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COMMONWEALTH OF MASSACHUSETTS
HAMPDEN, SS SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

COMMONWEALTH OF MASSACHUSETTS

vs.

Erick Cotto	07-0770
Jermaine Watt	09-1068; 09-1069
Lizardo Vega	09-0097
Omar Harris	10-1233
Wendell Richardson	12-0399
Fiori Liquori	12-0624
Rolando Penate	12-0083
Omar Brown	05-1159
Bryant Ware	07-1072; 09-1072; 10-0253
Glenda Aponte	12-0226

MOTION FOR NEW TRIAL
BEFORE THE HONORABLE RICHARD J. CAREY

APPEARANCES:
(see next page)

Hampden Superior Court
50 State Street
Springfield, Massachusetts
December 15, 2016

ALICIA CAYODE KYLES
Official Court Stenographer
Registered Merit Reporter

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(09-97)

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(10-1233); Wendell Richardson (12-399); Fiori Liquori
(12-624)

Rebecca Jacobstein, Esquire, representing Defendants Erick
Cotto (07-770); Jermaine Watt (09-1068; 09-1069)

Jennifer Appleyard, Esquire, representing Defendant Rolando
Penate (12-83)

James McKenna, Esquire, representing Defendants Omar Brown
(05-1159); Bryant Ware (07-1072; 09-1072; 10-253)

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1 (The Court entered at 9:23 a.m.)

2 (The defendant and interpreter were present.)

3 THE CLERK: Good morning, Your Honor. Good morning,
4 everyone.

5 This is a criminal session for December 15, 2016, the
6 Honorable Justice Richard Carey presiding.

7 I'm Assistant Clerk Lois Cignoli for the Court.

8 Matters before the Court, part of the Farak drug lab,
9 matters include the case of Commonwealth vs. Erick Cotto
10 Docket 2007-770, represented by Attorney Rebecca Jacobstein.

11 The Commonwealth vs. Jermaine Watt, 2009-1068,
12 2009-1069, represented by Attorney Rebecca Jacobstein.

13 The Commonwealth vs. Lizardo Vega, Docket 2009-97,
14 represented by Attorney Luke Ryan.

15 Commonwealth vs. Omar Harris, Docket 2010-1233
16 represented by Attorney Jared Olanoff.

17 The Commonwealth vs. Wendell Richardson, Docket
18 2012-399, represented by Attorney Jared Olanoff.

19 The Commonwealth vs. Fiori Liquori, Docket 2012-624
20 represent by Attorney Jared Olanoff.

21 The Commonwealth vs. Rolando Penate, Docket 2012-83,
22 represented by Attorney Jennifer Appleyard.

23 The Commonwealth vs. Omar Brown, Docket 2005-1159
24 represented by Attorney James McKenna.

25 The Commonwealth vs. Bryant Ware, respective dockets

1 2007-1072, 2009-1072, 2010-253, represented by Attorney
2 James McKenna.

3 The Commonwealth vs. Glenda Aponte, Docket 2012-226,
4 represented by Attorney James McKenna.

5 For the Commonwealth we have Assistant Attorney
6 Generals Judy Zeprun, Kim West, Thomas Caldwell and Heather
7 Valentine.

8 And the District Attorney's Office we have Assistant
9 District Attorneys Deborah Ahlstrom and Katharine Johnson.

10 For the record, Your Honor, the interpreter is present
11 for this proceeding.

12 THE COURT: Good morning, everyone.

13 ALL COUNSEL: Good morning.

14 THE COURT: Ms. West.

15 MS. WEST: Good morning, Your Honor.

16 Prejudice is going to be one of the issues that you
17 have to determine here, so we're going to ask for five
18 minutes tomorrow for a rebuttal witness to talk about
19 whether the drugs in these ten defendants' cases are still
20 available.

21 We understand at this point that there are
22 certifications for retesting already in five, four other
23 defendants have samples available at Springfield PD, and we
24 are working on the last. So tomorrow we just want to give
25 you that information, about five minutes, probably Joe

1 Ballou.

2 THE COURT: Okay. Call your next witness.

3 MR. RYAN: Randall Ravitz.

4 (Pause)

5 **(Randall Ravitz, sworn)**

6 THE COURT: Good morning, sir.

7 MR. RYAN: Thank you.

8 **(Randall Ravitz)**

9 **DIRECT EXAMINATION BY MR. RYAN**

10 Q. Good morning.

11 A. Good morning.

12 Q. Could you state your name and spell your last time for
13 the record?

14 A. Randall Ravitz, last name is R-A, V as in Victor,
15 I-T-Z.

16 Q. And are you employed by the Massachusetts Attorney
17 General's Office?

18 A. Yes.

19 Q. Are you the Chief of the Appeals Division there?

20 A. Yes.

21 Q. And were you holding this position back in January of
22 2013?

23 A. Yes.

24 Q. Was Susan Reardon the Deputy Chief at the time?

25 A. Yes.

1 Q. Now --

2 A. Suzanne.

3 Q. -- your division is tasked with responding to
4 subpoenas; is that one of the jobs it has?

5 A. That's right.

6 Q. And Sue Reardon, and some other Assistant Attorney
7 Generals actually wrote a manual on how to do this, correct?

8 A. That's right.

9 Q. And this is kind of a step-by-step guide on responding
10 to subpoenas, correct?

11 A. Yes.

12 Q. And is it fair to say that it is partly based on the
13 law?

14 A. Yes.

15 Q. And it's partly based on common sense, too, correct?

16 A. Yes.

17 Q. Now, in the Fall of 2013, did it come to your attention
18 that a defendant named Rolando Penate had filed a motion for
19 records in the possession of your office?

20 A. Yes.

21 Q. I'm going to show you a document here. Is that a copy
22 of the motion from Rolando Penate for documentation in the
23 possession of at least partly of your office?

24 A. I've no reason to doubt the authenticity of it, but
25 I -- just not having memorized the document, I'm --

1 Q. Okay. Why don't you take a look at item number seven
2 on that document.

3 MR. RYAN: We have a plug issue, Your Honor.

4 (Pause)

5 Q. (By Mr. Ryan) So, having had a chance to review item
6 seven is that -- is that now a familiar request that was,
7 became an important one in your office in the Fall of 2013?

8 (Pause)

9 THE WITNESS: I -- I do remember a request regarding
10 interoffice correspondence pertaining to the tampering at
11 the drug lab.

12 Q. (By Mr. Ryan) Does the specific request say copies of
13 any and all inter or intraoffice correspondence from January
14 of 18, 2013, to the present, pertaining to the scope of
15 evidence tampering and/or deficiencies at the Amherst Drug
16 Lab?

17 A. Yes.

18 Q. Now, who did you assign to respond to this motion?

19 A. Kris Foster.

20 Q. And did you review the opposition that she filed?

21 A. I believe so, and I -- I'm only hesitating because
22 there were several documents in the case, so.

23 Q. I show you an email.

24 A. Right.

25 Q. Is that an email you sent to Kris Foster?

1 A. Yes.

2 Q. And would that have been on September 18, 2013?

3 A. Yes.

4 Q. And does it say: Attached is a draft of the opposition
5 of the Rule 17 and Penate with my comments?

6 A. Yes.

7 MR. RYAN: Okay. I ask this be admitted as the next
8 exhibit.

9 THE CLERK: Marked as --

10 THE COURT: May be marked.

11 THE CLERK: Marked as Number 251.

12 (Exhibit No. 251, email from AAG Ravitz to AAG Foster
13 (9/18/13), marked)

14 Q. (By Mr. Ryan) Now, that email that you had wrote
15 advised Kris that you attached a draft with your comments.

16 I just pull up to the -- is this the draft with your
17 comments that you provided?

18 A. Excuse me. Normally, there's a column in the right
19 with comments and there's red lining when I send something.

20 Q. Yeah, there is.

21 A. Okay.

22 Q. There is.

23 (Pause)

24 Q. (By Mr. Ryan) Was this the draft with the red lining
25 and the comments that you provided to Kris Foster?

1 You can get up and look, if it's-- oh, thank you.

2 A. Yes, sir.

3 Q. And if I could draw your attention here to item seven.

4 THE COURT: Sure.

5 Q. (By Mr. Ryan) Whatever is easier for you.

6 A. Okay.

7 Q. Did, in respect to item seven, you propose and did your
8 office take the position that these internal correspondence
9 would be protected as work product?

10 I can scroll down if that will be helpful.

11 Maybe a better question would be, was that one of the
12 grounds of opposing this particular request that you felt
13 were appropriate?

14 A. Just to be precise, I would say that Kris included the
15 work product doctrine.

16 Q. Uh-huh.

17 A. But the way that she discussed it was not as precise
18 for the type of case as I thought it would be --

19 Q. Okay.

20 A. -- so I made revisions to it.

21 Q. But as a general concept, that's one of the grounds
22 that your office decided to assert in resisting the
23 production of this particular request for evidence, correct?

24 A. Yes.

25 Q. Okay. Thank you.

1 Now, on October 2 -- you can have a seat, if you'd
2 like.

3 Showing you a copy of what's been previously marked as
4 Exhibit 216.

5 There was a hearing on this motion in Springfield,
6 correct?

7 THE COURT: I'm sorry, what date?

8 MR. RYAN: October 2.

9 THE WITNESS: I wasn't at the hearing.

10 Q. (By Mr. Ryan) Right. But you had sent Kris Foster to
11 go and represent the office in opposing this Rule 17,
12 correct?

13 A. Right.

14 Q. And this had been the second time that Kris Foster had
15 been out to Springfield for some motion practice, correct?

16 A. I don't remember, you know, what number it would be.

17 Q. Had she appeared previously on September 9, 2013 to
18 argue a motion to quash a subpoena issued to Sergeant Joseph
19 Ballou?

20 A. Yes.

21 Q. And when she came back from that hearing, was it your
22 understanding that the presiding judge in the hearing,
23 Jeffrey Kinder, had actually yelled at her for not reading
24 the file?

25 A. That I was not aware of, at that time, or I do not

1 recall being made aware of that at that time.

2 Q. In any event, after that September 9, hearing and
3 before the October 2, hearing, Kris Foster was actually out
4 of the office for a fair amount of time wasn't she?

5 A. She was.

6 MS. WEST: Your Honor, excuse me. Objection.

7 My point only being, I feel that we're getting into
8 another practice of a number of leading questions here.

9 Again, this is a witness that is going to go directly
10 to the issue you raised on Monday and I am sure the Court
11 wants to hear it directly from the witness.

12 I'll sit down.

13 Q. (By Mr. Ryan) Did Kris Foster get married in the Fall
14 of 2013?

15 A. Yes.

16 Q. And did she take a honeymoon in the Fall of 2013?

17 A. Yes.

18 Q. And would that have been between the September 9,
19 hearing and the October 2, hearing?

20 A. Yes.

21 Q. Now, I'd ask you to take a look at pages 26 and 27 of
22 this hearing.

23 Okay. Do you have it before you?

24 A. Yes.

25 Q. If you could look down at --

1 MR. RYAN: And if you could put the presenter, the
2 ELMO.

3 Q. (By Mr. Ryan) Now, did Kris Foster assert on lines 7
4 and 8, page 27 of Exhibit 216, that she felt that the work
5 product preparation would prevent the disclosure of the
6 items that Mr. Penate had requested?

7 A. I'm sorry. Can you say that again. Page 27?

8 Q. Page 27, line 7: I think that a lot of what is going
9 to, almost all of that is going to be work product
10 preparation.

11 Is that something she said?

12 A. Yes.

13 Q. And Judge Kinder said: Well, let me ask you the same
14 question that I asked with respect to Mr. Ballou's file.
15 Are you saying that because you've actually looked at it or
16 are you just guessing?

17 And what did Kris Foster say?

18 A. Based on the transcript, she said: I haven't, Your
19 Honor. The office has not compiled every email that
20 mentions the word "Farak" in it from this time period that
21 he's requesting.

22 Q. And did Judge Kinder go on to say: All right. Have
23 you looked at any of the correspondence or other documents
24 that would arguably qualify in these paragraphs?

25 A. Yes.

1 Q. And what did she respond to that?

2 A. I have talked to Assistant Attorney General Anne
3 Kaczmarek and she says the correspondence, which would
4 pretty much all be in email form, would be work product or
5 part of the ongoing investigation.

6 Q. And did Judge Kinder say: And other than talking to
7 Ms. Kaczmarek, have you actually looked at any of the
8 emails?

9 A. Yes.

10 Q. And did she respond: I have not, Your Honor. I know
11 the office has not gathered them in one database.

12 A. Yes.

13 Q. Now, if I could ask you to move to the bottom of page
14 35.

15 The very last line on that page, does it begin with
16 Judge Kinder saying: Let's assume that this flurry of
17 emails that Mr. Ryan thinks might be relevant, might be
18 there, is present, and there is an email exchange regarding
19 the scope of the misconduct and some statements by some
20 party at the lab, which opines that it would appear that
21 this conduct has been ongoing for some time. Would you
22 agree that that would be exculpatory information?

23 Did I read that correctly?

24 A. Yes.

25 Q. And did an Assistant District Attorney representing

1 Hampden County say: Sure, I would agree to that.

2 A. Yes.

3 Q. And did Judge Kinder then say: Has anybody looked at
4 the emails to determine whether or not that might exist?

5 MS. WEST: Your Honor, are we -- excuse me, objection.

6 Now, I appreciate --

7 THE COURT: So, I don't -- you've got this transcript.
8 You're asking him does it say X -- if that's a foundation to
9 asking him something about his own personal knowledge, his
10 own personal conduct, that's fine. But we've been going on
11 for quite awhile and all he is telling me is what's an
12 exhibit that speaks for itself.

13 MR. RYAN: Well, I think what it is important to
14 understand from this witness is what his understanding of
15 what happened at this hearing was. He doesn't know that
16 Judge Kinder, once again, said to Kris Foster, you need to
17 look at the emails, then that speaks for itself.

18 THE COURT: I agree that that would be an appropriate
19 foundation leading to questions as to his own conduct and
20 his own first-hand knowledge. I am just anxious to get to
21 the second part.

22 MR. RYAN: Okay.

23 Q. (By Mr. Ryan) Mr. Ravitz, after this hearing, did Kris
24 Foster make any report as to what she'd been told by Judge
25 Kinder at this hearing?

1 A. She made a report about what happened at the hearing.
2 Not all details that I'm seeing now.

3 Q. So, after the hearing, she didn't report that she had
4 acknowledged that if there was an email that your office
5 possessed, an exchange regarding the scope of the misconduct
6 and some statements by some party at the lab opining that
7 this conduct had been ongoing for some time, she didn't tell
8 you that she conceded that that would be exculpatory?

9 A. I don't recall any report as to that.

10 Q. Did she represent that the Judge had once again told
11 her the importance of actually looking at the information
12 that your office possessed as opposed to making bold
13 pronouncements?

14 A. I don't recall being told about that.

15 Q. Okay. In any event, after that hearing -- I'm showing
16 you a document.

17 Did Judge Kinder make a ruling on the motion?

18 A. Oh, yes.

19 Q. And am I showing you a copy of that ruling?

20 A. Yes.

21 Q. Okay.

22 MR. RYAN: I'd ask that this be admitted as the next
23 exhibit.

24 THE COURT: All right may be marked.

25 THE CLERK: Marked as Number 252.

1 (Exhibit No. 252, Endorsement of Kinder, J. on Penate
2 motion to compel (10/2/13), marked)

3 Q. (By Mr. Ryan) Did Judge Kinder allow the motion only
4 insofar as it seeks production of drug -- well, testing
5 administered to Sonja Farak by her employer, and any
6 correspondence related directly to drug use or evidence of
7 drug tampering by Sonja Farak?

8 A. Yes.

9 Q. I'm showing you a copy of what's previously been marked
10 as Exhibit 205. I represent to you it's an email from
11 Joseph Ballou to Anne Kaczmarek, John Verner, and Robert
12 Irwin. Have you seen this email before?

13 (Pause)

14 THE WITNESS: I don't recall seeing this. I don't
15 recall seeing this.

16 Q. (By Mr. Ryan) Ever? Before today? This moment in
17 time?

18 A. The -- if I did, it would have only been in the
19 Bridgeman (phonetic) submission recently.

20 Q. Okay.

21 A. So I -- where maybe there was a -- we might of quoted
22 it in the Bridgeman submission, but, I don't even know that
23 I saw the actual email.

24 Q. And just, for the record, would that have been
25 something that would have been filed in June of this past

1 year approximately?

2 A. Yes.

3 Q. Okay.

4 A. But that I didn't actually look at it until much more
5 recently.

6 Q. Okay. So how about this, what's attached to Exhibit
7 205 and has as a Bates number AGOFRK001816.

8 MS. WEST: Objection.

9 THE COURT: Basis of the objection?

10 MS. WEST: He, himself, hasn't independently seen this.
11 He says possibly he saw it through a Bridgeman filing. I
12 don't know how he could have seen this as well, or even go
13 further.

14 MR. RYAN: I asked him about the email, the cover
15 thing. I think that we are now into the body of a very
16 different document. It's a part of the exhibit, but it's --

17 MS. WEST: I'm sorry. I can't see it, so I don't know
18 what you're addressing about.

19 MR. RYAN: Okay. It's Exhibit 205. It covers the four
20 attachments as well as the email.

21 THE COURT: The objection is overruled. You can answer
22 the question if you feel you can.

23 THE WITNESS: What was the question?

24 Q. (By Mr. Ryan) Have you ever seen this document before,
25 this ServiceNet Diary Card?

1 A. I just want to be careful about how I answer. I recall
2 a point when you filed something or served something that
3 you attached copies of certain, what we've been calling
4 mental health worksheets. And I'm not -- you know, this
5 looks like it might have been one of those, and that was the
6 first time that I recall seeing mental health worksheets of
7 that type.

8 Q. Okay.

9 A. Does that answer your question?

10 Q. It does. So on October 2, 2013, when Judge Kinder
11 allowed the motion and ordered the production of evidence in
12 possession of your office directly related to Sonja Farak's
13 drug use or tampering, it's your testimony that you are
14 unaware that this document existed?

15 A. Yes. I remember when you attached it to the thing that
16 you filed or served.

17 Q. And just for the sake -- would it be helpful if you
18 knew that was November 1, 2014, a letter to Patrick Devlin;
19 is that what you are referring to?

20 A. Yes. Yes.

21 Q. Okay.

22 A. Right. I remember it's on your firm letterhead.

23 Q. Yup.

24 A. The -- I remember being struck by how unusual the
25 mental health worksheets were and how it just didn't look

1 like anything I had ever seen before.

2 Q. Okay. So your testimony is that when Judge Kinder
3 issued this order telling your office to turn over this
4 particular kind of document, so you had no idea that your
5 office actually possessed this document right here?

6 A. Right. I -- I'm aware that there is an email from some
7 earlier point that makes reference to mental health
8 worksheets being seized, and that I was on that email, but I
9 would not have known what that meant, you know, and do not
10 recall ever seeing the documents themselves.

11 Q. Okay. So we'll get to that thread in a minute. What
12 I'm interested in now is talking about what happened after
13 you got this order saying, turn over any correspondence
14 related to Sonja Farak, directly to drug use and tampering.

15 It's your testimony you never saw this? You didn't
16 know you had it?

17 A. Right.

18 Q. So what did your office do when it got this order that
19 Judge Kinder said to turn over this particular kind of
20 information?

21 A. We filed a motion for clarification.

22 Q. And did you provide some editing on that motion for
23 clarification?

24 A. Yes.

25 Q. Are these your edits?

1 A. Yes.

2 Q. Okay. I'd like to show you -- can we -- I think there
3 are page numbers here.

4 Now, is footnote three on page 13 an edit that you
5 proposed?

6 A. Yes.

7 Q. And can you read the footnote that you proposed be
8 included in this pleading?

9 A. It is appropriate for this Court to accept the AGO's
10 representation as to the existence of work product within
11 its materials. And then there's a citation to the Bing Sial
12 Liang case.

13 I can read that if you'd like.

14 Q. Would you, please.

15 A. Yes.

16 Bing Sial Liang, 434 Mass. at 136 note nine, 137 note
17 11, 138, noting that SJC in Borans, 379 Mass. at 151-152
18 affirmed denial of prosecution notes, quote, after
19 prosecutor represented to judge that notes constituted work
20 product, unquote, semicolon, observing that notes of
21 advocate at issue were not in record, comma, but that
22 Commonwealth represented that they contained no exculpatory
23 evidence, semicolon, in referencing Commonwealth's
24 representation that notes contain no witness, quote,
25 statements, as no witness adopted or approved of their

1 contents, period.

2 Q. Now, did you provide this legal authority for the
3 proposition that the Court should accept your office's
4 representations that your internal correspondence contained
5 no exculpatory evidence and was purely work product?

6 A. I provided it for what's stated there, that it would be
7 appropriate for the Court to accept the office's
8 representation as to the existence of work product within
9 its materials.

10 Q. Had you examined your office's correspondence that
11 would have been responsive to the Judge's order to determine
12 that it was, in fact, all work product?

13 A. No.

14 Q. To your knowledge, had anybody in your office done so?

15 A. I would have thought that that analysis would have been
16 done.

17 Q. And who did you think it would have been done by?

18 A. I would have thought it would have been done by Kris
19 Foster.

20 Q. Did you think it would have been done by her before she
21 went on her honeymoon?

22 A. That, I don't know. I --

23 Q. Did Judge Kinder end up allowing the motion for
24 clarification?

25 A. Yes. That's -- that's the way I -- there might have

1 been some qualification to it, but --

2 Q. Well, did he relieve you of the obligation to, in
3 effect, have to produce any documentation to the Court?

4 A. Yes.

5 Q. Now, I'd like to jump back a couple months to August of
6 2013. At some point did you learn that Anne Kaczmarek had
7 received a subpoena duces tecum?

8 A. Yes.

9 Q. And was this also in the Penate case?

10 A. Yes.

11 Q. We talked just at the outset of your testimony about
12 this responding to subpoenas manual that Sue Reardon had
13 helped create. Can we agree that the first thing you do
14 when you represent a fellow AG that's got a subpoena duces
15 tecum is you collect the file?

16 A. I actually think of there as being three things, three
17 big areas that should be covered.

18 Q. Sure.

19 A. So one is reaching out to the counsel who served it;
20 another is reaching out to the client which would include
21 collecting the files; and another is analyzing for
22 privileges and protections, which might even be -- might
23 even begin before you get the documents.

24 Q. So, within those big three things, one of them is
25 collecting the file, correct?

1 A. Yes.

2 Q. And the file encompasses electronically stored
3 information, correct?

4 A. Yes.

5 Q. Now, in the course of doing the work that you've done,
6 have you had occasion to read any prosecution memos?

7 A. Yes, but not much.

8 Q. Are you aware they exist?

9 A. Yes.

10 Q. Okay. And that they contain a synopsis of evidence
11 that your office possesses?

12 A. Yes.

13 Q. And discusses various legal and strategic issues?

14 A. Yes.

15 Q. Now, once your division received the assignment to
16 represent Ms. Kaczmarek on the subpoena duces tecum, did
17 anybody review the prosecution memo that she had submitted?

18 A. I don't know.

19 Q. Did you?

20 A. I don't recall reviewing it.

21 Q. Is it possible you reviewed it?

22 A. Because I don't recall, I'm just wary about saying one
23 way or another.

24 Q. Did Kris Foster represent to you that she'd done any,
25 that she collected Anne Kaczmarek's file or she at least

1 looked at the prosecution memo?

2 A. I don't -- I don't recall her saying that, but that,
3 you know, I can't say that she definitely didn't say it
4 either.

5 Q. As her supervisor, would it have been your expectation
6 that she would have done, at least cursory review, of Anne
7 Kaczmarek's file?

8 A. Yes.

9 Q. Now, did you become aware of another postconviction
10 case involving 15 defendants whose cases had been
11 consolidated?

12 A. Yes.

13 Q. And, in that case, and I think you may have referenced
14 it earlier, did Joe Ballou receive a subpoena duces tecum
15 from a defendant named Jermaine Watt?

16 A. Yes.

17 Q. At some point, did you have a chance to review the
18 order that Judge Kinder had issued, just sort of putting out
19 what the scope of this hearing was going to be?

20 A. Very possibly, but it's not coming to mind right now.

21 Q. In any event, were you in some discussions in late
22 August, early September, about how to respond to this
23 subpoena duces tecum to Joe Ballou?

24 A. There were a lot of discussions about responding to
25 different subpoenas, so I just -- I'm not sure that I know

1 which one we're talking about right now.

2 MR. RYAN: Can you put this up?

3 Q. (By Mr. Ryan) I'm showing you an email thread that
4 began on September 3, 2013, 8:42 in the morning. It's an
5 email from Anne Kaczmarek to you and Suzanne Reardon cc-ing
6 John Verner and says: This is the subpoena we were
7 expecting.

8 Did that kind of get the ball rolling for conversation
9 about what to do?

10 A. Yes.

11 Q. Now, later that day, at 9:01, did Anne Kaczmarek say:
12 I told the Judge -- I told -- and perhaps you can infer she
13 meant to say, I am told, that the Judge wants to come to the
14 bottom of the issues mentioned below, making it unlikely he
15 will allow a motion to quash. As long as the Judge has set
16 up the scope of the motion, and I am confident that Ballou
17 will be pretty unhelpful in what the Judge is trying to do,
18 do we just let Ballou go?

19 A. Yeah, I see that.

20 Q. And what did you believe that she meant when she was
21 suggesting the possibility of just letting him go?

22 A. I don't -- I don't recall what I thought at the time.

23 Q. Does it appear she expressed confidence that he would
24 be unhelpful in helping the Judge get to the bottom of
25 issues?

1 A. Yes.

2 Q. Now, later on, was there some communication about
3 perhaps meeting about this issue?

4 A. Yes.

5 Q. And various people gave various times that they were
6 available and at 9:47 did you provide an email that
7 constituted some food for thought?

8 A. Yes.

9 Q. And what did you say?

10 A. I said -- should I get up?

11 MR. RYAN: Sure.

12 THE COURT: Sure.

13 THE WITNESS: One thing we can talk about is that
14 sometimes even if we can't -- and I think I meant get the
15 subpoena quashed entirely, we can get its scope limited so
16 as to preclude certain types of questions.

17 Q. (By Mr. Ryan) Now, what types of questions did you
18 have in mind that you thought could or should be precluded?

19 A. Questions that would be -- that would elicit
20 information that's subject to a privilege or protection
21 recognized by law. So in some cases it would be work
22 product. In some cases it would be law enforcement
23 investigative privilege. In some cases it would be Grand
24 Jury information or CORI. You know, it depends on the case.

25 Q. Now, did you become aware that there was a third

1 defendant named Rafael Rodriguez, who was part of this 15
2 with Jermaine Watt who was engaging in some motion practice
3 as well?

4 A. I remember that name.

5 Q. And did -- just trying to help you get some context for
6 the next email I'm going to show you, was it your
7 understanding that I represented Rafael Rodriguez?

8 A. That, I didn't remember.

9 Q. In any event, why don't you take a look at this next
10 email that's up on the board that you sent at 11:57 a.m.
11 September 4, 2013.

12 A. Right.

13 Q. And once you have had a second to review it, I'm going
14 to ask you about a specific question about a line in there.

15 A. Yes. Yeah.

16 Q. You've read it?

17 A. Yes.

18 Q. There's a line that says: A defense attorney could
19 still try to elicit information of the type we don't think
20 should be revealed under the guise of fleshing out
21 information concerning the timing and scope of Ms. Farak's
22 alleged criminal conduct in the other categories. Thoughts.

23 A. It's not exactly what it says.

24 Q. Why don't you say what it exactly says.

25 A. A defense attorney could still try to elicit

1 information of the type that we think shouldn't be revealed
2 under the guise of fleshing out information concerning
3 timing and scope of Ms. Farak's alleged criminal conduct and
4 the other categories.

5 Q. Okay. And what were you referring to when you were
6 talking about information of the type that we think
7 shouldn't be revealed?

8 A. Right. Information that would be protected by a
9 recognized privileged or other protection provided by law.

10 You know, and I think that's clear from the term
11 shouldn't be revealed.

12 Q. Okay.

13 A. I think I would only use that term when referring to
14 something that objectively would be proper to not have
15 revealed.

16 Q. How many people got this email from you?

17 A. Five.

18 Q. So, you being the sender, there's six of you, correct?

19 A. Right.

20 Q. And you, Suzanne Reardon, and Kris Foster, are all in
21 the Appeals Division, correct?

22 A. Yes.

23 Q. And Dean Mazzone, Anne Kaczmarek, and John Verner are
24 they're doing trial work, correct?

25 A. Well, John and Dean were in supervisory roles at that

1 point.

2 Q. Supervising people doing trial work mostly?

3 A. Well, supervising the bureau.

4 Q. Okay. In any event, is it fair to say that the people
5 in the Appeals Unit are the more law oriented folks and the
6 people in the Trial Division are more fact oriented?

7 MS. WEST: Objection.

8 THE COURT: Well, sustained.

9 Q. (By Mr. Ryan) Well, did you have a certain legal
10 expertise that you were bringing to bear in these
11 conversations?

12 A. I like to think so.

13 Q. And did John Verner and Anne Kaczmarek, in particular,
14 know a lot about the facts of the Sonja Farak case as
15 prosecutors in it?

16 A. That was my understanding.

17 Q. So did the people who knew about the law ever talk to
18 the people who knew about the facts, about how the law and
19 the facts might mix in responding to these subpoenas?

20 A. I recall discussions among us, yes.

21 Q. And did the people who knew the facts tell the people
22 who knew about the law some of the facts that they
23 possessed?

24 A. Yes.

25 Q. And what did the people who knew about the facts tell

1 the people who knew about the law?

2 A. I don't remember everything that everyone said.

3 Q. Well, best you can recall, did anybody ever talk about
4 the kinds of information that they actually had as opposed
5 to the kinds of information that legally there might be
6 grounds to protect?

7 MS. WEST: Are we speaking of a specific date, Your
8 Honor? Can we clarify?

9 MR. RYAN: For sake of clarifying, the week of that
10 September 4, 2003 (sic) email.

11 THE WITNESS: So again, the question is, is what?

12 Q. (By Mr. Ryan) Did the people, who knew about the facts
13 of the Sonja Farak case, the evidence that they had that was
14 being subpoenaed, did they ever talk to the people who knew
15 about the law who could provide some legal justification
16 perhaps to prevent them from having to turn over their
17 evidence?

