COMPLAINT AND REQUEST FOR INVESTIGATION

The undersigned respectfully request that the Massachusetts Board of Bar Overseers conduct an investigation into whether attorney Kris Foster 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 Kris Foster. *See* Memorandum, Decision, and Order (attached hereto as Appendix A) ("Carey Mem."), at 122. In 2013, Foster was assigned to the Appeals Division and entrusted with the critical task of providing the Court and defendants whose cases may have been tainted by Farak's misconduct with all relevant, exculpatory evidence in the Commonwealth's possession regarding the duration and scope of Farak's criminal conduct. Judge Carey found that Foster not only failed to make the required disclosures, but in the course of her duties engaged in a series of deliberate and intentional misrepresentations about the evidence in the Commonwealth's possession—and her own review of the files—that constituted nothing less than a "fraud upon the Court." *Id.* at 69.

Indeed, so "egregious" was the misconduct committed by Foster and at least one of her former colleagues (former Assistant Attorney General Anne Kaczmarek, the subject of a parallel Complaint being filed by the undersigned) that Judge Carey imposed 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 122, 125-27. The Court found that such a sanction, while extraordinarily rare, is justified here because its "ramifications" were "nothing short of systemic." *Id.* at 70. The Court also found that such a drastic sanction was warranted to deter official misconduct in future cases. *Id.* at 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 this recognition 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 Foster personally accountable. Nearly three years after evidence emerged that she had made material false statements to then-presiding Judge Kinder on a matter of enormous public importance, Foster 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 General Counsel for the Alcoholic Beverages Control Commission.

Accordingly, the undersigned[2]—each of whom appeared as *amici* in the *Cotto* proceedings before Judge Carey—respectfully request that the Board of Bar Overseers conduct a prompt and thorough investigation of Foster's conduct in these cases, as outlined in Judge Carey's Memorandum and documented in the underlying record, and impose an appropriate sanction. To assist in that process, this Complaint (1) summarizes the key portions of the Memorandum and record as they relate to Foster's actions and (2) 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, Foster's own role in the Commonwealth's response to the Amherst laboratory scandal, and Foster'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:

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

- 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; 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.

- Within weeks of Farak's arrest, on February 14, 2013, the lead detective on the case, Sergeant Joseph Ballou, provided the AGO with the most critical and relevant of those documents: "mental health worksheets" dating back to December 2011 ("the Worksheets"), in which 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.

- The Worksheets and articles were emailed to AGO officials under the pointed header "Farak admissions." The Worksheets were directly referenced in the AGO's prosecution memo for the Farak case, which was reviewed by numerous AGO officials. And they were raised in internal AGO emails exchanged in 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.

- On August 22, 2013, Sergeant Joseph Ballou and AAG Anne Kaczmarek received subpoenas duces tecum for production of materials related to the Farak investigation—and, specifically, the scope and duration of Farak's drug use on the job—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.

- In August 2013, Foster was an Assistant Attorney General in the Appeals Division. She was assigned by her supervisors to review the subpoenas and prepare and argue the Commonwealth's response to them.

- On September 3, 2013, Foster met with her superiors at the Attorney General's Office regarding the subpoena for Sgt. Ballou. Foster later testified that at some point Kaczmarek told her that everything in Sgt. Ballou's file had already been produced and advised her that Foster had no reason to review the file herself (Kaczmarek denied this assertion). Foster did not check the file to see whether this was true. On or soon after September 5, 2013, Foster asked Deputy Chief Suzanne Rearden to review her draft motion to quash. When Reardon asked Foster if she had reviewed Sergeant Ballou's files, "Foster falsely responded that she had done so," when in fact she had not examined a single document in those files. *Id.* at 49.

- Foster never looked through the AGO's paper files to see what had been produced. Nor did she take any of the other "fundamental first step[s]" required of an attorney in her position to respond to the subpoenas and the Court's subsequent orders. Indeed, "Foster should have collected the files from Ballou and Kaczmarek, reviewed their contents, and either asked Ballou and Kaczmarek to find responsive documents in their emails or she ought to have asked the IT department to check electronically stored information (ESI) to see what evidence to the subpoenas existed. . . .Had Foster reviewed either of their files or the physical evidence or had she arranged for IT to check Ballou's and Kaczmarek's ESI, Foster would have seen the mental health worksheets." *Id.* at 45.

- Foster's motion to quash the subpoena to Sergeant Ballou sought a protective order to restrict the scope of the subpoena, exempting "emails responsive to the subpoena, but not already contained in the case file specifically listed therein" and "information concerning the health or medical or psychological treatment of individuals." Foster's "wording and these grounds were not inadvertent but deliberately intended to relieve the AGO from having to produce the mental health worksheets." *Id.* at 48.

