COMMONWEALTH OF MASSACHUSETTS
BOARD OF BAR OVERSEERS
OF THE SUPREME JUDICIAL COURT

BAR COUNSEL, **Petitioner** **vs.** **KRIS C. FOSTER, ESQ.,** **ANNE K. KACZMAREK, ESQ., and** **JOHN C. VERNER, ESQ.,** **Respondents**	**B.B.O. File Nos. C1-17-00248283** **C1-17-00248284** **C1-18-00255238**

HEARING REPORT

On June 28, 2019, bar counsel filed a petition for discipline against the respondents, Kris C. Foster, Anne K. Kaczmarek, and John C. Verner.

The petition charged that the respondents, all of whom worked as Assistant Attorneys General at the time, engaged in numerous acts of misconduct related to the Attorney General's prosecution of drug lab chemist Sonja Farak. The alleged disciplinary violations include, in the main, failure to disclose exculpatory evidence as to the timing and scope of Farak's drug use and tampering, intentional misrepresentations to the Court and third-parties, failure properly to supervise subordinates, lack of competence and diligence, and conduct prejudicial to the administration of justice.

Prehearing Motions

Represented by counsel, the respondents filed their answers on August 22, 2019, August 30, 2019, and August 30, 2019, respectively.

There was robust and substantial prehearing activity, a summary of which is offered here. Foster filed three motions along with her answer: a motion to sever, a motion to strike and a motion to appoint a Special Hearing Officer (SHO). In the motion to sever, she argued that there were narrow claims against her, appearing only in Count 3 of the three-count petition; that unlike

Verner and Kaczmarek, she was a subordinate lawyer, following instructions from her supervisors; and that it would be unfair and expensive to make her attend, with counsel, a lengthy hearing which largely concerned the other respondents. In her motion to strike, she objected on fairness grounds to particular language concerning her conduct. The motion to appoint a SHO noted the length and complexity of the Petition for Discipline, and urged the Board to choose a SHO "who had previously served on the Board of Bar Overseers and who had substantial experience in criminal practice."

Bar counsel opposed all three motions, arguing that because the allegations concerned a common set of facts, there was no prejudice from joinder of the three cases; no merit in the claim that particular language should be stricken from the petition; and no need for a SHO because the facts were not especially complicated. The Board Chair at the time, John J. Morrissey, held oral argument on the motions. By Order dated October 1, 2019, he denied the motion to sever and the motion to strike, and allowed the motion for appointment of a SHO.

The Board appointed me SHO October 21, 2019. I held a prehearing conference November 13, 2019, after which I issued the first of several scheduling prehearing orders. On January 8, 2020, bar counsel filed a motion to strike noncompliant parts of Foster's answer, and to compel her to file a more definite answer, noting that she had failed to respond to more than half of bar counsel's allegations and had refused voluntarily to amend her answer. Foster opposed the motion, claiming that bar counsel had included in the petition for discipline events about which Foster had no knowledge and in which she did not participate. By Order dated February 7, 2020, I largely denied bar counsel's motion to strike and compel, but I ordered Foster to file an amended answer and to include in it specific information. She complied on February 19, 2020.

The parties filed various motions in March and April 2020. Foster filed a motion to dismiss particular charges for lack of evidence, a motion to require bar counsel to identify witnesses and exhibits by count, and a motion to require bar counsel to provide the expected order of witnesses. Bar counsel opposed these, and filed his own motion in limine to exclude the testimony of Hon. Carol Ball (ret.) and Erik Lund, two expert witnesses Foster had earlier identified. Kaczmarek filed a motion in limine to allow her counsel to testify about the

development of the ABA's Model Rules of Professional Conduct, and to admit certain legislative history materials. Bar counsel opposed this motion in limine.

On June 12, 2020, I held a videoconference hearing on the motions in limine. By Order dated June 23, 2020, I concluded that Judge Ball's proffered testimony would not be relevant, but agreed that Foster could offer limited expert testimony from Lund. I denied Kaczmarek's motion, but noted that she was certainly free in her briefing papers to make relevant arguments about the Rules' history or interpretation. I urged the parties to work out their issues as to the identification of witnesses, exhibits and the order of witnesses, and did not make a formal ruling on those requests. By Order dated June 29, 2020, Board Chair Jeffrey R. Martin denied Foster's motion to dismiss.[1]

On September 16, 2020, at the parties' request, I entered a sequestration order for the upcoming hearing. During the hearing, I issued an Order October 5, 2020, noting that the parties had included among the disputed exhibits transcripts from six days of hearings held in 2016 before Hon. Richard J. Carey in a matter captioned Commonwealth v. Cotto, Superior Court Indictment No. 2007-770. I agreed that Justice Carey's 2017 findings and conclusions of law would not be given preclusive effect, but asked about the admissibility of the record in that matter for any other non-hearsay purpose. I ruled orally on October 14, 2020 (Day 11, pp. 37-41) that Judge Carey's findings would not be admitted; that I would accept into evidence only the cover page and pages 125-127 of his Memorandum; that despite the overlap, any exhibits admitted in Cotto would be admitted before me only if they were agreed to by the parties or could meet my test of admissibility; and that as to witnesses other than the respondents - whose testimony in full from the Cotto hearings was admitted into evidence here – prior Cotto testimony of any witnesses who testified before me could be used to refresh their memories.

On October 20, 2020, a local radio station, WBUR, sought permission from the Board to record the proceedings. The Board Chair, Jeffrey R. Martin, allowed this request on October 26, 2020, noting that the official record of the proceeding would remain the transcript prepared by the court reporter, and giving me the right to prohibit recording if, in my view, it were to

[1] Under BBO Rules, § 3.18(b), a motion to dismiss a petition for discipline or any charge or set of charges is decided by the Board Chair or a Board member designated by the Chair.

interfere with the orderly process of the case. The respondents immediately objected, and asked for time to respond. The Board Chair stayed his Order and gave the parties an opportunity to file written objections. All three respondents did so. By Order dated October 27, 2020, the Board Chair rejected their arguments and allowed WBUR's request.

The hearing was held by videoconference over twenty-three days in 2020: September 21, 22, 23, 24, 25, 29, 30; October 1, 2, 13, 14, 15, 16, 27, 28, 29; November 4, 5, 6, 13, 23, 24; and December 1, which was reserved for closing arguments. Three hundred and five exhibits were admitted, two of them subject to a protective order. In addition to the three respondents, twelve witnesses testified: Elaine Pourinski; Susanne Reardon; Luke Ryan; Justice Francis E. Flannery; Dean A. Mazzone; Sean W. Farrell; John P. Bossé; Randall E. Ravitz; Rebecca Jacobstein; Joseph Ballou; Edward Bedrosian, Jr.;[2] and Erik Lund. I issued a briefing Order December 29, 2020, asking the parties to defer briefing on sanctions until further Order. On February 4, 2021, the parties filed their proposed findings and conclusions (PFCs).

Introductory Statement

After offering relevant background about the respondents, this Report covers, more or less chronologically, the relevant incidents in the AGO from January 2013 until December 2016. Each Count of Bar Counsel's Petition for Discipline charges numerous violations of the Rules of Professional Conduct against each respondent. My conclusions about the alleged rule violations follow the pertinent factual recitations. My recommendations as to mitigating and aggravating factors, and for sanctions for the misconduct I have found, will be presented in a later Report, which I will submit after the parties have had the opportunity to review the material contained herein, and to brief their respective positions.

[2] At the November 13, 2019 prehearing conference, upon learning that Mr. Bedrosian would testify, I disclosed the fact that I knew him well. The parties raised no objection to my continuing as SHO.

Findings and Conclusions[3]

Structure in Pertinent Part of the Attorney General's Office

At all relevant times, Martha Coakley was the Attorney General for the Commonwealth of Massachusetts. Edward Bedrosian served as the First Assistant, and Sheila Calkins as a Deputy Attorney General. The Attorney General's Office (AGO) included four Bureaus; Respondent Verner was the head of the Criminal Bureau. The Criminal Bureau, in turn, consisted of between eight and ten divisions for which Verner was responsible, among them the Enterprise and Major Crimes Division (EMC) and the Appeals Division (Appeals). Until he became Deputy Director of the Criminal Bureau in September 2013, Dean Mazzone was the chief of EMC. Respondent Kaczmarek worked as a line AAG for him, in the EMC division. Randall Ravitz was chief of the Appeals Division. His deputy was Susanne Reardon. Respondent Foster worked as a line AAG in Appeals. See generally Ex. 236.

Basic Background Information about the Respondents

John Verner

1. Verner was admitted to the Bar of the Commonwealth on June 14, 2000. Ans. ¶ 6. Shortly after he graduated law school, in June 2000, he accepted a position as a prosecutor in the Middlesex District Attorney's Office. Tr. 11:227-228 (Verner).

2. While in Middlesex, Verner became close with Ed Bedrosian, whom he described as a mentor. Tr. 11:243 (Verner). Bedrosian moved from Middlesex to the First Assistant position at the AGO in late 2006 or early 2007. Tr. 17:24, 26 (Bedrosian). He contacted Verner a couple of times to try to get him to move to the AGO. Tr. 11:244-245 (Verner). Verner was at

[3] The transcript shall be referred to as "Tr. __:__"; the matters admitted in the answer shall be referred to as "Ans. ¶_"; and the hearing exhibits shall be referred to as "Ex. _." The matters admitted by the answer include those deemed admitted as a result of a respondent's failure to deny them in accordance with B.B.O. Rules, § 3.15(d). See Matter of Moran, 479 Mass. 1016, 1018, 34 Mass. Att'y Disc. R. 376, 379 (2018). I have considered all of the evidence, but I have not attempted to identify all evidence supporting my findings where the evidence is cumulative. I credit the testimony cited in support of my findings to the extent of the findings, and I do not credit contradictory testimony. In some instances, I have specifically indicated testimony that I do not credit.

first not interested, opting instead to remain in Middlesex where he worked for a total of twelve years. While there, he developed extensive trial experience and served in three different supervisory positions. Tr. 11:230-231, 237-238 (Verner).

3. When Bedrosian told Verner there was an opening at the AGO for the Criminal Bureau Chief position, Verner applied and was hired. Tr. 11:229, 243-244 (Verner). In August 2012, Verner began to serve as Chief of the Criminal Bureau. 11:244 (Verner). Bedrosian, as the First Assistant to General Coakley, was Verner's direct supervisor at the AGO. Tr. 11:251 (Verner). Verner also "managed up" to Deputy Attorney General Sheila Calkins and the Attorney General herself, keeping his supervisors on the 20th floor up to date on the Criminal Bureau's activities. Tr. 11:251, 12:12 (Verner).

4. At the time Verner joined, the Criminal Bureau included eight divisions. Ex. 119 (KFV00829). During Verner's tenure, the number of divisions expanded to ten. See Ex. 236 (5). Between 2012 and 2014, Verner managed about 100-110 people, including about twenty-five state troopers. Tr. 12:6, 10 (Verner). The troopers were not employed by the AGO, but "served two masters": they worked for the AGO, but were employed by the state police and reported through their chain of command up to their colonel. Tr. 12:9 (Verner). About fifty of the people Verner managed were lawyers. Tr. 12:10 (Verner).

5. When Verner joined the AGO, Dean Mazzone was Chief of EMC. Tr. 11:252 (Verner). EMC had four or five lawyers, including Mazzone, plus administrative staff. Tr. 11:253 (Verner). Prior to Mazzone's September 2013 promotion to Deputy Bureau Chief, Verner operated without a deputy chief. Tr. 12:10-11 (Verner).

6. Working without a deputy had been difficult. Verner described his work as "a massive job." Tr. 12:11 (Verner).

7. Verner was instrumental in hiring Randall Ravitz to be Chief of the Appeals Division in December 2012. Tr. 8:104 (Ravitz); 11:255-257 (Verner). At the time, Ravitz had been an AAG in Appeals since 2004. Tr. 8:103-104 (Ravitz).

8. The State Police had a detective unit (SPDU) within the AGO. Tr. 11:269, 270 (Verner); Ex. 236. During Verner's tenure, the SPDU was led by Captain Robert Irwin. Tr. 12:6

(Verner). The SPDU's team in the AGO's Springfield office was led by Sergeant Joseph Ballou. Tr. 12:7 (Verner).

Anne Kaczmarek

9. Kaczmarek was admitted to the Bar of the Commonwealth on December 14, 1999. Ans. ¶ 4. In July 2000, she joined the Suffolk County District Attorney's Office as an Assistant District Attorney, working in the District Court. Tr. 19:80 (Kaczmarek). In 2003, she was moved to Superior Court, to work in the General Felonies Unit and the Safe Neighborhood Initiative Unit. Tr. 19:80-81 (Kaczmarek). She remained there until late 2004, when she worked briefly in private practice doing probate work and real estate transactions. Tr. 19:81 (Kaczmarek).

10. Kaczmarek applied to the AGO in 2005, and was assigned to work in the Safe Neighborhood Initiative Unit, based out of Suffolk. Tr. 19:81 (Kaczmarek). She handled drug cases, shootings and gun arrests. Id. In 2008 she began to work in the Narcotics Unit of the AGO. Tr. 19:82 (Kaczmarek). The name of this unit changed to EMC. Id. In the 2012-2013 timeframe, Kaczmarek worked on narcotics cases, a prostitution case and bank robberies. Tr. 19:82-83 (Kaczmarek).

11. Kaczmarek was directly supervised by Dean Mazzone, an experienced prosecutor. See Tr. 5:229-230; 238-239 (Mazzone). As discussed in more detail infra, for the most part, Mazzone did not supervise Kaczmarek's work on the Farak prosecution. (Mazzone). Verner was actively involved in the initial Farak investigation, until Farak was arrested. Then Kaczmarek was primarily in charge of the day-to-day handling of the Farak prosecution, including all court appearances.

Kris Foster

12. After her graduation from law school, Foster began working in September 2008 as an Assistant District Attorney in the Appellate Division of the Suffolk County District Attorney's Office. Tr. 14:11-12 (Foster). She was admitted to the Bar of the Commonwealth on December 9, 2008. Amended Ans. ¶ 2.

13. While employed at Suffolk, Foster wrote about seventy briefs, for both the Appeals Court and the SJC, and argued approximately sixty appeals. Tr. 14:13 (Foster). She also

handled about twenty single justice cases, and twenty to thirty new trial motions. Tr. 14:13-14 (Foster). She carried a "heavy" caseload at Suffolk. See Tr. 14:17-18 (Foster).

14. The resumé Foster submitted to the AGO described her legal experience as including "trial litigation, including second-seating superior court prosecutions from indictment to verdict; drafting and presenting pretrial motions and jury instructions . . .; drafting and arguing post-conviction motions in the superior court and district court." Ex. 199 (KFVOBJ01937).

15. Among the "contributions" she identified in her resumé was that she "[a]uthored and argued 25+ post-conviction motions for new trial in Boston Municipal and Superior Courts." Id.

16. Foster had three interviews before she was hired at the AGO to work in its Appellate Division, including with Ravitz, Reardon and Verner. Tr. 14:23 (Foster). Reardon recalled that Foster cited her superior court work with post-conviction motions. Tr. 2:14-15 (Reardon). Ravitz noted that Foster "explained that she worked on trial level matters, . . . had second seated a murder trial and that she had handled a large complement of post-conviction motions." Tr. 8:108 (Ravitz). Foster's trial experience was significant to Ravitz because the Appellate Division was looking for people open to doing trial work. Tr. 8:109 (Ravitz).

17. A Request to Hire form, dated April 22, 2013 and submitted to the Criminal Appeals Bureau by Randall Ravitz, includes numerous hand-written notes, among them that Foster "2d sat homicides." Ex. 199 (KFVOBJ01933).

18. Foster's employment with the AGO began on July 8, 2013. Amended Ans. ¶ 3. Ravitz was her immediate supervisor; Reardon also supervised her and edited her work. Tr. 2:17 (Reardon); Tr. 14:25 (Foster).

COUNT ONE – FINDINGS OF FACT

Activities Incident to Farak's Arrest and AGO's Commencement of Prosecution

19. From 2004-2013, Sonja Farak worked as a chemist at a laboratory located at the University of Massachusetts in Amherst (Amherst lab). During her tenure, on July 1, 2012, the Massachusetts State Police (MSP) began to administer the Amherst lab, having taken over from the Massachusetts Department of Public Health. Ex. 146 at 5 (KFVOBJ00336). The lab was overseen by Major James Connolly of the MSP. Tr. 16:133-134 (Ballou).

20. The lab was the subject of a Quality Assurance Audit conducted October 10, 2012, among the purposes of which was to determine what steps had to be taken for it to become accredited. See Ex. 138 (2644). The Amherst lab had not been accredited since it began operation in 1987. Ex. 146 at 5. This was not unusual; laboratories frequently operate without accreditation. Id. The audit turned up numerous areas of concern, some of which appear to have been remediated. See Ex. 138 (2648-2650).

21. Farak transferred to Amherst after having worked at the Boston (Hinton) lab in Jamaica Plain. Ex. 16 (KFV00151).

22. As a chemist, Farak was responsible for chemically analyzing suspected narcotics submitted by law enforcement agencies. See Ex. 138 (2847). Farak's additional responsibilities included issuing drug analysis certificates, testifying in criminal proceedings regarding her analyses, and maintaining and repairing equipment. See id.; Ans. ¶ 10 (Kaczmarek and Verner). She worked with chemist Rebecca Pontes, chemist Sharon Salem, who was also the Amherst evidence officer, and chemist Jim Hanchett, the Amherst lab supervisor. Ex. 138 (3039).

23. On Thursday, January 17, 2013, Salem determined that there were two cocaine samples missing from the evidence locker in the Amherst lab. Ex. 31 (KFV00241). The samples had been assigned to Farak to analyze. Ex. 31 (KFV00242). The next morning, Friday, January 18, 2013, Salem told Hanchett about the missing samples. Id. He confirmed that Farak had completed the analysis of both samples, and that both had been positive for cocaine. Id.

24. Hanchett searched Farak's work area and found the packaging for the two missing samples. Subsequent testing showed one of the samples had been adulterated with a foreign substance, and the other was not cocaine. Ex. 31 (KFV00243-244). One additional sample assigned to Farak was also found missing. Ex. 31 (KFV00244-245). That day - January 18, 2013 - the MSP became involved, investigating Farak for potential criminal misconduct in tampering with and mishandling drug samples that had been submitted for analysis. Ans. ¶ 11 (Kaczmarek and Verner).

25. The same day, the MSP contacted the AGO regarding its criminal investigation of Farak. The AGO agreed to undertake the investigation and potential prosecution of Farak. These duties fell within the Criminal Bureau and EMC. See Ans. ¶ 15 (Kaczmarek and Verner).

26. It was generally recognized in the AGO that the Farak case was a matter of high importance. Tr. 12:41, 46 (Verner); Tr. 8:200 (Ravitz). Verner assigned Kaczmarek the responsibility of overseeing the investigation and prosecution of Farak. Tr. 19:200 (Kaczmarek).

27. Verner and Kaczmarek saw their roles differently. She considered Verner to be both her supervisor and co-counsel on the case. See, e.g., Tr. 20:176 (Kaczmarek); Tr. 21:174-175,181 (Kaczmarek). While Farak eventually pled guilty, Kaczmarek's understanding prior to this was that had the case gone to trial, Verner would have tried it with her. Tr. 21:177 (Kaczmarek) Actively trying the case would have been inconsistent with the understanding Verner had reached with his supervisors when he was hired: that he would not try cases. Tr. 11:245 (Verner). Verner saw Kaczmarek as primarily in charge. See, e.g., Tr. 12:187-188 (Verner); Verner PFCs, p. 25, n. 3. I find that after Farak was arrested, Kaczmarek was in charge of the Farak investigation and prosecution. Verner was available to Kaczmarek for support and assistance, as needed.

28. One of the reasons Verner assigned Kaczmarek to the Farak case was that she had been assigned to, and was at the time working on, the prosecution of lab chemist Annie Dookhan. Tr. 13:85 (Verner). Dookhan's conduct had come to the attention of the MSP in July 2012, when the MSP began to administer the Hinton laboratory in Boston. See generally Commonwealth v. Scott, 467 Mass. 336, 338 (2014). Aware that Dookhan had removed some samples without authorization and had forged the initials of an evidence officer to cover her tracks, the MSP asked the state police detective unit of the AGO to launch a broader investigation, to make sure that Dookhan's misconduct extended no further. Scott, id at 339. In fact, it turned out that Dookhan's known misconduct was, in the Court's words, "the proverbial tip of the iceberg"; Dookhan's misconduct went back two to three years, and included dry-labbing – grouping together multiple samples and testing only a few, but reporting the results as if she had tested all – and intentionally contaminating samples. Id. at 339.[4] See generally Bridgeman v. District Attorney for the Suffolk District, 476 Mass. 298 (2017) (adopting protocol for defendants impacted by Dookhan's misconduct).

[4] Dookhan's misconduct "was not accompanied by misconduct by a prosecutor or investigator." Committee for Public Counsel Services v. Attorney General ("CPCS v. Att'y Gen."), 480 Mass. 700, 725 (2018).

29. In January 2013, when Kaczmarek was assigned to Farak, it had been just a month since Dookhan had been arraigned. See Tr. 19:129 (Kaczmarek).[5]

30. Kaczmarek and Verner understood early on that, as had been the case in Dookhan, defendants with pending cases, and those who had been convicted on the basis of Farak's drug analysis ("Farak defendants"), would be entitled to receive from the District Attorneys' Offices (DAOs), potentially exculpatory evidence obtained by the MSP and the AGO in the investigation and prosecution of Farak. Ans. ¶ 20 (Verner); Tr. 21:144 (Kaczmarek). Kaczmarek understood that this obligation extended to information held by a police officer within her control. Tr. 21:211-212 (Kaczmarek).

31. It was understood from the outset that all evidence that was inculpatory towards Farak was potentially exculpatory to Farak defendants. See Tr. 19:156, 157-158 (Kaczmarek); Tr. 5:72-73 (Flannery); see Ex. 156 (107) (Verner). This conclusion would be obvious to any prosecutor or criminal defense counsel.

32. The AGO's approach in the Dookhan case had been a policy decision "to turn over all of our discoverable information, and what I mean by discoverable, obviously not work product or mental impressions but we were going to turn over everything, police reports, lab reports, interviews, whatever came from that investigation that we had or produced was going to go to the DA's offices. Whether it was exculpatory or not . . . [t]hey were going to get everything." Tr. 12:71 (Verner). Verner understood that Dookhan's admissions to misconduct were clearly exculpatory. See Tr. 12:69-70 (Verner).

33. In the Dookhan case, the AGO sent the DAOs numerous documents. The AGO described these in its first discovery letter, dated September 17, 2012, as reports which "may contain potentially exculpatory information, as well as information necessary to your Offices' determination about how to proceed with cases in which related narcotics information was tested at the Hinton laboratory." Ex. 177. Subsequent Dookhan letters cited the AGO's "continuing"

[5] Dookhan pled guilty December 4, 2013 to twenty-seven charges arising out of the investigation. Tr. 19:130 (Kaczmarek); Commonwealth v. Scott, supra, 467 Mass. at 337, n. 3.

obligation to provide potentially exculpatory information. Exs. 178, 179.[6] The plan was for the AGO to follow the same protocol in the Farak case. See Tr. 12-112 (Verner).

34. Joseph Ballou was the MSP officer assigned to the Farak case. While he currently holds the rank of detective lieutenant, at all relevant times, he held the position of sergeant. Tr. 16:124, 127-128 (Ballou). Ballou supervised Troopers Randy Thomas and Evan Breeding; in turn, Ballou was supervised by Detective Lieutenant Robert Irwin. Tr. 16:125 (Ballou); ¶ 8, supra.

35. Ballou's involvement in the Farak case began when Irwin called him at home, at approximately 7:00 P.M. on Friday, January 18, 2013, to tell him there had been evidence tampering at the crime lab in Amherst. Tr. 16:130 (Ballou). Ballou went to the Hampshire District Attorney's Office and met there with Thomas, Breeding, and Detective Lieutenant Robin Whitney. Tr. 16:131,132 (Ballou). Whitney told Ballou that she and her troopers had interviewed crime lab staff and had seized drug evidence from the lab. See Ex. 138 (3080-3085; 3089-3091). After they saw drug lab envelopes in Farak's car, they brought the vehicle to the Northampton state police barracks. Tr. 16:133 (Ballou).

36. Ballou's team undertook to write a search warrant for Farak's car. Thomas debriefed Whitney's troopers. Tr. 16:134-135 (Ballou). Irwin spoke repeatedly to Verner. Tr. 16:136 (Ballou).

37. Kaczmarek reviewed a draft search warrant, which was eventually finalized, approved and executed. Exs. 139, 253. The return reflects that the search of the car took place very early in the day, specifically, at "0323 Hrs" on January 19, 2013. Ex. 139 (KFVOBJ00018). It took one and a half to two hours to execute the search warrant of the car. Tr. 16:137 (Ballou).

[6] I recognize that in the Dookhan case, the prosecution of Dookhan herself was bifurcated from the parallel extensive and comprehensive review of the Hinton drug lab. See Exs. 2, 3. The AGO was in charge of Dookhan's prosecution, and other individuals and organizations undertook the lab review. See generally Ex. 170, "The Identification of Individuals Potentially Affected by the Alleged Conduct of Chemist Annie Dookhan at the Hinton Drug Laboratory," David E. Meier, August 2013 (describing efforts to find and contact individuals whose drugs had been tested by Dookhan, including review of millions of pages of lab documents and making accessible copies of all the relevant discovery material from the lab); Ex. 274, Affidavit of Audrey C. Mark, Esq. (describing Office of the Inspector General's review of Hinton lab, including its hiring of Navigant Consulting, Inc., to create a searchable database and scan and digitize approximately 3.5 million pages of Hinton Drug Lab-related documents).

