 tell when this article was printed out?
- 23 A. Yes. It says September 20, 2011.
- 24 Q. Okay. And is there anything else on this particular  
25 page?

1 A. Yes, handwritten notes.

2 Q. And what was the -- what's, like, a summary of what the  
3 handwritten notes say?

4 A. Well, the article is regarding a police officer and a  
5 trooper that were found with steroids and one of their names  
6 she refers to it as: And Kirschner seems like such a good  
7 guy. I feel bad for his five year old daughter. I'm glad I  
8 don't work as law enforcement officer.

9 It's hard to read there.

10 P.S. most of the cases he's been a part of have been  
11 dismissed for exactly this reason.

12 Q. Do you know who wrote that?

13 A. I don't.

14 Q. Do you know who printed these articles out?

15 A. No, I don't.

16 Q. Do you know whether Ms. Farak printed them out or  
17 someone printed them out and gave them to her?

18 A. No, I do not know.

19 Q. Can you tell from the note, from the handwriting there,  
20 whether it was written to someone or it was written by  
21 someone?

22 A. I can't tell.

23 Q. Okay. Going onto the third page, SFGate.com, when is  
24 this article from?

25 A. December, maybe 2, 2011.

1 Q. Okay. And do you know when this was printed up?

2 A. Again, it's blocked by the discovery type, but it likes  
3 like December 2011.

4 Q. Okay. What is this article regarding?

5 A. It says: Feds indict former SFPD drug lab technician.

6 Q. And why would these three pieces of these articles be  
7 relevant to your investigation in the search of her car?

8 A. Right. To find her state of mind, I guess, if she is  
9 the type of person wondering what would happen to her if she  
10 got caught.

11 Q. Did you find any other prescription pills inside the  
12 car?

13 A. Yes.

14 Q. What kind?

15 A. Again, there were assorted pills and majority of them  
16 were over-the-counter medications and some were prescribed  
17 to her and we didn't charge her with that.

18 Q. Okay. Going back to her work station, were there  
19 capsules found there? Where were the capsules found?

20 A. In her work station there was just -- the only capsule  
21 I know was that one, the one that was found with the heroin  
22 packet.

23 Q. Do you remember -- do you know if there were capsules  
24 found with a white powdery substance inside of them?

25 A. I don't recall.

1 Q. Do you know what plaster of Paris is?

2 A. It was a number of adulterants and that probably was  
3 one of them.

4 Q. Okay. And that was at her work station?

5 A. Either in a duffle bag or her work station.

6 Q. Okay. Now, the capsules I'm talking about are -- were  
7 in the search of her vehicle. So if you can go to F13. The  
8 best way to do it is to find F12, and then go on to the next  
9 page.

10 There's a package of capsules?

11 A. This is the photographs that you're referring to or?

12 (Pause)

13 Q. (By Mr. Olanoff) Here. (Indicating)

14 Do you remember finding those in her vehicle?

15 A. Yes.

16 Q. Okay. And what were they?

17 A. I don't recall. I just -- I know that we never charged  
18 her with any pills and the reason was because some of them  
19 were over-the-counter medications and/or prescribed to her.

20 Q. Well, some of these pills had white powder in them,  
21 some of them were empty, correct?

22 A. I don't remember that part.

23 Q. Did members of your investigatory team interview Sonja  
24 Farak?

25 A. Again that was the -- yes, from the Hampden County DA's

1 Office they interviewed her.

2 Q. Do you remember who interviewed her?

3 A. Yes, it was Detective Lieutenant Robin Whitney and  
4 Sergeant John Cummings.

5 Q. And in that interview, do you remember Miss Farak was  
6 asked if she kept any drugs at her work station?

7 A. Yes.

8 Q. Do you remember what her response was to that?

9 A. Well, her response was there would be no reason for her  
10 to keep drugs in her work station.

11 Q. But she did admit that there were some drugs there,  
12 correct?

13 A. Right.

14 MR. FLANNERY: Your Honor, I'm going to object just  
15 because I don't believe Sergeant Ballou was present for this  
16 interview. The transcript of the interview itself I think  
17 has been admitted, so I don't know what the purpose of this  
18 questioning would be.

19 THE COURT: Does seem to be, Mr. Olanoff, that you are  
20 having this witness repeat much of what is documentary  
21 evidence already admitted.

22 MR. OLANOFF: Understood.

23 THE COURT: So perhaps we can move on to what you think  
24 is relevant to that misconduct.

25 MR. OLANOFF: Sure.

1 Q. (By Mr. Olanoff) So the other day, did you happen to  
2 finish your investigation as to the Finch and Espinosa  
3 cases?

4 A. Yes.

5 Q. Can you tell us who Finch and Espinosa were?

6 A. They were two defendants in a Springfield Police case  
7 and search warrant was done at their house and drug evidence  
8 and a firearm were seized.

9 Q. And how did their cases come to your attention?

10 A. The affiant on the search warrant, I believe was about  
11 a year ago, he felt that -- he felt he had submitted  
12 Oxycodone pills for analysis.

13 Q. And are you referring to a Springfield Police Officer?

14 A. Yes.

15 Q. Do you know which one?

16 A. Yes, Greg Bigda.

17 Q. Okay. Continue.

18 So he wrote an affidavit that described the substances  
19 he submitted?

20 A. No -- no. He wrote an affidavit for a search warrant  
21 to that house.

22 Q. I see.

23 A. And another officer had recovered what they thought was  
24 Oxycodone pills and they had submitted it to the lab for  
25 analysis, but when it came back it came back as not as a

1 controlled substance and the count was different from what  
2 he thought he had submitted.

3 Q. Okay. And to the officer did those look like Oxycodone  
4 pills?

5 A. When he submitted them he said used an online pill  
6 identifier and felt they were probably Oxycodone pills.

7 Q. And how many pills did he submit?

8 A. I believe he said he submitted 51 and when the analysis  
9 came back there was 61.

10 Q. And did the officer have a chance to look at the pills  
11 after they came back?

12 A. Yes.

13 Q. What was his take on the pills then?

14 A. He couldn't remember what the pills looked like that he  
15 submitted and he hadn't described them or photographed them,  
16 but he felt that if he had submitted the pills that he now  
17 had that he wouldn't have identified them as Oxycodone.

18 Q. Okay. And so was it his -- it was his understanding  
19 that those may not have been the pills that he submitted?

20 A. That's what he felt, yes.

21 Q. When was -- when did this search take place where these  
22 items were seized?

23 A. Again, I don't have everything locked in memory, but I  
24 think it was March of 2012.

25 Q. Would it help you to take a look at your police report?

1 A. Yes.

2 Q. If you were to go to Exhibit 0.

3 A. He submitted it for testing on March 16, 2012.

4 Q. When was it discovered that the pills that he submitted  
5 were probably not the ones that came back?

6 A. I think he discovered it back in, basically when he had  
7 to go to Grand Jury on that case. He -- wait a minute. No,  
8 he didn't have the analysis back at that point.

9 Q. Well, who supposedly analyzed the drugs?

10 A. Sonja Farak.

11 Q. Okay. And she certified that these were not Oxys,  
12 correct?

13 A. Correct.

14 Q. Now, if you could tell us a little bit about the  
15 Berkshire case.

16 A. The first I heard of the Berkshire case was this  
17 morning.

18 Q. How did you hear about it?

19 A. From you.

20 Q. From me?

21 A. From opening.

22 Q. I've never met you.

23 A. Well, just at the start of this hearing this morning.

24 Q. Okay. So you didn't investigate that?

25 A. No.

1 Q. Do you know who did?

2 A. No.

3 Q. Are there any other cases besides Finch and Espinosa  
4 and the evidence recovered from the lab, are there any other  
5 cases that you're aware of that may have had tampering going  
6 on or where there's suspected tampering?

7 THE COURT: We're talking about suspect tampering by  
8 Miss Farak?

9 MR. FLANNERY: Correct.

10 THE WITNESS: I know there's an investigation at the  
11 lab and that's ongoing and that they're retesting. I don't  
12 know the results of any of those tests.

13 Q. (By Mr. Olanoff) Do you know which cases they pertain  
14 to?

15 A. I don't.

16 Q. And so there's testing going on now for additional  
17 samples other than the ones we've talked about here today?

18 A. I don't know about now, but back when I did my  
19 investigation, just as an example, I submitted all of the  
20 lab numbers for the packaging that was found in her car.  
21 And I know that was all looked at, but again, I haven't  
22 gotten any results.

23 I know at that time Major Connolly had said they were  
24 going to retest things at the lab.

25 MR. OLANOFF: Your Honor, may I have a moment?

1 THE COURT: You may.

2 (Off the record discussion with Defense Counsel)

3 Q. (By Mr. Olanoff) Did you find any crack pipes in your  
4 investigation?

5 A. I didn't, but I believe in her desk or her work station  
6 that was found.

7 Q. Okay. And was that noted anywhere or was that ever  
8 documented?

9 A. Everything that was found was documented, yes.

10 Q. Okay. Are you familiar with the evidence report form?

11 A. Yes.

12 Q. And it has dozens of items in there that were found --  
13 it's every piece of evidence that was collected in this  
14 case, correct?

15 A. Correct.

16 Q. And do you remember where it says crack pipe in there?

17 A. There was a -- there was like a glass rod or something  
18 found, but there was no -- there was no pipe, like a  
19 certain -- not like a specific type.

20 Q. I see. So it was the trooper's understanding that it  
21 was a used for smoking crack, correct?

22 A. Again, I would have to know what you're referring to.  
23 I don't know if you -- I don't know if you're referring to  
24 what was found in her work station.

25 Q. Well, the crack pipe.

1 A. Well, it was nothing that was labeled a crack pipe. I  
2 believe there was a glass rod with soot.

3 Q. With what?

4 A. With possibly with residue.

5 Q. Okay. And there was also some, an item that had some  
6 copper wire in it?

7 A. Yes.

8 Q. And where was that located and where was it?

9 A. That was located in her car, as I said, the bag that  
10 seemed to be like her work was -- there were little balls of  
11 copper wire.

12 Q. Why was that significant?

13 A. It appears that it would be something that somebody  
14 would use to smoke crack rocks.

15 Q. Was copper wire found anywhere else in this  
16 investigation?

17 A. Yes, in a duffle bag. In those items there, there were  
18 little fragments of copper found.

19 Q. And what did that tell you about finding the copper  
20 wire there?

21 A. Well, to me it was a connection. It made a connection  
22 between her duffle bag and her car.

23 Q. And are the -- are you saying the copper wire is  
24 fragments from smoking crack?

25 A. I think the ones that were in the duffle bag were --

1 seemed, I know, clean, not sooty or anything like that.

2 MR. OLANOFF: Your Honor, at this time, I'm done with  
3 my portion. Like I said, I haven't had a chance to review  
4 the materials that were just handed over, so I guess we will  
5 address that later.

6 THE COURT: Although I understand that you may have at  
7 some other time further inquiry for this witness; while we  
8 are here, further they're inquiry from defense counsel?

9 MR. RYAN: If I may?

10 **CONTINUED DIRECT EXAMINATION BY MR. RYAN:**

11 Q. Good afternoon.

12 A. Good afternoon.

13 Q. If you could pull back up Exhibit O in the binder.

14 A. Sure.

15 Q. Now, Attorney Olanoff had asked you about some  
16 questions about your investigation?

17 A. Yes.

18 Q. This document is back in May of this year; is that  
19 correct?

20 A. Yes.

21 Q. Back on May 10 you met with Officer Bigda?

22 Feel free to look at your notes.

23 A. Yes, May 10.

24 Q. Now, in addition to speaking with Officer Bigda you  
25 obtained an evidence card from the Springfield Police

1 Department, correct?

2 A. Yes.

3 Q. And that evidence card is located, it's the very last  
4 piece of paper, correct?

5 A. Yes, it is.

6 Q. And that evidence card, if you look down at about  
7 halfway down the middle it says "item".

8 A. Yes.

9 Q. And it says "51 Oxycodone pills"?

10 A. Yes.

11 Q. Now, if you look at the evidence sheet, the page that  
12 precedes this in Exhibit 0.

13 A. Yes.

14 Q. Is that a drug certification?

15 A. Yes.

16 Q. And at the top of the drug certification, can you tell  
17 the Court how many tablets Ms. Farak certified were in this  
18 sample?

19 A. Sixty-one tablets.

20 Q. Now, this, what we've received so far, is your police  
21 report and for Exhibit 0 the drug certification and this  
22 evidence tag; is that correct?

23 A. I didn't understand that question.

24 Q. Well, what's before you are those four pieces of paper,  
25 right?

1 A. Yes. Yes.

2 Q. A two-page police report?

3 A. Right, and those two items.

4 Q. Now, in the course of investigating this, did you  
5 obtain what's known as a drug receipt from the Amherst  
6 laboratory with respect to this submission?

7 A. No, I did not.

8 Q. And in the course of your investigation you have become  
9 familiar with these so-called drug receipts?

10 A. I don't know what you're referring to, no.

11 Q. Well, local police departments would drop-off suspected  
12 narcotics at the Amherst lab. Did you become familiar with  
13 the protocol that would be involved with Evidence Officer  
14 Salem?

15 A. Yes.

16 Q. They would turn over the submission, correct?

17 A. Right.

18 Q. The detective or the officer dropping them off would  
19 receive in return a receipt for what they dropped off?

20 A. I know it was logged in. I didn't know they received  
21 an actual receipt.

22 Q. So you're not -- haven't become familiar with this  
23 document that is generated in all drug cases?

24 A. Not what you're referring to, no.

25 Q. So in the course of investigating this -- you would

1 agree that on its face value, if a police officer writes  
2 down 51 pills and drops it off at the Amherst laboratory and  
3 gets 61 pills back, that raises your concerns on your part,  
4 doesn't it?

5 A. It does, yes.

6 Q. So in your investigation, did you inquire of the  
7 evidence officer at the Amherst lab as to if there was any  
8 paperwork as to how many pills she counted when the police  
9 department dropped off this submission?

10 A. No, I do not.

11 Q. Do you think that might be relevant evidence in terms  
12 of looking to see whether or not there was some breach in  
13 protocol that took place with respect to this submission?

14 A. Yes, that would be relevant.

15 Q. Now, Attorney Olanoff asked you some questions about  
16 other cases where suspected evidence tampering is sort of in  
17 the air. Do you recall those questions?

18 A. Yes.

19 Q. And I believe you said that there was an investigation  
20 going on at the lab?

21 A. Yes.

22 Q. Who's conducting that investigation?

23 A. It was Major Connolly and -- Major James Connolly and a  
24 captain -- I can't remember his name off hand.

25 Q. Are these members of the investigative team that's

1 prosecuting Sonja Farak?

2 A. No.

3 Q. And so there is an independent investigation that's  
4 being conducted by these individuals that you just named?

5 A. Correct.

6 Q. And you are not privy to what they're investigating?

7 A. Correct.

8 Q. Now, there's been an Assistant Attorney General who's  
9 been assigned to prosecute Ms. Farak; is that correct?

10 A. Yes.

11 Q. And what's her name?

12 A. Anne Kaczmarek.

13 Q. Does Ms. Kaczmarek, to your knowledge, is she aware of  
14 what's -- this independent investigation that's ongoing,  
15 retesting?

16 A. I'm not sure what their, exactly what their connection  
17 is.

18 Q. Well, if -- let me ask you this. If this independent  
19 investigation, of which you have no knowledge were to --

20 A. No, I do -- I'm aware of it. They're in charge of the  
21 overall investigation. When I have things, I have sent them  
22 to them.

23 Q. Well, are you aware of any specific cases they are  
24 retesting based on concerns of evidence tampering?

25 A. They have not come back to me and said they have found

1 anything would pertain to Sonja Farak that I should be aware  
2 of.

3 Q. Lieutenant, so -- but they are -- their investigation  
4 is not completed?

5 A. No.

6 Q. So there is an investigation that is ongoing, that  
7 involves retesting of samples?

8 A. Yes.

9 Q. If those retesting of samples were to result in some  
10 indication of evidence tampering, that could be relevant to  
11 your prosecution of Ms. Farak; is that correct?

12 A. Yes.

13 Q. Now, you're aware that in the course of this proceeding  
14 that you've been called here today, there's been some  
15 disclosures that your office has made to defense counsel; is  
16 that correct? ..

17 A. Yes.

18 Q. Have you had any role to play in deciding what  
19 documentation is provided to the defendants in this case?

20 A. No, I've -- everything in my case file has been turned  
21 over.

22 Q. And to your knowledge, is everything in Ms. Kaczmarek's  
23 case file been turned over?

24 THE COURT: You're asking this witness whether  
25 something in Ms. Kaczmarek's case file has been turned over?

1           MR. RYAN: I'm just trying to find out what we have and  
2 don't have. And if he knows that's she's maintaining a file  
3 that reflects the investigation that he just referenced by  
4 Major Connolly.

5           THE COURT: If, for some reason you know the answer to  
6 that question, you may answer it.

7           THE WITNESS: I believe everything pertaining to the  
8 Farak investigation has been turned over. I am not aware of  
9 anything else.

10          MR. RYAN: I would join attorney Olanoff in stating I  
11 have no further questions at this time.

12          I would like to reserve the right to reopen or recall  
13 this witness should additional materials comes to light.

14          THE COURT: I'm going to assume that's the case of all  
15 defense counsel present.

16          You may cross examine, Mr. Flannery.

17          MR. FLANNERY: Thank you.

18           **CROSS EXAMINATION BY MR. FLANNERY:**

19          Q. Good afternoon.

20          A. Good afternoon.

21          Q. I'm going to start where direct left off. The  
22 Finch/Espinosa case.

23          A. Yes.

24          Q. That was something that was brought to your attention  
25 relatively early on in this investigation; is that correct?

- 1 A. Yes, it was.
- 2 Q. And, you interviewed Officer Bigda from the Springfield  
3 Police Department?
- 4 A. Yes.
- 5 Q. And he indicated to you what he believed was a  
6 discrepancy in terms of the amount and the type of pills  
7 that he got back from the lab, right?
- 8 A. Yes.
- 9 Q. But he also conceded that he had no specific memory of  
10 the pills before they went to the lab, right?
- 11 A. Yes.
- 12 Q. He didn't photograph them, correct?
- 13 A. Correct.
- 14 Q. He didn't describe them with any particularity in any  
15 report that you're aware of?
- 16 A. Right.
- 17 Q. And so at that point, investigation wasn't closed, it  
18 wasn't finished, right?
- 19 A. Right.
- 20 Q. And the purpose of your investigation was to collect  
21 evidence that would go to not just what Ms. Farak had  
22 already been charged with, but also with an eye towards  
23 potentially bringing further charges with respect to other  
24 specific episodes of tampering, right?
- 25 A. Yes.

1 Q. And based on your investigation of this issue that  
2 Officer Bigda brought to your attention, based on your  
3 conversation with him, you've decide not to suggest another  
4 charge in relation to these pills, right?

5 A. Yes.

6 Q. And can you tell us why that is?

7 A. You know, I'm looking at it from the standpoint of  
8 trying to charge Ms. Farak, whether there's probable cause  
9 and ability to convict. I felt because we couldn't describe  
10 the pills, we don't know. And Oxycodone is a generic term  
11 that applied to -- every brand has a different type of pill  
12 and Officer Bigda didn't know what the pills looked like  
13 that he submitted.

14 There wasn't a lot to go forward on.

15 Q. All right. So was it possible, in your mind, that  
16 Officer Bigda was the one who made a mistake and he was now  
17 justifying that or viewing it differently based on the  
18 allegations against Ms. Farak?

19 A. No, I don't -- I don't know if he made a mistake or  
20 not. I don't know.

21 Q. So you just didn't know based on what you have?

22 A. Yes.

23 Q. Now, getting back to your testimony concerning the  
24 warrants that were executed, the case against Ms. Farak.  
25 You testified at various points about things that were --

1 items that were found in her vehicle and also in a tote bag?