- After being repeatedly chastised by Judge Kinder for asserting potential privileges against disclosure of a Farak file that she had not reviewed, Foster was ordered to review and amend her response after conducting that review. But she did not do so. Instead, Foster deliberately worded a subsequent letter to the Court in a manner that concealed the fact that she still had not read a single document. Her letter also falsely informed the Court that "every document in [Sgt. Ballou's] possession has been disclosed." *Id.* at 53-54.

- Foster then repeated this false claim on the record in an October 2, 2013, status conference, assuring the Court in response to a direct question that "all of the

contents" of the Ballou file had "already been turned over." *Id.* at 54-55.

- Foster thus "deceived Judge Kinder into believing that there were no privileged documents for him to review on the ruse that the AGO had turned over all of the documents. Foster's letter essentially violated Judge Kinder's order." *Id.* at 68-69.

- 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 the *very same date* that she had admitted, in the Worksheets seized by Sgt. Ballou that she was severely impaired following the ingestion of LSD at the lab. *Id.* at 61, 93.

- The truth about the scope of Farak's criminal misconduct finally came to light in November 2014, 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 first 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.

- When the existence of the Worksheets and other documents establishing Farak's earlier drug use came to light in November 2014, Foster was still employed as an Assistant Attorney General. *Id.* at 45 n. 30. At no time, however, did she alert the Superior Court or the Supreme Judicial Court to her earlier misrepresentations regarding Sgt. Ballou's file and the falsity of her earlier claim that defendants seeking evidence of drug use by Farak that predated the summer of 2012 were engaged in a baseless "fishing expedition"—even though numerous Farak defendants had litigation that was still pending. Indeed, the SJC decided two Farak cases in April 2015 without hearing from Foster, or any other attorney for the Commonwealth, that the Superior Court record on which it relied was infected

with Foster's false statements. *Id.* at 60-61.

The foregoing history led Judge Carey to make a series of findings about the intentionality, scope, and systemic effects of Foster's misconduct of the sort that are rarely, if ever, seen in written judicial opinions. First, he found that when Foster submitted her October 2013 letter to Judge Kinder, containing false statements designed to "keep [the Court] from reviewing the AGO's documents," she "committed a fraud upon the court[.]" *Id.* at 69. Second, he found that the conduct of both Foster and her colleague Anne Kaczmarek (who had personally received the Worksheets months earlier, and worked with Foster to prepare and argue the Commonwealth's objections to the subpoena for those materials) 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. Third, the Court placed great weight on the repeated violations committed by Foster and Kaczmarek, 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.

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 personal sanctions by the Board against the responsible government attorneys beyond those that even 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, Foster's conduct violated several well-established provisions of the Massachusetts Rules of Professional Conduct ("MRPC" or "Rules"). These include the following:

- MRPC 3.3, requiring candor towards the court;
- MRPC 3.4, requiring fairness to opposing party and counsel;
- MRPC 3.8, imposing additional ethics requirements on prosecutors, including the affirmative obligation to disclose exculpatory evidence; and
- MRPC 4.1, requiring truthfulness in statements to others.

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. Foster Made False Statements to the Court and Opposing Counsel that Resulted in the Concealment and Suppression of Relevant, Exculpatory Evidence in Violation of MRPC 3.3, 3.4, and 4.1

The record demonstrates that Foster made a series of false representations to the court on at least two material issues: (1) whether the complete contents of Sgt. Ballou's investigative file had been disclosed, and (2) whether she herself had reviewed the AGO's Farak file to ensure that the required disclosures had been made. In so doing, Foster breached the Massachusetts Rules of Professional Conduct duty of candor. *See* MRPC 3.3, 3.4, and 4.1. These rules required Foster to ensure that all of her assertions to the Court were either factually true statements, or at least statements she believed to be true "on the basis of a reasonably diligent inquiry." *See* Rule 3.3 cmt. [3]. In addition, Foster had an ethical duty to "make reasonably diligent effort to comply with a legally proper discovery request. . ." *See* Rule 3.4(d).

A. The Ethics Rules Require Candor to Courts and Third Parties

The duty of candor to the court prohibits lawyers from knowingly "mak[ing] a false statement of fact or law to a tribunal or fail[ing] to correct a false statement of material fact or law previously made to the tribunal by the lawyer." Rule 3.3(a)(1); *see In re Hilson*, 448 Mass. 603, 610, 616 (2007) (finding that attorney violated Rules 3.3(a)(1) and (a)(4) because attorney made knowing misrepresentation regarding checks written out of his IOLTA account); *Commonwealth v. Sosa*, 79 Mass. App. Ct. 106, 112 & n.6 (2011) (citing Rule 3.3(a)(1) when an attorney made a representation in a brief that directly contradicted the record at the suppression hearing); *In re Stallworth*, No. 11-19919-WCH, 2012 WL 404952, at *6 (Bankr. D. Mass. Feb. 8, 2012) (making a referral to the district court for ethical violations pursuant to Rule 3.3 because attorney repeatedly made knowingly false representations that certain documents had been filed, when they had not been).[3]