38. Farak's car was full of trash and papers. Tr. 16:137-138 (Ballou); see Ex. 138 (3350-3357). Manila envelopes were found, with dates as early as 2008 and 2009. Ex. 139 (KFVOBJ00017-18). The entire car was emptied, after which Thomas took the things of evidentiary value and logged them in. Tr. 16:138 (Ballou). Thomas wrote the search warrant return and labeled certain items "lab paperwork"; a look at some of these papers reflected that they included lab results. Tr. 16:139, 16:146 (Ballou).

39. The search warrant return for the car listed an inventory of twenty separate items. Ex. 139 (KFVOBJ00017-18). Among the items seized were a zip lock baggie containing multiple white capsules (#3); a zip lock bag containing white powder substance (#9); a zip lock bag containing assorted pills (#10); full and empty pill bottles, three labeled with Farak's name (#16, 19); and "metal mesh, 1 metal rod, clear plastic baggie containing dark colored substance, wax paper containing white chunk substance, and 1 clear, knotted, plastic baggie containing white chunk substance" (#18). After the search was completed, Ballou and Thomas took the evidence back to the Springfield office and secured it in the evidence room. Tr. 16:142 (Ballou).

40. Later on January 19, Brad Puffer, the AGO's Director of Communications, sent a draft press release to Verner and Kaczmarek. Ex. 173 (KFVOBJ00012). Kaczmarek answered some questions and made some edits, asking that Verner's name be added to hers as an investigator. Tr. 19:202-203 (Kaczmarek); Ex. 173 (KFVOBJ00010). Verner specified that Kaczmarek's name should be first. Id.

41. The Farak case garnered immediate attention from the media, AGO and others in government, including the Governor. Tr. 21:139 (Kaczmarek). The Dookhan case was pending when Farak began. Tr. 12:92-93 (Verner). Kaczmarek had just arraigned Dookhan and was keenly aware that these cases likely would "destroy evidence for thousands of drug cases but also . . . the public confidence in what was happening in those drug labs." Tr. 19:159 (Kaczmarek).

42. Farak was arrested at her home on Saturday, January 19, 2013 by the MSP. See Ex. 276 (AGO press release). She was arraigned Tuesday, January 22, 2013 at the East Hampshire District Court in Belchertown. Ballou and Kaczmarek both attended the arraignment. Tr. 16:148-149 (Ballou). Farak was represented by Elaine Pourinski, whom she had retained

when she was arrested. Tr. 1:130 (Pourinski). Farak was charged with two counts of evidence tampering, possession of cocaine and possession of heroin. Ex. 125 (KFV00839). The heroin charge was later changed to a second possession of cocaine charge. See Ex. 22.

43. A decision was made to search a tote bag that had been found at Farak's work station in the Amherst lab. Ballou sent a draft search warrant to Kaczmarek and Verner for review January 22, 2013. Ex. 251. Verner made extensive comments on January 23 to give "credence to our proposition that stuff will be found in the bag," among them a suggestion to add "all that was found [in the car], including the papers," highlighting specifically that "we found personal papers, drug test results pertaining to an (unknown? Or do we know) person." Id.; Tr. 13:93,98 (Verner); Ex. 251. Ballou responded by requesting paperwork in the warrant. Tr. 16:150 (Ballou). Kaczmarek reviewed an iteration, and sent it to Verner for final approval. Ex. 254 (OBC029552).

44. The warrant for the tote bag was executed January 25, 2013. Ex. 252 (KFVOBJ00060). The return listed twenty items, no papers among them. Id. The items include baking soda (#3); baking powder (#4); Ziploc bag containing bar of Dove soap and razor blade (#5); Ziploc bag containing opened 1lb container of "Soy Candle Wax" off-white colored flakes (#12); an 8 oz bar of "Oven Baked Clay" and empty bag of "Oven Baked Clay" (#15). Ballou updated Verner and Kaczmarek as to what had been found; Verner, in turn, updated Bedrosian. Ex. 254 (OBC029551). These items, too, were stored by the MSP in the evidence room in Springfield. Ex. 137 (pp. 10-14).[7]

AGO Activities in Late January 2013

45. Ballou informed Kaczmarek, Verner and Irwin on January 23, 2013 that he had received information from Hampden County ADA Karen Southerland that Farak had potentially tampered with a sample of pills in a Hampden County case. Ex. 257 (KFVOBJ00068). Ballou expressed concern that "this may be the first of many such calls." Id. Kaczmarek and Verner each approved and authorized Ballou to obtain additional information about Farak's potential tampering, Kaczmarek writing back to all three: "I think this is the tip of the iceberg." Id.

[7] In addition to the search of the car and tote bag, Farak's work station was also searched and yielded additional items. See Ex. 137 (listing sixty items seized January 18, 19 and 25, 2013).

46. Ballou met with Southerland and reported back to Kaczmarek, Verner and Irwin that Farak had been the testing chemist in a March 2012 case involving an irregularity with suspected Oxycodone pills; the officer who submitted the pills apparently asserted that after testing, he received back *more* pills and that they were different in appearance than the pills he had submitted to the lab. Ex. 258 (KFVOBJ00069).

47. While Ballou was meeting with Southerland, she told him that ADA Dillon of her office had had a discrepant Farak case, this one involving cocaine that had decreased in weight by four grams (102 grams-98 grams) between the time the police weighed it and the time Farak certified it. Id. Ballou spoke to Dillon, and learned that Farak had tested the cocaine in 2005. Ex. 284. Dillon thought the difference in weight could possibly be explained by the weight of the packaging, drying of the product and inaccuracy in the police scale. Id.

48. The information reported by Ballou to Kaczmarek and Verner about the pills and the missing cocaine suggested that Farak's evidence tampering might have been going on for many years. It also suggested that in addition to cocaine, Farak may have been abusing other drugs.

49. Ballou did not think this was the case. In his January 23, 2013 response to Verner, Kaczmarek and Irwin, summarizing the two discrepant Hampden County cases, Ballou wrote: "I'm a little skeptical because neither of these cases seem to fit the scheme that we think Farak was perpetrating. In our cases, she was certifying the drugs correctly, then stealing/replacing drugs. They also go back a lot further than the cases we are looking at. Still, it warrants investigation of course." Ex. 258.

50. After receiving Ballou's emails detailing the pill case and the "light" cocaine case, Kaczmarek wrote: "Please don't let this get more complicated than we thought. If she were suffering from back injury – maybe she took some oxys?" Ex. 157 (KFVOBJ01838). In her 2016 testimony before Judge Carey, Kaczmarek had explained Ex. 157 as "kind of a plea to God, being like this is going to be like an avalanche of work to hit us." Ex. 163 (102).

51. Ballou denied that he took Kaczmarek's comment as a directive not to look into the Oxycodone matter further; he explained that their working theory in January 2013 was that Farak's drug use was fairly recent, going back only to November or December of 2012. Tr.

16:179-180 (Ballou).[8] He enumerated the reasons for this belief: all the missing drug cases they had were from November or December 2012; Farak's colleagues, when interviewed by the State Police, had noticed a decrease in her productivity only during the prior few months; and Ballou himself, who had first met Farak in September 2012 and had found her "somewhat pretty," noted a marked change in her appearance between then and January 2013, when she was "very pale, very drawn." Tr. 16:180-182 (Ballou).

52. Ballou also assumed, incorrectly, that chemists at the state labs would have been tested so that "you just couldn't get away with something like this for very long." Tr. 18:69 (Ballou). Subsequent events proved this assumption to be wholly inaccurate. See fn. 9, infra.

53. Kaczmarek claims she considered the Oxycodone and light cocaine cases to be outliers. She agreed with Ballou that the evidence they had at the time was that Farak was correctly analyzing the samples, then tampering afterwards. Tr. 19:216 (Kaczmarek). She agreed with Ballou about the dramatic change in Farak's appearance since the fall, and did not think Farak's drug use could have been going on very long, citing the testimony of Farak's colleagues that her productivity had been down only within the four to five months preceding her January arrest. Tr. 19:217-218; 20:28-29 (Kaczmarek). She insisted cocaine was Farak's drug of choice; that "is what she had the works for." Tr. 19:223 (Kaczmarek).[9]

54. She defended her "don't let this get more complicated" comment as a sober reflection about her own case and what she would have to prove should she include these incidents in any potential prosecution of Farak, stressing that because the evidence in the Oxycodone pill case and the 2005 light cocaine case had long left the lab, the chain of custody had been broken and there would have been no way to tie the discrepancies to Farak. Tr. 19:222-223 (Kaczmarek).

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[8] I discuss infra that in fact Ballou did not look into the Oxycodone matter further until early May 2013, when ADA Flannery prodded Kaczmarek to have him do so. See infra, ¶¶ 106, 175.

[9] I agree that most of the evidence taken from Farak's car and tote bag, much of which I have set out above in ¶¶ 39 and 44, suggests cocaine use and cocaine adulteration. However, I find that it was unreasonable, less than a week into the investigation, to narrow the focus exclusively to cocaine. There was at least some early evidence that Farak was abusing Oxycodone. Tr. 19:24-25 (Ballou); see Ex. 138 (3303, 3305 [item 17]). And in fact, Farak's drug abuse turned out to have been wide-ranging and of long-standing duration. See generally CPCS v. Att'y Gen., supra, 480 Mass. at 706-709 (describing the evolution of Farak's drug use from 2000-2012, writing that she had used, during that period, alcohol, marijuana, cocaine, heroin, methamphetamine, amphetamine, phentermine, ketamine, LSD and crack cocaine).

55. While I express no view as to whether Farak could actually have been prosecuted for the Oxycodone pill case and the 2005 light cocaine case, that is not the standard for the disclosure of potentially exculpatory evidence. I do not credit that Kaczmarek, an experienced prosecutor, failed to realize that this evidence was potentially exculpatory for Farak defendants, both to widen Farak's range of drug abuse and to lengthen substantially the tampering time-period. Verner certainly did. Tr. 13:169-171 (Verner) (pill discrepancy "was exculpatory information," as was information suggesting tampering as early as 2005).

56. I see this as an example of Kaczmarek's disregard for the rights of defendants possibly impacted by Farak's misconduct. Both the 2012 Oxycodone case and the 2005 light cocaine case were potentially exculpatory as to the Farak defendants.

57. After Verner reminded her to check (Ex. 300), Kaczmarek learned Thursday, January 24 from the Belchertown probation department that the previous day, January 23, Farak had tested positive for cocaine. Ex. 261. She forwarded this information to Verner, Ravitz and Ballou, adding that she would research the drug test they had used to see how long the cocaine would remain in Farak's system. There is no evidence that she in fact did this. Farak had told probation that she last used cocaine on "Friday," which would have been January 18, 2013. See id.

58. Kaczmarek denied that she believed Farak's positive cocaine test was potentially exculpatory, claiming, as she had with the Hampden County cases, that she was looking at this through the lens of her prosecution of Farak. Tr. 22:65-66 (Kaczmarek). I disagree and find that the positive drug test was potentially exculpatory information as to the Farak defendants. It is no answer to claim, as Kaczmarek has done, that evidence of Farak's drug use was "there in her car," a fact known to the public and legal community and a forgone conclusion. See Tr. 21:137, 22:66-68 (Kaczmarek). If Farak had used cocaine Friday, January 18, this was a work day and an inference would have been reasonable that she was under the influence during work, and/or getting her drugs from the lab. Even if she had not used cocaine until Saturday, this would still support an inference that she was a drug user, a potentially exculpatory fact. I do not agree that "everyone knew" Farak was a drug user based on the charges against her and the information in the January 19, 2013 press release (Ex. 276), and that this effectively neutralized the significance

of the positive drug test. While the materials found in her car and the circumstances of her arrest gave rise to strong inferences of drug use, the urine test results were compelling and irrefutable evidence that Farak had recently used cocaine. There is no doubt that a defense attorney would have used to great advantage the fact that the Commonwealth (the party opponent) had tested Farak, and that Farak had tested positive for cocaine use.

59. Verner agreed that Farak's positive drug test was exculpatory evidence. Tr. 12:145 (Verner).

60. By no later than January 29, 2013, Farak's conduct was attracting considerable attention; Kaczmarek and Verner were informed, by email dated January 29, 2013 from an AAG located in Western Massachusetts, that the DA in Hampden County "was getting pressure from the judges to identify cases that were handled by Farak." Ex. 285.

Discovery of Mental Health Worksheets

61. On February 14, 2013, Ballou "finally had a chance to pull all the evidence out and really start going through it and looking at it." Tr. 16:185-186 (Ballou). He opened the envelopes and went through the documents page by page. Tr. 16:186 (Ballou). He realized that what had appeared to be lab notes for particular cases in fact were personal papers, "psychological worksheets and things like that." Tr. 16:187 (Ballou).

62. Ballou was excited to find these documents; he thought they were good inculpatory evidence to be used against Farak. Tr. 16:217 (Ballou). The hand-written notes appeared to show Farak had been seeking therapy for drug addiction and struggling unsuccessfully to resist using drugs at work.[10]

63. Ballou knew Kaczmarek was preparing for the grand jury- the first session had been February 7 and his own first appearance would be February 28, 2013 - and he wanted to help her prepare. See Ex. 9; Tr. 16:188 (Ballou). He called Kaczmarek and told her about the "psychological worksheets," and expressed a concern that they could be privileged or HIPAA

[10] The Petition for Discipline charges, and Verner and Kaczmarek do not deny, that a notation in the upper left corner of one of the mental health worksheets said "homework 11-16-11." Ans. ¶ 24 (Kaczmarek and Verner). Although this document is part of the 289 pages Verner provided on November 13, 2014, see Petition at ¶ 144; ¶¶ 340, 341 infra, it is not clear why it was not separately admitted or discussed at the hearing. It is accessible through the link admitted as Ex. 136.

related. Tr. 16:187-188 (Ballou). She said she would check with Verner as to whether they could use them or would first need a court order. Tr. 16:188 (Ballou).

64. On February 14, 2013, Ballou scanned and emailed to Kaczmarek, with copies to Verner and Irwin, eleven pages of documents he described as "anything I thought was relevant to our case against Sonja Farak or anything that I thought could have been exculpatory to any particular case." Tr. 16:190 (Ballou); Ex. 155. He wrote "FARAK Admissions" as the email's subject, and named the attachments "Articles and Notes.pdf; Emotion Regulation Homework.pdf; Positive Morphine Test.pdf; Emotion Regulation Worksheet.pdf." Ex. 155.

65. The first four pages he sent were news articles about drug use by, respectively, Massachusetts law enforcement officers, a Pittsfield, Massachusetts pharmacist and a former San Francisco drug-lab technician. All were dated from sometime in 2011; all bore banners reflecting that they had been printed in 2011.

66. There was handwriting in the margin of the article about the Massachusetts law enforcement officers, reading: "And Kirchner [a subject of the article] seemed like such a good guy. I do feel bad for his 5 y.o. daughter. (Thank god I'm not a law enforcement officer). p.s. Most of the cases he's been a part of have been dismissed for exactly this reason." Ex. 155 (KFVOBJ01842). Ballou believed the handwriting was Farak's; it was consistent with other writing in her notes. Tr. 18:78 (Ballou).

67. It was because of the 2011 dates that Ballou included the articles among the papers he sent Kaczmarek and Verner. These showed him that "the case could have gone back much further than the time frame we had been looking at." Tr. 16:220 (Ballou). Although in his words the dates in the news articles were "outliers," in the sense that at this early stage of the investigation they did not have other evidence that Farak's drug abuse went back to 2011, Ballou agreed that the dates concerned him, and he recognized that the articles might have been exculpatory as to other defendants suggesting, as they did, that Farak's misconduct may have gone back further than they realized. Tr. 16:220-222 (Ballou). Ballou believes he discussed with Kaczmarek this concern, namely, that Farak's misconduct may have gone back further than they had thought. Tr. 16:221-222 (Ballou). I credit Ballou's testimony.

68. The remaining seven pages included a lab report for Quest Diagnostics with the participant's name scratched out, showing a positive morphine test on 1/28/11; two undated documents titled "Emotion Regulation Worksheet," with numerous handwritten entries; a sheet of paper with a grid labeled "Pros" and "Cons" at the top, and "resisting" and "TB" on the left side; another handwritten sheet with columns listing emotions, number values and days of the week, and a document entitled ServiceNet Diary Card with another grid, this one listing days and dates across the top ranging from Tuesday, Dec. 20 to Monday, Dec. 26 and at the left side, directions to "observe and describe emotions" and "target behaviors." Ex. 155 (KFVOBJ01846-1852) (Attached as Appendix (without morphine test result)).[11]

69. The papers included three references to "Anna," as well as references to "Becky" and "Jim." Farak wrote about the risk of getting caught and the option of lying about various things; lying about or on a DEA application; having "12 urge-ful samples to analyze out of next 13"; having urges to use a "good sample" at work, "knowing that I will be the only one here after lunch"; and the option to "give in and go w/ urge."

70. One of the pages (Ex. 5, KFV00015) said: "Thursday: tried to resist using @ work, but ended up failing," and Friday: "@ work use w/out debating doing it." I find that any prosecutor or criminal defense counsel who spent even a few minutes reviewing the attachments to Ballou's February 14 email would have recognized their significance: highly inculpatory to Farak, and highly exculpatory to all Farak defendants. I find that Kaczmarek and Verner knew the documents were exculpatory.

71. Kaczmarek received and reviewed these documents and renamed her electronic copy of them "mental health worksheets." Tr. 19:88-89 (Kaczmarek). She printed a hard copy, put it in a manila folder labeled "mental health worksheets," and put the folder in her trial box, where it remained. Tr. 19:89-90 (Kaczmarek). I neither heard nor have seen any evidence that Kaczmarek forwarded the February 14 email or its attachments to anyone.

72. Verner, who was copied on Ballou's email, claimed that he receives so many emails – "between 75 and 100 emails a day" – that he does not pay close attention to those on

[11] The reference to Christmas as falling on a Sunday (Ex. 5 (KFV00015)) could not have been to the Christmas just passed, Christmas 2012, which had fallen on a Tuesday. A simple review of the calendar would have shown that the Christmas reference in the mental health worksheets was not to the year 2012.

which he is merely cc'd, as distinguished from those sent to him. He claims he did not open the attachments. Tr. 12:129-130, 131 (Verner). I do not credit this testimony and find instead that he looked at the attachments. The subject line – "FARAK Admissions" – headlined an important subject in one of the most significant cases in the office. I find that Verner, who was detail-oriented, especially with high profile cases, would not have failed to review the email and attachments. See Tr. 5:247-248 (Mazzone).

73. After emailing Kaczmarek the mental health worksheets, Ballou discussed them by phone with her. Tr. 16:220-222 (Ballou). She understood that he had sent a selection of things he had found of interest, taken from multiple manila envelopes, and that some of the lab envelopes found in Farak's car had multiple papers mixed in. Tr. 16:191-192 (Ballou); Tr. 18:89 (Ballou); Tr. 21:203 (Kaczmarek). He explained to her that "there were so many papers and things that she would have to come out and look at them . . . ." Tr. 16:204 (Ballou).

74. Ballou and Kaczmarek Googled some of the abbreviations to try to see what Farak was saying, including the name Anna "like psychologist Springfield" and "TB." Tr. 18:89-90 (Ballou); Tr. 21:198, 205 (Kaczmarek).

75. Kaczmarek also made inquiry of chemist Nancy Brooks, asking her if she knew what the initials "TB" would mean in regard to drugs. Ex. 302. Brooks did not, and asked Salem, "Becky" and "Jim," who also did not know. Ex. 303. That was the extent of Kaczmarek's research. Tr. 21:196 (Kaczmarek). All told, Kaczmarek spent maybe half an hour reviewing the mental health worksheets. Tr. 21:202 (Kaczmarek).

76. Kaczmarek sought Verner's advice about whether to include the mental health worksheets in the presentation she was preparing for the grand jury. She told him there were documents found in the car in which Farak "was talking about how she felt using drugs and it may have been with some form of clinician . . . but . . . [Kaczmarek] had a concern that they might be privileged." Tr. 12:126-127 (Verner). Verner advised Kaczmarek not to include Farak's mental health worksheets in her grand jury presentation. See Ans. ¶ 33 (Kaczmarek and Verner).

77. Kaczmarek reported back to Ballou that she had checked with Verner and they decided they had sufficient grand jury evidence without the mental health worksheets, so they were not going to introduce them. Tr. 16:212 (Ballou). Once this determination was made,

Ballou did not look at the mental health worksheets again. Tr. 18:66-67 (Ballou). The documents remained in the evidence room at the MSP. In addition, copies of the mental health worksheets were on Kaczmarek's computer as an attachment to Ballou's February 14, 2013 email, and also in Kaczmarek's trial box.

78. I find that Kaczmarek's attitude toward the investigation was that of a prosecutor who was not eager to investigate her subject fully. Among other things, her statements about the "tip of the iceberg," an "avalanche of cases," and "please don't let this get more complicated than we thought" suggest a desire to avoid developing more evidence, the antithesis of how a prosecutor should act. She also developed a theory of Farak's conduct and its scope within days of Farak's arrest and declined to depart from it, notwithstanding Ballou's statements to her and the available evidence. I conclude that Kaczmarek recognized the exculpatory nature of these materials and, as discussed infra, knowingly failed to produce them to the DAOs.

Prosecution Memo and Grand Jury Preparation

79. In late March 2013, Kaczmarek was preparing a Prosecution Memorandum ("pros memo") seeking approval from the Executive Bureau of the AGO to indict Farak for four counts of evidence tampering, four counts of larceny of a controlled substance from a dispensary and two counts of unlawful possession of a Class B controlled substance. Mazzone, her supervisor, reviewed the first draft of the pros memo and suggested edits, which she made. Tr. 19:180-181 (Kaczmarek); Ex. 175.

80. In the section on items of note recovered from Farak's vehicle, Kaczmarek included "mental health worksheets describing how Farak feels when she uses illegal substances and the temptation of working with 'urge-ful samples.'" Ex. 176 (KFVOBJ00125). I find that Kaczmarek's reference in the pros memo to the mental health worksheets and the "temptation" of working with urge-ful samples reflects her knowledge of their importance.

81. Before Mazzone signed the pros memo, he and Kaczmarek, at her instigation, had a conversation about the mental health worksheets. Tr. 6:69-70 (Mazzone). She was concerned that the "notes, records of her meetings with the therapist" found in Farak's car should not be put into the grand jury because of HIPAA or because they would be too prejudicial. Tr. 6:70 (Mazzone).

82. In her pros memo, Kaczmarek described the mental health worksheets as "possibly privileged," while at the same time noting that case law suggested the paperwork was *not* privileged. Ex. 176, n. 7 (KFVOBJ00125). Kaczmarek acknowledged before me that if she had wanted to use this material at an eventual trial, she would have "had to do something about it," but at the time just wanted to get Farak indicted and "hadn't given it that much thought." Tr. 19:164-165 (Kaczmarek). She knew that if she possessed and wanted to use possibly privileged material, her duty was to seek a judicial ruling on its use. Ex. 163 (166-167). She did not take that easily available step.

83. Verner reviewed the pros memo after Mazzone, and although he signed his approval on March 27, 2013, he made significant and substantial comments throughout it, including comments and questions directed specifically to Kaczmarek. Ex. 176 (KFVOBJ00120, 126, 131). One of the comments related to the number of "counts" and was specifically directed to "Anne." Ex. 176 (KFVOBJ00129). Kaczmarek corrected the number of possession counts, raising it from one to two. Ex. 176 (KFVOBJ00120; Ex. 243 (KFVOBJ00151, 156).

84. Verner made a handwritten notation next to footnote seven, writing as to the mental health worksheets: "this paperwork NOT turned over to DAs office yet." Ex. 176, n. 7 (KFVOBJ00125) (emphasis in original). While Kaczmarek denied ever discussing with Verner that the mental health worksheets had not been turned over, she claimed he knew this fact because, as discussed in more detail below, she and Verner were, at precisely this time, together preparing the first discovery disclosure which did not include the mental health worksheets. Tr. 19:186-187 (Kaczmarek). I find that Verner and Kaczmarek discussed the issues surrounding the mental health worksheets, and Verner recognized that they included written admissions damaging to Farak. Tr. 13:108 (Verner). Verner "absolutely" understood that admissions should be turned over. Tr. 13:235 (Verner).

85. Calkins reviewed the pros memo next, and made some comments. She approved it March 28, 2013. Ex. 176 (KFVOBJ00120). The pros memo with the notations and comments was returned to Kaczmarek. Tr. 19:183-184 (Kaczmarek).

86. Before me, Kaczmarek claimed that once she learned the pros memo had been approved, she had no reason to review it, stating: "In my experience of doing pros memos, I've

never reviewed a signed, approved pros memo because the case has already been indicted." Tr. 19:184 (Kaczmarek). She stated that even if she had seen Verner's note about the mental health worksheets, she would not have viewed it as an instruction to her to turn over the mental health worksheets. Tr. 19:187 (Kaczmarek).

87. I do not credit Kaczmarek's testimony that she had no reason to review, and did not review, the pros memo once it was returned to her. I base my finding on the fact that she changed the number of possession counts based on Verner's note, and that Verner directed particular comments to her, supporting an inference that he knew she would read them. The inference is inescapable that Verner communicated to Kaczmarek through the pros memo; she saw his comments and knew she should act on them. If I did believe her, I would find her approach to be a knowing violation of office policy and protocol. I credit Verner's statement on this topic, as consistent with good work habits and common sense: "In every case, I expect the line AAG to review the comments, act on them, note them, do whatever they need to with the comments and act accordingly. . . . [O]therwise I would not write comments on it." Tr. 12:147-148 (Verner). "[T]he pros memo comes back to the line prosecutor to take action on anything that needs to be done." Tr. 13:28-29 (Verner). Mazzone's testimony was to the same effect, and I credit this testimony as well. Tr. 6:251 (Mazzone).

