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December 17, 2021

BY EMAIL

Joseph S. Berman
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Board of Bar Overseers
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RE: BBO File No. C1-17-00248283 (Kris C. Foster, Esq.)
BBO File No. C1-17-00248284 (Anne K. Kaczmarek, Esq.)
BBO File No. C1-18-00255238 (John C. Verner, Esq.)

Dear Mr. Berman:

Enclosed for filing please find Bar Counsel's Consolidated Brief on Appeal and Request for Oral Argument.

Thank you for your attention.

Sincerely,

/s/
Joseph M. Makalusky
Assistant Bar Counsel

JMM/jb
Enclosure
cc: Merle Hass, Esq.
Thomas J. Butters, Esq.
Patrick Hanley, Esq.
Thomas Kiley, Esq.
Meredith Fierro, Esq.
George A. Berman, Esq.
Kristyn Kelley, Esq.
(by email)

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

BAR COUNSEL'S CONSOLIDATED BRIEF ON APPEAL AND REQUEST FOR ORAL ARGUMENT

Bar Counsel, pursuant to Section 3.50(a) & (b) of the Rules of the Board of Bar Overseers, submits this Consolidated Brief on Appeal and Request for Oral Argument in the above-captioned matters. In this appeal, Bar Counsel raises issues concerning each of the respondents, John C. Verner ("Verner"), Kris C. Foster ("Foster") and Anne K. Kaczmarek ("Kaczmarek") (collectively, "Respondents"), which will be addressed seriatim. In support of his appeal, Bar Counsel incorporates herein by reference Bar Counsel's Brief on Aggravation, Mitigation and Sanctions in the above-captioned matter, dated August 16, 2021 ("BC's Sanction Brief").[1]

[1] References herein to the SHO's Hearing Report, dated July 9, 2021 will be cited as "Hearing Report, at ⁋ [number]" or "Hearing Report., [page number]", while citations to the SHO's Supplemental Report on Aggravating Factors, Mitigating Factors, and Recommended Sanctions, dated October 8 2021 will be noted as "Sanction Report, [page number], at ⁋ [number, if any]." Any reference to the transcripts of the disciplinary hearing will be cited as "Tr. [volume number]:[page number]", while citations to exhibits introduced during the disciplinary hearing will be noted as "Exh. [number], at [Bates number, if any]".

STATEMENT OF THE CASE

On Saturday, January 19, 2013, Sonja Farak ("Farak"), a state-employed chemist working in the drug lab in Amherst, was arrested at her home. Hearing Report, at ¶¶ 19 & 42. A press release issued by the Office of the Attorney General ("AGO") informed the public that Farak was "charged with allegedly tampering with drug evidence and possessing drugs[.]" Exh. 276. *See generally* Hearing Report, at ¶¶ 40 & 42. Attorney General Martha Coakley was quoted as saying that "'[c]hemists at the State Drug Laboratory are entrusted with ensuing the integrity of the evidence that they analyze, both for law enforcement and the defendants who had been charged[,]'" and that the AGO "allege[d] that this chemist violated that trust, placing the integrity of that evidence in question.'" Exh. 276. This news sent shockwaves through the criminal justice system all the way to the Governor's Office. Hearing Report, at ¶¶ 41 & 60. For obvious reasons, criminal defendants with cases involving drugs analyzed by Farak (both those with pending cases and those who had already been convicted) (the "Farak defendants") were particularly interested in this news and obtaining more information of Farak's misconduct. *See id.* at ¶¶ 30-31 & 150. Kaczmarek, a prosecutor in the AGO's Enterprise and Major Crimes Division, "had just arraigned [state-employed lab chemist Annie] Dookhan[2] 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.'" *Id.* at ¶¶ 10 & 41.

Within a month of Farak's arrest, Sergeant Joseph Ballou ("Ballou") of the Massachusetts State Police ("MSP") provided Kaczmarek and her supervisor Verner, the Chief of the AGO's Criminal Bureau, with significant evidence (including, but certainly not limited to, the so-called mental health worksheets) proving inculpatory of Farak and exculpatory to the

[2] For a further explanation of the Dookhan case, *see* Hearing Report, at ¶¶ 28-33.