While an attorney is usually not required to have personal knowledge of matters asserted in litigation documents prepared on behalf of a client, assertions made about *an attorney's personal knowledge*, such as in an affidavit or a statement made in open court, may be made only when the attorney knows the assertion is true or believes it to be true on the basis of a

[3] Courts have found violations of MRPC 8.4(c) (prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation) and MPRC 8.4(d) (prohibiting conduct that is prejudicial to the administration of justice) when attorneys made misrepresentations of material fact to the court. *See, e.g., In re Diviacchi*, 475 Mass. 1013, 1016-20 (2016) (affirming single justice's finding that attorney violated Rules 3.3(a)(1) and 8.4(c) by making a knowingly false statement on his own personal knowledge in verified complaint regarding client's fee arrangement, standard habits, and business routine); *In re Gargano*, 460 Mass. 1022, 1022 (2011) (finding violation of MRPC Rules 8.4(c) and (d), among others, when attorney made knowing misrepresentations to the court and caused false affidavits to be filed by his client).

Disciplinary opinions have also found that statements made "with reckless disregard for their truth or falsity" violate Rule 8.4(d) as well as Rule 8.4(h)—a catch-all provision prohibiting "any other conduct that adversely reflects on [an attorney's] fitness to practice law." *See In Re Bartley*, No. BD-2008-016, 2014 WL 4410444, at *1 (Ma. St. Bar Disp. Bd. July 21, 2014); *In re Serpa*, No. BD-2014-025, 2014 WL 2453014 (Ma. St. Bar. Disp. Bd. May 1, 2014); *accord In re Serpa*, 95 A.3d 393, 394 (R.I. 2014) (ordering reciprocal suspension when attorney made reckless misrepresentations in affidavit in violation of MRPC Rule 8.4(d)).

"reasonably diligent inquiry." Rule 3.3 cmt. [3]. Under some circumstances, the failure to make a disclosure can amount to an affirmative misrepresentation. *Id.*; *see also In re Diviacchi*, 475 Mass. 1013, 1020 (2016) (finding violation of Rule 3.3 because attorney made false assertions but offered no evidence that he conducted a reasonably diligent inquiry before making them).

Rule 3.3(a)(3) (formerly Rule 3.3(a)(4)) provides that a lawyer shall not "offer evidence that the lawyer knows to be false." *See* Rule 3.3(a)(3); *see also Stephens-Martin v. Bank of N.Y. Mellon Trust Co.*, No. 12 MISC 465277 AHS, 2015 WL 732087, at *18 (Mass. Land Ct. Feb. 20, 2015) (finding that attorney had an ethical obligation under former Rule 3.3(a)(4) to bring to the court's attention emails that he withheld, which he knew undermined the position that he and his clients had previously taken and to bring to the court's attention that his clients were proffering information he knew to be false). That rule demands that "[i]f a lawyer . . . has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures." *See* Rule 3.3(a)(3).

Attorneys also have a duty of fairness to opposing parties and counsel, which includes specific mandates related to discovery. Rule 3.4(a) provides 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*." MRPC 3.4(a) (emphasis supplied). In pretrial procedure, Rule 3.4 provides that a lawyer shall not "fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party." MRPC 3.4(d). Comment [2] provides that "[s]ubject 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.*; *see 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).

Finally, lawyers have a duty of truthfulness to others outside of active litigation. According to Rule 4.1, "In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6." Comment [1] to Rule 4.1 provides that "a misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements."

Although Rule 4.1 falls under the heading of "transactions with persons other than clients," courts have applied that rule in the litigation context. In *In re Gargano*, 460 Mass. 1022, 1024 (2011), an attorney, in an opposition to a motion to dismiss an amended complaint, made a representation that the initial complaint had overlooked a specific judicial opinion. The representation, however, was not true; the case had been cited in court filings related to the first complaint. *Id.* The attorney argued that he did not review the opposition, an assertion that the hearing committee did not credit. *Id.* In affirming a violation of Rule 4.1, the SJC found that the

attorney was responsible for the papers he filed, and that the attorney could not avoid the fact that he knowingly made a misrepresentation to the court, which substantiated the violation of Rule 4.1. *Id.*

Courts have also stated 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. Foster Breached her Duties of Candor and Fairness

Foster did not meet her duty of candor and fairness to the court, opposing counsel, or others. Because she neglected her basic responsibility to review documents in the file, Foster made multiple statements to the Court which were demonstrably false. Although an unintentional false statement made after a cursory but admittedly inadequate inquiry might not be sanctionable, Foster's actions were in no way inadvertent, for she (1) made these false statements even *after* being chastised by the Court for her earlier failure to personally review the Commonwealth's files for any relevant discovery (which would have revealed the existence of additional exculpatory evidence that had not yet been disclosed); (2) admitted that she deliberately worded her follow-up letter to the Court to conceal the fact that she had not

personally reviewed the file as directed; and (3) made affirmative representations to Judge Kinder that Farak's drug use was limited to a period of "roughly four months" before her arrest, and the defendants' efforts to review the underlying documents were nothing more than a baseless "fishing expedition."