88. Kaczmarek presented testimony and exhibits to the Grand Jury on four separate days. Exs. 9, 11, 14, 21. Among the exhibits she introduced were the newspaper articles, described above in ¶¶ 65 and 66. Ex. 14 (p. 2). On April 1, 2013, a state-wide grand jury indicted Farak on four counts of tampering with evidence, two counts of unlawful possession of Class B controlled substance [cocaine], and four counts of theft of a controlled substance [cocaine] from a dispensary. Ans. ¶ 41 (Kaczmarek and Verner); see Ex. 22, Ex. 31(KFV00257-258).

Discovery and Discovery-Related Activities

89. By no later than March 21, 2013, the AGO began receiving requests from district attorneys for discovery. Tr. 19:172 (Kaczmarek); Exs. 283, 299. Kaczmarek requested and reviewed some of these. E.g., Ex. 19; Ex. 192; Ex. 299; Tr. 20:43 (Kaczmarek). If she had the requested items, she would turn them over. Tr. 19:173-174 (Kaczmarek); Exs. 166, 283. As

noted above, she and Verner both understood that the AGO had an obligation to provide all potentially exculpatory information to the DAOs because the DAOs had an obligation to provide that potentially exculpatory information to the Farak defendants. See Tr. 21:144 (Kaczmarek).

90. As the pros memo was being edited and finalized, Kaczmarek and Verner communicated concerning the language of a letter to be sent to the DAOs with documents related to and obtained in the course of the Farak investigation. Ans. ¶ 37 (Kaczmarek and Verner). In keeping with the Dookhan protocol, the evidence the AGO uncovered "would be turned over by our office to the individual DA's offices who would then make the determination on what to do with them vis-à-vis their own defendants." Tr. 12:112 (Verner). Verner understood "in [his] core that as a prosecutor we had a responsibility to fairness and to justice to turn this stuff over." Tr. 12:114-115 (Verner).

91. Kaczmarek helped to edit the first Farak discovery letter. While I have not been shown a first draft, Kaczmarek asked Verner why the AGO's obligation to provide exculpatory information was described in this first letter as "continuing." Ex. 263. This question appears to reference and echo the Dookhan pattern, where the first letter did not cite the AGO's "continuing obligation to provide potentially exculpatory information," but at least two successive letters did. Exs. 177, 178, 179. The letter sent March 27, 2013 over Verner's signature did not include the word "continuing." Ex. 165 (KFVOBJ00178).

92. Verner's letter cited two discrete obligations: the AGO's "obligation to provide potentially exculpatory information to the District Attorneys as well as information necessary to your Offices' determination about how to proceed with cases in which related narcotics evidence was tested at the Amherst laboratory." Id. It included sixteen listed items – mostly reports and interview transcripts - and the number of pages of each, totaling 210 pages. I credit that Kaczmarek pulled these documents together, and Verner signed the letter. Tr. 13:26 (Verner); see Ex. 262.

93. Verner's letter did not reference the mental health worksheets, information concerning the 2012 Oxycodone case, the 2005 light cocaine case, or Farak's January 23, 2013 urinalysis. He claimed he "didn't have a role in deciding what was in the letter or not in the letter." Tr. 12:145-146 (Verner).

94. Verner knew that as of March 27, 2013, the mental health worksheets had not "yet" been turned over. Tr. 13:25-26 (Verner). His language implies that he believed the mental health worksheets should be turned over, and would be. The language also implies that he discussed this subject with Kaczmarek. But he never followed up, to make sure that the mental health worksheets, and other information, was disclosed to the DAOs. Tr. 12:224, 13:30 (Verner). His expectation that Kaczmarek would turn over all exculpatory information was reasonable, but as her supervisor, he had a duty to follow up. He failed to do so. As described in more detail below, he never asked Kaczmarek if she had turned everything over. Ex. 156 (229).

95. After he sent this letter, Verner did not review the next two discovery packages. Tr. 12:150-151 (Verner). As described below, Kaczmarek prepared and signed the next two letters.

96. Farak was arraigned in Superior Court on April 22, 2013 on the charges enumerated above at ¶ 79. Tr. 20:53 (Kaczmarek). On or before April 22, Kaczmarek provided Farak's attorney, Pourinski, with particular discovery, referenced in a document entitled Commonwealth's First Certificate of Discovery. Tr. 20:55 (Kaczmarek); Ex. 24. The Certificate listed five CDs; the second CD included six items, the fourth of which was identified as "Paperwork recovered from M/V (7 pages)." These were the seven pages of mental health worksheets that Ballou had sent Kaczmarek and Verner on February 14, 2013, Ex. 24; Tr. 20:55 (Kaczmarek).

97. Asked at the hearing to compare what Pourinski was sent with what the DAOs had been sent a few weeks earlier, Kaczmarek admitted that the DAOs had received, in their March 27 package, only four of the six items on CD #2. Tr. 20:60-61 (Kaczmarek). They had not received item one, "Amherst drug lab paperwork/tampered samples (32 pages)" or item four, the mental health worksheets. Id.

98. Kaczmarek had no coherent answer for this omission, stating in response to my question about why she had not turned over to the DAOs everything in CD #2: "I think this is where you're seeing . . . the breakdown. This was, these CDs were the product of my prosecution of Sonja Farak . . . there was just a disconnect." Tr. 20:60 (Kaczmarek).

99. Kaczmarek arranged with Ballou for Pourinski and Farak to review the evidence in the Springfield MSP office on May 14, 2013. Kaczmarek did not go through the evidence then or, indeed, ever. See Tr. 19:95, 20:58-59 (Kaczmarek). I find that Kaczmarek willfully neglected her duty to investigate fully the scope of Farak's misconduct. Her decision not to review – indeed, her refusal to review – the evidence in Springfield when she was there for Pourinski/Farak's inspection is inexplicable. She could also have asked that the evidence be brought to Boston.

100. Between April 1, 2013 and June 26, 2013, the grand jury minutes and exhibits were prepared. Kaczmarek and Verner each understood that the grand jury minutes and exhibits contained potentially exculpatory information for Farak defendants. Ans. ¶¶43, 44 (Kaczmarek and Verner).

101. Kaczmarek and Pourinski disagreed about the dissemination of the grand jury minutes from February 7, 2013 that included the testimony of Farak's wife. Pourinski wanted them redacted; Kaczmarek's position was that "my responsibility is to turn over all the minutes unredacted and the accepting prosecutors can decide what is relevant to meet their discovery requests." Ex. 166 (KFVOBJ00193). They argued their respective positions at a hearing June 24, 2013.

102. After the hearing, First Assistant District Attorney of Hampden County, Frank Flannery, requested an update, advising Kaczmarek that "some of our Judges may want a status report." Id. Kaczmarek told him she was preparing the release of all the other grand jury material, and that it "[s]hould be in the mail tomorrow," i.e., June 26, 2013. Id.

103. On or about June 26, 2013, Verner directed Kaczmarek to send the grand jury minutes and exhibits to the DAOs. See Ans. ¶ 45 (Kaczmarek and Verner). On or about June 26, 2013, Kaczmarek drafted a cover letter and sent it to Verner for his approval. Ans. ¶¶ 46, 48 (Kaczmarek and Verner).

104. Kaczmarek's letter noted her office's "continuing obligation to provide potentially exculpatory information to the District Attorneys as well as information necessary to your Offices' determination about how to proceed with cases in which related narcotics evidence was tested at the Amherst laboratory." Ex. 167. It listed the two enclosures – grand jury minutes,

except for those from February 7, 2013 - and grand jury exhibits. Id. Kaczmarek signed and caused the letter to be sent in her name to the DAOs.

105. Kaczmarek sent a third letter to the District Attorneys on July 12, 2013, enclosing the redacted February 7, 2013 grand jury minutes that had been missing from the June 26, 2013 letter. Tr. 19:196 (Kaczmarek); Ex. 242.[12] It included the language set out above, about the AGO's continuing obligation as to potentially exculpatory evidence, and other information. This was the last discovery letter Kaczmarek sent to the DAOs.

Conclusions as to Failure to Disclose Potentially Exculpatory Evidence to the DAOs for the Farak Defendants

106. Ballou and Kaczmarek made no attempt to follow up on or disseminate the information they had been given about the Oxycodone or the light cocaine case. Ballou had met with ADA Southerland in January 2013, but did not interview Officer Bigda, one of the officers involved, until May 2013, and then only after Flannery sent Kaczmarek an inquiry. Ex. 26 (KFV00218). Flannery sent his email to Kaczmarek because he thought the Oxycodone case might be relevant to the scope or timing of Farak's misconduct. See Tr. 5:39 (Flannery). Ballou did not prepare a report about the case until September 3, 2013, emailing it to Flannery September 4. Ex. 169 (KFVOBJ01873, 01876).

107. Ballou never prepared a report about the 2005 light cocaine case. This information was not disclosed to defense counsel until 2016. See generally Affidavit of Christopher Post, Ex. 224, ¶ 6; Tr. 4:159 (Ryan). Post describes how he used the information – in brief, he determined that the light cocaine case was Commonwealth v. Johnson, found the Appeals Court and Supreme Court cases, got the Record Appendix with the drug certificate signed by Farak, and learned that the sample had not only changed in weight, but contained filler. See id. at ¶¶ 11-14. He notes that by the time Kaczmarek received information about the Johnson case, she should have been aware that materials to create counterfeit drugs had been found in Farak's workstation. Post Affidavit, ¶ 16. As indicated above, Farak had begun abusing drugs by 2004. This delayed

[12] In an email to Pourinski dated June 17, 2013, she noted her "obligation" to turn potentially exculpatory materials over to the DAOs. Ex. 130.

disclosure prejudiced a number of Post's clients; he would have been able to use this information in 2013 in various motions for new trials. Id. at ¶ 19.

108. To the extent that Kaczmarek claims that the DAOs were already aware of the 2012 Oxycodone and the 2005 light cocaine cases, I reject her argument. I agree that both cases originated in Hampden County, so it may be that that office knew generally about them. But the AGO did not have obligations only to the Hampden County DAO and its drug defendants, or even only to the four western Massachusetts counties. While I credit that samples from the four western counties went to the Amherst Lab where Farak worked, the AGO's discovery obligations extended to all of the DAOs and it sent discovery packages to all the offices. See Tr. 22:68-69 (Kaczmarek); Ex. 156 (110); Ex. 241.

109. I conclude that information about the Oxycodone case and the 2005 light cocaine case should have been sent to all the DAOs.

110. I have already noted that to the extent Kaczmarek claims she did not recognize the potentially exculpatory nature of the mental health worksheets, I do not find her claims credible. Their exculpatory value was patent and obvious, especially to a prosecutor with her years of experience. See Tr. 19:156 Kaczmarek).

111. Specifically, I find that the mental health worksheets both contained and led to the discovery of evidence vitally important to the defenses of the Farak defendants. I heard credible and compelling testimony about how these records were used after defense attorney Jacobstein received them in 2014: they formed the basis of Mass. R. Crim P. 17 motions to get third-party information from Farak's medical and mental health providers, as well as from the jail. Tr. 10:233, 242 (Jacobstein). Jacobstein learned from the documents she received from third-party providers that "this substance use problem was longer than had previously been divulged and also that [Farak] had been using possibly more substances." Tr. 10:238 (Jacobstein). She learned that Farak started using drugs in 2004, when she worked at the Hinton lab in Boston. Farak had made admissions to using drugs while at work, and taking all of her substances from work. Tr. 10:242 (Jacobstein).

112. ADA Flannery also acknowledged the records' valuable potential to support Rule 17 motions. Tr. 5:208-209 (Flannery).

113. In addition to claiming that she did not recognize the exculpatory nature of particular materials, Kaczmarek has defended her failure to disclose exculpatory evidence to the DAOs by stating, at different times, that it was not her job; that she had been told to "stay in her tunnel" and do nothing by way of inquiry or evaluation except for her own case; that she looked at the evidence only through the lens of what she would need to prove in her case against Farak; that Byron Knight, or some third-party,[13] was to play a role in the Farak discovery; and that "the system failed, it never kicked in, and I can't assume responsibility for that." E.g., Tr. 19:156, 158, Tr. 21:21-22, 118-120 (Kaczmarek).

114. I do not credit any of these claims. I heard no evidence that any third-party was at hand or on deck to help with discovery or anything else.

115. While my credibility determinations stand on their own, I note further that there was no credible evidence presented to me that Kaczmarek was told only to prosecute Farak and to assess the evidence only as it related to the Farak prosecution. I recognize that Kaczmarek was Farak's primary prosecutor, but the argument that she was told to stay in her silo or tunnel is not supported and, accordingly, unavailing. Indeed, it is strongly undermined by the numerous instances, identified above and below, when Kaczmarek explicitly recognized her duty to provide exculpatory evidence, reviewed motions forwarded by various ADAs, and sent them helpful information.

116. In summary, I do not agree and do not credit that it was not part of Kaczmarek's job to identify and send Farak-related discovery to the DAOs for the benefit of the Farak defendants. Kaczmarek played a vital role in the dissemination of all the Farak discovery letters sent during her tenure at the AGO. Further, she credited herself, in her 2013 Employee Self-Evaluation, with managing "volumes of discovery" in the Dookhan and Farak matters, specifying: "I was the point person in determining whether the information had been disseminated and gathering further information if needed." Ex. 127 (KFV00849).

[13] Byron Knight had been appointed by Governor Patrick to assist in providing discovery in Dookhan. Ex. 273, Affidavit of Byron J. Knight, Esq., ¶ 3. With the exception of one email, he played virtually no role in the Farak matter. See id., ¶ 13. As discussed infra, when Sean Farrell reached out to him for help, he told Farrell to contact Kaczmarek. See Ex. 71.

117. To its credit, the AGO made a policy decision early on in the Farak investigation that the AGO would disclose everything to the DAOs for the potential benefit of Farak defendants. Kaczmarek admitted that her office undertook this obligation. See Tr. 21:144 (Kaczmarek). The disclosure of potentially exculpatory evidence was particularly important. Verner described the office culture well in this regard, stating: "[I]f you're having more than a 30-second conversation about it, it needs to be turned over. . . . [Y]ou turn everything over. You give discovery. You do not hold back discovery. Do not hold back exculpatory evidence." Tr. 11:239 (Verner). My findings, conclusions and credibility determinations above and below reflect that Kaczmarek not only failed to do this; she actively misled others in the AGO as to what had been produced to the DAOs.

COUNT ONE – CONCLUSIONS OF LAW

Basic Legal Principles

Exculpatory Evidence and Duties of Prosecutors

118. Before addressing particular arguments about the reach and meaning of the Rules of Professional Conduct, I review here some basic principles concerning exculpatory evidence and the general duties imposed on prosecutors. It has long been the law that a prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935). A prosecutor "may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones." Id. See generally CPCS v. Att'y Gen., supra, 480 Mass. at 730–31 (2018); Commonwealth v. Tucceri, 412 Mass. 401, 407-408 (1992) (acknowledging that duty to disclose exculpatory evidence is "inconsistent with the traditional adversary role of litigants. But the duties of a prosecutor to administer justice fairly, and particularly concerning requested or obviously exculpatory evidence, go beyond winning convictions.").

119. "Under the due process clause of the Fourteenth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights, a prosecutor must disclose exculpatory information to a defendant that is material either to guilt or punishment." Matter of

Grand Jury Investigation, 485 Mass. 641, 646 (2020). Mass. R. Crim. P. 14(a)(1)(A)(iii) requires disclosure to a defendant of "[a]ny facts of an exculpatory nature," and Mass. R. Prof. C. 3.8(d) requires prosecutors to "`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.'" Matter of Grand Jury, supra, at 647. Comment [1] to Rule 3.8(d) underscores these particular obligations, providing: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. . . ."

120. The duty to disclose exculpatory evidence extends to information in the custody and control of those acting on the prosecutor's behalf, such as police investigators. Strickler v. Greene, 527 U.S. 263, 280-281 (1999). This is because "`[t]he government' is not a congery of independent hermetically sealed compartments; and the prosecutor in the courtroom, the United States Attorney's Office in which he works, and the FBI are not separate sovereignties. The prosecution of criminal activity is a joint enterprise among all these aspects of 'the government.'" United States v. Osorio, 929 F.2d 753, 760 (1st Cir. 1991). For those reasons, "[t]he prosecutor charged with discovery obligations cannot avoid finding out what 'the government' knows, simply by declining to make reasonable inquiry of those in a position to have relevant knowledge." Osorio, 929 F. 2d at 761. See also Commonwealth v. Frith, 458 Mass. 434, 440 (2010) (where cursory reading of incident report would have led prosecutor to additional discoverable material, further inquiry was in order); Commonwealth v. Martin, 427 Mass. 816, 824 (1998) (prosecutor has a duty to inquire concerning existence of scientific tests; obligations "extend to information in possession of a person who has participated in the investigation or evaluation of the case and has reported to the prosecutor's office concerning the case.").

Powers of the Attorney General/Separation of Powers Doctrine

121. Kaczmarek and Verner cite the Attorney General's unique status, as well as the separation of powers doctrine, in support of their claims that their actions, or some of them, are not subject to judicial review. See Kaczmarek PFCs, pp. 105-111; Verner PFCs, pp. 70-73. They

reason from these principles, and from certain constricted and unnatural constructions of the Rules of Professional Conduct, that they cannot be found to have violated particular rules.

122. It goes without saying that the Attorney General is accorded particular – even unique - treatment under our statutes and case law. E.g., M.G.L., c. 12; Shepard v. Att'y Gen., 409 Mass. 398, 401 (1991) (noting that discretionary executive decisions of the Attorney General, absent allegations of arbitrary or capricious conduct, are generally beyond judicial review because review of such decisions "`would constitute an intolerable interference by the judiciary in the executive department of the government and would be in violation of art. 30 of the Declaration of Rights'" (citation omitted)); Feeney v. Commonwealth, 373 Mass. 359, 366 (1977) (holding that Attorney General's authority "to assume primary control over the conduct of litigation which involves the interests of the Commonwealth has the concomitant effect of creating a relationship with the State officers he represents that is not constrained by the parameters of the traditional attorney-client relationship"); Sec'y of Admin. & Fin. v. Att'y Gen., 367 Mass. 154, 159 (1975) (Attorney General "has control over the conduct of litigation involving the Commonwealth, and this includes the power to make a policy determination not to prosecute the Secretary's appeal in this case.").

123. Our Rules single out government lawyers for special mention. Comment [4] of the Scope provision of the Rules provides, in pertinent part, that the rules "are not meant to address the substantive statutory and constitutional authority of the Attorney General when appearing for the Commonwealth."

124. However, recognizing the uniqueness of the Attorney General in some particulars does not lead to the conclusion that the conduct of its lawyers, in the matters at issue here, is beyond my reach or somehow insulated from my review. The very fact that special issues concerning the Attorney General are mentioned in the Rules' Scope provisions indicates that the Rules of Professional Conduct *do* apply to the attorneys in that office. My role is not to review any policy decisions of the AGO but, simply, to assess the professional conduct or lack thereof of its attorneys.

125. "Among the inherent superintendence powers of the Supreme Judicial Court is the authority to govern the conduct of attorneys in the practice of law. . . . This superintendence

authority includes determining who is qualified to be admitted to the bar to practice law, controlling the practice of law through rules of professional conduct, disciplining attorneys who violate those rules, and suspending and disbarring those attorneys who are no longer fit to practice law." Matter of Olchowski, 485 Mass. 807, 810, 36 Mass. Att'y Disc. R. 217, ___ (2020). Even before the Olchowski decision was issued, S.J.C. Rule 4:01, § 1(1) unambiguously settles the separation of powers issue, providing clearly: "Any lawyer . . . admitted to, or engaging in, the practice of law in this Commonwealth shall be subject to this court's exclusive disciplinary jurisdiction . . . ." This obviously includes prosecutors.[14] See Imbler v. Pachtman, 424 U.S. 409, 429 (1976) (Court observes that "a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers"); In re Flatt-Moore, 959 N.E. 2d 241, 246 (Ind. 2012) (rejecting deputy prosecutor's separation of powers argument and observing that "[p]rosecutors and their deputies must follow the Rules of Professional Conduct in plea bargaining and other acts involving prosecutorial discretion, and they may be disciplined by this Court when they fail to do so"); Massameno v. Statewide Grievance Comm., 234 Conn. 539, 563, 663 A.2d 317, 330 (CT 1995) (prosecutors "must act within recognized principles of law and standards of justice . . . [and] the authority underlying a prosecutor's powers merges with his or her complimentary obligations to the judicial process."). Cf. Sec'y of Admin. & Fin. v. Att'y Gen., supra, 367 Mass. at 158 (recognizing the right of review by the Court "where the powers of the Attorney General are themselves in question.").

126. Taken to its logical conclusion, the respondents' argument would exempt lawyers in the Attorney General's Office from the reach of the disciplinary rules, effectively establishing

[14] I reject out of hand the argument that the respondents were not acting as prosecutors. See Mass. R. Crim. P. 2 (b)(12) and (13): (12) "`Prosecuting Attorney' means the attorney general or assistant attorneys general, district attorney, assistant district attorneys, special assistant district attorneys, or legal assistants to the district attorney, or other attorneys specially appointed to aid in the prosecution of a case. (13) 'Prosecutor' means any prosecuting attorney or prosecuting officer, and shall include a city solicitor, a police prosecutor, or a law student approved for practice pursuant to and acting as authorized by the rules of the Supreme Judicial Court.'" Furthermore, the testimony of Pourinski, Flannery, Ryan, Jacobstein, Farrell and Bossé make clear that the AGO exercised total control, and was seen as exercising total control, over all evidence seized in the Farak investigation. To the extent that this evidence may have been exculpatory in the hands of defendants and their counsel in cases where Farak was the chemist, the AGO became, de facto, a part of the "prosecution team" in those other cases. See infra, ¶ 180.

a discipline-free zone for that sub-set of lawyers. This result would be untenable. Nothing about my assessment of the respondents' conduct impacts in any way the Attorney General's Office's unique status or its right to make and carry out policy decisions.

Scope of Rules/Statutory Construction

127. Familiar principles of statutory construction guide and inform my analysis of how to interpret the SJC's Rules of Professional Conduct. "`Ordinarily, where the language of a statute is plain and unambiguous, it is conclusive as to legislative intent.' . . . That said, '[w]e will not adopt a literal construction of a statute if the consequences of such construction are absurd or unreasonable.'" Commonwealth v. Brown, 479 Mass. 600, 606 (2018) (citations omitted). "`[A] statute should be construed in a fashion which promotes its purpose and renders it an effective piece of legislation in harmony with common sense and sound reason.'" Commonwealth v. Soldega, 80 Mass. App. Ct. 853, 855 (2011), rev. den., 461 Mass. 1106 (2012) (citation omitted).

128. "`The object of all statutory construction is to ascertain the true intent of the Legislature from the words used. If a liberal, even if not literally exact, interpretation of certain words is necessary to accomplish the purpose indicated by the words as a whole, such interpretation is to be adopted rather than one which will defeat that purpose.'" Champigny v. Commonwealth, 422 Mass. 249, 251 (1996) (citation omitted). Where two readings of the statute are possible, "we choose the reading that best comports with the statute's apparent intent and purpose, and we reject a reading that would hobble the statute's effectiveness." Lindsay v. Dep't of Soc. Servs., 439 Mass. 789, 796 (2003). "`Courts normally shrink from construing laws in a manner that would reward wrongdoing. The reason is that, in common experience, a legislature does not intend to reward wrongdoing . . . .'" Milton v. Comm'r of Correction, 67 Mass. App. Ct. 253, 259 (2006) (citation omitted).

129. In construing a Rule of the SJC, the Court, of course, has the final say; there are no separation of powers issues at play when the Court is assessing rules it writes, adopts and enforces. See Commonwealth v. Denehy, 466 Mass. 723, 733 (2014) (as to rule of criminal procedure, the Court is "`the final arbiter of what the rule means and permits.'") (citation omitted). The fundamental issue here is fairness and adequate notice to attorney respondents.

130. The Rules' Scope provision begins with the SJC's reminder that "[t]he Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself." Scope, Comment [1], Massachusetts Rules of Professional Conduct. See generally Matter of Crossen, 450 Mass. 533, 554 (2008) (disciplinary rules are "written in terms that any attorney bound by them should readily understand"); Matter of the Discipline of an Attorney, 442 Mass. 660, 669 (2004) (Court observes that "ethical rules of the profession 'written by and for lawyers ... need not meet the precise standards of clarity that might be required of rules of conduct for laymen'"); Matter of Eisenhauer, 426 Mass. 448, 452 (1998) (defining "client" broadly to reach attorney's misconduct). Cf. Matter of Fordham, 423 Mass. 481, 494 (1996) (that the Court had not previously "had occasion to discipline an attorney in the circumstances of this case does not suggest that the imposition of discipline in this case offends due process.").

Violation of Particular Rules

Anne Kaczmarek

131. Bar counsel charged that by failing to disclose to the district attorneys potentially exculpatory information known to her, Kaczmarek violated Mass. R. Prof. C. 1.1 (provide competent representation to a client), 1.3 (act with diligence in representing a client), 3.4(a) (do not obstruct another party's access to evidence), 3.4(c) (do not knowingly disobey an obligation under the rules of a tribunal), 3.8(d) (prosecutor to timely disclose to defense all evidence or information known to prosecutor that tends to negate guilt of the accused or mitigates the offense) and 8.4(d) (conduct prejudicial to the administration of justice).

132. Kaczmarek claims that Rules 1.1 and 1.3 apply only to a lawyer representing a client in a representational capacity, and therefore do not apply to her. Kaczmarek PFCs, ¶¶ 226, 227 (pp. 71-73). I reject this hyper-technical reading of the rules as inconsistent with the basic principles of statutory construction set out above. I conclude that Kaczmarek was functioning at all times as a prosecutor, with the Commonwealth as her client. I conclude, based on the facts set out above, that she was neither competent nor diligent in failing to disclose potentially exculpatory information known to her. Bar counsel has proved violations of these rules.

