COMPLAINT AND REQUEST FOR INVESTIGATION

The undersigned respectfully request that the Massachusetts Board of Bar Overseers conduct an investigation into whether attorney Anne Kaczmarek violated one or more of the Massachusetts Rules of Professional Conduct while serving as an Assistant Attorney General for the Commonwealth of Massachusetts, with the supporting grounds set forth below.

INTRODUCTION

On June 26, 2017, the Superior Court Justice Richard J. Carey issued a 127-page Memorandum, Decision and Order in *Cotto et. al.*, (Ind. No. 2007-700), following a six-day evidentiary hearing and the Court's review of thousands of pages of documents, focusing in significant part on the Attorney General's Office's handling of the fallout from the Amherst laboratory scandal involving former chemist Sonja Farak. In 2014, Farak pled guilty to ten criminal charges, including illegal possession, tampering, and theft of narcotics from the laboratory while an employee. A court-ordered investigation of Farak and the lab would later establish that Farak perpetrated similar criminal conduct for more than eight years before her arrest in January 2013. According to one estimate, Farak may have helped prosecutors secure more than 8,000 drug-related convictions—untold numbers of which may have involved evidence she mishandled, contaminated, or fraudulently reported in laboratory paperwork.[1]

At the heart of Judge Carey's June 2016 Memorandum are a series of findings of fact and

[1] *See* Affidavit of Christopher K. Post 1-2, 7-8, *Bridgeman v. Dist. Attorney*, No. SJ-2014-005 (Mass. June 29, 2016) (estimating that there are 8,411 adverse drug dispositions for which Farak was the chemist, and that there were 18,303 adverse drug dispositions involving the Amherst Lab during Farak's tenure), available at https://aclum.org/wp-content/uploads/2015/06/2016_06_29-CPCS-affidavits.pdf, pg. 136. An estimate was necessary because there is no "Farak list" of impacted defendants to whom prosecutors have provided notice.

conclusions of law regarding "egregious misconduct" committed by former Assistant Attorney General Anne Kaczmarek. *See* Memorandum, Decision, and Order (attached hereto as Appendix A) ("Carey Mem.), at 122. Kaczmarek had previously been assigned to prosecute another disgraced Commonwealth chemist, Annie Dookhan, who in September 2012 had been arrested and charged with a widespread pattern of falsifying drug test results at the Hinton laboratory. *Id.* at 23. Farak was arrested and charged on Saturday, January 19, 2013, and that same weekend, Kaczmarek was assigned to prosecute the Farak case. *Id.* at 29. As AAG on the case, "Kaczmarek was accorded significant deference in leading the Farak prosecution. She had the trust of her superiors and she circumscribed the scope of [the lead detective]'s investigation into Farak's misconduct." *Id.* at 42. In this capacity, Kaczmarek was also entrusted with the critical task of investigating and promptly disclosing to all impacted parties all relevant information about the scope and duration of Farak's wrongdoing—including which drugs Farak had been abusing and stealing from the lab, and for how many months or years her criminal conduct had gone on. But in what Judge Carey found were a series of actions specifically intended to limit the fallout from the Farak scandal, Kaczmarek obstructed a full investigation into the scope of Farak's drug use, and hid patently exculpatory information from the court and defense counsel.

Indeed, so "egregious" was the misconduct committed by Kaczmarek and at least one of her former colleagues (former Assistant Attorney General Kris Foster, the subject of a parallel Complaint being filed by the undersigned) that Judge Carey found that it amounted to "fraud upon the court." *Id.* at 67, 69. He proceeded to impose the most sweeping remedy available—dismissal of the Commonwealth's indictments with prejudice—as to six of the individual defendants with cases pending before him. *Id.* at 69, 122, 125-27. Judge Carey found that such

a sanction, while extraordinarily rare, is justified here because its "ramifications" were "nothing short of systemic." *Id.* at 70. He also found that such a drastic sanction was warranted to deter official misconduct in future cases. *Id.* at 77, 93.

Judge Carey's Memorandum constitutes an important, and overdue, official recognition of the prosecutorial misconduct that compounded the considerable harm caused by Farak's actions. But it should not end there. For while the judiciary has the authority to belatedly grant post-conviction relief to certain defendants who may have been wrongly convicted and/or incarcerated as a direct result of a prosecutor's malfeasance, Judge Carey's order is necessarily limited to the relief requested by the individual defendants with cases pending before him, and does nothing to hold Kaczmarek personally accountable. Indeed, nearly three years after evidence emerged that she deliberately withheld evidence and obstructed investigation on a matter of enormous public importance, Kaczmarek remains not only a member of the Bar in good standing, but she continues to hold a position of significant responsibility in the Commonwealth, as the Assistant Clerk Magistrate for the Suffolk Superior Criminal Clerk's Office.

Accordingly, the undersigned[2] – each of whom appeared as *amici* in the *Cotto* proceedings before Judge Carey—respectfully request that the Board conduct a prompt and thorough investigation of Kaczmarek's conduct in these cases, as outlined in Judge Carey's Memorandum and documented in the underlying record, and impose an appropriate sanction. (Further information on the backgrounds and interests of the signatories to this Complaint are attached as Appendix B.) To assist in that process, this Complaint summarizes the key

[2] Further information on the backgrounds and interests of the undersigned is attached as Appendix B.

portions of the Memorandum and record as they relate to Kaczmarek's actions, and discusses the grounds for discipline under each of the applicable Massachusetts Rules of Professional Conduct.

JUDGE CAREY'S FINDINGS OF FACT

Judge Carey's Memorandum contains an exhaustive history of Farak's criminal conduct while a state employee; Kaczmarek's own role in the Commonwealth's response to the Amherst laboratory scandal; and Kaczmarek's testimony before the Court at the 2016 evidentiary hearing before Judge Carey. For the Board's convenience, the history and findings most relevant to this Complaint are briefly stated here.

- Farak was arrested on January 19, 2013, and charged with narcotics possession and tampering with evidence. Appx. A. (Carey Mem.), at 29. Farak came to be under police surveillance after her colleagues discovered evidence that she had tampered with missing cocaine samples at the lab; and the day before her arrest, Farak smoked crack cocaine in her car while on a break from testifying as a Commonwealth's witness. *Id.* at 22.

- In connection with her arrest and an accompanying search warrant, detectives seized hundreds of papers from Farak's car, which were later inventoried and examined for evidence of criminal conduct. *Id.* at 27.

