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

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| BAR COUNSEL,<br><br>Petitioner | ) | |
| v. | ) | BBO File Nos. C1-17-00248283<br>C1-17-00248284<br>C1-18-00255238 |
| KRIS C. FOSTER, ESQ.,<br>ANNE K. KACZMAREK, ESQ., and<br>JOHN C. VERNER, ESQ.,<br><br>Respondents | ) | |

**RESPONDENT ANNE KACZMAREK'S SANCTIONS MEMORANDUM**

**Overview**

But for the unusual posture in which this sanction memorandum is being presented in what appears to be an unprecedented and unique disciplinary hearing, this memorandum would suggest at most a public reprimand. In light of those factors, a term suspension is the appropriate sanction for the misconduct ascribed to Anne Kaczmarek in the Hearing Report. That is because the Hearing Officer's findings of fact and conclusions of law assign more responsibility to her than they do to her former colleagues, John Verner and Kris Foster, each of whom has also been found to have violated the Massachusetts Rules of Professional Conduct. Those findings of fact and the conclusions of law drawn from them are not now open to challenge, however strong the challenges may be. Thus sanctions will logically be recommended for each of them. If each lawyer found to have violated the rules is to receive the sanction most appropriate to her, the Hearing Officer's recommended sanction with respect to Anne should not be less than the recommendations concerning her co-respondents.

Whether the term suspension is for a short term or a "long term" as defined in the rules depends in significant part on the sanctions imposed on Attorneys Foster and Verner. If the staircasing suggested by the Hearing Report results in the recommendation of a long term suspension to Attorney Kaczmarek, its duration should be short. That too is at least partially a function of the findings in the Hearing Report. It chronicles numerous lapses and oversights not only attributable to the three respondents but to others as well. Those lapses do not excuse the misconduct ascribed to the respondents, but they mitigate it and provide context for the sanctions to be recommended.

The primary purpose of professional discipline is the protection of the public. That purpose would be disserviced by overly harsh sanctions imposed on any one of the respondents. That is because there was clearly a systemic failure in the approach to the issues posed by Sonja Farak's drug tampering. The lessons learned and to be learned from the detailed consideration of events contained in the Hearing Report and the series of Supreme Judicial Court decisions it cites should not become secondary considerations in efforts to protect the public. Scapegoating one or all of the respondents can only detract from the ultimate goals of those who seek justice for those who were unjustly accused or prosecuted.[1]

In many instances, the systemic failings are introduced in the Hearing Report by the phrase "should have."[2] Three of the most salient of those instances appear in paragraphs 208, 226 and 266.

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[1] In 2013, defense attorneys criticized the focus on Dookhan's misconduct as "scapegoat[ing]" that deflected from systematic failures. See, e.g., Travis Anderson and John R. Ellement, *Coakley takes tough stand on Dookhan Sentence*, Boston Globe (October 18, 2013), https://www.bostonglobe.com/metro/2013/10/17/annie-dookhan-chemist-drug-lab-scandal-should-get-years-guilty-plea-attorney-general-says/7CAxybo8rldtZIKSMgSH3L/story.html("[N]ow that it's all been revealed, they want to make her the scapegoat, so they can tell the public, 'we took care of the rogue.'"). For the same reasons, the message should not be sent that one individual—who like anyone else is fallible—bears the responsibility for the government's handling of Farak's misconduct.

[2] According to Respondent's Count there are forty occasions the phrase appears.

Paragraph 208 opens with a finding that AAG Kaczmarek's failure to review Detective Sergeant Ballou's case file was "a dereliction of duty. Any prosecutor should[3] want to review the contents of the lead investigator's file and all the evidence he had collected. The paragraph ends by observing that "she knew 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."

Paragraph 226 also deals with Detective Sergeant Ballou's case file and the hearing that was intended to achieve the goal Judge Kinder sought to accomplish. It closes with five findings about what AAG Foster should have done before that long hearing. It opens though with a broader focus on the events at that hearing, observing that the Detective Sergeant had brought his file to the hearing at the request of Attorney Olanoff who had subpoenaed the documents. "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." Indeed it might have, and it was AAG Kaczmarek who suggested that the Detective Sergeant appear pursuant to the subpoena rather than that the AGO move to quash it.

Paragraph 266 deals with another suggestion made by AAG Kaczmarek. It is reflected in the email she sent to Ms. Farak's counsel in the immediate follow up to the Kinder hearing, asking "Will you think about doing a proffer to determine the scope of Sonja'a [sic] alleged misconduct?" Ex. 295. The Hearing Report finds no fault with the decision not to enter into a proffer agreement prior to Ms. Farak's plea, but continues: "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."