133. Kaczmarek claims that Rule 3.4(a) does not apply to her because any obligation under it runs only to opposing parties, not third parties. See Kaczmarek PFCs, ¶ 228 (pp. 73-75). I do not agree with this cramped and unnatural construction. For numerous reasons, detailed above, the AGO had obligations to transmit potentially exculpatory information to the Farak defendants through the DAOs. That the recipients were not directly adverse parties to the AGO is of no moment. Bar counsel has proved a violation of this rule.

134. Kaczmarek claims that Rule 3.4(c) does not apply to her conduct because there was no outstanding obligation "under the rules of a tribunal." Kaczmarek PFCs, ¶ 229 (p. 75). I reject this argument. The AGO undertook to disclose this material, as a well-considered policy decision. Even if it had not had to do so by law or rule, it made a policy decision and made clear its intentions and was, accordingly, bound to follow through. I find Verner eloquent in this regard: "[W]e had stuff that could affect people . . . get it out. So whether there's an actual or a technical [requirement], wasn't my concern." Ex. 156 (211-212). Bar counsel has proved a violation of this rule.

135. Kaczmarek claims that Rule 3.8(d) does not impose an obligation on her to disclose exculpatory information to other prosecutor's offices but, rather, that the rule's disclosure obligation runs only to the *defense* - in a particular case - of an *accused* – one charged with crime, not one seeking post-conviction relief. She claims further that she was not part of any prosecution team, and that any alleged exculpatory information was not known to her. See Kaczmarek PFCs, ¶¶ 230, 232 (pp. 75-77, 81-83).

136. Rule 3.8(d) imposes greater obligations on prosecutors than the Brady v. Maryland line of cases and the due process clause. See Cone v. Bell, 556 U.S. 449, 470, n.15 (2009) ("[a]lthough the Due Process Clause of the Fourteenth Amendment, as interpreted by Brady, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations); ABA Formal Opinion 09-454 (July 8, 2009), p. 4 ("Courts as well as commentators have recognized that the ethical obligation [under Rule 3.8(d)] is more demanding than the constitutional obligation. The ABA Standards for Criminal Justice [Prosecution Function, Standard 3-3.11(a) (ABA 3d ed. 1993] likewise acknowledge that prosecutors' ethical duty of

disclosure extends beyond the constitutional obligation"); Massachusetts Bar Discipline: History, Practice and Procedure (2018), Ch. 16, II(A), p. 371 ("Rule 3.8(d) augments an obligation that the Due Process Clause of the United States Constitution imposes.").

137. The Farak defendants' access to the exculpatory material ran through the AGO: this was the AGO's investigation, the AGO agreed to provide and did provide information to third-parties, and everyone recognized the AGO's gatekeeping function. As I explained above, the AGO undertook to provide potentially exculpatory evidence to the Farak defendants through the DAOs. This obligation was broader than and not co-extensive with any disclosure duties under Mass. R. Crim. P. 14. I do not agree that the obligation did not apply to post-conviction Farak defendants; it clearly did. Even if I did accept that construction, I noted above – and it is undisputed – that there were pre-trial defendants among the Farak class.[15]

138. A prosecutor's duty to disclose exculpatory evidence is not as narrow and circumscribed as the respondents claim. I note that in CPCS v. Att'y Gen., where the misconduct at issue exclusively concerned Farak defendants, most of whom were post-conviction, the Court included Rule 3.8(d) in its discussion of a prosecutor's disclosure duties. Id., 480 Mass. at 731. If Rule 3.8(d) had had no application except as between a prosecutor and her defendant in a pending case, this reference, without explanation, would have been at best confusing and at worst superfluous.

139. Matter of Grand Jury Investigation, supra, is to similar effect. At issue there was review of a Superior Court order that the district attorney make disclosure to criminal defendants, in cases not yet tried and in certain disposed-of cases, that particular police officers had admitted to filing false police reports.[16] The Court framed the issue by summarizing Brady

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[15] Cf. Commission for Lawyer Discipline v. Hanna, 513 S.W.3d 175, 183 (Tx. App. 2016) (finding no post-conviction duty of disclosure under Texas equivalent to Rule 3.8(d) for prosecutors who learned, after guilty plea, of chemist's earlier misconduct; Court observes that its holding "should not be misinterpreted as a conclusion that prosecutors owe no duty to disclose exculpatory information post-conviction" but, rather, "is limited to a determination that Rule 3.09(d) did not impose such a duty under the specific facts and circumstances of this case."). Texas and its courts may interpret Texas's rules as they choose. To its credit, the AGO here chose, as a matter of policy, to interpret expansively the Commonwealth's duty to disclose potentially exculpatory evidence to Farak defendants.

[16] The Superior Court judge had ordered the Commonwealth "to notify by means of the proposed discovery letter, all defendants of cases not yet tried and cases now disposed that were tried after the date of the filing of the false police reports, for which the identified officer either prepared a report or is expected to be a witness at trial." Matter of Grand Jury Investigation, 485 Mass. at 645-646.

and its obligations, and citing Mass. R. Crim. P. 14(a)(1)(A)(iii), a rule entitled "Pretrial Discovery," and Rules 3.8(d), 3.4(a), 3.8(g) and (i). 485 Mass. at 646-647. It reviewed and systematically rejected all of the police officers' arguments against disclosure: that the information was outside the prosecutors' Brady obligation; that it would not be admissible at trial; that disclosure would violate immunity orders in the petitioners' favor; and that disclosure was barred by the rules governing grand jury secrecy.

140. The Court's interpretation of Brady and the cited rules to cover disclosure to third parties, 485 Mass. at 657-658, was a natural extension of existing case law and established legal principles, not a groundbreaking announcement of a momentous shift. The absence of discussion is significant and, for purposes of this case, supports interpreting Rule 3.8(d) with some flexibility. This view harmonizes more naturally with the general principles outlined above than does the respondents' approach of isolating particular words and ascribing to them both an unduly narrow meaning and an outsized significance. Cf. Matter of Eisenhauer, supra, 426 Mass. at 452 (construing disciplinary rule broadly to mitigate harm).

141. It bears noting that the purpose of Rule 3.8 is to impose additional duties on prosecutors consonant with their charge to seek justice. Although amendments to the Rule that post-date the events at issue here add new and explicit obligations, the Rule pre-amendment, and the case law construing it, were strongly animated by a prosecutor's duty to administer justice and to enhance the judicial process, not simply to win and sustain convictions.

142. I conclude that bar counsel has proved that Kaczmarek violated Rule 3.8(d).

143. I conclude that bar counsel has proved that Kaczmarek violated Rule 8.4(d). As the result of Kaczmarek's misconduct, voluminous litigation ensued and continues still, many years after the fact.

John Verner

144. Bar counsel charges that by failing to disclose to the district attorneys potentially exculpatory information known to him, Verner violated Mass. R. Prof. C. 1.1, 1.3, 3.4(a) 3.4(c), 3.8(d) and 8.4(d)

145. Verner makes many of the same claims about the rules' reach and significance that I discussed and rejected above, e.g., that AGO did not prosecute the Farak defendants and

was not part of any prosecution team (Verner's PFCs, p. 70); Verner was not functioning as a prosecutor (id. at 73-74); Rule 3.8(d) imposed no obligation on the respondents (id. at 75-77); Verner did not have a client, and had no opposing party or counsel. Id. at 92-94. For the reasons already stated, I reject these contentions.

146. However, I do not agree that bar counsel has proved Rule 1.1, 3.4(a), 3.4(c), 3.8(d) or 8.4(d) violations against Verner for his failure to disclose to the DAOs potentially exculpatory evidence known to him. Except as explained below, I find that Verner was entitled to rely on Kaczmarek to discharge competently and fully the duty to disclose exculpatory evidence. While Verner was deeply engaged at the beginning, his involvement waned as the case progressed. The case was largely Kaczmarek's to manage and prosecute, albeit with regular oversight by Verner. I do not agree that bar counsel has proved these violations.

147. Bar counsel charges that by failing to ensure that Kaczmarek disclosed to the district attorneys potentially exculpatory information that was known to the AGO, Verner violated Mass. R. Prof. C. 1.1, 1.3 and 5.1(b) (lawyer supervising another lawyer shall make reasonable efforts to ensure that supervised lawyer's conduct conforms to Rules).

148. Bar counsel has proved violations of Rules 1.3 and 5.1(b). The failure to disclose potentially exculpatory evidence happened on Verner's watch, due at least in part to Verner's failure adequately and diligently to supervise Kaczmarek and follow up with her. I do not agree with Verner's claim that Mazzone, not he, was Kaczmarek's supervisor in this matter. See Verner PFCs, p. 85. Verner should have done more to ensure that the potentially exculpatory evidence – particularly the mental health worksheets – were disclosed. I found above that he had received and opened Ballou's February 14, 2013 email marked FARAK Admissions. He knew how important admissions were in a criminal case. He knew as of the date of the pros memo that this critical material should be but had not yet been disclosed. He never followed up. He did not exercise diligence. This was a violation of Rules 1.3 and 5.1(b).

149. Bar counsel charges that by failing to take remedial action when he was aware that Kaczmarek had not disclosed to the district attorneys potentially exculpatory information, Verner violated Mass. R. Prof. C. 5.1(c)(2) (lawyer is responsible for another lawyer's violation of the Rules if lawyer knows of misconduct at a time when its consequences can be avoided or

mitigated but fails to take reasonable remedial action). Verner knew in March 2013 that the mental health worksheets had not been turned over. He assumed and expected that they would be. My finding above reflects that in failing to follow up, he committed misconduct, However, I did not and do not find that Verner was actually aware, until November 2014, that the potentially exculpatory material had not been turned over. Once he learned this, he acted promptly. In the circumstances, I do not find that bar counsel has proved that Verner failed to take remedial action when he was aware of Kaczmarek's misconduct.

COUNTS TWO AND THREE– FINDINGS OF FACT

Discovery Requests and Related Activity in the Summer of 2013

150. Beginning in the spring and summer of 2013, multiple Farak defendants filed subpoenas and requests for discovery. E.g., Exs. 38, 39, 44, 118.

151. Hon. C. Jeffrey Kinder, an Associate Justice of the Superior Court in Hampden County, consolidated numerous Farak-related matters for an evidentiary hearing on September 9, 2013 (Kinder hearing). To streamline the presentation of evidence, on July 25, 2013, in an Order Regarding Drug Lab Evidentiary Hearing, Judge Kinder ordered counsel to confer in advance of the hearing to determine the witnesses to be called, the order of presentation, and which counsel was to examine the witnesses. Ex. 292. Counsel were also ordered to prepare a binder of agreed exhibits. Id.

152. Judge Kinder's Order stated that the scope of the hearing was limited to "(1) the timing and scope of Ms. Farak's alleged criminal conduct; and (2) the timing and scope of the conduct underlying the negative findings in the October 10, 2012, MSP Quality Assurance Audit at the Amherst Drug Laboratory; and how the alleged criminal conduct and audit findings might relate to the testing performed in these cases." Ex. 292.

153. On or about August 16, 2013, Judge Kinder assigned ADA Flannery to act as lead counsel to represent the Commonwealth in the consolidated hearings. Tr. 5:137-138

(Flannery).[17] Judge Kinder also assigned two lawyers, Luke Ryan[18] and Jared Olanoff, to act as lead counsel for the Farak defendants. Tr. 5:70-71 (Flannery).

154. Flannery was the ADA in charge of providing discovery to the Farak defendants. Tr. 5:22-23 (Flannery). He created a link for this purpose, on or about August 16, 2013. Tr. 5:32-33 (Flannery); Ex. 136. The evidence connected to the link had been received from other DAOs and from the AGO. Tr. 5:139-141 (Flannery).

155. By email dated August 16, 2013, Flannery informed Kaczmarek of the Kinder hearing, his role, and that the purpose of the hearing was "to define the scope, to the extent possible, of Farak's misconduct." Ex. 168. He noted that he had had "numerous requests for the photos that were taken during the search of Farak's vehicle," and asked for Kaczmarek's permission to provide these. Id. He explained that he had all the grand jury minutes but not the exhibits and asked her to send those. Id. Flannery also informed Kaczmarek in this email that he expected that the evidence admitted in the hearing "will include the testimony of some of the investigators and chemists involved in your investigation along with the discovery you have provided." Id. Flannery explained at the disciplinary hearing that he believed that by the time of the Kinder hearing, the AGO would have provided him with all the evidence in its possession concerning its investigation of Farak and her drug use and misconduct. Tr. 5:58-60 (Flannery). I find that this expectation was reasonable and credible. I find further that Kaczmarek knew what Flannery's role was, and knew that Flannery was relying on her to provide him with these materials.

156. Kaczmarek received a copy of Justice Kinder's July 25, 2013 "scope" Order. See Ex. 57 (KFV00401-402). She understood that Flannery was alerting her about her own witnesses' testimony because of the possibility for inconsistent statements or recorded statements of her witnesses. Tr. 20:106 (Kaczmarek).

157. By email dated August 21, 2013, Ballou alerted Kaczmarek that Flannery needed him to testify September 9, 2013 in the Kinder hearings, explaining that Judge Kinder had

[17] Flannery was appointed to the Superior Court bench in 2018. Tr. 5:13 (Flannery).

[18] I am aware that Ryan represents a class of plaintiffs in civil litigation in federal court and, therefore, has a bias. See Penate v. Kaczmarek, 3:17-30119-KAR (D. Mass.) However, I saw no reason not to credit his well-prepared testimony.

consolidated a number of motions from defense attorneys regarding the drugs Farak tested, and asking if he could send Flannery the above-mentioned photos taken during the vehicle search. Ex. 40. Kaczmarek had, of course, been forewarned about Ballou's testimony by Flannery's August 16 email. She responded August 22, giving him permission to send the photos, telling him she would talk to Flannery about "what your [Ballou's] testimony will be," and noting that in the Dookhan case, they had tried to quash subpoenas for Ballou's superior, Robert Irwin. Id. Aside from agreeing to the release of the photos, I find that Kaczmarek took no steps to ensure that, prior to September 9, Flannery would be given all of the potentially exculpatory Farak material.

The AGO is Served with Penate and Watt Subpoenas and Rodriguez Discovery Motion

158. On August 22, 2013, Ryan served Kaczmarek and Ballou with subpoenas, seeking testimony and documents, on behalf of Rolando Penate (Penate subpoenas). Ex. 39. Penate was a pre-trial defendant, charged with various drug crimes. See Ex. 118 (KFV00810), ¶ 2.

159. The Penate subpoenas, returnable on August 27, 2013, directed Kaczmarek and Ballou to appear, testify and produce documents in a Schedule A, among them "copies of any and all inter-office correspondence pertaining to the scope of evidence tampering and/or deficiencies at the Amherst Drug Laboratory from January 18, 2013, to the present"; "any and all evidence suggesting that Sonja Farak may have had an accomplice in the evidence tampering she engaged in at the Amherst Drug Laboratory"; "any and all evidence suggesting a third party may have been aware of Sonja Farak's evidence tampering"; and "copies of the news accounts with handwritten notes recovered by the Massachusetts State Police during a search of Ms. Farak's car." Ex. 39 (KFV00308, KFV00312).

160. Kaczmarek did not review the Ex. A connected with her subpoena or with Ballou's. Tr. 20:117, 118 (Kaczmarek).

161. On August 23, Ballou forwarded the subpoenas, with a note, to Verner, Mazzone, Irwin and Kaczmarek writing, "Anne asked me to forward this to the group to see if it can be quashed." Ex. 213.

162. I have already noted that the Farak case was a matter of high importance in the AGO and in the community generally. See supra, ¶¶ 26, 72. Ravitz assigned Foster, who had no

experience responding to subpoenas, to respond to the Penate subpoenas, telling her he would discuss them with her the following Monday, August 26. Tr. 8:155-156 (Ravitz); 14:34-35 (Foster). Given the nature of the Farak prosecution, and the subpoenas' importance both to the Farak case and the Farak defendants' cases, someone with significant experience with subpoenas should have been assigned. Ravitz may have assumed a level of experience by Foster with Superior Court practice that Foster did not have.

163. Ravitz and Foster met August 26 to discuss the response. Tr. 14:37-38 (Foster). By no later than the morning of August 26, 2013, Ravitz had provided Foster with samples – a motion, and three memoranda of law. Tr. 8:156-157, 163 (Ravitz); Tr. 14:40 (Foster); Ex. 42. I credit that Ravitz sat down with Foster and went over the steps of handling a subpoena. Id.

164. I credit that Ravitz followed the first two steps of his usual practice with Foster, telling her how to respond. Tr. 8:167-168 (Ravitz). First was to reach out to opposing counsel to find out both if the deadline was fixed and if the scope could be narrowed. Tr. 8:167 (Ravitz). Ravitz had no clear memory that he instructed Foster to review the files in order to determine which documents were privileged. I do not credit his testimony to the effect that he was sure he would have done so. Tr. 8:164,168 (Ravitz).

165. By email dated August 29, 2013, Ryan told Foster that he represented a second defendant, Rafael Rodriguez, who had moved to withdraw his guilty plea based on Farak's conduct. Ex. 43 (KFV00336).

166. Ryan attached to his email papers he said he had filed that day: an Amended Motion to Compel Discovery Pursuant to Mass. R. Crim. P. 30(c)(4), a Memorandum of Law, and an Affidavit in support of the amended motion to compel. The discovery motion requested, among other items, inter- and/or intra-office correspondence pertaining to the scope of evidence tampering at the Amherst lab; copies of any and all correspondence from January 18, 2013 to present, to and/or from district attorneys' offices in the four western counties pertaining to the scope of evidence tampering at the Amherst laboratory; evidence suggesting that Sonja Farak may have had an accomplice in the evidence tampering she engaged in at the Amherst Drug

Laboratory; and evidence suggesting a third person may have been aware of Farak's evidence tampering prior to her arrest (Rodriguez discovery motion). Ex. 43 (KFV00360).[19]

167. Ryan explained in his email that it was not going to be possible to go forward with the hearing on the Rule 30 motion on September 4, 2013, as he had hoped. Citing the hearing scheduled for September 9, he wrote: "it has become clear to me that in order to prepare effectively for the hearing on 9/9, I will need to inspect the 60 items seized during the course of the Farak investigation referenced in a Case Information report Sgt. Ballou generated on 1/ 29/13. (See Farak Discovery Pages 3076-3088.)" He asked for Foster's help in arranging for him to review these items, which he knew were "in the main evidence room at 'Western SP.'" Ex. 43.

168. Foster, who by this point had been assigned to respond to the Rodriguez discovery motion, replied to Ryan that, as to his request to inspect the evidence, her office was taking the position that this would not be possible due to the ongoing Farak investigation. Tr. 3:142 (Ryan); Tr. 14:47-48 (Foster).

169. On or about August 30, 2013, Olanoff served Ballou with a subpoena on behalf of a client, Jermaine Watt (Watt subpoena). Ex. 44. The Watt subpoena directed Ballou to appear at Court on September 9, 2013 and bring with him "a copy of all documents and photographs pertaining to the investigation of Sonja J. Farak and the Amherst drug laboratory."

170. Ballou emailed Kaczmarek the same day, telling her that he had received the Watt subpoena to appear in court September 9, the date Flannery had "warned" him about. Ex. 47 (KFV00380). Kaczmarek emailed Ravitz, Reardon and Verner September 3, stating that the referenced subpoena "is the subpoena we were expecting." She noted that she had a copy of the Order that the judge had issued as to the scope of the motion [sic], and that "Sgt. Ballou will not be very helpful in the motion. Specifically, the court is trying to determine the scope of Farak's malfeasance and whether the sample numbers found in the car were tampered with as well. The other [A]mherst chemists can answer these questions the best." Ex. 47 (KFV00379-00380).

[19] There are no dates or signatures on the copies of documents attached to Ryan's August 29, 2013 email, admitted as Ex. 43. Ryan testified at the hearing that he filed the affidavit in connection with the amended motion to compel on or about August 29 or 30, 2013. Tr. 3:144-145 (Ryan).

171. I find that "the scope of Farak's malfeasance" is exactly the issue Ballou had flagged for and discussed with Kaczmarek on February 14, 2013, the date he sent her the mental health worksheets.

172. Verner questioned Kaczmarek's comment that she did not think Ballou would be a particularly helpful witness. In response, she wrote: "I told [sic] that the judge wants to come to the bottom of the issues mentioned below making it unlikely he will allow a motion to quash." Ex. 47 (KFV00379). After she proposed that maybe they should "just let Ballou go," Verner suggested a meeting for later that day. Kaczmarek responded that she was home sick, and asked if Mazzone or Irwin could take her place. Id.

173. A meeting was scheduled for September 3, 2013, with Verner, Ravitz, Reardon, Mazzone and Irwin. Ex. 51. Ravitz invited Foster, explaining that "[t]here is another subpoena [Watt] related to the Farak chemist issue for September 9" and that "we'd like you to attend [the meeting.]" Ex. 50 (KFV00384). I credit that Foster attended and knew by September 3 that she would be responsible for responding to the two Penate subpoenas for Kaczmarek and Ballou; the Rodriguez R. 30 motion; and the Watt subpoena for Ballou. Tr. 14:53 (Foster).[20]

174. I heard different accounts of what was discussed at the September 3, 2013 meeting. I credit that Kaczmarek was ill and therefore did not attend it. Reardon claimed that Kaczmarek discussed the mental health worksheets at the meeting, and whether they were privileged. Tr. 2:99-100 (Reardon). I do not credit this testimony. As indicated above, Ballou had sent the mental health worksheets to Kaczmarek (cc'd to Verner) as attachments to a February 14, 2013 email. I find no credible evidence that they were brought up or discussed with

[20] In addition to the four Farak-related requests, I find that on or before August 23, 2013, Foster had been assigned to respond to a third-party subpoena in a matter captioned Stamps v. Town of Framingham. Tr. 8:143 (Ravitz); Ex. 203. Eva Badway, one of the longest-serving members of the appellate division, was assigned to assist Foster. Tr. 10:190-191 (Ravitz). In connection with the Stamps matter, Foster contacted the attorney serving the subpoena, and subsequently retrieved and reviewed the subject files. Ex. 203. I find that by no later than September 4, 2013, Foster had received from Ravitz three sample motions to quash; discussed with Eva Badway how to respond to a subpoena; reviewed the file in the Stamps case; and communicated with that attorney. Tr. 14:38 (Foster); Tr. 15:172-173 (Foster); Ex. 202.

anyone other than Verner or Mazzone until Kaczmarek referred to them in her September 10, 2013 email, discussed below. I find that Reardon was mistaken.[21]

175. Late on September 3, Ballou forwarded to Irwin for approval a report he had prepared about Farak's possible evidence tampering in the Oxycodone case from Springfield. Ex. 49 (KFV00383). He explained that Flannery needed this report by the following day, to prepare for the September 9 hearing. Id.

176. Shortly after sending Irwin the report, Ballou emailed Irwin again, this time copying Kaczmarek, that Flannery wanted him to set up a day this week "so a team of defense attorneys can review the FARAK evidence at my office before Monday." Ex. 49. To this, Kaczmarek quickly responded, "No. This is still an open criminal case. I do not want defense attorneys going through evidence on a fishing expedition." Id. Ballou understood that it was the AGO, not Flannery, who was in charge of making this decision. Tr. 18:47-48 (Ballou).

177. Early on September 4, Kaczmarek wrote Verner that she had just spoken with Flannery about the defense attorneys' request "to review all the evidence in our criminal case against Farak." She wrote: "I am firmly opposed. You can see on Ballou's [Watt] subpoena that they request he bring all the evidence with him." Ex. 52 (KFV00388). Verner wrote: "We are objecting to that. Please." Id.

178. Not only Ballou but Flannery and others also viewed Kaczmarek as controlling access to discovery. For instance, Flannery asked Kaczmarek for permission to disseminate photos (Ex. 168) because Farak was the AGO's investigation so he felt it was appropriate, plus she was the one he was getting the information from. Tr. 5:58 (Flannery). I find that there was no reason, however, for Flannery and other ADAs not to seek authorization from the AGO for the ADAs themselves to view the evidence at the MSP offices in Springfield.

179. The example above, and other instances of Kaczmarek refusing access described below, support a finding that Kaczmarek, in her role as Farak's lead prosecutor, clearly saw herself as in charge of and in control of all of the Farak evidence, including evidence in the

[21] Aside from the finding I made above, I found the testimony about the September 3 meeting to be internally inconsistent and at odds with other evidence. I draw no other inferences or conclusions from the various accounts I heard.

custody and control of the MSP. Furthermore, Kaczmarek knew that others saw her as the gatekeeper with regard to access to Farak evidence.

180. I find that Kaczmarek was part of the "prosecution team" in all pending cases where Farak was the chemist, and in all cases where Farak had been the chemist and the defendants were seeking to withdraw guilty pleas or seeking new trials. Team status derives from her control of all evidence related to Farak. Even if another interpretation were possible, the AGO took an expansive view of its legal obligations to produce potentially exculpatory evidence.

Kaczmarek and John Bossé

181. Kaczmarek was back at the office September 4, 2013. That morning, she met with John Bossé, an assistant district attorney from the appellate unit of the Berkshire County District Attorney's Office who had been assigned to cover every defendant in Berkshire County who was moving to vacate a drug conviction because of Farak's misconduct. Tr. 7:220-221, 224-225 (Bossé).

182. Bossé had first made contact with Kaczmarek on August 23. He had received discovery requests in July and August 2013 from an attorney representing a post-conviction defendant. See Tr. 7:222 (Bossé); Exs. 193, 194. After conversation with his supervisors about how to respond, it was determined that he should speak with Kaczmarek. Tr. 7:223. Bossé sent the requests to Kaczmarek, and they also spoke by phone on August 23, 2013. Tr. 7:223-224 (Bossé); Tr. 20:142 (Kaczmarek); Ex. 192.

183. Kaczmarek forwarded Bossé a sample opposition on August 23, 2013. Tr. 20:141-142 (Kaczmarek); Ex. 192. Later that day, he sent to her three oppositions to vacate guilty pleas he had drafted in Farak cases. Id.