- Four days after Farak's arrest, Kaczmarek was informed that a Springfield officer had reported serious discrepancies in the inventory of more than fifty oxycodone pills that had been given to Farak for testing in March 2012. In a "dismissive" email, Kaczmarek wrote back, "Please don't let this get more complicated than we thought. If she was suffering from back injury, maybe she took the oxies." When asked about it at the 2016 hearing, Kaczmarek testified that she feared that if Farak's misconduct turned out to be more "complicated" (involving substances beyond cocaine, and for more than a "few months" before her arrest), it would create an "avalanche of work" for "us" (the Commonwealth's attorneys and investigators). *Id.* at 34-35.

- On February 14, 2013, within weeks of Farak's arrest, the lead detective on the case, Sergeant Joseph Ballou, provided Kaczmarek and others at the AGO with

the most critical and relevant of the documents seized: select pages from "mental health worksheets" dating back to December 2011 (the "Worksheets"). In them, Farak, who was undergoing treatment for her substance addiction, had contemporaneously recorded her own misconduct, as part of her "homework" for her treatment program. Although the Worksheets did not list the year in which Farak made each entry, the evidence contained within—such as the day of the week, and events like a New England Patriots game on Saturday, December 24th—fully accorded with the 2011 (not 2012) calendar, *i.e.,* nearly thirteen months before Farak's arrest. (In that same communication, Ballou provided the AGO with copies of a 2011 NFL schedule and news articles regarding other officials investigated or charged with drug crimes in 2011, some of which Farak had annotated in her own handwriting.) *Id.* at 27-29.

- These Worksheets and articles were emailed to Kaczmarek under the pointed header "Farak admissions." In his cover email, Ballou wrote, "Here are the forms of the admissions of drug use that I was talking about." *Id.* at 38. Thus, by February 2013, "It was clear that such evidence constituted important exculpatory evidence for the drug lab defendants and that such evidence supported a finding that the scope of Farak's conduct warranted further investigation." *Id.* at 38.

- The Worksheets were directly referenced in the AGO's prosecution memo for the Farak case, which Kaczmarek herself drafted in March 2013. And they were raised in internal AGO emails exchanged in the summer and fall of 2013 for the very purpose of determining what exculpatory information had yet to be disclosed to the District Attorneys and potentially affected defendants. *Id.* at 37-38.

- In February 2013, Kaczmarek sent an email to then Senior Counsel at OIG, Audrey Mark, a friend of hers, who was leading an investigation at the Hinton lab (where the Annie Dookhan misconduct had occurred). Kaczmarek wrote, "Audrey--when they ask you to do this audit-say no. Actually, it's very different than [the Hinton lab in Jamaica Plain]." In doing so, Kaczmarek improperly discouraged an investigation into the Amherst drug lab. *Id.* at 37.

- By summer 2013, Kaczmarek had personally decided that the AGO was not going to give the mental health worksheets to the drug lab defendants, and informed Farak's lawyer of her decision. *Id.* at 42.

- On August 22, 2013, Sergeant Ballou and Kaczmarek received subpoenas duces tecum for their own testimony, and for production of materials related to the Farak investigation—and, specifically, the scope and duration of Farak's drug use on the job. These subpoenas were served in connection with motions brought by defendants whose drug certificates Farak had signed prior to her arrest. All of these motions were pending in front of Superior Court Regional Administrative

Justice C. Jeffrey Kinder, who had been specially assigned to handle the "first wave" of cases brought by defendants concerned that their convictions may have been tainted by Farak's misconduct. *Id.* at 32, 44; Exh. 199 (mot. to quash).

- Kaczmarek intentionally gave Foster, at least one ADA, and her superiors the misimpression that everything in Sergeant Ballou's file had been turned over to the DAs' offices. *Id.* at 47. Kaczmarek knew that the mental health worksheets were directly relevant to the issue of the nature and scope of Farak's drug use. Yet she also knew that the AGO had not turned them over, and had no intention of doing so. *Id.* at 69-70.

- In her 2016 hearing testimony, Kaczmarek claimed that when the AGO was litigating its response to the subpoenas in the summer and fall of 2013, she simply "forgot" that the Worksheets had not yet been turned over. Judge Carey found this testimony to be flatly incredible, given the "repeated communications [about the worksheets] to which Kaczmarek was a party" in 2013. Instead, Kaczmarek was merely "feigning that she forgot about the mental health worksheets" when called upon to justify her earlier failure to produce them. *Id.* at 69.

- Without checking for herself that everything had been turned over, and based on what Kaczmarek had told her, Kaczmarek's colleague Kris Foster repeatedly represented to Judge Kinder, in written submissions and in open court, that "everything" in the AGO's possession regarding the scope of Farak's drug use had been turned over to the DAs' offices and the defendants with pending claims. *Id.* at 54.

- Thus, compounding the AGO's initial failure to disclose the worksheets, "Foster and Kaczmarek piled misrepresentation upon misrepresentation to shield the mental health worksheets from disclosure to the drug lab defendants." *Id.* at 57.

- These misrepresentations also included "patently false" assertions to Judge Kinder in October 2013 that the evidence seized from Farak's car was "irrelevant" to any of the defendants' pending claims. This false statement, while made on the record by Foster, "originated with Kaczmarek," since Foster had not reviewed the file herself, whereas Kaczmarek had primary responsibility for the AGO's prosecution of Farak, had personally received the Worksheets from Ballou, and controlled access to the seized evidence. *Id.* at 56-57.

- On November 4, 2013, based on "the misrepresentations made by Foster and the limited evidence before him," Judge Kinder made a factual finding that Farak's drug abuse and other misconduct did not begin until July 2012. The Court denied post-conviction relief to all defendants whose samples were tested by Farak before that date—including at least one defendant (Rolando Penate) whose

certificate was signed by Farak on one of the *very same dates* that she had admitted, in the worksheets seized by Sgt. Ballou, that she was abusing drugs at the lab. *Id.* at 61, 93.

- The truth about the scope of Farak's criminal misconduct finally came to light in November 2014, after Kaczmarek had left the AGO's office, and only because of the tireless efforts of defense lawyers who remained suspicious of the AGO's claims that Farak's drug use was limited to just a few months. The Worksheets discovered by one of these attorneys (who finally secured an order permitting him to inspect the evidence from Farak's car after Farak's pled guilty) revealed that Farak used drugs on the job at least six months before the date Judge Kinder found evidence that Farak had engaged in criminal conduct. *Id.* at 62-63.

- Years later, after several defendants appealed Judge Kinder's orders to the Supreme Judicial Court and more thorough investigation of the Amherst lab and Farak's drug abuse was ordered, the Commonwealth finally acknowledged that Farak's misconduct had transpired for more than *eight years*. As Judge Carey found, the record now contains a wealth of credible evidence that Farak was under the influence of narcotics "on almost a daily basis" from 2004 until her arrest in January 2013, and that by 2009, and possibly earlier, she was stealing and consuming suspected drug samples from the lab for her personal use. *Id.* at 21.