[3] Emphasis supplied here and throughout the next several pages.

Other shortcomings in the way the Commonwealth handled the Farak Investigation are discussed at pages 11-14 below.

**The Uniqueness of the Case**

The uniqueness of this case should be a significant factor in fashioning sanctions for the violations found. In the Matter of the Discipline of Two Attorneys, 429 Mass. 619 (1996) is an example of the effect novel circumstances can have in determining what discipline, if any, should be imposed, inter alia, for engaging in conduct the Board of Bar Overseers had found to be prejudicial to the administration of justice. The language of the Disciplinary Rule in effect at that time, DR 1-102(A), is mirrored in the analogous Rules of Professional Conduct, M.R.Prof. C. 8.4(d) and the Hearing Report includes a conclusion that Anne Kaczmarek has violated it. The issue the Court considered with respect to that rule was whether the attorneys' breach of duty as escrow holders amounted to conduct prejudicial to the administration of justice. 421 Mass. at 627. In part because of the "uncertainty of the law of the Commonwealth concerning the duties of attorneys as escrow agents" the Court found no violation of the Disciplinary Rule and, citing the "novel circumstances of [the] case", rejected the Board's recommended sanction and reduced it to an informal admonition, the lowest sanction available. Id. at 629.

Central to this case are the finding that AAG Kaczmarek "neglected her duty to investigate fully the scope of Farak's misconduct", H.R. ¶99, and that she had a duty to disclose information learned in that investigation that was exculpatory with respect to other individuals to the district attorneys' offices which were prosecuting or had previously convicted those individuals. H.R. ¶¶ 136, 137 and 138. The source or sources of those duties is just as uncertain as was the source of the Two Attorneys duties as escrow agents. Like those two attorneys, Anne Kaczmarek "was not indifferent to (her) ethical dilemma" 421 Mass. at 630; she "explicitly

recognized her duty to provide exculpatory evidence, reviewed motions forwarded by various ADAs, and sent them helpful information." H.R. ¶115. Like them, however, she "did not select the correct course to avoid violations of disciplinary rules." 421 Mass. at 630.

To be sure, the subject matter of the duties of the two attorneys as escrow agents is different than the duties of prosecutors in handling exculpatory evidence. The Hearing Report discusses those duties under the heading

COUNT ONE – CONCLUSIONS OF LAW
Basic Legal Principles
Exculpatory Evidence and Duties of Prosecutors

The three paragraphs under that set of headings cite to eight cases which do indeed reflect basic principles, but those cases do not in any way undercut the Supreme Judicial Court's approach to discipline in Matter of Two Attorneys. They do illustrate that courts have historically enunciated lofty principles for prosecutors but have not promulgated rules or enforced the extant rules in a manner consistent with the articulated principles.

The rules violations ascribed to Anne Kaczmarek are for conduct that occurred in 2013 and 2014. Two of the eight cited decisions were issued by the Supreme Judicial Court at least four years after that conduct.[4] The Supreme Judicial Court's opinion in CPCS v. Attorney General, 480 Mass. 700 (2018)[5] obviously post dates that misconduct. The pinpoint citation to pages 730-731 is to a segment of the opinion headed "3. Prophylactic measures." 480 Mass. at 729. The discussion includes specific reference to the 2016 amendments to Rule 3.8 which deal explicitly with postconviction disclosure of exculpatory matters. 480 Mass. At 731. With respect to pretrial matters, the Court observes that one of the nine categories of "automatic discovery"

[4] As the Hearing Officer astutely observed, "it would be a mistake to view the 2013 evidence through the prism of all the developments and all that we've read and heard about in the last – in the last seven years." (Tr. 8:239).

[5] It follows the citation to Berger v. United States, 295 US 78 (1935) and precedes that to Commonwealth v. Tucceri, 412 Mass. 401 (1992). H.R. ¶118. Each is discussed below.

required under Mass. R. Crim. P. 14(a)(1)(A) applies to "any facts of an exculpatory nature", and that the rule enumerates certain categories of potentially exculpatory evidence. Id. at 731-732. The Court accepted the argument that more detailed guidance to prosecutors was necessary and asked its standing advisory committee on the rules of criminal procedure to compile a Brady list to provide it. Id. at 732. Thus even if applied retroactively, the case reflects uncertainty as to the basis of Anne Kaczmarek's duty of disclosure. The opinion two years later in Matter of Grand Jury Investigation, 485 Mass. 641 (2020) does nothing to resolve that uncertainty. The pinpoint citations to it in paragraph 119 lead directly back to the CPCS case.