184. Bossé had an oral argument in Boston on September 4, 2013, and he and Kaczmarek had agreed to meet after it, at her office. Tr. 7:235 (Bossé). I reject as not credible Kaczmarek's claim that she had not agreed to discuss the discovery requests Bossé had received. Tr. 20:143 (Kaczmarek). Instead, I credit Bossé's testimony that this was precisely the point of the meeting. Tr. 7:222-223 (Bossé).

185. I credit that when Bossé arrived, Kaczmarek had the two discovery request letters he had earlier sent her, and looked at them in his presence. Tr. 7:235, 236, 241-242, 244 (Bossé). I credit that she told him that he could respond to the defense attorney that all relevant discovery had been provided to the DAOs. Tr. 7:235-236, 241-242 (Bossé). Asked specifically about the drug analysis for the defendant at issue, she checked and said she did not have it but gave Bossé two examples of other analyses that had been provided to the DAs' offices. Tr. 7:237 (Bossé).

186. On September 30, 2013, Bossé sent Kaczmarek a draft of the letter he proposed to send to the defense attorney, summarizing the conversation he had had with Kaczmarek about discovery. Tr. 7:247-248 (Bossé); Ex. 293. She did not get back to him, and he sent the final letter to the defense attorney on October 2, 2013. Tr. 7:248 (Bossé). In pertinent part, he wrote the defense attorney that as to her two letters dated July 18, 2013 and August 8, 2013: "On September 4, 2013, Assistant Attorney General Anne Kaczmarek informed me that all relevant discovery from the Farak prosecution has been provided to the Berkshire District Attorney's Office. Thus, the Commonwealth would object to the additional discovery inquiries on grounds that the Attorney General's Office has released all relevant discovery in the Farak prosecution." Ex. 198.

187. Before me, Kaczmarek testified to a different version of these events: in addition to denying that she had agreed to meet Bossé at her office to discuss his discovery, she testified that she could not have answered anyone's motions; she "wasn't a part of that." 20:144 (Kaczmarek). She claimed she did not remember reviewing Bossé's motions (Tr. 20:146 (Kaczmarek)); that she left him alone in her office with her trial box and let him review what she had (Tr. 20:146, 160 (Kaczmarek)); and that she never told him that all relevant discovery had been provided. Tr. 20:159 (Kaczmarek). I note that at the Carey hearing, Kaczmarek did not say she had left Bossé alone with her trial box. See Ex. 163 (115-118). She is correct that the record reflects that Bossé was under an order from Judge Kinder to respond to discovery requests by August 2, 2013, i.e., before the meeting had occurred, but this is irrelevant to my credibility and other factual findings. Tr. 8:58 (Bossé); Ex. 195, p. 5 (7/8/13 entry).

188. I find that Kaczmarek's statement to Bossé that all relevant discovery had been provided was materially false and intentionally misleading. Kaczmarek knowingly failed to

disclose the mental health worksheets, the information concerning the 2012 Oxycodone case, the 2005 light cocaine case, and Farak's urinalysis. In addition, having made no effort to review the evidence in Springfield, she could not, in good faith, have stated that all relevant discovery had been provided.

Foster Drafts Subpoena/Discovery Responses

189. Reardon was responsible for supervising Foster's work on the Motion to Quash Ballou's subpoena in the Watt case. I credit that Reardon told Foster to speak with Kaczmarek and Ballou before responding, so that she could determine what had yet to be turned over. Tr. 2:59-60 (Reardon). Foster did not do this. Despite having never reviewed Ballou's file, Tr. 15:102 (Foster), she proceeded to draft a Motion to Quash Ballou's Watt subpoena, and a Memorandum of Law in support.

190. Foster sent Reardon her draft to review on September 5, 2013, writing that this was "her first time doing anything with subpoenas." Ex. 55. Reardon reviewed the draft and responded within a few hours, noting in her cover email that it would help to get more information about what had already been given to defense counsel, and that although the CORI privilege Foster had included might be relevant, Reardon "would be "more comfortable knowing what documents are at issue or what was already turned over before we raise that privilege. Have you heard back from Anne?" Id.

191. Reardon's red-lined comments to Foster's draft underscore her concerns. She questioned the applicability of a detailed CORI argument, asking, "is this true?" in response to the sentence that "nearly all documents that would be responsive to the subpoena would constitute CORI." Ex. 135 (OBC049258). She asked, "do you know this for sure?" in response to another sweeping claim, to the effect that with few exceptions, "all documents in the possession of Sergeant Ballou that would be responsive to the subpoena fall within the above definition of CORI." Id. at OBC049261.

192. Reardon alerted Verner that Foster had drafted a motion to quash the Watt subpoena, and asked him if he wanted to meet before the September 9 hearing and if he wanted to review Foster's motion before filing. Ex. 54 (KFV00395). He did not indicate interest in reviewing the motion, but did want to meet September 5 or 6. Id.

193. On September 5, before sending Reardon the draft, Foster had emailed Kaczmarek a question about Judge Kinder's scope order, asking her what he meant by "conduct underlying the negative findings in the October 10, 2012, MSP Quality Assurance Audit at the Amherst Drug Laboratory." Ex. 57 (KFV00402); Ex. 292. Kaczmarek was not sure, offering that "[i]t was a MSP audit" and that "only the chemists could answer these questions." I found above that by no later than August 30, 2013, Kaczmarek had read Judge Kinder's July 25, 2013 Order; this exchange shows that Foster, too, had read it by no later than September 5.

194. On the morning of September 6, Foster sent Kaczmarek two further emails concerning the September 9 hearing. In the first one, she noted that one of the defense attorneys had stated in his affidavit that the DA's office had released around 3800 pages of Farak documents, and asked what those would be. Ex. 57 (KFV00401). I infer that this reference was to the affidavit Ryan had sent Foster August 29, 2013 in support of the Rodriguez Rule 30(c)(4) motion. See Ex. 43, ¶ 23 (KFV00341) (Ryan references release of 3358 pages of discovery).

195. Kaczmarek responded: "All of our police reports, GJ minutes & exhibits. We released them as part of our discovery to the DAs office." The three discovery releases, dated March 27, 2013, June 26, 2013 and July 12, 2013 (Exs. 165, 167, 242) do not contain anywhere near 3800 pages, but neither Kaczmarek nor Foster appears to have pursued further precisely what had been disclosed to the DAs or by the DAOs to the defense attorneys.

196. Shortly afterwards, Foster asked Kaczmarek for a copy of Ballou's grand jury testimony, writing that "[d]efense counsel informed me that he's limiting his questioning of Ballou to only what he testified to in the GJ." Ex. 57 (KFV00401). I have seen no written response to this email. However, Kaczmarek identified, as one of the three dates she met Foster in person, September 6 when she went to Foster's office to give her something, possibly the grand jury minutes. See Tr. 20:132-133 (Kaczmarek). I find that Foster received and read these. Tr. 16:31 (Foster). I find further that Foster never asked Kaczmarek for her actual file and, aside from requesting Ballou's grand jury testimony, she asked for and reviewed nothing else. Tr. 14:58-59, 60 (Foster); Ex. 163 (133). If Foster had asked to review Kaczmarek's emails, she would have seen the February 14, 2013 email and the mental health worksheets. And if she had

seen the pros memo, with its prominent references to the mental health worksheets, their significance would have been obvious.

197. A meeting was held September 6, 2013, at 10:30 A.M., with Verner, Mazzone, Kaczmarek, Foster and Reardon. Ex. 56.[22] Foster claimed, and I credit, that they discussed the contents of her Motion to Quash at the meeting. Tr. 14:72-73 (Foster). She testified that they reviewed the motion and discussed the privileges being raised, insisting that the CORI argument she had put in her memorandum was cut "because the group who knew the file and knew what Sergeant Ballou had had said that a CORI argument wasn't appropriate." Tr. 14:59-60 (Foster). I find that Foster should have asked more questions and should have asked to see the documents that had been turned over to the DAOs.

198. On September 6, Foster filed and served on Ryan an opposition to the Rodriguez Rule 30 motion for discovery. Tr. 3:152 (Ryan); Ex. 109 (KFV00692).[23] It is not clear to me whether Reardon or Ravitz helped her prepare this. See Tr. 10:188 (Ravitz) (Reardon helped her prepare this); Tr. 15:154-157 (Foster) (Ravitz helped her prepare this). In any event, I note that Ryan had requested twelve categories of documents. As to eight of them, Foster essentially wrote that the documents sought were not in the care, custody or control of the AGO. Ex. 109 (KFV00696-697).

199. She was more expansive in her responses to the remaining four categories. She argued extensively that "Inter- and intra- office correspondence at the AGO" was protected by either the attorney work product or law enforcement investigative privilege, and that "AGO correspondence with District Attorneys' offices" was similarly protected. As to request ten, seeking "accomplice evidence," she wrote: "The AGO has turned over all grand jury minutes,

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[22] I find that Ravitz was out of the office September 6, 2013 for a religious holiday. He checked in with Foster that morning, asking her if she had gotten "some more direction on the subpoena matter," and suggesting she might speak to Mazzone. Ex. 201. She wrote back that Reardon had edited a draft, and she would be getting more guidance at the 10:30 meeting. Id.

[23] I credit that Ryan told Foster no later than September 4 that Judge Kinder had denied the Rule 30 motion he had filed in Rodriguez. Ex. 53 (KFV00391). However, because Foster's Rule 30 Opposition bears a date stamp of September 6, 2013, I find that Foster nonetheless prepared and filed an opposition. Ryan testified before me that on September 9, he wanted to be heard on his Rodriguez discovery motion. Tr. 3:153 (Ryan). In fact, he *was* heard. See infra, ¶¶ 214-215.

exhibits, and police reports in its possession to the District Attorney's office. Based on these records, to which the defendant has access, there is no reason to believe that an accomplice was involved." I infer, and find, that Foster had been told that the AGO had turned over the referenced materials to the DAOs. She wrote essentially the same thing in response to request eleven, which sought third-party knowledge, modifying the second sentence to read: "Based on these records, to which the defendant has access, there is no reason to believe that a third party had knowledge of Farak's alleged malfeasance prior to her arrest." Ex. 109 (KFV00697-700). I find that the request relating to "third party knowledge" is ambiguous. A typical subpoena seeking medical records specifically requests "medical records," instead of records of a "third party" with "knowledge of Farak's alleged malfeasance . . . ." Nor is it clear that Farak's therapist would have known of Farak's malfeasance, as distinct from Farak's drug abuse. Foster's response, limited to the documents produced to the DAOs, was literally true.

200. Also on September 6, 2013, Foster filed a motion to quash the Watt subpoena to Ballou and a memorandum in support of the motion. Ex. 112. The as-filed version of the Memorandum of Law did not include a CORI argument. Id. Among other things, Foster argued that the AGO had not waived any privileges by voluntarily disclosing to defense counsel and the public some information about the investigation; that the subpoena for "all documents and photographs" was unreasonable and irrelevant given the narrow scope of the evidentiary hearing; that the qualified law enforcement privilege protected disclosure; that Ballou "does not have first-hand knowledge of the many of the facts [sic] and events described in the documents requested by the defendant"; and that Ballou should not be forced to disclose his thought processes or the work product of the AAGs and the AGO for whom he was working. Ex. 112 (KF00723-729).

201. Foster alternatively asked the Court to restrict the subpoena's scope, and to protect categories of information including "information concerning the health or medical or psychological treatment of individuals," "legal work product," and "emails responsive to the subpoena, but not already contained in the case files specifically listed therein." Ex. 112 (KFV00729-730).

202. Foster filed these materials without having reviewed Ballou's file. As found above, however, I find that while Foster should have asked more questions of Kaczmarek, she relied on statements of Kaczmarek and others in the AGO whom she believed knew what had been turned over to the DAOs. I credit Reardon's testimony that she believed, based on Foster's draft in the Watt Motion to Quash, that Foster had reviewed the file, but there is no evidence that Reardon followed up to determine whether Foster had spoken to Kaczmarek and/or reviewed all of the material as to which Foster was making representations. See Tr. 2:91-92 (Reardon). I credit Foster's testimony that neither Ravitz nor Reardon had told her to review Ballou's file but that, instead, she was told not to "reinvent the wheel" and was to copy wholesale from the sample motions she had been given. Tr. 14:58, 14:60 (Foster).

203. Ravitz testified that while he did not have a specific memory of telling Foster to review Ballou's file, he "cannot imagine" explaining the process without mentioning that. Tr. 10:37 (Ravitz). "[I]t's like how do you explain open heart surgery without mentioning cutting. You know, it's just part of the process. So I don't actually have a doubt that I told her that." Id. I credit Ravitz's testimony that it would have been against office policy for Foster to rely on what Kaczmarek had said was in the file. See Tr. 9:47-48 (Ravitz). But there is no evidence he followed up to determine whether Foster had reviewed the file. I find that Foster's reliance on statements of Kaczmarek was not reasonable. She could easily have acquainted herself with important elements of readily available documents in the AGO. For example, a review of the pros memo or of email traffic between Ballou and Kaczmarek would have revealed to Foster both the fact and importance of the mental health worksheets. I also find that Ravitz and Reardon should have provided more guidance and direction to Foster, knowing Foster had not previously responded to a subpoena. Moreover, Ravitz and Reardon did not directly ask her whether she had looked at the file.

204. Reardon's comments to Foster's draft Watt motion take as a given her review of the file, the need to particularize her arguments and her familiarity with what had already been turned over. Ex. 135. But, again, there is no evidence Reardon followed up to determine whether Foster had done so.

205. Practice in the AGO was to contact the subpoena's issuer, seek to narrow the subpoena's scope, and object to production as needed. See Tr. 2:29 (Reardon); Ex. 126

206. Before the hearing, Foster did not contact Ballou. See Tr. 18:50 (Ballou). Even though she believed her motion to quash was likely to be denied, and even though Olanoff had told her he wanted testimony, not documents, see Ex. 57 (KFV00401), she did nothing to prepare Ballou to testify. Tr. 15:193-194 (Foster). Nor did she direct him to bring any of the materials required by the subpoena.

207. Kaczmarek was aware of the hearing date, and knew that Ballou had been subpoenaed to testify and bring documents. She even knew it was likely that the motion to quash would be denied, and went so far as to suggest "just let[ting] Ballou go." Ex. 47. Yet she made no attempt to contact Ballou, review her documents, review his documents, or prepare him for the hearing. Tr. 18:51-52 (Ballou); Tr. 20:162-163 (Kaczmarek). In fact, she never even reviewed Ballou's case file. Tr. 20:181 (Kaczmarek).

208. I find this to be a dereliction of Kaczmarek's duty. Any prosecutor should want to review the contents of the lead investigator's file and all the evidence he had collected. See Tr. 7:34-35 (Mazzone). Ballou was to be Kaczmarek's central witness should the Farak case have gone to trial. Ballou should not have testified on September 9, 2013, without guidance and direction from Kaczmarek. Flannery recognized what was at stake, and sent her an email to this effect. Ex. 168. Kaczmarek's lapse was especially acute given that Farak was a state chemist, had been a key witness or potential witness in hundreds or thousands of drug cases in the Commonwealth, and Kaczmarek knew that Judge Kinder's goal was to determine the "timing and scope of Ms. Farak's criminal conduct . . . ." Ex. 292. The Commonwealth and the AGO should have had, sought, and achieved the same goal.

209. I find that no one from the AGO made contact with Ballou before the September 9 hearing. Tr. 18:51-52 (Ballou). No one from the AGO gave him any direction as to what he might be asked if the motion to quash his testimony were denied. Tr. 18:60 (Ballou). Ballou instead turned to Olanoff, the defense attorney who had issued the subpoena; Olanoff told him to be there with the subpoenaed documents. Tr. 18:52-53 (Ballou).

September 9 Hearing before Judge Kinder

210. On September 9, 2013, Foster and Ballou appeared at the Hampden Superior Court hearing before Judge Kinder. Ex. 113.[24]

211. Judge Kinder immediately denied Foster's motion to quash Ballou's appearance and testimony. Id. at 15 (KFV00735). As to Foster's request for a protective order, he asked: "Have you personally reviewed the file to determine that there are categories of documents in the file that fit the description of those that you wish to be protected?" Id. Foster said she had not, but had talked with Kaczmarek, "who has been doing the investigation for the Attorney General's Office. She has indicated that several documents, emails, correspondence, would be protected under work product mostly." Id. She answered "correct" to Judge Kinder's next question: "But you don't know, having never even looked at the file, what those documents are?" Ex. 113 at 15-16.

212. Judge Kinder next asked if the file was present, and Foster told him, incorrectly, she did not believe it was. Ex. 113 at 18 (KFV00736). He advised her to "get that file here," and submit to him copies of documents she believed should be protected. "I will review it in camera, and make a determination, after hearing from you, both, all, if necessary, whether or not it needs to be protected further." Ex. 113 at 19 (KFV00736). He added that he was "a little disturbed that a court order for the production of a file has not been produced [sic] absent a determination by me as to whether it should or should not be produced." Id.

213. Minimal preparation by Foster would have enabled her to answer Judge Kinder's questions correctly, and would have prevented much of the confusion that ensued over the course of the next several years. Ballou had his "file" with him. Ryan and Olanoff knew that the actual "evidence" was at the MSP. Ballou's "file" contained his reports and other materials. The AGO had turned over to the DAOs the contents of Ballou's case file, but not the evidence at the MSP.

214. Ryan reminded Judge Kinder that he had filed, and the AGO had opposed, a motion for discovery on behalf of his client, Rafael Rodriguez. Judge Kinder denied the motion

[24] Foster has claimed she was not representing the Commonwealth at this hearing, that Flannery was. Tr. 14:77 (Foster). I reject any argument that, when Foster appeared in Court on behalf of the AGO, she was not representing the Commonwealth. I find that each respondent represented the Commonwealth, and that the Commonwealth was the client of each.

as untimely to the extent that it had sought the production of additional discovery before the hearing, and took under advisement the question whether additional discovery should be forthcoming. Ex. 113 at 19-20 (KFV00736). He expressed his belief that the Commonwealth had had "very close to an open file discovery policy," given the binders of exhibits present at the hearing. Ex. 113 at 21 (KFV 00737). Ryan disagreed vehemently with this categorization, saying that while Flannery had acted in good faith, the AGO had not provided critical discovery and instead had "erected roadblocks that have prevented the defendants from having what the Court has referred to as access to an open file." Id. at 21-22.

215. Foster responded to this exchange by elaborating on her written response to the Rodriguez discovery motion, telling Judge Kinder that as to the twelve items sought, "the only thing we would have would be emails, correspondence – that would be for the purposes of investigation and prosecution." Tr. 113 at 23 (KFV00737).

216. Ballou testified at the hearing. Contrary to what Foster had told Judge Kinder, he had his file with him and brought it with him when called to the stand. Tr. 18:56-57 (Ballou). He would have shown it to Foster had she asked to see it; she did not. Tr. 18:57 (Ballou).

217. Ballou was asked by defense attorney Olanoff if he had had "any role to play in deciding what documentation is provided to the defendants" in this case. He answered: "No. I've – everything in my case file has been turned over." Olanoff asked if he knew whether everything in Kaczmarek's file had been turned over, and he stated: "I believe everything pertaining to the Farak investigation has been turned over. I am not aware of anything else." Ex. 113 at 150-151 (KFV00769).

218. Before me, Ballou testified that he did not know if the mental health worksheets were in his case file. His normal practice when he scans something would have been to make it part of his file, but he does not specifically remember doing that here. Tr. 16:214 (Ballou). When preparing for the 2016 Carey hearings, he reviewed his file; the mental health worksheets were not in it. Tr. 18:73 (Ballou). I find that Ballou's "file" contained his reports, search warrants, returns, and other similar items, but not the "actual evidence" which was in the "evidence locker" in Springfield.

219. Ballou insisted before me that there was no inconsistency between his statement in court that "everything in my case file has been turned over," and his earlier email correspondence with Kaczmarek, where she had refused to allow defense attorneys to review the evidence in the Farak investigation. He explained: "[E]lsewhere in the hearing we are talking about the fact that evidence and documentary evidence had not been viewed by the defen[se] attorneys, so that was . . . already known at the time . . . and as a matter of fact, Attorney Ryan made a motion to view the evidence including documentary evidence . . . during this hearing. So I guess it was with the qualifier that everyone already knew that that did not include evidence." Tr. 18:102-103 (Ballou).

220. Ballou is not an attorney. He cannot be charged with rule violations, but the response of others to his conduct is at issue here. Minimal preparation of Ballou to testify would have led to accurate testimony: that although the contents of his "case file" had been "turned over" to the DAOs, the mental health worksheets were not in it and had not been turned over. Having reviewed no documents before the hearing, as of September 9, 2013, Foster had not even heard of the mental health worksheets. She did not actually see a reference to "mental health worksheets" until the next day. See infra, ¶ 232. Kaczmarek, as noted, did know about them and knew they had not been turned over to anyone.

221. At the conclusion of the hearing, Foster asked Judge Kinder to clarify the scope of his order. He did not want to see anything that had been turned over or that the AGO had agreed to turn over. "But as to those documents that you believe are somehow privileged or otherwise not discoverable, and I understand many of them you are saying you don't have, so I had assumed, based on what you told me earlier, that we were talking about a fairly narrow universe of documents where you had – you on behalf of the Commonwealth, and the Attorney General had an objection to turning over those documents." Ex. 113 at 244 (KFV00792). This would appear to refer back to Foster's objection to the Rodriguez discovery request; that is the document where she described the twelve categories of documents and stated that the AGO did not have most of them. Ex. 109.

222. I find that Foster's next comment related not to the Rodriguez motion but to the Ballou subpoena: "It's just [that the] language of the subpoena was for all documents and

photographs for the whole investigation, so I was wondering since the subpoena was for Sergeant Ballou, the documents he has or the documents the Attorney General's Office has?" Ex. 113 at 244-245 (KFV00792-793). Judge Kinder responded: "The subpoena duces tecum, as I understood it, went to Sergeant Ballou and that was the subpoena that you sought to quash." Foster: "Correct." Judge Kinder: "So that is what we are talking about." Ex. 113 at 245 (KFV00793).

223. Immediately afterwards, Ryan alerted Judge Kinder that "at least a portion of the defense counsel" wanted access to the evidence that had been seized from Farak's car. Id. Citing the inadequacy of Ballou's representations, writings and photographs, he asked for permission to view that evidence. Judge Kinder encouraged him, the AGO, the DAOs and the defense to try to work through an agreement to view, "physically, the evidence if that can be done." Ex. 113 at 246 (KFV00793). If the parties could not agree, then the defendants were to file a motion to compel, a motion to which the Commonwealth could respond and which would be dealt with "in the normal course in advance of the next hearing." Ex. 113 at 246 (KFV00793).

224. Judge Kinder again returned to Foster, asking her, "having heard my response to your inquiry about the Attorney General's obligation with respect to Sergeant Ballou's file" how much time she needed. Id. He summarized: "And what I expect, again, if you can provide and that will be for my in camera review, those documents that you feel should not be disclosed with some indication somewhere in the body of the pleading why it is you feel those documents should not be disclosed." Ex. 113 at 247 (KFV00793).

225. I credit that after the hearing, Foster had no conversation with Ballou. Tr. 14:90 (Foster). I do not credit Ballou's testimony that they spoke briefly afterwards and he told her he had his file with him and "they already have what's here." Foster insisted at the disciplinary hearing, and I credit, that after the hearing she did not talk with Ballou about his file and she had "no idea if he had it with him or not." Tr. 15:88 (Foster). In fact, Foster did not testify that she ever had any direct conversations with Ballou, and I so find.

226. Questions remain with regard to events at the September 9, 2013 hearing. First, Olanoff had asked Ballou to be there with the subpoenaed documents. Ballou brought his file to the hearing. Yet neither Olanoff, Ryan, Judge Kinder, Flannery, nor Foster asked Ballou what

was in the file, which he brought with him to the witness stand. Questioning might have elicited a document-by-document list of the contents of the file. Only Foster's conduct is before me. I find that before the hearing, Foster should have discussed with Ballou what he was bringing to Court, should have met with him, should have reviewed with him the contents of his file, should have prepared him to answer questions, and should have been better prepared herself to answer questions from Judge Kinder.

AGO's Immediate Post-Hearing Activities

227. Early on September 10, 2013, Kaczmarek sent Mazzone, Foster and Verner a link to an article pertaining to the September 9 Kinder hearing. Tr. 20:163-164 (Kaczmarek); Ex. 59 (KFV00405). Verner responded by asking Foster what had happened with the "request for documents etc" Id. Judge Kinder had not issued any written orders, and there was no transcript available yet.

228. Adding Ravitz and Reardon to the thread, Foster responded in some detail, writing in pertinent part that her motion to quash had been "flat out rejected," and that Judge Kinder had given them until September 18 to go through Ballou's file and give the judge in camera anything in it they thought was privileged or should not be disclosed, along with a memorandum explaining the basis for each privilege claim. Id. (KFV00404-405). She reported that "Ballou only testified to what was in the grand jury – i.e. what he found in Farak's car, work station, etc." – and that Judge Kinder "did not allow any questioning anywhere near anything privileged." Id. (KFV00405). She added that defense counsel had been frustrated by Ballou's lack of memory and kept indicating that maybe Kaczmarek would have a better memory, and that Judge Kinder had denied as untimely Ryan's Rule 30 motion and refused to rule on it on the merits, but noted that he might revisit this ruling at a later time. Id.

229. Verner responded almost immediately, copying the entire group and asking: "Anne, can you get a sense from Joe what is in his file? Emails etc? Kris, did the judge say his "file" or did he indicate Joe had to search his emails etc?" Ex. 59 (KFV00404).

230. I credit Verner's testimony that despite the odd phrasing of his email – directing the "contents" question to Kaczmarek alone and asking her to get a "sense" of this from Ballou - he believed at that point that both Foster and Kaczmarek had reviewed Ballou's file. His

rationale for this belief is sensible and sound: Foster was representing Ballou in Court about his testimony and documents, and prior review of the file "is how you would represent the Commonwealth . . . ." Tr. 12:175 (Verner). As to Kaczmarek, nine months into the case and having gotten indictments with Ballou's aid, Verner had "no doubt in my mind whatsoever that Anne had reviewed everything that [Ballou] had." Tr. 12:177 (Verner).