The foregoing history led Judge Carey to make a series of findings about the intentionality, scope, and systemic effects of Kaczmarek's misconduct of the sort that are rarely, if ever, seen in written judicial opinions. First, he found that the conduct of both Kaczmarek and her colleague Kris Foster was "reprehensible, and magnified by the fact that it was not limited to an isolated incident, but a series of calculated misrepresentations." *Id.* at 70. Second, the Court placed great weight on the repeated violations committed by Kaczmarek and Foster, and the "systemic" harm that resulted in the context of a major lab scandal. *Id.* In this regard, Judge Carey emphasized that the conduct (1) "was perpetrated in part through intentional misrepresentations to the court and was pursued to conceal the extent of underlying misconduct by another government actor, Farak," and (2) and was not an isolated act of malfeasance in an individual case, but "continued for a prolonged period, in violation of many drug lab defendants'

constitutional rights." *Id.* at 77. Further, as to Kaczmarek specifically, Judge Carey found that "the misrepresentations did not stop in 2013," as she proceeded to give false testimony at the evidentiary hearing before him when asked to explain her earlier failure to disclose the worksheets. *See id.* at 69 ("I do not credit Kaczmarek's 2016 testimony . . . feigning that she forgot about the mental health worksheets and erroneously assumed that they had been turned over"); *id.* at 69-70 (detailing the substantial record evidence contradicting Kaczmarek's claim).

GROUNDS FOR INVESTIGATION AND DISCIPLINE

The facts found by Judge Carey are well-supported by the underlying record. In certain respects, the record establishes grounds for sanctions by the Board of Bar Overseers against the responsible government attorneys beyond those that Judge Carey's lengthy opinion in *Cotto et. al.* addresses. For the record makes clear that more than just providing cause for extraordinary remedies in the post-conviction context, Kaczmarek's conduct violated several well-established provisions of the Massachusetts Rules of Professional Conduct ("MRPC" or "Rules"). These include the following:

- MRPC 3.4, requiring fairness to opposing party and counsel;
- MRPC 4.1, requiring truthfulness in statements to others; and
- MRPC 3.8, imposing additional ethics requirements on prosecutors.

Such conduct would be grounds for discipline in any case. But in a case of this magnitude—involving issues of government accountability and public trust that may have impacted thousands of defendants, most of whose claims are only beginning to be heard more than four years after Farak's arrest—they warrant a swift and proportionate sanction.

I. Kaczmarek Unlawfully Obstructed the Farak Defendants' Access to Evidence and Concealed Documents Having Clear Evidentiary Value in Violation of MRPC 3.4 , and Made False Statements in the Course of This Obstruction in Violation of MRPC 4.1

Judge Carey's Memorandum includes unsparing findings that Kaczmarek, along with her former colleague Foster, engaged in a series of intentional actions designed to obstruct the Farak defendants' access to critical evidence from the investigation. Both of these Assistant Attorneys General, he found,

> tampered with the fair administration of justice by deceiving Judge Kinder and engaging in a pattern calculated to interfere with the court's ability to impartially adjudicate discovery in the drug lab cases and to learn the scope of Farak's misconduct. Kaczmarek and Foster's misconduct improperly influenced and distorted Judge Kinder's fact finding and legal conclusions and it unfairly hampered the defendants' presentation of defenses. Their conduct constitutes a fraud upon the court.

Appx. A. (Carey Mem.), at 69.

The specific actions taken (and not taken) by Kaczmarek herself, as detailed in Judge Carey's Memorandum and additional portions of the record below, constitute manifest violations of MRPC Rules 3.4(a) and 4.1(a). Kaczmarek violated these rules when she (1) intentionally and unlawfully obstructed the Farak defendants' access to the mental health worksheets seized from Farak's car ("the Worksheets")—which did not just have "potential evidentiary value," *see* Rule 3.4(a), but were plainly relevant and exculpatory, and (2) in the course of this obstruction, made a series of false statements about the nature and alleged prior disclosure of the evidence to her colleagues, at least one District Attorney, and consequently the Farak defendants.

A. As the Prosecutor in Charge of the Farak Investigation, and Whose Colleagues Relied on Her for Information Regarding the Existence and Disclosure of Exculpatory Evidence, Kaczmarek Had a Duty of Fairness and Candor to All Impacted Parties Under Rules 3.4(a) and 4.1(a)

Kaczmarek's role as chief prosecutor in Farak's criminal case brought with it important additional responsibilities as the AGO and the courts attempted to assess the potentially widespread damage caused by Farak's misconduct. As the primary AGO contact with Sgt. Ballou and others in law enforcement investigating Farak, Kaczmarek's colleagues relied upon her to provide them with a full and fair accounting of all exculpatory evidence in the Commonwealth's possession. They relied on her so that the AGO could (1) provide that information to the DAs from the relevant jurisdictions, who in turn would provide it, as *Brady* material, to the impacted defendants, and (2) advise the courts and the "first wave" of Farak defendants whether all such evidence had in fact been disclosed as required, or present any undisclosed but potentially privileged information to the court *in camera* for a ruling. *See* Appx. A. (Carey Mem.), at 32, 51 (discussing AGO colleagues' reliance on Kaczmarek's review of file and her statements whether material had been disclosed or not). In addition, in August 2013, Kaczmarek was personally served with subpoenas to produce relevant documents, and to appear herself to give testimony, in connection with several defendants' efforts to determine the duration of Farak's drug use. *See id.* at 44-45; Exh. 199 (Foster Mot. to Quash Kaczmarek subpoena).

Both Rule 3.4 and Rule 4.1 provided clear ethical guidelines for Kaczmarek in carrying out these duties. First, Rule 3.4(a) holds that a lawyer shall not "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material

having potential evidentiary value." *See* Rule 3.4(a). And if the plain language of the Rule were not clear enough, the Comment explains why the "competitive[]" nature of the adversary system does not justify the improper obstruction of access to evidence, given the systemic consequences that can result: "Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. *Id.*, Comment [1], [2]. *See also Mass. Inst. of Tech. v. Imclone Sys., Inc.*, 490 F. Supp. 2d 119, 126 (D. Mass. 2007) (holding that attorney who deprived adversary of a cooperating witness violated Rule 3.4, among others, by prejudicing plaintiff's ability to prosecute the litigation); *In re Munroe*, No. BD-2010-054, 2010 WL 3058195, at *3 (Ma. St. Bar. Disp. Bd. July 21, 2010) (finding a violation of MRPC 3.4(a) when attorney impeded administration of an estate by obstructing the special administrator's access to the business premises and records and interfering with her effort to sell the business).