The United States Supreme Court also issued opinions in two of the eight matters considered in paragraphs 118-120 of the Hearing Report. Berger v. United States, 295 U.S. 78 (1935) rightfully is the first case there cited. Justice Sutherland's eloquent description of the United States Attorney as 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" makes the chest of every prosecutor and ex prosecutor in the country, not just in the Department of Justice, swell with pride. It appears in thousands of cases and virtually every treatise on the role of prosecutors. But the Berger case had nothing to do with the disclosure of exculpatory evidence. A new trial was ordered in Berger because of the prosecuting attorney's thoroughly indecorous and improper conduct at trial.[6]

On the other hand, Strickler v Greene, 527 U.S. 263 (1999) does deal with exculpatory evidence in a postconviction context. Mr. Strickler was convicted of capital murder and

[6] He was guilty of misstating the facts in his cross examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pretending to understand that a witness had said something which he had not said and persistently cross-examining the witness on that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and, in general, of conducting himself in a thoroughly indecorous and improper manner. 295 U.S. at 845.

sentenced to death. His habeas corpus petition was denied in state court and he subsequently filed a habeas corpus petition in federal court and in those proceedings was granted access to exculpatory evidence which significantly impeached the trial testimony of a government witness. The first question considered by the Supreme Court was "whether the Commonwealth violated the *Brady* rule." 527 U.S. at 280. The opening paragraph analyzing the question closes with two propositions relevant here.

> "Moreover, the *Brady* rule encompasses evidence 'known only to the police investigators and not to the prosecutors' … In order to comply with *Brady*, therefore, "the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in this case, including the police"…(citations to *Kyles* omitted, emphasis supplied).[7]

527 U.S. at 280-281.

The following paragraph closes with the chest-swelling statement from Berger. But the next paragraph was more deflating to the chests of Mr. Strickler's lawyers and criminal defense lawyers yet to be born. It intoned "strictly speaking there is never a real 'Brady violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." Id. at 281. That passage presaged the result. The Court affirmed the denial of Mr. Strickler's petition. Strickler, like Berger, therefore, says nothing about the source of the duty AAG Kaczmarek owed to the Farak defendants.

The remaining four cases cited in the Exculpatory Evidence paragraphs all underscore the unusual exercise now facing the parties and the Hearing Officer with respect to sanctions. There is no reported disciplinary action against any of the individual prosecutors in those four cases.

Commonwealth v Tucceri, 412 Mass. 401 (1992) is cited in paragraph 118. There the exculpatory evidence consisted of photographs taken of the defendant by Cambridge police

[7] Anne Kaczmarek was not the individual prosecutor of any of the Farak defendants. And none of the individuals who were ever asked her for exculpatory evidence. She did provide the evidence she had to Ms. Farak's counsel.

shortly after his arrest. That arrest occurred within minutes of the time he left the victim he was convicted of kidnapping and raping. 412 Mass. at 403. Those photographs showed him to have a moustache. The victim, a second civilian witness and the police witnesses who testified at trial all testified the attacker was clean-shaven or had no moustache. Id. A general request for exculpatory evidence was made, but not a specific request for the photos and they were not provided. Ten years after his conviction Mr. Tucceri obtained the photographs from the Cambridge police and the frontal photograph of his face showed him with a moustache. Id. When the Commonwealth's appeal from Tucceri's successful motion for new trial reached the Supreme Judicial Court, it concluded "it is time for this court to expand on the appropriate considerations in cases in which the prosecution would have assisted the defendant but did not provide it." Id. The passage quoted in the Hearing Report appears at the end of a paragraph which opens, "There are several forces at work in prosecutorial nondisclosure cases. First, when the question arises posttrial, there is a public interest in the finality of judgements. New trials should not be granted except for substantial reasons." 412 Mass. at 406. The second force at work is identified in the discussion as the role prosecutors play "as agents for the state", which speaks to the wisdom of a rule encouraging pretrial disclosure of obviously or even arguably exculpatory information. Id. at 406-407.[8] That second point ends:

> "A prosecutor's duty, however, extends only to exculpatory evidence in the prosecutor's possession or in the possession of the police who participated in the investigation and prosecution of the case."