Farak defendants. *See* Hearing Report, at ¶¶ 3 & 45-78. "Kaczmarek and Verner understood early on that . . . [the 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." *Id.* at ¶ 30. Nevertheless, the exculpatory evidence provided to Kaczmarek and Verner remained hidden for nearly two years from its initial discovery by the AGO. *See id.* at ¶ 341. Foster, an appellate attorney in the AGO, was instrumental in keeping the exculpatory evidence from the Farak defendants for so long. *See generally id.* at ¶¶ 158-180, 189-257, 267-278 & 294-306. In fact, the exculpatory evidence did not see the light of day until a dogged criminal defense counsel representing one of the Farak defendants lifted the lid of a box in the AGO and found the "smoking gun"[3] resting inside. *See id.* at ¶¶ 322-331.

"Due to the conduct of the AGO, the [Supreme Judicial] 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." Hearing Report, at ¶ 358, citing *Committee for Pub. Counsel Servs. v. Attorney Gen.*, 480 Mass. 700, 729 (2018). Consequently, well over 8,000 cases were vacated and dismissed. Hearing Report, at ¶ 358.

On June 28, 2019, Bar Counsel filed with the Board of Bar Overseers (the "Board") and served upon Respondents the Petition for Discipline (the "Petition") in the above-captioned matters charging Verner, Foster and Kaczmarek with various violations of the Rules of

[3] "The mental health worksheets were, in effect, a smoking gun, as [defense attorney Luke] Ryan proved in late 2014 after he first saw them." Hearing Report, at ¶ 304.

Professional Conduct by participating in the conduct that resulted in the AGO's failure to timely disclose exculpatory evidence in the AGO's possession.

On August 22, 2019, Foster filed her answer to the Petition, while Verner and Kaczmarek filed their respective answers on August 30, 2019.

On October 21, 2020, the Board appointed Mr. Alan D. Rose to serve as the Special Hearing Officer ("the SHO") in these disciplinary matters. Thereafter, over the course of some twenty-three (23) days in the fall of 2020,[4] the disciplinary hearing was held via videoconference. During the disciplinary hearing, fifteen witnesses testified and three hundred and five (305) exhibits were admitted into evidence.

On December 29, 2020, the SHO entered an Order bifurcating the parties' briefing of the proposed findings of fact and conclusions of law and the parties' briefing on sanctions. Pursuant to that Order, the parties filed their proposed findings of fact and conclusions of law on February 4, 2021.

On July 9, 2021, the SHO issued his Hearing Report. The SHO "found misconduct by the three respondents while employed by the AGO between 2013 and 2016[,]" which involved "numerous lapses, oversights, intentional misconduct and rule violations[.]" Hearing Report, pg. 92. In greater detail, the SHO concluded that Verner violated Mass. R. Prof. C. 1.3 and 5.1(b) by failing "adequately and diligently to supervise Kaczmarek and follow up with her[,]" and by failing to "have done more to ensure that the potentially exculpatory evidence – particularly the mental health worksheets – were disclosed." Hearing Report, at ¶ 148.

[4] The hearing dates were: 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, 2020.

As to Foster, the SHO concluded that she violated Mass. R. Prof. C. 1.1, 1.2(a), 1.3, 8.4(d) and 8.4(h) by drafting and submitting her "intentionally vague"[5] September 16, 2013 letter in which she "misled Judge Kinder" by "deliberately obscur[ing] who had allegedly reviewed Ballou's file, and . . . recklessly expand[ing] the alleged review to include 'every document in [Ballou's] possession.'" Hearing Report, at ¶ 378. The SHO further found Foster in violation of Mass. R. Prof. C. 1.1, 1.2(a) and 1.3 for her conduct in mishandling the *Watt*, *Rodriquez* and *Penate* matters, *see* Hearing Report, at ¶¶ 371 & 372, and in violation of Mass. R. Prof. C. 1.1, 1.2(a) and 1.3 for failing to ensure that the files were reviewed after Judge Kinder's order to review the files. *See* Hearing Report, at ¶ 376.