The most obvious (and inexcusable) instance of Foster's violation of these maxims is her September 16, 2013, letter to Judge Kinder and the circumstances that preceded it. At an earlier hearing (on September 9) regarding the AGO's motion to quash, Judge Kinder took Foster to task for not personally reviewing the Farak investigative file before asserting potential privileges; according to Foster's 2016 testimony, Judge Kinder was so displeased by her failure to examine the materials that were subject to subpoena that he "yelled" at her. Tr. III, at 53 (Foster).[4] One week later, she wrote him a letter representing that "[a]fter reviewing" everything in Sgt. Ballou's file, "every document in his possession has been disclosed." Appx. A (Carey Mem.) at 54; Exh. 193. Foster testified that she made a deliberate decision to word the letter that way to avoid saying "I." In that letter, she did not even intimate that it was "her colleagues" who had (purportedly) reviewed the file. Tr. III, at 94 (Foster). As Judge Carey found, "Incredulously, Foster testified that she did not want to misrepresent that she had personally reviewed the file and she had no idea who had reviewed it. . . . This letter was intended to, and did, give Judge Kinder the false impression that Foster had personally reviewed Ballou's file." Appx. A (Carey Mem.), at 54.

After submitting the letter, Foster continued to make false statements to the Court.

[4] An electronic copy of the transcript of the evidentiary hearing before Judge Carey, at which Foster and others testified, is included on an external thumb drive appended to this complaint. The drive also includes selected exhibits from the proceedings before Judge Carey that are cited herein. Should the Board wish to review any additional exhibits, in electronic or paper form, the undersigned can provide them promptly.

Without reviewing a single document in the investigative file, she repeatedly defended the AGO's erroneous position, in statements to the court and others, that Farak's misconduct spanned only a few months prior to her arrest, that defense attempts to prove otherwise were a "fishing expedition," and that the evidence seized from Farak's car was "irrelevant" to the claims of any defendants whose evidence was handled by Farak before July 2012. *See* Exh. 199, at 9. For example, in an October 2, 2013, hearing, Judge Kinder asked Foster several pointed questions about the contents of her September 16th letter, including whether she now "agree[s] that all of the contents of [Sgt.] Ballou's file have already been turned over?" She answered, unequivocally, "They have, Your Honor." Appx. A (Carey Mem.) at 55.

Six weeks later, on November 25, 2013, Foster filed a separate motion to quash the subpoena that attorneys for defendant Penate had served on her AGO colleague Anne Kaczmarek to secure Kaczmarek's testimony on the results of the AGO's investigation into the scope and duration of Farak's criminal conduct. *See* Exh. 199 (11/25/13 motion to quash). In that pleading, Foster affirmatively represented to the Court that the AGO's investigation had already established that Farak's drug use and tampering were limited to a period of time "roughly four months before her arrest." *Id.* at 9. She assured the Court that there was "nothing" in the file indicating that Farak may have been abusing drugs when she signed the drug certificate in the defendant's case in late 2011, and that the subpoena was "merely a fishing expedition." *Id.* For these reasons, Foster assured the Court, the information gathered by Kaczmarek as the prosecutor handling the Farak case was "irrelevant," and requiring Kaczmarek to testify regarding any information she possessed regarding the AGO's investigation into Farak's drug use would serve no purpose but "to cause AAG Kaczmarek's time and resources to

be diverted away from important public duties." *Id.* In fact, in the as-yet undisclosed mental health worksheets Farak admitted to using LSD on January 9, 2012, the very same day she analyzed the substances in defendant Rolando Penate's case. Appx. A (Carey Mem.), at 93.

By making these statements without reviewing any documents, *see, e.g.*, Tr. III, at 72:8-11 *and* Appx. A (Carey Mem.), at 47, Foster made assertions purporting to be on her own personal knowledge that she either knew or should have known were simply false. MRPC 3.3, 3.4, 4.1. At the very least, Foster's statements were not made on the basis of a "reasonably diligent inquiry." *See* Rule 3.3 cmt. [3]; *In re Diviacchi*, 475 Mass. 1013, 1020 (2016); *see also* Mass. R. Civ. P. 11 ("The signature of an attorney to a pleading constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief *there is a good ground to support it.*") (emphasis supplied).[5]

It is no excuse to assert that Foster was so inexperienced that her actions were inadvertent, since Foster was far from a novice. She worked in the Suffolk County DA's Appellate Unit for approximately four years before she was hired by the AGO. Tr. V, at 43:25-44:6 (Ravitz). And as Judge Carey noted, responding to subpoenas of the sort that Foster was charged with handling was a straightforward task: "The fundamental first step in preparing a motion to quash, after reading the subpoena, is to examine the materials sought." Appx. A. (Carey Mem.), at 45. Had Foster done so, (1) she would have seen the mental health worksheets with their dates and other identifying information (such as the Patriots schedule and news articles from 2011), and (2) after even a cursory check of a calendar, she would have known that Farak's

[5] In addition, under Massachusetts law, even negligent misrepresentation "does not require an intent to deceive or actual knowledge that a statement is false." *Infinity Fluids Corp. v. Gen. Dynamics Land Sys., Inc.*, No. CV 14-40089-TSH, ___F. Supp. 3d ___, 2016 WL 5660359, at *10 (D. Mass. Sept. 29, 2016) (citing *Cumis Ins. Soc'y, Inc. v. BJ's Wholesale Club, Inc.*, 455 Mass. 458, 471–72 (2009)).

misconduct lasted far longer than the "four months" alleged by the AGO.