Id. at 407.

The prosecutor in the Tucceri matter was William J. Codinha. There is no reported disciplinary matter reported with respect to him. Frankly none would have been warranted at

[8] Mass. R. Crim. P. 14 is such a rule and its comments refer specifically to Tucceri. Official notice of that rule as well as Rule 17 was taken during the proceeding.

that time. He is a highly respected member of the bar whose distinguished career spans six decades and includes government service in a prosecutorial or investigative capacity to both the United States and the Commonwealth of Massachusetts. He is a partner at Nixon Peabody and a role model to public and private attorneys.

Paragraph 120 dealing with Strickler cites United States v. Osorio, 929 F 2d. 753 (766) (1st Cir. 1991), Commonwealth v. Martin, 427 Mass. 816 (1998), and Commonwealth v. Frith, 458 Mass. 434 (2010). Osorio may justly be considered the federal counterpart to Tucceri, as the Court took it to "provide an occasion to consider how the adverse effects of the problem of governmental failure to make timely disclosure of exculpatory evidence may be ameliorated or eliminated. In doing so [the Court addressed] the respective responsibilities of defense counsel, government counsel and the courts." 929 F.2d. at 755.

The Hearing Report concludes that Anne Kaczmarek was a member of the "prosecution team" in cases being handled by the District Attorneys, where she was not serving as trial counsel. Osorio therefore leaves open the source of the duties imposed on her, just as in The Matter of Two Attorneys. Part B of the Osorio discussion headed "The Responsibility of Governmental Counsel" makes clear the disclosure duty rests with trial counsel who is identified indirectly as James M. Walker III. 929 F.2d at 760 and 755. There is no reported discipline against Attorney Walker, who is now deceased. According to the opinion, he "subtly sought to avoid any personal or institutional responsibility", Id. at 760, for his "astounding negligence" in breach of his duty. Id. at 755. The Court's response is slightly more fulsome that the passage quoted in the Hearing Report.

> Neither the individual nor the institutional responsibility of government counsel may be sloughed off easily. It is apparent that Caruso's past was well known to others in "the government," including both the United States Attorney's office and the FBI, which was using him as a cooperating individual. "The 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". And in this prosecution, "the government" as such a joint enterprise plainly did not provide known impeachment information about Caruso "as soon as it became aware of it."
>
> The kindest interpretation that can be placed on the matter is that there was insufficient diligence within the prosecutor's office regarding a direct order of the court. It is wholly unacceptable that the Assistant United States Attorney trying the case was not prompted personally or institutionally to seek from knowledgeable colleagues highly material impeachment information concerning the government's most significant witness until after defense counsel got wind of it independently and indirectly from another government source.
>
> An Assistant United States Attorney using a witness with an impeachable past has a constitutionally derived duty to search for and produce impeachment information requested regarding the witness. *See generally Giglio v. United States*, 404 U.S. 150, 92 S.Ct. 763, 31 L.E.2d 104 (1972). That constitutional imperative, sharpened in this case by specific court order, is not merely good policy. It is good strategy. No properly prepared trial lawyer should permit himself to be surprised by the vulnerability of his witness, particularly when that vulnerability is well known by his colleagues. To do so needlessly hands a strategic advantage to one's adversary. And it is not merely sloppy personal practice; it implicates the procedures of the entire office for responding to discovery ordered by the court.
>
> The 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.[9]

Important as that passage is in considering the source of duty in issue is this case is the paragraph closing the Part B discussion. It reads:

> We close this portion of our discussion by observing that it would be no adequate response for trial counsel to suggest negligence on the part of the case agent or the relevant investigative agency. Trial counsel is a member of the government team who is an officer of the court. In this sense, it may be a form of insubordination if the investigative agents working on the case for trial counsel are not forthcoming in satisfying the government's disclosure obligations. But the prosecutor is duty bound to demand compliance with disclosure responsibilities by all relevant dimensions of the government. Ultimately, regardless of whether the prosecutor

[9] The underlined language is in the Hearing Report.

> is able to frame and enforce directives to the investigative agencies to respond candidly and fully to disclosure orders, responsibility for failure to meet disclosure obligations will be assessed by the courts against the prosecutor and his office.[10]

Osorio thus leaves open the rules-based source of any duty of disclosure imposed on AAG Kaczmarek.

Neither Commonwealth v. Martin, 427 Mass. 816, 824 (1998) nor Commonwealth v. Frith, 458 Mass. 434, 440 (2010) which relies on it fills in the gap. Both focus on trial counsel who failed to make reasonable inquiry to find out what others in government might know rather than focusing on those occupying other positions in government.