Kaczmarek, as the SHO concluded with respect to Count I of the Petition, failed to disclose potentially exculpatory evidence in violation of Mass. R. Prof. C. 1.1, 1.3, 3.4(a), 3.4(c), 3.8(d) and 8.4(d). *See* Hearing Report, at ¶¶ 131-134 & 142-143. As for Count II, the SHO determined that Kaczmarek violated the following rules: Mass. R. Prof. C. 1.1, 1.3, 3.4(a), 3.4(c), 3.8(d), 4.1(a), 8.4(a), 8.4(c), 8.4(d) and 8.4(h) concerning her interactions with Frank Flannery, John Bossé and Sean Farrell, *see* Hearing Report, at ¶¶ 359 & 361; Mass. R. Prof. C. 1.1, 1.3, 3.4(a), 3.4(c), 3.8(d), 5.3(b), 8.4(a), 8.4(d) and 8.4(h) concerning her failure to properly supervise Sergeant Joseph Ballou ("Ballou"), *see* Hearing Report, at ¶¶ 362 & 364; and Mass. R. Prof. C. 5.3(c)(2) by failing to take remedial action in response to Ballou's failures, which also makes her 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). *See* Hearing Report, at ¶¶ 365-366. Finally, in Count III, Kaczmarek was found to have failed to review her file, produce responsive documents and alert Foster to the existence of undisclosed documents in violation of Mass. R. Prof. C. 1.1, 1.3 and 3.4(c), *see*

[5] *See* Hearing Report, at ¶ 276 ("I find that the statements in Foster's letter were not only misleading but intentionally vague.")

Hearing Report, at ⁋⁋ 373-374, and she violated Mass. R. Prof. C. 1.1, 1.3, 3.4(a) and 8.4(d) by failing to ensure after reviewing the Motion to Clarify that the exculpatory evidence had been disclosed. *See* Hearing Report, at ⁋⁋ 383-384.

On August 16, 2021, the parties filed their briefs concerning aggravation, mitigation and sanctions.

On October 8, 2021, the SHO issued his Supplemental Report on Aggravating Factors, Mitigating Factors, and Recommend Sanctions.

On October 25, 2021, General Counsel allowed Respondent Kris C. Foster's Assented to Motion for Extension of Briefing Schedule, which extended the deadline for appeals to December 3, 2021. Then, on November 23, 2021, General Counsel allowed Bar Counsel's Assented-To Motion for Extension of Briefing Schedule, thereby setting December 17, 2021 as the deadline for appeals by all parties. This timely appeal followed.

SUMMARY OF BAR COUNSEL'S POSITION

Overall, Bar Counsel commends the SHO for doing a remarkable job presiding over a disciplinary proceeding of such extraordinary length and complexity.[6] Of course, as with all things touched by human hands, some mistakes were made. As set forth herein, Bar Counsel's position on these issues are as follows:

- With the exception of relevant facts concerning certain mitigating and aggravating factors as noted below, Bar Counsel asks the Board to adopt the SHO's findings of fact as set forth in his Hearing Report and Sanction Report;

[6] While not technically "in the record," it is believed that this case was the second-longest disciplinary hearing conducted in Massachusetts history, and it was also just the second hearing ever conducted remotely as a consequence of the COVID-19 pandemic.

- With the notable exception of the erroneous conclusion that Foster's conduct did not violate Mass. R. Prof. C. 8.4(c), Bar Counsel asks the Board to adopt the SHO's rulings of law set forth in his Hearing Report;
- Bar Counsel also asks the Board to recommended a sanction for Foster's misconduct of at least a one-year-and-one-day suspension, as set forth in the Sanction Report; and
- Finally, Bar Counsel asks the Board to decline to adopt the SHO's recommended sanctions for Verner's and Kaczmarek's misconduct as set forth in the Sanction Report.