18 A. My understanding is that those -- that there were
19 discussions, communications.

20 Q. Right. And you attended meetings on this; is that
21 correct?

22 A. Yes.

23 Q. In the Chief's Office?

24 A. Yes.

25 Q. On September 3, 1:30, 1:45 p.m., and after you sent

1 that 11:57 email, did John Verner decide that maybe -- in
2 his words: Maybe we should get the band together?

3 A. Yes.

4 Q. And so did you end up meeting again with this group of
5 people to talk about these subpoenas?

6 A. I would imagine that we did.

7 Q. And did, in the course of these discussions, anybody --
8 John Verner, Anne Kaczmarek, Dean Mazzone disclose to the
9 rest of you that they had mental health worksheets that were
10 seized from Sonja Farak's car that had not been introduced
11 to the Grand Jury or disclosed to the District Attorneys?

12 A. I don't remember that --

13 Q. What do you remember?

14 A. -- being said.

15 I, you know, I don't remember exactly what was said in
16 various meetings. I'm just saying I don't remember anybody
17 talking about, at that point, about mental health worksheets
18 not being disclosed.

19 I remember the first -- the earliest recollection I
20 have about mental health worksheets was, you know, the thing
21 that you served. And again, I know that I've seen there's
22 an email, you know, from earlier, that makes reference to
23 mental health worksheets or something to that effect, but I
24 don't actually remember anything about that.

25 Q. And I'm pulling up, you've referenced, I believe it's

1 Exhibit 210.

2 And you can have a seat.

3 A. Yes.

4 Q. I'll give you a paper copy of this.

5 MR. RYAN: 210.

6 Q. (By Mr. Ryan) Did this thread begin when Kris Foster
7 reported on what happened in Springfield the day before on
8 September 9?

9 A. Yes.

10 Q. And she told the group that there was this obligation
11 to go through Joe Ballou's file?

12 A. Let me just look at it, yes.

13 Q. And after that, after she said this is what we've got
14 to do, that's when John Verner posed the question about what
15 was in his file, and whether it included emails.

16 When he said that, did that strike you as kind of an
17 odd question to ask, whether emails would be part of a file?

18 A. I don't know that it struck me as odd or not odd at the
19 time.

20 Q. Well, didn't you testify before that emails are a part
21 of the file?

22 A. I would -- you were talking before about a different
23 file, I think, but the file that you were talking about
24 before, I said yes, I would think that emails would be
25 included. I don't remember exactly the phrasing that you

1 used, but it was something to the effect of collecting. I
2 thought it was something relating to collecting documents
3 and whether that would include emails.

4 Q. Collecting the file would include emails, right?

5 A. I think if you say, like, a file, related to a case --

6 Q. Yeah.

7 A. I would think of that as including emails.

8 Q. So when he said that question as to whether this seemed
9 to be important to him, whether emails would be included in
10 the file, that didn't strike you as kind of an odd question
11 to ask?

12 A. Not necessarily. I mean he's just seeking
13 clarification.

14 Q. Well, did he go on to say to Kris, did he say in
15 quotation marks, file, or did he indicate Joe had to search
16 his emails, et cetera?

17 MS. WEST: Your Honor, Mr. Verner is in the hallway and
18 will testify to this exact thing. So what Mr. Ravitz thinks
19 about what Mr. Verner said and the tone of voice he was
20 using, I don't think is relevant or helpful.

21 THE COURT: I'm going to sustain the objection.

22 Q. (By Mr. Ryan) Did you have any follow-up with John
23 Verner, in meeting with him or talking with him, asking why
24 he might have been concerned about a distinction between a
25 file or an email?

1 A. I don't recall doing that.

2 Q. In any event, after this question, that is when you
3 learned that Anne Kaczmarek disclosed that in Joe's file
4 were some mental health worksheets, correct?

5 MS. WEST: Objection. He said earlier he doesn't
6 remember that. It might be in the email, but he should be
7 asking the question as to what he remembers about this.

8 Q. (By Mr. Ryan) What do you remember about that email?

9 A. All right. That recently I did a search on my system
10 for mental health worksheets and this email came up.

11 Q. Uh-huh.

12 A. So I realized recently that I had received this email,
13 at that time; but I don't actually recall, you know, seeing
14 anything about mental health worksheets on September 10.
15 It's more that, after the fact, I went back and realized
16 that this email was there and I certainly don't recall
17 seeing the actual mental health worksheets before they were
18 attached to the thing that you served.

19 Q. After receiving this email from Kris Foster saying that
20 need to go through Joe Ballou's file, what happened over the
21 course of the next six days with respect to that assignment
22 from Judge Kinder, best you can recall?

23 (Pause)

24 THE WITNESS: I don't recall. I'm not -- I'm not
25 saying that there's nothing that would refresh my

1 recollection.

2 Q. (By Mr. Ryan) Oh, I don't have anything to refresh
3 your recollection. I've got what happened at the end of the
4 six days.

5 A. All right.

6 Q. Have you seen that before?

7 A. I have recently.

8 Q. Exhibit 193?

9 A. Yes.

10 Q. Letter from Kris Foster to Judge Jeffrey Kinder?

11 A. Yes.

12 Q. Did you see that before it went out the door and was
13 delivered to a Superior Court Judge?

14 A. My first recollection of seeing this was very recently,
15 as in within the past few weeks in preparing for this
16 hearing.

17 I don't recall seeing this at the time that it was
18 drafted and sent out.

19 Q. What was the practice in your office about reviewing
20 filings that -- from lower level members of your staff?

21 A. Anything substantive was to be reviewed by that
22 person's designated reviewer, so that would be either me or
23 Sue and if one of us is absent or can't review it for some
24 reason, then the other one would review it.

25 And when I say "anything substantive", things that

1 would be exceptions would be notices of appearance, motions
2 to enlarge time, motions for scheduling orders. Even those,
3 when somebody is new, we like to see, see them at the
4 beginning.

5 But a letter that would say: Enclosed, please find a
6 copy of --

7 Q. Let's just make it easy.

8 A. Right.

9 Q. Exhibit 193, would that have been something that Kris
10 Foster would have just done on her own and given to the
11 Judge or would that have been a document that would have
12 been subjected to some level of review before leaving One
13 Ashburton Place?

14 A. I think it is something that should have been subjected
15 to review.

16 Q. Knowing what you knew, limited knowledge that you had,
17 back on September 16, 2013 would you have signed off on that
18 letter?

19 A. One thing that struck me about it was that there's a
20 significant grammatical error that would have caught my
21 attention.

22 Q. And what was that?

23 A. After reviewing Sergeant Ballou's file, every document
24 in his possession has already been disclosed.

25 There's a subject missing.

1 Q. There is, isn't there?

2 A. There is.

3 Q. And the subject of that sentence would have been the
4 individual who reviewed the file, wouldn't it?

5 A. Right.

6 Q. And that's what was missing in that sentence?

7 A. Yes.

8 Q. Hmm.

9 A. I would also capitalize the "you" before Your Honor,
10 maybe --

11 Q. And so the lack of capitalization, is that -- do you
12 believe you didn't see this document or would you have
13 caught that?

14 A. That is what I believe. I also don't have any red
15 lined or could not find any red-lined copy of this document
16 on my system.

17 Q. And this was a report that Kris had given to not just
18 you and Suzanne Reardon, but to four -- three other people.
19 Did any of those people, to your knowledge, talk to Kris and
20 contribute to the -- what you have before you?

21 A. I wouldn't know that.

22 MR. RYAN: I don't have any further questions.

23 MS. WEST: If I could have just one moment, please,
24 Your Honor?

25 (Off the record discussion among Counsel.)

CROSS EXAMINATION BY MS. WEST

Q. Good morning, Mr. Ravitz.

A. Good morning.

Q. Just for clarity of the record, you are the Chief of the Appellate Unit, right?

A. Yes.

Q. How long have you been chief?

A. Four years.

Q. How long have you been in the office?

A. Twelve years.

Q. When did Sue Reardon become division -- Deputy Division Chief?

A. It was some time -- I think of it as being under the first chief that I worked under, who's Kathy Nieves (phonetic), and she left shortly after Martha Coakley.

Q. So let me ask you this, there was a period of time where Sue was the Deputy Division Chief and you were just a line assistant, not just, but a line assistant, right?

A. Correct.

Q. Now, Sue is currently not the Deputy Division Chief, right?

A. Correct.

Q. And she was demoted in the Summer of 2015?

A. That's right.

Q. And part of the reason for that decision was the

1 Office's dissatisfaction for her performance?

2 A. Yes.

3 THE COURT: I'm sorry. Can you give me that again, Ms.
4 West, that last question and answer?

5 MS. WEST: Part of the reason for that was the Office's
6 dissatisfaction for her performance?

7 THE COURT: For what? Go back one. I missed that
8 piece.

9 MS. WEST: Oh, I'm sorry.

10 Q. (By Ms. West) Was she demoted in the Summer of 2015?

11 A. Yes.

12 THE COURT: She who?

13 MS. WEST: Sue Reardon.

14 THE COURT: Thank you.

15 MS. WEST: Thank you.

16 Q. (By Ms. West) Mr. Ravitz, is part of the caseload that
17 attorneys in your division handle have to do with habeas
18 work?

19 A. Yes.

20 Q. And then is also part of the casework have to do with
21 motions to quash, like what we've been talking about now?

22 A. Yes.

23 Q. And can you just tell us, clarification, the motions
24 for quash, who are the agencies that you represent?

25 A. Well, really it could be any public safety agency or

1 any agency that's not a public safety agency where the
2 motion is in relation to a criminal matter.

3 Q. When you first came to the office, if you have a memory
4 of this, about how many of these did you receive a year?

5 A. You know, I'm more familiar with, with the number over
6 the past four years.

7 Q. What's the number over the past four years?

8 A. About 120 subpoenas.

9 Q. Is that an increase?

10 A. Over the past four years?

11 Yes, because about half of those are from Dookhan and
12 Farak related matters.

13 Q. When was Kris Foster hired in the office?

14 A. The Summer of 2013.

15 Q. Were you part of the process, part of the decision
16 making to hire her?

17 A. Yes.

18 Q. And do you have a memory of her background that she
19 explained in the interview?

20 A. Yes.

21 Q. Do you have a memory of what she purported to be her
22 background on her resume?

23 A. Yes.

24 Q. At the time, what did you understand it to be?

25 A. That she had been in the Suffolk DA's Appellate Unit

1 for about four years, I think it ended up being four years
2 at the time that we brought her on. That she handled a very
3 substantial number of appeals in the SJC and the Appeals
4 Court. Also, a substantial number of proceedings in the
5 Single Justice Session of the SJC and a substantial number
6 of post-trial motions.

7 But -- that she also handled, she also worked on trial
8 teams from Grand Jury all the way through, and that she
9 drafted and presented pre-trial motions.

10 That she had recently joined the office's, I think it's
11 called the Narcotics Case Integrity Unit that was
12 established to deal with the Dookhan-related drug lab
13 matters.

14 She was both -- she described herself and one of her
15 references described her as being more prolific, more
16 productive than other ADAs and that she was particularly
17 good at getting things done quickly and on tight time
18 frames.

19 She also had some experience with public records
20 requests and in particular had -- there was some kind of a
21 prior assignment where she had, prior position where she had
22 worked on public records matters.

23 She was also involved in drafting legislation and rules
24 as part of the Suffolk DA's Office.

25 She had gotten an award, the Spotlight award which is

1 given to ADAs.

2 Q. And you were part of the interview process, right?

3 A. Yes.

4 Q. And ultimately you hired her?

5 A. Yes.

6 Q. Now, you said she was hired in the Summer of 2013?

7 A. Yes.

8 Q. The motions that are at issue today, do you remember
9 what the first one, the first one that was assigned to her?

10 A. I remember there were a couple right around the same
11 time, so there was a Secreast I think it's pronounced,
12 Secreast Velazquez. There were a couple of matters there
13 and there was a Yuri stamps case, and then the Penate case.

14 Q. Okay. And the Penate case, was a Springfield case
15 obviously, yes?

16 A. Right.

17 Q. So you assigned her a Springfield case. Was there some
18 particular reason for that?

19 A. Well, there were a number of reasons really. The --
20 one was just availability. We had trouble lining up
21 somebody who could go out to Springfield. We had an AAG in
22 Springfield at the time and she was out and I reached out to
23 her anyway, but she was unavailable.

24 And then we tried to get another AAG from outside our
25 division from Springfield and she was, for whatever reason,

1 that didn't work out.

2 Q. Let me just stop you there.

3 A. Yes.

4 Q. And when Kris Foster came in, she obviously didn't have
5 much on her plate, right?

6 A. Right. Right.

7 Q. So she had some room?

8 A. Right, so she would be available. It would make sense
9 that she was available, because she was still ramping up.

10 We -- I'm not saying we never give people a case that's
11 in the middle of its progression when they start, but we
12 like to give people things from the beginning and so that,
13 what that means is that naturally at the beginning there's
14 this ramp up period where they are actually looking for
15 work.

16 Also, because it was a state criminal case; Kris had
17 considerable experience, actually more experience than some,
18 a lot of us, in state criminal matters; because, as you
19 mentioned, a lot of what we do in the division is not in the
20 state criminal -- it's not in state criminal cases. It's in
21 federal habeas cases, it's even in civil cases.

22 Kris also was very -- had expressed a lot of interest
23 in expanding her range of experience, which suited us well,
24 being we believed that everyone in the division should be
25 able to do everything.

1 Q. And if I could stop you there. Kris had no experience
2 in filing motions to quash, right?

3 A. I don't know with certainty if that's the case.

4 Q. That would be the case for a lot of the attorneys who
5 go to the Appellate Division, right?

6 A. Right. The fact is our practice, generally, is very
7 specialized. It's very different from other areas.

8 Q. And is it your practice to ensure that all of the
9 attorneys in the division have the ability to do the habeas
10 work, have the ability to direct appellate work, and have
11 the ability to deal with subpoenas like this that come in?

12 A. Yes. Yes. And we tell people that in the interviews.
13 We make that clear. We make sure that the people are
14 interested in getting that full range, and then we make an
15 effort to see to it that they get the full range.

16 Q. All right. So when these people come in the door and
17 as we talked about many cases they may not have this
18 experience, what do you do to train them?

19 A. Well, I think -- I was thinking about this. There's
20 really, I think, three areas, three main ways that we train
21 people. One is formal training; second is through written
22 materials; and a third is through less formal training.

23 And so, just to elaborate on those, the formal training
24 would be through things like what's called the AG Institute.
25 Which is a series of CLE type programs within the office. I

1 should mention the office has its own CLE requirement.

2 Q. What is that requirement?

3 A. I believe it's 12 hours per year. But Judy Zeprun
4 Kalman can correct me if I'm wrong.

5 But -- and so there are those training programs, which
6 I routinely describe as outstanding and encourage people to
7 attend.

8 Q. And, in fact, you were asked about one of those
9 training programs on direct, correct?

10 A. That's right.

11 Q. And that had to do with a training that took place in
12 2013 regarding subpoenas?

13 A. Yes.

14 Q. Do you remember that training?

15 A. Yes.

16 Q. And do you remember specifically encouraging people in
17 your division to attend that training?

18 A. I -- yes. And then there was another one in 2015, but
19 I guess that was after Kris left.

20 Q. Go ahead. Continue on with the training.

21 A. Right.

22 There's also, in the formal category there's also we
23 can sometimes take advantage of national training seminars
24 put on by the National Association of Attorneys General
25 which are also fantastic. And then there are CAAP meetings,

1 that's C-A-A-P. I forget what it stands for, but it's
2 basically an organization of state appellate prosecutors,
3 and they have periodic meetings where people give
4 presentations on different topics.

5 Then, at our division meetings, I will routinely ask
6 people to give mini presentations on an issue related to our
7 practice.

8 There's also bureau trainings.

9 So that's all still within the formal category.

10 The written training category would include things like
11 we have a habeas corpus manual. We have a subpoena manual
12 that was referred to before. We have a manual on
13 renditions. So those are, in other words, extraditions of
14 fugitives.

15 Q. And do you make these manuals available to all of your
16 attorneys through the internet?

17 A. Correct.

18 Q. You communicate that to your attorneys?

19 A. Yes.

20 Q. If I can just move to the informal category, can you
21 please tell the Court what that means?

22 A. Sure. Well, it might be less formal, but it's
23 sometimes the most significant part. When an attorney is
24 new, they will, with the first cases they get, the deputy
25 chief -- I normally give a -- an overview of the habeas

1 corpus process, for example, and then the deputy chief will
2 sit down with them and go over the specific cases
3 themselves, how they should be handled. And then with new
4 matters of different types, we will either sit down with
5 them, go over how they're normally handled and/or pair them
6 up with somebody else in the division who's experienced in
7 that area.

8 Q. And then, let me stop you there for a second --

9 A. Yes.

10 Q. -- and ask you, do you remember Kris Foster when she
11 first started?

12 A. Yes.

13 Q. You remember that?

14 A. Yes.

15 Q. And did you, yourself, have a specific sit down with
16 her in regard to motions to quash?

17 A. Yes.

18 Q. And where was that meeting?

19 A. It was -- there's a little conference room, it's number
20 19-1 on our floor. It's directly across from what was then
21 Kris' office.

22 Q. And it was just the two of you?

23 A. Yes.

24 Q. And did you bring documents with you to show her?

25 A. Yes, I sat down with Kris and brought a set of samples

1 of motions and responses to these types of subpoenas that we
2 had prepared in connection with related cases and that would
3 give a good range, and went over with her how we normally
4 handle these.

5 Q. All right. So you went through the steps and process
6 in which you would file a motion to quash?

7 A. Yes.

8 Q. Do you have a specific memory telling her, at that
9 meeting, you need to look at the file itself?

10 A. I don't remember exactly what I said at the meeting.

11 Q. But that is one of the steps, is it not?

12 A. Right.

13 Q. Now, you, yourself, have done motions to quash, right?

14 A. Yes.

15 Q. And prior to your coming to the Attorney General's
16 Office, you were in private practice, right?

17 A. Yes.

18 Q. So you had no experience in motions to quash, right?

19 A. I don't recall doing a motion to quash beforehand;
20 yeah.

21 Q. In order to come up to speed on how to do them, did you
22 go through all of the things you just talked about in order
23 to understand how to file appropriate memo and motion to
24 quash?

25 A. Yeah, you mean like sitting down with people and going

1 over samples and -- yes. And then we had -- we had an older
2 subpoena manual when I started. The one that's been
3 referred to is an updated one; but, you know, the office has
4 long had a subpoena manual.

5 Q. You mentioned that some of the -- some of the clients
6 who have motions to quash will, obviously, be people outside
7 the office?

8 A. Right.

9 Q. It will be attorneys or employees from state agencies?

10 A. Yes.

11 Q. Have there been occasions where you have asked that
12 particular person to look at their file and they refused?

13 A. Yes.

14 Q. And what do you do in that situation?

15 A. Yes. Well, let's put it this way, one way or another
16 we find a way to not give in. We diplomatically explain to
17 them that we can't characterize the files or make
18 representations about the files, and would even be unable to
19 assert certain objections and protections without us
20 independently reviewing the files.

21 So we insist on it.

22 And then, if, for some reason, they don't -- for some
23 reason we can't get their cooperation, we look for another
24 way that does not include making representations about files
25 that we haven't reviewed.

1 Q. Mr. Ravitz, I'm going to talk to you about one of the
2 privileges that has been the subject of these hearings, and
3 that's a law enforcement investigative privilege. Are you
4 familiar with that?

5 A. Yes.

6 Q. What is it?

7 A. It's a common law privilege that applies to things like
8 sensitive law enforcement techniques and confidential
9 informants and surveillance locations, things that could
10 jeopardize an ongoing investigation or law enforcement
11 efforts.

12 Q. And is there a difference where, how that privilege is
13 used during an ongoing case versus how it's used after a
14 case is over?

15 A. Yes, I think that it's -- it's more rare for the
16 privilege to have applicability after a case is over. You
17 know, it could, in some situation, if let's say there was a
18 confidential informant whose identity needed to be
19 protected, but it's -- oftentimes it -- it's really not a
20 valid argument after the investigation is over.

21 Q. So if a third-party subpoena was served in an ongoing
22 case, like in Farak, would it be unusual to assert that the
23 documents in that case were protected by that very
24 privilege?

25 A. I'm sorry. Can you repeat that?

1 Q. If a third-party subpoena was served in an ongoing
2 case, like in Farak, would it be unusual to assert
3 investigative privilege?

4 A. It would not be unusual.

5 Q. And the documents inside the case file might be
6 privileged for other reasons as well, but the investigator
7 privilege would then protect the whole file, wholesale,
8 correct?

9 A. Right.

10 Q. Now, you were asked some questions on cross, it was an
11 email you saw in which Anne Kaczmarek spoke about --

12 MS. WEST: Your Honor, one moment?

13 (Pause)

14 Q. (By Ms. West) I'm showing you an email you saw
15 earlier. Do you recognize this?

16 A. Yes.

17 Q. And this is the email where Anne had indicated Joe
18 Ballou had been subpoenaed, right?

19 A. Yes.

20 Q. And as you go through the email on the front page, you
21 write on September 4, and you were asked about the language
22 of your email?

23 A. Right.

24 Q. And now, I think everybody has a copy of this.

25 You indicated that there could be some outstanding

1 issues, and you sort of gave some reasons why you could
2 still object to this. Can you explain what you meant by
3 that?

4 A. Sure. Well, a couple of things. One is, I just want
5 to be clear that, what I'm talking about in this email would
6 be filing a motion that would put the issue before the
7 court.

8 So it's, just in case there's any confusion about this
9 email, I want to note that it does not refer to or suggest
10 anything about withholding documents secretly. It's
11 discussing making a request to a court; which, if the court
12 allowed, then we would presumably be in the right; and if
13 the court didn't allow, we would presumably comply with the
14 court's order. And I only say "presumably" because
15 occasionally, you know, something like that would be taken
16 up on appeal.

17 But -- and then the -- you know, when I talk about a
18 defense attorney could still try to elicit information of
19 the type that we think shouldn't be revealed under the guise
20 of fleshing out certain information, I note that I'm not
21 referring to any specific information that I had in mind,
22 and I don't recall having any specific information in mind.
23 It's more just the general concept that if there is
24 information that we think shouldn't be revealed, that then
25 there would be a -- there could be a basis to file a motion

1 to quash.

2 Q. Is this an -- is this email an example of you giving a
3 legal analysis?

4 A. Yes.

5 Q. And are you just giving the options that might be
6 available to the attorney?

7 A. Yes. I mean -- as both as head of the division that
8 handles subpoenas and just as Chief of Appeals, I'm often in
9 this position of being the legal adviser, the person to
10 raise the -- any legal issues or protections that might be
11 applicable in a given situation, and I feel it's my
12 responsibility to put those out there.

13 And here, again, I just want to point out also where I
14 say under the guise of fleshing out information, I think
15 there's a suggestion there that what I was concerned about
16 would be a defense attorney doing something improper or
17 misusing the order or reading something into it that doesn't
18 belong there.

19 Q. Okay.

20 A. And just an example of where I put this option out
21 there and asked for thoughts at the end.

22 Q. And whether those options are taken are not your
23 decision, right?

24 A. Right. Right.

25 Q. Now, at this point, in this particular example here,

1 there was no talk about physical evidence. This was just
2 talk about a file, right?

3 It was moving to quash testimony and a file of
4 Mr. Ballou's, correct? If you know?

5 A. I don't recall.

6 Q. Okay. But let me ask you this, you recognize the
7 distinction between requests to actually look at physical
8 evidence, original physical evidence in a case versus
9 requests to look through a trooper's file?

10 A. Yes.

11 Q. Now, there's a distinction there, right?

12 A. Yes.

13 Q. And there's going to be different privileges that might
14 apply to the former rather than the latter?

15 A. Correct.

16 Q. So, ultimately, this case was assigned to Kris Foster?

17 A. Yes.

18 Q. Earlier you mentioned some of the cases that she had in
19 addition to the Watt case. And you -- I think you mentioned
20 Secreast, S-E-C-R-E-A-S-T. Do you remember that?

21 A. Yes.

22 Q. Was that something you assigned her?

23 A. I can't remember if I assigned it to her, but I know I
24 reviewed her report.

25 Q. Okay. I'm going to show you a document that we have

1 spoken about, this is August 26, shortly after Ms. Foster
2 had arrived at the office.

3 Do you recognize this document?

4 A. Yes.

5 Q. Okay. And can you tell us what it is?

6 A. It's copy of an email exchange between me and Kris and
7 I'm attaching a filing of mine in a case called United
8 States of America vs. Jerome Vaughn.

9 Q. Were you attaching that to give her a template in order
10 to work off -- excuse me, in order for her to draft a
11 response in another case?

12 A. Yes. Yeah, and a sample to look at.

13 Q. Now, I'm going to show you another email and this is
14 regarding Secreast. Do you remember this?

15 A. Yes.

16 Q. What is this?

17 A. This is an email from me to Kris attaching a copy of a
18 motion to quash that she drafted in that case with my red
19 lining and comments.

20 Q. Okay. And that was one of two emails, correct? There
21 was another Secreast email?

22 A. That's correct.

23 Q. I'm putting that one in front of you now. Do you
24 recognize that?

25 A. Yes.

1 Q. Is that the second red-line version of -- with your
2 comments?

3 A. That's the second motion with my red lining and
4 comments, yes.

5 Q. And so, in looking at the very first one, the one that
6 has a paragraph in the front -- it's up on the screen, but
7 it's right below you.

8 This is your email. This is where you are attaching
9 the red lining, but you're also giving her some comments and
10 I want to direct your attention where you say in the last
11 line: Please take note of my comments to section three
12 which I leave to you to adjust appropriately.

13 Do you see that?

14 A. Yes.

15 Q. And what was that regarding?

16 A. It was regarding a comment at the end, section three.
17 The heading says: As an alternative to quashing the
18 subpoena, this court should restrict its scope.

19 And I attached a comment there.

20 Q. What's the comment say?

21 A. The comment says: This list should be tailored to
22 what's at issue here and the kinds of information that you
23 say is protected in the sections above and to the fact that
24 what is sought is testimony and not documentation.

25 Q. And you made that comment because she did a cut and

1 paste off of your Vaughn memo, right?

2 A. Yes.

3 Q. I'm going to show you this second motion, this is the
4 email you wrote. And you say here: Here's the Irwin one
5 with my comments. And, again, I'm going to go to the final
6 section entitled: As an alternative to quashing the
7 subpoena, this court should restrict its scope.

8 Did you put the very -- the same exact comment there?

9 A. Yes.

10 Q. And were you telling this because she hadn't tailored
11 that list to the facts in her case?

12 A. Yes. Yes.

13 Q. And, essentially, you were telling her, make sure you
14 look at the file and ensure that these alternatives,
15 whatever they are, match what's in that file?

16 A. The -- okay, because these seek testimony and not
17 documentation.

18 Q. Excuse me, my mistake.

19 A. The idea is that whatever the alternatives are, and
20 really whatever is written in the whole document should be
21 tailored to the case at issue and the subpoena at issue and
22 whatever privileges and protections fit that particular
23 case.

24 Q. Did she do that here?

25 A. I'm sorry. Say that again.

1 Q. Did she do that here in -- ultimately, in Vaughn --
2 excuse me -- strike that.

3 Did she ultimately do that in Seccrest?

4 A. You mean in the draft that she sent me?

5 Q. In the final that she filed.

6 A. The final that she filed, I believe she then made
7 adjustments to it.

8 Q. Okay. I'm going to show you what's been marked as
9 Exhibit 250. This is a filing in the case Jermaine Watt.
10 Do you recognize this?

11 A. From -- well, from preparing for this hearing.

12 Q. Okay.

13 A. Yes.

14 Q. Now, this was filed in early September, correct?

15 A. Yes.

16 Q. Go to the back page.

17 A. Yes.

18 Q. On the evening of September 4, 2014, to the evening of
19 September 5, 2015, do you celebrate Rosh Hashanah?

20 A. Yes.

21 Q. Were you in the office?

22 A. No.

23 Q. So you were not available to edit this piece of work,
24 were you?

25 A. That's correct. I was also out on the sixth, yes.

1 Q. This is Exhibit 250. I'm looking at page nine to the
2 section, the alternative section; you see here there are
3 five listed, and then on page ten there's six and seven. Do
4 you recognize those?

5 I'm going to give this to you so you can do it
6 directly.

7 A. Right.

8 Thank you.

9 Yes, this also looks like Vaughn.

10 Q. So is that a direct cut and paste from Vaughn?

11 A. Yes. And I think the only difference might be that
12 "subpoena" is not capitalized.

13 Q. Okay. So Sue Reardon reviewed this filing, right?

14 A. That's my understanding.

15 Q. And Sue Reardon was not on the earlier emails of your
16 exchange with Foster regarding Secreast, was she?

17 A. No.

18 Q. And Sue Reardon would not have seen your red-line
19 version of Secreast, would she?

20 A. Right.

21 Q. Was the Watt memo, that memo, the first one that Kris
22 Foster had written?

23 A. No, I think Secreast came first.

24 Q. And if you had edited Watt, and had seen this, what
25 would you have told her?

1 A. I would have noticed that it was, again, very, very
2 similar to what I wrote in Vaughn, if not identical to what
3 I wrote in Vaughn, which would suggest that it was unlikely
4 that there was much tailoring to the case.

5 Q. And would -- you would of questioned her as to whether
6 she had gone back to that part of the section and really put
7 substantial effort into it?

8 A. Yes.

9 MS. WEST: Your Honor, may I admit these three
10 exhibits, the first being the Vaughn memo, the second being
11 the email in Secreast, and the third being email in Secreast
12 as well?

13 THE COURT: May be marked.

14 MS. WEST: And also just to clean up, may I also admit
15 the email that Mr. Ravitz spoke about earlier regarding his
16 clarification on the order regarding the drug lab
17 evidentiary hearing that both of the parties spoke about?