Martin presented the question "whether the Commonwealth, subject to a specific direction to produce evidence, may be exonerated from failing to produce State police laboratory results because that evidence was not in the prosecution's possession (or known to it), but rather was held by the State police crime laboratory and perhaps only known to it." 427 Mass. at 823. The court opined in the negative, indicating the prosecution had a duty concerning the existence of scientific tests, at least those conducted by the Commonwealth's own crime laboratory. Martin has particular significance with respect to the lapses and oversights by others in this matter because it directed trial prosecutors to the State Police laboratory, recognizing that the prosecutors' own offices did not perform scientific tests. The Attorney General's office was not the repository for drug tests conducted at the Amherst lab. That lab became under the administrative control of the Massachusetts State Police in July, 2012. H.R. ¶19. With respect to pending prosecutions; retesting of drug samples was an option, followed in some instances by the prosecuting district attorneys' offices. Indeed, Assistant District Attorney Velasquez appearing for the Commonwealth in the Penate October 2, 2013 hearing before Judge Kinder,

[10] The underlined language is in the Hearing Report.

reminded the judge that retesting had occurred in that particular case. Ex. 143, p. KFVOBJ00286. The information highway put in place in response to Annie Dookhan's dry-labbing was not operative in response to Sonja Farak's drug tampering. But the road Martin directed trial prosecutors to follow was not redirected through the AGO. Anne Kaczmarek had no maintenance duties with respect to that road.

Furthermore, Martin held that the duty of inquiry lay with the prosecutor, not the state police, and was said to extend to information in possession of a person who had participated in the investigation or evaluation of the case and has reported to the prosecutor's office concerning the case. 427 Mass. at 823. As indicated by the quotation from Kyles v. Whitley, supra at 437, it is the individual prosecutor who has that duty. The individual prosecutor in the Martin homicide trial was Renee Dupuis, now a Superior Court Judge with impeccable credentials. There is no reported discipline with respect to her.

Commonwealth v. Frith, 958 Mass. 934 (2010) presented the question whether a District Court Judge abused his discretion by imposing a $5,000 monetary sanction on the Commonwealth by failing to conduct a "reasonable inquiry" as to the existence of a supplemental incident report and falsely stating in the certificate of compliance that it had been so done. 458 Mass. at 434. The "reasonable inquiry" requirement was said to arise from the automatic discovery provisions of Rule 14. Id. at 440. Rule 14 has no application to the misconduct ascribed to Anne Kaczmarek. In any event, the Court determined that the District Court had abused its discretion in imposing the sanction because there was no evidence of bad faith by the ADA in the matter, id. at 441, the sanction was not tailored to the injury suffered, id at 443, and as a factual matter defense counsel engaged in a game of 'gotcha' with respect to the unproduced police report. Id. at 444. The prosecutor in Frith was Benjamin Ostrander. He was

admitted to the bar in 2007 and has not yet received the professional accolades earned by Judge Dupuis or Attorneys Codinha and Walker. Like them, however, he was not the subject of public discipline as a result of whatever duty may be found in the Frith opinion.

The Hearing Report's recurring reference to what "should have" occurred is noteworthy because of the Scope of the Rules of Professional Conduct themselves. "Some of the rules are imperatives, cast in terms 'shall' or 'shall not'… The rules are thus partly obligatory and disciplinary… Many of the Comments use the term 'should'. Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules." M.R. Prof. C. Scope[1]. Many of a "lawyers responsibilities" as described in the Preamble also use the word "should". It appears a dozen times in paragraphs [4] [5] and [6]. As paragraph [7] states "[m]any of a lawyer's professional responsibilities are prescribed in the Rules". The corollary to that statement is that others are not so prescribed.

Unless there has been a failure to comply with an obligation or prohibition imposed by a Rule, discipline is inappropriate. M.R. Prof. C. Scope[5]. And whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as willfulness and seriousness of the violation, extenuating facts and whether there have been previous violations. Id.