2 A. Yes.

3 Q. And you expressed, I believe, some reservation about  
4 the clarity of your memory with respect to what was found  
5 where; is that fair to say?

6 A. Yes.

7 Q. Now, you testified, I believe, that --

8 A. Well, specifically with lab numbers and weight. I  
9 don't have weights and lab numbers memorized.

10 Q. Okay.

11 THE COURT: Mr. Flannery, let me interrupt for just a  
12 minute and tell you for scheduling purposes what I have in  
13 mind.

14 I would like to break if we haven't concluded with  
15 Sergeant Ballou's testimony at quarter of 1:00 so that we  
16 can address this outstanding issue of the motion having to  
17 do with Ms. Farak's spouse, to resolve that before we move  
18 on with the hearing. So I just want to let you know we have  
19 another five minutes before we break, for that purpose.

20 MR. FLANNERY: Yes, Your Honor.

21 Thank you.

22 Q. (By Mr. Flannery) Well, you indicated, I believe,  
23 during your testimony that a number of KPac bags with  
24 initials were found in Ms. Farak's car as opposed to the  
25 tote bag. Is your memory clear on that?

1 A. Well, as far as like KPac bags, I don't remember, you  
2 know, I have a visual memory of seeing KPac bags. I don't  
3 know exactly which ones were found in the bag versus the car  
4 without referring to a report.

5 Q. Well, I a have a copy of -- you authored a report  
6 relative to a search of Ms. Farak's vehicle, correct?

7 A. Yes.

8 Q. And do you remember that you listed items that were  
9 found in her vehicle?

10 A. Yes.

11 Q. And that's a copy of her report, just for the record,  
12 which is contained in Exhibit K.

13 MR. FLANNERY: If I may approach, Your Honor?

14 THE COURT: You may.

15 Q. (By Mr. Flannery) I'm just going to ask you to just  
16 quickly look at that report and see if it refreshes your  
17 memory as to whether there are KPac bags.

18 A. (Complying)

19 There's no KPac bags listed here.

20 Q. Now, you recall KPac packages, but does that refresh  
21 your memory as to whether they were found in the vehicle?

22 A. We also weren't referring to them as KPac bags at that  
23 time because I didn't realize that's what they were called.

24 Q. Okay. Well, were there any bags that had initials that  
25 were sealed?

1 A. No.

2 Q. Okay. So, what you did find among other things were  
3 envelopes with lab numbers, correct?

4 A. Yes.

5 MR. FLANNERY: And if I may I approach again?

6 THE COURT: You may.

7 Q. (By Mr. Flannery) And did you recall you photographed  
8 the evidence that was found in the vehicle?

9 A. Yes.

10 MR. FLANNERY: And, just for the record, I'm referring  
11 to Exhibit H.

12 Q. (By Mr. Flannery) My binder doesn't -- isn't more  
13 specific than that, but there are -- I'll show you  
14 photographs.

15 A. Yes.

16 Q. Showing you a photograph of Manila envelope that is  
17 contained in Exhibit H.

18 A. Yes.

19 Q. Can you just describe what we're looking at?

20 A. It's a Manila envelope, in handwriting and a black  
21 marker, lab number written on the top and lab number is  
22 crossed out.

23 Q. Okay. So the lab number is written on this Manila  
24 envelope, appeared to have been handwritten, perhaps with a  
25 magic marker?

1 A. Yes.

2 Q. And then it's crossed out?

3 A. Yes.

4 Q. I'm going to show you another photograph not separately  
5 marked, but again part of the same exhibit.

6 And, again, can you tell us what that depicts?

7 THE COURT: Maybe you can orient me as to at least  
8 where it appears. There seems to be a page number  
9 underneath these photographs.

10 THE WITNESS: 3384.

11 MR. FLANNERY: I'm sorry, Your Honor, there is a --  
12 33 -- no. Yes, 3384 is in the small print in the corner.

13 THE COURT: All right. I see that.

14 Q. (By Mr. Flannery) And again, can you tell us what that  
15 depicts in terms of the envelope?

16 A. It's in a different Manila envelope, also with a lab  
17 number written on the top, which is also scratched out with  
18 black marker.

19 Q. And very next page, again, is that another envelope?

20 A. Yes. Same Manila envelope, handwritten lab number and  
21 scratched out with black marker.

22 Q. All right. And then one last one, and that's a few  
23 pages later, Numbers 3393.

24 Did I read that correctly?

25 A. Yes. That's a Manila envelope with a lab number hand

1 written scratched out in black marker and the words "to do"  
2 written on it in black marker.

3 Q. Okay. Now is it fair to say, of the items found in Ms.  
4 Farak's vehicle, the only items with identifying lab numbers  
5 are these envelopes?

6 A. Yes.

7 Q. You didn't find any evidence bags --

8 A. No.

9 Q. -- with the official lab number on them, correct?

10 A. No. No, we didn't.

11 Q. And the cocaine was contained in a Ziplock bag?

12 A. Or a sandwich bag.

13 Q. A sandwich bag?

14 A. Yes.

15 Q. Which would not have -- the bag itself would not have  
16 come from a lab as far as you know?

17 A. Right.

18 Q. Now, with respect to the search of the tote bag which  
19 was found inside of the lab --

20 A. Yes.

21 Q. You also wrote a report relative to that, correct?

22 A. Yes.

23 Q. And, is your memory now refreshed that the KPac bags  
24 that you referred to were actually found --

25 A. Inside the duffle bag, yes.

1 Q. And there would have been, in addition to the  
2 description in the report of those KPac bags, there would  
3 have been an even more detailed description that would have  
4 been part of the, sort of official inventory of that  
5 evidence?

6 A. Yes.

7 Q. And I don't expect that you would remember this off the  
8 top of your head, but would it refresh your memory as to the  
9 dates and the initials that appeared on those bags to look  
10 at -- would looking at this inventory refresh your memory as  
11 to those details?

12 A. Yes.

13 THE COURT: Mr. Flannery, why don't we start there when  
14 we resume after lunch.

15 Sergeant, I'm going to ask you to step down and we're  
16 going to address a legal matter and I will ask you to return  
17 at two o'clock, please.

18 THE WITNESS: Thank you, Your Honor.

19 (The witness stepped down.)

20 (\* \* \* \* \*)

21

22

23

24

25

1                   (The Court entered at 2:03 p.m.)

2                   THE COURT: Mr. Olanoff, Mr. Ryan, you may call your  
3 next witness.

4                   MR. OLANOFF: We are still on a witness, cross.

5                   THE COURT: Yes, we are still on cross-examination.

6                   Sergeant, can you resume the stand, please.

7                   THE COURT: Mr. Flannery, you may continue.

8                   MR. FLANNERY: Thank you.

9                   (Joseph Ballou, continued)

10                  CROSS EXAMINATION BY MR. FLANNERY:

11 Q. Good afternoon, Sergeant.

12 A. Good afternoon.

13 Q. To start with, I just want to, I think, correct a  
14 statement that I made earlier. And that pertains to an item  
15 or items that were found in Ms. Farak's vehicle.

16                  After the break, did you have an opportunity to review  
17 the police report that related to the search of Ms. Farak's  
18 vehicle?

19 A. Yes.

20 Q. And although it's not been described, not described as  
21 KPac bags, did that report refresh your memory that some of  
22 those KPac bags were found in her vehicle as well?

23 A. Confirmed my original memory that we did find KPac bags  
24 in her car, but they were inside the envelopes, so they  
25 weren't itemized separately.

1 Q. Okay. Those weren't the bags that have initials or  
2 dates on them, correct?

3 A. They only had initials and none of them had dates.

4 Q. Okay. With respect to the bags that had initials and  
5 dates, those would have been found in the tote bag, correct?

6 A. Yes.

7 MR. FLANNERY: Your Honor, if I may I approach?

8 THE COURT: You may.

9 Q. (By Mr. Flannery) I'm going to show you what is  
10 contained in Exhibit N and it's page 11 for the record.  
11 Actually, beginning on page 10, that -- can you tell us  
12 whether that indicates in more detail what those bags looked  
13 like?

14 A. Yes. This is the evidence inventory that I took and it  
15 describes the items in more detail.

16 Q. Okay. And in terms of the dates that are listed on the  
17 KPac evidence bags, can you tell us, without listing all of  
18 the dates, what the range of dates -- what the range of  
19 dates is as reflected there?

20 A. February 16, 2012 through January 6 of 2013.

21 January, January 6 -- January 6 of 2013.

22 Q. Okay. You said February?

23 A. December 16, 2012 through January 6, 2013.

24 Q. Okay. So the earliest one would have been dated  
25 December of 2012, December 6 (sic)?

1 A. Yes.

2 Q. And then, that ranged from that to some bags that were  
3 dated January 2013?

4 A. Correct.

5 THE COURT: And just to clarify, those are the dates on  
6 the KPac bags that were taken from the duffle bag?

7 THE WITNESS: Yes, Your Honor.

8 THE COURT: All right.

9 Q. (By Mr. Flannery) One last topic, there was some --  
10 what you initially believed to be heroin found in  
11 Ms. Farak's vehicle, correct?

12 A. Correct.

13 Q. That substance was later analyzed and determined not to  
14 be heroin; is that right?

15 A. That's correct.

16 Q. So, in terms of your initial investigation, at least in  
17 all of the charges that flowed from that investigation,  
18 cocaine was really the only drug that appeared Ms. Farak was  
19 stealing or tampering with?

20 A. Yes.

21 MR. FLANNERY: I have nothing further.

22 THE COURT: Redirect examination limited to those  
23 areas?

24 MR. OLANOFF: Yes, thank you, Your Honor.

25

1                   **RECROSS EXAMINATION BY MR. OLANOFF:**

2       Q. With respect to those evidence bags found in  
3       Ms. Farak's vehicle, if I could direct your attention to  
4       Exhibit H. And it's going to be page number 3369.

5                   So it's about 20 photos into this Exhibit H, number  
6       3369.

7       A. I have it.

8       Q. Okay. That is a Manila envelope with lab a number on  
9       it, correct?

10      A. Yes.

11      Q. The 508 would refer to the Amherst lab number for  
12       evidence that was submitted in the year 2008, correct?

13      A. Correct.

14      Q. Okay. Now, on the next page --

15      A. But it is crossed out.

16      Q. It is crossed out, I understand.

17                  Now, on the next page, 3370, another photograph of that  
18       same Manila envelope, correct?

19      A. Yes.

20      Q. And going the next page after that, 3371, that is the  
21       contents of that Manila envelope, correct?

22      A. Yes.

23      Q. And those are the KPac bags or the evidence bags that  
24       we've been talking about that were found in Ms. Farak's  
25       vehicle, correct?

1 A. Yes.

2 Q. As you can see from that photograph, and the one  
3 following it, there's initials on that KPac bag, correct?

4 A. Yes.

5 Q. Are those Rebecca Pontes' initials, RP?

6 A. It's hard to read, but as I said I remember there was  
7 one that said RP and the rest were all SF.

8 Q. Okay. And these bags had been sliced open, correct?

9 A. Yes.

10 Q. And as you testified on direct examination, one of  
11 these bags contained cocaine residue, correct?

12 A. It was -- there was a bag that contained something that  
13 tested not positive for cocaine.

14 Q. Okay. And that was from this particular envelope,  
15 correct, and the KPac bag?

16 A. No. There was like a baggie that was not a KPac bag  
17 that had a white crystal substance in it. It didn't appear  
18 to be cocaine to me, and it tested not to be cocaine. The  
19 bag that had residue was from the lab, from the bag from the  
20 tote bag that we recovered.

21 Q. I understand, and so these KPac bags that had been  
22 sliced open, you didn't notice any residue in those,  
23 correct?

24 A. Right.

25 Q. And those were not sent for testing, correct?

1 A. Correct.

2 Q. And again, there's no date on those KPac bags, but they  
3 are inside of that larger Manila envelope with the 08  
4 evidence number, correct?

5 A. Right. There was actually a lot of KPac bags stuffed  
6 into one envelope.

7 Q. And those had all been sliced open?

8 A. I think all of them.

9 MR. OLANOFF: Thank you. I have nothing further.

10 THE COURT: Mr. Ryan?

11 MR. RYAN: Thank you.

12 **CONTINUED RECROSS EXAMINATION BY MR. RYAN:**

13 Q. Sir, we've been talking quite a bit now about the  
14 evidence that was in Ms. Farak's car, correct?

15 A. Yes.

16 Q. And what we've been talking about is how you described  
17 that evidence in various reports you wrote, correct?

18 A. Yes.

19 Q. And we've been looking at photographs of this  
20 particular evidence?

21 A. Yes.

22 Q. And the reason we're doing that is because this  
23 evidence no longer exists, right?

24 A. No. It still exists.

25 Q. Oh, where is it?

1 A. It's in a drug storage locker -- I mean, excuse me,  
2 evidence storage locker.

3 Q. And can you tell me why none of the counsel for none of  
4 the defendants have been permitted to look at any of this  
5 evidence?

6 MR. FLANNERY: Objection.

7 THE COURT: Sustained.

8 Q. (By Mr. Ryan) Well, there's this physical evidence that  
9 we've been discussing from the car, correct?

10 A. Yes.

11 Q. And you would agree that your reports regarding what  
12 was in the car are summary notes?

13 A. Summary, yes.

14 Q. You didn't write paragraph after paragraph about what  
15 assorted lab paperwork was found, right?

16 A. As you mentioned, we also took pretty detailed photos,  
17 yes.

18 Q. Well, how many photos did you take?

19 A. I didn't take any. This was from -- the crime scene  
20 services took these.

21 Q. And whatever is in that book, is that a fair  
22 representation of how many photographs were taken?

23 A. From the car, sir, yes; vehicle search warrant, yes.

24 Q. A couple dozen?

25 A. Yes.

1 Q. And about how many items of evidentiary interest were  
2 there?

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

5 THE COURT: Sustained as to what has evidentiary  
6 interest.

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

8 A. Yes.

9 Q. And that had some 67 items on it?

10 A. Yes.

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

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

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

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

19 Q. Did anybody make a video recording of the execution of  
20 the search warrant?

21 A. There's no video, no.

22 Q. Now, you talked earlier about some, what was perceived  
23 to be heroin that was found in Ms. Farak's possession. Do  
24 you remember that?

25 A. Yes.

1 Q. And you said that that was -- that turned out not to be  
2 heroin, correct?

3 A. Correct.

4 Q. That actually field-tested positive for heroin, didn't  
5 it?

6 A. Yes.

7 Q. And there was some field-testing positive for cocaine  
8 as well?

9 A. Yes.

10 Q. And when those particular items went to the laboratory  
11 and there was actual analysis done on these substances, it  
12 turned out they weren't narcotics, correct?

13 A. No. One of them was cocaine and the other one of was  
14 not heroin.

15 Q. The one with heroin, that's sort of why we have a crime  
16 lab that analyzes drugs, right?

17 A. Yes.

18 Q. Because those field-tests aren't always accurate?

19 MR. FLANNERY: Objection.

20 THE COURT: I'm not sure of the relevance of this,

21 Mr. Ryan.

22 MR. RYAN: Well, with respect to my client's case,  
23 there was field-testing that was done and there's been some  
24 indication that this goes to the, you know, what he knew  
25 about the substances at the time of law enforcement, whether

1 there was actually any need to implicate -- duplicate Ms.  
2 Farak's testing in question.

3 THE COURT: It's beyond the scope of today's hearing.

4 MR. RYAN: Understood.

5 Q. (By Mr. Ryan) You testified earlier that cocaine was  
6 the only substance that it appeared that Ms. Farak had any  
7 interest in tampering with; is that correct?

8 A. Yes.

9 Q. With respect to Exhibit O, we talked about earlier?

10 A. Yes.

11 Q. Those are Oxycodone pills?

12 A. Yes.

13 Q. That is not a derivative of cocaine?

14 A. No.

15 Q. That would be more of the nature of a -- well,  
16 Oxycodone, what is it, do you know?

17 A. I don't know.

18 Q. But it's not cocaine?

19 A. No.

20 Q. And we talked about before there was some evidence that  
21 that particular evidence is not -- was not returned to the  
22 police department in the state that it was arrived at the  
23 lab; is that correct?

24 A. That's what the officer thinks, yes.

25 Q. And would you agree with Mr. Flannery that this officer

1 apparently made some huge mistake in counting the number of  
2 pills that his department submitted to the laboratory?

3 A. I don't know what happened. I don't know if he made a  
4 mistake or not.

5 Q. It's because you haven't looked at any of the  
6 laboratory records that would indicate what the evidence  
7 officer said as to how many pills she counted when she  
8 accepted the sample?

9 A. I haven't looked at those no.

10 MR. RYAN: No further questions.

11 THE COURT: Recross-examination limited to those areas?  
12 Any further?

13 MR. FLANNERY: No.

14 THE COURT: Any further inquiry from defense counsel  
15 noting your earlier conditional decision not to ask further  
16 questions today, but reserving the right to do so at a  
17 future time?

18 Sergeant, you are excused.

19 You may step down.

20 MS. FOSTER: Your Honor, if I may ask quickly, related  
21 to subpoena for document and photographs, we're wondering if  
22 we could have a different date to respond to that.

23 THE COURT: The subpoena?

24 MS. FOSTER: For Sergeant Ballou included all documents  
25 and photographs.

1           THE COURT: Let's address that at the end of this  
2 hearing.

3           MS. FOSTER: Okay.

4           (The witness stepped down.)

5           (\* \* \* \* \*)

6           THE COURT: Mr. Ryan, you may call your next witness.

7           MR. OLANOFF: Defense calls Sharon Salem.

8           THE CLERK: Raise your right happened, ma'am.

9           (Sharon Salem, sworn)

10          THE COURT: Ms. Salem, good afternoon.

11          THE WITNESS: Hi.

12          THE COURT: Is that the way you pronounce your last  
13 name?

14          THE WITNESS: Salem.

15          THE COURT: Salem.

16          Ms. Salem, before we begin, I want to remind you that  
17 it's important I hear everything and please keep your voice  
18 up and try to make certain your responses are verbal rather  
19 than just by gesture.

20          If you don't understand the question, please let us  
21 know. If you do understand the questioning, please limit  
22 your response to that question.

23          Do you understand me so far?

24          THE WITNESS: Yes.

25          THE COURT: You may proceed.





COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

TRIAL COURT OF THE  
COMMONWEALTH  
SUPERIOR COURT DEPT.  
INDICTMENT NO. 12-083

Commonwealth

v.

ROLANDO PENATE

DEFENDANT'S MOTION TO COMPEL PRODUCTION OF DOCUMENTARY  
EVIDENCE PURSUANT TO MASS. R. CRIM. 17(a)(2)

Now comes the defendant and respectfully requests that this Honorable Court issue an order pursuant to Rules 13 and 17(a)(2) of the Massachusetts Rules of Criminal Procedure, and following the protocol established by *Commonwealth v. Lampron*, 441 Mass. 265 (2004), directing the Massachusetts Attorney General's Office, the Massachusetts State Police, the Executive Office of Public Safety and Security, and/or the Department of Public Health to provide undersigned counsel with the following documentation:

1. Copies of all police reports related to each packet of suspected narcotic evidence found in the possession of Sonja Farak ("Farak") at the time of her arrest. This includes, but is not limited to, evidence seized from her workstation and safe at the Amherst Laboratory, from her vehicle, and as a result of the search of her home.
2. Copies of drug certificates and chain of custody reports for each packet of suspected narcotic evidence found in Farak's possession at the time of her arrest.