18 THE COURT: May be marked.

19 MS. WEST: Thank you.

20 THE CLERK: That will be marked as Number 253,
21 following is 254, 255 and 256.

22 (Exhibit No. 253, emails from AAG Ravitz to AAG Foster
23 (9/4/13 11:57 a.m.), marked)

24 (Exhibit No. 254, emails from AAG Ravitz to AAG Foster
25 (8/26/13 10:38 a.m.), marked)

1 (Exhibit No. 255, emails from AAG Ravitz to AAG Foster
2 re: Secreast (9/2/13 11:21 a.m.), marked)

3 (Exhibit No. 256, emails from AAG Ravitz to AAG Foster
4 re: Secreast (9/12/13 1:38 p.m.), marked)

5 Q. (By Ms. West) Mr. Ravitz, you were asked some
6 questions about a September 9 hearing, that Kris Foster came
7 to, in front of Judge Kinder. Do you remember those
8 questions?

9 A. Yes.

10 Q. And do you have a memory of having a conversation with
11 her on that very day?

12 A. Yes. She called from court or -- we spoke while she
13 was out at the court.

14 Q. And do you remember the conversation?

15 A. I remembered generally that she described the hearing.

16 Q. Do you remember what she said?

17 A. I remember certain things, but not everything.

18 Q. If I showed you some -- let me show you a piece of
19 paper that says Farak 9/9/13 on the top with handwriting on
20 it.

21 Do you recognize this?

22 A. Yes.

23 Q. Are these your notes --

24 A. Yes.

25 Q. -- from that conversation?

1 A. Yes.

2 Q. Take a moment to look at it.

3 (Pause)

4 THE WITNESS: Yes.

5 Q. (By Ms. West) Does that refresh your recollection as
6 to what was said in the conversation?

7 A. Yes.

8 Q. What did she tell you happened?

9 A. That there was repetition of the Grand Jury testimony,
10 that the witness Ballou was asked if Anne Kaczmarek has
11 anything that he doesn't have, and that the Judge didn't
12 allow that questioning.

13 That --

14 Q. Let me ask you this, did she mention in that phone call
15 that Kinder told her to look at the file?

16 A. No.

17 Q. Now, on the following day, September 10, Foster is back
18 in the office, right?

19 A. Yes.

20 Q. And do you have a memory of having another conversation
21 with her?

22 A. Yes.

23 Q. About what had happened at the hearing?

24 A. Yes.

25 Q. And what's your memory of that conversation?

1 A. It was similar in that it described what happened at
2 the hearing. There are certain things I can remember from
3 it, but not everything.

4 Q. I'll ask you this. Do you remember if she told you
5 that Kinder had told you -- told her, Kris Foster, to look
6 at the file also?

7 A. No, I don't remember her saying that Judge Kinder told
8 Kris to look at the file.

9 Q. I'm going to show you an email that you saw earlier.

10 You saw this earlier and it's part of the thread of
11 Exhibit 210?

12 A. Yes.

13 Q. It's an email where Kris describes what happened at the
14 9/9 hearing in front of Judge Kinder, correct?

15 A. Yes.

16 Q. And in that description -- I know you've seen this this
17 morning. She indicates: Judge Kinder is giving us until
18 the 18th to go through Ballou's file and anything in it we
19 think is privileged shouldn't be disclosed and we have to
20 give it to Kinder to review in camera, along with a memo
21 explaining why we think each document is privileged.

22 Now my question is, other than this information that's
23 in the email, describing what happened in the hearing, and
24 the file, and Kinder's directions, did you have any other
25 information, at the time, of what actually what the

1 interchange was between Judge Kinder and Kris Foster?

2 A. No. It was -- it was more about Ballou and his
3 testimony.

4 Q. Mr. Ravitz, I trust you've never read the transcript
5 from the 9/9 hearing?

6 A. That's right.

7 Q. I'm just going to read a short short portion of the
8 that transcript.

9 It starts on page 16, with the Court saying: With
10 respect to the request for the protective order, my first
11 question is, have you actually, personally, reviewed the
12 file to determine that there are categories of documents in
13 the file that fit the description of those that you wish to
14 be protected?

15 Foster: I've been talking with AAG Kaczmarek whose
16 been doing the investigation for the Attorney General's
17 Office. She has indicated that several documents, emails,
18 correspondence, would be protected under the work product
19 mostly.

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

22 Correct.

23 And then it just goes onto page 18 where the file
24 itself is addressed in which Judge Kinder says: First of
25 all, can I ask you whether or not the file is present?

1 And Foster responds: I don't believe it is. Attorney
2 Olanoff told me he actually wasn't seeking documents and
3 photographs, that he's only seeking Ballou's testimony.

4 The Court: It's been subpoenaed, so there's a court
5 order for it to be present today, and I haven't yet ruled.
6 My advice to you is to get that file here.

7 What I'm going to do with respect to your request for
8 protective order is ask you to submit to me copies of all
9 these documents that you believe fit into one of these
10 categories that should be protected. I will review it, in
11 camera, make a determination after hearing from you, both,
12 all, if necessary, whether or not it needs to be protected
13 further.

14 But I must say, I'm a little disturbed that a court
15 order for the production of a file has not been produced
16 absent determination by me as to whether it should or should
17 not be produced.

18 Now, Mr. Ravitz, did you understand that that was the
19 interchange between the Court and Ms. Foster?

20 A. No.

21 Q. And had you known that this is what Judge Kinder said
22 to Kris Foster, would you have told her to look at the file?

23 A. Of course.

24 Q. Just briefly, you were showed 193 earlier. And this
25 is -- you may have it in front of you, but this is the

1 letter signed by Kris Foster to Judge Kinder. And I know
2 you have explained that you have not seen this before.

3 A. Right.

4 Q. How are you so sure you haven't seen it before?

5 A. Well, I -- as I said before, the grammatical error and
6 arguable error in failing to capitalize the Y tells me that
7 I didn't review it.

8 I don't remember seeing it or reviewing it, before very
9 recently in preparing for this hearing.

10 I did a search in my system and I couldn't find a
11 red-lined version of this or an email -- either from Kris or
12 from me -- attaching this.

13 Q. Is it always your practice to capitalize the Y in
14 "your"?

15 A. I think that's correct. The correct thing to do.

16 Q. Okay. I want to ask you about some events that
17 happened in November 2014.

18 A. Yes.

19 Q. Now we're going forward about a year.

20 THE COURT: Actually, Ms. West, we're going to take the
21 morning recess.

22 MS. WEST: Thank you, Your Honor.

23 (The Court exited at 10:59 a.m.)

24 (* * * * *)

25 (The Court entered at 11:30 a.m.)

(The defendant and the interpreter were present.)

THE COURT: Ms. Cignoli, are you all set?

THE CLERK: Yes.

MS. WEST: Your Honor, I have just a few more minutes.

(Randall Ravitz, continued)

CROSS EXAMINATION BY MS. WEST

Q. Mr. Ravitz, September 9, September 10, that time frame we were talking about, did you know at that time that Kris Foster had not looked at that file?

A. No.

Q. And has she ever -- during that, also that period of time frame, did she ever tell you not to bother -- pardon me. Strike that.

Did you ever tell her not to bother to look at the file because everything had been turned over?

A. I don't recall ever telling her that. It sounds like something I wouldn't say.

Q. I'm going to move now to 2014. In the Summer of 2014, post the plea. You have a memory that a motion to inspect evidence came, correct?

A. Yes.

Q. And there was some discussion among a number -- yourself, Verner, and Dean, Cara about whether we should --

A. Yes.

Q. -- assent to that, right?

1 A. Yes.

2 Q. So there was some discussion, but ultimately you also
3 agreed that we should assent, correct?

4 A. Yes.

5 Q. Now, moving a little bit forward, bring your attention
6 to November 3, 2014. I'm going to show you an email.

7 Now, that first weekend in November, it's your
8 understanding that Mr. Ryan came on October 30, to the
9 office to inspect the evidence box, correct?

10 A. Yes.

11 Q. And you understand that that weekend he sent a letter
12 to Mr. Devlin indicating that he had found some material
13 that he did not have before, right?

14 A. Yes.

15 Q. At this point, it's fair to say, that the landscape had
16 changed. You were now post-ongoing case, you're not in a
17 case anymore, correct?

18 A. Yes.

19 Q. So your view as to whether -- as you said, your view as
20 to whether you should allow defense attorneys to come and
21 inspect the evidence is that you should, correct?

22 A. Yes.

23 Q. That very weekend, Mr. Ryan indicated he wanted to file
24 a motion on May -- excuse me on Monday, it was an emergency
25 motion to lift the protective order. Do you remember this?

1 A. That I don't remember.

2 Q. All right. So why don't you take a look at the email
3 in front of you.

4 (Pause)

5 Q. (By Ms. West) And on that Monday, November 3, John
6 Verner forwarded a motion and said: Thoughts on if we
7 should agree to the motion. And in response you said: I
8 vote yes.

9 Right?

10 A. Yes.

11 Q. But then you say it would be good to confirm that his
12 take on the matter's correct, i.e. that Farak prepared these
13 materials, that she did so around December 2011 and that
14 they say what he says they say, and they weren't turned over
15 previously.

16 Did you write that?

17 A. Yes.

18 Q. What did you mean by that?

19 A. Well, if we're making any decision or even if we're
20 just analyzing the matter, it's only responsible to confirm
21 the accuracy of what we're hearing. And not to suggest
22 anything about Mr. Ryan, it's just we should just
23 independently verify the relevant facts.

24 Q. Okay. This is just another example of you providing
25 legal advice to John Verner?

1 A. Yes.

2 MS. WEST: Your Honor, I would like to move to admit
3 that as the next exhibit.

4 THE COURT: May be marked.

5 THE CLERK: Marked as Number 257.

6 (Exhibit No. 257, emails from AAG Verner to AAG Ravitz
7 (11/3/14 10:19 a.m.), marked)

8 Q. (By Ms. West) Let me show you one more email.

9 If you look at the beginning of this chain, it actually
10 starts on September 7, 2013, and then it quickly jumps to
11 November of 2014.

12 Mr. Ravitz, is it fair to say that in early November,
13 when you, Mr. Verner, and Dean discovered that some material
14 hadn't been produced, that there was a scrambling to figure
15 out what had happened?

16 A. Yes.

17 Q. And please describe for me what you did.

18 A. I went back and looked through emails and tried to
19 piece it all together.

20 Q. And you did this because you have no memory of not
21 turning over information, correct?

22 A. Yes.

23 Q. And what did you find when you pieced together the
24 emails?

25 A. That there's an email where Anne references mental

1 health worksheets and appears to say those are in Ballou's
2 file, and then there was something else to suggest that
3 everything in Ballou's file was turned over already. So the
4 two taken together would mean that the mental health
5 worksheets were turned over already.

6 Q. And you did this because you had no idea what had
7 happened, right?

8 A. Right.

9 Q. Because you had -- you had never had a discussion with
10 anyone in the office about deliberately withholding any
11 evidence in this case?

12 A. Correct. Right.

13 Q. And you never received any order, from any superior, to
14 do so?

15 A. Right.

16 Q. And you, yourself, never instructed anyone below you to
17 do that?

18 A. Right.

19 Q. Now, beyond your response to this email, it continues
20 on, correct?

21 A. Yes.

22 Q. And Kris Foster also -- it just -- take a look at it.

23 Is this a cut and paste from an old email that she had
24 describing what had happened on that day?

25 A. Yes.

1 Q. Is it fair to say that in this time frame, when this
2 all happened, a number of you were scrambling to figure out
3 what had happened?

4 A. Yes. That's exactly right.

5 Q. And besides yourself, who was that, who was involved
6 with this?

7 A. Kris, John Verner, there's other people who might have
8 been involved at that time.

9 Well, it might have involved Dean. It might have
10 involved, also -- I can't remember when Patrick Devlin -- I
11 can't remember when he was involved, and wasn't.

12 Q. Well, you particularly remember your involvement,
13 correct?

14 A. Yes. Yes.

15 Q. Because this was particularly troubling to you?

16 A. Yes. Yes. This was a big deal. This was very
17 upsetting. I don't want to speak for other people, but my
18 impression was that we were all very upset by this, and
19 surprised by it. And there was this postmortem trying to
20 figure out what happened.

21 And there was -- there was a very uncomfortable meeting
22 in John's office. I don't -- unfortunately, I don't
23 remember exactly what was said in the meeting, but I do
24 remember Kris being very rattled.

25 You know, and so we were trying to figure it out.

1 I went back to the old filings in the case and tried to
2 figure out for myself, if I could figure out why certain
3 statements were made and whether they were, in fact,
4 inaccurate, even if inadvertently inaccurate.

5 So like I said, there was a lot of, on my part and I
6 think on other people's parts, this act of looking back and
7 analyzing it all and trying to recreate history and figure
8 out what happened.

9 MS. WEST: Your Honor, may this email be admitted as
10 the next exhibit?

11 THE COURT: All right.

12 THE CLERK: Marked as Number 258.

13 (Exhibit No. 258, emails from AAG Foster to AAG Mazzone
14 (11/3/14 3:14 p.m.), marked)

15 MS. WEST: Your Honor, I have nothing else.

16 Thank you.

17 **QUESTIONS BY THE COURT**

18 THE COURT: Mr. Ravitz, from your testimony, it seems
19 appropriately that you prepared for this testimony.

20 THE WITNESS: Yes.

21 THE COURT: What did you do to prepare for this
22 testimony?

23 THE WITNESS: I went back and looked at old emails, in
24 connection with the matter. I looked at documents on the
25 system related to Farak on my own system.

1 I went into Kris Foster's files that -- when an
2 Assistant AG leaves, there will generally be certain files
3 of their's that are transferred to a communal drive and it's
4 generally final copies of things.

5 So I went and looked in there, just to see if I could
6 see anything that was new or different.

7 I looked through my own paper files. I looked for any
8 notes that I could have.

9 I have -- I have to admit, my office is messy. I have
10 a lot of unsorted files. I went through the unsorted files
11 to look for anything related to this matter.

12 I did have some discussions with people in the office.

13 I think that covers that.

14 THE COURT: And those efforts refreshed your
15 recollection to this time frame of September to October of
16 2013; is that fair to say?

17 THE WITNESS: Yes. Yes.

18 THE COURT: And so at that time, the office was dealing
19 with the Dookhan matter, now this Farak matter arises in the
20 west. And you've got all these multiple defendants seeking
21 documents, and that was on your desk, fair to say?

22 THE WITNESS: Yes. Yes.

23 THE COURT: Okay. And so, prior to the September 9,
24 hearing before Judge Kinder, you -- I believe you testified
25 you recalled discussions about this issue, correct?

1 THE WITNESS: About -- about which issue?

2 THE COURT: The issue of the defendants requesting
3 documents that there needed to be a motion -- not needed to
4 be, but decided to file a motion to quash before Judge
5 Kinder.

6 THE WITNESS: I don't remember how that relates to the
7 September 9 date.

8 THE COURT: Uh-huh.

9 THE WITNESS: But, I don't remember exactly which came
10 first, and but --

11 THE COURT: Do you remember any meetings with, you
12 know, or the collection of people to deal with the issue of
13 how to respond to the September 9, issue?

14 THE WITNESS: I know that there were meetings. I don't
15 know -- I don't remember exactly when they were.

16 With the exception of, you know, a couple that stand
17 out, like I mentioned, the one later in time where I said
18 Kris Foster seemed rattled.

19 THE COURT: That was in November of 2014.

20 THE WITNESS: Right.

21 THE COURT: I'm talking about 2013. You assigned Kris
22 Foster to go out and file and fight the good fight on this
23 motion to quash, right?

24 THE WITNESS: Yes.

25 THE COURT: And you made that assignment, that was you;

1 is that accurate?

2 THE WITNESS: I think -- yeah, I think so.

3 THE COURT: Okay. And she called you from the court?

4 THE WITNESS: That's right.

5 THE COURT: All right. And you testified that you, at
6 some point, and I wanted to try to figure out when that was.

7 You had a sit down with Ms. Foster?

8 THE WITNESS: Right.

9 THE COURT: And when did that sit down take place?

10 THE WITNESS: The way that I remember it, was that it
11 was before her first subpoena matter. So, I can't -- I
12 can't say with 100 percent certainty that was Penate, as
13 opposed to the Secreast Velazquez or the Yuri stamps federal
14 matter; but, you know, but I --

15 THE COURT: And that meeting took place as a result of
16 a particular case, is that accurate?

17 THE WITNESS: Yes. Yes.

18 THE COURT: And --

19 THE WITNESS: Your Honor, I also know, just in looking
20 back over the emails, there was an email from me around
21 the -- I think it was right after the Penate one came in,
22 where I said, Let's sit down and talk about this.

23 THE COURT: Uh-huh. And at or about September of 2013,
24 did you recall a meeting or meetings that involved both the
25 representatives of the appeals section and the line

1 prosecutor Ms. Kaczmarek and Ms. Foster and other
2 individuals -- do you remember any meetings like that
3 regarding these subpoena issues?

4 THE WITNESS: I know there were meetings like that. I
5 just don't know exactly when, when they were.

6 THE COURT: All right. Well, you talked about what
7 your office's protocol is --

8 THE WITNESS: Right.

9 THE COURT: -- and your in-office continuing education
10 and your conversations with Ms. Foster as to how to do these
11 things. Do you recall at any of these meetings, any of
12 these starting off by saying, Let's find out what we've
13 given them and what we haven't given them; what's this all
14 about; what's this fight about; will somebody please tell me
15 what we've given them and what we haven't given them -- from
16 anybody?

17 You remember anybody saying, you know, before we start
18 fighting about whether it's mental health or whether it's
19 investigative or whether it's mental, you know, whatever it
20 might be, do you have any recollection of anybody saying,
21 Well, here's a log, or here's an inventory, here's what
22 we've given them, and here's what we've not given them.
23 This is what we're fighting about.

24 Anything?

25 THE WITNESS: I don't. I do -- I did find some notes

1 that, from a conversation I had with Sue Reardon around that
2 time where there are questions like that.

3 But, I don't know -- I don't know exactly who asked,
4 whether she asked me, or I asked her, or whether it was just
5 thoughts that I had. But there were questions to that
6 effect of along the lines of what Your Honor is describing.

7 Beyond that, I know that there were meetings. I just
8 don't remember exactly what was said in them.

9 THE COURT: The exhibit that was shown to you earlier,
10 which was Ms. Foster's letter to Judge Kinder.

11 THE WITNESS: Yes.

12 THE COURT: You ever see an animal like that in
13 response to a judicial order? Dear Judge Kinder?

14 THE WITNESS: I think it's unusual and also at the
15 end -- I was just looking at it again during the break.
16 There's -- I don't have it in front of me -- oh, here it is.

17 Please do not hesitate to contact me should you require
18 anything further.

19 It just seems odd to say that when you're a litigant
20 submitting a filing to a judge in connection with a case.

21 THE COURT: Ms. Foster is part of your team and you had
22 motions to quash in the past, and when you had that, and the
23 issue is what have you given them, what haven't you given
24 them; is it fair to say that the source of that information
25 for someone in your position is the line prosecutor?

1 THE WITNESS: Yes.

2 MR. OLANOFF: Thank you, Your Honor.

3 **CROSS EXAMINATION BY MR. OLANOFF**

4 Q. Good morning.

5 A. Hi.

6 Q. You mentioned earlier that you were the one in
7 conjunction with Ms. Reardon who hired Kris Foster?

8 A. Yes.

9 Q. And just a few moments ago you just touted her resume
10 in great detail for us, correct?

11 A. I don't know it would be called touting or not touting.
12 I was just referencing things that were on her resume and
13 that came out in the hiring process.

14 Q. And so, by the time these Ballou subpoenas came to your
15 office, were you aware at all that she was not what her
16 resume may have made her out to be?

17 A. I'm still not aware if that's the case. In other
18 words, on this date, I have no information to say that she's
19 not -- was not what she purported to be.

20 Q. Did you have any inclination though, during that time,
21 September 12, 2013, did you have any inclination prior to
22 that, she may not have known certain things about what it is
23 you all do in that Appeals Unit?

24 A. No. No. I mean there were two interviews. The
25 posting -- well, two interviews and then she goes upstairs;

1 so there's at least one other interview. There's a posting
2 that describes what we do.

3 Q. Well, what I'm asking is what was her work like from
4 the time that you hired her to September of 2013? Was it
5 good? Bad?

6 A. I thought it was fine.

7 Q. You mentioned and testified earlier that you, at the
8 Attorney General's Office, have this extensive training
9 program for new lawyers, correct?

10 A. What I said was that we have extensive training
11 programs for people in the office generally.

12 Q. And did Kris Foster go through those training programs?

13 A. Yes. I just want to be clear. This is -- it's not
14 like, it's, you know, one weekend thing when you first
15 start. There are various seminars and CLE type programs
16 throughout the year. But yes, she took advantage of quite a
17 few programs.

18 Q. And had she attended any Attorney General based
19 programs from the time that she was hired to 2013 that you
20 know of?

21 A. To 2013?

22 Q. To September of 2013.

23 A. Oh, I don't know. I'm sorry. I should -- I do know
24 that there's an initial new-hire training that the office
25 does. That's, you know, within days of somebody being

1 hired, but I can't really make representations about what
2 that entailed at the time.

3 Q. As part of your training of new lawyers, do you ever
4 send another lawyer to accompany them to court on maybe
5 their first time in dealing -- in going somewhere?

6 A. We've done that, yes.

7 Q. Okay. And did you do it in this case?

8 A. I don't recall our doing it in this case.

9 Go ahead.

10 Q. Were you aware that this was Kris Foster's either first
11 or second time responding to a subpoena in her life?

12 A. No.

13 Q. And so when you assigned her to handle the Farak case,
14 in let's say August of 2013, you knew that the Farak
15 situation was a big deal, correct?

16 A. Yes.

17 Q. This was Dookhan part two, right?

18 A. Yes.

19 Q. And so, nevertheless you -- I think you said, you tried
20 to find other people to do it first?

21 A. Right.

22 Q. And that didn't -- that fell through, correct?

23 A. Right.

24 Q. So you assigned Kris Foster, and one of the things that
25 we saw that you did was that you helped her draft her motion

1 to quash the subpoena, correct?

2 A. I -- I edited it, correct.

3 Q. And when you're editing it, you're looking for, to
4 include as many privileges as possible, correct?

5 A. Provided there's a valid basis for asserting it.

6 Q. And when you're doing that, when you're including these
7 privileges. In fact, you asked -- you suggested that she
8 include this other type of privilege, right, that she hadn't
9 already included?

10 A. I don't remember that, but --

11 Q. Okay. But when you're including these privileges,
12 you're inserting them as sort of in a theoretical way. In
13 other words, you don't know what documents you are talking
14 about, correct?

15 A. I wouldn't put it that way, I think that the
16 expectation is that there would not be a privilege asserted
17 without some good-faith basis to believe that it should be
18 asserted, and the best way to determine that is to review
19 the documents.

20 You know, there are certain types of protections that
21 or objections that could be raised that would just be
22 apparent from the face of the subpoena, but there would need
23 to be enough to -- for the person who's signing it, to have
24 a good-faith basis to assert a protection or an objection.

25 Q. Now, when Kris Foster filed her motion to quash there

1 were -- she asserted a bunch of different privileges,
2 correct?

3 A. Yes.

4 Q. And she came back from Springfield -- in fact, she
5 called you and said the motion to quash was denied, correct?

6 A. Yeah, I'm not sure when she mentioned that. It might
7 have been afterwards.

8 Q. And you knew that Judge Kinder wanted to know, from
9 Kris Foster, which documents she thought were privileged,
10 correct?

11 A. The -- he -- based on the email, the email indicated
12 that he asked for there to be a review of identification of
13 which documents were privileged.

14 Q. Okay. And did you participate in the process of
15 finding out which documents you all thought were going to be
16 privileged?

17 A. I don't recall participating in that process.

18 Okay. Now, you mentioned earlier you used, I think, as
19 an explanation -- well, let me back up.

20 Q. At some point you stopped supervising Kris Foster
21 because of the High Holidays, correct?

22 A. I wouldn't say stopped supervising. I would say that
23 something else was reviewed -- something was reviewed by Sue
24 as opposed to by me because of the High Holidays.

25 Q. Okay. And so the Rosh Hashanah that year was

1 September 5 and 6, was it not?

2 A. Right.

3 Q. So that was three days before Kris Foster came to
4 Springfield to argue her motion to quash, correct?

5 A. Correct.

6 Q. Now, Yom Kippur was some ten days later on
7 September 14, correct?

8 A. It's a Saturday; is that right? Yes.

9 Q. And that was a Saturday, correct?

10 A. Yes.

11 Q. And this letter that she wrote to Judge Kinder was two
12 days after that on September 16, correct?

13 A. Yes. Yes.

14 Q. And you are saying here today that you did not
15 participate in any way in the drafting of this letter,
16 correct?

17 A. I'm saying that I don't have any recollection of
18 participating in the drafting of the letter. I don't -- I
19 didn't recognize the letter when it was shown to me very
20 recently and I couldn't find anything in my system referring
21 to that letter.

22 Q. Okay. But the letter is important because this is what
23 Judge Kinder asked, is for you all to identify which
24 documents you thought were privileged, correct?

25 A. Right.

1 Q. And when it came time to tell him which documents would
2 or would not be privileged, there were none, correct?

3 A. There were none identified in the letter.

4 Q. Okay. And Kris Foster, though, in writing this letter,
5 saying that there were no documents to be turned over, no
6 documents that were privileged, consulted with the office,
7 did she not?

8 A. Consulted with the office -- I -- I don't know exactly
9 what she did between the hearing and the letter.

10 Q. Well, you were involved in what was going to be
11 identified as privileged. You were the privilege guru,
12 correct?

13 A. I wouldn't call myself the privilege guru, but I was
14 her supervisor.

15 Q. Okay. And so it was your understanding though that in
16 asserting privileges, you wanted certain documents to not be
17 turned over, correct?

18 A. If -- if the office at that point in time was, wanted
19 to assert privileges regarding certain documents, then
20 that's what we would try to do assuming the privilege
21 applied.

22 Q. And, as it turned out, there were no privileges, right?

23 A. That's what it says in the letter.

24 Q. All right. The postmortem that you all had in
25 November -- was it 2014?

1 A. I think you would know better than I did. It was right
2 after Luke Ryan's letter.

3 Q. Okay. And the people that are involved in that are
4 you, Verner -- was Suzanne Reardon there?

5 A. I don't have a memory of her being --

6 Q. Kris Foster there though, right?

7 A. Yes. Yes.

8 Q. And it's fair to say that the higher ups were upset
9 that this sort of thing had happened, correct?

10 A. Yes.

11 Q. And you said Kris Foster was rattled, right?

12 A. Yes.

13 Q. At any point did she say that she lied in this letter
14 to a judge?

15 A. No. And I'm not saying she lied. I'm just saying no,
16 that kind of thing I would remember.

17 Q. At any point did she -- did she say where she got that
18 line: After reviewing Sergeant Ballou's file, every
19 document in his possession is already been disclosed.

20 MS. WEST: Your Honor, I'm sorry to interrupt. This is
21 my confusion.

22 I understood, when you did this, I was thinking this
23 was a cross, but if these defendants are consolidated, is
24 this a redirect? Because if it's a redirect it's mostly out
25 of form.

1 THE COURT: Ms. West, is there an objection?

2 MS. WEST: If it's a redirect, there's a lot of
3 objections, but I want to be respectful if this mistake is
4 mine.

5 THE COURT: Okay. Whatever it might be, the objection
6 is overruled.

7 MS. WEST: Thank you.

8 THE COURT: Next question.

9 THE WITNESS: Can you repeat your question?

10 Q. (By Mr. Olanoff) Did Kris Foster ever tell you where
11 she got that line: After reviewing Sergeant Ballou's file
12 every document's been disclosed.

13 A. I don't recall her ever telling me that because, again,
14 I don't recall anything about the letter prior to seeing it
15 very recently.

16 Q. So, in your postmortem, what was your impression of
17 what -- the wrong that had occurred?

18 A. There was a statement in one of the filings saying
19 that -- let me just think for a second.

20 That something about third parties having knowledge,
21 okay, that there's no evidence that a third party had
22 knowledge.

23 Comparing that to the mental health worksheet, and if
24 we assume that the mental health worksheet was in the
25 possession of the AG's Office at the time, the mental health

1 worksheet suggested -- and if we assume that the date was
2 prior to whatever the date was, then the mental health
3 worksheet suggested that some third party would have been
4 aware of her drug use prior to, you know, whatever the
5 triggering date was.

6 So then, that would make that statement that was in our
7 filing, inaccurate. Not -- I don't mean to suggest it was
8 knowingly inaccurate or deliberately inaccurate, but just
9 inaccurate.

10 Q. Did Kris Foster ever tell you, during that postmortem
11 meeting, that she had never looked at the file?

12 A. I don't recall her ever saying that. I think that is
13 something I would recall, but --

14 MR. OLANOFF: Thank you, Your Honor.

15 MR. RYAN: Just a couple.

16 **REDIRECT EXAMINATION BY MR. RYAN**

17 Q. You had testified that on November 3, you wrote an
18 email and said: But it would be good to confirm his take on
19 the matter is correct, i.e. that Farak prepared these
20 materials, that she did so around December 11, that they say
21 what he says they say, and that they weren't turned over
22 previously.

23 A. Yes.

24 Q. Was my take on the matter, correct?

25 A. Um, well, okay, I can't say whether Farak prepared the

1 materials, because I wasn't there. It appears that way on
2 the surface, but I'm just --

3 Q. So to this day --

4 A. Yes.

5 Q. To this day, you can't say, sitting here today, two
6 years and a month later, that your office screwed up?

7 MS. WEST: Objection.

8 THE COURT: Objection sustained.

9 Q. (By Mr. Ryan) Mr. Ravitz, you've testified that Kris
10 Foster's pleading was inaccurate, that this letter she
11 conveyed something that was not correct to a Superior Court
12 Judge. Did anybody suggest that she might have a duty of
13 candor to the Court to correct a materially false statement
14 that had been made knowingly or unknowingly?

15 A. Um, did I? I don't recall saying that she -- can I
16 just understand what you're referring to when you say that I
17 said that she made a --

18 Q. She made a representation that the office did not
19 possess any documents that had displayed, suggested a third
20 party might know of Sonja Farak's misconduct.

21 A. Okay.

22 Q. There exists these mental health worksheets that I
23 think you just acknowledged were -- suggested exactly that.

24 Did anybody from your office, Kris Foster, anybody
25 else, say, you know what, that wasn't accurate, I think you

1 just testified, let's correct the record?

2 A. Well, what I recall is that we decided to provide you
3 with everything with the exception of internal work product
4 to ensure that even if we thought we had already provided
5 those things to ensure you had it.