MRPC Rule 4.1 also governed Kaczmarek's conduct. In addition to their duty of candor to the tribunal (*see* MRPC Rule 3.3), lawyers have a duty of truthfulness to other parties and individuals. According to Rule 4.1(a), "In the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person." Comment [1] to Rule 4.1 further provides that "[m]isrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements."

The courts have also made clear that attorneys "may not permissibly mislead or intentionally make false statements, particularly knowing full well that third parties or opposing

counsel will rely on such assertions—here, a promise—to their detriment." *Nova Assignments, Inc. v. Kunian*, 77 Mass. App. Ct. 34, 45 (2010) (Brown, J., concurring) (noting that, if plaintiff proves its allegation that its law firm detrimentally relied on defendant attorney's misrepresentations, the attorney would also be in violation of Rule 4.1); *In re Malden Mills Indus., Inc.*, 361 B.R. 1, 8 (Bankr. D. Mass. 2007) (finding a violation of Rule 4.1(a) because debtor and agent sought to have creditor trust assent to a motion for a final decree when they knew that they would immediately refile in a different venue, and by offering a misleading, or at least an incomplete, explanation in response to a direct question).

B. Kaczmarek Unlawfully Obstructed the Farak Defendants' Access to the Evidence Seized from Farak's Car, and Breached Her Duties of Candor and Fairness to Numerous Parties

From the time she first received the "FARAK admissions" email from Sgt. Ballou in February 2013, Kaczmarek repeatedly, unlawfully, and successfully (until her departure from the AGO in November 2014) blocked the defendants' access to the Worksheets and other evidence from Farak's car.

Judge Carey's Memorandum examines this history in detail, but certain actions by Kaczmarek deserve particular emphasis. First, Kaczmarek personally researched and authored the Prosecution Memo in March 2013 which discussed the Worksheets and conceded that there was likely no legal basis for the AGO to assert a privilege in those documents, and at no time did she become aware of any grounds for the AGO to claim such a privilege. *Id.* at 39, 69. Second, after she deliberately excluded the Worksheets from her presentation to the grand jury in March 2013 (with her supervisors' permission, but only "out of an abundance of caution"), one of her supervisors made a notation on her Prosecution Memo that the Worksheets had "NOT [been]

turned over to DA's Office yet" (emphasis in original)—putting her on notice that the disclosure and privilege issues would need to be resolved in the future, since the "extent of Farak's drug tampering remained an unanswered question" for the impacted parties. *Id.* at 39; Exh. 163. She then made a deliberate decision not to provide the Worksheets to the drug lab defendants—assuring Farak's attorney prior to Farak's plea that they would not be disclosed. *Id.* at 42.

Third, in the ensuing months, Kaczmarek repeatedly and falsely assured attorneys at the AGO that all evidence conceivably "relevant" to the critical issue of the duration of Farak's drug use had already been disclosed, when she knew that the Worksheets had not. *See* Appx. A. (Carey Mem.), at 43, 53 (discussing misstatements to colleagues at AGO in meetings regarding responses to subpoena). These misstatements were documented not just through the sworn recollections of her colleagues, but through correspondence. For example, in September 2013, when attorney Luke Ryan asked for permission to visually inspect the evidence seized from Farak's car, Kaczmarek directed Foster in an email to reject the request, because the evidence was "not relevant to his case[,]" a statement Foster then relayed to Ryan. *See id.* at 56; Exh. 214, 215. Kaczmarek's email to Foster also revealed a surprising animus towards Ryan ("I really don't like him")—an attorney whom she had never met, and whose only apparent offense was to diligently pursue evidence of Farak's drug use to investigate his client's potential defenses.

Kaczmarek also falsely assured at least one local prosecutor, Berkshire ADA John Bosse, that all relevant discovery had already been provided to his office, when it had not. ADA Bosse then sent a letter to defense counsel relaying Kaczmarek's representation and opposing further discovery by the drug lab defendants on that basis. *See* Appx. A. (Carey Mem.), at 47 & 47 n.31; Exh. 178, 179. And fourth, Kaczmarek was the direct source of an egregious misstatement

that Foster made to Judge Kinder at an October 2013 hearing on defendant Penate's motion: that the evidence from Farak's car was "irrelevant" to the Penate case. *See* Appx. A. (Carey Mem.), at 57 (quoting hearing transcript, and finding, "This statement, which originated with Kaczmarek, was patently false.")

As Judge Carey found, Kaczmarek's failure to turn over the mental health worksheets and other evidence was not inadvertent. In fact, "Kaczmarek knew that the mental health worksheets were exculpatory admissions by Farak, that the drug lab defendants were entitled to them, that the AGO had not turned them over to the drug lab defendants, and that it had no intention of doing so." Appx. A. (Carey Mem.), at 69-70. Thus, Kaczmarek intentionally misled her colleagues, ADA Bosse, and others by saying that all relevant discovery had been turned over, in violation of Rule 4.1.[3] Through this "pattern" of misstatements and nondisclosure, Kaczmarek "managed to withhold the mental health worksheets through deception," Appx. A. (Carey Mem.), at 69, and engaged in precisely the sort of unlawful concealment of evidence that is proscribed by Rule 3.4(a).

II. Kaczmarek Violated Rule 3.8 by Failing to Disclose Farak's Worksheets, and by Failing to Conduct a Minimally Adequate Investigation Into the Actual Dates of Farak's Criminal Conduct

[3] There appears to be no authority specifically addressing whether statements an attorney makes to colleagues inside the AGO or others who are part of the prosecution "team" are considered statements to "third parties" for purposes of Rule 4.1(a). However, given the extent to which Foster's misstatements to her colleagues were directly relied upon by other prosecutors, and in turn led those attorneys to convey patently false information to the court and numerous defendants, there would seem to be strong grounds to apply the Rule here. For example, as discussed *infra*, Judge Carey found that Kaczmarek was the direct source of an egregious misstatement that Foster made to Judge Kinder at an October 2013 hearing on defendant Penate's motion. *See* Appx. A. (Carey Mem.), at 57. She also falsely told Berkshire ADA John Bosse that all relevant discovery from the Farak investigation had been disclosed to his office, leading ADA Bosse to oppose certain defendants' discovery requests on an erroneous factual premise. *Id.* at 47.