3. A copy of Farak's personnel file, including, but not limited to, her employment application(s) for the position of chemist, as well as the results of any psychosocial evaluations, drug testing, and/or background checks;<sup>1</sup>
4. Results of any and all searches of computers to which Farak had access, including but not limited to copies of e-mails sent and received by Farak from January 1, 2010 to January 19, 2013;
5. Results of any and all searches of cellular telephones to which Sonja Farak had access, including but not limited to text messages sent and received by Ms. Farak from January 1, 2010 to January 19, 2013;
6. Copies of performance evaluations and/or documentation reflecting the performance of Farak, Rebecca Pontes, and/or Sharon Salem at the Amherst Drug Laboratory from January 1, 2005 – January 18, 2013.
7. Copies of any and all inter- and/or intra-office correspondence from January 18, 2013 to the present pertaining to the scope of evidence tampering and/or deficiencies at the Amherst Drug Laboratory.
8. To the extent not covered by Request No. 8, copies of any and all correspondence from January 18, 2013 to the present to and/or from District Attorney's offices in the four Western Counties pertaining to the scope of evidence tampering and/or deficiencies at the Amherst Drug Laboratory.
9. Any and all evidence suggesting that Farak may have had an accomplice in the evidence tampering she allegedly engaged in at the Amherst Drug Laboratory.

<sup>1</sup> This request includes materials generated in conjunction with Farak's work in the Hinton Drug Laboratory where she began her career as a chemist prior to transferring to the Amherst Laboratory in 2004.

10. To the extent not covered by Request No. 10, any and all evidence suggesting that a third party may have been aware of Farak's evidence tampering at the Amherst Drug Laboratory prior to Farak's arrest in January, 2013; and
11. The results of any handwriting analysis conducted by law enforcement of the handwritten notes found on news accounts recovered by the Massachusetts State Police during a search of Farak's car.

\* \* \* \*

As his reasons for this Motion, the Defendant assigns as follows:

1. The documents are sought for production in good faith;
2. The subject materials are relevant to material issues at trial and are therefore evidentiary in nature;
3. The defense cannot fully and competently prepare for trial of this case in the absence of such evidence;
4. The subject materials cannot be produced other than by a summons issued by this Court;
5. The Defendant is constitutionally entitled to inspection of the materials under Article XII and M.G.L.A. c. 263, § 5; and
6. *Lampron, supra*, permits the requests made herein.

The Court is referred to the Affidavit of Counsel and Memorandum of Law, filed herewith, for further reasons in support of this Motion.

The defendant respectfully requests a hearing on this motion on Thursday, September 19, 2013.

Sep. 17. 2013 12:55PM

SASSON TURNBALL & HOOSE

No. 1500 P. 5

Respectfully Submitted,  
ROLANDO BENATE,

By \_\_\_\_\_  
His Attorney

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**EXHIBIT B**

## COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

TRIAL COURT OF THE  
COMMONWEALTH  
SUPERIOR COURT DEPT.  
INDICTMENT NO. 12-083

Commonwealth

v.

ROLANDO PENATE

AFFIDAVIT OF COUNSEL IN SUPPORT OF DEFENDANT'S MOTION TO  
COMPEL PRODUCTION OF DOCUMENTARY EVIDENCE PURSUANT TO  
MASS. R. CRIM. 17(a)(2)

I, Luke Ryan, state under the pains and penalties of perjury that:

1. I represent the defendant, Rolando Penate, with respect to the above-referenced matter.
2. Mr. Penate currently stands charged with, *inter alia*, three counts of distributing a Class A Substance, two counts of possessing controlled substances with the intent to distribute, and five school zone violations.
3. These charges stem from the sale of substances alleged to be heroin by Mr. Penate to an undercover officer in October and November of 2011, as well as the recovery of substances alleged to be heroin and cocaine during a search of the defendant's residence on November 15, 2011.
4. The chemist who tested the substances giving rise to these charges was Sonja Farak (Farak).

5. Following Farak's arrest on January 19, 2013, based on allegations of evidence tampering, I filed a motion on Mr. Penate's behalf to compel the production of certain evidence, including copies of e-mails and text messages to and from Farak that law enforcement seized during its investigation of Farak following her arrest. See Def.'s Second Motion to Compel, Paper No. 39 (filed May 14, 2013).
6. This discovery request was motivated, in large part, by revelations that law enforcement officers seized email correspondence of Hinton Drug Laboratory Chemist Annie Dookhan, which "vividly detail[ed] her close relationship with prosecutors," who she "coached . . . on trial strategy" for the purpose "getting [drug dealers] off the streets." Andrea Estes, "Indicted drug analyst Annie Dookhan's e-mails reveal her close personal ties to prosecutors," BOSTON GLOBE (Dec. 20, 2012), available at <http://www.boston.com/news/local/massachusetts/2012/12/20/indicted-drug-analyst-annie-dookhan-mails-reveal-her-close-personal-ties-prosecutors/A37GaztHLKfW1kphDjxLXJ/story.html>.
7. After assenting to Mr. Penate's motion to compel, the Commonwealth neither furnished such documentation nor advised undersigned counsel that it does not exist.
8. Due in part to the prosecution's failure to comply with its discovery obligations, I moved to dismiss the drug charges pending against Mr. Penate. See Def.'s Mem. of Law in Supp. of Mot. to Dismiss, Paper No. 42 (filed July 15, 2013).
9. On July 23, 2013, the Honorable Mary-Lou Rup issued an order ruling that Mr. Penate was entitled to an evidentiary hearing to explore his claim of egregious

government misconduct and reminded the prosecution of its obligation to adhere to its discovery obligations. See Mem. on Def's Mot. to Dismiss, Paper No. 45.

10. To date, the prosecution has not furnished any copies of the sought after emails or texts.
11. In advance of the evidentiary hearing in Mr. Penate's case scheduled for August 27, 2013, I served subpoenas *duces tecum* on a number of law enforcement witnesses seeking the production of documentation pertaining to the scope of Farak's misconduct at the Amherst Laboratory, as well as deficiencies in the testing and handling of evidence at that Laboratory.
12. Prior to August 27, 2013, I spoke with representatives of the Attorney General's Office who advised me that they would likely move to quash subpoenas seeking such information.
13. On August 27, 2013, I received new discovery from Assistant District Attorney (ADA) Eduardo Velazquez specific to Mr. Penate's case that necessitated a continuance of his evidentiary hearing to September 23, 2013.
14. A hearing on any motions to quash in Mr. Penate's case is now scheduled for September 19, 2013.
15. In addition to representing Mr. Penate, I represent Rafael Rodriguez with respect to Hampden County Indictment Number 10-1181.
16. Mr. Rodriguez was charged in 2010 with possessing a Class B substance with the intent to distribute and pled guilty to this charge on September 9, 2011 and received a state prison sentence.

17. The chemist was analyzed the substance in Mr. Rodriguez's case was Sonja Farak.

18. Following Farak's arrest, I filed a motion on Mr. Rodriguez's behalf seeking to withdraw his guilty plea.

19. On July 25, 2013, the Honorable C. Jeffrey Kinder issued an order determining that Mr. Rodriguez and fourteen other post-conviction defendants were entitled to an evidentiary hearing to determine the scope of Farak's misconduct at the laboratory in Amherst where she was employed.

20. On July 31, 2013, I filed on behalf of Mr. Rodriguez a motion to compel certain evidence in preparation for this evidentiary hearing.

21. While waiting for Mr. Penate's case to be called on August 27, 2013, I happened to see First Assistant District Attorney Frank Flannery.

22. ADA Flannery is handling the aforementioned post-conviction cases for the Commonwealth.

23. I had previously spoken with ADA Flannery about the discovery motion I filed on behalf of Mr. Rodriguez on July 31, 2013, and ADA Flannery advised me that his office would likely take the position that, with respect to Farak's personnel file, such documentation was in the custody and control of third parties.

24. During our conversation on August 27, 2013, ADA Flannery confirmed that this was, in fact, the position of his office and suggested that I amend the motion I previously filed to seek an order of production from the party or parties in actual possession of that item.

25. As previously noted, the ADA assigned to Mr. Penate's case assented to the motion for discovery I filed on May 14, 2013, and to date, has not taken the position that any of the items I have requested are in the possession of third parties.

26. During the course of my representation of both Mr. Rodriguez and Mr. Penate, I have reviewed the 3358 pages of discovery made available by the Hampden County District Attorney's office related to the investigation and prosecution of Sonja Farak.

27. Among other things, this discovery indicates that searches of Farak's automobile and work station revealed the presence of packaging related to various narcotics prosecutions dating back to 2008.

28. During his testimony at the Grand Jury, Amherst Drug Laboratory Supervisor James Hanchett depicted Farak as a more or less a model employee up until about three or four months before her arrest when her production allegedly decreased and she began behaving strangely.

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

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

31. I believe that access to Farak's personnel file is also important in light of Grand Jury testimony from Farak's wife, Nikki Lee, who stated that she observed Farak use cocaine in 2000 while in Philadelphia and saw Farak smoke marijuana on multiple occasions.
32. Under such circumstances, I believe that Farak's personnel file is likely to reveal that supervisors at the Hinton and Amherst Laboratories were either grossly negligent in failing to screen out a prospective chemist with a history of illicit drug use and/or the victims of misrepresentations made by Farak during the hiring and transfer processes.
33. In my view, evidence of such negligence and/or fraudulent behavior dating back over a decade would tend to discredit any claim made by the prosecution that the misconduct leading to Farak's arrest did not begin until the fall of 2012.
34. Also included in the discovery thus far produced is the Grand Jury Testimony of lead investigator Massachusetts State Trooper Sergeant Joseph Ballou.
35. According to Ballou, while searching Farak's car, investigators recovered three on-line news articles that had been printed and placed inside a manila envelope that had apparently been used in the past for the storage of drug evidence.
36. These news accounts, which were introduced as exhibits to the Grand Jury during Ballou's testimony, documented the prosecution of a Pittsfield pharmacist for stealing prescription drugs, the investigation of a Pittsfield Narcotics Officer named Kirchner for illegally possessing steroids, and the prosecution of a San Francisco chemist for stealing cocaine from a drug laboratory.

37. These Grand Jury exhibits were not made available to defense counsel until August 16, 2013.

38. A review of the Kirchner news article reveals that it was printed on September 20, 2011, i.e. prior to Mr. Penate's arrest and before any items were delivered to the Amherst Laboratory for testing.

39. This article also contains the following handwritten notes: "And Kirchner seemed like such a good guy. I do feel bad for his 5 y.o. daughter. (Thank God I'm not a law enforcement officer. P.s. Most of the cases he's been a part of have been dismissed for exactly this reason."

40. If my request for the results of any handwriting analysis of this evidence is granted, I anticipate that I will be told one of three things: (i) the notes in question were written by Farak; (ii) the notes in question were written by an unknown third party; or (iii) no such analysis was conducted.

41. If the notes were written by Farak, I believe that this would provide substantial support to the argument that she was engaged in evidence tampering long before her performance as a chemist purportedly began to decline in the fall of 2012.

42. If the notes were written by an unknown third party, I believe this would suggest that Farak had an accomplice and the scandal at the Amherst Drug Laboratory is much larger than defense counsel or the public has been led to believe.

43. If no such analysis was undertaken, I believe this would support an argument that the Attorney General's office and the Massachusetts State Police are laboring under an obvious conflict of interest in attempting to establish wrongdoing on the

part of an individual whose misconduct threatens to jeopardize the successful prosecution of hundreds, if not thousands, of other criminal defendants.

9/6/13

Date

Luke Ryan







COMMONWEALTH OF MASSACHUSETTS  
SUPERIOR COURT

Hampden, ss.

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COMMONWEALTH	)	
	)	
v.	)	No. HDCR2012-00083
	)	
ROLANDO PENATE	)	
	)	
	)	

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**OPPOSITION TO THE DEFENDANT'S RULE 17(a)(2) MOTION FOR PRODUCTION**

The Attorney General's Office ("AGO") respectfully opposes the defendant's motion to compel production of documentary evidence pursuant to Mass. R. Crim. P. 17(a)(2). As reasons therefor, many of the documents requested are not in the Attorney General's care, custody, or control. Additionally, several of the documents the defendant is seeking are privileged and not subject to discovery. Therefore, the Attorney General's office requests that this Court deny the defendant's motion for production of documents.

**BACKGROUND**

On February 1, 2012, a Hampden County grand jury returned indictments against the defendant, Rolando Penate, charging him with three counts of possession with intent to distribute a class A substance, in violation of G.L. c. 94C, § 32A(d), as a subsequent offense, G.L. c. 94C, § 32(b), and with related school zone violations, G.L. c. 94C, § 32J; two counts of unlawful possession of a firearm, in violation of G.L. c. 269, § 10(h); and use of a firearm while committing a felony, in violation of G.L. c. 265, § 18B.

The drugs in the defendant's case appear to have been tested by Sonja Farak. Farak is currently charged with four counts of evidence tampering, four counts of larceny of drugs and two counts of possession of cocaine allegedly arising out of her work at the University of Massachusetts Amherst drug laboratory in her capacity as a chemist. AAG Anne Kaczmarek is assigned to prosecute the Commonwealth's case against Farak.

On August 22, 2013, Sergeant Joseph Ballou of the Massachusetts State Police assigned to the AGO and Assistant Attorney General Anne Kaczmarek were served with subpoenas compelling their testimony on August 27, 2013, and the production of documents related to their investigation of Farak. On August 27, the Court rescheduled the evidentiary hearing in this case to September 23, 2013, with a hearing on the subpoenas and production of documents scheduled for September 19, 2013.

On September 6, 2013, the defendant served undersigned counsel with a Rule 17(a)(2) motion for production of documentary evidence. He has requested a hearing on this motion on September 19, 2013.

#### ARGUMENT

I. THE COURT SHOULD DENY THE DEFENDANT'S MOTION FOR PRODUCTION OF DOCUMENTS BECAUSE SEVERAL OF THE DOCUMENTS ARE NOT IN THE ATTORNEY GENERAL'S CARE, CUSTODY, OR CONTROL, OR ARE OTHERWISE PRIVILEGED.

Production of documents in custody of a nonparty is governed by Mass. R. Crim. P. 17(a)(2), and the issuance of a summons under the rule "is reserved to the sound discretion of the judge." *Commonwealth v. Mitchell*, 444 Mass. 786, 790-791 (2005). Because Rule 17 is not to be invoked merely as a discovery tool, but rather for evidentiary materials that are likely to be admissible at trial, the defendant must make a factual showing that: "(1) the documents are evidentiary and relevant; (2) they are not otherwise procurable reasonably in advance of trial by

exercise of due diligence; (3) [he] cannot properly prepare for trial without such production and inspection in advance of trial, and the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) application is made in good faith and not intended as a general fishing expedition.” *Commonwealth v. Dwyer*, 448 Mass. 122, 140-141 (2006) (citing *Commonwealth v. Lampron*, 441 Mass. 265, 269 (2004)). “Potential relevance and conclusory statements regarding relevance are insufficient.” *Lampron*, 441 Mass. at 269.

Rule 17(a)(2) “is not to be used as a means to explore the *availability of potential evidence . . . .*” *Commonwealth v. Daniels*, 76 Mass. App. Ct. 1118 (2010) (quoting *Commonwealth v. Mitchell*, 444 Mass. 786, 791 (2005)) (emphasis added in *Daniels*). Here, the defendant failed to show that the documents in question will actually contain the evidence he seeks, as opposed to what he anticipates will be contained in the documents. That is not sufficient. See *Commonwealth v. Bishop*, 416 Mass. 169, 179-180 (1993); *Commonwealth v. Villalobos*, 09-P-1429, 2012 Mass. App. Unpub. LEXIS 470, \*9, *review denied*, 462 Mass. 1107 (2012) (defendant “had no actual information about what might be in the school records”). Contrast *Commonwealth v. Lam*, 444 Mass. 224, 232 (2005) (the complainant’s middle school records relating to her sexual abuse allegation could be summonsed because the complainant admitted that she disclosed the sexual abuse to the school counselors).

The defendant claims that these documents and correspondence *may* uncover inadequate supervision of Farak without providing any support for that claim. Likewise, he insists that these documents and correspondence *may* uncover evidence that Farak was allegedly stealing drugs long before the time revealed in the grand jury minutes, without any evidence to support that claim. He contends that these documents would *possibly* permit him to impeach the test results of the drugs, tested by Farak, in his case. “Generalizations and unsubstantiated statements” are

not enough to procure a pretrial inspection of the requested documents. *Bourgeois*, 68 Mass. App. Ct. at 436. He is merely engaging in a “fishing expedition” for anything that might possibly help him. This is an inappropriate use of a Rule 17 summons. *Dwyer*, 448 Mass. at 145 (Rule 17[a] [2] is not a discovery tool; the defendant required to show relevance, admissibility, necessity and specificity to guard against a mere fishing expedition for possibly relevant information).

For these reasons, the Court should deny the defendant’s motion. See, e.g., *Villalobos*, 2012 Mass. App. Unpub. LEXIS 470, at \*9 (that the complainant attended school for adolescents with PTSD and self-injurious behavior, and that she may have been raped by someone other than defendant, was not sufficient to conclude that school records would contain disclosure of sexual abuse); *Commonwealth v. Daniels*, 08-P-1808, 2010 Mass. App. Unpub. LEXIS 280, at \*5-6 (Mass. App. March 16, 2010) (complainant’s admitted use of drugs at time of attack not sufficient to permit inspection of her health records).

In any event, the documents that the defendant is seeking are not discoverable. Each of the eleven requests is described in turn below.

1. *Copies of police reports related to each of the packets of narcotics in Farak’s possession when arrested.* These documents are not in the care, custody, or control of the AGO.
2. *Copies of drug certificates, and chain of custody reports related to each of the packets of narcotics in Farak’s possession when arrested.* These documents are not in the care, custody, or control of the AGO.
3. *Farak’s personnel file.* These documents are not in the care, custody, or control of the AGO.
4. *Farak’s computer.* The AGO did not search any computers to which Farak had access; therefore, the AGO does not have care, custody, or control of any such documents.

*5. Farak's cellular telephone.* The AGO did not search any cellular telephones to which Farak had access; therefore, there AGO does not have care, custody, or control of any such documents.

*6. Copies of performance evaluations.* The AGO does not have care, custody, or control over any evaluations or documents reflecting the performance of Farak, Rebecca Pontes, or Sharon Salem. A State Police audit was conducted, which was turned over to the District Attorney's office. Moreover, the defendant provides no explanation as to why these various documents may support his motion for new trial. The defendant must make a *prima facie* showing that these documents would assist in him in getting a new trial. Where he does not make *any* argument, speculative or not, as to why these documents would assist him, he has not met his burden.

*7. Inter- and intra- office correspondence at the AGO.* As an initial matter, the defendant provides no explanation as to why these various forms of correspondence may assist him in impeaching the drug test results in his case. Where he does not make *any* argument, speculative or not, as to why these documents would assist him, he has not met his burden. Regardless, it is unclear what exactly the defendant is requesting. If he is seeking correspondence not involving the AGO, then the AGO is not in possession of such correspondence. If this request is for correspondence internal to the AGO, then it is not discoverable. These communications would be protected because they would constitute legal work product. *See, e.g., Commonwealth v. Paszko*, 391 Mass. 164, 187-88 (1984) (noting that core of work product doctrine is protection of attorney mental processes); *Commonwealth v. Lewinski*, 367 Mass. 889, 902 (1975) (recognizing that defendant would not be entitled to access work product of prosecutor within documents); *Hickman v. Taylor*, 329 U.S. 495, 509-14 (1947) (explaining that doctrine in part protects against "inquiries into" "mental impressions of an attorney," "personal beliefs," and other "intangible" matters, in part due to the chilling effect on attorney work that could be produced by the mere

fear of disclosure); *Commonwealth v. Bing Sial Liang*, 434 Mass. 131, 137-38 (2001), *citing Hickman*, 329 U.S. at 511 (finding that victim-witness advocate working with prosecution may be protected by work product doctrine, and explaining, “Proper preparation of a . . . case demands that prosecutors assemble information, sift what they consider to be the relevant from the irrelevant facts, prepare their legal theories and plan their strategy without undue and needless interference. . . . This work is reflected . . . in interviews, statements, memoranda, correspondence, briefs, mental impressions, and personal beliefs”).