6 Q. Did you think you previously provided it?

7 A. Do I?

8 Q. Yeah.

9 A. I don't know, because I wouldn't have been the one to
10 provide it.

11 Q. You sat in on these postmortem that you talked about,
12 there was this deep soul searching, people were very upset,
13 what were they upset about?

14 A. They were upset about a suggestion that we had made,
15 the office had made a statement in a court filing that was
16 inaccurate --

17 Q. Uh-huh.

18 A. -- and had not provided, you know, you know if -- had
19 thereby prevented you from receiving something or knowing
20 about something that you asked for.

21 Q. You're talking about a suggestion, that I made a
22 suggestion that this had happened. Did it happen or not
23 happen?

24 A. Did what happen or not happen?

25 Q. Did you not turn over these things until November of

1 2014?

2 A. I can't say because I wasn't the one to turn over the
3 first batch of information.

4 MR. RYAN: I have no further questions.

5 Thank you.

6 THE COURT: Anything further?

7 MS. WEST: Just one.

8 **RECROSS EXAMINATION BY MS. WEST**

9 Q. You were just asked about misrepresentations made by
10 Ms. Foster and were corrected.

11 Mr. Ravitz, you understand that we didn't know that the
12 dates of these records would make such representations wrong
13 until Mr. Ryan told us in November 2014, right?

14 A. Right. I don't recall even being aware of these
15 records until that point, so -- and it was all presented
16 together with -- it wasn't just the records, it was an
17 interpretation of the records and how to figure out when
18 they would have been prepared.

19 MS. WEST: Thank you, Your Honor.

20 **QUESTIONS BY THE COURT**

21 THE COURT: Mr. Ravitz, at the point after the
22 September 9, 2013 hearing or at the -- when Ms. Foster
23 called you, and then subsequently met with you, or in the
24 Fall of 2014, at the postmortem, when she was rattled; did
25 she ever tell you that she informed the Court that

1 everything had been turned over, and that she informed the
2 Court of that because Anne Kaczmarek or any other specific
3 individual told her that everything had been turned over?

4 THE WITNESS: Um, I don't recall her saying that.

5 I -- I recall more comments to the effect that we
6 thought we turned everything over, but I don't know exactly
7 who said that.

8 THE COURT: Well, would it be fair to say at the
9 postmortem there was a laser-like attention on Kris Foster
10 and her representations to the Court?

11 THE WITNESS: Yes.

12 THE COURT: And more specifically her representations
13 to the Court that everything had been turned over?

14 THE WITNESS: I -- what I remember is more the
15 representation that I described about the -- oh, yeah, I
16 guess that representation did include the statement that --
17 right. That --

18 THE COURT: I'm sorry.

19 THE WITNESS: -- that anything that would reveal a
20 third party's knowledge had been turned over.

21 THE COURT: And I can tell you that her testimony, in
22 part, is that she made representations to this Court
23 everything had been turned over because her superiors had
24 told her everything had been turned over.

25 My question is, do you have any present knowledge of

1 her saying that, as to any particular individuals, in your
2 office?

3 THE WITNESS: I don't.

4 THE COURT: Thank you. You may step down.

5 (The witness stepped down.)

6 THE COURT: You may call your next witness.

7 MS. JACOBSTEIN: Your Honor, we are calling Frank
8 Flannery so the Commonwealth can cross.

9 THE COURT: Okay.

10 THE CLERK: You may take the stand. You are reminded
11 you are under oath.

12 THE COURT: Mr. Caldwell.

13 MR. CALDWELL: If I may, Your Honor?

14 Thank you.

15 **(Frank Flannery, continued)**

16 **CROSS EXAMINATION BY MR. CALDWELL**

17 Q. Good afternoon, Mr. Flannery.

18 A. Good afternoon.

19 Q. I just have a few questions for you, Mr. Flannery. You
20 had previously testified a couple of days ago that you were
21 First Assistant District Attorney here in Hampden County,
22 correct?

23 A. Yes.

24 Q. And you had that role for approximately 18 months; is
25 that fair to say?

1 A. Yes.

2 Q. And just to talk about your duties and responsibilities
3 as First Assistant District Attorney of a particular county,
4 it's fair to say you answer directly to the District
5 Attorney of the county, correct?

6 A. That's correct.

7 Q. And not only are you involved in perhaps carrying your
8 own caseload and supervision of perhaps division chiefs, but
9 also maybe perhaps addressing policy issues, correct?

10 A. That's right.

11 Q. Very important job, correct?

12 A. Yes.

13 Q. And it's fair to say you were -- not fair to say, you
14 were involved in the October/November 2013 hearings
15 regarding various Rule 30 motions that were filed in this
16 court, correct?

17 A. Yes.

18 Q. And that was -- those individuals had filed Rule 30
19 motions seeking postconviction relief because of alleged
20 misconduct at the Amherst Laboratory, correct?

21 A. That's right.

22 Q. Not only of a particular chemist, Sonja Farak, but also
23 there were questions as to the integrity of the laboratory
24 itself, correct?

25 A. That's correct.

1 Q. So in your position as First Assistant you were
2 assigned this matter because it was a very important
3 hearing, correct?

4 A. I don't know exactly why, but that's a fair statement,
5 yes.

6 Q. Fair. Okay. Thank you.

7 And you had indicated on direct that you had received
8 discovery from the Attorney General's Office, correct?

9 A. Yes.

10 Q. And were you aware that the Attorney General's Office
11 had sent discovery to not only your county, but to all of
12 the various counties of the Commonwealth?

13 A. Yes.

14 Q. And is it fair to say that the discovery you received
15 was voluminous in nature, correct?

16 A. Yes.

17 Q. And it was not only Grand Jury minutes to the
18 investigation of Sonja Farak, but also Grand Jury exhibits,
19 fair to say?

20 A. Yes.

21 Q. Was there anything else that you received outside of
22 that, what I had just indicated to you, if you recall?

23 A. From the?

24 Q. From the Attorney General's Office.

25 A. There were some materials related to the lab protocols,

1 things of that nature.

2 Q. And were there various testing materials concerning the
3 defendants that were offered at trial?

4 A. Yes.

5 Q. Okay. And I believe you did indicate on direct, and
6 let me stop right there, I have another question.

7 You received the discovery on the Farak investigation
8 from the Attorney General's Office you testified to, and we
9 gave that discovery not only to your county, but the other
10 various counties because -- specifically to your county, I'm
11 sorry, those were your cases that you were -- had
12 prosecuted, that were subject to the Rule 30 motion,
13 correct?

14 I'm sorry. Very bad, very bad question.

15 The defendants that were -- had filed the Rule 30
16 motions, that were the subject of the October/November
17 hearings, were cases that your county had previously
18 prosecuted, correct?

19 A. That's correct.

20 Q. And those were not cases that the Office of the
21 Attorney General was involved in, in any way, correct?

22 A. Yes, that's fine, that's correct.

23 Q. And you had indicated, and of course, this proceeding
24 is regarding some mental health worksheets that were not
25 turned over to your office, correct?

1 A. Yes.

2 Q. Have you had -- you've had an opportunity to review
3 those worksheets?

4 A. Recently, yes.

5 Q. Was that just the other day?

6 A. I saw it briefly a few days before that, but only
7 that -- only those documents.

8 MR. CALDWELL: Your Honor, if I could just have one
9 moment?

10 THE COURT: Sure.

11 (Pause)

12 MR. CALDWELL: If I may I approach?

13 THE COURT: Sure.

14 Q. (By Mr. Caldwell) Mr. Flannery, I'm placing before you
15 what was entered as Exhibit 169. And I know you said you
16 previously looked at these a couple days ago.

17 Can you just take another look.

18 A. (Witness complying)

19 Q. All done?

20 A. Yes.

21 Q. Now, it's fair to say that these are the documents you
22 previously testified to were not provided to your office,
23 correct?

24 A. That's right.

25 Q. Are you certain?

1 A. Yes.

2 Q. Okay. And these various worksheets, the handwritten
3 notes also described as Emotion Regulation Worksheets,
4 correct?

5 A. Yes.

6 Q. And did you have an opportunity to read what was
7 written in the various positions regarding urges to use at
8 work, things of that nature?

9 A. Parts of it.

10 Q. And you were aware of the -- you were aware of the
11 facts and circumstances surrounding the Attorney General's
12 prosecution of Sonja Farak, correct?

13 A. Yes.

14 Q. And the essential allegations and indictments that were
15 returned regarding her specific conduct at the lab, correct?

16 A. That's right.

17 Q. And, essentially, she's prosecuted for tampering with
18 controlled substances, correct?

19 A. Yes.

20 Q. So -- and those controlled substances that she was
21 believed to be tampering with were police submitted samples,
22 correct?

23 A. That's correct.

24 Q. Now, let me ask you something. As -- in your position
25 as First Assistant District Attorney for Hampden County, if

1 you had received those materials, knowing what we know now,
2 that Ms. Farak's conduct went back possibly to 2011, what
3 would you have done in those Rule 30 motions that were filed
4 on October/November of the hearing?

5 A. Are you asking whether I would have turned the
6 documents over for discovery?

7 Q. Well, you would of turned those documents over,
8 correct?

9 A. Yes.

10 Q. As you did everything else?

11 A. Yes.

12 Q. But knowing what we know now in terms of Ms. Farak's
13 conduct as highlighted by Mr. Ryan, that her alleged
14 criminal misconduct goes back to 2011 at the lab, what would
15 you have done, as the First Assistant District Attorney in
16 this county dealing with those motions for new trial?

17 A. What would I have done --

18 Q. Correct. If you had this information.

19 A. -- if I had that?

20 Well, I don't know what I would of done.

21 It would of gone into evidence. I assume, if we had
22 it, it would have been part of the evidence at the hearing
23 before Judge Kinder and I don't know what he would have
24 done.

25 Q. Would have done -- that's fair enough. But it is fair

1 to say that you would of discovered that her conduct, her
2 misconduct had gone back to 2011, correct?

3 A. If not further back.

4 Q. If not further back. But at least as to these
5 documents we can say, given the ServiceNet Diary Card, that
6 her misconduct had gone back to 2011, correct?

7 A. You can draw that inference, yes.

8 Q. Correct.

9 And it's fair to say, as a trial attorney, an Assistant
10 District Attorney, that information could be used in a
11 variety of different ways in litigation, correct?

12 A. You mean as to the Rule 30 motions?

13 Q. Well, as to if the motions for new trial were to be
14 allowed, defendants would have various avenues?

15 A. I understand, yes.

16 Q. And one would be they could impeach the chemist doing
17 the test, Ms. Farak, correct, if she were to testify?

18 A. If she were to testify, yes.

19 Q. Or would it be fair to say that those drugs could be
20 retested if they existed?

21 A. If they existed, yes.

22 Q. Now, you had -- you had an opportunity to have
23 conversation with the Assistant Attorney General Anne
24 Kaczmarek, correct?

25 A. Yes.

1 Q. In regards to viewing the evidence in her pending
2 indictment of Ms. Farak, correct?

3 A. We had a number of conversations, but I think we had at
4 least one about that.

5 Q. Okay. And you had attempted to make some types of
6 arrangements for people to come in and look in the
7 prosecution file at the Attorney General's Office?

8 A. I passed along that request, yes.

9 Q. You later learned that request was not -- was denied by
10 the Office of the Attorney General, correct?

11 A. Yes.

12 Q. Because it was a pending investigation into the
13 misconduct of Ms. Farak, correct?

14 A. I think that was the explanation, yes.

15 Q. And it's fair to say that Ms. Kaczmarek's concern was
16 keeping into the integrity of the evidence during the
17 ongoing investigation?

18 A. I don't know what her primary concern was.

19 Q. Did you ever have a conversation with her regarding the
20 integrity of the evidence and her desires to maintain it in
21 its best state possible?

22 A. If we -- we may have. I don't recall. I mean, I
23 understood that that was an issue for her, and I understood
24 where she was coming from in terms of it being a pending
25 case.

1 MR. CALDWELL: I have nothing further.

2 THE COURT: Okay. Anything else?

3 **REDIRECT EXAMINATION BY MS. JACOBSTEIN**

4 Q. So Judge Kinder ruled that her, Ms. Farak's misconduct
5 went back to July 2012; is that correct?

6 A. That sounds right.

7 Q. And what did your office do with any pleas that
8 happened after July 2012?

9 A. Well, there's still a fair number of cases, and I
10 believe we resolved most of those cases.

11 We assented to the motions for new trial, but not
12 before we had an agreement in place. And so, most of those
13 cases were resolved fairly quickly.

14 Q. What about the people before July 2012?

15 A. We took a different tack there because they fell
16 outside of that time frame.

17 Q. Did they get any relief?

18 A. I don't believe so, no. I mean, not in the same way.

19 MS. JACOBSTEIN: That's all.

20 THE COURT: Okay. All set?

21 MR. CALDWELL: Nothing further.

22 THE COURT: All right. Thank you, Mr. Flannery.

23 You may step down.

24 THE WITNESS: Thank you.

25 (The witness stepped down.)

1 THE COURT: Call your next witness.

2 MR. RYAN: John Verner.

3 (John Verner, sworn)

4 THE CLERK: You may take the stand.

5 THE WITNESS: Give afternoon, Your Honor.

6 MR. RYAN: Thank you.

7 (John Verner, sworn)

8 DIRECT EXAMINATION BY MR. RYAN

9 Q. Good afternoon.

10 A. Good afternoon, sir.

11 Q. Could you state your name and spell your last name for
12 the record?

13 A. Absolutely, John Verner, V-E-R-N-E-R.

14 Q. Mr. Verner, back in September of 2012 were you the
15 Chief of the Criminal Bureau for the Massachusetts Attorney
16 General's Office?

17 A. I was.

18 Q. And did you and Anne Kaczmarek prosecute former drug
19 lab chemist named Annie Dookhan?

20 A. Yes.

21 Q. And was she the lead prosecutor on the case?

22 A. She was.

23 Q. Was that due in part because you had various
24 supervisory responsibilities as Chief of the Criminal
25 Bureau?

1 A. Yes, so she was acting lead, I was in involved early
2 on. I wasn't involved with Dookhan much as the prosecutor
3 after early on.

4 Q. So you did a fair, fair amount of work on the
5 investigative side before she was charged?

6 A. Not even the investigative side. When it came on, I
7 did some work on it. Anne's father-in-law passed away right
8 before we arrested Ms. Dookhan, so I was involved in the
9 arrest and her arraignment in District Court and then Anne
10 did all of the investigation and she would keep me posted,
11 so to speak.

12 Q. Fair to say, that at the outset of the investigation
13 your office obtained certain information that was
14 inculpatory towards Annie Dookhan, correct?

15 A. Sure.

16 Q. And your office determined that if it was inculpatory
17 towards Annie Dookhan, it could be potentially exculpatory
18 towards people who had cases where she had signed drug
19 certificates?

20 MS. WEST: Objection to form.

21 THE COURT: You can answer the question if you feel you
22 can.

23 THE WITNESS: Absolutely.

24 Q. (By Mr. Ryan) And did your office provide potentially
25 exculpatory information to defendants directly?

1 A. No.

2 Q. Who did you provide them to?

3 A. The DAs Offices.

4 Q. And why'd you do that?

5 A. So as opposed to -- I didn't distinguish between
6 potentially exculpatory or not. We just gave them the
7 information.

8 Q. And did you give them to them by way of letters?

9 A. Yes.

10 Q. I'm going to show you a letter dated September 12,
11 2012. Is that a draft of a letter that you sent to the
12 District Attorneys?

13 A. Correct. Yes.

14 MR. RYAN: Okay. I'd ask that this be marked as the
15 next exhibit.

16 THE COURT: May be marked.

17 THE CLERK: Marked as Number 259.

18 (Exhibit No. 259, letter to DA Conley/all DAs
19 (9/17/12), marked)

20 MR. RYAN: I will put this up on the presenter.

21 Q. (By Mr. Ryan) Now, this lists District Attorney Dan
22 Conley, but did all 11 District Attorneys get the same
23 letter?

24 A. Yes.

25 Q. And, the date of the letter is September 17, 2012, is

1 that roughly about the time that you made this first
2 disclosure in the Dookhan case to the District Attorneys?

3 A. If that's disclosure one, and that's the date, then
4 yeah.

5 Q. And would this have actually been about a week or two
6 before Annie Dookhan was arrested?

7 A. I don't know the answer to that. If you have the date
8 then -- I'm not arguing with that. If you have the date she
9 was arrested then, yeah.

10 Q. If I represent to you she was arrested on September 28,
11 does that sound about right?

12 A. I don't remember, but I have no reason to doubt that.

13 Q. In any event, did you, in your letter say that the
14 reports by the Massachusetts State Police may contain
15 potentially exculpatory information as well as information
16 necessary to your office's determination about how to
17 proceed with cases in which narcotics evidence was tested at
18 the Hinton lab?

19 A. Yes.

20 Q. Now, was Sonja Farak arrested on January 19, 2013?

21 A. I don't know the date, I know it was a weekend. It was
22 Martin Luther King Day weekend. I don't know the date.

23 Q. Does that sound about right?

24 A. If that's MLK weekend and there are documents, I am
25 sure police reports filed.

1 Q. Okay. And I'm going to show you a double-sided copy of
2 a letter dated March 27, 2013.

3 A. Okay.

4 Q. And is this a letter that's also addressed to District
5 Attorney Conley?

6 A. It is.

7 Q. And is -- did all 11 District Attorneys get this same
8 letter from you?

9 A. Yes.

10 MR. RYAN: I ask this be marked as the next exhibit.

11 THE COURT: Okay. May be marked.

12 THE CLERK: Marked as Number 260.

13 (Exhibit No. 260, letter to DA Conley/all DAs

14 (3/27/13), marked)

15 Q. (By Mr. Ryan) And in this letter, did you say right
16 here: Pursuant to this office's obligation to provide
17 potentially exculpatory information to District Attorneys,
18 as well as information necessary to your offices'
19 determination about how to proceed with cases in which
20 related evidence was tested at the Amherst Drug Laboratory,
21 please find below the listed materials -- and I may have
22 skipped a word or two.

23 A. Yeah, if that's the letter, that's the letter. Yeah, I
24 don't have a problem with that.

25 Q. And did you model this letter on the letter you sent in

1 the Dookhan case?

2 A. That's the Farak letter, right?

3 Q. Yes.

4 A. So I didn't write that letter.

5 Q. Who wrote that letter?

6 A. Oh, wait, I'm sorry. That Farak letter I wrote that,
7 yes. Yeah.

8 Q. The one you signed, but did anybody draft it? Did Anne
9 Kaczmarek by any chance?

10 A. I -- no. I was thinking of a different letter. I
11 wrote that letter.

12 Q. Was there a second later that came that next summer in
13 which, after the Grand Jury minutes had been compiled, that
14 she was responsible for writing and sending out to various
15 District Attorneys Offices?

16 A. I think so.

17 Q. Okay. Now, I'm showing you what's previously been
18 marked as Exhibit 167. Do you recognize this document?

19 A. I do.

20 Q. And is this a document that you sent to, on or about
21 November 13, 2014 to District Attorney David E. Sullivan?

22 A. Yes. So this is the letter that I did not write.

23 Q. Okay. Now, this is a letter you didn't write, but it's
24 a letter that you signed, correct?

25 A. It went out under my name. I didn't sign that either.

1 That's not my signature. I'm sure I saw it, but it went out
2 in my name because I was the Bureau Chief, but I didn't
3 write it.

4 Q. Okay. Does this letter accurately portray the position
5 of your office?

6 A. Um -- my position was get the stuff out, the stuff
7 wasn't turned over, get it out.

8 Q. And I guess that's my question, this letter here --

9 THE COURT: Is that 167?

10 MR. RYAN: Yes; 167.

11 Q. (By Mr. Ryan) In this letter here, does it refer to
12 your office having previously provided documents and reports
13 relating to the prosecution of Sonja Farak?

14 A. Yes.

15 Q. And it says: Included in those reports were reports by
16 the Mass. State Police of all evidence seized during the
17 execution of search warrants.

18 A. Yes.

19 Q. And recently Judge Richard Carey of the Hampshire
20 Superior Court allowed a motion to inspect all physical
21 evidence from the Farak case, currently in the custody of
22 our office.

23 A. Yes.

24 Q. And it then goes on to say that responsive to that
25 request, please find 289 pages of documentary evidence

1 currently in our custody?

2 A. Yes.

3 Q. And at the bottom, you reference the report of Trooper
4 Randy Thomas?

5 A. Uh-huh.

6 Q. And that was the report referencing or related to the
7 execution of the search warrant for Ms. Farak's car?

8 A. Yes.

9 Q. And at the bottom you say: This disclosure is pursuant
10 to this office's continuing obligation to provide
11 potentially exculpatory information.

12 A. Again, that's what the letter says. I didn't write the
13 letter.

14 Q. Well, your position, I think you said before we kind of
15 got into the text of the letter was get the stuff out?

16 A. Yes.

17 Q. What "stuff" did you feel needed to get out?

18 A. So by that point, if I got the date right, it was
19 discovered that there were documents that weren't sent out.

20 Q. Okay.

21 A. So my position was get 'em out.

22 Q. And so what this letter that you didn't write or didn't
23 sign, but contains your name, was a cover letter to some
24 material that had not previously been disclosed?

25 A. Correct.

1 Q. And in the letter, you referred to that information
2 that hadn't been previously disclosed as being potentially
3 exculpatory information for purposes of the District
4 Attorneys and their Brady obligations; is that accurate?

5 A. So, again, I just want to clarify. You keep saying I
6 referred. I didn't write the letter, but that's what the
7 letter says, yes.

8 Q. Again, my question is, is whether the letter is
9 accurate?

10 A. I didn't think about it when it went out. I haven't
11 thought about it since. My position had always been: Oh,
12 my God, this stuff wasn't turned over. Get it out.

13 Q. Okay. So I just want to be clear, because believe it
14 or not, this is not clear.

15 The "stuff" that's referred to in the letter had not
16 been previously turned over, correct?

17 A. Correct.

18 Q. Okay.

19 (Pause)

20 THE WITNESS: Well, let me say, at least that's my
21 understanding. It came to my attention that the stuff
22 wasn't turned over, so I said, Let's get it out.

23 Q. (By Mr. Ryan) As you sit here today, do you have any
24 reason to believe that this stuff had previously been
25 disclosed?

1 A. No, but I'm just trying to be accurate.

2 Q. Well, I'm trying to be accurate, too. I think we all
3 are, so --

4 A. No.

5 Q. Did I make a mistake when I came and said to your
6 office, Hey, you guys never turned this stuff over.

7 A. No, I'm not suggesting you did.

8 Q. Okay. You guys looked into this, didn't you?

9 A. Yes.

10 Q. You wanted to make sure, you weren't just going to
11 assume I was correct, right?

12 A. I mean, I had no reason to doubt you, so.

13 Q. No, nothing personal; but you've got a job to do and
14 defense attorney says, hey, you didn't turn something over,
15 you've got to check and make sure defense attorney is
16 correct, correct?

17 MS. WEST: Objection to form. I just don't want to get
18 into this stream again.

19 THE COURT: Objection is sustained.

20 Q. (By Mr. Ryan) So you did some due diligence after you
21 got this letter that was sent to Patrick Devlin on November
22 1, 2014?

23 A. Correct, but it was, turn it over, get it to you, and
24 then do due diligence. If you were saying you didn't get
25 it, whether you got it or not, I wasn't going to say, Oh,

1 I'm going to check to make sure he didn't get it before I
2 give it to him. If you say you didn't get it, my position
3 was give it to him, and then we did due diligence, yes.

4 Q. Well, the letter went out on when?

5 A. I don't know.

6 Q. Does the letter say November 13?

7 A. If you say it does, absolutely.

8 Q. And did you get a letter from me on November 1?

9 A. Our office -- if it was November 1, yeah.

10 Q. And did your office spend some time between November 1
11 and November 13 deciding whether or not the representations
12 in the letter were accurate?

13 A. I didn't.

14 Q. Did anybody?

15 A. I don't know the answer to that. My understanding was
16 you went into court and filed a motion and we agreed to give
17 you the stuff. At least that's my memory.

18 Q. Showing you an email from Randall -- well, let's see,
19 November 3, 9:42 a.m. you have an email that you send to
20 Patrick Devlin, Cara Krysil, Dean Mazzone, Randall Ravitz
21 and Kris Foster. And your question is: Thoughts on if we
22 should agree to the motion.

23 A. So what's the motion though?

24 Q. The motion to lift a protective order so that these
25 materials or that the -- I will withdraw the question. It's

1 not a question. It's answer to your question.

2 Was Randall Ravitz -- did Randall Ravitz write back and
3 say: I vote yes, but it would be good to confirm his take
4 on the matter is correct, that Farak prepared these
5 materials, that she did so around December 11, that they say
6 what he says they say, and that they weren't turned over
7 previously.

8 A. Yes.

9 Q. And then, that was at 10:19 in the morning. Did
10 Randall Ravitz write back at 4:30 in the afternoon and say:
11 So let's turn them over. Who will call Luke Ryan? Do we
12 need to get out there and assent?

13 A. Yes.

14 Q. And so, during that period from 10:19 in the morning to
15 4:30 in the afternoon, was that -- during that six-hour time
16 did anybody do any due diligence to see if I had it right or
17 did Randall Ravitz just change his mind about whether that
18 would be a good idea?

19 MS. WEST: Objection. He could of just asked Randall
20 Ravitz this. We just went over this exact same topic.

21 THE COURT: Okay. All right.

22 You can answer the question, if you feel you can.

23 THE WITNESS: So I don't know what Randy did. I know
24 my position was, turn it over.

25 Q. (By Mr. Ryan) Well, your first position was: Thoughts

1 on if we should agree to the motion; correct?

2 A. Well -- so -- look, so I'm a supervisor of a lot of
3 people, and a lot of times I'm gauging. I'm getting
4 consensus and gauging but -- what people's thoughts are, but
5 I knew what I wanted to do.

6 Q. Now, this letter to Patrick Devlin, that was forwarded
7 to you, correct?

8 A. Your letter?

9 Q. Right.

10 A. Yes.

11 Q. And in that letter, there were some references to some
12 service -- a ServiceNet Diary Card and some Emotion
13 Regulation Worksheets, correct?

14 A. Correct.

15 Q. And these were documents that you had previously seen,
16 correct?

17 A. No.

18 MR. RYAN: 205.

19 And could you get the Patrick Devlin letter.

20 Q. (By Mr. Ryan) Okay. So I am showing you what's been
21 previously marked as Exhibit 205.

22 A. Uh-huh.

23 Q. A Valentine's Day email from Joseph Ballou in 2013 to
24 Anne Kaczmarek, Robert Irwin, and you John Verner.

25 Do you see this?

1 A. Yeah.

2 Q. Did you receive this email?

3 A. I later learned that I did, yes.

4 Q. So, it's your testimony here today that you had -- you
5 didn't open this email? You didn't read this email? What's
6 your testimony, I guess, with respect to this --

7 MS. WEST: Objection to the first part. Second part is
8 fine.

9 THE COURT: You can answer the question.

10 THE WITNESS: So I know I was cc'd on the email. When
11 this whole thing came to light, after your letter to Devlin,
12 I -- when Devlin told me about -- when I got the letter from
13 Devlin and when this came to light, I had no idea what you
14 were talking about. I had never heard anything about a
15 schedule, a ServiceNet Diary dates. I was surprised. I was
16 actually shocked.

17 I went back, I believe it was on the Monday, and found
18 this email.

19 Q. (By Mr. Ryan) Was it unopened?

20 A. No, it was opened, the email itself. So -- but I had
21 no memory of it.

22 Q. What was the title of that email?

23 A. Articles and notes, Emotion Regulation Homework.

24 Q. I think you may be reading the attachments. What's the
25 title of email?

1 A. Oh, Farak admissions.

2 Q. In the case against Sonja Farak, did you have -- wasn't
3 her admissions kind of a big deal?

4 A. They were.

5 Q. And so, did you read the email, but not the
6 attachments? Is that --

7 A. So, I saw the email.

8 Q. Uh-huh.

9 A. Anne and I talked about her admissions.

10 Q. Let me stop you there. Where'd you have and when did
11 you have this conversation about her admissions?

12 A. I couldn't tell you when. Somewhere along the process.

13 Q. Was this the first you heard of this, this email of
14 Valentine's Day? Prior to that, had you had any indication
15 that these admissions were out there in the world?

16 A. Oh, yeah. I knew that she had made admissions.

17 Q. Okay.

18 A. What I'm telling you is, I didn't look at these
19 documents when I got the email. I would get between 75 and
20 a hundred emails a day. My rule is if it's to me, I deal
21 with it immediately. If I'm cc'd -- (Indicating)

22 Q. Okay. So when was the first time that you knew there
23 were these Farak admissions on pieces of paper taken from
24 her car?

25 A. I couldn't give you a date. It was somewhere,

1 obviously, in the process of the indictment process before
2 the pros memo or at the pros memo time.

3 Q. Okay. So she -- if I represent to you that she was
4 arrested on January 19, 2013.

5 A. Uh-huh.

6 Q. And that she was indicted on April 1, 2013. You get
7 this email on February 14, 2013. Where's the first place,
8 the first window of time that you think you --

9 A. I don't have a memory of that.

10 Q. You don't think -- was it before or after this email?

11 A. I don't have any memory of that.

12 Q. Now -- I'm not sure if this is in evidence.

13 I'm showing you -- we are going to check to see if this
14 is in evidence already -- an email dated January 23, 2013,
15 8:38 in the morning from you.

16 If you could take a second to review this.

17 A. (Witness complying)

18 Okay.

19 Q. Now, in -- is it fair to say that at this time you were
20 writing to Joseph Ballou, Anne Kaczmarek, and Randy Thomas
21 and you were talking about giving your feedback on what
22 might go into an affidavit to support an application for a
23 search warrant for a tote bag that was recovered by
24 Ms. Farak's work station?

25 A. Yes.

1 Q. And if you look in paragraph three, you make a
2 suggestion that I would add all that was found, including
3 the papers. The fact that all this stuff was found in her
4 car leads credence to our position that stuff will be found
5 in the bag. Most is in there, but we found personal papers,
6 drug test results pertaining to an unknown or do we know
7 person?

8 What were you referring to on January 23, when you said
9 "personal papers"?

10 A. So by that point, I'm sure I knew there were papers
11 found in the car. I'm sure there was discussion about
12 admissions.