There are three independent reasons why the Board should decline to adopt the SHO's recommended sanction for Verner's misconduct. First, the SHO improperly considered as a factor in mitigation evidence that he earlier had concluded formed a basis of liability. Second, the SHO did not take into account a number of applicable aggravating factors when making his recommendation. Finally, even if the mitigating and aggravating factors were properly weighed (which they were not), the SHO's recommended sanction of a public reprimand is insufficient to reassure the bar and the public that the misconduct is intolerable and to deter future misconduct. In making its independent recommendation, the Board should suggest a suspension.

As for Foster, by drafting and sending her September 18, 2013 letter to Judge Kinder, she "engage[d] in conduct involving dishonesty, fraud, deceit or misrepresentation." Mass. R. Prof. C. 8.4(c). As matters of fact, the SHO found that "the statements in Foster's letter were not only misleading but intentionally vague[,]" Hearing Report, at ¶ 276, since she "deliberately obscured who had allegedly reviewed Ballou's file[.]" *Id.* at ¶ 378. Foster's intentional and deliberate conduct "misled" Judge Kinder; so found the SHO. *Id.* at ¶ 378. And, yet, the SHO ruled that Foster did not violate Rule 8.4(c) (although he acknowledged it was a "close call"). *Ibid.* But only by doing violence to the words "dishonesty" and "deceit" can it be said that Foster's

conduct did not violate Rule 8.4(c). The Board should find that Foster violated Rule 8.4(c) and recommend a sanction of a suspension of at least one year and one day.

With respect to Kaczmarek, the SHO concluded that she committed forty (40) separate violations of the Rules of Professional Conduct, and he noted no less than eight (8) aggravating factors weighing against her (with no mitigating factors tempering her misconduct). He recognized that Kaczmarek's misconduct directly caused "great harm to the third-party defendants, the system of justice and the public at large." Sanction Report, pp. 20-21. Elsewhere, the SHO described the fallout as "spectacular harm" and "significant harm." *Id.* pp. 17 & 14, at ¶ 48. In the end, however, the SHO decided to recommend a two-year suspension for the aggregate misconduct. There are two independent reasons why the Board should decline to adopt the SHO's recommended sanction for Kaczmarek's misconduct as too lenient. First, the SHO's recommended sanction did not take into account all applicable aggravating factors. Second, the SHO's recommended sanction was based on incorrect standard of law. In making its independent recommendation, the Board should suggest disbarment.

GROUNDS FOR APPEAL

1. With respect to Verner, the Board should decline to adopt the SHO's recommended sanction as too lenient, since his recommendation: (a) took into account a nonexistent mitigating factor; (b) failed to account for all applicable aggravating factors; and (c) in any event, does not adequately protect the public and deter future misconduct.

2. With respect to Foster, the SHO's conclusion that Foster's misconduct did not violate Mass. R. Prof. C. 8.4(c) amounted to an error of law.

3. With respect to Kaczmarek, the Board should decline to adopt the SHO's recommended sanction, since his recommendation: (a) failed to account for all applicable aggravating factors; and (b) was based on an incorrect standard of law.

ARGUMENT

I. IN ORDER TO REASSURE THE BAR AND THE PUBLIC AND TO DETER FUTURE MISCONDUCT, VERNER'S FAILURE TO PROPERLY SUPERVISE KACZMAREK CALLS FOR A SUSPENSION.

"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." Hearing Report, at ¶ 148. For Verner's role in the historic debacle, the SHO recommended a public reprimand. *See* Sanction Report, pp. 17-18. But that recommended sanction rested precariously upon the finding of an inapplicable mitigating factor, and the absence of a number of applicable aggravating factors. Even aside from those inherent problems, the recommendation was inadequate. The Board should recommend a suspension for Verner's misconduct.