Judge Carey also appropriately found no merit to Foster's excuse that she had made no independent decisions in this case "because the AGO protocol gave line AAGs like herself very little discretion. . . Foster chose to follow instructions and information received from Kaczmarek while ignoring established protocol, common sense, and...subsequent unambiguous directives from her superior, [Deputy Chief Suzanne] Reardon, and more importantly court orders from Judge Kinder." *Id.* at 47. Even now, as the general counsel of a state commission, Foster continues to dispute that she even engaged in "poor practice." Tr. III, at 80:22-81:1, 92:4-22, 96:14-25, 106:19-107:20 (Foster). As Judge Carey observed, "Foster's denial in December 2016 of having made any mistakes underscores her lack of moral compass." Appx. A (Carey Mem.), at 70. No attorney, no matter how inexperienced, can properly think it is acceptable to write such affirmative statements to the court—particularly on matters of such monumental public concern and importance, involving the criminal conduct of another government actor (Farak)—without any basis to believe that the statements are true.

Yet another troubling fact in this matter is that Foster not only admitted that she did not review "the file" or any other Farak documents, but claimed that her superiors *directed her* not to do so, and to instead make unsupported representations to the Court that the entire investigative file had been produced. Current and former AGO attorneys vigorously disputed her account, and after hearing the respective testimony, the court deemed Foster's account not to be credible. Judge Carey found that Deputy Chief Suzanne Reardon specifically directed Foster to review the file and "Foster falsely responded she had done so." *Id.* at 49.

Finally, in continuing to neglect her imperative to review the file despite Judge Kinder's

directive, Foster claimed she was "balancing" the wishes of her supervisors—who, she claimed, told her she had no need to review the file herself—with her duty to abide by a court order.[6] For obvious reasons, even if Foster's testimony were credited, such a position is not tenable. As Judge Carey found, "Foster's letter essentially violated Judge Kinder's order," and no provision of the Rules of Professional Conduct allows an attorney to ignore a Court order based on the contrary wishes of a colleague. *Id.* at 69.

By purposefully and repeatedly misleading the Court and others, Foster violated Rules 3.3, 3.4, and 4.1 of the MRPC.

C. Foster Violated Rule 3.3 by Failing to Correct Her Earlier False Statements to the Court After the Previously Undisclosed Evidence of Farak's Earlier Criminal Conduct was Revealed

Foster had a duty under MRPC 3.3 to correct her prior misstatements to Judge Kinder, upon learning that (1) the Worksheets from Sgt. Ballou's file had not been disclosed, and (2) that Foster's earlier assertions that Farak had committed misconduct for "roughly four months" before her arrest was inaccurate. Yet neither she, nor anyone else at the AGO, did so.

i. False Statements to Courts Must Be Corrected and Remedied

Rule 3.3(a)(1) requires attorneys "to correct a false statement of material fact or law previously made to the tribunal by the lawyer."[7] In addition, if an attorney offers "material

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[6] Specifically, Foster alleged that the reason she did not review the file even after Judge Kinder directed her to do so was that her "superiors" *instructed her not to look at it*. Tr. III, at 94, 96:18-21 (Foster). Foster also claimed that, at a meeting before the September 9th hearing with Randall Ravitz, John Verner, Dean Mazzone, and possibly others, she "was told" by one of the supervisors present that everything in Sergeant Ballou's file "had been already been turned over" and Ravitz directed her to so inform the court. Tr. III, at 15:6-10, 20:18-23, 21:22-23, 94:3-97:6 (Foster). None of her colleagues confirmed this account, and several of them vehemently denied they had ever given Foster any such instruction. *See, e.g.,* Tr. V, at 70:14-17; 95:21-96:3 (Ravitz) (no recollection of ever discussing file with Foster); *id.* at 224:8-12, 201:13-25 (Verner) ("never" told Foster not to review file); Tr. VI, at 172:2-8, 185 (Kaczmarek) (initially testifying that she could not recall whether she discussed file review with Foster, and then asserting that Foster "did not" ever ask her about file contents or disclosures).