13 Q. Okay.

14 A. But what I'm telling you is, I never saw those papers,
15 and there was never a discussion about the ServiceNet or
16 dates or times is what I'm telling you.

17 Q. That's fine. But people had been discussing: Hey,
18 there's some admissions on these pieces of paper. They
19 didn't put them your way, you get 75, 100 emails a day, but
20 that had been explained to you, correct?

21 A. Yes.

22 Q. Okay. Do you recall who explained it to you that they
23 existed?

24 A. I do not.

25 MR. RYAN: I'm going to ask that this be admitted as

1 the next exhibit.

2 It's 8:38 email.

3 THE CLERK: Marked as Number 261.

4 (Exhibit No. 261, emails from AAG Verner to Ballou and
5 AAG Kaczmarek (1/23/13 8:38 a.m.), marked)

6 Q. (By Mr. Ryan) Now, were you out of town that weekend
7 that Sonja Farak got arrested?

8 A. I was.

9 Q. Where were you?

10 A. I was in New York City.

11 Q. Were you down there for a Big East tournament?

12 A. No.

13 Q. Had you been at a Big East tournament before when your
14 weekend got ruined by work?

15 A. So, I've been at a Big East tournament every year for
16 the past 15 years or so. I've had a lot of things ruined by
17 work. I was down watching the Patriot's ACF Championship
18 game with a buddy.

19 Q. Okay. Now, when this case started, was on Friday, the
20 18?

21 A. Yes.

22 Q. That night, at around 1:00 in the morning or so, some
23 investigators applied for a search warrant, and afterwards
24 showed you what they had used for an affidavit, correct?

25 A. Correct.

1 Q. And as soon as you got it, you looked at it and you
2 forwarded it to somebody named Randy Ravitz, right?

3 A. If you have the email, then sure.

4 Q. Does that sound like something you would of done, look
5 at a search warrant after its been approved and turn to
6 Randy Ravitz and say: Don't blame me. You know, I didn't
7 have nothing to do with it, because he's the law guy and
8 would know whether or not you'd --

9 MR. RYAN: Ms. West is standing up. I think I will
10 withdraw the question.

11 THE COURT: Sustained.

12 MR. RYAN: Yes.

13 Q. (By Mr. Ryan) In any event, did you get updates that
14 night as the search was being performed?

15 A. Throughout the night, yes.

16 Q. And who was giving you those updates?

17 A. Captain Lieutenant or -- Bobby Irwin. I forget his
18 rank at the time, Lieutenant Captain.

19 Q. Was he a Detective Lieutenant at the time?

20 A. Yeah, he was in charge of our detectives.

21 Q. And was he sending you texts or was he giving you
22 calls?

23 A. I don't remember the form.

24 Q. And when you were getting them, were you passing them
25 along to Ed Bedrosian?

1 A. I know I spoke to Ed that weekend.

2 Q. And when I say "passing them along", is it possible you
3 might have sent him some emails in the early morning hours
4 like 4:00 or 5:00 in the morning?

5 A. I know I was up working throughout the night. I don't
6 know if -- I don't I remember if I sent emails or not.

7 Q. So I'm showing you up on the screen an email, John
8 Verner to Ed Bedrosian, Saturday, 1/19, 4:07 a.m.

9 Is that an email that you sent Ed Bedrosian that
10 morning?

11 A. Sure.

12 Q. And did you send another one to him at 5:38?

13 A. Yes.

14 Q. Now, Sonja Farak was arrested at approximately 10:30
15 that night. Does that sound about right?

16 A. I don't remember the time, but I have no reason to
17 doubt you.

18 Q. And prior to her arrest, was it determined that Anne
19 would be the, serve as the lead prosecutor in the case?

20 A. I don't know when exactly, but it was that weekend
21 because she was in the loop that weekend.

22 Q. And did you make that decision?

23 A. It would of been something I would of spoken to Ed
24 about, would of been made either -- I would have suggested
25 or -- I don't know whether it was me, Ed, Ed and I together.

1 I don't know.

2 Q. Sure. And why was Anne selected for this job, if you
3 know?

4 A. Because she had just done Dookhan.

5 Q. And did that seem to -- did she seem to have acquired a
6 certain skill set doing Dookhan that could potentially be
7 useful doing Farak?

8 A. Sure. I mean Anne's a talented prosecutor, so.

9 Q. When Anne received this assignment, did he she joke at
10 all about how she didn't feel like driving out to
11 Belchertown District Court?

12 A. I don't know.

13 Q. In any event, Monday was the 21st. That was Martin
14 Luther King, Jr. Day, correct?

15 A. Yes.

16 Q. Now, Tuesday the 22nd, would have been the day Sonja
17 Farak was arrested, correct?

18 A. Arrested or arraigned?

19 Q. Arraigned, excuse me.

20 A. Yes.

21 Q. And at her arraignment, did you become aware she was
22 released on certain conditions?

23 A. I'm sure I did. I don't have a firm memory of that,
24 but I'm sure I did.

25 Q. Shortly after her arraignment, did you and Randy confer

1 or did you and Anne confer with Randy about the possibility
2 of getting an order to get a sample of Sonja Farak's hair to
3 see if you could determine if she had any drugs in her
4 system?

5 A. You're saying "Randy", Ravitz or Randy Thomas?

6 Q. Yes, Randy Ravitz.

7 A. I know Anne and I spoke about that at some point. I
8 don't know when it was or who else was involved, but I know
9 Anne and I talked about that.

10 Q. And that eventually didn't really matter because you
11 found out something that had happened at the Probation
12 Department in Belchertown with Ms. Farak, didn't you?

13 A. I don't have a memory of that. I'm not saying I
14 didn't, but I don't have a memory of that.

15 Q. Well, did you find out she had tested positive at the
16 Probation Department for the presence of cocaine and had
17 admitted to having used cocaine on the Friday, her last day
18 as a drug lab chemist?

19 A. Sounds familiar. I don't have a firm memory of that,
20 it sounds -- I know there was a reason we didn't move
21 forward on the hair samples.

22 Q. Would it be helpful to see Anne's email on this?

23 A. Absolutely.

24 Q. Showing you an email from Anne Kaczmarek to you.

25 A. Yes.

1 Q. So did you learn on January 24, 2013, that Sonja Farak
2 had tested positive for cocaine and had admitted to
3 probation that she'd used cocaine?

4 A. Yes.

5 MR. RYAN: Could I have this marked as the next
6 exhibit?

7 THE COURT: Yes.

8 THE CLERK: Marked as 262.

9 (Exhibit No. 262, email from AAG Kaczmarek to AAG
10 Verner (1/24/13 10:56 a.m.), marked)

11 Q. (By Mr. Ryan) Now, do you know whether -- did you know
12 somebody in your office -- well, strike that.

13 Do you know whether or not your office took any steps
14 to determine whether or not this evidence might be
15 admissible against Ms. Farak in her criminal case?

16 A. I don't have any knowledge of that.

17 Q. Would you agree that that evidence, it would have been
18 inculpatory evidence that could be used in Sonja Farak's
19 case?

20 A. If there was a positive -- are you talking about the
21 Belchertown thing?

22 Q. Yes.

23 A. Yeah.

24 Q. When you sent your letter to the District Attorneys on
25 March 27 of 2013, did you include any information related to

1 this positive test and admission by Sonja Farak to the
2 Probation Department?

3 A. So, going back, so I didn't write that letter either.

4 This is the one with the police reports?

5 Q. Uh-huh.

6 A. Yeah, I didn't write that letter. So Meghan Scafati,
7 who was my AA, administrative assistant, she compiled that
8 letter and it was sent out.

9 Q. Did you sign that one?

10 A. I don't know if I signed it or if Meghan signed it.

11 Q. Did you review what was on it before it got signed?

12 A. Probably looked at it.

13 Q. Okay. And would you agree with me that there's no
14 reference at all in there to this Probation Department
15 revelation from January 24?

16 A. Correct. Correct.

17 Q. Okay. Was that an oversight?

18 A. No. I didn't -- I didn't compile the stuff that went
19 out. It just went out under my name.

20 Q. Whose responsibility was it for providing all
21 potentially exculpatory information to the District
22 Attorneys?

23 A. So, it was Anne's case, so that would of been Anne.

24 Q. Okay. Did you, on or about this time, learn from
25 Sergeant Ballou that there had been a report from a Hampden

1 County District Attorney about some missing pills?

2 A. Yes.

3 Q. And was it the consensus of you and Anne and Bobby
4 Irwin that this is something that should be investigated?

5 A. Yes.

6 Q. And what happened? What did you learn when this was
7 investigated?

8 A. I don't remember the details. So at this point, after
9 that weekend, I'm not intimately involved in the Farak
10 investigation. I'm the Bureau Chief, so I'm getting updated
11 on the case like all the other cases.

12 So if there's something in writing which would --
13 there's an update, I wouldn't doubt it; but I don't have a
14 firm memory of that. I wasn't doing the stuff at that time.

15 Q. Well, did you write a -- on January 28, 2013 at 8:46 in
16 the morning, an email to Joe Ballou and Robert Irwin and
17 Anne Kaczmarek asking if there'd been any follow-up on this
18 call from the Hampden DA's Office?

19 A. Yes.

20 Q. And, at that point, did you get an email within a half
21 an hour from Joe Ballou who advised you that while he was
22 down there, he not only learned that these pills were
23 handled by Sonja Farak back in May of 2012, there was
24 another ADA who had a cocaine case that was light by four
25 grams and that this was in 2005?

1 A. So like I've been trying to say, I don't have a memory
2 of that, but I'm not doubting the email.

3 Q. Okay. Would you agree that when that March 27, letter
4 went out, under your name, that neither of these potentially
5 exculpatory information incidents were on it?

6 MS. WEST: Objection.

7 THE COURT: You can answer the question, if you feel
8 you can.

9 THE WITNESS: Yeah, I would agree what's in the letter
10 is what went out and what's not in the letter is not what
11 went out.

12 Q. (By Mr. Ryan) Do you know whether anybody ever
13 investigated the 2005 case where cocaine was light by four
14 grams?

15 A. I don't know the answer to that.

16 Q. Now, did you end up writing an email on, not long
17 thereafter, on Monday, January 28, at 11:55 in the morning,
18 saying to Robert Irwin, Anne Kaczmarek, and Joe Ballou, and
19 cc-ing Meghan O'Brien that the DLT had a great idea, and
20 that you had wanted to get together for a meeting?

21 A. Is this about -- I don't know what that's about.

22 Q. Okay. Well, did you end up having a meeting at this
23 time with those individuals or conference call where a
24 couple called in?

25 A. I couldn't tell you.

1 Q. Okay. The next --

2 A. When I say I don't know, I don't what you're talking
3 about. I can't see the email from here.

4 Q. Okay. Do you want to get down and take a look?

5 THE WITNESS: May, I Your Honor?

6 THE COURT: Sure.

7 THE WITNESS: Yes, I don't know what this is
8 referencing.

9 Q. (By Mr. Ryan) Okay. So you have no memory of whatever
10 that great idea was that the Detective Lieutenant had?

11 A. I don't.

12 Q. Okay. Now, if I told you that Anne began putting in
13 the Grand Jury case against Sonja Farak on February 7, 2013,
14 would that sound about right?

15 A. I apologize if I keep saying this. If you have the
16 paperwork that shows that, then I would certainly agree.
17 I'm not doubting it. I just don't know.

18 Q. Okay. Let me ask you this, by mid February had your
19 office begun providing Grand Jury minutes in the Dookhan
20 case to the District Attorneys?

21 A. I don't know the date, but it's all documented.

22 Q. Showing you a letter dated February 12, 2013.

23 A. Yes.

24 Q. Is that your signature on the letter?

25 A. It is.

1 Q. And does this letter advise -- does this go to all the
2 District Attorneys and provide copies to the Grand Jury
3 minutes?

4 A. It did.

5 Q. So --

6 MR. RYAN: Can I have this marked as the next exhibit?

7 THE CLERK: Marked as Number 263.

8 (Exhibit No. 263, letter to DA Conley/all DAs re:
9 Grand Jury minutes (2/12/13), marked)

10 Q. (By Mr. Ryan) So was it your understanding that the
11 Grand Jury minutes for Sonja Farak's case would be something
12 that would eventually, in almost all likelihood, end up in
13 the possession of various District Attorneys?

14 A. Yes. I wanted Farak to be handled the way Dookhan was.

15 Q. Okay. Now, at any point, did you meet with Anne and
16 discuss whether or not these admissions of drug use by Farak
17 would be used as evidence at the Grand Jury?

18 A. We had -- I don't know. We had a conversation about
19 it.

20 Q. And what was the conversation about?

21 A. So Anne had come to me and said, There's some
22 admissions. She's afraid they might be privileged; Should I
23 put them into the Grand Jury?

24 And I said, Do you need them to get the indictments?

25 She said no.

1 So we decided together, out of an abundance of caution,
2 there was no need to put them in against Farak and cause a
3 McCarthy, O'Dell that type of thing.

4 Q. Okay. Now, was there any conversation -- you said you
5 learned about the -- you're not exactly sure when you
6 learned about these admissions or these personal papers that
7 you referenced in the January 23, email. Had there been any
8 talk about whether to -- how to refer to them in the search
9 warrant return that was going to be filed for the warrant?

10 A. Not by me, no.

11 Q. Are you aware of anybody who talked about that?

12 A. I am not.

13 Q. Okay. Now --

14 THE COURT: Mr. Ryan, I think we will suspend.

15 MR. RYAN: Okay.

16 THE COURT: All right. We will suspend for the
17 luncheon recess.

18 Two clock.

19 (The Court exited at 12:58 p.m.)

20 (* * * * *)

21 (The Court entered at 2:14 p.m.)

22 (The defendant was present with the interpreter.)

23 THE CLERK: We are back on the record in the Farak drug
24 lab matters.

25 THE COURT: All right. Good afternoon.

1 Mr. Ryan.

2 MR. RYAN: I think we were going to take the
3 Commonwealth's expert out of order, but I was hoping to be
4 heard on something at sidebar.

5 (Beginning of Sidebar Discussion)

6 THE COURT: How are you?

7 MS. ZEPRUN: Good. How are you? Good to see you.

8 MR. RYAN: Your Honor, when Mr. Verner comes back on
9 the stand I'm going to be asking him some questions about an
10 email related a offer you heard some testimony about with Ed
11 Bedrosian. The reason I'm coming at sidebar, there's an
12 email from Anne Kaczmarek to John Verner dated November 6,
13 2013, where she begins it by saying: That gym teacher
14 called and wants a recommendation for Farak since we're no
15 longer willing to proffer.

16 The "gym teacher", I have reason to believe is Elaine
17 Pourinski who is -- a nickname, that I think Ms. Anne
18 Kaczmarek had given to Ms. Pourinski.

19 I don't want to refer to Ms. Pourinski in open court as
20 a gym teacher, so I'm going to refer to Ms. Pourinski when I
21 talk about it. I just want the record to reflect that this
22 is what I'm referring to and it's marked for, perhaps,
23 identification.

24 THE COURT: Sure.

25 MR. RYAN: Okay.

1 (End of Sidebar Discussion)

2 THE COURT: Okay. My understanding that, by agreement,
3 Exhibit Number 264, which has been labeled Curriculum Vitae
4 Robert A. Powers, that will be admitted as an exhibit.

5 Lois, you can have that.

6 THE CLERK: Thank you, Judge.

7 (Exhibit 264, CV of Dr. Robert Powers, marked)

8 MS. JOHNSTON: Thank you, Your Honor.

9 The Commonwealth will call Dr. Robert Powers.

10 (Dr. Robert Powers, sworn)

11 **DIRECT EXAMINATION BY MS. JOHNSTON**

12 Q. Good afternoon.

13 A. Good afternoon.

14 Q. Could you please state your name and spell your last
15 name?

16 A. Robert Powers, P-O-W-E-R-S.

17 Q. And how are you employed?

18 A. I'm an Associate Professor at the University of New
19 Haven.

20 Q. How long have you been employed in that position?

21 A. Just over two years.

22 Q. Now, did you provide your curriculum vitae to the
23 Commonwealth in this case?

24 A. I did.

25 Q. Okay. That has been marked already and accepted into

1 evidence, but I want to just discuss what you did before the
2 position you currently hold.

3 So if you could tell the Court what that is and what it
4 entailed.

5 A. I was the Director of the Controlled Substances and
6 Toxicology Laboratory for the Connecticut State Forensic
7 Laboratory located in Hartford, Connecticut. And then in
8 2010 we moved that laboratory to the Main Forensic
9 Laboratory in Meriden, at which point I became a Deputy
10 Director over Controlled Substances, Toxicology and
11 Chemistry.

12 My responsibilities were to see the oversight -- was to
13 provide oversight for both toxicology and controlled
14 substances analyses for the laboratory.

15 Q. Okay. And in addition to that, prior to or during
16 that, did you belong to any professional organizations?

17 A. Yes. I was a member of the American Academy of
18 Forensic Sciences, The Society of Forensic Toxicology. I
19 served on SWGDRUG. And, I think that's it.

20 Q. Okay. And do you know what ASCLD stands for?

21 A. Oh, I forgot. I was a member of ASCLD, American
22 Society of Crime Laboratory Directors.

23 Q. And how were you involved with them?

24 A. I directed a laboratory, so I was -- I joined the
25 organization.

1 I was also an inspector for ASCLD, of forensic -- of
2 accredited laboratories, and laboratories attempting to
3 become accredited. I also served on the Proficiency Review
4 Committee for ASCLD.

5 Q. And when you were inspecting labs, what did that
6 entail?

7 A. Basically determining if the policies, procedures and
8 the way those policies and procedures were implemented by
9 the laboratory provided forensically defensible results.

10 Q. Okay. And again, just briefly, prior to that, before
11 taking on these supervisory roles were you an actual chemist
12 serving on the ground in any laboratories?

13 A. Well, as I've always been kind of hands-on director, so
14 I would always be involved a little bit. But I've been
15 mostly directing labs at some level of complexity since
16 receiving my degree.

17 Q. Okay. And now, in terms of coming to court, how often
18 have you testified in court?

19 A. Over 300 times.

20 Q. And have you testified for prosecution?

21 A. Yes.

22 Q. And for defense?

23 A. Yes.

24 Q. And how would you balance those two numbers?

25 A. Probably 90 percent on behalf of the prosecution.

1 Q. Okay.

2 A. Or I should say called by the prosecution.

3 Q. Okay. And what's the reasoning behind that?

4 A. Well, in many cases in my role in Connecticut, if my
5 opinion favored the defense, in many cases, the case would
6 not go forward, primarily driving under influence type
7 cases.

8 Q. When you say "favored the defense" you would have
9 consulted with defense on a case?

10 A. They would often call the laboratory and ask my
11 opinion, yes.

12 Q. Okay. Now, you've mentioned toxicology a lot. Were
13 you a actual toxicologist in the lab for some period of
14 time?

15 A. Yes. I'm Board Certified, Forensic Toxicology.

16 Q. Okay. And did you also work in a coroner's office?

17 A. Yes, I directed a toxicology lab for, let's see, two
18 coroners' operations.

19 Q. Okay. And so we're here talking about a controlled
20 substances lab, on a level of complexity, how does a
21 controlled substances lab, where you have substances coming
22 in off the street, with known standards, compare to the
23 level of complexity in either a coroner's office or a
24 toxicology lab?

25 A. From an analytical chemistry prospective, the work with

1 seized drugs or potentially drugs is much simpler because
2 you're dealing with a mixture of many fewer compounds at,
3 essentially, almost pure compounds. So their concentrations
4 are considerably higher, thousand to a million fold higher
5 concentrations than what we deal with in toxicology labs.

6 So there's generally not the processes of concentration
7 and purification, separation that have to be done to
8 toxicology samples. So the analytical procedures in a
9 controlled substances laboratory are much simpler. In fact,
10 they're hardly procedures at all, usually just dilute and
11 shoot.

12 Q. Now, you talked a little about accreditation. Have you
13 worked in both accredited and nonaccredited labs?

14 A. Yes.

15 Q. Have you worked in nonaccredited labs that, under your
16 training and experience, in your opinion, were, let's say,
17 up to snuff or up to the standards that would be required,
18 if it was an accredited lab?

19 A. Yes. All the labs I worked in were either accredited
20 or in the process of accreditation and I've overseen four
21 laboratories acquire accreditation.

22 Q. Okay. And, in your inspections of labs, have you ever
23 gone into a controlled substances lab that was so below par
24 that it had to be shut down?

25 A. Not a controlled substances laboratory, no.

1 Q. You put an emphasis on not a controlled substances lab,
2 why do you say that?

3 A. Because I have had that experience with toxicology
4 laboratory.

5 Q. Okay. Is that in part due to what you just sort of
6 explained as the differences in the processes that are going
7 on in those two labs?

8 A. One could fail to run a controlled substances
9 laboratory appropriately as easily as one could fail to run
10 the admittedly more complex toxicology laboratory, but it
11 just depends on the degree to which the laboratory has
12 appropriate SOPs and follows those SOPs.

13 Q. And what are SOPs?

14 A. I'm sorry. Standard Operating Procedures.

15 Q. Thank you.

16 Now, in some labs that you are taking through
17 accreditation or going in and inspecting, is it just a
18 matter of more documentation and paperwork?

19 A. For many laboratories that is all that was required to
20 acquire accreditation.

21 Q. Okay. And do you have any idea, either in this region
22 or sort of nationwide, how many labs are accredited or not
23 accredited?

24 A. It's becoming fairly unusual for a governmentally
25 funded laboratory to not be accredited. I think most in the

1 Northeast and Central US are.

2 Q. Okay. And now, if we walked back, let's say ten years,
3 would your answer change?

4 A. Yeah. Yeah.

5 Q. Why would it change?

6 A. Because ASCLD was just becoming accepted as, or widely
7 accepted as a program, so it was relatively few
8 laboratories.

9 Q. And is that the accrediting body that you are most
10 familiar with or is that most familiar in the area is ASCLD?

11 A. In terms of crime labs, yes; in terms of toxicology
12 laboratories --

13 Q. But in controlled substance labs, it's typically an
14 ASCLD accreditation?

15 A. Pretty much ASCLD.

16 Q. Okay. Now, you mentioned SWGDRUG. What's SWGDRUG?

17 A. SWGDRUG stands for The Scientific Working Group for
18 Seized Drug Analysis.

19 It was one of the -- an evolution of a technical
20 working group of scientists. SWGDRUG was actually worldwide
21 group, whose purpose was to provide workable guidelines
22 which would set, kind of a minimal level of acceptability
23 for the process of analysis of seized drugs.

24 Q. Okay. Now, in this case, have you had the opportunity
25 to review various documents, testimony that's been provided

1 you by the Commonwealth for the Amherst lab?

2 A. Yes.

3 Q. And upon your review of that, and based on your
4 knowledge of SWGDRUG, what's your opinion about whether this
5 lab was up to par for SWGDRUG?

6 A. In terms of the core of the analysis, in other words,
7 determining whether or not a particular drug was or was not
8 a particular controlled substance, they were certainly well
9 within SWGDRUG guidelines.

10 Q. Okay. And does that include presumptive and
11 confirmatory testing?

12 A. Yes.

13 Q. And presumptive testing just gives you an idea what
14 something may be, and confirmatory is obviously
15 confirmatory, that tells you that absolutely is what it is?

16 A. Yeah, presumptive is a quick and dirty analysis, which
17 allows you to get rid of negative samples very quickly and
18 devote your confirmatory time, which is a more complex time
19 and expensive process to the samples that are probably or
20 have a higher chance of being positive.

21 Q. Okay. And you saw both of those practices in place in
22 this lab, in your review of the materials?

23 A. Yes.

24 Q. Let's talk about the machine that they were using, the
25 GC-MS. In terms of that machine, once you input a vial into

1 that machine and the result comes out at the other end, is
2 there much work for a chemist to do in terms of how that
3 process takes place?

4 A. In terms of actually introducing the sample into the
5 instrument and generating a result, no. The work comes on
6 the setting up the instrument to run the batch. The batch
7 runs, and then there's a lot of work on the tail end,
8 putting the batch together and evaluating the results.

9 Q. Okay. And in your review of the documents of this
10 case, who did it appear to you was the person responsible
11 for setting up that instrument and inputting information?

12 A. I think all the analysts in the lab were able to do
13 that.

14 Q. Okay. And, now, this machine has an internal library,
15 correct?

16 A. Probably more than one; but, I'm sorry, the simple
17 answer is yes, it does have an internal library.

18 Q. Okay. And these types of machines, these GC-MS's this
19 internal library, is it different from lab to lab?

20 A. Generally no, most laboratory -- most of the
21 instruments come with a standard library produced by the
22 National Institutes of Standards and Technology or NIST. In
23 addition, many labs, my own lab included, would generate
24 their own libraries, and so the instrument would look at
25 compounds coming off the -- from the chromatogram and check

1 one library and then check another library and potentially a
2 third library.

3 Q. Okay. The internal library that comes from the
4 manufacturer, that contains a spectra, correct?

5 A. All the libraries contain spectra.

6 Q. Okay. And those are unique to a certain drug, correct?

7 A. Certain compound, yes.

8 Q. Okay. And would the spectra for cocaine be different
9 here than it is in say Germany?

10 A. No. In fact, that's the basis of the value of the mass
11 spectrometer is the uniformity of the spectra that are
12 produced.

13 Q. And at what point in this process does the check happen
14 against the spectra? In other words, is it in a presumptive
15 stage, is it in a confirmatory stage? Where are we in the
16 line when the machine says I have to check this against the
17 spectra?

18 A. On the confirmatory stage --

19 Q. Okay.

20 A. -- if you're using GC as a presumptive analysis.

21 Q. Okay. Fair to say that that's at the end of the
22 process?

23 A. Yes.

24 Q. Okay. And if a -- something goes through, and let's
25 say one of the presumptive tests has said that it is cocaine

1 or it is heroin, what happens at the end when it gets to the
2 spectra confirmation?

3 A. Well, there's -- the instrument has no knowledge of the
4 presumptive test. What's happening is a sample has been
5 injected into the instrument, and the instrument has a time
6 window in it, in which it's looking for specific compounds,
7 if its been set up that way. And it will look within that
8 time window, and determine if there's a peak. If there's a
9 peak, it will take a spectrum at the apex of the peak,
10 compare that to the library, and then provide identification
11 if it matches the library compound.

12 So there's two parts. There's the retention time
13 check, it has to be within a particular time window, and
14 then the spectrum has to match.

15 Q. Okay. Let's say someone went in and changed settings
16 or, for something to find a sample within a window, to find
17 a retention time, and the machine at that time thought those
18 peaks were cocaine. If we get to the end, does it have to
19 match back to the uniform cocaine spectra?

20 A. Well, in the first part, if I tell the instrument,
21 okay, cocaine is going to come out between three and four
22 minutes, when it actually comes out between five and six
23 minutes, the instruments will look in that window and it
24 won't find anything that generates the spectrum of cocaine,
25 so it'll come up no peaks detected.

1 Q. Okay. So it would be a negative result for controlled
2 substance, or for that controlled substance?

3 A. For that particular controlled substance, yes.

4 Q. Okay. Now, there's been a lot of talk about secondary
5 standards. Do you understand what a secondary standard is?

6 A. Yes.

7 Q. Okay. And how would you describe that?

8 A. Well, it, as used in this case, it's actually a
9 retention time standard. I guess I would say secondary
10 standard is something that's not utilized as the primary
11 mechanism for identification of an unknown substance. And,
12 in this case, what is referred to as the secondary standard
13 and what I would call retention time standard, is something
14 that's been previously identified that's used to check or
15 establish the retention time for cocaine or heroin on the
16 instrument. It's not used as the basis for identification.

17 Q. Okay. And did you have an understanding of where
18 Mr. Hanchett was getting what he was ultimately calling a
19 secondary standard?

20 A. Yes.

21 Q. And where was that coming from?

22 A. He was getting it from a previously identified
23 materials in the laboratory, from samples, basically.

24 Q. From samples, okay. And did you understand that to be
25 the beginning or after they've been run through?

1 A. After they've been analyzed.

2 Q. Why that?

3 A. Well, he wouldn't know what it was.

4 Q. Okay. So this is a vial that comes out of the end of
5 the GC-MS?

6 A. Well, it may be the material, but from another
7 location, but that sample has been identified as cocaine or
8 heroin, or whatever it was you happen to need. But it has
9 to have been identified, by the laboratory, with reference
10 to the primary standard for him to know what it is --

11 Q. Okay.

12 A. -- to be able to then use it as a retention time
13 standard.

14 Q. In your training and experience, once that's been done,
15 are there pitfalls using what we're calling a secondary
16 standard?

17 A. We tend not to use them in toxicology, though, we do on
18 regular basis because there are so many drugs out there.

19 It's -- it's -- the pitfalls would be the potential for
20 seeing more than one peak in your retention time standard,
21 but that's not really a problem for the analytical chemist.
22 It may be a problem in explaining it. All you're using it
23 for is locating your retention time of your particular
24 target analyte. Otherwise, it's really -- you know, it's
25 not a problem, as long as you have a mixture that contains

1 the analyte that you want to establish the retention time
2 for.

3 We do that in toxicology with mixtures of 30 and 40
4 different drugs at once.

5 Q. Okay. So in a controlled substance lab, when your
6 standard is, in this case, a cocaine and a heroin standard,
7 if there's other things in there, other adulterants or
8 unknown substances, does that affect using that as a
9 secondary standard?

10 A. Not if it doesn't interfere with the retention times of
11 the cocaine and the heroin, if that's what you're using it
12 for.

13 Q. Okay. And would a trained chemist be able to sort that
14 out while looking at results coming out of a machine?

15 A. Certainly. It's immediately obvious.

16 Q. Okay. I'm going to hand you a packet of papers.

17 MS. JOHNSTON: And, Your Honor, these are all contained
18 within Exhibits 222, 224 and 228, that fall under the
19 umbrella of assorted lab paperwork. And these were all
20 shown to the Court yesterday with Rebecca Pontes.

21 THE COURT: Thank you.

22 Q. (By Ms. Johnston) So let me start, I put up here Bates
23 Stamp 585, excuse me, 485.

24 A. 485.

25 Q. Okay. And based on what it says at the top, would you

1 agree that it's a cocaine/heroin standard run on
2 November 29, 2011?