Beyond the disclosure duties imposed on all attorneys under Rules 3.4 and 4.1 (discussed *supra*), prosecutors have special obligations of their own under MRPC Rule 3.8. In particular, Rule 3.8(d) provides that the prosecutor in a criminal case must make timely disclosure to the defense of "all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense," and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.[4]

Judge Carey's findings and the underlying record make clear that Kaczmarek violated Rule 3.8 ("Special Responsibilities of a Prosecutor") in at least one, if not two, respects. First, because there is no question that she received and reviewed the Worksheets and other documents (such as the news articles from 2011) seized from Farak's car—which were plainly exculpatory as to numerous Farak defendants—she had an ethical obligation to timely disclose them under Rule 3.8(d), but failed to do so. Second, Rule 3.8(g) barred Kaczmarek from "intentionally avoid[ing] the pursuit of evidence because the prosecutor believes it will damage the prosecution's case or aid the accused." Because the record contains considerable evidence that Kaczmarek actively sought to limit the investigation into Farak's own conduct and the broader systemic issues at the Amherst lab that allowed it to go undetected for years, in order to

[4] Legal academics have also discussed the scope of prosecutors' ethical obligations as well as proposed changes to the ethics rules to protect defendants' rights. *See generally, e.g.*, Hon. Emmet G. Sullivan, *Enforcing Compliance with Constitutionally-Required Disclosures: A Proposed Rule*, 2016 Cardozo L. Rev. DeNovo 138 (advocating that Fed. R. Crim. P. should be amended to explicitly incorporate constitutionally required prosecutorial disclosures); Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 Wash. L. Rev. 35 (2009) (arguing that, when a defendant's factual innocence is in question, there should be a fuller realization that prosecutors should be "ministers of justice" in the post-conviction context); Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 Ohio St. J. Crim. L. 467 (2009) (discussing prosecutors' affirmative obligations when new evidence is discovered that a convicted defendant might be innocent).

minimize the resulting harm to the government's existing convictions, she may fairly be said to have violated Rule 3.8(g). Even if the Board accepts her dubious claim that she did not immediately realize, upon receiving the Worksheets, that Farak used illegal drugs prior to the summer of 2012, Rule 3.8(g) required her to do far more than assume that such evidence supported what she called "working theory" of the case, *see* Tr. VI, at 126:23-127:1 (Kaczmarek), without even a cursory investigation into the dates reflected in those key documents.

A. The AGO and the DA's Office Were On the Same "Prosecution Team" for the Purposes of the Farak Prosecution and Related Cases; Thus, Under Rule 3.8(d), Kaczmarek was Obligated to Disclose All Evidence Known to Her That Tended to Negate the Farak Defendants' Guilt or Mitigate Their Alleged Offenses

As a preliminary matter, Rule 3.8(d)'s disclosure requirement clearly applies to Kaczmarek even though she was assigned to prosecute Farak, not the individual "Farak defendants." This duty arises from her role as a senior attorney at the AGO, as well as the fact that she was personally subpoenaed to produce documents and appear for testimony in the defendants' cases. Thus, she was intimately involved in the process of ensuring that all exculpatory and relevant evidence was disclosed to them, and had an obligation to fulfill both her own and the AGO's legal and ethical duties in that regard.

As Judge Carey found, *see* Appx. A (Carey Mem.), at 122-23, the AGO, including Kaczmarek, had a duty to disclose evidence that was exculpatory as to defendants being prosecuted by county DAs because they were members of the same "prosecution team." A prosecutor's obligations extend to material information in the possession or control of members of his or her staff and of any others who have participated in the investigation or evaluation of the case, and who either regularly report or with reference to the particular case have reported to

his or her office. *See Commonwealth v. Sleeper*, 435 Mass. 581, 605 (2002); *see also* 30A Mass. Prac., Crim. Prac. & Proc. § 26:21. It is also well-settled that the individual prosecutor has an affirmative duty to learn of any favorable evidence known to other persons acting on the government's behalf in the case, including the police. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995); *Strickler v. Greene*, 527 U.S. 263, 281 (1999); *Commonwealth v. Daniels*, 445 Mass. 392, 403 (2005). Indeed, "[w]hen any member of the prosecution team has information in his possession that is favorable to the defense, that information is imputable to the prosecutor." *Mastracchio v. Vose*, 274 F.3d 590, 600 (1st Cir. 2001) (citing *Kyles* 514 U.S. at 437 (1995)).

In addition—and critically—the AGO is the Commonwealth's chief law officer and "has a common law duty to represent the public interest." *See Sec'y of Admin. & Fin. v. Attorney General*, 367 Mass. 154, 163 (1975) (citations omitted); *Commonwealth v. Silva*, 448 Mass. 701, 706 n.6 (2007). The AGO has a duty to "consult with and advise district attorneys in matters relating to their duties." G.L. ch. 12, § 6. Finally, if the AGO appears in any case, it has control of such cases. *Id.* § 27.

Even assuming those special responsibilities do not make the AGO part the "team" in a typical criminal case prosecuted by a District Attorney, the AGO and, in extension, Kaczmarek surely were part of those teams in the specific context of the Farak investigation. Kaczmarek knew the AGO was prosecuting a state chemist who tampered with evidence; that Farak's misconduct would tend to exculpate other defendants; and that DAs were *relying on the AGO* to pass on that evidence. The DAs did not have direct access to Farak discovery; for that reason, they asked the AGO in writing to confirm that all such information had been provided to them. Tr. II, at 159:21-160:4 (Flannery); Exh. 177-79, 233. The AGO even set up a mechanism for

sending Farak evidence to the DAs. In addition, senior AGO attorneys have affirmed that they were at the very least under ethical obligations to turn over Farak-related evidence to the DAs. *See* Tr. V, at 211:20-25, 222:14-21 (Verner); Tr. VI, 58:16-59:2 (Mazzone).

In other respects, the AGO also behaved as though it and the DAs were on the same team for purposes of the Dookhan and Farak scandals. For example, Kaczmarek asked a Suffolk County ADA for an opposition to a motion for post-conviction relief in the Dookhan case and subsequently shared it with a Berkshire County ADA opposing a motion for post-conviction relief in a Farak case. *See* Tr. VI, at 116:7-20 (Kaczmarek); Exh. 233. And the record demonstrates that top AGO attorneys believed that they were under clear ethical obligations to turn over Farak-related evidence to the DAs. Tr. V, at 211:20-25, 222:14-21 (Verner); Tr. VI, 58:16-59:2 (Mazzone).

It should be noted that Rule 3.8 was amended in April 2016 to specify disclosure responsibilities where a prosecutor finds evidence that potentially exculpates a defendant being prosecuted by a different office. *See* MRPC 3.8(i). Comment [7] to Rule 3.8 provides that "Paragraph (i) applies to new, credible, and material evidence regardless of whether it could previously have been discovered by the defense. The disclosures required by paragraph (i) should ordinarily be made promptly."