[7] Prior to July 1, 2015, Rule 3.3(a)(1) prohibited attorneys from knowingly "mak[ing] a false statement of material fact or law to a tribunal" but did not contain the requirement to correct that the current rule does.

evidence" and comes to know of its falsity, the attorney must "take reasonable remedial measures." MRPC 3.3(a)(3) (formerly 3.3(a)(4)). Under current Rule 3.3(c) (former Rule 3.3(b)), the duties under Rule 3.3(a) "continue to the conclusion of the proceeding, including all appeals, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6." The "conclusion of a proceeding" means "a final judgment in the proceeding has been affirmed on appeal or the time for review has passed." MRPC 3.3 cmt. [13].

A lawyer must take steps to remedy prior false statements even when doing so would entail a departure from typical litigation practice. For example, the attorney must "seek the client's cooperation" with correcting the record. MRPC 3.3 cmt. [10]. If the client refuses, and "if withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6." *Id.* This is because "[i]t is for the tribunal," not the lawyers responsible for the falsehood, "to determine what should be done." *Id.*

ii. Foster Did Not Correct Her Earlier False Statements, Nor Did She Ensure that Anyone at the AGO or DA's Offices Did So on Her Behalf

Foster did not correct the material false statements that she made to Judge Kinder in 2013, even though the court directly relied upon her misstatements to make key factual findings and limit discovery and other relief to the defendants. *See, e.g.*, Appx. A (Carey Mem.), at 61; Exh. 184, at 14-15 n.1; *see also* Exh. 184, at 13-15; Exh. 185, at 14; Exh. 186, at 14-15. Nor did she, or anyone acting at her request or on her behalf, alert the Supreme Judicial Court to her misstatements when those cases were on appeal.

Foster, the AGO, and the Hampden County District Attorney had ample opportunity to

remedy the earlier statements while numerous Farak defendants' litigation was active. After filing renewed motions following Farak's own guilty plea, and making numerous requests to the AGO, attorney Luke Ryan was finally permitted to inspect the evidence seized from Farak's car on October 30, 2014. *See* Appx. A at 62. He immediately recognized the significance of the Worksheets. On November 1, 2014, Ryan wrote to a senior AAG, Patrick Devlin, and laid out the results of his review—including how the Worksheets "memorialize[d] actions Farak took during the week of December 20, 2011, *i.e.* more than six months before Judge Kinder found that there was any evidence that she engaged in criminal behavior." *See* Exh. 166, at 10. John Verner, then Chief of the AGO's Criminal Bureau, reviewed the letter and immediately began to investigate the history of the AGO's earlier misrepresentations. Verner testified that he was "angry," "upset," "shocked," and "frustrated" about this revelation, and confirmed that the materials Ryan cited had not yet been disclosed. *See* Tr. V, at 196:8-16, 198:4-6 (Verner). Verner promptly called Foster into his office to ask her about the documentation Ryan had found and why they were not addressed in her earlier responses to the defendants' subpoenas. Tr. V at 224:8-12, 201:13-25 (Verner); Ex. 266. Supervisors decided to send the mental health worksheets to the DAs and to third party defendants who had requested them, and Verner personally transmitted the supplemental discovery to the DAs under his own name. Appx. A (Carey mem.), at 63.

Foster remained at the AGO for another four months after she was confronted with Ryan's discovery of the Worksheets. Yet neither Foster, the AGO, nor the District Attorney went to the Superior Court or the SJC, where the *Cotto* and *Ware* cases were pending, to inform the judiciary that Foster's claims were contradicted by the new disclosures, much less that these

documents had been in the AGO's own files since early 2013.[8] In direct consequence of that failure to act, the SJC relied upon an inaccurate account of the documents recovered from Farak's car. *See Cotto*, 471 Mass. at 101; *Ware*, 471 Mass. at 87-88. The SJC also upheld, as not an abuse of discretion, Judge Kinder's findings about the scope of Farak's misconduct, which in turn were the consequence of Foster's false statements. *See Cotto*, 471 Mass. at 101 n.7, 108, 111 n.13. As Judge Carey wrote, "The improper withholding of that evidence irremediably prejudiced an undetermined number of defendants by precluding them from asserting what would have been a powerful post-conviction or trial defense argument, namely, that Farak's certificate of drug analysis was fatally flawed, and therefore, inadmissible." Appx. A (Carey Mem.), at 123. The outcome of the *Cotto* and *Ware* cases were prejudiced by Foster's misrepresentations; even after the decisions in those cases were published in April 2015, no one on behalf of the Commonwealth, including Foster herself, alerted the SJC that its opinion rested on Foster's false statements to the Court. Because these false statements had been made to *a court*, "[i]t [was] for the tribunal to determine what should be done." *See* Rule 3.3 cmt. [10]. By failing to make reasonable remedial efforts and notify the SJC of her false statements, Foster violated Rule 3.3.