3 A. Yes.

4 Q. Okay. And when you look at this, what do you see?

5 A. I see three peaks.

6 Q. Okay. And based on your review of it, would one of
7 them be a cocaine peak, one be a heroin, and something else?

8 A. That would be my expectation.

9 Q. Okay. And do you have concern about the fact that
10 there's a third peak sort of in the middle there?

11 A. Not at all. Any of these peaks -- they're nice narrow
12 peaks, lots of abundance. I'm perfectly good for
13 establishing retention time.

14 Q. Okay. And now in reviewing Mr. Hanchett's testimony,
15 you read that he was trying to clean up a sample. So after
16 it came out, if there was a bunch of adulterants, he would
17 try to clean it up. Would you do that?

18 A. Not if it looked like this and -- probably not. Again,
19 if I were using it for such purpose, I just want to identify
20 my peak that I'm interested in establishing a retention time
21 for.

22 If the peak I was interested in were much smaller than
23 a lot of the other peaks present, then yes, I might; but for
24 something that looks like this, I wouldn't even bother.

25 Q. Okay. So you said the secondary samples are used for

1 determining retention time, correct?

2 A. That's my understanding, yes.

3 Q. Okay. So, if this was your standard and you ran it
4 through and you got these peaks, you've got retention times
5 at the bottom, correct?

6 A. Yes.

7 Q. Okay. So if you knew that this was cocaine and you
8 knew that this was heroin, you're ready to run your batch
9 through, correct?

10 A. Well, it depends. What normally happens is you look at
11 the retention time, and you have the instrument set up to
12 look for each of these drugs within a certain defined window
13 of time. And so your question is, on today's run, is my
14 cocaine appearing in its window right in the middle? Is my
15 heroin appearing in its window right in the middle? If
16 they're not right in the middle, I might go in and adjust
17 the windows in which the instrument looks for cocaine and
18 heroin, so that the variation is from the middle of the
19 range rather than from on end.

20 Q. Okay. With that in mind, I'm going to show you what's
21 Bates Stamped 550.

22 A. 550.

23 Q. And that, if you look at the top is November 30, 2011,
24 cocaine/heroin standard, correct?

25 A. Yes.

1 Q. Okay. Now, does this look -- again, I'm not a chemist,
2 but to a trained eye, does this look like a similar output from
3 the day before which is 485?

4 A. Yes, it does.

5 Q. Now, why at the bottom on this next day are there no
6 peaks detected?

7 A. It just has to do with how the instrument was set up.
8 It may have had the retention time windows set essentially
9 to zero to re-establish. It may not have been in a search
10 mode.

11 Q. Okay. And so, if you knew this was your cocaine/heroin
12 standard, you would go back in and tell the computer where
13 to look?

14 A. Yes.

15 Q. Now, if you did that -- so you're essentially inputting
16 some data in manually or introducing a human into this
17 machine -- at the end of the day, at the end of the run, in
18 both days, does it still have to check back to a cocaine and
19 heroin spectra which is uniform?

20 A. Yes, absolutely.

21 Q. Okay. So in this sort of process, that we've just
22 talked about, is there a way to get a false positive? In
23 other words, if you run something through that's not cocaine
24 or heroin, and you've adjusted it and the machine picks up a
25 peak in a window. At the end of the day, does it have to

1 check back to the spectra?

2 A. Yes. The spectra has to be of the compound. If the
3 retention time windows aren't set up right, all you're going
4 to get is false negatives. You won't get false positives.

5 Q. Okay. Now, just, in these two, on the Y axis, we're
6 seeing abundance numbers, correct?

7 A. Yes.

8 Q. Okay. And on 485 and 550 we're up somewhere in like
9 the millions range, correct?

10 A. Yeah, five million.

11 Q. Okay. Now, I want to show you a -- and are those two
12 run on a similar machine?

13 A. Yeah, they're both on GC mass spec; looks like, yeah,
14 5975, yup.

15 Q. Okay. And now, if I show you what's Bates Stamped 511.

16 A. 511.

17 Q. Okay. Is that also run on that same machine?

18 A. It's on an HP 5975, yes.

19 Q. Okay. And it says that's a blank, correct?

20 A. Yup.

21 Q. Now, what's the abundance on that side? It's only
22 about 14,000; is that correct?

23 A. That's correct.

24 Q. Okay. So essentially, this graph is of something that
25 would be maybe like a pencil dot on the other two?

1 A. Well, it's -- yeah, it's a real small slice of the Y
2 axis because it's blank.

3 Q. Okay. And so this is a blank?

4 A. Yup.

5 Q. Why are we seeing what we're seeing here?

6 A. You mean the wide squiggly line?

7 Q. Correct.

8 A. Well, that's basically background noise because the
9 instrument is designed to take whatever it sees in that
10 window and express it as the full size of the Y axis. And
11 when there's no peaks present, it'll take the blank baseline
12 and blow it up. What you're seeing there, that rise is as
13 the instrument runs the temperature increases, so you're
14 seeing that temperature increase during the course of the
15 run, which basically gives you a higher background noise
16 level. So what you're seeing is the instrument multiplying
17 the background noise large enough to fill in the space on
18 the printout. But that's just --

19 Q. Noise?

20 A. -- instrumental noise, yes.

21 Q. That's not a dirty blank or contaminated blank?

22 A. No, it's a beautiful blank.

23 Q. Okay. Now, do you know other labs that either do or
24 have used these secondary standards?

25 A. Sure, I've used them myself.

1 Q. Okay. And as we move towards more accreditation, is it
2 a practice that labs are moving away from?

3 A. Certainly for the more common drugs, but, you know, as
4 we deal with more and more designer drugs, and new compounds
5 you're often stuck using less than optimal secondary
6 standards; but I think it's pretty much standard throughout
7 the industry now to not use manufacturer's or not certified
8 materials as primary standards. And we certainly used to in
9 the past.

10 Q. Okay. So now this was a blank we put up here. Let's
11 talk about blanks.

12 Is it preferable to run a blank in between each sample
13 in your run?

14 A. No -- a lot of labs do that. I guess I would rather
15 have a laboratory where the analysts are cognizant of the
16 possible problems with carryover and think about it and
17 inject every sample after another, than a laboratory that's,
18 you know, just putting in blanks and not even thinking about
19 the possibility. So a lot of labs do that. I've done it in
20 some labs and not done it in others.

21 I think you're better off with conscientious analysts.

22 Q. Okay. And in your review of the testimony from the
23 various parties that you've read in this case, do you -- is
24 your opinion that they were conscientious analysts?

25 A. Well, I didn't get a chance to examine their analytical

1 batches and actually evaluate how they did their review.

2 So, I've no reason to think otherwise, but I did not have
3 the opportunity, as an inspector, to evaluate the quality of
4 their review process.

5 Q. Okay. In your review of their testimony, was there
6 mention of carryover and blanks?

7 A. Yes.

8 Q. Okay. And the fact that they were looking out for
9 those potential problems that might come up while running a
10 machine?

11 A. Yes.

12 Q. Do you -- let's say you did run a blank every time.
13 Does that eliminate carryover?

14 A. Oh, no. There's carryover in every sample.

15 Q. Okay. And as you sit, are you concerned about
16 carryover at all times or is there certain level of
17 carryover that's not an issue?

18 A. There's a certain level of carryover that's not an
19 issue. For example there's carry over in that blank. It's
20 just at such a level that you can't even detect it on the
21 instrument.

22 Q. And this is blown up to a very, very high degree?

23 A. Pretty high.

24 Yeah.

25 Q. Okay. So if we saw this on an actual sample, and by

1 that I mean, if this was present, would you even see it?

2 So, for example if we were looking again at, let's say
3 just for 485 again. That was on a scale of what, 1400, and
4 this is on a scale of almost 6 million, correct?

5 A. Yes.

6 Q. Okay.

7 A. So what I'm --

8 Q. So we would be looking somewhere down here, fair to
9 say? (Indicating)

10 A. Yeah, if you blew-up this Y axis, the baseline would
11 look pretty much the same, only now it would have a peak
12 coming up at 3.8, a peak coming up at 5.7.

13 Q. Okay. So the first number on this graph is 500,000
14 correct, on 485 on that axis?

15 A. Yeah. Yeah. The smallest scale is half a million,
16 yeah.

17 Q. Okay. Now --

18 A. What I'm saying is if you blew up the Y axis, you would
19 see this baseline, this what looks like a flat line.
20 Eventually it would look just like this, only with peaks
21 sticking out of it.

22 Q. Okay. Perfect. If you keep blowing it up.

23 Now, in this case you've reviewed and you know what was
24 going on with an analyst at the lab. If any of those
25 samples somebody requested they be retested, could they be

1 retested, the samples that were in the lab at the time it
2 was shut down?

3 A. Sure.

4 Q. Okay. And would there be -- let's say we're talking
5 about cocaine and heroin. How long would those samples
6 typically sort of retain their validity? In other words, if
7 I had a street sample from 2004 of cocaine, and now we're in
8 2016, would there be an issue with that retest?

9 A. Only in the sense that you might not see as much
10 cocaine as you -- it might of been say, for the sake of
11 argument, 50 percent cocaine. When you retest it, it might
12 be considerably less. But what you'd see instead are the
13 breakdown products typical of cocaine -- ecgonine, ecgonine
14 methyl ester, benzoylecgonine, maybe tropane, but it
15 would -- you'd know right away, yeah, this was once cocaine.
16 But I would expect to see parent cocaine in that mix as
17 well.

18 Q. Okay. Would any of these samples have an ability to
19 get stronger?

20 A. If they were stored in a really dry environment and
21 they lost whatever water hydration was in them, yeah.

22 Q. Okay.

23 A. But not, only by a couple of percentage points.

24 Q. Okay. And with that in mind, as these samples sit, do
25 they tend to gain or lose weight or can you even make that

1 characterization?

2 A. It depends on the material and mostly the humidity.

3 And in Las Vegas, samples tended to loose weight. Here
4 in the Northeast, in wet to warm summers, samples gained
5 weight, just pulling water in or losing water to the
6 atmosphere.

7 Q. And if you -- did you have a chance to review the
8 testimony of Heather Harris who testified as a defense
9 expert in the last hearing?

10 A. Yeah.

11 Q. She said she saw no positive controls in this lab.
12 Would you agree with that, based on what you've seen?

13 A. Well, positive controls are a process controls. When
14 you have a process like with a toxicology sample, where you
15 have a sample of blood and you have to precipitate the
16 proteins, extract the drugs, clean up the drugs, you're
17 carrying them through multiple steps. Then -- then a
18 process control, is you take some blank blood and you stick
19 some known quantity of drug in it and you carry that
20 through. And you also do that with a blank as well. So
21 that you know that A, you're getting your drug through, if
22 it's present; B, you're not introducing any, you're not
23 getting any false positive results if the sample is actually
24 negative.

25 In controlled substances, you don't really have a

1 process. You just take some sample, you put it in a tube,
2 and you add some solvent, and you take that to GC mass spec.

3 So, how do you do a positive control for simple
4 dilution? Well, you take your sample and you could
5 conceivably add something to the methanol and then you have
6 your, essentially, your retention time standard.

7 What's really important in that process, is that you
8 run the solvent as a blank so that you know you're not, that
9 the solvent itself is clean.

10 Q. Okay. And that blank that I placed there in front of
11 you, that's a methanol blank. Does it say at the top?

12 A. It does.

13 Q. So they ran the solvent through, according to that?

14 A. Apparently.

15 Q. Just two more questions. In terms of this lab, and
16 what you understand from your review, do you have a way that
17 you could conceivably have this lab create, through the
18 processes that they were undergoing, the machines that they
19 were using, a false positive?

20 And what I mean by that is, could you have a sample
21 that wasn't something and now you're generating certificates
22 of analysis saying this is cocaine; this is heroin?

23 A. Well, a false positive is the worst possible thing you
24 can have in forensic laboratory. And based on my
25 understanding of the way they were handling their samples,

1 analytically, I don't see how that could happen.

2 Q. Okay. And based on your review of everything in this
3 case, do you feel that the processes that they were using
4 were producing reliable results?

5 A. Yes.

6 Q. Why do you say that?

7 A. Nothing raised a red flag with me there. They've got
8 blanks, they've got presumptive tests, they've got retention
9 time checks, and most importantly their -- the key of their
10 identification comparison of mass spectra is going back to
11 certified reference material.

12 THE COURT: Ms. Johnston, thank you.

13 **CROSS EXAMINATION BY MR. RYAN**

14 Q. Good afternoon.

15 A. Good afternoon, sir.

16 Q. You just testified based on your review of everything
17 in the case?

18 A. I have no idea if I have everything in the case.

19 Q. Well, I think when Ms. Johnston was saying, based on
20 your review of everything that you've reviewed, you just
21 offered an opinion.

22 MR. RYAN: Could I have this marked for Identification?

23 THE CLERK: Marked as F, for Identification.

24 (Exhibit F, Joint Proposed Findings, marked for
25 Identification)

1 Q. (By Mr. Ryan) I'm showing you a copy of the parties'
2 Joint Proposed Findings of Fact, 70 pages long, referencing
3 147 exhibits.

4 Have you seen this document before?

5 A. No, I have not.

6 MR. RYAN: I don't have any questions.

7 THE COURT: Okay. Thank you, sir.

8 MR. OLANOFF: I'm -- Your Honor, I'm sorry. He yielded
9 a minute or so to me.

10 THE COURT: You may take it.

11 MR. OLANOFF: Thank you.

12 **CROSS EXAMINATION BY MR. OLANOFF**

13 Q. Good afternoon.

14 A. Good afternoon, sir.

15 Q. You said that you reviewed some things in preparation
16 for today?

17 A. Yes.

18 Q. And found nothing wrong with the way business was
19 conducted at this lab?

20 A. I think I limited my comment to the analytical aspect.

21 Q. Well, you were the head of a lab for a number of years,
22 correct?

23 A. Yes.

24 Q. And so you know how a lab should be run, correct?

25 A. Yes.

1 Q. And would it be fair to say that if a chemist working
2 within your lab was stealing evidence from the main evidence
3 locker, where all the samples were stored, that that might
4 compromise the reliability or accuracy of testing at that
5 lab?

6 A. Merely stealing, stealing drugs from the evidence
7 locker; how would it compromise the analytical process?

8 THE COURT: Mr. Powers, you don't get to ask questions.

9 THE WITNESS: I'm sorry, Your Honor.

10 Q. (By Mr. Olanoff) Is that your answer?

11 A. My answer is if there is an individual in the
12 laboratory who is not acting in a proper manner, there is
13 certainly the possibility that their actions could
14 compromise the analytical process, but one -- but I don't
15 think it necessarily means that it would.

16 I would want to know the mechanism by which the actions
17 led to a compromise of the analytical process. I am not
18 saying it could not. I would want to know the mechanism by
19 which that stealing of evidence or whatever, could have
20 affected a particular sample.

21 I acknowledge the possibility exists.

22 Q. Okay. Well, in the main evidence locker is where you
23 store samples that have come into the lab for testing,
24 correct?

25 A. Yes.

1 Q. And that's also where you may store samples that have
2 already been tested at the lab, correct?

3 A. Correct.

4 Q. And so if a chemist is going in there and stealing some
5 of those samples, let's say before they've even been tested,
6 how then would that sample be affected?

7 A. There would be less of the sample. Though it seems odd
8 that an individual would take untested material when they
9 have access to tested material, if it's for their own use or
10 even for re-sale. I mean, why would you not --

11 Q. You're speculating.

12 A. I'm sorry. I'm asking a question again. I apologize.

13 Q. These are very interesting questions, aren't they?

14 A. Absolutely.

15 Q. And so, well, if a chemist were to go into the main
16 evidence locker and take all of the sample, then there
17 wouldn't be anything left over to test, right?

18 A. Yes, and I would expect that that would be caught in
19 the quality control procedures of the laboratory.

20 Q. Okay. Well, have you ever -- have you ever heard of
21 something like that being able to go on for eight years?

22 A. Close.

23 Q. And you're referring to this case, right?

24 A. I'm sorry?

25 Q. And you're referring to this case?

1 A. No, I'm actually not.

2 Q. Okay. And so, what if a chemist were to be going in
3 and tampering with the standards that you used at the lab?

4 A. Okay.

5 Q. That might affect the reliability or accuracy of the
6 testing that goes on there, correct?

7 A. Well, again, I -- before I could answer that
8 positively, I would like to know in what fashion because,
9 again, you've got the problem that we all know what these
10 spectra look like, and all of a sudden you're telling me
11 that this cocaine standard doesn't have a 303 or 182, I'm
12 going to have a problem.

13 And from what I can gather, the level of knowledge of
14 the analysts at the laboratory, they kind of knew what they
15 were looking at, so if I tried to call Procaine, cocaine,
16 and I tried to say, well, this spectra with a big 293 is
17 cocaine, I think any one of these analysts would have said
18 no it's not, where's my real cocaine.

19 So, again, I acknowledge the possibility, but I'd be
20 interested in learning a mechanism or being presented a
21 mechanism whereby tampering could logically lead to an
22 erroneous result.

23 Q. A lot of the testing that happens in the lab is done
24 through instruments, correct?

25 A. Yes.

1 Q. The equipment, right?

2 A. Absolutely.

3 Q. And you need a password to get into some of that
4 equipment, right?

5 A. Yes.

6 Q. And so, if one of the chemists in your lab stole the
7 password of another chemist, and used it to -- I don't know,
8 alter the results of some of those nice graphs we just
9 looked at, that might affect the reliability or accuracy of
10 testing?

11 A. I've been playing around with mass spec.s before mass
12 spec.s came into laboratories and I don't think I could get
13 in there and alter the spectra of a run sample.

14 So, again, I acknowledge that the possibility of
15 somebody getting into a computer, but I'm missing the how,
16 I'm also missing why would one do that.

17 THE WITNESS: -- I'm sorry, Your Honor.

18 MR. OLANOFF: Thank you.

19 THE COURT: All set?

20 MS. JOHNSTON: Yes. Thank you, Your Honor.

21 THE COURT: Thank you.

22 Mr. Powers, you may step down, sir.

23 THE WITNESS: Thank you, Your Honor.

24 (The witness stepped down.)

25 THE COURT: You may call your next witness.

1 MR. RYAN: I would ask that John Verner return to the
2 stand.

3 THE COURT: Okay. Mr. Verner.

4 Mr. Ryan, when you're ready.

5 MR. RYAN: Thank you.

6 (John Verner, continued)

7 DIRECT EXAMINATION BY MR. RYAN

8 Q. Good afternoon, Mr. Verner.

9 A. Good afternoon sir.

10 Q. So before the lunch break, I think one of the last
11 things we were discussing, this conversation with Anne about
12 the potential problems of introducing these admissions to
13 the Grand Jury. Do you recall that?

14 A. I do.

15 Q. Did you or Anne seek out any legal opinion from anybody
16 in your office as to whether these were protected by HIPAA
17 or some other thing that could prevent you from using them
18 as evidence against Sonja Farak?

19 A. I did not. That wouldn't have been my role as a bureau
20 chief. I don't know if Anne did or not.

21 Q. Okay. Now, I think at some point earlier, you
22 referenced a pros memo or prosecution memo?

23 A. If I did, I know what you're talking about, yeah.

24 Q. Okay. I'm going to show you what's previously marked
25 as Exhibit 163. Is that the copy of the pros memo in this

1 case?

2 A. Yes.

3 Q. And if you could just take a second to review it, and
4 what I'm mostly interested in is identification of
5 handwriting, because you would agree, there's some
6 handwritten notes throughout, is that --

7 A. Absolutely.

8 Q. And if we could just maybe expedite this. At the
9 bottom of page two, is there some cursive writing that is
10 different than some of the rest of the writing on the
11 document?

12 A. Yes. So, that's not mine.

13 Q. Yup.

14 A. Mine is the really bad looking writing.

15 Q. Okay.

16 A. (Witness indicating)

17 Q. Is yours -- are all of the rest of the notes yours, as
18 far as you can tell?

19 A. I don't know if this is helping the Judge, but that's
20 not.

21 Q. Okay. Page four, top of first paragraph, tamper, maybe
22 two times, underline theft, that doesn't look like yours?

23 A. That's not.

24 Q. Another, tamper, in between the first and second
25 paragraph on that same page?

1 A. That is not.

2 Q. Another, theft, on the right-hand column of that second
3 paragraph?

4 A. Tamper four is not.

5 Q. Okay. Do you recognize the handwriting of any of these
6 other ones?

7 A. I don't. I don't.

8 Q. Okay. Let me just ask you a question about page five.

9 A. Yes.

10 Q. Do you see some writing?

11 A. Footnote seven.

12 Q. Footnote seven, circled with an arrow down below.

13 A. Yes.

14 Q. Is that your writing?

15 A. It is.

16 Q. And what does it say?

17 A. This paper -- must be paperwork, not turned over to
18 DA's Office yet.

19 Q. And is that in reference to mental health worksheets
20 describing how Farak feels when she uses illegal substance
21 and the temptation of working with urgeful samples?

22 A. Yes.

23 Q. Can you explain what you meant when you said: This
24 paperwork not turned over to DA offices yet?

25 A. So when I'm reviewing a pros memo, so the procedure is

1 the line AAG will wrote a pros memo. It will go to his or
2 her division chief.

3 Q. Uh-huh.

4 A. And then after they approve it, it goes to me. After I
5 approve it, it goes upstairs to either Sheila or Ed.

6 So when I'm going through this, I'm doing some issue
7 spotting.

8 This document then goes back -- if it's not approved, I
9 give it back to the AAG or the Division Chief, and say
10 you've got to fix some stuff.

11 Q. Okay.

12 A. If it's approved, again, it goes upstairs.

13 It eventually makes it way back down to the line AAG
14 and this is issue spotting, so to speak.

15 So to your direct question, I'm pointing out that these
16 have not been turned over yet.

17 THE COURT: I'm sorry. Mr. Ryan, what's the date of
18 that?

19 THE WITNESS: The memo -- so, Your Honor, there's an
20 approval by Dean Mazzone who is a Division Chief on 3/27.

21 THE COURT: 3/27 of 13?

22 THE WITNESS: Yes.

23 THE COURT: That's close enough.

24 THE WITNESS: Okay.

25 Q. (By Mr. Ryan) And so this note that you'd written

1 there, would that be fair to say that was like a reminder
2 that they had not been turned over yet?

3 A. A reminder they have not been turned over and by the
4 word "yet", it's my intention that the stuff is going over.

5 Q. Okay. Now, and just so we're clear, when you're using
6 line prosecutor, this would of been -- this was approved,
7 correct?

8 A. Correct.

9 Q. It was approved first by --

10 A. Dean.

11 Q. Dean Mazzone, and then it was approved by you?

12 A. Correct.

13 Q. And then you brought it upstairs to the 20th floor?

14 A. Yeah, so brought it or got it up there.

15 Q. And do you recall who you met with and had it approved
16 by?

17 A. So I don't, and there wouldn't necessarily be a
18 meeting.

19 Q. Uh-huh.

20 A. So I would give it to, Meghan -- Meghan O'Brien, now
21 it's Scafati -- say, however many pros memos, can you bring
22 these up.

23 And so Sheila and Ed would split them up depending, I
24 don't know what the criteria was.

25 Q. And in some cases would you kind of personally deliver

1 one and talk to Sheila or Ed about its contents?

2 A. There were times I would do that, absolutely.

3 Q. And do you have any recollection whether you did it on
4 this occasion?

5 A. I do not.

6 Q. Okay. Now, in any event, the last page, if you could
7 take a look at these last couple sentences on page 12.

8 And just for the sake of everyone: We are also hoping
9 that the defendant, once indicted will detail how long she's
10 been abusing drugs and how many cases are affected. Farak
11 would expect some consideration in sentencing for that
12 information.

13 A. Yes.

14 Q. Now, as you reviewed the document, that's not something
15 that you wrote any kind of note about; is that correct?

16 A. Correct. That would be a down-the-road bigger
17 conversation.

18 Q. But, at least at this juncture, that was something that
19 you didn't feel was inappropriate in any way?

20 A. I didn't form any opinion either way on that.

21 Q. Okay. Now, a little bit above that, she had said that
22 there was not a breakdown of quality control managerial
23 oversight; do you see that?

24 A. I do.

25 Q. And what did you underline and write?

1 A. So that's not me.

2 Q. Okay. Do you know whose writing that is?

3 A. I don't -- well, I can say it's not Ed's.

4 Q. Okay.

5 A. So I worked with Ed in Middlesex for many, many years,
6 so, he was my supervisor there too. I know his handwriting,
7 so that's not Ed's.

8 Q. So, and in terms of whoever identified as: Looks to be
9 still a problem with QC, underline, underline.

10 A. Uh-huh.

11 Q. Were you aware at this time there was some potential
12 problems with quality control at Amherst?

13 A. That's hard to answer. I know at some point there was
14 an audit done.

15 Q. Uh-huh.

16 A. And you have the audit, and I know you've seen
17 paperwork where we're getting the audit out to the DAs
18 Offices and so we're talking about that.

19 Q. Right. Did you ever discuss the contents of that audit
20 with Ed or Sheila?

21 A. I don't have a memory of that. I'm sorry.

22 Q. Okay.

23 A. I'm not saying I did or didn't. I just don't know
24 either way.

25 Q. Now, at some point or another, do you recall -- I think

1 you said that would be for down the road with respect to Ms.
2 Farak expecting some consideration in sentencing for
3 information about how long she'd been abusing drugs and how
4 many cases are affected.

5 At some point or another, did it come to your attention
6 that Sonja Farak, through counsel, was proposing a proffer?

7 A. Yes.

8 Q. And when was that?

9 A. I couldn't tell you when. I know there's an email that
10 Anne sent me.

11 Q. And when she sent you that email, what did you -- well,
12 maybe I can just give you the email.

13 A. Okay. So I know I said I'll talk to Ed about it, or Ed
14 Bed or Ed B, whatever.

15 Q. Is that the email that we're referring to?

16 A. Yeah.

17 MR. RYAN: Okay. Can I have this marked as the next
18 exhibit?

19 THE CLERK: Marked as Number 265.

20 (Exhibit No. 265, email from AAG Verner to AAG
21 Kaczmarek (10/2/13), marked)

22 Q. (By Mr. Ryan) So this was sent -- this thread happened
23 on October 2, 2013?

24 A. Yes.

25 Q. And were you aware at that time that there had been

1 some litigation in this courthouse related to Sonja Farak
2 issues?

3 A. No.

4 Q. Were you aware that there had been a consolidated
5 evidentiary hearing that Sergeant Joseph Ballou had gotten a
6 subpoena to, to come testify?

7 A. All right. I take that back. I'm getting my dates
8 wrong. That was September 13, the consolidated?

9 Q. I will represent to you the first day of that -- I --

10 A. I know I shouldn't be asking questions. Sorry.

11 Q. That's okay. September 9, 2013, got continued to
12 October 7, 2013 the second day.

13 A. So, yes, I was aware at some point there was stuff in
14 this courthouse and if it's September, then, yes.

15 Q. Generally speaking, you were aware that the judge had
16 called this hearing to try to find out the scope of Sonja
17 Farak's misconduct?

18 A. I knew there was a hearing. I don't know if I knew the
19 pinpoint details of it.

20 Q. Okay. In any event, the email that Anne forwarded to
21 you, from counsel from Ms. Farak, was: Anne, you've not
22 responded to my last email regarding the proffer, which is
23 unusual for you. Would you please respond one way or the
24 other. Thanks, Elaine.

25 A. Uh-huh.

1 Q. At that point, Anne said: Farak is willing to do a
2 proffer regarding the scope of her drug use in exchange for
3 state and federal immunity against future charges. The DAs
4 in Western Mass. would love this. Not sure if it's viable
5 but worth a discussion.

6 A. Yes.

7 Q. So this is something that you, in fact, did take up to
8 Ed Bed?

9 A. Absolutely.

10 Q. And could you tell the Judge about what the discussions
11 were like with him about the possibility of a proffer for
12 Sonja Farak?

13 A. Sure. So Ed and I, like I said, had worked together
14 for many, many years.

15 I think it was 2004 Ed supervised me in Middlesex
16 Superior and we were in Special Investigations and one of
17 the things we did was proffers.

18 I took over that unit in 2005 and Ed moved up to the
19 front office. So I, at this point, I had 11 -- 2005 --
20 nine, ten years of doing proffers, a lot of them with Ed.

21 So I went up and talked to Ed.

22 We had just done this with Dookhan. There was just a
23 discussion about whether or not there'd be an interest in
24 doing a proffer with Dookhan.

25 We evaluated what we normally evaluate, whether we do a

1 proffer or not -- whether or not we can -- we think that the
2 defendant is going to be honest, how we'll be able to tell
3 if he or she is going to be honest, what our sentencing
4 goals are -- things of that nature.

5 So, with Dookhan, and I only mention Dookhan because
6 it's right on the heels of this. One of the concerns was
7 Annie Dookhan is never going to be able to tell us what
8 cases she tampered with or when this exact date that this
9 started, or things of nature.

10 We also felt strongly that Annie Dookhan should serve a
11 significant prison sentence.

12 And as all of us who practice know, once you start
13 doing proffers and whatnot, there's a reduction in the
14 sentence.

15 We had that same analysis with Sonja Farak and decided
16 that we weren't going to do a proffer with her.

17 Q. Well, what were your sentencing goals with Sonja Farak?

18 A. State prison.

19 Q. And with Ms. Dookhan, when you did this analysis, did
20 you take into consideration that she had, essentially,
21 already made admissions in her interview with Robert Irwin
22 in terms of dry labbing, dating back two or three years,
23 and, you know, intentionally contaminating some samples or
24 switching samples?

25 A. I mean, we -- certainly we took into account the

1 totality of the whole case, like we do in every case. So,
2 what Dookhan had said, which we didn't necessarily -- we
3 didn't believe that she came 100 percent clean. So, sure,
4 we took into account everything, on all cases.

5 I mean proffers are one of the hardest things you're
6 ever going to do as a prosecutor. It's judgment. It's -- I
7 mean, it's really, really hard to decide. I mean, you're
8 dealing with their -- is someone going to tell you the
9 truth, what are you going to get out of it, sentencing
10 goals. I mean it's-- I've been a prosecutor for 16 years.
11 I've done everything from trespass to really bad homicides
12 and proffers are one of the hardest things that I've done to
13 decide whether to do or not.

14 Q. And one of the things that makes them so hard is the
15 thing you have to give up to take a proffer, is the ability
16 to prosecute this person for the crimes they're telling you
17 about, right?