The conclusion that Anne Kaczmarek intentionally withheld from the District Attorney's offices information that would have been exculpatory to the "Farak defendants" is the baseline for the determination whether and how severe a sanction should be recommended. Highly relevant in that determination is failure of the executive and legislative branches of government to recognize and address the potential scope and effects of chemist Farak's drug tampering. That failure is difficult to reconcile with the approach the political branches took with respect to the

dry-labbing of Chemist Annie Dookan. The Hearing Report recognizes that Anne Kaczmarek was assigned to the Farak case in part because she had been assigned to and was at the time working on the prosecution of Annie Dookan. H.R. ¶28. Its discussion of Dookan continues through paragraph 33 and the footnote to that paragraph briefly references the extraordinary steps undertaken by the Commonwealth in the Dookan case. As Luke Ryan testified those extraordinary efforts were not mirrored in the Farak related matters. Tr. 4, pp. 60-61.

What "could have"[11] and "should have" happened in Farak related cases are functions of all the circumstances and cannot be ascribed solely to the three Respondents in this matter. The simple truth is that John Verner and Anne Kaczmarek performed their roles in the Dookan case in a manner that should have garnered them medals. In the Farak case, as in the military, shit flows downhill, but responsibility lies at the top. Harsh sanctions imposed on three Respondents, two of whom were line prosecutors with no supervisory or policy-making power, would obscure if not erase, the significance of the institutional failure.

The pattern of lofty pronouncements coupled with no discipline or light discipline in matters involving non-disclosure or suppression of exculpatory evidence is by no means confined to Massachusetts. Many commentators have identified and criticized that phenomenon. See Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 732-3 (1987); Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WISC. L. REV. 399, 427 (2006); Ellen Yaroshefsky, *Wrongful Convictions: IT is Time to Take Prosecution Discipline Seriously*, 8 U.D.C. L. REV. 275, 292-93 (2004).

Far fewer are the cases imposing discipline. Matter of Larson, 379 P.3d 1209 (Utah, 2016) imposed a six month suspension on trial counsel who showed the witnesses to a 2010

[11] Eight references according to Respondent's word count.

robbery a single photograph and failed to disclose the suggestive identifications until the second of those witnesses took the stand. The Court affirmed the six month suspension identifying as one of its grounds "the precedents involving sanctions against prosecutors under rule 3.8(d) include a few suspensions for six months but none for any longer period, and no disbarments." 379 P.3d at 1217. Note 5 from that opinion contains an apt list of cases from around the country that fit that quote. It is reproduced in the margin.[12] The undersigned counsel has found no reported decisions that impose discipline on prosecutors as investigative agents or members of a prosecution team. Counsel likewise has found no reported decision imposing discipline on a prosecutor for failure to produce exculpatory evidence to trial counsel in a different jurisdiction. It is no stretch to label this proceeding "unique" or its circumstances novel.

Ferrara v. United States, 456 F.3d 278 (1st Cir. 2006) discussed briefly at H.R. ¶320, may be counted as a case in which no discipline was imposed. It would not necessarily have been identified in a search for pre-2016 Rule 3.8(d) cases, as it is a federal case.[13] The opinion opens

[12] We are aware of no Utah cases under rule 3.8(d). But cases in other jurisdictions seem to generally sustain the proportionality of the sanction imposed in this case. See, e.g., Comm. on Prof'l Ethics and Conduct of the Iowa State Bar Ass'n v. Ramey, 512 N.W.2d 569, 572 (Iowa 1994) (indefinite suspension, but with possibility of reinstatement after three months); Disciplinary Counsel v. Wrenn, 99 Ohio St.3d 222, 790 N.Ed.2d 1195, 1198 (2003) (six-month suspension); Disciplinary Counsel v. Jones, 66 Ohio St.3d 369, 613 N.E.2d 178, 180 (six-month suspension) State ex rel Okla Bar Ass'n v. Miller, 309 P.3d 108 (2013) (six-month suspension, but for numerous other counts as well); But see In re Jordan, 913 So.2d 775, 784 (2005) (three-month suspension, but deferred due to mitigating factors). We have found cases in which prosecutors have been given a lighter sanction. See In re Kline, 113 A.3d 202 (D.C. 2015) (no sanction due to confusion over the meaning of the rule); In re Jordan, 278 Kan. 254, 91 P.3d 1168, 1175 (Kan. 2004) (public censure for two counts of not making timely disclosure and for another professional conduct violation); Cuyahoga Cty. Bar Ass'n v. Gerstenslager, 45 Ohio St.3d 88, 543 N.E.2d 491, 491 (1989) (public censure); In re Grant, 343 S.C. 528, 541 S.E.2d 540, 540 (2001) (public reprimand). But to our knowledge none of these cases involved a prosecutor deemed to have *intentionally* failed to make a timely disclosure.