A brief overview is in order. After Farak was arrested on January 19, 2013, her case "garnered immediate attention from the media, AGO and others in government, including the Governor." Hearing Report, at ¶ 41. "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.'" *Id.* at 41. No doubt Verner was likewise "keenly aware" of the import. *See*, *e.g.*, Tr. 12:49-50 (Verner testifying that he "was involved heavily early on in the very beginning and the attorney general wanted to know what was going on so much so to the extent that she made the decision for us to go and arrest Ms. Dookhan.")

Just four days after Farak's arrest, Verner and others received information that "Farak had been the testing chemist in a March 2012 case involving an irregularity with suspected Oxycodone pills" ("the 2012 Oxycodone case"). Hearing Report, at ¶¶ 45-46. Verner and others

were likewise informed of another "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" ("the 2005 light cocaine case"). *Id.* at ¶ 47. "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." *Id.* at ¶ 48. Consequently, "[b]oth the 2012 Oxycodone case and the 2005 light cocaine case were potentially exculpatory as to the Farak defendants[,]" *id.* at ¶ 56, and Verner knew it. *Id.* at ¶ 55.

One day after discovering the 2012 Oxycodone case and the 2005 light cocaine case, Verner and others learned from the "Belchertown probation department that the previous day, January 23, Farak had tested positive for cocaine." Hearing Report, at ¶ 57. Verner also knew this evidence was exculpatory. *Id.* at ¶ 59.

Then, almost one month after Farak's arrest, on February 14, 2013, Verner and others received word that the "smoking gun" of exculpatory evidence had been discovered in Farak's car. *See* Hearing Report, at ¶¶ 61-64, 68-71 & 304. In a Valentine's Day email sent by Ballou, Verner received - - and reviewed - - the so-called "mental health worksheets." *Id.* at ¶¶ 64, 72 & 148.

"By no later than March 21, 2013, the AGO began receiving requests from district attorneys for discovery." Hearing Report, at ¶ 89. "As the pros memo[7] 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." *Id.* at ¶ 90. On March 27, 2013, a discovery letter, signed by Verner, was sent to the DAOs

[7] For more details about the Prosecution Memorandum or "pros memo", *see* Hearing Report, at ¶¶ 79-88.

providing them with certain documents and information. *Id.* at ¶¶ 90-92. Quite significantly, "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[,]" *id.* at ¶ 93, although he admitted that he "understood 'in [his] core that as a prosecutor we had a responsibility to fairness and to justice to turn this stuff over.'" *Id.* at ¶ 90 (citation omitted).

On the very day his discovery letter was sent, *see* Hearing Report, at ¶ 83, "Verner made a handwritten notation next to footnote seven [on the pros memo], writing as to the mental health worksheets: 'this paperwork NOT turned over to DAs office yet.'" *Id.* at ¶ 84 (citation omitted) (emphasis in original). Obviously, "Verner knew that as of March 27, 2013, the mental health worksheets had not 'yet' been turned over." *Id.* at ¶ 94. Equally apparent, Verner knew that the information concerning the 2012 Oxycodone case, the 2005 light cocaine case and Farak's January 23, 2013 urinalysis had not been turned over. *See id.* at ¶ 93. And as the SHO concluded, Verner "never followed up, to make sure that the mental health worksheets, and other information, was disclosed to the DAOs." *Id.* at ¶ 94. In fact, Verner "never asked Kaczmarek if she had turned everything over." *Ibid.* (emphasis added).

Fast forward to September 9, 2013; Verner was aware that a consolidated hearing concerning various discovery requests made by defense counsel representing Farak defendants was held that day in the Hampden Superior Court. *See*, *e.g.*, Hearing Report, at ¶¶ 192 & 197. On September 10, 2013, Verner emailed Foster asking "what had happened with the 'request for documents etc[.]'" *Id.* at ¶ 227 (citation omitted). When Foster reported to Verner and others that the "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.* at ¶ 228 (citation omitted), "Verner responded almost immediately[.]" *Id.* at ¶ 229. He sent an email to Kaczmarek and others, asking: "'Anne, can you get a sense from [Ballou] what is in his file? Emails etc? Kris, did the judge say his 'file' or did he indicate [Ballou] had to search his emails etc?'" *Ibid.* (citation omitted). In her September 10th email, Kaczmarek responded that Ballou "'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.'" *Id.* at ¶ 232. The SHO "infer[red] that Verner believed from Kaczmarek's September 10, 2013 email – incorrectly, as it turned out - that the mental health worksheets had been turned over." *Id.* at ¶ 233.