Furthermore, these communications are part of an ongoing criminal investigation. Courts have found information maintained by law enforcement regarding an ongoing criminal investigation to be privileged and not subject to disclosure. *See Kattar v. Doe*, CIV. A. 86-2206-MC, 1987 WL 11146 (D. Mass. Jan. 27, 1987) (granting in part a motion to quash subpoenas for a deposition that would require disclosure of information related to an active investigation and a deposition that would require disclosure of information protected by the law enforcement investigatory privilege); *see also Puerto Rico v. United States*, 490 F.3d 50, 64 (1st Cir. 2007), *cert. denied.*, 552 U.S. 1295 (2008) (recognizing a privilege for “law enforcement techniques and procedures”). “The purpose of this privilege is to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation.” *In re Dept. of Investigation*, 856 F.2d 481, 483-84 (2d Cir. 1988).

The law enforcement investigative privilege is a qualified privilege, which is “subject to balancing the [government’s] interest in preserving the confidentiality of sensitive law enforcement techniques against the requesting party’s interest in disclosure.” *Puerto Rico*, 490

F.3d at 64. To override the strong public interest in maintaining the confidentiality of information related to an active criminal investigation, a party must generally show a compelling need for the information that is sufficient to overcome the privilege. *See Gomez v. City of Nashua*, 126 F.R.D. 432, 436 (D.N.H. 1989) (granting motion to quash deposition of an assistant attorney general based on the law enforcement investigative privilege, the deliberative process privilege, and the principle that absent a compelling need, the time and energy of public officials ought to be preserved for public business); *see also Ass'n for Reduction of Violence v. Hall*, 734 F.2d 63, 66 (1st Cir. 1984) (a party seeking discovery of privileged material “must make a threshold showing of need, amounting to more than ‘mere speculation’”) (quoting *Socialist Workers Party v. Attorney General*, 565 F.2d 19, 23 (2d Cir. 1977)).

Similar principles can be found in various areas of Massachusetts law. As an example, the public records laws exempt from disclosure “investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials, the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.” M.G.L. c. 4, § 7, cl. 26(f). This exemption recognizes that the disclosure of certain investigatory materials “could so detract from effective law enforcement to such a degree as to operate in derogation, and not in support of, the public interest.” *Bougas v. Chief of Police of Lexington*, 371 Mass. 59, 61-63 (1976) (holding that police reports and letters from citizens to police were exempt from disclosure). Even if not directly applicable here, the exemption “provides guidance as to public policy considerations.” *Sheriff of Bristol County v. Labor Relations Comm'n*, 62 Mass. App. Ct. 665, 671 (2004); *see also Babets v. Secretary of Executive Office of Human Servs.*, 403 Mass. 230, 237 n.8 (1988) (finding that terms of public records law may offer some evidence of Legislature’s attitude on

issues of evidentiary privileges); *see also Puerto Rico*, 490 F.3d at 63 (noting that the law enforcement exemption in the federal Freedom of Information Act provides guidance in determining the scope of the investigative privilege). There are other examples. *See, e.g., In re Enforcement of a Subpoena*, 463 Mass. 162, 177 n.8 (2012) (listing “impounded filings regarding ongoing criminal investigations” as among types of document that “at least temporarily” can be shielded from public); Mass. G. Evid. § 515 (“Unless otherwise required by law, information given to governmental authorities in order to secure the enforcement of the law is subject to disclosure only within the discretion of the governmental authority.”).

The defendant has failed to make a showing that this correspondence would in any way impeach the drug test results in his case. In contrast, where this is an ongoing investigation, *see Rafuse v. Stryker*, 61 Mass. App. Ct. 585, 600 (2004), the release of much of this information could compromise the prosecution of Farak. *Id.* Therefore, much of the information is still confidential, and should remain as such. *See id.; see also Globe Newspaper v. Police Comm'r of Boston*, 419 Mass. at 862.

8. *AGO correspondence with District Attorneys' offices.* For the same reasons as in #7, *supra*, any such correspondence is not discoverable.

9. *Accomplice evidence.* The AGO has turned over all grand jury minutes, exhibits, and police reports in its possession to the District Attorney's office. Based on these records, to which the defendant has access, there is no reason to believe that an accomplice was involved.

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

11. *Handwriting analysis.* No such documents exist as the AGO did not perform any handwriting analysis.

For the above-stated reasons, the defendant's Rule 17(a)(2) motion for production of documents addressed to the Attorney General's Office should be denied.

Respectfully Submitted,

MARTHA COAKLEY  
ATTORNEY GENERAL

Kris C. Foster (BBO #672376)  
Assistant Attorney General  
Criminal Bureau  
One Ashburton Place  
Boston, Massachusetts 02108  
(617) 727-2200, ext. 2833

Date: October 1, 2013

**CERTIFICATE OF SERVICE**

I hereby certify that I served a copy of the Attorney General's opposition to the motion for production of documents upon the defendant and his counsel via electronic and first-class mail on this date.

---

Kris C. Foster  
Assistant Attorney General

Date: October 1, 2013

**COMMONWEALTH OF MASSACHUSETTS  
SUPERIOR COURT**

Hampden, ss.

COMMONWEALTH )  
v. ) No. HDCR2012-00083  
ROLANDO PENATE )

**OPPOSITION TO THE DEFENDANT'S RULE 17(a)(2) MOTION FOR ACCESS TO  
THE AMHERST LABORATORY**

At issue is the defendant's Mass. R. Crim. P. 17(a)(2) motion for access to the Amherst drug laboratory. This motion must be denied because the defendant is merely seeking permission to engage in a fishing expedition, particularly where the lab does not look the same as it did when Farak worked there. Accordingly, the Court should deny the defendant's motion.

## BACKGROUND

On February 1, 2012, a Hampden County grand jury returned indictments against the defendant, Rolando Penate, charging him with three counts of possession with intent to distribute a class A substance, in violation of G.L. c. 94C, § 32A(d), as a subsequent offense, G.L. c. 94C, § 32(b), and with related school zone violations, G.L. c. 94C, § 32J; two counts of unlawful possession of a firearm, in violation of G.L. c. 269, § 10(h); and use of a firearm while committing a felony, in violation of G.L. c. 265, § 18B.

The drugs in the defendant's case appear to have been tested by Sonja Farak. Farak is currently charged with four counts of evidence tampering, four counts of larceny of drugs and

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two counts of possession of cocaine allegedly arising out of her work at the University of Massachusetts Amherst drug laboratory in her capacity as a chemist.

On September 11, 2013, the defendant served the AGO with a Rule 17(a)(2) motion the inspect the Amherst laboratory.

#### ARGUMENT

##### **I. DENIAL OF THE DEFENDANT'S MOTION IS NEEDED TO PREVENT AN UNSUBSTANTIATED FISHING EXPEDITION.**

Production of documents in the custody of a non-party is governed by Mass. R. Crim. P. 17(a)(2), and the issuance of a summons under the rule "is reserved to the sound discretion of the judge." *Commonwealth v. Mitchell*, 444 Mass. 786, 790-791 (2005). Rule 17 is not to be invoked merely as a discovery tool. Thus, to access documents -- or a location -- under this rule, the defendant must make a factual showing that: "(1) the documents are evidentiary and relevant; (2) they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) [he] cannot properly prepare for trial without such production and inspection in advance of trial, and the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) application is made in good faith and not intended as a general fishing expedition." *Commonwealth v. Dwyer*, 448 Mass. 122, 140-141 (2006) (citing *Commonwealth v. Lampron*, 441 Mass. 265, 269 (2004)). "Potential relevance and conclusory statements regarding relevance are insufficient." *Lampron*, 441 Mass. at 269. Further, Rule 17(a)(2) "is not to be used as a means to explore the *availability of potential evidence . . .*" *Commonwealth v. Daniels*, 76 Mass. App. Ct. 1118 (2010) (quoting *Commonwealth v. Mitchell*, 444 Mass. 786, 791 (2005)) (emphasis added in *Daniels*).

Should a defendant make the proper required factual showings, a judge can grant him access to a particular location. *Commonwealth v. Matis*, 446 Mass. 632, 635 (2006). However,

the defendant fails to meet any of the four required factual showings. Principally, he does not show that the Amherst laboratory will actually contain any relevant evidence. He claims that he needs access to the lab in order to "discover and understand information that will bear on the admissibility of the results of any 're-testing' and the weight to be given by a jury to such results, including information relating the systems and equipment in place at the Amherst Lab for securing and safeguarding the chain of custody of evidence submitted to the lab" (motion at 2). He further claims that he wants to "observe and understand aspects of the lab's physical space and equipment that bear generally on the reliability and integrity of the work performed there . . . [which] can only be achieved if counsel is able to view the lab" (motion at 2). His position boils down to an argument that, somehow a tour of the laboratory may enable him to argue that any re-testing performed would not be an adequate remedy after Farak tested the drugs in question. The defendant makes no showing that the laboratory will contain the evidence he seeks. Instead, he guesses about what it may contain and provide for him. The defendant's speculation is not enough. *See Commonwealth v. Bishop*, 416 Mass. 169, 179-180 (1993); *Commonwealth v. Villalobos*, 09-P-1429, 2012 Mass. App. Unpub. LEXIS 470, \*9, *review denied*, 462 Mass. 1107 (2012) (defendant "had no actual information about what might be in the school records"). *Contrast Commonwealth v. Lam*, 444 Mass. 224, 232 (2005) (the complainant's middle school records relating to her sexual abuse allegation could be summonsed because the complainant admitted that she disclosed the sexual abuse to the school counselors). Indeed, the laboratory has not been frozen as a crime scene since Farak's arrest. It will not look the same as when Farak was testing there, since the State Police are in the process of shutting down the laboratory. Therefore, there is nothing to gain from exploring a laboratory that is not in the same condition or appearance as when Farak worked there.

Ultimately, the defendant is simply engaging in a “fishing expedition” for anything that might possibly help him. That violates the purpose of a Rule 17 summons. *Dwyer*, 448 Mass. at 145 (Rule 17[a] [2] is not a discovery tool; the defendant required to show relevance, admissibility, necessity and specificity to guard against a mere fishing expedition for possibly relevant information). The defendant’s “[g]eneralizations and unsubstantiated statements” are insufficient to procure a pretrial inspection of the requested documents. *Bourgeois*, 68 Mass. App. Ct. at 436. Simply put, the Court should deny the defendant’s motion and prevent the defendant’s unguided expedition. See, e.g., *Villalobos*, 2012 Mass. App. Unpub. LEXIS 470, at \*9 (that the complainant attended school for adolescents with PTSD and self-injurious behavior, and that she may have been raped by someone other than defendant, was not sufficient to conclude that school records would contain disclosure of sexual abuse); *Commonwealth v. Daniels*, 08-P-1808, 2010 Mass. App. Unpub. LEXIS 280, at \*5-6 (Mass. App. March 16, 2010) (complainant’s admitted use of drugs at time of attack not sufficient to permit inspection of her health records).

The Court should not consider the defendant’s reliance on a Hampshire County case to which he provides no case name, docket number, written memorandum of decision, transcript, or other information on the case wherein a judge allegedly permitted a defense attorney to inspect the Amherst laboratory. To consider this argument based solely on a short news article from the Republican located on the internet is inappropriate and lacking a factual basis in contradiction to Rule 17.

Likewise, the Court should not consider the Honorable Jeffrey Locke’s ruling wherein he permitted access to the Hinton drug laboratory in an Annie Dookhan-related case. Simply put, this case is completely unlike the Annie Dookhan matter, wherein it is alleged there was a

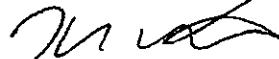
complete failure of oversight and supervision. Comparatively, Farak's case boils down to a lone chemist who alleged stole drugs from the Amherst laboratory for roughly three to four months before she was caught. That case is therefore inapposite. Therefore, the defendant's motion should be denied.

### CONCLUSION

For the foregoing reasons, the defendant's Rule 17(a)(2) motion for access to the Amherst drug laboratory should be denied.

Respectfully Submitted,

MARTHA COAKLEY  
ATTORNEY GENERAL

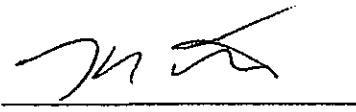


Kris C. Foster (BBO #672376)  
Assistant Attorney General  
Criminal Bureau  
One Ashburton Place  
Boston, Massachusetts 02108  
(617) 727-2200, ext. 2833

Date: October 2, 2013

**CERTIFICATE OF SERVICE**

I hereby certify that I served a copy of the AGO's opposition to the motion for access to the Amherst laboratory upon the defendant and his counsel in hand on this date.



Kris C. Foster  
Assistant Attorney General

Date: October 2, 2013







COMMONWEALTH OF MASSACHUSETTS  
SUPERIOR COURT

Hampden, ss.

## MOTION TO QUASH SUBPOENA FOR AAG ANNE KACZMAREK

The Massachusetts Attorney General's Office (AGO), hereby moves to quash the subpoena requiring AAG Anne Kaczmarek to appear at an evidentiary hearing in the above-entitled matter. As grounds therefor, the AGO states that the defendant seeks information on matters that are either confidential, privileged and exempt from disclosure, or cumulative of information of which the defendant already has possession. In support of this motion, the AGO has attached a memorandum of law.

WHEREFORE, for the foregoing reasons, the AGO requests that this Court quash the subpoena.

Respectfully submitted  
For the Attorney General,

MARTHA COAKLEY

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Kris C. Foster  
Assistant Attorney General  
Criminal Bureau  
One Ashburton Place

Boston, Massachusetts 02108  
(617) 727-2200, ext. 2833  
BBO # 672376

Dated: November 25, 2013

**CERTIFICATE OF SERVICE**

I hereby certify that I served a copy of the Motion to Quash Subpoena upon the defendant and his counsel in hand on this date.

*by hand, 1st class mail*



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Kris C. Foster  
Assistant Attorney General

Date: November 25, 2013

**COMMONWEALTH OF MASSACHUSETTS  
SUPERIOR COURT**

Hampden, ss.

COMMONWEALTH )  
v. ) No. HDCR2012-00083  
ROLANDO PENATE )  
 )

## **MOTION TO QUASH SUBPOENA FOR SERGEANT JOSEPH BALLOU**

Sergeant Joseph Ballou, through his counsel at the Massachusetts Attorney General's Office (AGO), hereby moves to quash the subpoena requiring him to appear at an evidentiary hearing in the above-entitled matter. As grounds therefor, Sergeant Ballou states that the defendant seeks information on matters that are either confidential, privileged and exempt from disclosure, or cumulative of information of which the defendant already has possession. In support of this motion, Sergeant Joseph Ballou has attached a memorandum of law.

WHEREFORE, for the foregoing reasons, Sergeant Ballou requests that this Court quash his subpoena.

Respectfully submitted  
For the Attorney General,

MARTHA COAKLEY

*Mrs*

Kris C. Foster  
Assistant Attorney General  
Criminal Bureau  
One Ashburton Place  
Boston, Massachusetts 02108

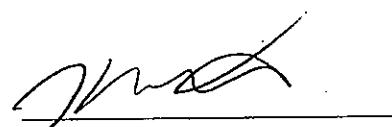
Dated: November 25, 2013

(617) 727-2200, ext. 2833  
BBO # 672376

**CERTIFICATE OF SERVICE**

I hereby certify that I served a copy of the Motion to Quash Subpoena upon the defendant and his counsel ~~in hand~~ on this date.

by 1<sup>st</sup> class mail



Kris C. Foster  
Assistant Attorney General

Date: November 25, 2013

COMMONWEALTH OF MASSACHUSETTS  
SUPERIOR COURT

Hampden, ss.

**MEMORANDUM OF LAW IN SUPPORT OF ATTORNEY  
GENERAL'S MOTION TO QUASH SUMMONS SERVED ON  
SERGEANT JOSEPH F. BALLOU**

This memorandum of law is submitted by the Massachusetts Attorney General's Office (AGO), in support of its motion to quash the summons served on Sergeant Joseph Ballou in the above-captioned matter. This Court should quash the summons because the testimony and documents sought relate to the ongoing criminal investigation of Sonja Farak. As argued below, such information is privileged or otherwise protected from disclosure and no exception or waiver applies. In the alternative, the AGO requests that this Court enter an appropriate protective order to prevent the unwarranted disclosure of privileged or otherwise protected information.

## **BACKGROUND**

On February 1, 2012, a Hampden County grand jury returned indictments against the defendant, Rolando Penate, charging him with three counts of possession with intent to distribute a class A substance, in violation of G.L. c. 94C, § 32A(d), as a subsequent offense, G.L. c. 94C, § 32(b), and with related school zone violations, G.L. c. 94C, § 32J; two counts of unlawful

possession of a firearm, in violation of G.L. c. 269, § 10(h); and use of a firearm while committing a felony, in violation of G.L. c. 265, § 18B.

The drugs in the defendant's case appear to have been tested by Sonja Farak. Farak is currently charged with four counts of evidence tampering, four counts of larceny of drugs and two count of possession of cocaine allegedly arising out of her work at the University of Massachusetts Amherst drug laboratory in her capacity as a chemist. AAG Anne Kaczmarek is assigned to prosecute the Commonwealth's case against Farak.

On August 22, 2013, Sergeant Ballou was served with a subpoena compelling his testimony on August 27, 2013, and the production of documents related to his investigation of Farak. The subpoena is attached as Exhibit A. On August 27, the Court rescheduled the evidentiary hearing in this case to September 23, 2013, with a hearing on the subpoena for Sergeant Ballou's testimony and production of documents scheduled on October 2, 2013.

On November 13, 2013, the defendant served a subpoena on Sergeant Ballou, seeking only his testimony, for November 22, 2013.

## ARGUMENT

**I. This Court should quash the subpoena because information regarding the ongoing criminal investigation of Sonja Farak are privileged and otherwise protected from disclosure.**

Courts have found information maintained by law enforcement regarding an ongoing criminal investigation to be privileged and not subject to disclosure. *See Kattar v. Doe*, CIV. A. 86-2206-MC, 1987 WL 11146 (D. Mass. Jan. 27, 1987) (granting in part a motion to quash subpoenas for a deposition that would require disclosure of information related to an active investigation and a deposition that would require disclosure of information protected by the law

enforcement investigatory privilege); *see also Puerto Rico v. United States*, 490 F.3d 50, 64 (1st Cir. 2007), *cert. denied.*, 552 U.S. 1295 (2008) (recognizing a privilege for “law enforcement techniques and procedures”). “The purpose of this privilege is to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation.” *In re Dept. of Investigation*, 856 F.2d 481, 483-84 (2d Cir. 1988).

The law enforcement investigative privilege is a qualified privilege, which is “subject to balancing the [government’s] interest in preserving the confidentiality of sensitive law enforcement techniques against the requesting party’s interest in disclosure.” *Puerto Rico*, 490 F.3d at 64. To override the strong public interest in maintaining the confidentiality of information related to an active criminal investigation, a party must generally show a compelling need for the information that is sufficient to overcome the privilege. *See Gomez v. City of Nashua*, 126 F.R.D. 432, 436 (D.N.H. 1989) (granting motion to quash deposition of an assistant attorney general based on the law enforcement investigative privilege, the deliberative process privilege, and the principle that absent a compelling need, the time and energy of public officials ought to be preserved for public business); *see also Ass’n for Reduction of Violence v. Hall*, 734 F.2d 63, 66 (1st Cir. 1984) (a party seeking discovery of privileged material “must make a threshold showing of need, amounting to more than ‘mere speculation’”) (quoting *Socialist Workers Party v. Attorney General*, 565 F.2d 19, 23 (2d Cir. 1977)).