231. Foster wrote back promptly: "Judge Kinder unfortunately didn't give too much insight into what he's looking for. I kept asking him to clarify and the best he would do is say, 'the subpoena's for Sgt. Ballou, it's what he has' or something along those lines. Sgt Ballou did testify that everything in his file has already been turned over." Id. (KFV00404). Mazzone observed that "[h]e [Judge Kinder] doesn't know the answer to the question. Everyone is fishing." Id.; Tr. 6:61 (Mazzone).

232. Kaczmarek wrote to the group minutes later: "Joe has all his reports and all reports generated in the case. All photos and videos taken in the case. His search warrants and returns. Copies of the paperwork seized from her car regarding new[s] articles and her mental health worksheets." Ex. 60 (KFV00406).

233. Kaczmarek testified before me that she had answered Verner's inquiry by going to her computer server to see the information Ballou had sent to her. Tr. 19:99 (Kaczmarek). Despite the certainty of her response, having never examined Ballou's file she did not in fact know what was in it. Tr. 20:179, 181 (Kaczmarek). Her prompt response, however, confirmed for Verner that "she knew exactly what was in [Ballou's] file and had reviewed it." Tr. 12:179 (Verner). I have found that Verner was aware of the mental health worksheets and believed they would be turned over to the DAOs. I infer that Verner believed from Kaczmarek's September 10, 2013 email – incorrectly, as it turned out - that the mental health worksheets had been turned over.

234. Kaczmarek claimed before me that the reference to mental health worksheets triggered nothing in her mind. Tr. 20:180-181 (Kaczmarek). I do not credit this testimony. I find that Kaczmarek had discussed, written about, and engaged with the mental health worksheets too many times to have simply forgotten about them: as early as February 14, 2013; in her pros memo; in Verner's handwritten comment on them in the pros memo's margin; again in

connection with her discussions with Mazzone and Verner about her grand jury presentation; likely in the course of not listing or including them with the materials sent to the DAOs March 27, 2013; and on or before April 22, 2013 when she sent them to Pourinski. Perhaps most importantly, Ballou had discussed with her the "FARAK Admissions" shortly before he sent them to her on February 14, 2013, alerting her to the fact that the documents could expand the timeline of Farak's misconduct.

235. Verner replied to the group: "Is that every[thing] in his file?" Ex. 60 (KFV00406).

236. Kaczmarek replied to the group four minutes later: "Yes. By file, we are talking about his working file. Think trial binder. The boxes of actual evidence are in Springfield. Log books (which we have copied), actual items taken from car, tote bag, and drawer (all of which are photographed)." Ex. 185 **(**KFVOBJ00248).

237. I heard conflicting testimony about whether or not a short meeting was held September 10, 2013. I find that there was a meeting and that Kaczmarek told Foster and the other attendees that everything had been turned over. See Tr. 2:126-129, 132-133 (Reardon); Tr. 14:106, 109 (Foster). I credit this portion of Foster's and Reardon's accounts. I do not credit Kaczmarek's denials. See Kaczmarek's PFCs, ¶ 154 (pp. 48-49).

238. I find Kaczmarek made no effort to clearly explain what she knew, i.e., that the materials in Ballou's trial file were but a small subset of the larger universe of evidence in Springfield, and that neither she nor anyone in the AGO had reviewed the evidence in Springfield. See Tr. 20:184 (Kaczmarek)("[I]f Ballou's testifying that everything in his case file has been turned over, that is not the universe of material." Tr. 20:187 (Kaczmarek)).

239. I find that Foster did nothing to explain this distinction either, although she knew, having participated in a hearing where both Ballou's file and the Springfield evidence had been discussed, that these were discrete materials. She also knew, having read Ballou's grand jury testimony, that there was much more evidence than what was in the case file. She never asked whether the evidence in Springfield had been reviewed by anyone in the AGO. This lapse was critical, and the failure to distinguish carefully and accurately between the two sources of evidence and information was the cause of rampant confusion.

240. Later on September 10, Ballou sent Kaczmarek, Irwin, Foster and Verner a link to the same article about the hearing that had been circulated earlier. Ex. 61 (KFV00408). Kaczmarek responded just to him, asking: "Can you come to Boston sometime this week and bring your file so we can see whats [sic] in it?" Ex. 61. She then emailed just Verner that she had asked Ballou "to come to Boston sometime this week so we/I can look at his file." Ex. 60 (KFV00406). I credit that she had no intention of going through Ballou's file; in her mind, this was not her responsibility. Tr. 20:167 (Kaczmarek).

241. Ballou emailed Kaczmarek September 11, copying Foster, that he would be in Boston "tomorrow" [September 12] after 10:30 with the Farak file. Ex. 114 (KFV00795).

242. Ballou came to Boston September 12, 2013 with his file. Tr. 18-112 (Ballou). No one from the AGO reviewed it. Tr. 18:113 (Ballou); Tr. 19:98 (Kaczmarek). Kaczmarek testified she expected someone else to review it; she claimed it was not her "duty" since she was not the one answering the subpoenas. Tr. 20:202 (Kaczmarek).

243. Verner assumed that Foster, perhaps in conjunction with Kaczmarek, would be doing the review ordered by Judge Kinder – i.e, that she was "physically going to sit down, perhaps with [Kaczmarek], and review everything that was in Sergeant Ballou's file," and determine what was privileged. Tr. 12:182, 187 (Verner). Despite Kaczmarek's having earlier enumerated its contents, Verner thought Kaczmarek was being cautious in requesting the file, wanting to confirm what was in it. Tr. 12:188 (Verner). However, he never followed up with Kaczmarek after Ballou's visit to Boston. Tr. 12:190 (Verner).

244. I find that Kaczmarek deliberately continued to avoid her duty to know what Ballou had and to determine the accuracy of Ballou's September 9 testimony. I also find that Verner did not comply with his supervisory duty to follow through and determine what was in Ballou's file and whether it had been turned over. Kaczmarek's reference in her September 10, 2013 email to "mental health worksheets" – items noteworthy enough to have elicited Verner's handwritten comment in the pros memo - should have prompted Verner to confirm his belief that they had indeed been turned over to the DAOs.

245. Foster, despite her knowledge about Ballou's planned visit, claimed she was not "invited" to the meeting and "assumed" he and Kaczmarek would meet. Tr. 14:110-111; 15:220

(Foster). She saw no need to attend personally, since Ballou had testified that everything had been turned over and Kaczmarek appeared familiar with the file's contents based on her September 10 email. Tr. 14:111-112 (Foster).

246. I find that Foster's position was unreasonable. She was fresh from a hearing where Judge Kinder had strongly implied that she should have been familiar with Ballou's file, and that her lack of preparedness was, at best, inconvenient and at worst incompetent. She knew she had been charged with responding to Judge Kinder about documents she had claimed were privileged. Her hands-off attitude was unreasonable in the circumstances.

247. This conclusion is underscored by Verner's expectation, noted above, that Foster would physically review the file.

Ryan Again Seeks Access to the Lab and Evidence Locker

248. Ryan emailed Foster late on September 11, attaching a motion for access to the Amherst lab and asking if there had been any decision as to whether he would be permitted to view the evidence seized from Farak's car. Ex. 65 (KFV00455-456). Foster forwarded the motion and inquiry about the car materials to Ravitz early on September 12; he responded that the request seemed broad, and told her to circulate the motion "to the usual people in the office." Id. (KFV00454-455).

249. Foster forwarded the motion and message to Verner, Kaczmarek, Mazzone, Reardon and Ravitz, stating that after Ryan had requested access to the evidence locker at the hearing, Judge Kinder had told the parties to work it out or file a motion; Foster added that Ryan would likely follow up his request for access to the evidence locker with a motion seeking access. Id. (KFV00453).

250. Kaczmarek and Verner wrote back to Foster but did not address the evidence locker request, Kaczmarek saying that the lab was no longer in the control of the state police but had become a U. Mass. facility, and adding, "[t]hat is why we took crime scene videos of the lab." Id. Verner wrote to Foster, Kaczmarek and the others: "Kris, Anne will talk to you but basically we are sending the lawyer to UMASS." Id.

251. There is no indication that Kaczmarek spoke to Foster. Foster responded to Ryan, telling him that as of September 1, 2013 the lab was a UMass facility. As to his second request,

she wrote: "Are you looking to view evidence seized from Farak's car or have access to the evidence locker? Your previous requests have been for access to the evidence locker." Ex. 68 (KFV00463). He responded on September 12 that he wanted to inspect the evidence seized from the car and from Farak's work station at the lab. Id. (KFV00462-00463).

252. I infer that Foster did not respond to Ryan, because he wrote again on September 16, asking if her office had determined its position with respect to reviewing the seized evidence. Id. (KFV00462). Foster immediately forwarded his message to Kaczmarek, writing, "Thoughts?" Id. Kaczmarek replied two hours later, writing: "No. Why is that evidence relevant to his case? I really don't like him." Id.

253. I do not credit Kaczmarek's explanation, at the hearing, that her "no" meant she had no thoughts on the matter, as opposed to "no," he cannot have access. She clearly did not want him to have access; she cited in support of her position, among other reasons, a concern about chain of custody. See Tr. 20:216-217 (Kaczmarek).

254. I give the email its logical meaning – no, he cannot have access. Kaczmarek manifestly had thoughts on the matter, which she voiced frequently and vociferously. Moreover, she conceded at the hearing that she did not believe the evidence was not relevant but, rather, she was annoyed that Ryan kept asking ("it's probably the 90th time he asked if he could see the evidence in the lab"), and she did not understand, having never looked or studied herself, why the actual evidence might be relevant to his case. See Tr. 20:218-219 (Kaczmarek).

255. Mazzone, who had earlier observed in response to the Watt subpoena that "everyone is fishing," see Ex. 59, would seem to have shared, at least initially, Kaczmarek's lack of comprehension as to why defense counsel were filing discovery motions. Mazzone explained that his "sense of things" was that everything had been disclosed to the DAOs at this point, and it appeared to him "that the defense attorneys kept on – without a basis of thinking there was something else that wasn't being disclosed they just asked to see everything - and didn't accept – and it's ironic now, didn't accept the representation that everything had been disclosed." Tr. 6:60 (Mazzone).

256. I reject the "fishing" and the "irrelevant" categorizations. Zealous representation of a client by requesting evidence that could have impeached the chemist, a key prosecution witness, is not fishing.

257. I also do not agree that the chain of custody concerns were entirely valid. I find that to the extent Ryan was seeking access to, or copies of, documents seized from Farak's car, the documents could have been easily copied and returned, as Ballou had done with the documents he had scanned and attached as "FARAK Admissions" to his email on February 14, 2013. Ex. 155.

Kaczmarek and Pourinski; Proffer Discussions about Farak

258. Kaczmarek and Pourinski attended a prehearing conference in the Hampshire County Superior Court on August 26, 2013. I take administrative notice of the Farak Docket sheet.

259. I reject Pourinski's testimony that Kaczmarek told her at this or another hearing that the AGO considered the mental health worksheets privileged and therefore was not including them as part of its discovery to the DAOs. Tr. 1:143-144, 146 (Pourinski). I find credible Kaczmarek's denial that this conversation occurred. Tr. 20:85-86 (Kaczmarek). I note in support of my finding that although Pourinski wrote in an affidavit that she had been "informed by the prosecutor handling Ms. Farak's case that these sheets were considered by the Attorney General's office to contain privileged information and thus were not included as part of discovery to those seeking new trials, " (Ex. 107 (KFV00688), Pourinski had not made this argument initially when she filed, in February 2015, a Motion to Redact Privileged Information from all Motions, Affidavits and Memoranda." Ex. 291. There, she argued forcefully that the third-party defendant was not entitled to Farak's treatment records, including the records of ServiceNet. Ex. 291. She did not state that the AGO had considered or treated certain records as privileged.

260. Kaczmarek and Pourinski exchanged emails on September 10, 2013 and again on September 22, 2013 about the possibility of a proffer "to determine the scope of [Farak's] alleged misconduct." Ex. 295 (KFVOBJ02023). By email dated September 22, 2013, Pourinski

wrote that any proffer "would have to include complete immunity for any possible additional charges in State and/or Federal court." Id.

261. Kaczmarek did not promptly respond to Pourinski, who followed up on October 2, 2013. Ex. 191. Kaczmarek forwarded to Verner Pourinski's email and immunity demands, adding: "The DAs in Western MA would love this. Not sure its [sic] viable but worth a discussion?" Id. Verner, who I find had extensive experience with and understanding of proffers, indicated he would speak to Bedrosian. Id. See Tr. 12:27-29, 12:31-33 (Verner).

262. A conference call was set up with Verner, Kaczmarek, and the First Assistant DAs from the counties most affected by Farak's tampering. Tr. 21:38 (Kaczmarek). Although Kaczmarek believed a proffer was the only way to determine the scope and timing of Farak's misconduct, the DAs were not enthusiastic about the prospect. Tr. 21:39, 43 (Kaczmarek).

263. Verner discussed the proffer possibility with Bedrosian, and they decided against it. Tr. 21:47 (Kaczmarek). Verner explained: "We just didn't believe she was going to be able to have that memory of cases. She was using drugs and taking it [sic] from cases. . . . The bigger concern for us was our sentencing goal. We wanted state prison. She wanted probation." Tr. 12:34 (Verner).

264. I credit Verner's explanation. I credit that a state prison sentence was important to the AGO. See Ex. 30, 31 (KFV00259). I do not find unreasonable its calculation and conclusion about what it would have had to give up versus what it would have obtained from Farak in return.

265. Specifically, Pourinski would not have agreed to a proffer without major concessions, which were unacceptable to the AGO. Agreeing to these would have given license to all chemists to mishandle evidence and, when caught, give a proffer. Farak deserved a harsh punishment for many reasons, including to deter others.

266. To the extent that bar counsel is suggesting that there was something unethical or even untoward in the AGO's refusal to agree on a proffer with Farak's attorney, I reject this suggestion. Following Farak's sentencing, however, the AGO should have sought a proffer, compelled Farak to testify, and immediately have turned over all evidence for inspection by

DAOs and defense counsel. Following sentencing, concerns about the "price" of a proffer, and chain of custody, were no longer relevant. See ¶ 323, infra.

Foster's September 16, 2013 Letter

267. Ravitz was aware that Foster had a September 18, 2013 deadline to respond to Judge Kinder about any documents the AGO believed were privileged. Ex. 60 (KFV00406-407). On the morning of September 16, Foster emailed him draft motions to quash for Kaczmarek and Ballou in the Penate case. Exs. 218, 219, 220. They met that day to discuss her cases. Tr. 9:65-66 (Ravitz).

268. Foster testified that Ravitz told her September 16, at a meeting also attended by Verner and Mazzone, that everything had been turned over and she should draft a letter to Judge Kinder saying everything had been turned over and there was nothing to produce. Tr. 15:82, 86 (Foster). I credit her account; given her junior status in the office, I do not believe she would have written to Judge Kinder without guidance and direction from others in the AGO.

269. Foster prepared a letter, dated September 16, 2013, to send to Judge Kinder concerning the Watt subpoena to Ballou. It reads:

> Dear Judge Kinder,
>
> On September 9, 2013, pursuant to a subpoena issued by defense counsel, you ordered the Attorney General's Office to produce all documents in Sergeant Joseph Ballou's possession that the Attorney General's Office believes to be privileged by September 18, 2013, to be reviewed by your [sic] Honor in camera. After reviewing Sergeant Ballou's file, every document in his possession has already been disclosed. This includes grand jury minutes and exhibits, and police reports. Therefore, there is nothing for the Attorney General's Office to produce for your review on September 18, 2013.
>
> Please do not hesitate to contact me should your [sic] require anything further.
>
> Sincerely,
>
> Kris C. Foster

Ex. 117. She sent Olanoff an electronic copy of the letter.

270. Ravitz and Foster offered very different narratives about the letter. Ravitz claimed before me that he did not see it until the Carey hearings in December 2016. Tr. 8:149-150 (Ravitz). In support of his version of events, he testified that he did not recall seeing it in 2013 and did not have a copy of the draft on his system, and there were no emails or notes about it. Tr. 9:68-69 (Ravitz). The time stamps on the office computer system told him the letter was worked on when he was in a meeting and then would have gone to watch Reardon in an oral argument in Court. Tr. 9:68-69; 10:63-64 (Ravitz). There were errors in the letter Ravitz is sure he would have corrected, among them that it was inappropriate for Foster to "invite" Judge Kinder to contact her personally. Tr. 9:70 (Ravitz). Had Foster walked into his office with the letter, he would have told her to email it. Tr. 9:235 (Ravitz). He recalls a meeting on September 16, but it was "a check-in" "later on the day on the 16th" to talk with Foster about her cases. Tr. 9:65-66 (Ravitz). She had earlier emailed him her draft Penate motions but not a draft of this letter. Exs. 218, 219, 220.

271. Foster claims that it is undisputed that she and Ravitz met September 16 (Tr. 9:65-67 (Ravitz)); given the letter's significance, it is reasonable to infer he reviewed it. Foster claims she printed it out and showed it to him; "he just looked at it and didn't have any feedback." Tr. 14:124-125 (Foster). She claimed, and I credit, that she showed Ravitz everything she wrote; she had no motive to send this important letter without his review.

272. I credit Foster's account and explanation and I find that Ravitz quickly reviewed this letter. Given Foster's status, and the importance of complying with Judge Kinder's September 9 Order, it makes good sense for her to have sought prior approval for her letter. Also, I find that Ravitz had reviewed and approved, and had available to him on PACER, Ex. 264, the letter Foster had written to U.S. Magistrate Judge Collings in the Stamps case; that letter also invites the Judge to contact her with any questions. Tr. 14:132-134 (Foster).

273. If it were true that Ravitz provided Foster with no guidance or direction on the September 16 letter to Judge Kinder, he was not exercising appropriate supervisory responsibility on an important matter.

274. I do not credit Foster's testimony that she was not trying to be intentionally vague in her September 16 letter. Cf. Tr. 14:194-195 (Foster). She was an experienced appellate lawyer; words and precision were her stock in trade.

275. Contrary to the letter's assertion, no one had reviewed Ballou's file and no one had determined whether every document in his possession had already been disclosed. Foster may have assumed that Kaczmarek had done a review, but did not phrase her letter to say that. When asked at the hearing why not, she answered, disingenuously: "I didn't think it was necessary because the scope of the order didn't say to identify who did the reviewing." Tr. 15:223-224 (Foster). Without nailing down whether anyone had actually reviewed Ballou's file, it was misleading for Foster to write this in her letter to Judge Kinder. Further, I heard no evidence that Ballou ever referenced documents in his "possession." Foster's addition of this gloss to the discrete category of documents in his "file" was reckless and misleading. Ballou had substantial evidence in his "possession," including all documents from Farak's car.

276. I find that the statements in Foster's letter were not only misleading but intentionally vague. The letter's vagueness is not surprising, given Foster's ignorance of the underlying facts. Had she made any effort to master them, she could have explained, for instance, the difference between the "file" that had been turned over to the DAOs, and the "evidence" that remained in the offices of the MSP.

277. Had Foster asked Ballou the kinds of basic questions that a lawyer in such a situation should have asked, she would not have been left to parrot vague and misleading testimony that "everything had been turned over," a phrase she cited repeatedly in a misguided claim that there was nothing more to produce.

278. The effect of Foster's intentional use of the passive voice, and the intentional vagueness of her phrasing, was to shield the AGO from further inquiry at that stage by Judge Kinder. The letter did nothing to advance Judge Kinder's stated goal of determining the scope and timing of Farak's misconduct or Foster's client's goal of doing

justice. Indeed, Foster's letter's misguided phrasing, and her incompetence and lack of diligence, obscured the truth and cut off fruitful areas of inquiry, contributing to cause Judge Kinder to find, as described infra, that the Farak defendants had not met their burden to show that Farak's misconduct had occurred early enough to make a difference in their cases.

Ryan Files Additional Motions in the Penate Case; Farrell Contacts Kaczmarek

279. On or about September 17, 2013, Ryan served on the AGO and DPH in the Penate case a motion to compel production of documents pursuant to Mass. R. Crim. P. 17(a)(2). Ex 118. The motion to compel discovery sought eleven categories of evidence, among them copies of inter- and/or intra-office correspondence from January 18, 2013 to the present pertaining to the scope of evidence tampering and/or deficiencies at the Amherst laboratory; evidence suggesting that Farak may have had an accomplice in her evidence tampering; and evidence suggesting that a third-party may have been aware of it prior to her arrest. Ex. 118 (KFV00807-808). The motion hearing was scheduled for hearing on October 2, 2013. Ans. ¶ 123 (all respondents).

280. Foster was assigned to draft the AGO and DPH responses. By email dated September 18, 2013, Ravitz returned her draft opposition to the Rule 17 Motion with his comments. Ex. 70. They also appear to have discussed, on September 18, the Penate Motions to Quash Kaczmarek and Ballou's testimony, which Foster filed just before the October 2, 2013 hearing, discussed infra. Exs. 218, 219, 220, 221.

281. As of the date of Ryan's motions, Ballou's and Kaczmarek's files contained information and documents responsive to the discovery requests. I find that prior to the hearing and to drafting her responses, Foster did not have any conversations with Kaczmarek and did not ask to review her trial box. Ex. 163 (172).

282. Ryan also served a motion to compel on the MSP, seeking the same eleven categories of documents, Ex. 142. Sean Farrell, an attorney for the State Police, was assigned to respond. Tr. 7:161, 162 (Farrell). Farrell reached out to Byron Knight, mistakenly believing that he was handling these motions. Tr. 7:164-165 (Farrell). Knight sent the motion back to Farrell and told him to contact Kaczmarek. Tr. 7:165 (Farrell); Ex. 71.

283. Farrell next reached out to Kaczmarek. Tr. 7:165-166 (Farrell). His September 27, 2013 email to her stated that Knight had been sent the request but "referred it back to us to handle," telling Farrell to contact Kaczmarek. Ex. 71. Farrell alerted her that he had not been involved in the Amherst Lab cases so he was "unaware of any discovery history or responses." Id.

284. Kaczmarek expressed familiarity with Ryan's discovery request, writing: "We also received this gem," and warning Farrell: "Do not give this attorney an inch, he is very rude and aggressive. He has also misrepresented us in court so make sure all your correspondence is in writing." Id. I heard no evidence in support of her statement that Ryan had "misrepresented" the AGO in court.

285. As to the specific requests, Kaczmarek wrote, "We did not do most of this stuff in our investigation – such as getting Farak's emails, phones info, personnel records. Everything other than 1 and 2 is a NO from us." Id. Farrell reasonably understood Kaczmarek's response to mean that other than requests one and two on Ex. 142 (KFVOBJ1889-91), the AGO did not have any of the documents requested in paragraphs three to eleven. Tr. 7:175-176 (Farrell).

286. Knowing that Ballou was the Farak investigator for the AGO, Farrell also reached out to him. Tr. 7:176-177 (Farrell). He copied Ryan's requests four, five, and seven through eleven into his email, and told Ballou that Kaczmarek had advised him that there were no records responsive to these requests, and asked Ballou to "take a look at each request and advise whether the investigation generated or contains documents/reports responsive to any of these requests." Ex. 72 (KFV00469-470). Among the material Farrell included were requests for inter- and/or intra- office correspondence pertaining to the scope of Farak's evidence tampering; evidence suggesting that Farak may have had an accomplice; and evidence a third party may have been aware of Farak's evidence tampering prior to her arrest. Id.

287. Ballou responded to Farrell by email with a copy to Kaczmarek that his "entire investigative file ha[d] been turned over" and that he had "no indication that Ms. Farak had an accomplice or that a third party was aware of her tampering." Ex. 72 (KFV00469). Ballou did not consider, before responding, that a therapist or third-party might have known of Farak's drug abuse. Tr. 19:37-38 (Ballou).

288. Ballou's statement that he had turned over his "entire investigative file" was materially misleading. Ballou did not explain that he had only turned over his case file to the AGO, and that there was additional evidence in the MSP offices. It is true that the evidence did not reveal the existence of an accomplice. Also, I do not believe that the existence of a therapist would suggest that a "third party" knew of Farak's evidence tampering.[25]

289. Kaczmarek received Ballou's response to Farrell in due course and failed to correct or clarify Ballou's statements. Kaczmarek knew that Ballou had not turned over his "entire investigative file." As to paragraphs nine and ten in the Penate requests (Ex. 142), I accept Kaczmarek's explanation that she did not consider the therapist a third-party, and that she was thinking of a third-party culprit or accomplice. Tr. 22:85 (Kaczmarek).

290. Kaczmarek falsely implied that the AGO had no information responsive to the Penate requests in its files. Kaczmarek failed to disclose that she, Verner, Ballou and others had exchanged correspondence pertaining to the scope of Farak's evidence tampering. Kaczmarek also failed to disclose that she and Ballou had the mental health worksheets. Kaczmarek's statement to Farrell was materially misleading.

291. Not only did Kaczmarek fail to disclose information; as illustrated above, she intentionally misrepresented the evidence she had, and worked to actively shut down inquiry and deflect zealous work by Farak defendants' counsel who were doing their jobs by requesting evidence of Farak's misconduct. Her flippant responses extended to evidence she had not even reviewed.

292. I do not accept Kaczmarek's explanation that she generally did not do a full review of the evidence until closer to trial. Tr. 20:95 (Kaczmarek). While that might have been a reasonable approach in a case with no implications for hundreds of other defendants, it was not reasonable here, where she knew she was being relied on as the point person to disseminate exculpatory evidence. Instead, she unreasonably relied on Ballou to send her "what he thought was most noteworthy," conceding before me that "the scope and timing . . . wasn't as important to me, it didn't make or break my case," even though "that is what people wanted to get to the

[25] See ¶ 199, supra, with regard to the ambiguity created by reference to a "third party" in this context. I do not believe it reasonable to conclude that a therapist who knew of drug abuse is a "third party" who knows of evidence tampering.

heart of for the Farak defendants." Tr. 21:44 (Kaczmarek). To the extent that she relied on Ballou to determine what was significant or exculpatory, such reliance was unreasonable; he was an investigator, not an attorney. See id.