Also on September 10, 2013, Kaczmarek "emailed just Verner that she had asked Ballou 'to come to Boston this week so we/I can look at his file.'" Hearing Report, at ¶ 240 (citation omitted). And "Ballou came to Boston September 12, 2013 with his file." *Id.* at ¶ 242. "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." *Id.* at ¶ 243 (citation omitted). "However, he never followed up with Kaczmarek after Ballou's visit to Boston." *Ibid.*

Based on these facts, the SHO concluded as a matter of law "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."[8] Hearing Report, at ⁋ 244. *Accord id.* at ⁋ 148.

A. The SHO Took Into Account An Inapplicable Mitigating Factor, And He Did Not Consider All Applicable Aggravating Factors.

As the sole mitigating factor in fashioning Verner's recommended sanction,[9] the SHO stated the following: "I find mitigating that Verner relied on Kaczmarek's statement, on September 10, 2013, that the mental health worksheets had been turned over." Sanction Report, pg. 5, at ⁋ 5. This finding directly conflicts with the SHO's earlier finding concerning Verner's liability, *i.e.*, that rather than serving to absolve or diminish Verner's responsibility, Kaczmarek's email actually highlighted Verner's failure to comply with his supervisory duties. As the SHO concluded:

> 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.

[8] Verner's subsequent concerns arising from the October 2, 2013 hearing before Judge Kinder should also have raised red flags that he needed to confirm whether the exculpatory evidence that he knew to exist had properly been disclosed. *See* Hearing Report, at ⁋⁋ 294-318.

[9] Elsewhere, the SHO added the following: "While not mitigating, I specifically find that during the hearings, Verner demonstrated candor, remorse, and a recognition of and responsibility for his mistakes." Sanction Report, pg. 6, at ⁋ 10. However, this is inconsistent with the SHO's Hearing Report filed some three months earlier in which he expressly discredited Verner. *See* Hearing Report, at ⁋ 148 ("I do not agree with Verner's claim that Mazzone, not he, was Kaczmarek's supervisor in this matter."); *id.* at ⁋ 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 which he is merely cc'd, as distinguished from those sent to him. He claims he did not open the attachments. 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.") (internal citation omitted); *id.* at ⁋ 148 ("I found above that [Verner] had received and opened Ballou's February 14, 2013 email marked FARAK Admissions. He knew how important admissions were in a criminal case.") In any event, as the SHO did not consider his comments to qualify as an applicable mitigating factor, Bar Counsel will press the point no further.

Hearing Report, at ⁋ 244 (emphases added). It simply does not make sense that reliance on a subordinate's representations could be both the basis of a rule violation and a mitigating factor.

The SHO also improperly discounted a number of applicable aggravating factors. To begin, the SHO "found that Verner is an experienced prosecutor and [he] recognize[d] that the SJC has found experience to be an aggravating factor[,]" but he said that "consideration of this factor [did] not change [his] sanction recommendation." Sanction Report, pg. 6, at ⁋ 11. Even if it could be said that the SHO had the discretion to so disregard this aggravating factor, the Board should not. The Supreme Judicial Court generally recognizes that "[a]n older, experienced attorney should understand ethical obligations to a greater degree than a neophyte." *Matter of Luongo*, 416 Mass. 308, 312 (1993). Here, it is critical to note that "Verner not only had 'extensive trial experience,' but had also 'served in three different supervisory positions[,]' . . . prior to joining the AGO in 2012." BC's Sanction Brief, pg. 9 (citations omitted). Given that Verner was the Chief of the AGO's Criminal Bureau, that he had supervised prosecutors for many years and that he had been through the Dookhan prosecution, his experience must be considered as an aggravating factor.