[13] Bar Counsel would argue otherwise, as that office fought vigorously to discipline Assistant United States Attorney Auerhahn and objected to the reference to it in these proceedings. Disciplinary proceedings were commenced against Assistant United States Attorney Jeffrey Auerhahn. The proceedings were conducted before a three judge federal panel which applied a higher standard of proof to Bar Counsel's petition than that used by the Board of Bar Overseers. No violation was found and no discipline was imposed on AUSA Auerhahn.

"It is axiomatic that the government must turn square corners when it undertakes a criminal prosecution." 456 F.3d at 280. In discussing the merits, Circuit Judge Selya wrote "Here, we are dealing with more than simple neglect to turn over exculpatory evidence; the government manipulated the witness (Jordan) into reverting back to his original version of events, then effectively represented to the court and the defense that the witness was going to confirm the story (now known to the prosecution to be a manipulated tale) that the petitioner was responsible for killing Limoli." Id. at 291. Summing up the "Misconduct" section of its merits discussion, the opinion states:

> The government's actions in this case do not depict some garden-variety bevue but, rather, paint a grim picture of blatant misconduct. The record virtually compels the conclusion that this feckless course of conduct—the government's manipulative behavior, its failure to disclose the Jordan recantation and/or the Coleman memo, and its affirmative misrepresentations (not anchored to any rational and permissible litigation strategy)—constituted a deliberate and serious breach of its promise to provide exculpatory evidence in the circumstances of this case, then, the government's nondisclosure was so outrageous that it constituted impermissible prosecutorial misconduct sufficient to ground the petitioner's claim that his guilty plea was involuntary. *See Brady v. United States*, 397 U.S. at 755, 90 S.Ct. 1463; *Correale*, 479 F.3d at 747.

As noted below, AUSA Auerhahn was not professionally disciplined.

Hanna v. Healey, 313 S.W.3d 175 (2016) is the most relevant of the out-of-state cases dealing with the non-disclosure of exculpatory evidence. It is the subject of footnote 15 on page 38 of the Hearing Report and, as stated in that note, its interpretation of the disciplinary rules of Texas is not binding in these proceedings. Moreover it is a case that deals with the timeliness of disclosure only in a post-conviction matter and this case involves a handful of pre-trial matters. That said, it interprets the Texas counterpart to M.R.Prof.C. 3.8(d) utilizing the same rules of construction that are applicable here and confirms its analysis with reference to the ABA's 2008 amendments to Model Rule 3.8, inserting new subsections that impose on prosecutors a duty to

disclose evidence learned post-conviction. 313 S.W.3d at 181-182. Those new subsections had not been adopted in Texas in 2016, id. at 182 nor in Massachusetts in 2013 and 2014, when the misconduct ascribed to Anne Kaczmarek occurred.

In fact, United States Attorney Ortiz (Ex. 161), First Assistant Attorney General Bedrosian (Ex. 162) of the Commonwealth and District Attorney Conley (Ex. 160) each submitted letters in 2014 commenting and seeking amendments clarifying proposals to adopt those rules in Massachusetts. Each of the writers expressed support for the goals behind the proposals but each objected to them. At the beginning of her letter, United States Attorney Ortiz quoted the same passage from Justice Sutherland's Berger opinion as does the Hearing Report, KFVOBJ017646 and 47, but it goes on in the succeeding pages to raise serious questions about: (1) the duties the proposal would impose on prosecutors not involved in particular cases, KFVOBJ01747 and 48; (2) the proposals' treatment of prosecutors as investigators, thus raising separation of powers issues KFVOBJ01748 and 49; and (3) the conflict between the proposals and substantive federal law. KFVOBJ01750 and 51. District Attorney Conley's letter raises no separation of powers issues, but addresses both the lack of clarify regarding the duties imposed, KFVOBJ01741 and the investigative function imposed on prosecutors. KFVOBJ01740.[14] Collectively these three letters illustrate that it was not the perceived view in 2013 or 2014 that prosecutors who were new to a case had rules based duties with respect to cases handled in offices other than their own. The decision in Hanna v. Healey illustrates that the one court that has considered whether such a duty exists under a disciplinary rule like M.R.Prof.C. 3.8(d) has answered the question with a "No". All those precedents support the approach of Matter of Two Attorneys.

[14] First Assistant Bedrosian's letter, drafted with input from other supervisory attorneys who were witnesses in these proceedings deal primarily with other proposed changes in Rule 3.8 and its comments.