[8] *See, e.g.*, Brief of the Commonwealth at 38, *Cotto*, 471 Mass. 97 (filed Nov. 21, 2014) ("Because the judge did not abuse his sound discretion in finding that the defendant failed to meet his burden of showing that Farak's misconduct antedated his guilty plea, the judge properly denied the defendant's motion for a new trial and his ruling should be affirmed."); Brief of the Commonwealth at 17-18, *Ware*, 471 Mass. 85 (filed Aug. 8, 2014) (arguing that "the defendant has not made an adequate showing that Ms. Farak's misconduct preceded his guilty plea" in February 2011).

II. Foster Violated Rule 3.8 by Failing to Disclose Farak's Worksheets or Conduct a Minimally Adequate Investigation Into Whether The Exculpatory Evidence in the AGO's Possession Had Been Disclosed

A. The AGO and the DA's Office Were On the Same "Prosecution Team," and Foster Was Obligated to Investigate the Scope of Farak's Misconduct and Disclose All Exculpatory Evidence

Separate and apart from the direct orders she received from Judge Kinder to review the investigative file in response to the defendants' subpoenas, Foster had an affirmative duty to investigate the scope of Farak's misconduct and to disclose evidence that was exculpatory as to defendants being prosecuted by county DAs. The AGO and the DA's offices were members of the same "prosecution team." A prosecutor's obligations extend to material and 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 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). 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—as Foster did in her capacity as an AAG in the Appeals Division—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 surely was part of those teams in the specific context of the Farak investigation. Foster 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, the record shows that top AGO attorneys believed that they were under 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).

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." Exh. 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.

B. Under Rule 3.8(g), Foster Had an Ethical Obligation to Conduct a Minimally Adequate Investigation Into the Scope of Farak's Misconduct

Foster also had a duty not to blind herself to unwanted facts about Farak, the person the AGO was investigating, and whose criminal conduct while a government laboratory employee called into question the veracity and accuracy of all prosecutions in which Farak participated during the time that she was addicted to drugs.

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)].[9] In this respect, Rule 3.8(g) codifies a prosecutor's existing legal obligations. 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).

Here, Foster was well-aware that the *Cotto* defendants' claims turned on whether Farak's drug use began prior to the summer of 2012, and that any information in the AGO's possession

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[9] Although Rule 3.8(d) does not require prosecutors to search for 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.

which confirmed that Farak was using drugs at or around the time when she signed the defendants' drug certificates would be highly relevant and exculpatory. Yet she failed to even review the documents that the AGO already had in its possession which would have quickly disproven the AGO's "working theory" that Farak's drug use did not pre-date 2012 and was limited to cocaine. Had she opened the file, she would have seen that Farak's Worksheets, like her Patriots calendar and news articles, were from 2011. These documents were identified as significant *immediately* in February 2013. Appx. A (Carey Mem.), at 37-38. Sgt. Ballou was "excited" about them when he noted them during the inventory, and he immediately pulled them from the hundreds of pages he had collected and sent them to the AGO with the label "Farak Admissions.", Tr. III, at 176:19-23; 209:2-11 (Ballou); Tr. IV 33:5-8 (Ballou);. Ballou and Kaczmarek knew these were the only documents in which Farak confessed to drug use in her own handwriting. Tr. III, at 159:2-6 (Ballou); Tr. III, at 160:14-18, 176:19-20 (Ballou).

Had Foster even taken a cursory look through the AGO's file (including not just the investigative file, but Kaczmarek's prosecution memo which referenced the Worksheets), she would have seen these documents and realized the AGO's contention that Farak's misconduct lasted only four months was false on its face. At the very least, even if Foster herself failed to grasp the significance of the Worksheets, she would have realized that there were previously undisclosed materials in the file relating to Farak's drug use, and the defense and the Court should have had the opportunity to examine them. By failing to make even basic, reasonable efforts to review the file and determine the scope of Farak's misconduct, Foster violated her duty under Rule 3.8(g).

C. Foster Breached Her Legal and Ethical Obligation to Disclose Exculpatory Evidence to Defendants Whose Cases May Have Been Tainted by Farak's Criminal Conduct

Foster had an ethical (as well as a state and federal constitutionally-grounded) obligation to disclose exculpatory evidence from the Farak investigations to defendants being prosecuted by the Commonwealth based on Farak's work. As Judge Carey found, it was clear that the Worksheets "constituted important exculpatory evidence for drug lab defendants" when Sgt. Ballou transmitted them to the AGO in his "Farak Admissions" email in early 2013. Appx. A (Carey Mem.), at 38. By failing to disclose the Worksheets when numerous attorneys at the AGO knew about them, and after Kaczmarek was unable to find any legal support for a claim of privilege, Foster violated MRPC Rule 3.8(d).

Beyond the ordinary disclosure obligations imposed on all attorneys responding to discovery demands under Rules 3.3 and 4.1 (discussed above), prosecutors have special obligations of their own under Rule 3.8. 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.[10]

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[10] 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

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) was not necessary to establish Foster'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" 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 at 71 (Carey Mem.), *citing Ware*, 471 Mass. at 95 (emphasis added); *Cotto*, 471 Mass. at 112 (same); *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

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discovered that a convicted defendant might be innocent).