In determining whether to quash the instant summons, therefore, this Court must weigh the minimal interest of the defendant in presenting testimony from Sergeant Ballou against the interests of the public and the Attorney General in maintaining the confidentiality of information

regarding an ongoing criminal investigation. To the extent the defendant asserts a constitutional right to elicit from Sergeant Ballou privileged information regarding the Farak investigation, the defendant “must at least make some plausible showing of how [the evidence] would [be] both material and favorable to his defense.” *U.S. v. Valenzuela-Bernal*, 458 U.S. 858 (1982). Here, the defendant is seeking to introduce information from Sergeant Ballou in order to show that test results in his case are suspect and illegitimate. Because the proffered evidence would do little to advance the defendant’s claims, the defendant fails to make a showing that there is a compelling need for this testimony.

Likewise, Sergeant Ballou does not have first-hand knowledge of the many of the facts and events of the investigation. Therefore, his testimony would consist largely of inadmissible hearsay. To the extent the defendant is able to demonstrate an exception to the hearsay rule for certain proffered testimony, he must demonstrate a necessity for offering that testimony through Sergeant Ballou that outweighs the concerns underlying the investigative privilege. He cannot do so. As this is an ongoing investigation, *see Rafuse v. Stryker*, 61 Mass. App. Ct. 585, 600 (2004), the release of much of this information could compromise the prosecution of Sonja Farak. *Id.* Therefore, much of the information is still necessarily confidential. *See id.; see also Globe Newspaper v. Police Comm'r of Boston*, 419 Mass. at 862.

In addition, to the extent any such testimony is permitted, the AGO requests that the Court define clear limits in advance to avoid any unwarranted disclosure of privileged information regarding the ongoing criminal investigation of Sonja Farak.

**II. The AGO Did Not Waive Any Privilege By The District Attorney or AGO Releasing Selected Information to Defense Counsel or to the Public.**

Defense counsel may not obtain Sergeant Ballou’s testimony based upon a theory that the AGO has waived any claim of privilege by releasing certain information to defense counsel or to

the public. This argument has been soundly rejected by courts. *See Puerto Rico*, 490 F.3d at 66 (holding that federal government did not waive law enforcement privilege by disclosing some information about an investigation in a “detailed, two hundred page report”). As the First Circuit observed in *Puerto Rico v. United States*, “[c]ourts have held in the context of executive privilege that ‘release of a document only waives these privileges for the document or information specifically released, and not for related materials.’” *Id.* (quoting *In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997)). “This limited approach to waiver serves important interests in open government by ‘ensur[ing] that agencies do not forego voluntarily disclosing some privileged material out of the fear that by doing so they are exposing other, more sensitive documents.’” *Id.* Here, by voluntarily disclosing some information about the investigation to defense counsel and to the public, the AGO did not waive its privilege with respect to any documents or information beyond those reports. To hold otherwise would be to chill law enforcement officials from releasing any information to the public while an investigation is ongoing. “It would be illogical to punish [the AGO and other law enforcement agencies] for [their] voluntary disclosure of these materials by also forcing them to disclose other information that [they] have deemed privileged.” *Id.* at 67. Accordingly, the subpoena served upon Sergeant Ballou should be quashed.

**III. Sergeant Ballou would be protected from testifying as to his work product or any communications made to secure the enforcement of law under recognized legal doctrines.**

Added to the above, certain lines of questioning would not be allowable should the defendant attempt to pursue them. First, Sergeant Ballou, who works closely with assistant attorneys general as an investigator at the AGO, would be protected from testifying as to or producing any work product. *See, e.g., Commonwealth v. Paszko*, 391 Mass. 164, 187-88 (1984)

(noting that core of work product doctrine is protection of attorney mental processes); *Commonwealth v. Lewinski*, 367 Mass. 889, 902 (1975) (recognizing that defendant would not be entitled to access work product of prosecutor within documents); *Hickman v. Taylor*, 329 U.S. 495, 509-14 (1947) (explaining that doctrine in part protects against “inquiries into” “mental impressions of an attorney,” “personal beliefs,” and other “intangible” matters, in part due to the chilling effect on attorney work that could be produced by the mere fear of disclosure); *Commonwealth v. Bing Sial Liang*, 434 Mass. 131, 137-38 (2001), *citing Hickman*, 329 U.S. at 511 (finding that victim-witness advocate working with prosecution may be protected by work product doctrine, and explaining, “Proper preparation of a . . . case demands that prosecutors assemble information, sift what they consider to be the relevant from the irrelevant facts, prepare their legal theories and plan their strategy without undue and needless interference. . . . This work is reflected . . . in interviews, statements, memoranda, correspondence, briefs, mental impressions, and personal beliefs”).

Sergeant Ballou would also be shielded from having to testify regarding communications made by citizens to secure the enforcement of law, under an absolute privilege held by the government. It has long been accepted in the Commonwealth that:

“It is the duty of every citizen to communicate to his government any information which he has of the commission of an offense against its laws. To encourage him in performing this duty without fear of consequences, the law holds such information to be among the secrets of state, and leaves the question how far and under what circumstances the names of the informers and the channel of communication shall be suffered to be known, to the absolute discretion of the government, to be exercised according to its views of what the interests of the public require. Courts of justice therefore will not compel or allow the discovery of such information, either by the subordinate officer to whom it is given, by the informer himself or by any other person, without the permission of the government. The evidence is excluded, not for the protection of the witness or the party in the particular case, but upon general grounds of public policy, because of the confidential nature of such communications.”

*Attorney Gen. v. Tufts*, 239 Mass. 458, 490-91 (1921) (quoting *Worthington v. Scribner*, 109 Mass. 487, 488-89 (1872) (involving communications made to Treasury officer, and collecting cases involving communications made to various types of governmental officials)); see also *District Attorney v. Flatley*, 419 Mass. 507, 510 (1995) (noting absolute nature of privilege and fact that “[n]o subsequent Massachusetts decision modifies or abrogates either *Tufts* or *Worthington*”).<sup>1</sup>

As a result of the above principles, the defendant’s ability to obtain evidence from Sergeant Ballou would be limited, making his compelled testimony all the more unwarranted.

**IV. If Sergeant Ballou Is Required to Appear in the Instant Matter, the AGO Anticipates that Its Investigative Team Will Soon Be Inundated With Such Requests.**

Due to the claims against Sonja Farak and her alleged misconduct, the AGO anticipates that this is among the first of many summonses of this type that may be directed to members of its investigative team.<sup>2</sup> It is simply not feasible for Sergeant Ballou to perform his investigative duties and also provide testimony in each case where Farak or the Amherst drug laboratory is at issue. Under the extraordinary circumstances of this case, this Court should take into account the extreme burden that would be placed on Sergeant Ballou if this Court were to rule that defense counsel in this and other similar cases may require his appearance to testify regarding the ongoing criminal investigation of Sonja Farak.

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<sup>1</sup> This common-law privilege has been “modified” by the Massachusetts Legislature’s enactment of the Public Records Law, M.G.L. c. 66, § 10, “to the extent that if the information qualifies as a public record, the public is entitled to have access to it unless it falls within one of the exemptions provided by [M.G.L. c. 4, § 7, cl. 26].” *Rafuse v. Stryker*, 61 Mass. App. Ct. 595, 596-97 (2004). The Public Records Law obviously does not apply here.

<sup>2</sup> Indeed, this is at least the second subpoena for Sergeant Ballou’s testimony and production of documents related to the investigation of Sonja Farak. See *Commonwealth v. Watt, et al*, HDCR2009-01068.

V. **As an alternative to quashing the subpoena, this Court should restrict its scope.**

In the event that this Court declines to quash the subpoena, it should restrict its scope by relieving the obligation of the AGO to produce the following types of information:

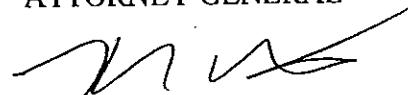
1. Information concerning the criminal history of those other than the individual referenced in the subpoena;
2. Information concerning the criminal history of any individual prior to the incidents giving rise to the criminal matter at issue;
3. Information concerning the health or medical or psychological treatment of individuals;
4. Information that could lead to identity theft or similar conduct, such as dates of birth, Social Security numbers; telephone numbers; precise addresses; and names of relatives.
5. Legal work product;
6. Information that could allow the identities of complainants to be learned;
7. Disclosure of confidential investigative techniques.<sup>3</sup>

**CONCLUSION**

For the foregoing reasons, the Attorney General's Office respectfully requests that this Court quash the summons served upon Sergeant Joseph Ballou in the above-captioned matter. In the alternative, the AGO requests that the Court issue an appropriate protective order to prevent the unwarranted disclosure of privileged or protected material.

Respectfully Submitted

MARTHA COAKLEY  
ATTORNEY GENERAL



Kris C. Foster (BBO #672376)

---

<sup>3</sup> The AGO reserves the right to raise other arguments and objections that become apparent.

Assistant Attorney General  
Criminal Bureau  
One Ashburton Place  
Boston, Massachusetts 02108  
(617) 727-2200, ext. 2833

Date: November 25, 2013

**CERTIFICATE OF SERVICE**

I hereby certify that I served a copy of the Attorney General's Motion to Quash Subpoena issued to Sergeant Joseph Ballou upon the defendant and his counsel *in hand* on this date.  
*by 1st class mail*



---

Kris C. Foster  
Assistant Attorney General

Date: November 25, 2013

COMMONWEALTH OF MASSACHUSETTS  
SUPERIOR COURT

Hampden, ss.

\_\_\_\_\_  
COMMONWEALTH )  
                )  
                )  
v.              )            No. HDCR2012-00083  
                )  
ROLANDO PENATE )  
                )  
\_\_\_\_\_  
\_\_\_\_\_

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**MEMORANDUM OF LAW IN SUPPORT OF ATTORNEY  
GENERAL'S MOTION TO QUASH SUMMONS SERVED ON  
ASSISTANT ATTORNEY GENERAL ANNE KACZMAREK**

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This memorandum of law is submitted by the Massachusetts Attorney General's Office (AGO), in support of its motion to quash the summons served on Assistant Attorney General Anne Kaczmarek in the above-captioned matter. This Court should quash the summons because the testimony sought relate to the AGO's ongoing criminal investigation of Sonja Farak. As argued below, such information is privileged or otherwise protected from disclosure and no exception or waiver applies. In the alternative, the AGO requests that this Court enter an appropriate protective order to prevent the unwarranted disclosure of privileged or otherwise protected information.

**BACKGROUND**

On February 1, 2012, a Hampden County grand jury returned indictments against the defendant, Rolando Penate, charging him with three counts of possession with intent to distribute a class A substance, in violation of G.L. c. 94C, § 32A(d), as a subsequent offense, G.L. c. 94C,

§ 32(b), and with related school zone violations, G.L. c. 94C, § 32J; two counts of unlawful possession of a firearm, in violation of G.L. c. 269, § 10(h); and use of a firearm while committing a felony, in violation of G.L. c. 265, § 18B.

The drugs in the defendant's case appear to have been tested by Sonja Farak. Farak is currently charged with four counts of evidence tampering, four counts of larceny of drugs and two count of possession of cocaine allegedly arising out of her work at the University of Massachusetts Amherst drug laboratory in her capacity as a chemist. AAG Anne Kaczmarek is assigned to prosecute the Commonwealth's case against Farak.

On August 22, 2013, AAG Kaczmarek was served with a subpoena compelling her testimony on August 27, 2013, and the production of documents related to her investigation of Farak. On August 27, the Court rescheduled the evidentiary hearing in this case to September 23, 2013, with a hearing on, *inter alia*, the subpoena issued for AAG Kaczmarek's testimony and production of documents. On October 2, 2013, the AGO filed a motion to quash the subpoena, the Honorable Jeffrey Kinder presiding. At that time, defense counsel indicated that he was not seeking AAG Kaczmarek's testimony at that hearing and the AGO's motion was dismissed as moot.

On November 13, 2013, the defendant served a subpoena on AAG Kaczmarek, this time seeking only her testimony, for November 22, 2013.

## ARGUMENT

**I. This Court should quash the summons because information regarding the ongoing criminal investigation of Sonja Farak are privileged and otherwise protected from disclosure.**

Courts have found information maintained by law enforcement regarding an ongoing criminal investigation to be privileged and not subject to disclosure. *See Kattar v. Doe*, CIV. A.

86-2206-MC, 1987 WL 11146 (D. Mass. Jan. 27, 1987) (granting in part a motion to quash subpoenas for a deposition that would require disclosure of information related to an active investigation and a deposition that would require disclosure of information protected by the law enforcement investigatory privilege); *see also Puerto Rico v. United States*, 490 F.3d 50, 64 (1st Cir. 2007), *cert. denied.*, 552 U.S. 1295 (2008) (recognizing a privilege for “law enforcement techniques and procedures”). “The purpose of this privilege is to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation.” *In re Dept. of Investigation*, 856 F.2d 481, 483-84 (2d Cir. 1988).

Similar principles can be found in various areas of Massachusetts law. As an example, the public records laws exempt from disclosure “investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials, the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.” M.G.L. c. 4, § 7, cl. 26(f). This exemption recognizes that the disclosure of certain investigatory materials “could so detract from effective law enforcement to such a degree as to operate in derogation, and not in support of, the public interest.” *Bougas v. Chief of Police of Lexington*, 371 Mass. 59, 61-63 (1976) (holding that police reports and letters from citizens to police were exempt from disclosure). Even if not directly applicable here, the exemption “provides guidance as to public policy considerations.” *Sheriff of Bristol County v. Labor Relations Comm'n*, 62 Mass. App. Ct. 665, 671 (2004); *see also Babets v. Secretary of Executive Office of Human Servs.*, 403 Mass. 230, 237 n.8 (1988) (finding that terms of public records law may offer some evidence of Legislature’s attitude on

issues of evidentiary privileges); *Puerto Rico*, 490 F.3d at 63 (noting that the law enforcement exemption in the federal Freedom of Information Act provides guidance in determining the scope of the investigative privilege). There are other examples. *See, e.g., In re Enforcement of a Subpoena*, 463 Mass. 162, 177 n.8 (2012) (listing “impounded filings regarding ongoing criminal investigations” as a type of document that “at least temporarily” can be shielded from public); *The Massachusetts Guide to Evidence*, Art. V, § 515 (“Unless otherwise required by law, information given to governmental authorities in order to secure the enforcement of the law is subject to disclosure only within the discretion of the governmental authority.”).

The law enforcement investigative privilege is a qualified privilege, which is “subject to balancing the [government’s] interest in preserving the confidentiality of sensitive law enforcement techniques against the requesting party’s interest in disclosure.” *Puerto Rico*, 490 F.3d at 64. To override the strong public interest in maintaining the confidentiality of information related to an active criminal investigation, a party must generally show a compelling need for the information that is sufficient to overcome the privilege. *See Gomez v. City of Nashua*, 126 F.R.D. 432, 436 (D.N.H. 1989) (granting motion to quash deposition of an assistant attorney general based on the law enforcement investigative privilege, the deliberative process privilege, and the principle that absent a compelling need, the time and energy of public officials ought to be preserved for public business); *see also Ass’n for Reduction of Violence v. Hall*, 734 F.2d 63, 66 (1st Cir. 1984) (a party seeking discovery of privileged material “must make a threshold showing of need, amounting to more than ‘mere speculation’”) (quoting *Socialist Workers Party v. Attorney General*, 565 F.2d 19, 23 (2d Cir. 1977)).

Here, the interests of the requesting party include his rights under the U.S. Constitution and the Massachusetts Declaration of Rights to present a complete defense and to utilize

compulsory process to secure the presence of witnesses on his behalf. See, e.g., *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (federal Constitution “guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’”) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)); *Washington v. Texas*, 388 U.S. 14 (1967) (“The right to offer testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense.”).

However, the constitutional right of a defendant to present a complete defense “is not unlimited, but rather is subject to reasonable restrictions.” *United States v. Scheffer*, 523 U.S. 303, 308 (1998); see also *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (finding right to present relevant testimony “may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process”). “As a result, state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused’s right to present a defense so long as they are not ‘arbitrary’ or ‘disproportionate to the purposes they are designed to serve.’” *Scheffer*, 523 U.S. at 308 (quoting *Rock v. Arkansas*, 483 U.S. 44, 56 (1987)).

In determining whether to quash the instant summons, therefore, this Court must weigh the interests of the defendant in presenting testimony from AAG Anne Kaczmarek against the interests of the public and the Attorney General in maintaining the confidentiality of information regarding an ongoing criminal investigation. To the extent the defendant asserts a constitutional right to elicit from AAG Anne Kaczmarek privileged information regarding the Farak investigation, the defendant “must at least make some plausible showing of how [the evidence] would [be] both material and favorable to his defense.” *U.S. v. Valenzuela-Bernal*, 458 U.S. 858 (1982). The defendant has not done so here.

Here, AAG Anne Kaczmarek does not have first-hand knowledge of the facts and events of much of the information being sought by the defendant. Therefore, any information she possibly has would consist largely of inadmissible hearsay. To the extent the defendant is able to demonstrate an exception to the hearsay rule for certain proffered testimony, he must demonstrate a necessity for offering that testimony through AAG Anne Kaczmarek that outweighs the concerns underlying the investigative privilege. He cannot do so. Testimony by a witness far removed from events at issue where the witness at most has indirect second-hand knowledge cannot suffice. In addition, to the extent any such testimony is permitted, the AGO requests that the Court define clear limits in advance to avoid any unwarranted disclosure of privileged information regarding the ongoing criminal investigation of Sonja Farak

**II. The AGO did not waive any privilege by the district attorney or AGO releasing selected information to defense counsel or to the public.**

Defense counsel may not obtain AAG Kaczmarek's testimony based upon a theory that the AGO has waived any claim of privilege by releasing certain information to defense counsel or to the public. This argument has been soundly rejected by courts. *See Puerto Rico*, 490 F.3d at 66 (holding that federal government did not waive law enforcement privilege by disclosing some information about an investigation in a "detailed, two hundred page report"). As the First Circuit observed in *Puerto Rico v. United States*, "[c]ourts have held in the context of executive privilege that 'release of a document only waives these privileges for the document or information specifically released, and not for related materials.'" *Id.* (quoting *In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997)). "This limited approach to waiver serves important interests in open government by 'ensur[ing] that agencies do not forego voluntarily disclosing some privileged material out of the fear that by doing so they are exposing other, more sensitive documents.'" *Id.* Here, by voluntarily disclosing some information about the investigation to

defense counsel and to the public, the AGO did not waive its privilege with respect to any information beyond those reports. To hold otherwise would be to chill law enforcement officials from releasing any information to the public while an investigation is ongoing. “It would be illogical to punish [the AGO and other law enforcement agencies] for [their] voluntary disclosure of these materials by also forcing them to disclose other information that [they] have deemed privileged.” *Id.* at 67. Accordingly, the subpoena served upon AAG Kaczmarek should be quashed.

**III. The defendant seeks testimony that either could be obtained from other sources or is irrelevant, and that would needlessly cause a prosecutor’s time and resources to be diverted away from important public duties.**

The testimony the defendant apparently seeks from AAG Anne Kaczmarek either could be obtained from other sources or is irrelevant. The drugs in the defendant’s case were seized in October and November of 2011. It appears that the defendant is going to argue that Farak may have tampered with the drugs in his case, by attempting to elicit from AAG Kaczmarek that the allegations against Farak date back much further than the roughly four months before Farak’s arrest that the AGO alleges. This is merely a fishing expedition. There is nothing to indicate that the allegations against Farak date back to the time she tested the drugs in the defendant’s case. Therefore, her testimony would be irrelevant and unhelpful to the Court.