18 A. That's not -- no, that is one thing, but it's not --
19 it's not the only thing. You know, for lack of a better
20 term, getting into bed with someone who you have no idea
21 whether they're going to tell you the truth or not.

22 If you are doing a proffer on a homicide you have to
23 consider these same things too. Same thing on this case,
24 so.

25 Q. What were the factors that led you to believe you

1 weren't sure that Sonja Farak could give you an honest
2 proffer?

3 A. Well, she hadn't spoken to us prior. She didn't
4 cooperate originally.

5 There was nothing about the situation that led us to
6 believe that she was going to be 100 percent honest. Again,
7 we have all these drug samples. We didn't believe she was
8 going to be able to tell us she used from this one, or used
9 from that one, or on one date this was.

10 Q. Did you think that she might be able to tell you how
11 long she'd been abusing drugs?

12 A. I mean in hindsight, certainly. And, again, we can sit
13 here and second guess the decision to do the proffer and I
14 respect that, I really do. I'm just telling you, from this
15 side of the table, it's incredibly hard and, you know, if we
16 had to do it over again, you know, sure, we could say we'd
17 make a different decision, that's something that I'll own,
18 that proffered decisions are very hard and we do the best
19 you can.

20 Q. Before rejecting the proffer proposal, did you attempt
21 to renegotiate the terms?

22 A. No, I mean the terms -- either immunity or not.

23 Q. Well, she wanted immunity for any future prosecution,
24 correct?

25 A. So, I don't know all those details.

1 We had made a decision that this is not something that
2 we were going to do. So, to answer your question directly,
3 no, we didn't make an attempt to renegotiate the proffer,
4 nor have I ever made an attempt to renegotiate a proffer.

5 Q. Well, by this point in October of 2013, there had been
6 some retested results that were bubbling up that were
7 suggesting that she was tampering with other samples,
8 correct?

9 MS. WEST: Objection.

10 THE COURT: You can answer it, if you feel you can.

11 THE WITNESS: I don't know the answer to that. I know
12 early on when I was involved, I worked with Jimmy Connolly,
13 Major James Connolly from the crime lab, about him working
14 with the other offices to get stuff tested.

15 At this point, I'm not involved with the day-to-day
16 with Farak, so I couldn't tell you if there was or wasn't
17 other test results that were bubbling up, to use your term.

18 (Pause)

19 Q. (By Mr. Ryan) Now, this is an email thread on the
20 screen I'm showing you, dated Wednesday, September 18, 2013.
21 The one on the bottom is from Anne Kaczmarek to you and Dean
22 Mazzone and it's sent at 11:00 in the morning and it says:
23 Gentlemen, as samples are being retested by different labs
24 and discovering that new samples were tampered, we do not
25 have a uniform manner to keep track of the changes.

1 So this would of been two weeks before you had gone and
2 gotten that email of October 2, that led you to go talk to
3 Ed Bed; is that correct?

4 A. Yeah, I have no memory of that email, but I'm not
5 disputing the fact that it's there and I'm on it, but I have
6 no memory of that.

7 Q. Well, you're not only on it, it's to you, correct?

8 A. Yeah, again, I'm not disputing it's there. I'm just
9 telling you I have no memory of it.

10 Q. Well, I guess my question is, did you, as these new
11 samples came up, did your office prosecute Sonja Farak for
12 any of these tampering retest cases?

13 A. Of the new ones, no. So she was indicted by then. Our
14 analysis was whether she was indicted on four samples or
15 five samples or six, our analysis was it wasn't going to
16 make a huge difference, we didn't think, in the sentencing.

17 Now, again, decisions to prosecute, to indict, to not
18 indict, those are hard decisions. And I understand we can
19 be second guessed, I understand that, but we were
20 prosecuting and we indicted Sonja Farak on a series of
21 cases.

22 There is another piece to this, which is, who was going
23 to be doing the bigger lab review.

24 Q. Who was going to be doing the bigger lab review?

25 A. I don't know. I know -- I know it wasn't us. And that

1 stems from months prior with the Annie Dookhan case where
2 our office spent considerable resources, considerable time,
3 considerable effort, volunteered to pull staff to do the
4 whole review of the Annie Dookhan case, and everyone seemed
5 on board and then all of a sudden, CPCS, Mass. Bar, all
6 these different bar associations send a letter saying, in
7 essence, we can't be trusted to do it, so.

8 Q. Still some hard feelings over that?

9 A. No. I wasn't going to be doing the review. It was
10 going to be the civil side.

11 Q. Well, that was on the Dookhan case, so you knew -- so
12 you had gone through, moved heaven and earth to get to do
13 this separate investigation of the whole lab in the Fall of
14 2012, correct?

15 A. Right.

16 Q. And that's -- that's only a slight exaggeration. Your
17 office committed extraordinary resources and personnel to
18 conduct a whole lab investigation; is that fair to say?

19 A. Yes.

20 Q. And then you get this letter from members of the
21 defense bar saying you can't be trusted to do it, and that
22 means you're out, and is that when the Inspector General's
23 office got in?

24 A. You'd have to ask Ed or Sheila on the timing of that.
25 I know Glenn Cunha eventually did it. I don't know what the

1 parameters were there.

2 Q. Okay.

3 So months later Sonja Farak gets arrested, you know
4 from experience, that your office can't really do anything
5 other than prosecute her, correct?

6 A. Yeah, and there were conversations. It wasn't just
7 experience. There were conversations within our office
8 about this larger investigation. I know I told Jimmy
9 Connolly -- I'm sorry, Major Connolly that our office wasn't
10 doing the global investigation.

11 I know Sheila spoke to Andrea Cabral.

12 Q. Who is that?

13 A. Secretary of Public Safety.

14 Q. Okay. What did she say?

15 A. Sheila had informed me that we informed Secretary of
16 Public Safety, i.e. the administration that we weren't doing
17 this global review. So Ms. Cabral knew that.

18 Q. Was there a recommendation that somebody should do it?

19 A. You'd have to ask Ed and Sheila.

20 So to be clear, the Dookhan piece -- the global
21 investigation, and the Farak global investigation were above
22 me.

23 Q. Sure. Now, as you were getting back to this proffer
24 decision, was this just about as you were weighing the pros
25 and cons here, just about Sonja Farak or did you take into

1 consideration the -- what Ms. Kaczmarek had said that the
2 Western Mass. DAs would love this proffer?

3 A. Sure.

4 Q. And one of the reasons they would have loved it is
5 because it could have helped them figure out how many of
6 these cases are tainted, correct?

7 A. Absolutely.

8 Q. And so there was a lot of people who had an interest in
9 whether or not you guys decided to try to get Sonja Farak to
10 tell you the truth about the extent of her misconduct,
11 correct?

12 MS. WEST: Objection. Again, we're falling into that
13 habit of putting words in this witness' mouth, when he's
14 clearly able to tell the story on his own.

15 THE COURT: You can answer the question if you feel you
16 can.

17 THE WITNESS: So I don't know the level of people's
18 interests. I don't know if DA is called out to Martha
19 Coakley. I don't know if First Assistant's called out to Ed
20 Bedrosian. I don't know any of that. What I know is, at my
21 level, there was that and mine and Anne's conversation i.e.
22 that email.

23 Q. (By Mr. Ryan) Okay. Now, who ultimately nixed the
24 proffer idea? Was that a joint decision between the two of
25 you or did Ed Bed make the call?

1 A. So Ed Bedrosian. So -- I'm just saying that's his
2 name.

3 So he was my boss, so ultimately he's going to make
4 that call, but I don't want to put it on Ed. Ed and I had,
5 like I told you, a long history and relationship of doing
6 these things.

7 So that was -- so you can say it was Ed's final call,
8 but I was in agreement with it. I don't want to put it all
9 on Ed.

10 Q. Now, I'd like to jump back a couple of weeks to the
11 morning of September 10.

12 MR. RYAN: Can I see Exhibit 2- --.

13 THE WITNESS: Of '13 or '14?

14 Q. (By Mr. Ryan) '13.

15 MR. RYAN: Do we have Exhibit 210 Handy?

16 (Pause)

17 Q. (By Mr. Ryan) All right. So this is an email thread
18 on the morning of Tuesday, September 10. And I'm going to
19 ask you to just take a moment to review it and then I'm
20 going to ask a question, I think will make Ms. West very
21 happy, which is just: What happened.

22 A. (Witness complying)

23 Is that the question?

24 Q. That's going to be the question, so why don't you take
25 a second to review the document.

1 (Pause)

2 MR. RYAN: I'm just going to put it up on the screen
3 for the benefit of the Court.

4 THE COURT: What's the exhibit number?

5 MR. RYAN: 210.

6 THE WITNESS: Was there one before that that says: How
7 did it go?

8 Q. (By Mr. Ryan) I believe you're right.

9 So I think we start -- let's get you -- yes. Thanks
10 Kris, what happened with request for documents, et cetera,
11 that you sent at September 10, 2013 at 8:55 in the morning.

12 A. Okay.

13 Q. And then 210, just so that I'm getting it, accurately,
14 is ends with a question from you: Is that everything --
15 everything spelled with an H at the end instead of a G, but
16 we won't hold that against you.

17 A. Thank you. And there's more to this chain as well,
18 right?

19 Q. But if you can just get us through from Kris Foster's
20 response to: What Happened; to your question: Is that
21 everything in the file.

22 A. And I don't mean to be sarcastic, I'm trying to be
23 helpful. I mean, I think it speaks for itself. So, I mean,
24 this is what happened. I wanted to know what happened.
25 Anne responded and then I had questions.

1 Q. Well, if you -- can you see what your questions were in
2 this document?

3 A. Anne, can you get a sense from Joe what is in his file,
4 emails, et cetera.

5 Kris, did the Judge say his file or did he indicate Joe
6 had to search his emails.

7 Q. Now, is it fair to say there had been a number of
8 conversations prior to this that you were involved with
9 discussing this upcoming hearing?

10 MS. WEST: Objection.

11 THE COURT: No, you can answer it, if you feel you can.

12 THE WITNESS: So, I wouldn't say a number. I don't
13 have any memories of conversations. I'm not saying there
14 wasn't. You know, this is three or so years ago.

15 I mean there's clearly something that preceded this.

16 Q. (By Mr. Ryan) Uh-huh.

17 A. Which led me to ask what happened.

18 Q. All right. Showing you an email from Wednesday
19 September 4, 2003 (sic), at 3:02 p.m. where you say: Okay.
20 Should we get the -- we should get the band back together.
21 When is the substantive court date?

22 And you can see that that was in response to Randall
23 Ravitz's take on the order regarding drug lab hearing.

24 A. Okay. So to answer your question, What happened.

25 My concern/prospective on this was emails, notes, work

1 product, Anne Kaczmarek testifying -- those were things I
2 didn't, respectfully, didn't thing was appropriate and we
3 decided we were going to object to that.

4 Q. Well, wasn't this a subpoena for Joe Ballou at the
5 September 9, hearing with my order for, regarding drug lab
6 hearing. That was separate from me subpoenaing Anne
7 Kaczmarek for the Rolando Penate. We're talking about the
8 big hearing before Judge Kinder with 15 postconviction
9 defendants.

10 A. I don't know. I'm not familiar with what hearing was
11 what. You know, I wasn't out here for them. I don't
12 remember the details of your different orders. I know for
13 sure I was concerned about our work product, emails, and
14 notes going over.

15 Q. And just so we're clear, when you're talking about you
16 ask a question to Anne about what's in Joe's file, correct?

17 A. Correct.

18 Q. So at that time you understood that this was not about
19 Anne it was about what does Joe have, correct?

20 A. Correct.

21 Q. And there had been -- I'm showing you: Getting the
22 band back together. That's -- that would suggest that the
23 band had been together before, right?

24 A. Correct, and potentially on -- probably on Farak; yeah.

25 Q. So let's just talk, if this meeting, which we have,

1 between you and Dean Mazzone, Randall Ravitz, Susan Reardon
2 and Kris Foster takes place and the question is, if you see
3 Randall Ravitz, my take on the drug lab evidentiary hearing
4 is we could still move to quash.

5 What are the various things? You're head of the
6 Criminal Bureau, Randy Ravitz is head of the Appeals Unit.
7 What sort of conversation should have taken place in this --
8 at this stage in terms of how your office is going to
9 respond to a subpoena pertaining to all documents and
10 photographs with the Farak investigation?

11 A. Like I said, I'm sure something preceded all of this.
12 I don't have memory of a meeting. I'm sure there was a
13 meeting. I can't tell you what was said in it. I can't
14 tell you who was there.

15 I can tell you my concerns in any of these meetings
16 were, as I stated, about emails and work product.

17 I mean, you also need to put in prospective, you
18 haven't asked me yet, but we were alluding to it, I'm
19 assuming that all the stuff is turned over, all the
20 documents are turned over.

21 Q. And Anne Kaczmarek is in the room, did you talk about
22 what had been turned over?

23 A. Again, I don't have a memory of what happened in the
24 meeting. I can tell you, as a Criminal Bureau Chief,
25 with -- supervising 110 people through 11 different

1 divisions and over 50 lawyers, I'm not micromanaging
2 experienced lawyers on discovery.

3 Q. Right up on the board is your acceptance to attend a
4 meeting, Farak subpoena meeting, for Tuesday, September 3,
5 1:30 p.m. to 1:45.

6 The people in the room, 15 minutes with the Chief, with
7 Randall Ravitz, what did you guys talk about?

8 A. Like I said, you know, until you show me that, the
9 acceptance, like I said, I'm pretty sure something preceded
10 this email chain. I'm sorry. I don't have a memory of the
11 meeting. I don't have a memory of what happened in the
12 meeting.

13 Q. Now, prior to Meghan, you asking Meghan to schedule
14 this meeting on Tuesday, September 3, at 9:01 Anne said:
15 I'm told the Judge wants to come to the bottom of the issues
16 mentioned below, making it unlikely he will allow a motion
17 to quash. As long as the Judge has set up the scope of the
18 meeting, motion, and I'm confident Ballou will be pretty
19 unhelpful with what the Judge is trying to do. Do we just
20 let Ballou go?

21 After you got that email is when you had sent this
22 group email trying to get the band together for the first
23 time, correct?

24 A. Yeah, I want to be clear. I'm not quibbling with you
25 that there was a meeting or not or that there was a

1 discussion, because the email certainly lay it out.

2 What I'm just telling you, as you're asking me from the
3 stand. I don't have a memory of that meeting, I'm sorry.

4 Q. What I guess I'm trying to understand is, you had the
5 prosecution memo where you had written a note highlighting,
6 these haven't been turned over yet. And now there's a
7 subpoena that's being given to a member of your unit, the
8 State Police Trooper Sergeant who's assigned to your unit to
9 turn over all documents. And would you have been --
10 wouldn't have somebody, in your position, have turned to
11 somebody who's on the appellate and Appeals Division; who's
12 handling the response and say, all right. This is what has
13 been turned over, and this is what hasn't.

14 I'm just trying to understand whether or not --

15 A. Sure, no, absolutely not. So that pros memo was five
16 month earlier.

17 Q. Right.

18 A. So this is five months. Again, I'm not going through
19 and asking experienced AAGs what they've turned over in
20 discovery, when they know they have to turn everything over.
21 It's just not something I would do.

22 Q. But isn't, on the other side, isn't Randall Ravitz's
23 side of this, isn't their obligation, when they represent
24 somebody like Anne and Joe Ballou to say, okay, what has
25 been turned over?

1 Isn't there an affirmative asking questions component
2 that they have?

3 A. I mean, I don't know how to answer that. You know,
4 Randy is a super smart, super experienced attorney.

5 If he's working with Kris or Sue is working with Kris,
6 you know, I'm not micromanaging or getting involved in that.

7 Q. But we've got this meeting of six people, three of them
8 have signed or written that prosecution memo, correct?

9 A. Myself, Anne, Dean.

10 Q. Yeah.

11 A. Yeah.

12 Q. And so three of the people in this meeting know about
13 the existence of these mental health worksheets, correct?

14 A. To varying degrees, certainly.

15 Q. And one of the persons who has probably the most
16 intimate knowledge is the line prosecutor who's prosecuting
17 Sonja Farak?

18 A. Correct.

19 Q. So you've got the people on the appeals division who
20 are filing or raising the possibility of asserting certain
21 privileges, like psychological and mental health, correct?

22 MS. WEST: Objection.

23 THE COURT: Sustained.

24 MS. WEST: Thank you.

25 THE WITNESS: I can tell you the mental health

1 records --

2 THE COURT: No. No. No question in front of you.

3 THE WITNESS: I'm sorry, Your Honor. I'm sorry.

4 Q. (By Mr. Ryan) After this, you said there's another
5 email that's not a part of this thread here. What's your
6 recollection of what that other email said?

7 A. So there's discussion about what Joe Ballou testified
8 was turned over. He says everything in his file was turned
9 over.

10 Q. Uh-huh.

11 A. And I asked Anne, What's in the file. And she says --
12 I forget all the terms, but she says the mental health
13 records.

14 So Kris is saying, Joe testified that everything in his
15 file was turned over. And Anne is saying this, this, and
16 this were in his file.

17 So I'm seeing nothing, throughout this case, at the
18 level that I'm working on it, that leads me to be concerned
19 that we haven't fulfilled our discovery obligations or
20 turned stuff over. I'm just not -- there's no red flags
21 with Anne for me. Anne's a smart, experienced, intelligent,
22 honest attorney.

23 Q. What about your questions about Anne -- this use of the
24 word "file". Isn't -- aren't emails part of a file?

25 A. If there are emails in a file, sure; but a work product

1 email between Anne and I, that's not in a file.

2 Q. Well, when you ask Anne: What's in Joe's file, did he
3 say file or did he mean emails?

4 Isn't -- aren't emails -- doesn't a file consist of not
5 just the things you happen to print out in paper and put in
6 a Manila folder, but things that exist in 2013 on a
7 computer?

8 A. I was under the impression that Joe had his physical
9 file with him and said, Everything in this file is turned
10 over.

11 Q. So after -- let me just ask this question.

12 Eventually, did you get an email from Kris Foster when
13 you asked her about what the Judge really meant, because
14 that's the second part of the question?

15 A. Uh-huh.

16 Q. Did she respond to you and say: Judge Kinder,
17 unfortunately, didn't give too much insight into what he is
18 looking for. I kept asking him to clarify and the best he
19 would do is say the subpoena for Joe Ballou is what he has,
20 or something along those lines?

21 And then she goes on to say: Sergeant Ballou did
22 testify everything in his file has already been turned over.

23 Given the uncertainty that Kris Foster expressed there
24 as to what the Judge actually wanted, in terms of how broad
25 a scope of what he was looking for, was there any

1 consideration to perhaps filing a motion for clarification?

2 A. Not -- no, I don't think so.

3 I mean, so Judge Kinder gives his order. We have Kris
4 Foster, she has a supervisor. We have Anne.

5 Again, I'm not digging into -- I'm not doing the
6 discovery myself or doing the motions myself. I'm not doing
7 it at that level. I just -- that wouldn't be possible in my
8 job.

9 So when I started as the Bureau Chief, I didn't have a
10 deputy, so I was doing all this myself.

11 Q. Right. And you were in these email threads as an
12 active participant yourself, correct?

13 A. Right, but look it, to do a criminal case, to answer
14 discovery and go through documents and that -- that should
15 take an attorney hours, if not a day. That's not what I'm
16 doing.

17 Q. Right. So in this group, you've got people who are at
18 a high level, like yourself and Randall Ravitz, correct, and
19 then you have people like Kris Foster or Anne Kaczmarek who
20 are down on the granular level or who should have a working
21 knowledge of the file?

22 A. Uh-huh.

23 Q. And is there any communication in these meetings, up
24 and down the chain, as to, you know, what has been turned
25 over, what hasn't?

1 A. I don't think so. I mean, I can tell you the mental
2 health records were not discussed in the meeting.

3 Q. Well, then, what was discussed in the meeting? What
4 were you thinking maybe we should -- if it's Joe Ballou's
5 file, what are you discussing if it's not the mental health
6 records?

7 A. So, again, I told you, I don't know.

8 The reason I know mental health records weren't
9 discussed, because when this thing happened, when you sent
10 that letter to Patrick Devlin, I was angry. I was upset. I
11 was shocked. I was frustrated. And when I went to look and
12 found those documents you're talking about, I know I had
13 never seen them before and I was really upset.

14 So that's how I know this conversation about mental
15 health records or the content of them never happened with
16 me.

17 Q. If I could just point your attention to the top up
18 there, this email from Dean Mazzone at 9:54 on September 10,
19 2013, where, in response to Kris Foster, she says: He
20 doesn't know the answer to the question. Everyone's
21 fishing.

22 Who did you think he was referring to when he said
23 "he"?

24 A. I don't think I ever gave the email a thought. I have
25 no memory of it. I see it, but --

1 Q. Does it sound like he's referring to Judge Kinder?

2 A. I mean, if I were to speculate, looking at it now, sure
3 commonsense wise, or maybe it's you, I don't know.

4 (Pause)

5 Q. (By Mr. Ryan) November 5, 2014, 11:51 a.m. a thread
6 ends between you and Dean Mazzone. Do you see that on the
7 board?

8 A. Uh-huh, yes.

9 Q. You had gotten notice by this point from First
10 Assistant of the Northwestern District Steven Gagne that
11 there was going to be a motion hearing related to whether or
12 not, based on these records you've never seen, there might
13 be third parties, like ServiceNet, that would have to
14 produce records related to Sonja Farak, if they existed,
15 correct?

16 A. Yes. And by this time, I believe I had seen them.

17 Q. Right. And so when Attorney Gagne says that he doesn't
18 think these motions are properly filed under the heading of
19 his case, but he can't predict whether the Judge will agree,
20 and if she allows the motions, there will obviously be
21 implications that extend far beyond my own case.

22 Your response was, in quotes, far beyond.

23 Is that correct?

24 A. Uh-huh, yes.

25 Q. And then Dean Mazzone's was: Way, way beyond.

1 And then you said: That's sarcasm.

2 And he responded and said: A little. We'll see what
3 happens. I know they think there will be another deluge.

4 You just testified a second ago that you were very
5 upset at the discovery of this. How upset were you?

6 A. I was pissed.

7 Q. And who were you pissed at?

8 A. At that point, I didn't know. I'm not sure I do know
9 now. I just know I was angry.

10 THE WITNESS: Excuse my language, Your Honor. I'm
11 trying to be genuine.

12 THE COURT: No.

13 THE WITNESS: The stuff was supposed to go out and it
14 didn't go out. And that's not good.

15 MR. RYAN: I don't have any further questions.

16 MR. OLANOFF: Judge, could I? Just for one minute at
17 this point?

18 THE COURT: Can I time you?

19 MR. OLANOFF: Please.

20 **CROSS EXAMINATION BY MR. OLANOFF**

21 Q. Good afternoon.

22 A. Hi, Counsel. I don't think I met you.

23 Q. I'm Jared Olanoff, on behalf of several defendants in
24 this case and also in the consolidated hearing back in 2013.

25 A. Nice to meet you, sir.

1 Q. Good to meet you.

2 Now, as someone in your position and someone who would
3 take an oversight like this seriously, there was a -- you
4 wanted to find out what happened, correct?

5 A. Yes.

6 Q. And how did you do that?

7 A. So I'm just looking at the date, so, I think Anne was
8 gone by then. I think Anne was gone by then, so I mean, had
9 two issues. One, I wanted to get control of and get out
10 what needed to get out. That was my biggest concern. So, I
11 think at that point, and --

12 THE WITNESS: I'm sorry, Your Honor. I'm bad with the
13 timing of when people are coming and going.

14 I think at that point Anne is gone and Pat Devlin is
15 around. So I know we were working on finding out what else
16 wasn't turned over and getting that out, so that was number
17 one.

18 Q. (By Mr. Olanoff) Well, let me interrupt you there.
19 Did you meet with Kris Foster and Anne Kaczmarek in your
20 office and sit them down and try to find out what had
21 actually happened?

22 A. No. Again -- this is 14, this is 14. So Anne is gone
23 by then. I think Anne's gone by then, I don't remember.
24 I'm pretty sure I went to ask Kris, Hey, what's up.

25 Q. And what did Kris tell you what was up?

1 A. She didn't have much of an answer. I wish I could give
2 you more. She didn't have much of an answer.

3 Her not having much of an answer, I inferred that, you
4 know, she didn't have a concrete explanation for -- no, no,
5 no, you know, this is wrong; or, I did this; or, I did that.
6 I wasn't getting much from her, so --

7 MS. WEST: I'm sorry. I didn't hear. Was this Kris
8 Foster or Anne?

9 THE WITNESS: Kris. Kris.

10 Q. (By Mr. Olanoff) So when you're talking to Kris and
11 you asked her what happened, you sort of confronted her with
12 the fact that she had told Judge Kinder that everything had
13 been turned over, correct?

14 A. Yes. Well, just what had happened. Why is this stuff
15 not out. And she didn't have much of an answer, so I said,
16 all right, and, you know, I just put that aside in my mind
17 and I'm like, all right, I'll deal with that after. I want
18 to get -- again, I keep saying this, but I wanted to get the
19 stuff out.

20 Q. Did you ask her if she had actually reviewed Sergeant
21 Ballou's file?

22 A. I don't remember if I did or not, I'm sorry.

23 (Off the record discussion among Counsel.)

24 (Pause)

25 THE WITNESS: I can say to you, I knew there was going

1 to be, pretty shortly after, transition and personnel
2 reviews; so I had this in my mind.

3 Q. (By Mr. Olanoff) Okay. And did you take any -- do you
4 remember if you took any notes as to your postmortem with
5 Kris Foster on this?

6 A. I don't remember.

7 MR. OLANOFF: Your Honor, may I approach?

8 THE COURT: Uh-huh.

9 (Pause)

10 Q. (By Mr. Olanoff) Showing you an item that's not yet
11 marked. Is that your handwriting?

12 A. It is.

13 Q. And are those notes that you took regarding your
14 conversation with Kris Foster as to what was turned over or
15 not turned over for that consolidated hearing?

16 A. Yes. Yes.

17 Q. And could you read what your handwriting says?

18 A. Per Kris, when I -- says started -- when I started
19 asking what happened. Joe B -- which would be Joe Ballou --
20 said to Kris, everything was turned over from file.
21 Parenthesis, Kris didn't look at file. So Joe told Kris
22 this at court. Told Anne in person.

23 And something, Kris went back and asked Anne and Joe.

24 So if I wrote this down, then Kris must have told me
25 that she didn't look at the file.

1 Q. Okay. And this is on a document --

2 A. It's on email.

3 Q. It's on email dated September 10, 2013, correct?

4 A. Yeah, but I don't know why it's on that email. I don't
5 have a memory of confronting Kris until more info had come
6 out and I can tell you from the tense and the tone, I would
7 of gone -- I would of gone back to my office and written
8 that down as opposed to while talking to Kris.

9 Q. Okay. So you wrote this on an email that you had
10 obviously printed out on your computer, and the email
11 actually that is right next to it is your email stating: Is
12 everything in his file.

13 A. Is that everything in his file.

14 Yeah. So what I'm saying, I don't think I did it on
15 September 10. I think the email, would of been -- would of
16 been topical to the email, if that makes sense.

17 Q. Yes, it does.

18 MR. OLANOFF: Thank you.

19 Thank you, Your Honor.

20 At this time, could I introduce this into evidence as
21 an exhibit, and that's all I have.

22 THE COURT: Thank you, Ms. West.

23 THE CLERK: Marked as Number 266.

24 (Exhibit No. 266, email from AAG Kaczmarek to AAG
25 Verner (9/10/13) with handwritten notes, marked)

CROSS EXAMINATION BY MS. WEST

Q. So I'm going to ask you about Exhibit 266, and my question is this: In November of 2014, when this all came out, did you go into your email to reconstruct what had happened?

A. I did, starting with looking for that email with the quote, mental health records -- mental health notes or whatever we are calling them.

Q. Okay. And you went through several emails, didn't you?

A. Yes.

Q. And this email, that is an email that was written or at least Anne Kaczmarek wrote it on September 10. Do you think this is an email you pulled in November 2014 and that's when you wrote that stuff down?

A. Probably.

Q. So do these notes reflect a conversation that you had with Kris Foster once you understood that there was a problem here?

A. Yes.

Q. So --

A. Because I --

Q. Sorry.

A. I wouldn't have asked her what happened if I don't know there was a problem.

Q. Thank you. All right.

1 Earlier you were asked questions about the Dookhan
2 investigation, and you had explained what happened in
3 Dookhan, and all the efforts that were made by the office
4 and then the defense bar didn't want the office to do it,
5 and consequently, as I understand it, tell me if this is
6 right, there was no expectation, certainly on your part, or
7 anyone in the office, that you would do a full lab
8 investigation in Amherst?

9 A. Correct.

10 Q. And then you mentioned Jimmy Connolly. Who is Jimmy
11 Connolly?

12 A. So James Connolly, he was the head of the crime lab
13 at -- in Maynard and I had a relationship with him. And he
14 was in charge of Middlesex homicide when I was in Middlesex,
15 so I knew him certainly enough to pick up the phone and have
16 a conversation about stuff.

17 Q. And was he taking part in the connection between the
18 State Police and Amherst lab, was he heading up what was
19 going on in Amherst?

20 A. Yes.

21 Q. So what sort of communications were you having with him
22 in the beginning of the Farak investigation?

23 A. So I told him at some point that we weren't, the AG's
24 Office wasn't doing this full investigation. I talked to
25 Major Connolly about the DAs Offices needed their samples

1 their Farak samples retested. And I helped get the ball
2 rolling with that by telling Major Connolly this needs to
3 happen, and he had called me or emailed me about a solution
4 that they go to Worcester. And then in -- the end result of
5 that was, Well, that's between you all and the DAs Offices.
6 But, we need to talk to them, but you also need to consider
7 if Worcester is a good lab, if they're going to travel
8 around the state to testify, things of that nature.

9 Q. But your interactions with Jimmy Connolly in the
10 beginning, you're making clear to him, whatever you find,
11 you'll find it, but you were working with the DAs Office,
12 the AG's Office is out?

13 A. Correct.

14 Q. In regard to the Farak criminal investigation, what
15 were the marching orders from executive?

16 A. We were going to do what was in front of us, the car,
17 things that were readily apparent.

18 And then the bigger investigation was going to be
19 someone else.

20 Q. Okay. And early on, when this -- close to even the
21 arrests, Anne Kaczmarek started to get emails and Joe Ballou
22 started to get emails and information about, for lack of a
23 better word, tips where people were calling and saying, oh,
24 I've got given another sample, it appears that she was
25 tampering with, right?