But Rule 3.8(i) is not necessary to establish Kaczmarek's duty to disclose evidence that tended to exculpate Farak Defendants. Under the specific circumstances of the Farak investigation, the AGO was part of the prosecution "team," and that included the DA's offices who had charged the individual Farak defendants in cases prior to and after Farak's arrest. *See* Appx. A (Carey Mem.), at 71, 105. Indeed, in interpreting Rules in existence before Rule 3.8(i),

the SJC made clear that the Commonwealth has a specific, affirmative duty to learn of and disclose exculpatory evidence in connection with prosecuting drug lab misconduct cases—including Farak's. This duty extended not only to defendants in a pre-trial or pre-plea posture, but those who had already been convicted based on Farak's testing:

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

Appx. A. (Carey Mem.), at 71 citing *Ware*, 471 Mass. at 95 (emphasis added); *cf. Bridgeman II*, 476 Mass. at 315 ("[T]he government bears the burden of taking reasonable steps to remedy [egregious] misconduct. . . . Those reasonable steps include the obligation to timely and effectively notify the defendant of egregious misconduct affecting the defendant's criminal case."); *Ware*, 471 Mass. at 95 ("[T]he duties of a prosecutor to administer justice fairly, and particularly concerning requested or obviously exculpatory evidence, go beyond winning convictions.") (citing *Commonwealth v. Tucceri*, 412 Mass. 401, 402–403 (1992) & MRPC 3.8(d)).

In the proceedings before Judge Carey, current counsel at the AGO asserted that at the time of the original investigation, the AGO had no obligation to turn over the Worksheets to the DAs—a position that Judge Carey found to be "patently baseless" and "at odds with the fundamental principles of fairness." Appx. A (Carey Mem.), at 68. In addition, the Court found "equally groundless" the AGO's assertion that it had a good faith basis for believing the Worksheets were privileged, since Kaczmarek herself noted in her prosecution memo that case

law suggested they were not. *Id.* at 68-69.

Under these circumstances, Kaczmarek had a constitutional and ethical obligation to investigate and to disclose exculpatory evidence to the DAs or to Farak Defendants themselves. As set forth below, by failing to disclose the Worksheets when Kaczmarek knew about them and after she was unable to find any legal support for a claim of privilege, Kaczmarek violated MRPC Rules 3.4 and 3.8.

B. Beginning in February 2013, Kaczmarek Was Aware of the Worksheets and Other Relevant, Exculpatory Evidence Seized from Farak's Car, But Repeatedly and Deliberately Failed to Disclose This Evidence

Here, there is no dispute that Kaczmarek knew (1) of the Worksheets' existence and (2) that the Worksheets contained *direct admissions* by Farak regarding her criminal conduct, for at least 18 months before they were finally disclosed. Appx. A. (Carey Mem.), at 37-38. Yet she did not disclose them to anyone outside the AGO (including the DAs themselves) upon receipt of Ballou's email, which emphasized that the attachments reflected the "admissions of drug use" by Farak that he had previously relayed to Kaczmarek verbally. *Id.* at 38; Exh. 205. Nor did she disclose them even after she conducted research for her Prosecution Memo in March 2013 and determined that there appeared to be no authority to support a claim of privilege. *Id.* at 39.

Kaczmarek also had multiple opportunities to disclose the Worksheets even after she authored her Prosecution Memo. She was the lead prosecutor on Farak's case for a full year, until Farak pled guilty in January 2014. She was personally subpoenaed to appear in front of Judge Kinder and produce responsive documents, and was involved in a series of meetings regarding those subpoenas with multiple colleagues. But during those meetings, and in email correspondence, Kaczmarek "deliberately misled" her colleagues into believing everything in the

file, including the mental health worksheets, had been turned over. Appx. A. (Carey Mem.), at 47, 53.

Whether Kaczmarek, Foster, or anyone else at the AGO realized back in 2013 that the dates on the Worksheets indicated drug use in 2011, rather than 2012, does not relieve her of the obligation to produce these plainly exculpatory materials. She had an obligation to give the defendants a fair opportunity to investigate the admissions reflected therein. *See, e.g.*, *Commonwealth. v. Ellison*, 376 Mass. 1, 25 (1978) (setting aside verdict because prosecutor's "late, piecemeal, and incomplete disclosures forced on defense counsel the necessity of making difficult tactical decisions quickly in the heat of trial"); *Commonwealth v. Vaughn*, 32 Mass. App. Ct. 435, 443 (1992) (setting aside verdict because prosecutor did not timely disclose witness's material change in testimony that implicated defendant).

Most obviously, the defendants could have done what Kaczmarek herself claims she did not do: checked the dates against a calendar. Even assuming that the AGO's assumption was correct that the log entries were from 2012, defense counsel was certainly entitled to probe the reasons why Farak was in drug treatment at all—and specifically, whether she had (in her own words) "failed" to resist the "urge" to use drugs on the job at any time prior to the dates on the Worksheets. We now know that both facts are true: the Worksheets *did* constitute direct admissions of drug use from more than a year earlier, *and* those 2011 dates were not the full (nor earliest) accounting of her use.

Indeed, Kaczmarek herself listed the worksheets in an email among the specific categories of evidence seized by Ballou when she and her colleagues were debating how to respond to Judge Kinder's order to produce "the file" *in camera* for his inspection if not already

disclosed. And she misled those same colleagues about what she later conceded at the 2016 hearing: that she knew, at that time, that the Worksheets had yet to be disclosed. Appx. A. (Carey Mem.), at 53; Tr. VI, at 133:10-15 (Kaczmarek). The Worksheets were flagged in early 2013, as soon as Ballou and Kaczmarek saw them. Appx. A. (Carey Mem.), at 37. Kaczmarek set the documents aside and conferred with John Verner about them; they both understood that the documents had not been turned over. *Id.* at 39. Regardless, the Worksheets were not disclosed to anyone other than Farak's attorney, Elaine Pourinski, who testified that Kaczmarek expressly assured her that the AGO *had made a decision not to disclose them* to other defense attorneys. Tr. VI, at 25:13-14 (Pourinski). Judge Carey thus appropriately found that Kaczmarek intentionally failed to disclose the Worksheets, even though it was the most important evidence the AGO had. Appx. A. (Carey Mem.), at 41.

In fact, it was not until after Kaczmarek left the AGO's office that defense attorneys were finally given access to the Farak evidence. (Kaczmarek's last day at the AGO was July 21, 2014, and attorney Luke Ryan's motion to inspect the evidence over the AGO's objection was granted ten days later.) After finally making arrangements with another AAG attorney to gain access to the evidence, on October 30, 2014, Ryan immediately found a number of documents that had not been previously disclosed and grasped their obvious significance, including the mental health worksheets. *Id.* at 62.

Judge Carey properly found that "the AGO was duty bound to provide" the highly exculpatory evidence seized from Farak's car in discovery, given its obvious exculpatory value and the defendants' entitlement to investigate Farak's admissions for themselves. *Id.* at 122. He also properly found that Kaczmarek personally engaged in some of the most serious violations a

prosecutor can commit under Rule 3.8(d): the "intentional, repeated, prolonged, and deceptive withholding of that evidence from the defendants[.]" *Id.* at 123.