293. The AGO, to its credit, had made an institutional decision that its continuing legal obligation was to produce to the DAOs potentially exculpatory information. Kaczmarek violated that obligation on numerous occasions. She also misled others in her office, failed to correct Ballou's inaccurate and misleading statements, and avoided learning anything more about the extent of Farak's misconduct than was needed to obtain an indictment.

October 2, 2013 Hearing

294. Foster appeared for a hearing before Judge Kinder on October 2, 2013 on the motions in the Penate case. Ex. 143. She stated that she was filing two motions to quash, one each for Ballou and Kaczmarek, as well as oppositions to Ryan's Rule 17 motions. Ex. 143 at 5 (KFVOBJ00273); see Exs. 45 (AGO Oct. 1, 2013 Opposition to Rule 17(a)(2) motion), Ex. 46 (DPH Oct. 1, 2013 Opposition to Rule 17(a)(2) motion). The docket sheet reflects that she also filed an opposition to the Rule 17(a)(2) motion for access to the Amherst Laboratory. Ex. 204, # 63 (KFVOBJ02128). On the morning of October 2, Ryan appears to have filed and served her with a motion to inspect physical evidence. Ex. 143 at 14 (KFVOBJ00282).

295. Foster confirmed, when asked by Judge Kinder, that the motion to quash she had filed for Ballou was identical to the one she had filed in the Watt case, and stated that all of the contents of Ballou's file had been turned over. Ex. 143 at 8 (KFVOBJ00276).

296. Ryan argued that he should be allowed to examine evidence seized during the search of Farak's work station, car and tote bag. Ex. 143 at 12-13 (KFVOBJ00280-281). He agreed that photographs had been taken and summaries of the evidence written, but argued that he had not seen the actual paperwork from the car, and that such review was critical to determine how far back Farak's misconduct went. Id. Citing the newspaper articles dating from 2011, Ryan stated: "So . . . this is not . . . just a shot in the dark in terms of trying to move the date back as to when this misconduct began. I think that in order to do right by this client and my other client, I need to go into the – to take a look at it." Ex. 143 at 13 (KFVOBJ00281).

297. Foster objected, claiming that the evidence sought was irrelevant, and that if Ryan was allowed to view it, every defendant with an Amherst case would want access to the lab to look at irrelevant evidence. Ex. 143 at 15 (KFVOBJ00283). Refocused by the Court on the paperwork in the car, not access to the lab, she repeated that it would open the door to third party requests. Ex. 143 at 15-16 (KFVOBJ00283-284). Asked if she would have the same objection after Farak's trial, scheduled to occur in February, she said she would because it would "open the floodgates to everyone." Ex. 143 at 17 (KFVOBJ00285).

298. Ryan argued next that he should have access to the lab. He mentioned that he had been told there was a video recording made by the State Police. Ex. 143 at 23-24 (KFVOBJ00291). Foster said she knew of no video – in fact, there *was* a video - and repeated the "floodgates" concern, stating that the lab evidence "appears to be even less relevant . . . than the physical evidence . . . ." Ex. 143 at 24-25 (KFVOBJ00292-293).

299. Ryan proceeded to argue his motion for the production of documentary evidence, conceding that some of the eleven categories he had sought did not exist. Ex. 143 at 25-26 (KFVOBJ00293-294). He and Foster agreed that the only categories at issue concerned item three (Farak personnel file); six (performance evaluations); seven (correspondence inside the AGO) and eight (correspondence with the DA's offices). Ex. 143 at 26 (KFVOBJ00294).

300. Foster objected that the correspondence was protected work product. Ex. 143 at 27 (KFVOBJ00295). In response to the Court's question, she admitted that, as had been the case with Ballou's file, she had not actually looked at any of it, explaining that she had spoken to Kaczmarek, who had told her that the correspondence "would be work product or part of the ongoing investigation." Id. She also admitted that she had not looked at the Farak personnel files. Ex. 143 at 28 (KFVOBJ00296).

301. As to the intra-office correspondence, Judge Kinder mentioned the possibility of "an email exchange regarding the scope of the misconduct" and asked if anyone had "looked at the emails to determine whether or not that might exist." Ex. 143 at 36 (KFVOBJ00304). Foster denied that the AGO was "hiding some type of exculpatory evidence," but admitted that no one had compiled all of the correspondence such as letters, emails and voice mails. Id.

302. In response to Judge Kinder's comment that it might be helpful for her to look at the information she was making representations about, Foster stated:

> "I have talked to Assistant Attorney General Kaczmarek. I talked to Sergeant Joe Ballou and both of them has [sic] said there's nothing – there's no smoking gun, as I think Attorney Ryan is looking for other than what's already been disclosed in Grand Jury minutes, Grand Jury exhibits, police reports and the like, other than just office conversation about thought processes."

Ex. 143 at 37-38 (KFVOBJ00305-306).

303. As I found above, I received no evidence that Foster and Ballou had discussed, in any detail, the contents of his file or the evidence generally. I received no evidence that she and Kaczmarek ever discussed the evidence or anyone's file.

304. More troubling, I find that Foster's statement that there was "no smoking gun" was inaccurate and misleading. The mental health worksheets were, in effect, a smoking gun, as Ryan proved in late 2014 after he first saw them. Review of Foster's October 2 testimony reflects that she made repeated representations to the Court on critical issues without having any factual foundation. She misrepresented that she had personal knowledge about the evidence when in fact she had failed to make a diligent – or, indeed, any – inquiry about it. Careful review of the entire October 2, 2013 hearing transcript (Ex. 143) is revealing. The effect of her misleading statements was to steer Judge Kinder away from allowing Ryan to inspect the documents or even from ordering Ballou to copy the paperwork to which Ryan had referred.

305. I infer from Judge Kinder's comments to Foster that he was not favorably impressed by her lack of expected preparation and her failure, yet again, to review any of the materials about which she was writing and speaking. He told her explicitly: "Let me just say in the future, it would be helpful for me, in attempting to resolve these matters and deciding them, if you actually looked at the information you were talking about other than making bold pronouncements about them being privileged or the content of them." Ex. 143 at 37 (KFVOBJ00305). Foster's lackluster performance did her office, and her client, the Commonwealth, no credit.

306. The day after the hearing, Farrell emailed Kaczmarek, with a copy to Foster, asking Kaczmarek if, as Ryan had represented, a video had been made of the Amherst lab interior and, if so, whether she intended to provide this to defense counsel. Ex. 75. Kaczmarek responded that she would "happily" turn it over, and that she thought all the DAs had a copy. Id. The following day, Foster asked for a copy "to turn over to defense counsel." Id.

Motion for Clarification

307. On October 2, 2013, Judge Kinder issued a series of orders on Ryan's Penate motions. He denied the motion to inspect physical evidence, writing: "DENIED. I am not persuaded that Rule 17(a)(2) permits a third-party to inspect evidence held in a pending criminal case. Particularly under the circumstances of this case where the physical evidence has been described in detail for the defendant and photographs of that evidence have been provided." Ex. 73. He denied as moot the motions to quash the Kaczmarek and Ballou subpoenas. Ex. 76 (KFV00506). He allowed the motion for access to the Amherst lab. Id.

308. The wording of Judge Kinder's October 2, 2013 Order demonstrates the degree to which he had been misled. The "physical evidence" had not been "described in detail," nor had it all been photographed. Kaczmarek knew, even if Foster did not, that important documentary evidence existed and had not been produced.

309. As to the Rule 17 motion to compel production of documentary evidence, he wrote: "The parties have represented that only paragraphs 3, 6, 7 and 8 remain in dispute. After hearing and consideration of the plead[ings], the motion is ALLOWED only insofar as it seeks production of drug testing administered to Sonja Farak by her employer, and any correspondence related directly to drug use or evidence tampering by Sonja Farak. Otherwise the motion is DENIED." Ex. 76 (KFV00507).[26]

310. Foster received Judge Kinder's orders and, on October 9, 2013, circulated them to Ravitz, Reardon, Kaczmarek, Verner and Mazzone. Ex. 76 (KFV00505-506). She wrote that Ryan had already emailed her seeking access to the lab, and asked to whom she should direct

[26] I have found, supra at ¶ 58, that when Farak tested positive for cocaine shortly after she was arrested, that evidence was exculpatory and should have been disclosed.

him. Id. She also asked how to collect all correspondence from DPH and the AGO, noting that this seemed "awfully broad." Id.

311. Verner responded promptly, wanting to meet and asking among other things whether "correspondence" had been defined and seeking "more information ASAP." Ex. 76 (KFV00505). Foster replied to him immediately, including in the text of her response the exact wording of requests seven and eight. Ex. 77 (KFV00524-525). Verner asked: "Kris, are we required to turn over internal correspondence from the AGO? Anne's emails etc.?" Id. (KFV00523).

312. Verner authorized the preparation and filing of a motion for clarification. Tr. 12:200 (Verner). Ravitz instructed Foster to draft the motion, and he supervised her work on it. Tr. 12:200 (Verner), Tr. 14:148 (Foster).

313. Foster submitted a draft motion to Ravitz, who edited it heavily and sent it to Verner and Mazzone. Mazzone forwarded it to Kaczmarek. Exs. 80, 81. The following day, October 22, 2013, Kaczmarek asked Foster for a copy of the final version, explaining that she wanted to send it to the Western DAs. Ex. 84 (KFV00559). Foster complied. Id.

314. The motion sought clarification of the Court's order as to paragraphs seven and eight, concerning inter and intra-office correspondence. See Ex. 84. It noted that the Court "ha[d] ordered unnamed agencies to provide 'any correspondence related directly to drug use or evidence tampering by Sonja Farak.'" Id. at KFV00568. The AGO argued, in brief, that Penate had not made a *prima facie* showing that he was entitled to privileged communications; that "correspondence" should not include protected communications including, in pertinent part, work product, correspondence related to an ongoing investigation and prosecution, and information concerning the health or medical or psychological treatment of individuals; that certain materials had to be requested directly from the DAOs; and that the DAOs had not received notice and an opportunity to be heard. Ex. 84 (KFV00561-589).

315. After Kaczmarek reviewed the draft Motion for Clarification, she failed to ensure that all potentially exculpatory information known to her had been turned over to the district attorneys.

316. Foster went to court October 23, but did not argue the Motion for Clarification. Judge Kinder ruled on it on the papers.

317. On October 23, 2013, Judge Kinder clarified his October 2, 2013, order, in relevant part, as follows: "It was my intention to order…any correspondence which reflects that state employees were aware of alleged misconduct by Farak prior to the criminal investigation, whether such correspondence is in the possession of the Attorney General, The Department of Public Health, the Executive Office of Public Safety and Security or the Massachusetts State Police." Ex. 134. He concluded: "I am aware that Penate has been provided with a large volume of discovery related to the criminal investigation of Farak. It was not my intention to order that any agency of the Commonwealth produce work product related to the criminal investigation, Criminal Offender record Information or grand jury information, not already disclosed." Id.

318. I do not agree that the preparation of the Motion for Clarification constituted misconduct. I credit Verner's statement that the mental health worksheets were not work product and would not have been protected from disclosure by a favorable ruling on the Motion for Clarification. Tr. 12:201-203 (Verner). The motion would not have been necessary had Foster been more competent, diligent and better prepared in the materials she filed and the arguments she made before Judge Kinder. But I do not believe that the motivation behind the motion was to shield the mental health worksheets or other exculpatory materials.

Judge Kinder's Rulings on the Motions of the Farak Defendants

319. On various dates in October and November 2013, Judge Kinder denied discovery requests and other forms of relief to Rolando Penate, Eric Cotto, Jermaine Watt, Hector Vargas, Jose Vargas, Jose Garcias, Omar Harris, Deon Charles and Rafael Rodriguez. Ans. ¶ 140 (all respondents); see Exs. 144-152.

320. Judge Kinder reasoned generally in the post-conviction cases that, under Ferrara v. U.S, 456 F.3d 278, 290 (1st Cir. 2006), a defendant seeking to set aside a guilty plea had to show egregiously impermissible government misconduct that antedated the plea, and that the misconduct was material to the defendant's choice to plead. See, e.g., Rodriguez, Ex. 144 (KFVOBJ00463). He concluded that Rodriguez could not show that when he pleaded guilty on

September 9, 2011, Farak had been tampering, specifically concluding that it was not reasonable to infer from the 2011 newspaper articles that she was engaged in criminal conduct at that time. Ex. 144 (KFVOBJ00465). He concluded further that had Rodriguez known of the misconduct, it would not have been material to his decision to plead guilty. Id. (KFVOBJ00466).

321. As to Penate, a pre-trial defendant who had filed a motion to dismiss, Judge Kinder concluded that while there was "powerful evidence that Farak was stealing cocaine and replacing it with other substances," there was insufficient evidence that she was engaged in misconduct in November 2011 and January 2012, when Penate's samples were tested. Ex. 148 (KFVOBJ00377). Judge Kinder was not persuaded "that Farak's misconduct has substantially prejudiced the defendant or irreparably harmed his right to a fair trial." Id (KFVOBJ00378). I find that defense counsel could have used the undisclosed mental health worksheets to show that Farak was engaged in drug tampering and drug abuse in 2011, and perhaps could have used the light cocaine case to attempt to show that Farak's drug tampering and drug abuse had extended back many years before 2011. See generally supra, ¶¶ 107 (Post Affidavit) and 111 (Jacobstein testimony).

2014 Activities

322. On January 4, 2014, Farak pled guilty to four counts of evidence tampering, four counts of larceny of a controlled substance from a dispensary and two counts of unlawful possession of a Class B controlled substance. In her sentencing argument, Kaczmarek appeared to recognize the gravity and breadth of Farak's actions, stating: "The impact of the Defendant's tampering has affected hundreds of drug cases in western Massachusetts. She was in a position of trust, she had access to every drug sample submitted to the Amherst Lab. She intentionally allowed tampered samples to stand as evidence against criminal defendants without regard for that individual's rights and liberties. Her actions undermine the credibility of all drug analysis submitted at every criminal trial." Ex. 31 (KFV00259).

323. I have found, supra at ¶ 266, that the AGO's decision not to seek a proffer from Farak was appropriate, since Farak's counsel sought a no-prison recommendation as the price of a proffer. In this respect, timing is everything. Once Farak was sentenced, the AGO had no reason not to compel testimony from Farak, in order to determine the scope of Farak's

misconduct. I received no evidence justifying the AGO's failure to pursue the whole truth from Farak once she was sentenced. I note that it was not until September 2015 that Farak testified before the grand jury under a grant of immunity. CPCS v. Att'y Gen., 480 Mass. at 718 and n. 8.

324. In response to a public records request, the boxes of evidence were moved from the MSP offices in Springfield to the AGO in early June 2014. Tr. 21:63, 65 (Kaczmarek), Ex. 184. Ballou transferred them. Tr. 18:30 (Ballou).

325. By email dated June 24, 2014, AAG Patrick Devlin asked Kaczmarek to review the boxes with him, asking her: "Are you around for 30 minutes tomorrow afternoon to go through the boxes?" Ex. 297. I have seen no written response to this question. She stated at the hearing that she did not recall going through them, and I find that she did not, contrary to her duty and to Verner's and Mazzone's expectations. Tr. 21:66 (Kaczmarek).

326. On July 21, 2014, ADA Gagne, First Assistant in the Northwestern District Attorney's Office, sent Kaczmarek an email asking if, "now that the Farak case is over, the AG's Office ha[d] any objection" to a motion filed by a defense attorney to inspect the physical evidence. Ex.153 (KFVOBJ00240-241). July 21, 2014 was Kaczmarek's last day at the AGO; she had accepted a new position in the Suffolk Superior Criminal Bureau, Clerk's Office. Tr. 21:67 (Kaczmarek). She forwarded the request to Ravitz, Mazzone and Verner. Id. (KFVOBJ00240).

327. The AGO ultimately assented to the motion to inspect physical evidence, filed by Ryan on behalf of his client Burston, and Foster and Devlin signed the motion on the AGO's behalf. Ex. 96.

328. On October 30, 2014, Ryan viewed the Farak evidence in the possession of the AGO and learned that the AGO had withheld exculpatory evidence about the scope of Farak's misconduct. Ryan found that the documents were organized in a way that corresponded roughly to how they had been broken out in the search warrant return and Thomas's police report of January 24, 2013. Tr. 3:199 (Ryan). Ryan realized almost immediately that "there were documents in there that had nothing to do with the lab; that it was a collection of papers that were personal." Tr. 3:200 (Ryan).

329. In an eleven-page letter to AAG Devlin dated November 1, 2014, Ryan stated that he had found, during his review, the mental health worksheets and other documents, enumerating their contents and observing that "[i]t would be difficult to overstate the significance of these documents" and concluding that they constituted stronger evidence than had before been disclosed of Farak's misconduct prior to July 2012. Ex. 97 (KFV00660).

330. In the course of his letter, he noted the AGO's representation in response to his discovery requests that there was no reason to believe a third-party had knowledge of Farak's alleged malfeasance before her arrest, and the AGO's refusal to allow him access to the evidence. Id. at KFV00654. He noted the AGO's claim that the seized evidence was irrelevant to any case other than Farak's, and pointed out that Judge Kinder had denied both Penate's motion to dismiss and Rodriguez's motion to withdraw his guilty plea on the grounds that Ryan had been unable to point to persuasive evidence of pre-July 2012 drug tampering by Farak. Id. at KFV00655.

331. Ryan's letter reproduced parts of, and went over in some detail, the mental health worksheets and other papers, including identifying information for a therapist named "Anna," and a page entitled "Homework 11-16-11." Id. at KFV00657-00600.

332. I find that October 30, 2014 was the first time that any Farak defendant gained access to the mental health worksheets and other potentially exculpatory information known to Kaczmarek and Verner that had been in the possession of the MSP since January 2013.

333. Ryan asked the AGO to assent to an emergency motion to amend an outstanding protective order, so that he could share the results of his inspection with other defense counsel, and to provide copies of the "papers in question" to every defendant who had moved for post-conviction relief based on Farak's misconduct. Id. at KFV00660.[27]

334. Devlin forwarded Ryan's letter to others in the AGO. The reaction was immediate. Verner was very upset, angry and disappointed after receiving Ryan's letter. Tr. 12:216, 219 (Verner).

[27] The AGO agreed to Ryan's requests within a few days. Tr. 12:217-218 (Verner). Foster and Devlin attended the hearing on the emergency motion to amend the protective order. Ex. 187 (KFVOBJ00254).

335. Foster's reaction was shock; she was upset. Tr. 14:157 (Foster). She was concerned that if Ryan's representations were accurate, she "had represented to the court everything had been turned over and clearly not everything had been turned over." Id.

336. Ravitz was concerned that the Appeals Division had made potentially inaccurate representations that there was no reason to believe a third-party had had knowledge of Farak's misconduct. Tr. 9:155-156 (Ravitz).

337. Verner convened a meeting and tried to determine what had happened, whether Ryan's claims were valid and accurate, and what to do in response. Tr. 12:219 (Verner); Tr. 9:143 (Ravitz). At the meeting, which included at least Foster, Verner, Ravitz, Mazzone and Devlin, everyone was panicking and upset. Tr. 14:158 (Foster); Tr. 10:46 (Ravitz). Verner led the meeting and asked everyone what they remembered. Tr. 14:58 (Foster). He asked Foster several questions. Id. After the meeting, Verner asked everyone to go back to their offices and find anything they had related to Farak or any defendants, whether emails, pleadings, notes from phone calls or handwritten notes. Tr. 14:160 (Foster). Verner wanted to make a complete and accurate compilation of what had happened. Tr. 14:160-161 (Foster).

338. Verner told Devlin to speak to Kaczmarek, who by that time was working as an Assistant Clerk Magistrate in Suffolk Superior Criminal Clerk's Office. Ex. 163 (OBC001704); see Tr. 12:221 (Verner).

339. Devlin went to see Kaczmarek November 4, 2014 at Suffolk Superior Court. Tr. 21:75 (Kaczmarek). She testified that Devlin arrived in the session "worked up, animated, dramatic [and] particularly amped-up [and] out of breath." Tr. 21:75-76 (Kaczmarek). He asked her about the mental health work sheets in the Farak case and she told him they had not put them in the grand jury because "we thought they might be privileged." Tr. 21:76 (Kaczmarek). She had not remembered Devlin's visit when she first spoke to bar counsel, and claimed she did not remember it until she was preparing for this disciplinary case. Tr. 22:98 (Kaczmarek).

340. Verner himself, to make sure "there [was] nothing else," went to the area of EMC where the Farak material was stored, and went through it himself. Tr. 13:22-23 (Verner). He found additional paperwork, and asked that it be turned over. Tr. 13:23 (Verner).

341. On November 13, 2014, the AGO turned over to the DAOs, who in turn gave the Farak defendants, 289 pages of documentary evidence not previously turned over. Ex. 104. This documentary evidence included seven pages of mental health worksheets (the material Ballou had emailed to Kaczmarek, with a cc to Verner, on February 14, 2013), and other papers supporting a strong inference that Farak's misconduct began before 2012. See Ex. 136, Ex. 294. Verner admitted before me the obvious: the AGO did not get exculpatory information out to the DAOs in a timely manner. Tr. 13:179 (Verner).

342. Foster left the AGO in early 2015. Tr. 14:165 (Foster). On her last day in the office, Verner asked her to tell him once more what she remembered happening in connection with the Farak materials. Tr. 15:126-127 (Foster).

343. I find that Verner acted appropriately upon learning that exculpatory information had not been produced.

Carey Hearings and SJC Relief

344. In December 2016, Hon. Richard Carey, an Associate Justice in the Hampden Superior Court, held a six-day evidentiary hearing on renewed motions to dismiss and motions for new trials or to withdraw guilty pleas filed by ten defendants who claimed a right to relief based on Farak's tampering and the AGO's misconduct. See CPCS v. Att'y Gen., 480 Mass. at 719.

345. Many people who had worked in the AGO testified before Judge Carey, including all three respondents. See id. As indicated above, the testimony in full of all three respondents was admitted into evidence here. Exs. 156, 163, 164.

346. Foster made statements under oath in front of Judge Carey that differ from what she testified to before me. For instance, she denied before Judge Carey that she had worked closely with Reardon in Farak-related issues; she stated she was "not sure" if she learned in November 2014 that her office possessed documents that had not been turned over; and she did not recall that after Ryan had inspected the evidence he advised the office that he had found some things that had not been turned over. Ex. 164 (32, 36-38). She was defiant in stating: "I haven't reviewed any documents related to Sonja Farak ever." Id. at 41.

347. Far more troubling, Foster admitted before Judge Carey that she had purposely made her September 16 letter vague. Ex. 164 (94). Before me, she claimed that this was not the case. Tr. 14:194 (Foster).

348. Foster explained her discrepant responses by claiming that she was not properly prepared or represented at the Carey hearings. She had a two-month old baby at the time. Tr. 14:167-168 (Foster). She asked the AGO to represent her, but had to sign an engagement letter where she waived many rights. Tr. 14:168-169 (Foster); Ex. 123. She had a one-hour meeting in her home to prepare, with attorneys Kim West, Tom Caldwell, Judy Zeprun and a fourth person. Tr. 14:171-172 (Foster). She was given only a single binder of documents to review. Id.[28] The only advice she said she was given was: "if you don't remember something, don't make it up, just say you don't remember." Tr. 14:173 (Foster).

349. Foster also insisted that she was never told by West and the others, and had no understanding, that her conduct would be at issue, stating: "So at no point was I told I was going to be one of the focuses of this hearing until I was actually testifying." Tr. 14:171 (Foster). "I didn't realize [the hearing] was anything having to do with prosecuting, anything having to do with misconduct by the AG's office. I thought it was focused on Ms. Farak's conduct." Tr. 14:179 (Foster); see also Tr. 15:148-149 (would not agree that she understood that she would be a focus of Carey hearing).

350. I do not credit Foster's claims that she was not told that her conduct would be at issue. Bar counsel introduced an email, which Foster admits she received, where West specifically laid out for Foster "the allegations and the court's expectations for this hearing." Ex. 270 (OBC030718).

351. West's email to Foster described three allegations of misconduct: (1) on Farak's part; (2) on the drug lab's part; (3) and on the AGO's part. As to the AGO, she wrote: "[T]he defendants make two claims. First, they claim that, from the outset, the AGO had and `willfully chose to breach' a duty to investigate the extent to which the integrity of its evidence (drugs

[28] This was supplemented Friday, December 2, 2016 with pages from the September 9, 2013 hearing before Judge Kinder, a request for Foster to review the material, and an expectation that she and AAG Caldwell would "talk on Monday if possible." Ex. 271.

tested by Farak) had been impaired and determine the impact of that on pending and closed cases." Id.

352. "Second, the defendants claim that the breach of that duty to investigate was compounded by the AGO's `deliberate failure to disclose evidence' it had in its possession concerning the extent of Farak's drug use. Specifically, the defendants claim that in connection with the September 2013 hearing before Judge Kinder concerning the scope and extent of Farak's misconduct, *you made verbal and written misrepresentations to the Court to the effect that Farak's tampering with samples/drug use did not go back earlier than September 2012* and, as a result, Judge Kinder denied their motions for discovery which would have led them to learn sooner that in fact her drug abuse began long before that date*."* Ex. 270 (OBC030718-719) (Emphasis added).

353. I have seen no evidence that Foster made representations at the September 9 hearing about the timing of Farak's misconduct. But Foster was certainly aware, before the Carey hearing, that her own verbal and written conduct was squarely at issue. She recognized this risk back in November 2014, when she first saw Ryan's letter.