Quashing the subpoena would be especially warranted considering that compliance would cause AAG Kaczmarek’s time and resources to be diverted away from important public duties. Indeed, one court that confronted this same combination of circumstances when a prosecutor was subpoenaed to provide deposition testimony – that is, the facts that the party could obtain evidence from other sources, that the prosecutor’s thinking was not relevant, and that the prosecutor’s time would be diverted away from public service – reasoned as follows:

Although the information gathered by the [prosecutor's office] is relevant to plaintiff's action, the information may be obtained by less onerous means than taking the deposition of [the prosecutor]. Documentary evidence in the investigative file would reveal the information uncovered. Plaintiff may also depose any witnesses to the incident to discover their recollection of the events in question. Plaintiff states he is most interested in [one witness's] statement to the [prosecutor's office] because it formed the basis of the decision not to prosecute. But again, the [prosecutor's] decision whether to prosecute is not relevant to the instant action; it is [the witness's] recollection of events which is important. Plaintiff may discover this information by deposing [the witness]. Courts generally refuse to compel the deposition of a government witness if the plaintiff may obtain discovery by an alternative and less burdensome method to the government.

The [prosecutor's office] performs numerous investigations into purported criminal conduct as a part of its public function. Subjecting employees of that office to deposition absent the showing of a compelling need would violate public policy concerns that the time and resources of that office be conserved for the public business. Plaintiff has not established such a compelling need in this case.

*Gomez v. City of Nashua*, 126 F.R.D. 432, 434-36 (D.N.H. 1989) (additionally finding the federal deliberative process privilege relevant, which privilege is based on the policy that "the time and energies of public officials be conserved for the public's business to as great an extent as may be consistent with the ends of justice in particular cases [and a] failure to place reasonable limits upon private litigants' access to responsible governmental officials as sources of routine pretrial discovery would result in a severe disruption of the government's primary function" (quoting *Community Fed. Savings & Loan Ass'n v. Federal Home Loan Bank*, 96 F.R.D. 619, 621 (D.D.C. 1983))); see also *Church of Scientology v. IRS*, 138 F.R.D. 9, 12-13 (D. Mass. 1990) (Bowler, Mag. J.) (discussing rule generally precluding depositions of high government officials, which is based on "[t]he rationale . . . that such officials must be free to conduct their jobs without the constant interference of the discovery process," and which may be

overcome only “upon a showing that the information to be gained from such a deposition is not available through any other source”). These realities justify quashing the subpoena here.

**IV. AAG Kaczmarek would be protected from testifying as to her work product or any communications made to secure the enforcement of law under recognized legal doctrines.**

Added to the above, certain lines of questioning would not be allowable should the defendant attempt to pursue them. First, AAG Kaczmarek would be protected from having to testify regarding her thought processes in litigating any action, under the attorney work product doctrine. *See, e.g., Commonwealth v. Paszko*, 391 Mass. 164, 187-88 (1984) (noting that core of work product doctrine is protection of attorney mental processes); *Commonwealth v. Lewinski*, 367 Mass. 889, 902 (1975) (recognizing that defendant would not be entitled to access work product of prosecutor within documents); *Hickman v. Taylor*, 329 U.S. 495, 509-14 (1947) (explaining that doctrine in part protects against “inquiries into” “mental impressions of an attorney,” “personal beliefs,” and other “intangible” matters, in part due to the chilling effect on attorney work that could be produced by the mere fear of disclosure); *Commonwealth v. Bing Sial Liang*, 434 Mass. 131, 137-38 (2001), *citing Hickman v. Taylor*, 329 U.S. 495, 511 (1947) (“Proper preparation of a . . . case demands that prosecutors assemble information, sift what they consider to be the relevant from the irrelevant facts, prepare their legal theories and plan their strategy without undue and needless interference. . . . This work is reflected . . . in interviews, statements, memoranda, correspondence, briefs, mental impressions, and personal beliefs”).

Second, AAG Kaczmarek would be shielded from having to testify regarding communications made by citizens to secure the enforcement of law, under an absolute privilege held by the government. It has long been accepted in the Commonwealth that:

“It is the duty of every citizen to communicate to his government any information which he has of the commission of an offense against its laws. To encourage him in performing this duty without fear of consequences,

the law holds such information to be among the secrets of state, and leaves the question how far and under what circumstances the names of the informers and the channel of communication shall be suffered to be known, to the absolute discretion of the government, to be exercised according to its views of what the interests of the public require. Courts of justice therefore will not compel or allow the discovery of such information, either by the subordinate officer to whom it is given, by the informer himself or by any other person, without the permission of the government. The evidence is excluded, not for the protection of the witness or the party in the particular case, but upon general grounds of public policy, because of the confidential nature of such communications."

*Attorney Gen. v. Tufts*, 239 Mass. 458, 490-91 (1921) (quoting *Worthington v. Scribner*, 109 Mass. 487, 488-89 (1872) (involving communications made to Treasury officer, and collecting cases involving communications made to various types of governmental officials)); *see also District Attorney v. Flatley*, 419 Mass. 507, 510 (1995) (noting absolute nature of privilege and fact that “[n]o subsequent Massachusetts decision modifies or abrogates either *Tufts* or *Worthington*”).<sup>1</sup>

Third, AAG Kaczmarek should be protected from having to testify as to any ongoing investigations or sensitive law enforcement techniques, as described *supra*, should the defendant pursue such matters.

As a result of the above principles, the defendant's ability to obtain evidence from AAG Kaczmarek would be limited, making her compelled testimony all the more unwarranted.

**V. If AAG Kaczmarek is required to appear in the instant matter, the AGO anticipates that its investigative team will soon be inundated with such requests.**

Due to the claims against Sonja Farak and her alleged misconduct, the AGO anticipates that this is among the first of many summonses of this type that may be directed to members of

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<sup>1</sup> This common-law privilege has been “modified” by the Massachusetts Legislature’s enactment of the Public Records Law, M.G.L. c. 66, § 10, “to the extent that if the information qualifies as a public record, the public is entitled to have access to it unless it falls within one of the exemptions provided by [M.G.L. c. 4, § 7, cl. 26].” *Rafuse v. Stryker*, 61 Mass. App. Ct. 595, 596-97 (2004). The Public Records Law obviously does not apply here, where live testimony is sought, and where there are privacy exceptions to the public records law.

its investigative team. It is simply not feasible for AAG Kaczmarek to perform her investigative duties and also provide testimony in each case where Farak or the Amherst drug laboratory is at issue. Under the extraordinary circumstances of this case, this Court should take into account the extreme burden that would be placed on AAG Kaczmarek if this Court were to rule that defense counsel in this and other similar cases may require her appearance to testify regarding the ongoing criminal investigation of Sonja Farak.

**VI. As an alternative to quashing the subpoena, this Court should restrict its scope.**

In the event that this Court declines to quash the subpoena, it should restrict its scope by relieving the obligation of the AGO to produce the following types of information:

1. Information concerning the criminal history of those other than the individual referenced in the subpoena;
2. Information concerning the criminal history of any individual prior to the incidents giving rise to the criminal matter at issue;
3. Information concerning the health or medical or psychological treatment of individuals;
4. Information that could lead to identity theft or similar conduct, such as dates of birth, Social Security numbers; telephone numbers; precise addresses; and names of relatives.
5. Legal work product;
6. Information that could allow the identities of complainants to be learned;
7. Disclosure of confidential investigative techniques.<sup>2</sup>

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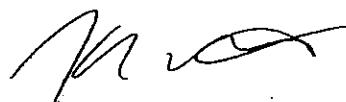
<sup>2</sup> The AGO reserves the right to raise other arguments and objections that become apparent.

CONCLUSION

For the foregoing reasons, the motion of the AGO should be allowed, and the subpoena should be quashed or modified as described herein.

Respectfully Submitted

MARTHA COAKLEY  
ATTORNEY GENERAL

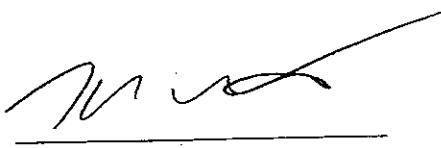


Kris C. Foster (BBO #672376)  
Assistant Attorney General  
Criminal Bureau  
One Ashburton Place  
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(617) 727-2200, ext. 2833

Date: November 25, 2013

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the Attorney General's Motion to Quash Subpoena issued to Assistant Attorney General Anne Kaczmarek upon the defendant and his counsel in-hand on this date. *by 1st class mail*



November 22, 2013

Kris C. Foster  
Assistant Attorney General







1 Pages: 1-39  
2 Exhibits: None

3 COMMONWEALTH OF MASSACHUSETTS  
4 HAMPDEN, SS SUPERIOR COURT DEPARTMENT  
5 OF THE TRIAL COURT

6 \*\*\*\*\*  
7 COMMONWEALTH OF MASSACHUSETTS

8 vs. Docket No:  
9 ROLANDO PENATE, 2012-083  
10 \*\*\*\*\*

11 Hearing: Evidentiary - Dismiss  
12 BEFORE THE HONORABLE C. JEFFREY KINDER

13 APPEARANCES:

14 For the Commonwealth:  
15 Hampden County District Attorney's Office  
16 50 State Street, Springfield, MA 01102  
17 By: EDUARDO VELAZQUEZ, ASSISTANT DISTRICT ATTORNEY

18 For the Defendant:

19 LUKE RYAN, ESQUIRE, Sasson, Turnbull, Ryan & Hoose, 100 Main  
Street, Northampton, MA 01060

20 Also Present:

21 SEAN W. FARRELL, ASSOCIATE CHIEF LEGAL COUNSEL, and JENNIFER  
22 O'NEIL, ESQUIRE, State Police Headquarters, 470 Worcester  
23 Road, Framingham, MA 01702

24 KRIS FOSTER, ASSISTANT ATTORNEY GENERAL, Office of the  
25 Attorney General, Appeals Division, One Ashburton Place,  
A-19, Boston, MA 02108

26 - Hampden Superior Court  
27 50 State Street  
28 Springfield, Massachusetts  
29 October 2, 2013

30 ALICIA CAYODE KYLES  
31 Official Court Stenographer  
32 Registered Merit Reporter

## EXHIBITS

(No exhibits were marked.)

1                   (The Court was present at 11:27 a.m.)

2                   THE CLERK: Hearing on Page 13, Item 26, Rolando  
3                   Penate, Indictment 12-83. Attorneys Velazquez and Ryan.

4                   MR. VELAZQUEZ: Your Honor, there is also counsel here  
5                   from the State Police and the Attorney General's Office who  
6                   had filed or will file opposition.

7                   THE CLERK: Any other counsel involved in the case, if  
8                   they could identify themselves and who they represent.

9                   THE COURT: Good morning, Counsel.

10                  MR. FARRELL: Good morning, Your Honor. My name is  
11                  Sean Farrell. I'm here on behalf of the State Police.

12                  THE COURT: Mr. Farrell, good morning.

13                  MS. FOSTER: And Kris Foster on behalf of the Attorney  
14                  General's Office and Department of Public Health.

15                  MS. O'NEIL: Jennifer O'Neil also here for the State  
16                  Police.

17                  THE COURT: All right. Let me take just a moment and  
18                  outline where I understand we are.

19                  You may be seated.

20                  This is a pending drug case which I understand, at  
21                  least currently, has a hearing date of October 23, and a  
22                  final pretrial conference today.

23                  MR. RYAN: That's correct.

24                  THE COURT: I don't know whether or not if you were  
25                  successful in accomplishing the final pretrial conference or

1       these matters made that not practical.

2           MR. VELAZQUEZ: I am prepared to report, however I  
3 believe Mr. Ryan has some opposition filling it out today.

4           THE COURT: All right. Let me go forward then.

5           There are two motions before me. One is a motion to  
6 compel production of documentary evidence and it lists  
7 specifically 11 paragraphs, various documentary evidence  
8 that Mr. Ryan is seeking. And, second, there is a motion to  
9 inspect physical evidence seized in connection with the  
10 criminal -- that case now pending against Sonja Farak,  
11 previously a chemist at the Amherst laboratory, now run by  
12 the Massachusetts State Police.

13           As I understand it, Mr. Ryan, you are seeking this  
14 discover in connection with a motion to dismiss that you  
15 have filed alleging egregious government misconduct and  
16 that, as I understand it from Judge Carey, is not the  
17 subject of our discussion today, rather the motions to --  
18 for discovery; is that correct?

19           MR. RYAN: Yes, Your Honor. I think it's partly in  
20 for -- in evidence for the dismissal motion, but also if  
21 that's denied I'll try -- potential trial evidence as well.

22

23           THE COURT: Sorry. Were you referring to the trial  
24 date?

25           MR. RYAN: Well, for Mr. Penate's ultimate trial, if

1 his motion to dismiss is not allowed, I think it will be a  
2 live issue at trial on a chain of custody defense.

3 THE COURT: Right.

4 MR. RYAN: That is --

5 THE COURT: All right. And your -- I have seen in the  
6 file Mr. Ryan's opposition to the motion of the Attorney  
7 General to quash. Perhaps, I just overlooked it, but I  
8 haven't seen, at least in the files that I have, that motion  
9 to quash.

10 MS. FOSTER: Your Honor, if I may. I have two motions  
11 to quash. One, is a motion to quash subpoena for Sergeant  
12 Ballou and the other is for the Assistant Attorney General,  
13 and then I also have three oppositions to the Rule 17.

14 THE COURT: Are these oppositions that have been filed  
15 or are you filing them for the first time at this moment?

16 MS. FOSTER: I am filing them for the first time. I  
17 did serve it on defense counsel yesterday.

18 THE COURT: Did you not think it would be helpful for  
19 the Court -- for me to look at them before the hearing?

20 MS. FOSTER: I did, Your Honor. Honestly, they weren't  
21 prepared until last minute.

22 THE COURT: Apparently, Mr. -- I'm confused. Mr. Ryan  
23 had at least an opportunity to review a written opposition.  
24 It must have been prepared and served on him some time ago.

25 MS. FOSTER: I believe I served them on him yesterday.

1                   (Pause)

2                   THE COURT: Well, I think it makes sense rather than  
3 have me shoot in the dark at this moment, to read what has  
4 now been filed for the first time before I address you  
5 further.

6                   We are in recess.

7                   (The Court exited at 11:31 a.m.)

8                   (\* \* \* \* \*)

9                   (The Court entered at 11:47 a.m.)

10                  (The defendant was present with an interpreter.)

11                  THE COURT: Counsel, I have now at least perused the  
12 various pleadings. As I'm sure you understand, there's some  
13 frustration in this unique circumstance because I am in the  
14 middle of an ongoing evidentiary hearing on 15 pending  
15 motions for new trial where there is direct overlap between  
16 the information sought in connection with that, those cases  
17 and this case in which, pretrial, Mr. Ryan is seeking to  
18 discover much of the same information.

19                  I addressed this with Mr. Ryan once previously and  
20 expressed a hope that the parties might come to some  
21 agreement as to avoid a duplication of evidence in the case  
22 and Mr. Ryan, I understand, there's been some effort in that  
23 regard. Perhaps you can tell me the posture of the  
24 evidentiary hearing on the motion to dismiss.

25                  MR. RYAN: I would be happy to, Your Honor.

1           As you just mentioned, we were last here on September  
2 17, for sort of impromptu status conference and at that time  
3 I advised the Court, when the Court addressed the desire to,  
4 with the conservation of judicial resources, that I just  
5 receive a transcript of the proceeding that took place on  
6 September 9. Since that date, I've had a chance to review  
7 that. And so with respect to Mr. Penate's motion to  
8 dismiss, I would be prepared to, instead of calling --  
9 recalling those same witnesses, to offer that transcript as  
10 evidence to be considered on his motion to dismiss for  
11 egregious government misconduct and I would not intend to  
12 take live testimony from the witnesses who are available  
13 today, who have also been subpoenaed for Monday for the  
14 ongoing evidentiary hearing.

15           So I think -- I believe Mr. Velazquez is willing to go  
16 down this route, which I think will save considerable amount  
17 of time and effort on the part of the Court and would result  
18 in a duplication of a lot of testimony. So I think that on  
19 that front, there is -- that goal of the Court has been  
20 achieved and not wasting time having the same witnesses  
21 repeat the same testimony for this motion.

22           THE COURT: All right. Is that correct, Mr. Velazquez?

23           MR. VELAZQUEZ: That is correct, Your Honor.

24           THE COURT: All right. Don't several of the motions to  
25 quash anticipate that these witnesses would be giving live

1       testimony today and are those now rendered moot?

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

11          MS. FOSTER: It has, Your Honor. I mostly filed this  
12       motion to quash because there is this outstanding subpoena  
13       for Sergeant Ballou to testify.

14          THE COURT: Do you agree that the motion is identical  
15       to the one you filed in the other case?

16          MS. FOSTER: I believe it is, yes.

17          THE COURT: And you, therefore agree that all of the  
18       contents of Mr. Ballou's file have already been turned over?

19          MS. FOSTER: They have, Your Honor.

20          THE COURT: So you're not seeking to quash those  
21       despite the fact that the motion says that?

22          MS. FOSTER: I guess not, Your Honor. I apologize for  
23       that, but I am seeking to quash his testimony.

24          THE COURT: All right. Testimony which I now hear will  
25       not be taken today in any event because there is an

1 agreement that the evidence in the motion for new trial will  
2 be taken as the evidence in the motion to dismiss, correct?

3 MS. FOSTER: That's my understanding.

4 MR. RYAN: Yes.

5 THE COURT: So your motion to quash is moot, is it not?

6 MS. FOSTER: I believe it is, Your Honor.

7 THE COURT: What other motions that you have filed are  
8 now moot?

9 MS. FOSTER: I believe that's the only one. The only  
10 other motion I filed was a motion to quash Assistant  
11 Attorney General Anne Kaczmarek's testimony and production  
12 of documents.

13 THE COURT: Well, she will not be testifying,  
14 correct?

15 MS. FOSTER: She is still subpoenaed, Your Honor.

16 THE COURT: Mr. Ryan?

17 MR. RYAN: I can tell the Court I subpoenaed  
18 Ms. Kaczmarek for the August 27 hearing on this particular  
19 case. That hearing had to be rescheduled because I just  
20 received some discovery that day.

21 Ms. Kaczmarek was not on the witness list for the  
22 postconviction proceeding and at the postconviction  
23 proceeding I thought that we were going to be able to,  
24 essentially -- potentially obtain evidence that she had from  
25 Sergeant Ballou. Unfortunately, as the Court may recall,

1       Sergeant Ballou, during his testimony, indicated this was  
2       this parallel investigation that was not connected to the  
3       criminal prosecution of Ms. Farak, that he knew the name of  
4       the Major at the State Police who was conducting, but he had  
5       no knowledge, there was nothing in his file. And it was --  
6       it was like a firewall that he had no knowledge of.

7              During that hearing, Sharon Salem, when questioned  
8       about the so-called Berkshire case, the recent discovery we  
9       received that day, was advised that Ms. Kaczmarek was the  
10      source of that information to her.

11             So at this stage of the proceeding, I filed an  
12      opposition essentially to protect my client's rights in the  
13      sense I don't want to put a prosecutor on the stand unless I  
14      have to, but the Attorney General's Office is aware of an  
15      investigation and is producing ongoing discovery without  
16      providing defense counsel with the identity of individuals  
17      who are re-testing substances or the overall scope of this  
18      parallel investigation.

19             So, in filing my opposition to the motion to quash  
20      Ms. Kaczmarek, I'm essentially just not letting go of the  
21      one witness I know who has knowledge of an investigation  
22      that directly relates to this case and the parallel  
23      proceeding.

24            THE COURT: Well, let's focus on what we can accomplish  
25      today. I am not going to take evidence today based on your

1 representation regarding your agreement, so if there are  
2 witnesses waiting in the hallway that have been subpoenaed  
3 here to testify, one of you can go tell them they are free  
4 to leave.

5 MR. VELAZQUEZ: Very well. May I?

6 THE COURT: You may.

7 (Pause)

8 THE COURT: Then, I think what I would like to do is,  
9 starting with defense counsel, hear from you on those  
10 motions that are still pending and in play today and these  
11 are motions having to do with the discovery you are seeking  
12 and then I will hear from counsel in opposition.