Of greater import, the SHO declined to weigh against Verner the "spectacular harm" that was caused by the failure to timely disclose exculpatory evidence.[10] *See* Sanction Report, pp. 17 & 7, at ⁋ 12. In the SHO's estimation, "Kaczmarek's actions in not turning over the mental health worksheets, and her statement, by email on September 10, 2013, implying that they had been turned over (as a part of Ballou's file), were deliberate acts for which Verner bore no responsibility." *Id.* pg. 7, at ⁋ 12. But as explained above, Verner bore the responsibility "to confirm his belief that they had indeed been turned over to the DAOs" after (and because of) the

[10] The SHO did allow that "Verner's failure adequately to supervise Kaczmarek certainly created the possibility of harm." Sanction Report, pg. 17.

email Kaczmarek sent to him on September 10, 2013. Hearing Report, at ¶ 244. As such, the harm that was caused to the thousands of Farak defendants and the integrity of the criminal justice system was causally connected to Verner's failure to "comply with his supervisory duty to follow through and determine what was in Ballou's file and whether it had been turned over." *Ibid.* Verner's hand in causing that harm is an appropriate aggravating factor. In a similar vein, the Board should take into consideration for Verner - - as the SHO expressly did for Foster - - "that the 'victims' -- criminal defendants either awaiting trial or who pleaded guilty or had been found guilty of drug offenses where the alleged drugs had been tested by Farak -- were vulnerable." Sanction Report, pg. 12, at ¶ 35.

Finally, there are two other aggravating factors advanced by Bar Counsel that the SHO should have considered, but did not. In conjunction with properly declining to accept Verner's position that the publicity generated by the case was a mitigating factor, *see* Sanction Report, pg. 5, at ¶ 6, the SHO should have recognized that the notoriety amounted to an aggravating factor. *See* BC's Sanction Brief, pp. 5-6. *See also* Section III.A. *infra* (arguing and citing cases that notoriety should be an aggravating factor as to Kaczmarek). Somewhat similarly, the SHO should also have recognized as an aggravating factor that Verner's misconduct occurred in the context of his service as "a minister of justice[.]" Mass. R. Prof. C. 3.8, Comment [1]. *See also* Section III.A. *infra* (arguing Kaczmarek's position as a prosecutor should be an aggravating factor).

In sum, the Board's recommended sanction for Verner should recognize that no mitigating factors exist and that no less than five aggravating factors should be considered.

B. A Public Reprimand Is Insufficient To Reassure The Bar And The Public And To Deter Future Misconduct.

Even assuming the SHO properly weighed the factors in aggravation and mitigation (which, as explained above, he did not), a public reprimand is insufficient to reassure the bar and the public that the misconduct at issue is intolerable and to deter future prosecutorial misconduct. The Board should recommend something more.

As Bar Counsel pointed out to the SHO, "[t]here are no disciplinary cases in Massachusetts concerning a supervisor's failure adequately and diligently to supervise a prosecutor to ensure that potentially exculpatory evidence is properly disclosed." BC's Sanction Brief, pg. 21. *Accord* Sanction Report, pg. 16 ("All parties agree that Massachusetts provides no precedent for determining appropriate sanctions in a case of this type.") Nevertheless, in arriving at his recommended sanction for Verner's misconduct, the SHO relied upon three cases. *See* Sanction Report, pp. 17-18 citing *Matter of Kenney*, 37 Mass. Att'y Disc. R. __ (2021); *Matter of Coleman*, 35 Mass. Att'y Disc. R. 71 (2019); *Matter of Goldberg*, 34 Mass. Att'y Disc. R. 135 (2018). But only *Matter of David Goldberg*[11] involved an attorney's failure to supervise, and it is hardly a case worthy of comparison to Verner's misconduct.