354. I asked Foster point-blank how she could square her current testimony that the letter was not vague with her testimony before Judge Carey, where she had been asked: "Did you purposely make that vague?" and her answer was: "I did." Tr. 15:109 (SHO). She answered that the question put to her had been from a lawyer who was supposed to be representing her; it was a leading question from her own attorney; and the question and answer had been taken out of context. Tr. 15:109-110 (Foster). This is not a satisfying explanation. I reiterate my conclusion, based on the evidence adduced above, including Foster's failure to review Ballou's file and failure to confirm that anyone else had done so, that she chose to be deliberately vague in the September 16, 2013 letter.[29]

355. I credit Foster's claims that she was not carefully prepared to testify, and that the AGO had or developed a conflict of interest in representing attorneys in the office whose interests were or became divergent from each other. Specifically, Foster's interests diverged

[29] Throughout the hearings before me, I frequently asked direct, open-ended questions, and afforded all respondents ample opportunity to explain their statements and conduct that were the subjects of the Petition for Discipline.

from the AGO's. This became apparent, dramatically, in at least two respects. First, Kaczmarek claimed that AAG West told her, just before she testified, that Foster had perjured herself and that Kaczmarek should testify that Kaczmarek had made a "mistake." See Tr. 21:162, 167-168 (Kaczmarek). Neither West nor any other AAG who worked on the Carey hearings testified before me, their conduct is not before me, and I draw no inference from Kaczmarek's account.

356. Second, however, it is undisputed that in its Proposed Findings of Fact at the Carey hearings, the AAGs sought to blame Foster - whom they represented – for misrepresentations before Judge Kinder. See Ex. 268, ¶¶ 347-352 (pp. 48-49). As Foster described it, they "[threw] me under the bus." Ex. 265.

357. On June 26, 2017, Judge Carey granted relief to seven of the defendants. See Ex. 223. While I have not reviewed or relied on Judge Carey's decision, I am aware that it was highly critical of Kaczmarek and Foster.

358. On October 11, 2018, the Supreme Judicial Court ordered relief for additional Farak defendants. Due to the conduct of the AGO, the Court determined that, in addition to cases that had already been dismissed, the Farak defendants were entitled to dismissal and relief from (1) all convictions based on evidence that was tested at the Amherst lab on or after January 2009, regardless of the chemist who signed the drug certificate; and (2) all methamphetamine convictions where the drugs were tested during Farak's tenure at the Amherst lab. CPCS v. Att'y Gen., supra, 480 Mass. at 729. The Court's opinion noted that approximately 8,000 cases where Farak had signed a drug certificate had already been vacated and dismissed. Id. at 703. I take administrative notice of the fact that after the Court's decision expanding the class of defendants entitled to relief, many more convictions were vacated.

CONCLUSIONS OF LAW – COUNT TWO

Kaczmarek's Conduct As to Flannery, Bossé and Farrell

359. Bar counsel charges that by knowingly failing to disclose to Flannery, Bossé, and Farrell potentially exculpatory information known to her in response to requests from Flannery, Bossé and Farrell, and by knowingly making materially misleading statements to Bossé and Farrell, Kaczmarek violated Mass. R. Prof. C. 1.1, 1.3, 3.4(a), 3.4(c), 3.8(d), 4.1(a) (knowing false statement of material fact to third person), 8.4(a) (knowingly assist or induce another to

violate rules or do so through the acts of another), 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation), 8.4(d), and 8.4(h) (conduct that adversely reflects on fitness to practice).

360. I have detailed above Kaczmarek's interactions with Flannery, Bossé and Farrell, and their reasonable expectations and understanding of her role as to discovery. She actively and intentionally misled Bossé and Farrell in response to their discovery inquiries. Flannery specifically reviewed with her his concerns about the September 9 hearing and his assessment of Judge Kinder's intentions. He reasonably expected that by the time of the hearing, the AGO would have provided him with all of its Farak-related evidence. This, of course, did not happen. I find that bar counsel has proved Kaczmarek's violation of all of the above rules.

361. I find that bar counsel has proved violations of all the above rules regarding Kaczmarek's interactions with Bossé and Farrell. She told Bossé that all relevant discovery had been produced when she knew this was not true. She told Farrell, falsely, and without having done any review of the AGO's documents, among them those at the MSP offices, that the AGO did not have various documents identified in the Penate requests.

362. Bar counsel charges that by failing to direct Ballou to provide Flannery with potentially exculpatory information known to her, Kaczmarek violated Mass. R. Prof. C. 1.1, 1.3, 3.4(a), 3.4(c), 3.8(d) 5.3(b) (lawyer with supervisory authority over nonlawyer shall make reasonable efforts to insure nonlawyer's conduct is compatible with lawyer's professional obligation), 8.4(a), 8.4(d) and 8.4(h).

363. Rule 5.3 is concerned with a lawyer's conduct as to "a nonlawyer employed or retained by or associated with a lawyer." I recognize that Ballou was at all times an employee of the MSP. See generally supra, ¶ 8. However, I do not agree that this circumstance precludes a finding of misconduct on Kaczmarek's part. The Comment to Rule 5.3 in effect at the time explicitly recognized that a lawyer might employ an investigator and/or an independent contractor. Employee status, and the ability to control, would not appear to be decisive; what is important is that "[t]he measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline." Former Comment [1]. The Comments now in effect make this even clearer, repeatedly referencing

potential responsibility for "nonlawyers outside the firm." See Comments [1] and [3]; ABA Formal Ethics Op. 467 (September 8, 2014) (discussing generally managerial and supervisory obligations of prosecutors under Rules 5.1 and 5.3, and (p. 10) observing that detectives and investigators would ordinarily be included in the group of nonlawyers employed, retained or associated with the office).

364. My findings above reflect that with very few exceptions, among them forwarding to Ballou Flannery's inquiry about the Oxycodone case, which resulted in Ballou's preparation of the September 3 report, and directing Ballou to provide Flannery with photos, Kaczmarek made no effort to direct Ballou to review his files and/or to provide to Flannery known exculpatory evidence. I find that bar counsel has proved Kaczmarek's violation of these rules.

365. Bar counsel charges that by failing to take remedial action when she was aware that Ballou had not disclosed to Flannery potentially exculpatory information, Kaczmarek violated Mass. R. Prof. C. 5.3(c)(2) and is responsible for what would be Ballou's violations of Mass. R. Prof. C. 1.1, 1.3, 3.4(a), 3.4(c), 3.8(d), 8.4(d) and 8.4(h), if he had been a lawyer.

366. Bar counsel has proved these violations.

Verner's Conduct As to Flannery and Ballou

367. Bar counsel charges that by failing to ensure that Ballou had been directed to disclose to Flannery potentially exculpatory information in Ballou's files, Verner violated Mass. R. Prof. C. 1.1, 1.3, 5.3(b), 8.4(d).

368. I have not heard persuasive evidence that Verner had regular, supervisory contact over Ballou with regard to the Farak matter after Farak was indicted. Bar counsel has not proved these charges.

369. Bar counsel charges that by failing to take remedial action when he was aware that Ballou had not disclosed to Flannery potentially exculpatory information, Verner violated Mass. R. Prof. C. 5.3(c)(2) (lawyer responsible for nonlawyer's conduct that would violate Rules if lawyer supervises nonlawyer and knows of conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action) and is responsible for what would be Ballou's violations of Mass. R. Prof. C. 1.1, 1.3, 3.4(a), 3.4(c), 3.8(d), 8.4(d) and 8.4(h), if he had been a lawyer.

370. I heard no evidence that Verner was made aware of Ballou's activities in this regard. Bar counsel has not proved these charges.

CONCLUSIONS OF LAW – COUNT THREE

371. Bar counsel charges that by failing to handle the response to the Watt subpoena and the Rodriguez and Penate motions with the diligence, knowledge, skill, thoroughness and preparation reasonably necessary for the representation, including failing to review the AGO file, prepare Ballou to testify, and direct Ballou to bring his file to the hearing, **Foster** violated Mass. R. Prof. C. 1.1, 1.2(a)(seek lawful objectives of client), 1.3, 3.4(a), 3.4(c), 8.4(a), 8.4(d) and 8.4(h).

372. I find that bar counsel has proved only violations of rules 1.1, 1.2(a) and 1.3 as to Foster.[30] Foster performed her role in an incompetent manner. She failed to ask sufficient questions of those with knowledge of the facts, she did not educate herself about the Farak investigation and documents obtained from Farak, she apparently did not see the pros memo, which would have been available to her, and did not look at Kaczmarek's trial box or her emails or Ballou's file. She did not adequately prepare for the September 9 and October 2, 2013 hearings, and did not prepare Ballou to testify or even ask what he had with him in his case file, which he brought with him to Court on September 9, 2013. Minimal preparation might have prevented much of the ensuing confusion.

373. Bar counsel charges that by failing to undertake a review of her file and produce documents responsive to the subpoenas and discovery motions, and to alert Foster to the existence of undisclosed documents, **Kaczmarek** violated Mass. R. Prof. C. 1.1, 1.3, and 3.4(c).

374. I conclude, based on my findings above, that bar counsel has proved these violations as to Kaczmarek.

[30] Foster has argued that Rule 5.2(b) relieves her of responsibility for her disciplinary violations because she was a subordinate lawyer acting in accordance with her supervisors' instructions "on an arguable issue of professional duty." See generally Foster PFCs, p. 3, 33, 46. I have not found any pertinent cases accepting a 5.2(b) defense, and I reject this analysis. See generally In re Lightfoot, 217 F.3d 914, 917 (7th Cir. 2000) (reliance on a superior's order is a defense only when reasonable); In re Douglas' Case, 147 N.H. 538, 545, 809 A.2d 755 (N.H. 2002) (no "arguable question of professional duty" where lawyer's conduct was in clear violation of rules).

375. Bar counsel charges that by failing to comply with Judge Kinder's order to personally review Ballou's file, and by failing to ensure that Ballou's file had been reviewed, **Foster** violated Mass. R. Prof. C. 1.1, 1.2(a), 1.3, 3.4(a), 3.4(c), 8.4(d) and 8.4(h).

376. I do not interpret Judge Kinder's Order on September 9, 2013 to mean that Foster herself was to review Ballou's file. He expected someone in the AGO to review Ballou's file and for Foster or someone in the AGO to give him, by September 18, 2013, documents as to which the AGO claimed privilege. Foster failed to ensure that someone from the AGO reviewed Ballou's files before she sent her September 16, 2013 letter to Judge Kinder. Based on my findings above, I conclude that bar counsel has proved violations of Rules 1.1, 1.2(a), and 1.3.

377. Bar counsel charges that by knowingly making materially misleading statements to the Court in a letter on September 16, 2013, **Foster** violated Mass. R. Prof. C. 3.3(a)(1) (knowing false statement of material fact or law to tribunal), 4.1(a), 8.4(c), 8.4(d) and 8.4(h). Alternatively, bar counsel charges that **Foster** made her misleading statements with reckless disregard for their truth in violation of Mass. R. Prof. C. 8.4(c), (d) and (h).

378. While this is a close call, I agree only in part. Foster relied, albeit unreasonably, on statements of others who were more senior and more knowledgeable. Foster's dissembling statements in her letter to Judge Kinder were not knowing false statements of material fact. She deliberately obscured who had allegedly reviewed Ballou's file, and she recklessly expanded the alleged review to include "every document in [Ballou's] possession." Her letter was one more act demonstrating her gross incompetence and lack of diligence. Moreover, Foster's statements misled Judge Kinder, were prejudicial to the administration of justice, and reflect adversely on her fitness to practice. Accordingly, I find that bar counsel has proved violations of Rules 1.1, 1.2(a), 1.3, 8.4(d) and 8.4(h).

379. Bar counsel charges that by knowingly failing to correct the false statements of fact previously made to the Court in her September 16, 2013 letter on or after her appearance in Court on October 2, 2013, **Foster** violated Mass. R. Prof. C. 3.3(a)(1) (knowingly fail to correct false statement of material fact or law previously made), 8.4(c), 8.4(d) and 8.4(h).

380. I find that bar counsel has not proved these charges. While I found above that Foster made repeated misrepresentations to Judge Kinder at the October 2 hearing, I do not agree that, as charged, they related to the September 16 letter. Nor can I conclude that Foster was actually put on notice that all of her actions at the October 2 hearing "would be subject to scrutiny." Matter of Abbott, 437 Mass. 384, 392, 18 Mass. Att'y Disc. R. 2, 12 (2002). Cf. Matter of Saab, 406 Mass. 315, 324, 6 Mass. Att'y Disc. R. 278, 287 (1989) (a shift in bar counsel's theory – specifically, the consideration of the cumulative effect of the disciplinary charges combined with lawyer's prior discipline – does not violate due process).

381. Bar counsel charges that by failing after reviewing the Motion to Clarify to ensure that potentially exculpatory information within the AGO's files had been disclosed to the district attorneys' offices including Hampden County, **Verner** violated Mass. R. Prof. C. 1.1, 1.3, 3.4(a) and 8.4(d).

382. I conclude that bar counsel has not proved these charges.

383. Bar counsel charges that by failing after reviewing the Motion to Clarify to ensure that potentially exculpatory information known to her that could be useful to Penate had been disclosed to the district attorneys' offices including Hampden County, **Kaczmarek** violated Mass. R. Prof. C. 1.1, 1.3, 3.4(a) and 8.4(d).

384. I conclude, based on my findings above, that Bar Counsel has proved these violations as to Kaczmarek.

Conclusion

I have detailed above numerous lapses, oversights, intentional misconduct and rule violations by the three respondents while employed by the AGO between 2013 and 2016. I have found misconduct on the part of each respondent. On or before August 16, 2021, the parties are directed to submit briefs addressing mitigation and aggravation, as well as their suggestions for disciplinary sanctions.

Dated: July 9, 2021

Respectfully submitted,

By the Special Hearing Officer

Alan D. Rose

Alan D. Rose

	Pros	Cons
resisting	- feel better about myself - don't lose phase coaching - better for health - don't get caught - no "crash" afterward - focus energy on work & not TB	→ "wanting" in the moment (mostly psychological) ↳ decreased productivity if distracted
TB	- instant gratification -	- no Anna - feel bad – for TB – if I lie - get caught - crash - trigger continue cycle - wasted time

shame

Notes:

Wed: Kept thinking that ~~most~~ most things I said to others sounded stupid, or the "where the hell did that come from" feeling (@work, @ doggy daycare, a little @ DBT group)

SKILLS		M	T	W	Th	F	Sa	Su
Formal Practice	M		X	X	X	X	X	X
One Mindful Activity		X	X	X	X	X	X	
Stops & Stickers					X	X		
DEAR MAN	IE			X	X			
GIVE								
FAST								
Observe & Describe	ER							
Feel Emotion as a Wave		X	X	X	X		X	
Mindfulness of Body Sensations						X	X	
Opposite Action		X	X	X	X	X		X
Problem Solving		X	X	X			X	X
Values			X	X	X		X	
Accumulate Positives		X	X	X	X	X	X	X
Build Mastery				X	X		X	X
Cope Ahead		X	X	X	X	X	X	
Treat PhysicaL Illness		X				X		
Balanced Eating				X			X	X
Avoid Mood-Altering Substances		X	X	X				
Balanced Sleep		X	X	X	X	X	X	
Exercise								X
Avoid Avoiding				X	X	X	X	
Activities	DT			X	X		X	X
Contributions			X				X	
Comparisons		X		X	X	X		
Opposite Emotions								
Pushing Away		X		X	X		X	
Thoughts			X					
Sensations								
Self Soothe (the five senses)			X	X		X		
Temperature								
Intense Exercise								
Progressive Relaxation (Paul)						X		
Imagery								
Meaning						X		
Prayer								
Relaxation			X	X				
One Thing in the Moment			X		X			X
Brief Vacation						X		
Encouragement		X		X	X			
Pros & Cons								X
Observe the Breath			X					
Half-Smile		X		X				
Awareness					X			X
Radical Acceptance		X	X	X	X	X	X	X
Turning the Mind			X	X	X	X	X	
Willingness		X	X	X	X	X	X	X

EMOTION REGULATION Worksheet
OBSERVE AND DESCRIBE EMOTIONS

DIRECTIONS: Write as much as you can about each as soon after "event" as possible. Write on back for more room..

Vulnerability Factors: What made me more vulnerable? - tired this morning (though enough sleep)
- urges to use beforehand

Emotion Name(s): Shame **Intensity:** (0-10) 6½

Prompting Event: For my emotion (what, who where, when?)
told Jim earlier in week I put DEA application in, but I didn't (figured I would later/soon). Today found out I need his signature on it - he knows/will know I lied)

Interpretations: What are my Thoughts, Judgments, Beliefs, Assumptions, Appraisals of the situation?
- He will know I lied - judge me
- wondering if I can ~~see~~ have docs over him sign it
- have to wait until at least tomorrow to tell/face him = build up anxiety

Face and Body Changes: What am I feeling in my face and body?
restlessness in hands/arms
- slight headache - head going in circles how to "fix" situation

Body Language: What is my facial expression, body posture and gestures?
clenched jaw
slouched a bit
passing around a little

Action Urge: What do I feel like doing or saying?
Asking Becky who she had sign it
use (have 12 urge-ful samples to analyze out of next 15)
- make up lie

What I Did or Said:
call Anna - commit to not using
asked Becky - she thinks Jim signed her stuff

After Effects: What is my state of mind, other emotions, actions or thoughts?

Function of Emotions: Communicate?, Organize?, Give Information?
Motivate/tell me to get my act in gear (both here and in life) = take charge, don't procrastinate

EMOTION REGULATION Worksheet
OBSERVE AND DESCRIBE EMOTIONS

DIRECTIONS: Write as much as you can about each as soon after "event" as possible. Write on back for more room..

Vulnerability Factors: What made me more vulnerable?

last night w/ Molly
Shawn (& Becky) ~~not~~ taking today off.

Emotion Name(s): (Pre-) Shame **Intensity:** (0-10) 7

Prompting Event: For my emotion (what, who where, when?)

got 'good' sample @ work & having urges to use
(& knowing that I will be the only one here after lunch)

Interpretations: What are my Thoughts, Judgments, Beliefs, Assumptions, Appraisals of the situation?

I'm a bad person for having urges
" " " " " not wanting to try to stop them
It doesn't matter - I won't get caught
Know I'll feel worse when/if I use

I know I should call Anna, but I don't want to.
I can lie on my homework

Face and Body Changes: What am I feeling in my face and body?

hungry (??)
head is/is running 100m/h
little tightness across shoulder

Body Language: What is my facial expression, body posture and gestures?

can't sit still - hands to/on my head temples
clenched jaw

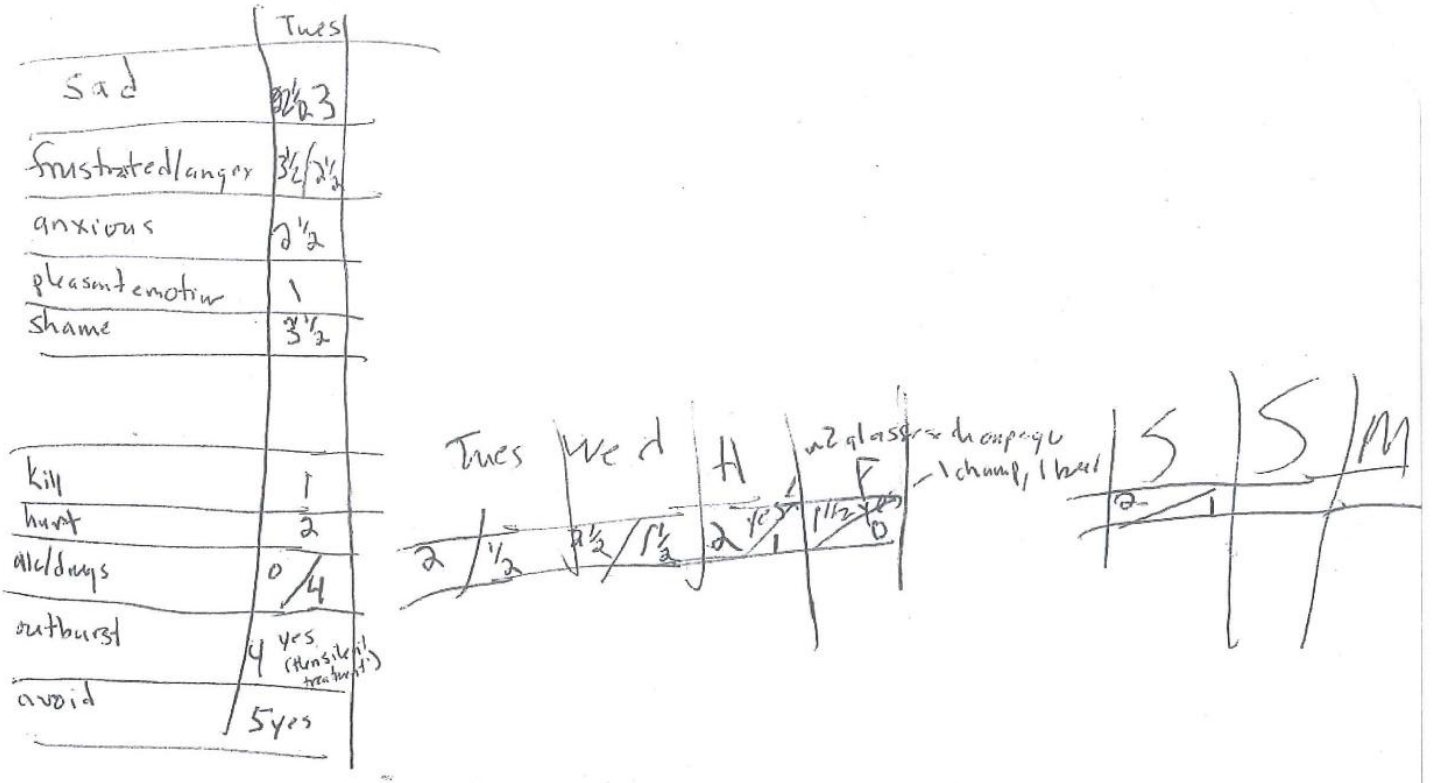
Action Urge: What do I feel like doing or saying? hurry up & prepare/use (my mind says to get it out of way, but I don't think that will be the end of it)

→ give in and go w/ urge

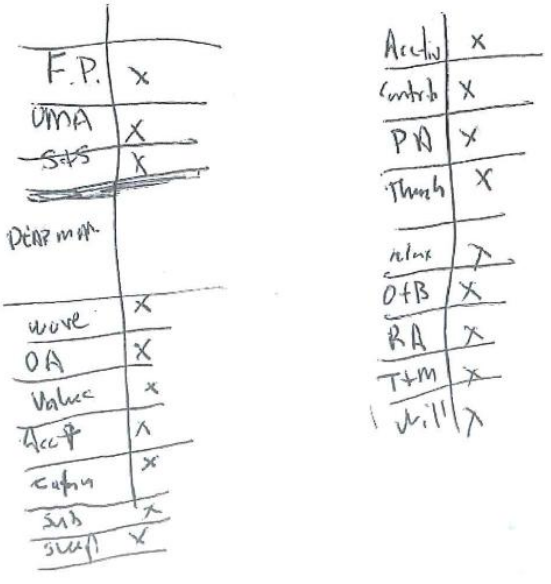
What I Did or Said:

After Effects: What is my state of mind, other emotions, actions or thoughts?

Function of Emotions: Communicate?, Organize?, Give Information?



Tues: work, cable guy, Tx; home (more relaxed than when I left - argument w/ Nikki RE smart TV) offered to let her watch



ServiceNet Diary Card

Name: ______________________ Week of: __________

Observe and Describe Emotions: Today I felt (0-5):	12-26 ---Mon	12-20 --Tues	12-21 Wed	12-22 --Thurs	12-23 ----Fri	12-24 --Sat	12-25 --Sun
sadness	3½	2½	2½	3	3	2½	
frustration / anger	4½ / 3 4 6½	4 / 3½	4 / 2	4 / 3	3 / 2	4 / 4	
anxiety	2½	2	2½		3	2	
"pleasant" emotion	1	2	1½		2½	1	
shame	3	2	3½	4	4	3	
Target Behaviors: Today I felt an urge to (0-5):							
Kill myself	0	0	0			2	
Injure myself	0	0	1			3	
Drink or take drugs (2 ciders, 2 shots)	3 yes / 3½ yes pot	1 / 1½	½ / 3½	1 / 4½ yes	1 / 4 yes	4 yes 6 / 2½	2 (2) yes / 1 (2 glass wine drink)
Binge, purge or not eat							
outburst	5 yes	4 yes (I'm told about everything, but I don't remember)	3½ a little (RE: taking cream cheese out of fridge)		2	5 yes (about game & Lynda's X-mas pres.)	
avoid	5 yes	4 yes	4½ yes			3	

Write "Yes" in the box next to the number if you acted on an urge.

What did you do today?

Monday: go home - expect to have relaxing day w/ Nikki, but went downhill fast; bed by 6pm

Tuesday: yell @ Nikki (about everything) [am + pm] - get mad about computer / recipe for cheesecake (+ broken spatula), so blow it off bed early - hopefully up early tomorrow

Wednesday: leave work ~10:30 to get X-mas stuff done ~~[illegible]~~; definitely moments throughout day where I thought I sounded stupid or did something stupid; DBT group: "Throw the shit to the curb"

Thursday: tried to resist using @ work, but ended up failing (I know I should have called, but had thoughts about how I felt last time I called); neighbors B-day; up to midnight wrapping presents.

Friday: go to NY in afternoon. @ work use w/out debating doing it. My thought about it = identity issue (i.e. wavering back + forth about whether I want to use).

Saturday: home from NY - mad about missing part of Pats game (out of 3 reasons, 2 are Nikki's, but main one is not) - had 2 ciders during game when mad, but decided not to drink 3rd

Sunday: papers; X-mas in RI

Margin notes: " ; IIIII ; want to [illegible] ~~[illegible]~~ as [illegible] for using ; Nikki drunk on way home from NY ★

★ Nikki drinking on way home from RI