## Other Sanctions Related Considerations

The Hearing Report concludes that Anne Kaczmarek violated a series of other rules and they must factor into the sanction calculus. While "consideration of the cumulative effect of several violations is proper," Matter of Saab, 406 Mass. 315, 326–27 (1989), the amalgamation of rule violations does not inexorably lead to a severe sanction. See BBO Public Reprimand No. 2021-6, In re Miriam Gordon Cauley, (public reprimand for violations of Rules 1.2(a), 1.3, 1.4(a)(1), 4.1, 8.4(c) and 8.4(h)); and BBO Reprimand No. 2021-7, In re Kelly Kevin Lydon, (public reprimand for violations of Rules 1.1, 1.2(a), 1.3, 3.1, 3.4(c) and 8.4(d)). That is especially so where many of the rule violations flow from the same central act, *i.e.*, the failure to disclose exculpatory information, as opposed to separate instances of misconduct. Contrast Saab, 406 Mass. at 316 (18-month suspension justified by five separate counts alleging misconduct in matters concerning four of the respondent's clients) and cases cited therein.[15]

In addition, Anne Kaczmarek has already been reprimanded in the form of public opprobrium in the four years between the Innocence Project's complaint against her to the present, in addition to opprobrium from the publication of Judge Carey's opinion and Netflix documentary "How to Fix a Drug Scandal" that was viewed throughout the world. "[W]here an attorney has been subjected to a considerable period of public opprobrium while awaiting formal discipline, the delay will have already inflicted an unofficial sanction, and the formal sanction should take into account what the attorney has suffered while awaiting resolution of the charges." In re Gross, 435 Mass. 445, 451-452 (2001).

[15] "See Matter of Herman, S.J.C. No. 87–24 BD (Nov. 30, 1987) (public censure warranted by several unrelated violations of the Canons); Matter of Gillis, S.J.C. No. 86–39 BD (June 3, 1987) (six-month suspension imposed on the basis of five separate incidents considered cumulatively); Matter of Collins, 1 Mass. Att'y Discipline Rep. 63 (1979) (public censure imposed on the basis of three separate instances of minor misconduct)." Saab, 406 Mass. at 316

## Conclusion

In another context, this submittal would end with a recommendation for the lowest form of discipline available, just as was the case in Matter of Two Attorneys. Given the interlocutory timing of the filing, the need to tailor the sanction recommendations to the individual respondents and the big picture presented by the systemic failure referenced above, the Hearing Officer should recommend a term suspension the actual duration of which is a year or less. There is no reason to put any of the respondents through the reinstatement process that would come with a suspension longer than that. If, however, a long term suspension is recommended, its duration should be short.

The mechanics of making a "long" term suspension "short" can be accomplished either by suspending the suspension or making its effective date retroactive. The former approach is not uncommon in disciplinary matters sanctioning prosecutors for the failure to disclose exculpatory information. Anne Kaczmarek's last day of active law practice was July 21, 2014. That was her last day in the AGO and she then worked in a new position in the Suffolk Superior Criminal Bureau Clerk's office until November 28, 2018. While the final word with respect to such steps belongs to the Court, a recommendation from the Special Hearing Officer who labored over this unique matter and its lengthy record would likely carry great weight.

Respectfully submitted,

ANNE K. KACZMAREK,
By her attorneys,

*s/s Thomas R. Kiley*
Thomas R. Kiley, BBO #271460
tkiley@ceklaw.net
Meredith G. Fierro, BBO #696295
mfierro@ceklaw.net
CEK Boston, P.C.
One International Place, Suite 1820

Boston, MA 02110
(617) 439-7775

Dated: August 16, 2021

**CERTIFICATE OF SERVICE**

I, Thomas R. Kiley, hereby certify that I have this day, August 16, 2021, served Respondent Anne Kaczmarek's Sanctions Memorandum by email to:

Patrick Hanley
Thomas J. Butters
Butters Brazilian
699 Boylston St., 12th Floor
Boston, MA 02116

Allen N. David
George A. Berman
Kristyn Kelley
Peabody & Arnold LLP
Federal Reserve Plaza
600 Atlantic Avenue
Boston, MA 02110

Stacey A.L. Best
Assistant Bar Counsel
Board of Bar Overseers
99 High Street
Boston, MA 02110

Joseph Makalusky
Assistant Bar Counsel
Board of Bar Overseers
99 High Street
Boston, MA 02110

*/s/ Thomas R. Kiley*
CEK Boston, P.C.

Dated: August 16, 2021