C. Kaczmarek Violated Rule 3.8(g) by Failing to Conduct a Minimally Adequate Investigation into the Scope and Duration of Farak's Misconduct

Kaczmarek had a duty not to blind herself—or the courts, or other prosecutors—to unwanted facts about Farak, the person she was investigating. Under Rule 3.8(g), a prosecutor cannot intentionally avoid pursuing evidence that will damage the prosecution's case or aid the defendant. MRPC. 3.8(g) [former rule 3.8(j)].

In this respect, Rule 3.8(g) codifies a prosecutor's existing legal obligations.[5] Prosecutors have a duty not to keep themselves willfully ignorant of potentially exculpatory evidence. *Commonwealth v. Beal*, 429 Mass. 530, 535 n.4 (1999) (citing former Rule 3.8(j)) ("The prosecutor in a criminal case shall . . . not intentionally avoid pursuit of evidence because the prosecutor believes it will damage the prosecution's case or aid the accused"). It is also well-settled that the individual prosecutor has a duty to learn of any favorable evidence known to other persons acting on the government's behalf in the case, including the police. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995); *Strickler v. Greene*, 527 U.S. 263, 281 (1999); *Commonwealth v. Daniels*, 445 Mass. 392, 403 (2005).

[5] There is also support for a finding that Kaczmarek violated Rule 3.8(d) by failing to investigate the obvious import of the Worksheets. Although Rule 3.8(d) does not require prosecutors to disclose favorable information of which they are unaware, ABA Formal Opinion 09-454 suggests that prosecutors have an obligation to search for exculpatory evidence if the prosecutor actually knows, infers from the circumstances, or it is obvious that the files contain favorable evidence or information. Thus, Model Rule 3.8(d) "ordinarily would not require the prosecutor to conduct further inquiry or investigation to discover other evidence or information favorable to the defense *unless he was closing his eyes to the existence of such evidence or information." See* ABA Formal Op. 09-454, at 5-6 (emphasis supplied). And as noted *infra*, Rule 3.8(g) independently addresses the prosecutor's obligation not to blind herself to facts that might undermine the government's case or aid a defendant's claims.

Here, Kaczmarek failed to pursue basic investigative leads that could have quickly disproven what she later characterized as her "working theory" that Farak's drug use did not pre-date July 2012 and was limited to cocaine (the substance Farak was abusing on the day of her arrest). When Kaczmarek learned, shortly after Farak's arrest, that a Springfield officer had reported serious discrepancies in the inventory of more than fifty Oxycodone pills that had been given to Farak for testing in March 2012, Kaczmarek "dismissively replied," in an email to Ballou, "Please don't let this get more complicated than we thought. If she was suffering from back injury, maybe she took the oxies." She later testified that she was worried about "an avalanche of work" hitting the AGO's office if the investigation revealed further drug tampering by Farak. Appx. A. (Carey Mem.), at 35. She also sought to justify her failure to further investigate these and other inferences that Farak had been addicted to a range of illegal substances by claiming that, in her experience, drug addicts typically "stick" to one drug. Tr. VI, at 101:23-25 (Kaczmarek).

But Kaczmarek's post hoc explanations only undermine her own defense. Even assuming that further investigation (which she did not conduct) had confirmed Kaczmarek's own hypothesis—a nonexistent "back injury" suffered by Farak in 2012—that would still mean that Farak (1) was addicted to opiates (not just cocaine); (2) sufficiently in the throes of that addiction that she was *stealing drug samples from the evidence at the Amherst lab*; and (3) suffered from that addiction and committed this criminal conduct at least as early as March 2012, *i.e.,* well prior to the "approximately four months" prior to her arrest that the AGO alleged.

Thus, as with the Worksheets, Kaczmarek "avoided the pursuit of evidence" (*see* Rule 3.8(g)) of what still would have been illegal conduct on Farak's part. This evidence surfaced

early in the investigation, but Kaczmarek chose to ignore it in favor of limiting the fallout from yet another drug lab scandal, and preventing what she feared would be an "avalanche of work" for her office if the pool of Farak defendants expanded. *Id.* at 35.

Kaczmarek also discouraged an OIG investigation into the Amherst drug lab which could have provided necessary information about the scope of Farak's tampering and possibly other governmental abuses (such as lack of supervision or scientific controls) that could have given rise to further claims for relief by defendants whose evidence passed through the lab. *Id.* at 37. A prosecutor who is hoping that her investigation will *not* find evidence inculpating the person she is prosecuting, for fear it will unleash an "avalanche" of evidence that exculpates others (or simply creates more "work" for the government to address), plainly violates Rule 3.8(g).

Finally, Kaczmarek, by her own account, failed to take a few moments to confirm that Farak's Worksheets, like her Patriots calendar and news articles, were from 2011. This is not because the Worksheets were not identified as significant. To the contrary, they were identified as such *immediately* in February 2013. *Id.* at 37-38. Ballou was "excited" about them, Tr. III, at 176:19-23; 209:2-11 (Ballou); Tr. IV 33:5-8 (Ballou); he and Kaczmarek knew they were the only documents in which Farak confessed to drug use in her own handwriting, and Kaczmarek asked to review them herself as soon as she spoke to Ballou about them on the phone. Tr. III, at 159:2-6 (Ballou); Tr. III, at 160:14-18, 176:19-20 (Ballou). Judge Carey also found that Kaczmarek had actually known about and closely reviewed at least one of the worksheets prior to the conversation with Sergeant Ballou, since on February 14, 2013 Kaczmarek sent an email to MSP Chemist Nancy Brooks asking about an abbreviation found on one of the worksheets. Appx. A. (Carey Mem.), at 38, footnote 24. For Kaczmarek to fail to take a mere thirty seconds

to compare the December dates listed on the worksheets against a 2011/2012 calendar—while affirmatively insisting that these materials were "not relevant" to the claims of any defendant whose evidence was tested by Farak prior to July 2012, in order to deny the defense an opportunity to independently examine them—is simply unconscionable.

Kaczmarek's obstruction also contributed to a significant delay in a full investigation into the scope of Farak's misconduct and the underlying problems at the Amherst lab that allowed it to go unchecked for so many years. Those issues remained uninvestigated until 2015, and only until after the Supreme Judicial Court, in *Cotto*, independently came to the conclusion that the AGO's investigation of the Amherst drug lab was "cursory at best." On remand, AAG Thomas Caldwell conducted a renewed investigation into the timing and scope of Farak's misconduct along with other failings in the operation of the Amherst drug lab. *Id.* at 2, 6 (citing *Cotto,* 471 Mass. at 115). As Judge Carey found, "There is no evidence that a comprehensive, adequate, or even reasonable investigation by any office or agent of the Commonwealth had been attempted, concluded, or disclosed prior to issuance of the Caldwell Report." *Id.* at 71-72. By failing to make any reasonable efforts to determine the actual scope and duration of Farak's misconduct, and by actually attempting to shield the lab from a broader investigation, Kaczmarek violated her duty under Rule 3.8(g).