13 MR. RYAN: Thank you, Your Honor.

14 If I could start with the motion to inspect the  
15 physical evidence.

16 As Your Honor may recall, my -- at the conclusion of  
17 the September 9, hearing I made an oral motion seeking  
18 access to the -- essentially, this evidence appears to be  
19 being maintained at the State Police Evidence Room in its  
20 western barracks.

21 Your Honor advised the parties that we should seek --  
22 we should confer with an eye towards trying to come to some  
23 mutual agreement that would not necessitate the filing of a  
24 motion. That conversation took place over a period of days.  
25 On September 17, Ms. Foster advised me it was the position

1 of her office that that physical evidence was irrelevant to  
2 any case except Ms. Farak's prosecution.

3 THE COURT: Let me stop you, just to make sure I  
4 understand the universe of physical evidence we are talking  
5 about. You're talking about the evidence that was seized  
6 during the search of her work station and during the search  
7 of her automobile and tote bag; is there other evidence?

8 MR. RYAN: No. That is all of the evidence that I  
9 understand is being held.

10 THE COURT: So much of this evidence has been discussed  
11 and photographed. And those photographs have been provided  
12 to you?

13 MR. RYAN: That's correct.

14 THE COURT: Can you tell me how you think your motion  
15 would be advanced by an actual physical review?

16 MR. RYAN: Certainly some of the photographs -- there  
17 were approximately two dozen that were taken. They depict  
18 these KPacs that there's been testimony about, inside a  
19 manila envelope that appear to have some writing on it. We  
20 are left in a position of taking the officer's word saying  
21 what these bags say on them, to the extent they've been  
22 compromised in any way, to the connection of the outside  
23 baggie. They did take pictures and they did write summary  
24 notes as to what the evidence is, but this really, I think,  
25 particularly the car, there was indication that the -- there

specifically  
asked

1       were materials and packaging that dated back to cases going  
2       back to 2008.

3              The Commonwealth is aware of the significance of this  
4       evidence and has furnished an affidavit for Ms. Salem that  
5       she was cross-examined about saying that these materials  
6       were paperwork that were discretionary as to what to do with  
7       them. But we haven't seen what the paperwork was and  
8       whether there's any connection with these packaging  
9       materials.

10          So I -- it's such a critical issue in terms of how far  
11       back Ms. Farak's conduct goes, and I should say one of the  
12       things that was found was some newspaper articles, as the  
13       Court is aware, from September of 2011 that had been --  
14       shared in common a theme that somebody was printing articles  
15       out that discussed the misuse and mishandling of narcotics  
16       and it was handwritten notes there to the effect of: I'm  
17       glad I'm not in law enforcement.

18          So there is this -- this is not a just a shot in the  
19       dark in terms of trying to move the date back as to when  
20       this misconduct began. I think that in order to do right by  
21       this client and my other client, I need to go into the -- to  
22       take a look at it.

23          I understand this is an unusual circumstance. Attorney  
24       General's Office doesn't want to open themselves up to chain  
25       of custody issues in Ms. Farak's prosecution, but I think

*Wants to  
be and talk*

1 where there's a will there has to be a way here and what I'm  
2 asking for is, you know, is standard. Pending criminal case  
3 where there is relevant evidence, I want to have a  
4 first-hand look at that evidence and not rely on  
5 representations in police report and photographs.

6 THE COURT: Well, you're correct it would be standard  
7 for Ms. Farak's counsel to be able to view the physical  
8 evidence against Ms. Farak. I can understand the  
9 Commonwealth's concern about a third party having the  
10 ability to physically inspect discovery in a case in which  
11 that third party is not a party.

12 So I am mindful and somewhat sympathetic to the  
13 Commonwealth's over-arching concern.

14 Let me turn first to Ms. Foster. As a practical  
15 matter, if Mr. Ryan were to show up with his investigator  
16 and say simply: I would like an opportunity to physically  
17 view, without physically handling the exhibits, what is the  
18 prejudice to the Commonwealth?

19 MS. FOSTER: This motion was only served on me at 9:30  
20 this morning so I haven't had much time to look over it, so  
21 I would like to reserve the opportunity to put something in  
22 writing.

23 THE COURT: Well, for now, why don't you focus on my  
24 question.

25 MS. FOSTER: Correct, Your Honor. I think the problem

1       is that this is just irrelevant evidence.

2           I think the prejudice would be the fact that every  
3           single defendant who has ever had an Amherst case will, all  
4           of a sudden be asking for access to the lab to look at,  
5           essentially, irrelevant evidence.

6           THE COURT: Well -- let me finish.

7           I understand your concern that you might be setting  
8           some precedent. However, I'm not persuaded necessarily that  
9           what Mr. Ryan is seeking an opportunity to view is  
10          necessarily irrelevant. There have been representations  
11          made in the hearing, for example, that a handful of these  
12          files found in Ms. Farak's vehicle were numbered in some way  
13          and there was reference in a fairly general way to  
14          laboratory paperwork without more specifics.

15           It may well be, and I don't know what that information  
16          is, but that may well be that information, if Mr. Ryan were  
17          able to look at it, might have some relevance to the defense  
18          of the case.

19           So let's assume, for the moment, that I conclude that  
20          what he's seeking to look at would have some bearing on the  
21          issues before me.

22           Other than your concern about setting a precedent of  
23          third parties looking at discovery in a criminal case, do  
24          you have other specific concerns?

25           MS. FOSTER: I don't with -- for looking at the

1 evidence in Ms. Farak's case except for the fact it would  
2 open the door to all third party requests to look at the  
3 evidence in this case.

4 And I'm not sure if this motion includes having access  
5 to the drug lab or if that was a separate motion, but I also  
6 am opposing that.

7 THE COURT: Well, right now we're only focused on this  
8 motion which is, I understand, having read it, that it does  
9 not apply to access to the drug lab which is a separate  
10 motion.

11 MS. FOSTER: Okay. I just haven't had an opportunity,  
12 really, to read this yet.

13 THE COURT: All right.

14 MR. RYAN: Could I just be heard briefly?

15 THE COURT: You may.

16 MR. RYAN: As the Court may be aware from the motion  
17 itself, I'm asking the opportunity to document this in a way  
18 that could be reproduced to other defendants with drug lab  
19 cases, so I think it would not necessarily open the door.  
20 It would open the door for the -- and it could be under a  
21 protective order, of course, but it would not necessitate  
22 setting a precedent that would result in multiple people  
23 going to the evidence room. It could be shared, I think,  
24 within a fairly easy way with our defendants who are  
25 similarly situated.

1           THE COURT: As a practical matter, Ms. Farak's case is  
2 scheduled for trial in February; is that correct?

3           MR. VELAZQUEZ: I believe so, Your Honor.

4           THE COURT: So your concern regarding the integrity of  
5 the files used in Ms. Farak's prosecution would apply up to  
6 and through the trial, but not thereafter; is that correct?

7           MS. FOSTER: I believe so, yes.

8           THE COURT: So are you telling me you wouldn't have  
9 objection to -- if, for some reason, I would put this issue  
10 off, and allow discovery of that information after the Farak  
11 trial, you would not be opposed to it?

12          MS. FOSTER: I think I still would be opposed to it for  
13 the same reason that it would open the floodgates to  
14 everyone.

15          THE COURT: Of course every case is considered on its  
16 own merits.

17          MS. FOSTER: Correct, Your Honor.

18          THE COURT: The fact that I allow it in this case would  
19 not necessarily automatically open the floodgates to every  
20 defendant in every criminal case.

21          MS. FOSTER: Correct, but just as an example though,  
22 Defense Counsel Mr. Ryan cites -- I believe it's a Hampden  
23 County case where there's access to the Amherst Lab, Suffolk  
24 County case with access to the Hinton lab, so I think once  
25 it's allowed it does start a chain.

1           THE COURT: All right. Let me ask whether or not other  
2           counsel wish to speak only to this motion, that is the  
3           motion to inspect physical evidence.

4           Mr. Velazquez?

5           MR. VELAZQUEZ: Your Honor, I just have a point of  
6           clarification, that is, this is in the context of a motion  
7           to dismiss.

8           THE COURT: As I understand it, Mr. Ryan is seeking an  
9           opportunity to view this motion to further support his  
10           motion to dismiss; is that correct, Mr. Ryan?

11           MR. RYAN: And as well as to potentially develop trial  
12           evidence, yes.

13           MR. VELAZQUEZ: And I just wanted to throw it out  
14           there, but the Court is aware that the evidence we are  
15           talking about in the Penate case has been re-tested and  
16           found to be the same substance that it was originally found  
17           to be by Ms. Farak.

18           THE COURT: Thank you for reminding me. I do recall  
19           when you were last before me that you did mention that.  
20           Which, of course, doesn't necessarily end the issue on the  
21           motion to dismiss.

22           MR. VELAZQUEZ: Right. It doesn't, but it certainly  
23           puts in the context of the evidence that was seized by  
24           Ms. Farak was videoed, photographed. It was documented in  
25           writing. And I don't see how a defense photographer is

1 going to get any better pictures than the State Police has  
2 already done and its been provided to defense counsel. And  
3 every time we have an issue like that, it opens up yet  
4 another avenue of arguments that just goes further and  
5 further into it, and there seems to be no end. And I'm just  
6 looking at the practical matter of this, because right now  
7 we're addressing it from the point of view of this case and  
8 then obviously the State Police and the Attorney General's  
9 concern are that we're going to address this both in prior  
10 violations of probation and we're going to address this in  
11 all appeals, anything that's ever been done in that  
12 particular lab and the floodgate argument, I think, is a  
13 strong one and should be really seriously considered in  
14 this.

15 But beyond that, Your Honor, I certainly would oppose  
16 it only because in terms of how it relates to what Sonja  
17 Farak did in this case. And we are alleging, obviously that  
18 the testing was done. There were over 20,000 such samples  
19 that were being tested at the same time, and I -- I sort of  
20 see this going to each and every one those samples as a  
21 potential way to somehow cast aspersions on that lab. But,  
22 the people who have testified thus far, and I expect Jim  
23 Hanchett and Rebecca Pontes will address that issue when  
24 they testify on the 7th.

25 THE COURT: Mr. Ryan, couple of thoughts; one, your

1 client is currently held; is he not?

2 MR. RYAN: That's correct.

3 THE COURT: So your argument, I assume, regarding the  
4 suggested delay until the close of the Sonja Farak case  
5 would be that your client, unfortunately, remains  
6 incarcerated and further delay is of obvious prejudice to  
7 him?

8 MR. RYAN: Yes, Your Honor.

9 THE COURT: In order to prevail on a motion to dismiss  
10 based on egregious government misconduct you, of course,  
11 would have to show some prejudice to your client and what  
12 Mr. Velazquez suggests is that the drugs have now been  
13 re-tested and that the Commonwealth, in its presentation  
14 would be presenting no evidence of any prior testing,  
15 granted they may be raised on cross examination.

16 I am trying to get a handle on how you think the --  
17 Ms. Farak's conduct, in light of the fact that she would not  
18 be a trial witness, has prejudiced your client such that  
19 that dismissal is warranted.

20 MR. RYAN: Well, respectfully, there are two avenues in  
21 which to obtain dismissal based on egregious government  
22 misconduct. One is through the showing of prejudice, the  
23 other is, there is a remedy for that. It embraces  
24 prophylactic considerations where a defendant need not show  
25 prejudice. If the conduct is egregious enough the Court can

1 dismiss, absent a finding of prejudice.

2 In this case, I think that is very much in play.

3 Now, with respect to Mr. Velazquez's argument that  
4 re-testing has occurred, that may be true; but I think that  
5 it is still -- I am still waiting for my expert, who has  
6 been given the discovery from the Mass. State Police Lab, as  
7 to re-testing to compare quantity of substances, to compare  
8 the spectra from one test to another as the Court is aware.  
9 Ms. Farak's -- the Berkshire case, there was a high degree  
10 of purity with some cocaine that was submitted to her when  
11 it went to the State Police lab. It was still cocaine, but  
12 it was of a much lower quantity. So I'm not conceding that  
13 these re-tests are going to put Mr. Velazquez in the  
14 position that he thinks they will.

15 I think that is still an open issue. I am not sure, at  
16 the end of the day, whether on their motion to dismiss the  
17 Court necessarily has to find that Mr. Penate has been  
18 prejudiced by what, I think we all would agree, is egregious  
19 government misconduct. This is a Commonwealth agent who,  
20 essentially, is caught using this laboratory for her own  
21 purpose. -

22 We don't know exactly what those purposes were, but the  
23 evidence is pretty compelling that she broke the law and did  
24 not discharge her duties in the manner that she was paid to  
25 do. So I understand these floodgate arguments, but this is

1       not something that any criminal defendant can have  
2       responsibility for.

3           The Commonwealth hired a person to do a job and she did  
4       it in a way that has given rise to these challenges that I  
5       think, unfortunately, Courts are put in a position to have  
6       that increase to their workload; but this is a natural  
7       consequence of misbehavior on the part of a government  
8       official.

9           THE COURT: Well, it may be misbehavior in that the  
10      evidence at least suggests that Ms. Farak was dipping into  
11      the substances and using them herself. Not sure that the  
12      evidence suggests there was any false testing. Rather, I  
13      think it is reasonable to infer, based only on what I have  
14      heard thus far, that she was taking cocaine from samples  
15      seized and replacing it with substances other than cocaine  
16      to cover her tracks and that, in my view, sets this case  
17      apart from the conduct of Ms. Dookhan who, apparently, was  
18      deliberately falsifying tests that were either never  
19      conducted or where there was evidence, there was no -- she  
20      reflected drugs were found when they were not.

21           I am not certain we have that evidence here, but that  
22      is an issue for another day.

23           Let me ask Mr. Farrell and Ms. O'Neil, if, on this  
24      motion, which is the motion to inspect physical evidence,  
25      you have a position you wish to be heard on?

1           MR. FARRELL: Your Honor, I think you've heard it. I  
2 will join in the arguments that have been already  
3 forwarded -- put forth with this particular issue.

4           THE COURT: All right. Thank you.

5           MR. FARRELL: Thank you.

6           THE COURT: Mr. Ryan, your next motion that you would  
7 like to address?

8           MR. RYAN: Thank you, Your Honor.

9           I guess, at this point, I would like to turn to the  
10 motion to permit access to the Amherst Laboratory. This a  
11 motion that I filed, as the Court is aware, this is,  
12 basically, a crime scene that's over at the University of  
13 Massachusetts. And the Commonwealth v. Matis provides some  
14 precedent for the idea that a physical location in the  
15 custody of a third party is susceptible to a Rule 17 motion  
16 to essentially take a view and memorialize a document.

17           I should say that in filing this motion I had some  
18 conversations with an attorney who is not present today,  
19 Byron Knight, who I believe Ms. Foster can clarify this. I  
20 think he represents the Department of Public Health.

21           My review of the file indicates that Crime Scene  
22 Services from the State Police went to the location and  
23 produced a video recording of the premises. And in speaking  
24 to Attorney Knight I said: Look, I filed this motion, but  
25 this is discovery that has not been provided, and if you

1       were to provide it, either one of two things would happen.  
2       You would have to withdraw the motion, or, I think you'd be  
3       in a substantially better position with the Court to say  
4       Attorney Ryan doesn't need to do this. He's got a video of  
5       the walk-thru.

6           So I think that that is a potential way to -- for me to  
7       get what I need and I think I spell out why I need it.

8           Part of the argument that is going to be banted about  
9       here is how much misconduct did this chemist engage in  
10      during days when other people were at the laboratory. And  
11      the physical location gives some sense as to what's  
12      available and who is -- what are the sight lines, where were  
13      different people stationed, where was this work  
14      accomplished. Right now this is information that has been  
15      sort of sketched out in a narrative form, but either a video  
16      of it that exists according to a police report I have or my  
17      own opportunity to go and walk the premises and take a video  
18      I think are necessary, in order for me to feel like I'm  
19      doing right by my clients.

20           THE COURT: Ms. Foster, is there such a video?

21           MS. FOSTER: This is the first I've heard of it, but I  
22      can check into that, Your Honor.

23           THE COURT: Well, as I understand it, Ms. Foster, this  
24      is no longer a working laboratory, correct?

25           MS. FOSTER: That's correct. It's in the process of

1 being turned back over to UMASS. I've been told that the  
2 room has been moved around, it wouldn't look how it looked  
3 when it was a functioning lab.

4 THE COURT: So what is the prejudice to the  
5 Commonwealth in allowing Mr. Ryan an opportunity go in and  
6 look at it even though it may not be quite the same?

7 MS. FOSTER: I think it's the same argument I made for  
8 inspecting the physical evidence. I think it just opens the  
9 floodgates to -- shortly we -- the Attorney General's Office  
10 and Department of Public Health won't have access to the  
11 lab, but I do think it opens up floodgates for inspecting  
12 what appears to be even less relevant evidence or less  
13 relevant than the physical evidence in Ms. Farak's case.

14 THE COURT: Okay. Let's move onto the other motion,  
15 you have, Mr. Ryan.

16 MR. RYAN: Just so the record is clear, I just handed  
17 Ms. Foster a copy of the police report that indicates that a  
18 video was made of that premises, and I don't know if that  
19 will impact her position or not.

20 The next motion that I would ask the Court an  
21 opportunity to be heard on is a motion I filed for the  
22 production of documentary evidence. This might bring some  
23 of the other attorneys into the fray.

24 I can say that I filed this motion seeking production  
25 of 11 different categories of evidence and I think that the

1 litigation and the responsive pleadings have established  
2 that a number of these items do not exist.

3 THE COURT: So why don't we put a finer point on it.  
4 Perhaps you can summarize for me, to the extent you know  
5 about it now, where the areas of disagreement are in these  
6 11 paragraphs.

7 MR. VELAZQUEZ: Certainly.

8 MR. RYAN: Certainly. Item Number Four -- excuse me,  
9 Item Number Three I think is probably one of the biggest  
10 ones out there, is a copy of Ms. Farak's personnel file.  
11 And Number Six dovetails with that. It's copies of  
12 performance evaluations of her and other individuals at the  
13 lab. And then Items Seven and Eight are -- seek the  
14 production of inter or intra-agency communications regarding  
15 the scope of the misconduct at the Amherst lab.

16 Those, I think, are the only issues that are really  
17 before the Court.

18 THE COURT: Three, six, seven and eight?

19 MR. RYAN: Correct.

20 THE COURT: All right. Let me perhaps hear the  
21 opposing position with respect to those paragraphs.

22 Who wants to carry the ball?

23 MS. FOSTER: I will, Your Honor.

24 I do agree those are the paragraphs in question.

25 The Rule 17 motion was filed on, I think four different

1 agencies -- the Attorney General's Office and Department of  
2 Public Health. I filed oppositions for those two.  
3 Regarding the Attorney General's Office, the numbers in  
4 question are Seven and Eight, which relate to  
5 correspondence. And its correspondence inside the Attorney  
6 General's Office and correspondence with other DA's Offices.

7 I think that a lot of that is going to -- almost all of  
8 that is going to be work-product preparation.

9 THE COURT: Well, let me ask the same question that I  
10 asked with respect to Mr. Ballou's file, are you saying that  
11 because you've actually looked at it or are you just  
12 guessing?

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

16 THE COURT: All right. Have you looked at any of the  
17 correspondence or other documents that would arguably  
18 qualify in these paragraphs?

19 MS. FOSTER: I have talked to Assistant Attorney General  
20 Anne Kaczmarek and she says the correspondence which would  
21 pretty much all be in email form would be work product or  
22 part of the ongoing investigation.

23 THE COURT: And other than talking to Ms. Kaczmarek,  
24 have you actually looked at any of the emails.

25 MS. FOSTER: I have not, Your Honor. I know the office

1 has not gathered them in one database.