1 A. Correct. And I was thing about a question that counsel
2 asked. I think Anne got involved that first weekend. I
3 know on the Friday, I mean, I have a firm memory of this.
4 We were out to dinner. I had ordered my first cocktail. I
5 got a phone call. I didn't drink it. I went back to my
6 friend's apartment in the City, and I stayed up all night
7 with this stuff. And I have a memory, I think, of not
8 getting Anne involved right away because of her kids, but I
9 got her involved that weekend.

10 Q. All right. But the tips started coming in, right?

11 A. Sorry, yeah.

12 Q. That's okay.

13 A. I was trying to answer something else. Yes.

14 Q. All right. And in the beginning, you're going to open
15 a Grand Jury for this investigation?

16 A. Correct.

17 Q. And you were following up with those tips, weren't you?

18 A. Anne was, but the office was; yeah, Anne was.

19 Q. And, in particular, you remember there was some tip
20 about pills?

21 A. Correct.

22 Q. Now, early on in the case, the beginning of the
23 investigation, can you tell us, generally, what the plan was
24 for the indictment?

25 A. So the plan was, we wanted to get the indictment done.

1 We wanted to start getting stuff out. So the plan was these
2 samples that were in front of us in the car, we were going
3 to do those. If a tip or something had come in while the
4 Grand Jury was open, we were going to do that.

5 So that was the plan, was to get the indictments done.

6 Q. And if a bigger tip had come in and need be to open a
7 new Grand Jury, would have done that?

8 A. Of course.

9 Q. Now, did that plan change as the case progressed and
10 you got closer to the end of 2013?

11 A. Closer to the end of 15?

12 Q. December 2013, Just for the record, I will remind you
13 she pled in January of 2013 -- pardon me, my mistake.

14 In 2013, and she pled in '14?

15 A. So by that point she was already indicted.

16 Q. Yes. Yes, so did the plan change even after indictment
17 as the tips were rolling in still?

18 A. No. Well, we were going -- I mean, no, the plan was
19 she was already indicted so, if things were coming in, we
20 would look at it, but we weren't going to necessarily open a
21 new Grand Jury for one more case.

22 Q. You spoke about this a little bit before, did you
23 believe adding a couple more charges was necessarily going
24 to change the sentence in the case?

25 A. No, I didn't. And look, I certainly respect every

1 judge and the Court. And a judge is going to be the one to
2 decide whether six samples or five samples or three samples
3 are different, but -- makes a difference; but in my
4 experience, you know, I've been doing this for 16 years now,
5 so 14 back then, I didn't think another sample was going to
6 change the result.

7 Q. I want to go back to the pill case. It was your
8 understanding from the original Farak stuff found in the car
9 that she had a cocaine problem and that cocaine problem
10 appeared to be going back at least a few months?

11 A. Correct.

12 Q. So when the pill case came in, you followed up on it,
13 right?

14 A. So Anne and Sergeant Ballou, yes; the office, yes.

15 Q. But notwithstanding that, pills don't necessarily fall
16 within what you understood to be the scheme of the case?

17 A. Correct.

18 Q. Now, you also -- you were asked about an email from an
19 ADA about what she understood to be a tampering case of
20 cocaine from 2005. Was a 2005 case within what you, at that
21 point, understood to be the time frame of this case?

22 A. No. And if my memory is correct, Joe or Anne or
23 someone was aware of that. You will have to ask Anne
24 whether that was followed up or not.

25 Q. Okay. I'm going to show you an email. Now this is

1 from December 2013 and it starts -- it's an email from Joe
2 Mason. And who is Joe Mason?

3 A. So Joe -- so Jimmy's the major, Joe is the lieutenant
4 at the lab.

5 Q. So he works at the lab?

6 A. Yeah, he's a trooper. He has a rank. He was one below
7 Major Connolly.

8 Q. And it's from Joe Mason to you, excuse me, to Anne and
9 Bobby Irwin. And he says: Good morning. See the message
10 below and attached photos from Bill Hebert. It appears as
11 though he has discovered a tampered case that Farak analyzed
12 in 2012. Let me know how you'd like to proceed.

13 Now Anne forwarded that to you?

14 A. Correct.

15 Q. And says: The UMASS chemist sent this to me. I think
16 we would just notify all the Western DAs Offices, but don't
17 think we are going to indict her on this. Correct?

18 And what's your response to that?

19 A. Correct. Give to her lawyer, the Western DAs. We can
20 use for sentencing, bit -- it must be but -- let's not slow
21 the case down for another charge, that won't change the
22 result.

23 Q. Okay. So what exactly did you mean by that?

24 A. So we want to get the case indicted. One more charge,
25 I didn't think was going to effect sentencing, but we can

1 talk about sentencing, potentially. I know some judges will
2 take that, but most judges will say if it's not indicted
3 it's not before me, so fine. And we'll notify people but,
4 that's that.

5 Q. Mr. Verner, I want to talk to you about the material
6 you sent out to District Attorneys and the timing.

7 Now, you had already -- you, when I say you, I'm
8 talking about the office.

9 A. Yup.

10 Q. Had already had a similar experience in Dookhan,
11 correct?

12 A. That is correct.

13 Q. And in the Dookhan case you provided, obviously,
14 discovery to Annie Dookhan, the defendant herself, right?

15 A. Yes.

16 Q. And, in addition, you provided material to the District
17 Attorneys?

18 A. That is correct.

19 Q. What was the purpose of providing the material?

20 A. So it appeared, we now know, yes, but at the time it
21 appeared that Annie Dookhan had done something wrong and
22 that it could have affected cases, there could be people in
23 jail, there could be people who didn't get fair trials. It
24 was to get the stuff out to the DAs so they could deal with
25 their particular defendants and their defense lawyers.

1 Q. And, in Dookhan, when you started providing material to
2 the DAs, did you do it pre-indictment?

3 A. We did.

4 Q. Is that unusual?

5 A. In my 16 years, I can't remember providing, absent a
6 court order, of course, discovery to a defendant
7 pre-indictment, never mind to other people pre-indictment.
8 I mean --

9 Q. Particularly unusual, because it was, essentially, to a
10 third-party?

11 A. Correct.

12 Q. Now, when Farak hit, you decided to do the same exact
13 thing all over, right?

14 A. Correct.

15 Q. And we earlier saw the first -- the letter that you
16 sent out originally in Dookhan, and then the letter you sent
17 out in Farak. And in those letters, there's language
18 indicating that you're complying with your -- excuse me -- a
19 duty to provide exculpatory information to District
20 Attorneys Office. Now, as we stand here today, you
21 understand that you didn't have an ethical obligation to
22 provide those to DAs, right?

23 A. Yeah, I mean, there's people a lot smarter than me that
24 can talk about Rule 14 and Rule 17 and whatnot. My position
25 was, we had stuff that could affect people, and get it out.

1 So whether there's an actual or a technical, wasn't my
2 concern.

3 Q. Okay. In meeting in September of 2013, you understood
4 some third-party subpoenas were coming in, right?

5 A. That is correct.

6 Q. And you also understand that there had been some
7 requests for inspection of the physical evidence in the
8 case?

9 A. That's correct.

10 Q. Now, you voiced an objection to the inspection of
11 physical evidence?

12 A. That is correct.

13 Q. Why did you?

14 A. So to start, Anne, who had the case, objected. So I
15 backed her up on that. I didn't want people going through
16 physical drugs, things of that nature. I think we all know
17 by now, a case is never over. So I was concerned about
18 chain of custody and integrity of evidence.

19 You know, you need to keep in mind, or at least from my
20 prospective, I wasn't aware of all those documents that were
21 in the car. I was aware of the email, but again, I'm
22 assuming stuff is being turned over, so I wasn't -- I was
23 never, ever intentionally blocking someone's ability to get
24 documents.

25 Q. So you understood that they were getting the documents

1 anyway, through the DA's Office, because you understood it
2 had all been given to the DAs, right?

3 A. That was my belief, initially.

4 Q. You just didn't want them coming in and messing around
5 with physical evidence itself when you didn't know whether
6 there was going to be a trial in this matter?

7 A. Correct. And I know there were -- I knew there was
8 writings that said the stuff in the car was photographed. I
9 didn't look at the photos. Again, I'm not digging into the
10 case that deep.

11 So, again, Anne is someone I respect very much, and she
12 voiced an objection to lawyers looking through her evidence
13 so, or the evidence, so I was fine with backing that up.

14 Q. You understood that the original evidence that Joe
15 Ballou seized from the car, from Farak's car, the physical
16 evidence was actually in the evidence locker, right?

17 A. Correct.

18 Q. And you didn't want them messing around with the stuff
19 that was seized from the car?

20 A. Correct.

21 Q. And, in regard to the request for his file, you didn't
22 necessarily have the same concerns, right?

23 A. Correct.

24 Q. And why not?

25 A. Because that -- that was paper, those were paper and

documents, so fine. Have at it.

Q. I want to talk to you specifically about the times in which the mental health records came up; how many times it came up for you.

You were earlier shown an email, Exhibit 205, which is an email. I don't think it's in front of you now, but it's one that was written by Joe Ballou. It was entitled admissions.

A. Yes.

Q. And there was an attachment to it?

A. Correct.

Q. Now, do you have any memory of receiving the email?

A. Memory, no.

Q. Okay. But notwithstanding, do you have any memory of opening the attachments up and looking at what was in there?

A. I don't, and what further backs that up is when I opened them after Attorney Ryan wrote the letter to Pat, I know I had not seen those before. And I was very surprised, to say the least. I hadn't seen them before.

Q. But your first memory of at least having a conversation, a substantive conversation about these, is with Anne Kaczmarek, correct?

A. Correct.

Q. And it's when Anne has a discussion with you about whether these admissions should be put into the Grand Jury?

1 A. Yeah. I mean, there was probably something beforehand
2 about, there's some papers in the car in which she talks
3 about using drugs, so the admissions. So that was loosely
4 out there and Attorney Ryan had asked me about that.

5 But, the first substantive real conversation was when
6 Anne -- so there -- so we're now focusing on the Farak as a
7 defendant, whether or not it's wise to put these documents
8 in because of potential privilege and risk, McCarthy,
9 O'Dell, something messing up the Farak prosecution.

10 Q. And you came to the conclusion that no reason to do
11 that?

12 A. Yeah. I asked her straight up, do we need these to get
13 the indictments and she said no, so I said well, then
14 there's no need to put them in.

15 Q. And further, at that point, the only real significance
16 you saw in them is because they were couched as admissions,
17 so they were inculpatory to Farak?

18 A. Correct.

19 Q. Now, the next point where you have any understanding of
20 mental health record is the pros memo, right?

21 A. Correct.

22 THE COURT: Is the what?

23 MS. WEST: I'm sorry, the prosecution memo.

24 THE COURT: Oh, thank you.

25 MS. WEST: Yup.

1 Q. (By Ms. West) And you were asked questions about this
2 and there's footnote seven, in which you write: These have
3 not been turned over to the DAs yet.

4 A. Correct.

5 Q. And you, that pros memo, I think, was dated in late
6 March, right?

7 A. I think so.

8 Q. I'll tell you.

9 A. March 27, maybe.

10 Q. March 27.

11 A. Okay.

12 Q. And your first letter to the DAs with discovery is also
13 dated March 27, isn't it?

14 A. Correct.

15 Q. So, obviously, at that moment, that was something on
16 your mind?

17 A. Correct.

18 Q. Now, I want to talk about the hearing that took place
19 out here on September 9 in front of Judge Kinder.

20 What is your memory as to the source of information
21 that you received about that particular hearing?

22 A. Emails. I know Anne sent a clip from Masslive or
23 something in one of the emails. I couldn't tell you if I
24 looked at the clip or not, but the emails is my memory of
25 the best source of what happened out here.

1 I know Attorney Ryan asked could there have been a
2 meeting, if the calendar shows it, then sure. I still don't
3 have a memory of what was said in a meeting.

4 Q. So showing you an email, it's Exhibit 210, and it ends
5 with you saying: Is everything in the file.

6 And what I've just shown you is just a continuation of
7 that particular chain.

8 A. Uh-huh.

9 Q. And you -- in this you say: Anne, can you get a sense
10 from Joe what's in his file. Kris, did the Judge say his
11 file or did he indicate Joe had to search his emails?

12 And this is the response from Kris Foster herself,
13 correct?

14 A. Yes.

15 Q. But if you look at the bottom, the original is kind of
16 summary of what happened on September 9. Kris writes:
17 Judge Kinder has given us until September 18, to go through
18 Ballou's file, anything in it we think is privileged should
19 be disclosed. We have to give Judge Kinder -- give it to
20 Judge Kinder to review in camera along with a memo
21 explaining why we think each document is privileged.

22 Is this the only source of information that you had as
23 to what actually took place at that hearing?

24 A. To the best of my memory, yes.

25 Q. Did you ever get a transcript of the hearing itself?

1 A. No.

2 Q. Did you ever hear, at the time, that Judge Kinder
3 yelled at Kris Foster?

4 A. No.

5 Q. I'm just going to read you a few quotes. It will be
6 very short. This is the 9/9 transcript, page 15.

7 This is Judge Kinder to Kris Foster: With respect to
8 the request for the protective order, my first question is,
9 have you actually personally reviewed the file to determine
10 that there are categories of documents in that file that
11 that fit the description of those you wish to be protected?

12 Miss Foster: I've been talking to AAG Kaczmarek whose
13 been doing the investigation for the Attorney General's
14 Office. She's indicated that several documents, emails,
15 correspondence will be protected under the work product
16 mostly.

17 The Court: But you don't know, having never even
18 looked at the file, what the documents are?

19 Have you ever heard that before?

20 A. That's the 100 percent first time I'm hearing that.

21 Q. Had you known that Judge Kinder had said that to Kris
22 Foster, what would you have done?

23 A. I would of been upset. I would of talked to Kris. I
24 would of talked to Randy, Randy Ravitz. If a judge is
25 yelling at an AAG, I need to know why, and how do we correct

1 that.

2 Q. Mr. Ryan showed you a document earlier. It was Exhibit
3 261. It was -- it regarded the search warrant for Farak's
4 duffle bag and it appears that you had reviewed the
5 affidavit?

6 A. Correct.

7 Q. And then in it you were just making some comments back
8 to Joe, and in particular, in paragraph three, you -- you
9 explicitly write out, personal papers.

10 Now, at this point, had you physically seen any of the
11 papers that came out of the car?

12 A. No.

13 Q. And, why did you focus on personal papers?

14 (Pause)

15 THE WITNESS: I don't know.

16 Q. (By Ms. West) Would the fact that you were considering
17 constructive possession, a charge -- the legal concept of
18 constructive possession to be the reason why you were
19 focused?

20 A. I mean, that sounds good. I just -- I don't have --
21 and just to put it in prospective, yeah, I don't remember.
22 I'm sorry.

23 Q. That's okay. So now I want to move to November of
24 2014.

25 A. Okay.

1 Q. So this is when you find out that some material had not
2 been turned over.

3 So you find out on the weekend, right?

4 A. Yes.

5 Q. So what's the first thing you remember?

6 A. So I know I was home. I know it was a PDF. I know Pat
7 had sent it to me. I could open -- I could get the
8 attachment open, but I couldn't see it or read it. That was
9 the whole thing.

10 Q. What you were trying to read was the letter that Luke
11 Ryan had written, right?

12 A. Correct.

13 Q. And you understood he had been in the office on
14 Thursday of the previous week?

15 A. I don't know if I knew that then. I may have. I don't
16 know if I knew that. I understood, at some point, that this
17 was coming from Mr. Ryan's visit; whether it was Thursday, I
18 don't know.

19 Q. All right.

20 A. So I was frustrated. I couldn't open it. I'm at home.
21 I don't have a computer at home.

22 I'm now finding out, via email, and whatnot, that
23 there's allegations we didn't turn something over. So now
24 I'm upset. I'm freaking out, like, you know, what's going
25 on, why wasn't this done. I'm just anxious and upset.

1 Q. And when you come into the office on Monday, is that
2 when you start trying to re-create what had happened?

3 A. Correct. And I'm sure I probably went into the office
4 before Monday to open that document. I know I couldn't open
5 it then, and I couldn't go to the office then -- I don't
6 know why -- I had kids at home, so I don't -- I know -- I
7 don't have a computer at home. I have a work laptop, but it
8 wasn't at home. I couldn't open it, and I was frustrated.
9 So at some point I went in to look at it and then certainly
10 started recreating.

11 Q. All right. Now, during this period of time, Pat Devlin
12 is the person receiving who's the letter and sort of
13 responsible for facilitating this, correct?

14 A. Correct.

15 Q. And do you ask Pat to put everything together so you
16 can get it out the door?

17 A. Yes.

18 Q. And does he do that?

19 A. He starts to do it.

20 Q. And then what happens?

21 A. So at some point in this chain, this timing, I
22 understand -- I learn that what Pat sent out wasn't
23 everything.

24 Q. How do you learn that?

25 A. Because now -- I'm still upset. I'm still anxious.

1 THE WITNESS: So I go over to the other side of the
2 office, Your Honor, where EMC, which is the division where
3 he was, and I go to the evidence room and I look at the
4 boxes. And, what the hell, there's -- I'm sorry, there's
5 all these documents, like, this isn't what went out. And I
6 kind of lost it on Pat at some point. I was upset. And I
7 talked to Cara Krysil I said Cara, please deal with this.

8 Q. (By Ms. West) So did it take some time to clearly
9 harness all of the correct documents to send them out?

10 A. It did.

11 Q. And, ultimately, that second discovery letter went out
12 that you signed, correct?

13 A. Correct.

14 Q. And, again, there is some language in that second
15 discovery letter that you saw that had to do with an
16 obligation to send exculpatory information to DAs. Now, is
17 that another example of you not particularly looking at the
18 law, but just wanting to get it out?

19 A. Yeah, again, I'm not quibbling or thinking about
20 different rules. I'm thinking about, we have this stuff,
21 and if it's effecting someone, it needs to go out.

22 Q. When this all happened, was Ed Bedrosian still in the
23 office?

24 A. No.

25 Q. All right. And were you particularly reporting to

1 anybody?

2 A. No. It was an interesting time. So Attorney General
3 Coakley wasn't in the office every day. So I was reporting
4 to her on some stuff. Sheila was there. Sheila had
5 criminal background, but a lot of stuff I was just dealing
6 with.

7 Q. And this particular one, you knew you didn't have to
8 tell anybody or get permission because you were going to do
9 it, weren't you?

10 A. Correct. Correct. This was a done thing in my mind.
11 Let's get this -- I know at some point I let Sheila know
12 what was going on.

13 (Off the record discussion among Counsel.)

14 Q. (By Ms. West) Just to backup a second.

15 You earlier spoke about your objection to having people
16 come in and inspect the evidence while there's an ongoing
17 investigation?

18 A. Correct.

19 Q. And you explained all sorts of reasons of why that's
20 not a good idea?

21 A. Correct.

22 Q. Now, post plea in 2014, Mr. Ryan filed a motion to
23 inspect the evidence, and did you have any problem with
24 that?

25 A. No. And from our review, for this, I know there was an

1 email, something along the lines of let's be as helpful as
2 possible, but again, control the evidence so it doesn't
3 leave the office or things of that nature, but.

4 Q. Why were you concerned about controlling the office --
5 excuse me, controlling the evidence?

6 A. Well, again, you know, my experience, a case is never
7 over, so --

8 Q. Mr. Verner, did you tell Kris Foster to not to bother
9 to look in Joe Ballou's file?

10 A. No. Never.

11 Q. Did you believe all the materials in this matter had
12 been given to the DAs?

13 A. I did.

14 Q. Did you intentionally not provide relevant and
15 exculpatory material to the defense attorneys who requested
16 it?

17 A. No.

18 Q. Did you ever affirmatively conceal mental health
19 records?

20 A. No. I would never ever, ever, do that. Never.

21 Q. Did you ever have a discussion with anyone in the
22 office about hiding the mental health records?

23 A. No. If I had ever said that to Ed or Sheila or Martha
24 they would of fired me and reported me.

25 If anyone ever said that to me, I would have reported

1 them. I would have -- no -- that's not who I am. That's
2 not how I was brought up. I wouldn't do that.

3 Q. John, your parents worked in the court system as well,
4 right?

5 A. They do.

6 Q. And so you've been exposed to workings of criminal
7 system for a long time?

8 A. Yeah, so my dad was a court officer for 33 years in
9 Malden District Court and then in Middlesex Superior.

10 My mom runs the Middlesex Bar Association. She's not a
11 lawyer, but it's a bar association with -- defense lawyers
12 join.

13 I grew up going to Cambridge, 40 Thorndike. I grew up
14 going to Malden District Court.

15 My wife's a lawyer. She does Child in Need of Services
16 court appointments from CPCS. My friends are lawyers.

17 I would -- my father would kill me if I did this.

18 I would -- my wife would look at me and say, What the
19 hell are you doing.

20 Like, I wouldn't -- I would never ever, ever do that.

21 And I'm sorry to get upset, but for an accusation to be
22 made, I've worked 16 years of my career to have a good
23 reputation and to respect people. And then for someone to
24 say we purposefully hid documents because we didn't want
25 more cases to get dismissed or because we wanted someone to

1 get elected is just nonsense.

2 My wife would kill me.

3 My -- Luke, you can look however you want, all right,
4 but this is the truth.

5 THE COURT: Okay. Mr. Verner, that's enough. That's
6 enough.

7 Any other questions?

8 THE WITNESS: I wouldn't do it.

9 MS. WEST: Thank you. No.

10 THE COURT: All right.

11 **QUESTIONS BY THE COURT**

12 THE COURT: Mr. Verner, your experience as a
13 prosecutor, you probably have, and have you had those
14 occasions where you make discovery, and some lawyer comes
15 and says: Hey, Judge, I never got that. I never got X. I
16 never got Y.

17 In these days they typically, at least out here in the
18 state level, the prosecutor will give you all the discovery
19 and it's got kind of brand new page numbers. It's part of
20 the discovery packet, page 323 of 400, okay.

21 And so when somebody is a pain in the neck and says I
22 didn't X or Y, you are able to go back and say, Judge, this
23 is what I gave them, right?

24 THE WITNESS: Yes.

25 THE COURT: So when this issue first came up and once

1 again some lawyers are complaining they didn't get X, right,
2 just prior to you're having your oh-my-God moment.

3 THE WITNESS: Yes.

4 THE COURT: Somebody must have went and checked to see
5 whether or not they did or did not get this discovery?

6 THE WITNESS: I think we all did our best to recreate.
7 I say we all -- myself, Randy Ravitz, Dean Mazzone.

8 THE COURT: Who came back to you and said, you know, we
9 didn't do it. I checked, and we didn't give them all this
10 stuff.

11 THE WITNESS: I don't -- Your Honor, I don't think it
12 was someone saying that. I think it was a collective we're
13 all working, I think we all figured it out as we were going
14 that this stuff wasn't turned over.

15 THE COURT: Okay. And was it in the Fall of 2014 when
16 you had your oh-my-God moment?

17 THE WITNESS: November of 14, after Mr. Ryan met in our
18 office and then after he wrote the letter to Pat Devlin.

19 THE COURT: Uh-huh. Okay.

20 THE WITNESS: That's the moment.

21 THE COURT: Okay. And when you were asked earlier
22 about that oh-my-God moment, and asked what did you do,
23 first, you -- you thought for a second, and you said, Well,
24 Anne was gone then. Is that because Anne would be the most
25 logical person who would have responsibility to make sure

1 everything was turned over?

2 THE WITNESS: Yes.

3 THE COURT: And that's because why?

4 THE WITNESS: So it's her case.

5 THE COURT: It was her case.

6 And the fact that a State Trooper may have turned over
7 documents to the AG's Office, doesn't mean that they are
8 necessarily turned over to defense lawyer, right?

9 The responsibility lies with the prosecution team, not
10 with the State Police to make discovery.

11 THE WITNESS: Yes. Of course.

12 THE COURT: And tell me what you presently recall about
13 the September of 2013 incident where Kris Foster came out
14 here on a motion to quash and had a run-in with Judge
15 Kinder.

16 What's your memory of your knowledge or your
17 involvement in that particular controversy?

18 THE WITNESS: I didn't know anything about it until
19 this, about a run-in with Judge Kinder. I had no idea Judge
20 Kinder spoke harshly, or that transcript there that was
21 read, I never heard of that until today, Your Honor.

22 THE COURT: So in this whole thing, when did -- what's
23 your present memory of when the phrase, mental health
24 records, came past your eyes or knowledge?

25 THE WITNESS: So, the term itself would have been

1 during the pros memo, prosecution memo.

2 THE COURT: And you wrote, they haven't turned that
3 over yet?

4 THE WITNESS: Correct.

5 THE COURT: And what do you mean by that, they haven't
6 turned this over yet?

7 THE WITNESS: So I'm issue spotting, and I'm pointing
8 out these haven't been turned over yet; meaning these need
9 to go over because that's on the heels of that first letter,
10 which is just the State Police reports.

11 THE COURT: Okay.

12 THE WITNESS: So now Anne, it's Anne's case, and she's
13 going to do the process, the discovery and whatnot.

14 THE COURT: Okay. Directing your attention again back
15 to the Fall of 2014, when people were trying to find out
16 what the heck happened. Do you recall a meeting in which
17 Kris Foster was present?

18 THE WITNESS: I've been -- so Kim asked me about that.
19 I've been -- apparently, there was a meeting. I don't
20 remember specifics. I really don't.

21 THE COURT: Okay. And did Anne Kaczmarek, at any point
22 during this process, tell you that she had turned everything
23 over?

24 THE WITNESS: No. And I didn't ask.

25 And, again, respectfully, that's not something I would

1 of done. I don't go to individual lawyers and ask is the
2 discovery done on that. Not --

3 THE COURT: And when you got to your oh-my-God moment,
4 she had already been gone?

5 THE WITNESS: Correct.

6 THE COURT: And did Kris Foster ever tell you that she
7 told Judge Kinder that everything had been turned over
8 because her bosses told her that everything had been turned
9 over?

10 THE WITNESS: No. Never.

11 THE COURT: Thank you very much.

12 MS. WEST: May I have one question, Your Honor?

13 THE COURT: Sure.

14 **RECROSS EXAMINATION BY MS. WEST**

15 Q. Was Anne Kaczmarek Kris Foster's superior in any way?

16 A. No. Sue Reardon and Randy were.

17 MS. WEST: Okay. Thank you.

18 THE COURT: Okay.

19 MR. RYAN: Briefly?

20 **REDIRECT EXAMINATION BY MR. RYAN**

21 MR. RYAN: Can we go back.

22 Q. (By Mr. Ryan) Mr. Verner, putting up an email from
23 July 21, 2014, it starts with from Steve Gagne to Anne
24 Kaczmarek, cc-ing Beth Lux at 9:35 in the morning where he's
25 advising her that prosecuting this case, I filed a motion to

1 inspect the evidence. And she writes back at 11:29 and says
2 she's going to forward it to her appeals people, mostly
3 because today is my last day at the office.

4 Is that when Anne Kaczmarek left the Attorney General's
5 Office?

6 A. It must be. I have no reason to doubt down that, sir.

7 Q. Okay. And then later that day is when, just looking at
8 the email that she forwarded to Randall Ravitz and then you
9 all had a conversation about whether to oppose my motion to
10 inspect or not, does that sound right?

11 A. Am I on that conversation?

12 I'm not being argumentative, I'm just asking.

13 Q. Sure. Right now here's the conversation with Randall
14 Ravitz and writing to you Anne, but Anne, this on her last
15 day --

16 A. Okay.

17 Q. -- with Dean Mazzone and Cara Krysil and Beth Lux.

18 A. Okay.

19 Q. So you testified earlier about this tips that you got
20 about different substances and that, or pills, and you had
21 indicated that -- you had actually gotten left off of a
22 thread with follow-up. Five days later you ended up having
23 to write say, hey, what's up with the Hampden County missing
24 pills case. That's when Joe Ballou and Robert Irwin both
25 forwarded you this email about the ten extra spells and the

1 2005 cocaine case, correct?

2 A. I'm not doubting you, I just -- I don't know. If it's
3 there, then certainly, yes.

4 Q. Okay. Now, you got left off that thread. I'm showing
5 you what Anne Kaczmarek wrote to Joe Ballou at 1/24, if you
6 can take a look.

7 THE WITNESS: May I, Your Honor?

8 THE COURT: Sure.

9 THE WITNESS: I'm sorry. What time?

10 Q. (By Mr. Ryan) 1/24, January 24, 2013, at 9:47 a.m.

11 What did she write to Joe about this?

12 MS. WEST: I don't want to be difficult except he's not
13 on this email.

14 MR. RYAN: Right.

15 MS. WEST: It's Anne to Joe and Anne's coming tomorrow.

16 THE COURT: I understand that.

17 MS. WEST: I object.

18 THE COURT: Overruled.

19 Question.

20 Q. (By Mr. Ryan) Can you just read what she wrote to Joe
21 Ballou?

22 A. Just talked to ADA Dillon about --

23 Q. I'm sorry. That's what Joe Ballou wrote to her.

24 If you can look at the very top one where Anne wrote
25 back.

1 A. Please don't let this get more complicated than we
2 thought. If she was suffering from back injury, maybe she
3 took some oxies.

4 Q. And just to be clear, that's not something that Anne
5 Kaczmarek ever told you she had communicated to Joe Ballou
6 as to how to deal with this information from Hampden?

7 A. I don't -- I don't -- no.

8 Q. And you would not have thought that that was -- if
9 somebody's dealing with a back injury, that entitles them to
10 take some oxies if they are working at a drug lab?

11 A. I'm sorry. Is your question if someone has a back
12 injury --

13 THE COURT: That's okay. I'm going to sustain it
14 not -- without a standing objection.

15 (Laughing)

16 MR. RYAN: I will stop standing and sit down.

17 THE COURT: All right. Thank you.

18 Thank you, Mr. Verner.

19 THE WITNESS: Thank you, Your Honor.

20 Madam Clerk. (Indicating)

21 (The witness stepped down.)

22 THE COURT: Nine o'clock.

23 (The Court exited at 4:17 p.m.)

24 (* * * * *)

25

C E R T I F I C A T I O N

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