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. T ucceri*, 412 Mass. 401, 402–403 (1992) & MRPC 3.8(d)).

Here, there is no dispute that numerous AGO attorneys knew of the Worksheets' existence, including Foster's colleague Anne Kaczmarek, with whom Foster spoke repeatedly in the summer and fall of 2013 about the Ballou file and, specifically, how the Commonwealth should respond to the Farak defendants' subpoenas regarding the evidence in this ongoing investigation. It is also clear that the AGO knew that the Worksheets contained *direct admissions* by Farak regarding her criminal conduct, and possessed those materials for at least 18 months before they were finally disclosed after one of the defendants' motions to inspect the evidence was finally granted. For these reasons, the Worksheets were flagged in early 2013, as soon as Ballou and Kaczmarek saw them. Kaczmarek set the documents aside and conferred with John Verner about them; they both understood that the documents had not been turned over. In fact, Kaczmarek testified that she would not have told Foster in 2013 that everything had been turned over (as Foster claimed she did) because she herself understood that the Worksheets had not yet been disclosed. *See* Tr. VI, at 133:10-15 (Kaczmarek).

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). Foster thus made the deliberate and "inexcusable" decision not to look through the file and disclose the

Worksheets, even though the AGO already knew that these documents were the most important evidence they had gathered regarding Farak's history of drug use as a government employee. Appx. A (Carey Mem.), at 70.

Further, whether Foster or anyone else at the AGO specifically realized back in 2013 that the dates on the Worksheets indicated drug use in 2011 rather than 2012 (a claim that is itself highly dubious, given how easily those dates could have been checked) did not relieve Foster of her obligation to produce these plainly exculpatory materials; she had an obligation to give the defendants a fair opportunity to investigate the admissions reflected therein.[11] *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).

Under these circumstances, then, Foster had an ethical obligation under MRPC 3.4 to disclose information having "potential evidentiary value," subject to evidentiary privileges or other lawful objections. In addition, pursuant to Rule 3.8(d), Foster had an ethical obligation to disclose to the defense all unprivileged mitigating evidence, unless the court relieved it of the obligation. Because the record powerfully supports Judge Carey's finding that Foster not only failed to fulfill that duty, but engaged in the "intentional withholding of exculpatory evidence

[11] Most obviously, the defendants could have done what Foster and Kaczmarek apparently did not do: check the dates against a calendar. Even assuming, *arguendo*, that Kaczmarek had a good faith basis for her professed assumption that the log entries were from December 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.

from the drug lab defendants and Judge Kinder," Appx. A at 84, she violated Rule 3.8(d).

III. Foster'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 an eight-year period, 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; (4) one prosecutor (Foster) repeatedly made material, false statements to a court; *and* (5) neither the attorney who made the false statements, nor any of her colleagues in the Attorney General's Office, alert any court about these false statements for more than two years after the AGO was alerted to them.

Judge Carey's Memorandum is unsparing in its criticism of Foster's key role in the AGO's mishandling of the fallout from the Farak 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" committed by Foster and her colleague Anne Kaczmarek "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. Further, even after it was revealed that Judge Kinder had relied on material misrepresentations of fact she had made more than a year earlier, Foster refused to concede that her failure to review a single document from the case file in the course of this litigation

constituted even so much as "poor practice." *Id.* at 70 (citing Foster's lack of remorse for her actions and questioning her "moral compass").

Indeed, Judge Carey found Foster's and Kaczmarek'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 Foster's "betrayal of public trust," *id.* at 124, and that her misconduct contributed to the continued wrongful incarceration of numerous Farak defendants, Foster 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.[12] 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.[13]

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

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[12] 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).

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

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.[14] 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.[15] Ethics boards nationwide are similarly hesitant to chastise prosecutors for blatant discovery violations.[16]

Here, the Massachusetts Board of Bar Overseers has a chance to do what most other disciplinary agencies have failed to do: hold a government lawyer accountable for egregious misconduct. Unlike many cases, the record is crystal clear with respect to Foster'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 and a half years have passed since Farak was arrested for tampering with drug samples; 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 Foster repeatedly (and falsely) stated to the court that

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[14] *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).

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

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

Farak's misconduct predated her arrest by only a few months, and that any attempts by the defense to claim otherwise were merely a "fishing expedition," the Commonwealth has now conceded that Farak's evidence tampering and drug use had actually gone on for *eight years*. In so doing, she may have denied justice and due process to thousands of potentially impacted defendants, many of whom remained incarcerated as information that would make their cases eligible for review languished in the AGO's files.

There is no cure for the defendants in the Farak cases that will fully remedy this gross miscarriage of justice perpetrated by Foster, although Judge Carey's decision provides a long overdue official 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 Foster'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 Foster 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 Foster'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. For if such serious prosecutorial malfeasance in the course of a major laboratory scandal is not met with appropriate consequences, the public cannot have confidence that the Commonwealth's attorneys will act with the requisite degree of care and candor in the future.

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