2 THE COURT: All right.

3 MS. FOSTER: And for the Department of Health, I agree  
4 that the only thing in question there are the Sonja  
5 Farak's -- I think a few different people, personnel files  
6 and performance evaluations, and I think those are  
7 privileged.

8 I --- I really -- the -- I think the defendant has to  
9 show some type of relevance that outweighs the privacy  
10 interest in it and I don't think he's shown anything from  
11 Rule 17 purposes that shows a *prima facie* showing.

12 THE COURT: All right. And have you looked at either  
13 the personnel files?

14 MS. FOSTER: I have not, Your Honor.

15 THE COURT: Counsel, do you wish to be heard on this  
16 motion?

17 MR. FARRELL: Judge, I would only add, as the Court is  
18 fully aware of, the Lampron requirements place the burden on  
19 the defendants to demonstrate to this Court how any  
20 documents that he seeks are relevant, how they're admissible  
21 at trial; and most importantly, Your Honor, he has to make a  
22 showing of some specificity.

23 In this particular case no speci- -- excuse me,  
24 specificity, has been demonstrated by counsel. He hasn't --  
25 he hasn't explained to the Court how the contents of any

*look up  
Lampron*

1 personnel file are relevant to any issue that he's dealing  
2 with.

3 He hasn't explained how any of the other items he is  
4 seeking are relevant or admissible at trial.

5 If you look at the affidavit that's been submitted in  
6 the case, counsel states in his affidavit no less than five,  
7 six, seven paragraphs: Well, I believe this evidence; I  
8 believe; I believe; In my view.

9 THE COURT: Well --

10 MR. FARRELL: That, I think, goes towards the state of  
11 mind as to --

12 THE COURT: Let me interrupt for a moment. Of course  
13 the personnel files are not public documents, so he would  
14 not have seen the contents of the public -- of the personnel  
15 file.

16 Let's just assume, for example, that there's some  
17 information in the personnel file that deals with the  
18 discipline, disciplinary matters involving Ms. Farak in the  
19 relevant time period that may have to do with work  
20 attendance, work performance, information that may arguably  
- 21 bear some relationship to the misconduct that's been charged  
22 in the criminal case and may arguably be relevant to the  
23 defense.

24 Is more than that needed?

25 MR. RYAN: Well, whether we know that's in the contents

1 of those files, we don't know. That's the burden of the  
2 defendant to demonstrate to this Court how the contents of  
3 that file are relevant to this particular case.

4 THE COURT: And how can he do that?

5 MR. O'CONNOR: Your Honor, I'd ask the SJC that  
6 question because it's his burden. It's clear from the  
7 Lampron case, one is Rodriguez, those line of cases, that  
8 the burden lies squarely on the defendant or moving party  
9 seeking those files.

10 THE COURT: Well, we get these motions all the time,  
11 for example, in cases where victims in crimes of violence  
12 have a history of mental health treatment. Of course,  
13 without looking at those files, defense counsel cannot say  
14 without any certainty what is there, but I frequently and  
15 regularly find that evidence of past counseling may be  
16 relevant to the issue of credibility.

17 It seems to me that the defendant isn't in a much  
18 different position with respect to personnel files, perhaps  
19 the argument is not quite as strong, but in any event he's  
20 never going to be able to describe in detail the contents of  
21 the file without first seeing it.

22 So perhaps it's a chicken and egg kind of argument, but  
23 it seems to me the Lampron standard is a little bit looser  
24 than you're suggesting.

25 MR. FARRELL: The -- based upon the affidavit, Your

1 Honor, there's -- and I'd suggest to the Court there's  
2 nothing in that affidavit that suggests in any way how  
3 any -- first of all, there's no specific documents  
4 requested.

5 Testimony -- it's couched in "any and all records  
6 relating to this". "Any and all records". There's no  
7 specificity in there. And that's just, I suggest to the  
8 Court, that that is what the standard requires that there be  
9 specificity.

10 From what I've seen so far, we've seen a form motion  
11 going to four separate State agencies asking for the same  
12 thing. I would suggest this is nothing more than counsel  
13 cast a broad net in this particular case seeking information  
14 which may or may not exist.

15 That's specifically what the SJC and Lampron warned  
16 against, criminal discovery is not open season. It's not a  
17 civil case where we have a right to discovery. There is no  
18 right to discovery of third parties unless the showing has  
19 been made, Your Honor, and I'd suggest with all of these,  
20 particularly with the ones that are at issue here, no  
21 showing has been made whatsoever, Your Honor.

22 THE COURT: Mr. Ryan, why should you be entitled to the  
23 personnel file in its entirety?

24 MR. RYAN: Well, Your Honor, I think two reasons. I  
25 think the Court hit upon it. The only reason anybody files

1       a discovery motion is if I already had the information then  
2       I wouldn't need to file the discovery motion. The reason I  
3       am entitled to the personnel files, it's going to show one  
4       or two things, it's either going to show an absence of  
5       supervision -- in other words, it's going to be a manila  
6       folder with a couple of pieces of paper in there that  
7       suggests that there was no supervision that took place.  
8       That would undercut an argument that, you know, we knew that  
9       she wasn't engaging in misconduct because we had a close  
10      watch on our employees.

11           Or, it's going to show a more detailed level of  
12       supervision that I think, ultimately, will give rise to the  
13       argument that Ms. Farak was engaged in a game of deception.  
14       I mean, one of the things that I think is -- I want to see  
15       in the personnel file is did anybody ask Ms. Farak whether  
16       she had a history of using elicit substances.

17           Ms. Farak's wife testified at the Grand Jury that she  
18       used cocaine before she became a chemist at a laboratory  
19       where she was going to be charged with analyzing substances  
20       suspected of being cocaine highly addictive substance that  
21       has a huge street value.

22           I think if this personnel file doesn't address that, if  
23       there's no job application in there where she's asked that  
24       specific question, it's going to buttress arguments I'm  
25       going to make that the supervision at this laboratory, as

1 the Quality Assurance Audit from October 2012, makes clear,  
2 what was lacking -- there's a reason this lab wasn't  
3 accredited. They did not do things in a way that accredited  
4 labs do and I think that goes down to training and  
5 supervision that employees like Ms. Farak had.

6 I don't know what's in that file, but I do know that  
7 the misconduct alleged here occurred on the job and it --  
8 her performance, at least in the Grand Jury minutes that  
9 I've received and some of the testimony came in from  
10 Ms. Salem suggests that Ms. Farak's performance was  
11 beginning to spiral in the months preceding this.

12 Well, if there's no notation of that, then I think that  
13 starts to look like an argument that supervisors are making  
14 to cover themselves to be able to say: Look, you know,  
15 trust me, back in 2007, 2008 she was a model employee, but  
16 in the, you know, in the months preceding this, as the  
17 Attorney General's pleading repeatedly -- she didn't start  
18 doing any problematic things until roughly four months  
19 before her arrest.

20 Well, that's because supervisors who have an incentive  
21 to misrepresent Ms. Farak's performance as being stellar  
22 right up until it wasn't, I have given them that  
23 information.

24 So this personnel file goes right to the heart of key  
25 witnesses on this motion and potentially at trial as well.

1           THE COURT: If the Commonwealth were to seek a Rule 17  
2 subpoena to your client's employer for his personnel file to  
3 discover whether or not there might be evidence of  
4 misconduct or drug use on the job, would they be entitled to  
5 that?

6           MR. RYAN: That's a very good question. I don't know  
7 the answer to that. I think that, as is often the case, the  
8 rules don't exactly apply in the same way for a defendant  
9 who is facing deprivation of his liberty as for the  
10 Commonwealth who is attempting to deprive him of his  
11 liberty.

12          So my instinct would be to fight that. I don't think I  
13 would be adopting any inconsistent positions. I think it  
14 would have to do with the different positions that the  
15 parties would face.

16          THE COURT: Does that exhaust the motions that are  
17 before me today?

18          MR. RYAN: It does. I haven't been heard on the  
19 intra-office correspondence.

20          I can very quickly say --

21          THE COURT: Those are which paragraphs?

22          MR. RYAN: Seven and eight.

23          THE COURT: Thank you.

24          MR. RYAN: I think that my -- and again, I wouldn't  
25 file this motion if I knew what the contents of these emails

1 are, but I suspect they're -- particularly in the immediate  
2 days and weeks after Ms. Farak's arrest -- there was  
3 probably quite a bit of correspondence related to how bad is  
4 this scandal that we're facing here, and how bad was the  
5 supervision at Amherst. And this sort of correspondence, I  
6 don't think would be something that Ms. Farak's attorney  
7 would necessarily be entitled to because I think there's an  
8 argument that it is work product in that context, but I  
9 think, if you look at the rules on this, this work product  
10 is about opposing parties and the Attorney General's Office  
11 is not an opposing party to Mr. Penate, they are a third  
12 party. I don't think that rule applies and I don't think  
13 that the Attorney General's Office has made a showing in  
14 citing civil case after civil case where law enforcement  
15 privileges trump the needs of civil litigants to depose or  
16 obtain documentary evidence.

17 This is a criminal case and this is this man's liberty  
18 on the line. And I think that, under the circumstances,  
19 this is exculpatory evidence. It goes to the scope of a  
20 problem with a chemist who is at the heart of his criminal  
21 prosecution.

22 THE COURT: Well, if it's exculpatory evidence, the  
23 Commonwealth would have an obligation to turn it over.

24 Let me ask Mr. Velazquez.

25 Let's assume that this flurry of emails that Mr. Ryan



1       thinks might be there is present and there is an email  
2       exchange regarding the scope of the misconduct and some  
3       statements by some party at the lab, which opines that it  
4       would appear that this conduct has been ongoing for some  
5       time; would you agree that that would be exculpatory  
6       information?

7            MR. VELAZQUEZ: Sure, I would agree to that.

8            THE COURT: Has anybody looked at the emails to  
9       determine whether or not that might exist? I understand  
10      from Ms. Foster she hasn't looked at any of them.

11          MR. VELAZQUEZ: I have no access to them, but I'm not  
12      aware if anybody has, in fact, looked.

13          THE COURT: All right. Let me ask that question of  
14      you, Ms. Foster.

15          MS. FOSTER: I do believe -- I agree that that would be  
16      exculpatory, but I also think this is a fishing expedition.  
17      I believe anything that -- presuming that the Attorney  
18      General's Office is hiding some type of exculpatory  
19      evidence.

20          THE COURT: My question is: Has anybody looked?

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

24          THE COURT: So you agree that that kind of information  
25      would be exculpatory if it existed, but you don't believe

1 anybody has even looked to determine whether it exists?

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

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

12 MS. FOSTER: I agree, Your Honor, but again, we don't  
13 have this in some type of database.

14 I think the fact that I don't think there's even been a  
15 prima facie showing on this being relevant to the  
16 defendant's guilt or innocence, I think requiring the  
17 Attorney General's Office to compile possibly thousands of  
18 emails, voice mails, letters, requiring everyone who has  
19 been related to that unit to go through all their work to  
20 find these documents, I think that's asking a lot.

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

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

9       THE COURT: I'm prepared to take the matters under  
10 advisement unless any counsel has anything more to add?

11      MR. RYAN: No, Your Honor. Thank you very much for  
12 your time today.

13      THE COURT: All right. Let me just drop back on two  
14 unrelated matters.

15      First, Mr. Ryan, I have asked that the Campos matter be  
16 recalled, so I'm going to ask you to stand by for that.

17      Second, Ms. Foster, I don't know what Monday is going  
18 to bring in terms of motion practice, but if you intend, on  
19 behalf of the Attorney General, to file any motions, you  
20 have until close of business Friday at 5:00.

21      MS. FOSTER: Thank you, Your Honor.

22      THE COURT: We are in recess.

23      (The Court exited at 12:31 p.m.)

24      (\* \* \* \* \*)

25

## 1                   C E R T I F I C A T I O N

2                   I, ALICIA CAYODE KYLES, REGISTERED PROFESSIONAL  
3                   REPORTER, REGISTERED MERIT REPORTER, OFFICIAL COURT  
4                   STENOGRAPHER, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE  
5                   AND ACCURATE TRANSCRIPT FROM THE RECORD OF THE COURT  
6                   PROCEEDINGS IN THE ABOVE ENTITLED MATTER.

7                   I, ALICIA CAYODE KYLES, FURTHER CERTIFY THAT THE  
8                   FOREGOING IS IN COMPLIANCE WITH THE ADMINISTRATIVE OFFICE OF  
9                   THE TRIAL COURT DIRECTIVE ON TRANSCRIPT FORMAT, RESERVING MY  
10                  RIGHT TO PROVIDE AN ELECTRONIC COPY, WHEN REQUESTED, AT THE  
11                  COPY RATE AS PROVIDED BY THE STATUTE IN CHAPTER 221: SECTION  
12                  88, AS AMENDED.

13                  I, ALICIA CAYODE KYLES, FURTHER CERTIFY THAT I NEITHER  
14                  AM COUNSEL FOR, RELATED TO, NOR EMPLOYED BY ANY OF THE  
15                  PARTIES TO THE ACTION IN WHICH THIS HEARING WAS TAKEN, AND  
16                  FURTHER THAT I AM NOT FINANCIALLY NOR OTHERWISE INTERESTED  
17                  IN THE OUTCOME OF THE ACTION.

18

19

20                  ALICIA CAYODE KYLES, RPR, RMR, OCR

21                  Dated: May 1, 2015                    -

22                  50 State Street

23                  Springfield, Massachusetts 01103

24                  413-748-7624

25







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# COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

**TRIAL COURT OF THE  
COMMONWEALTH  
SUPERIOR COURT DEPT.  
INDICTMENT NO. 12-083**

**HAMPDEN COUNTY  
SUPERIOR COURT  
FILED**

OCT - 2 2013

*Clerk of Courts*  
CLERK OF COURTS

## Commonwealth

v.

ROLANDO PENATE

**HAMPDEN COUNTY  
SUPERIOR COURT  
FILED**

OCT - 4, 2013

*Bernard*

**DEFENDANT'S MOTION TO INSPECT PHYSICAL EVIDENCE**

Now comes the defendant in the above-entitled action and respectfully requests that this Honorable Court issue an order, pursuant to Mass. R. Crim. P. 17(a)(2), *Commonwealth v. Lampron*, 441 Mass. 265 (2004), and *Commonwealth v. Matis*, 446 Mass. 632 (2006), compelling the Attorney General's Office and/or the Massachusetts State Police to permit undersigned counsel, an investigator and/or expert to conduct an inspection/examination of physical evidence recovered during searches conducted in the course of the investigation and prosecution of Sonja Farak. (See Ex. A, Report of Trooper Randy Thomas re: Search Warrant Execution of Farak vehicle (Jan. 24, 2013; Ex. B, Report of Sgt. Joseph Ballou re: Search Warrant Execution of Tote Bag Recovered from Amherst Lab (Feb. 15, 2013); Ex. C, Report of Sgt. Josph Ballou re: Visit to the Amherst Laboratory (Feb. 15, 2013); Ex. D, Office of the Attorney General Department Case Report (Jan. 29, 2013).)

The Supreme Judicial Court (SJC) has made clear that Rule 17(a)(2) governs these circumstances,

as it provides for the summonsing of documentary evidence and other "objects" from third parties for use at trial, and permits the judge to order that they be produced prior to trial for purposes of inspection. Such inspection can include inspection by experts who may be called as witnesses to testify at trial regarding the import or significance of the objects.

*Matis*, 446 Mass. at 634.

The defendant states that disgraced chemist Sonja Farak originally analyzed the alleged cocaine and heroin he is charged with distributing and possessing with the intent to distribute. Recently furnished discovery reveals that, following Farak's arrest and indictment, the Commonwealth had these substances "re-tested" at the State Police Crime Laboratory in Sudbury.

The defendant states that, in order to effectively defend his case at trial, and at pretrial motions – where he has sought dismissal and will likely seek to exclude the results of any "re-testing" should his motion to dismiss be denied – his counsel requires a full understanding of the items seized by law enforcement in the course of its investigation. Such an understanding can only be achieved by means of a personal inspection of the evidence.

Police reports generated as a result of the search of Farak's car indicate that it contained lab materials related to cases dating back to 2008, as well as plastic bags containing substances believed to be narcotics. While pictures were taken during the execution of the warrant, neither the quantity nor quality of these photographs is sufficient to resolve what the evidence in Farak's car means in terms of the timing and scope of her criminal conduct and the timing and scope of the deficiencies at the

laboratory where she was employed. These are among the very issues the evidentiary hearing in this case has been scheduled to resolve.<sup>1</sup>

During a recent evidentiary hearing in parallel post-conviction proceedings, Sgt. Joseph Ballou was questioned extensively regarding the physical evidence in the possession of law enforcement. (*See Ex. E, Transcript of Testimony of Jospeh Ballou (Sept. 9, 2013).*) While the defendants in these proceedings have argued that such evidence suggests that Farak was engaged in evidence tampering years before her arrest, the Hampden County District Attorney's office has adopted the position taken by the Attorney General's office that the physical evidence in its possession only supports an inference that her misconduct began in the fall of 2012. To date, defendants like Mr. Penate have been forced to accept representations concerning the nature of this critical evidence from an agency that has consistently turned a blind eye toward anything suggesting that the target of its prosecution committed other crimes with which she has not been charged.<sup>2</sup>

---

<sup>1</sup> On July 23, 2013, following the argument of counsel, the Honorable Mary-Lou Rup issued an order finding that

[A]n evidentiary hearing must be conducted on the following issues: (1) if Ms. Farak and/or the Amherst drug lab engaged in egregious misconduct in the handling, storage, and analysis of suspected narcotics during the time period between November 2011 and January 2012, when the Amherst drug lab had custody and control of the alleged controlled substances related to the defendant's case; (2) if such misconduct has substantially prejudiced the defendant or irreparably harmed his right to a fair trial; or (3) if such egregious misconduct was deliberate and intentional, warranting a prophylactic sanction of dismissal.

(Mem. on Def.'s Mot. to Dismiss 2 (July 23, 2013).)

<sup>2</sup> For example, on May 10, 2013, Sgt. Ballou conducted an interview with Springfield Police Officer Gregory Bigda. According to Officer Bigda, at some point in early 2012, he seized 51 pills suspected of being oxycodone. These 51 pills were submitted to the

Following the presentation of evidence at aforementioned post-conviction proceeding, undersigned counsel made an oral motion for the relief sought by this written motion. When the Attorney General's office objected, the Honorable Jeffrey Kinder directed the parties to confer with an eye towards reaching an agreement. Ultimately, discussions with the Attorney General's office concluded on September 17, 2013, when an Assistant Attorney General conveyed the position of her office that "viewing the seized evidence is irrelevant to any case other than Farak's." (Ex. F, E-mail correspondence between AAG Kris Foster and Attorney Luke Ryan.)

Based on the foregoing, the defendant respectfully requests that this Honorable Court allow this motion and issue an order permitting counsel for the defendant (including an investigator and/or expert) to:

1. Access the location where the physical evidence pertaining to the prosecution of Sonja Farak is currently being stored and, while under the supervision of the State Police, conduct a visual inspection of said physical evidence;
2. Take photographs, video recordings, measurements, notes, and/or drawings of said physical evidence; and
3. Make available to other defense attorneys handling cases involving the Amherst laboratory the results of the inspection, including access to any

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Amherst Laboratory for analysis on March 8, 2012. On May 8, 2012, Farak analyzed the pills and certified that the 61 pills submitted for analysis did contain any narcotics or illegal drugs. When asked whether these facts raised concerns regarding the possibility that Farak tampered with additional evidence, Ballou stated that they did. However, neither he nor anyone else involved in the Farak investigation made any effort to determine how many pills were logged into evidence when Springfield Police relinquished custody of them to the Amherst lab.

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photographs, video recordings, measurements, notes, and/or drawings made  
during the inspection.

Respectfully Submitted,  
ROLANDO PENATE

By \_\_\_\_\_  
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