III. Kaczmarek's Conduct Was "Egregious" and Warrants a Proportionate Sanction

The Farak case involves serious government wrongdoing, in which (1) a state chemist engaged in criminal conduct over a course of eight years, potentially tainting thousands of criminal convictions; (2) prosecutors with the Attorney General's Office then withheld key

evidence that they knew about and discussed internally for months, before and after it was subpoenaed; (3) prosecutors failed to conduct any reasonable investigation into the scope of the chemist's misconduct, even after hearings were convened for that purpose; *and* (4) one of those prosecutors (Foster) made material, false statements to a court, incorporating "patently false" assertions that "originated with" one of her senior AGO colleagues (Kaczmarek).

Judge Carey's Memorandum is unsparing in its criticism of Kaczmarek's key role in the AGO's mishandling of the Farak's scandal, but appropriately so. He found that her "misconduct was so egregious and harmful to the administration of justice that it gives rise to presumptive prejudice. Additionally, [her] misconduct evinces a depth of deceptiveness that constitutes a fraud upon the court." Appx. A (Carey Mem.), at 123. Judge Carey further found that the "intentional and deceptive actions" taken by Kaczmarek and her colleague Kris Foster "ensured that justice would certainly be delayed, if not outright denied, and in the process, they violated their oaths as assistant attorneys general and officers of the court." Id. at 124.

Indeed, Judge Carey found Kaczmarek and Foster's behavior so egregious that he was compelled to dismiss numerous criminal indictments in narcotics cases with prejudice, a remedy that "must be reserved for extreme cases." *Id.* at 123. But despite the compelling record evidence of Kaczmarek's "betrayal of public trust," *id.* at 124, and that her misconduct contributed to the wrongful incarceration of numerous Farak defendants in violation of their right to due process, she continues to work as an attorney for the government, in a position of considerable responsibility.

It is now well-established that the United States criminal justice system convicts innocent people at a rate once thought to be unimaginable. The National Registry of Exonerations, which

chronicles exonerations nationwide that have occurred since 1989, reports almost 2000 exonerations as of this date—with 2016 a record year for exonerations of persons who pled guilty to crimes they did not commit.[6] The year 2016 also involved the largest number of exoneration cases on record (70) in which government misconduct (by prosecutors, police, and/or lab officials) was identified as a contributing cause.[7]

Yet all too often disciplinary agencies across the country neglect to sanction prosecutors for major ethical lapses. That is so even when a court has entered *a finding* of prosecutorial misconduct. For instance, a total of 4,741 disciplinary actions were taken against lawyers in California from January 1997 to September 2009. A mere six of those actions concerned prosecutors' conduct in handling criminal cases—even though California prosecutors were found by the courts to have committed misconduct in 707 reported cases during that same period.[8] Similarly, a 1999 study of more than 300 Illinois convictions reversed on appeal for prosecutorial misconduct found that only two of those prosecutors were sanctioned by the Illinois Attorney Registration and Discipline Commission.[9] Ethics boards nationwide are

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[6] See National Registry of Exonerations, *Exonerations in 2016* , at 3, http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2016.pdf (last visited July 19, 2017); *see also http://www.law.umich.edu/special/exoneration/Pages/about.aspx* (documenting total exonerations nationally as of July 19, 2017).

[7] *Id.* at 2-3.

[8] See Kathleen M. Ridolfi & Maurice Possley, *Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009*, Oct. 2010, at 2-3, *available at* http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1001&context=ncippubs (last visited July 19, 2017).

[9] *See* Daniel S. Medwed, *Prosecution Complex: America's Race to Convict and Its Impact on the Innocent* 31 n.109 (2012).

similarly hesitant to chastise prosecutors for blatant discovery violations.[10]

Here, the Massachusetts Board of Bar Overseers has a chance to do what most other disciplinary agencies have largely failed to do: hold a government lawyer accountable for egregious misconduct. Unlike many cases, the record is crystal clear with respect to Kaczmarek's conduct. This is not a matter of a single ethical lapse or exercise of poor judgment, but rather an appalling display of prolonged and repeated misconduct that added insult to the injury wrought by Sonja Farak's crimes. *See* Appx. A. (Carey Mem.) at 124 (finding that Foster and Kaczmarek's misconduct was "in many ways more damning" than Farak's own). Indeed, more than four years have passed since Farak was arrested for tampering with drug samples, and she has been convicted, served her time, and released from prison. Yet remarkably little is known about how many people may have been convicted of and sentenced for drug crimes due to her misconduct, untold numbers of whom may still be incarcerated or suffering the considerable collateral consequences of their convictions. After repeatedly (and falsely) stating to the court that Farak's misconduct predated her arrest by only a few months, the Commonwealth has now conceded that her evidence tampering and drug use had actually gone on for *eight years*. In doing so, the Commonwealth's attorneys may have denied justice and due process to thousands of potential defendants, many of whom remained incarcerated as information that would make their cases eligible for review languished in Kaczmarek's undisclosed investigative files. *Id.* at 35.

There is no cure for the defendants in the Farak cases that will fully remedy this gross miscarriage of justice, although Judge Carey's decision provides a long overdue official

[10] *Id.* at 39-41.

acknowledgment of what transpired and why. Further, Judge Carey's decision to impose the most powerful sanction available in the cases of all of the defendants before him who were directly impacted by Kaczmarek's misconduct sends a strong message about the severity of her actions. But a message alone is not enough; Foster must be formally held accountable for her misconduct. No lawyer, especially one with the power and responsibility of an assistant attorney general, should be immune from investigation for ethical violations. And such an investigation here would reveal what the record patently shows—that Kaczmarek engaged in an egregious and persistent pattern of misconduct that warrants sanctions from the Board.

Because the record amply supports Judge Carey's finding that Kaczmarek's "reprehensible" actions were substantially responsible for a "systemic" harm to the public interest, *id.* at 70, the Board should impose a sanction that is proportionate to her misconduct. Kaczmarek's failure to conduct any meaningful investigation into Farak's criminal conduct, and her "intentional, repeated, prolonged, and deceptive withholding of . . . evidence from the defendants, the court, and local prosecutors," *id.* at 123, must be addressed by the Board, so that the public can have confidence that the Commonwealth's attorneys will act with the requisite degree of care and candor in the future.

Respectfully submitted,

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Dated: July 20, 2017