In *Matter of David Goldberg*, the attorney worked in a high-volume debt collection firm, and he failed to supervise lawyers and staff who signed his name to pleadings in four cases. 34 Mass. Att'y Disc. R. at 135-36. In three cases, a motion to continue signed by others contained misrepresentations about who sought the continuance and the reasons in support, *id.* at 136, and in the fourth case a motion to vacate a default signed by another falsely stated that neither party

[11] In his brief to the SHO, Bar Counsel cited a case involving attorney Lawrence Goldberg. *See* BC's Sanction Brief, pg. 23, citing *Matter of Goldberg*, 23 Mass. Att'y Disc. R. 19 (2007). The case the SHO relied upon involved attorney David Goldberg. To avoid confusion herein, Bar Counsel with include the lawyer's given name in referencing those cases.

had appeared at a hearing. *Id.* at 137. There were no aggravating factors. *Id.* at 138. In stark contrast, Verner held people's liberty interests in the palm of his hand, and he was supposed to be acting as a "minister of justice." Mass. R. Prof. C. 3.8, Comment [1]. Nevertheless, over the course of nearly two years, he failed to carry out his supervisory responsibility of ensuring that exculpatory evidence was produced to thousands of vulnerable criminal defendants. *David Goldberg* and Verner are not in the same league, let alone the same ballpark.

Given the lack of relevant precedent, the Board will write on a blank slate when it recommends an appropriate sanction for Verner's misconduct. That task must necessarily involve careful consideration of what level of discipline is "adequate to address the seriousness of the misconduct, to reassure the bar and the public that such conduct is completely contrary to the oath of office taken by every lawyer, and to underscore that, when it is uncovered, such conduct will be treated with the utmost severity." *Matter of Foley*, 439 Mass. 324, 339 (2003). For assistance in that regard, Bar Counsel respectfully refers the Board to BC's Sanction Brief, pp. 20-23, and will not belabor those points. It does bear repeating here, however, that "Verner's failure adequately and diligently to supervise Kaczmarek must surely be on par with cases involving the mishandling of client funds." *Id.* pg. 21. *See*, *e.g.*, *Matter of Lawrence Goldberg,* 23 Mass. Att'y Disc. R. 191, 191-94 (2007) (one year and a day suspension with reinstatement subject to two-year probationary period for attorney's failure to supervise secretary and bookkeeper resulting in secretary's embezzlement of client funds, failure to maintain adequate records and safeguard client funds, failure to ensure funds promptly paid to clients, and misuse of client funds to pay obligations of unrelated clients). Otherwise, the bar and the public could reasonably conclude that our profession considers liberty interests less valuable than monetary concerns.

In furtherance of this point, this Board should bear in mind its own institutional wisdom and warning as expressed in the seminal *Matter of Kane* case, which decision the SHO used as "the starting point for [his] analysis." Sanction Report, pg. 17. In establishing guidelines for sanctioning incompetence and neglect, the Board noted a crucial exception applicable here:

> Nor would the Board hesitate to impose or recommend more severe sanctions in an appropriate case, such as where the total abandonment of one's clients might warrant disbarment or where the character of the harm to a client is particularly outrageous. See, e.g., *Matter of Young*, 11 Mass. Att'y Disc. R. 309 (1995) (client remained incarcerated for three years due to lawyer's unexcused failure to file motion for new trial).

Matter of Kane, 13 Mass. Att'y Disc. R. 321, 329 (1997) (emphasis added). In *Matter of Young*, which involved misconduct adversely affecting the liberty interests of a single client, the offending lawyer was suspended from the practice of law for two and one-half years. 11 Mass. Att'y Disc. R. at 310. Bar Counsel recommended to the SHO that a suspension of one year and one day should be imposed for Verner's misconduct affecting the liberty interests of thousands of people. *See* BC's Sanction Brief, pp. 20-23. Even if the Board were disinclined to adopt Bar Counsel's recommendation, it should still recommend a suspension of some duration - - not to punish Verner, but in order to restore some modicum of the public's trust in the criminal justice system, and to ensure that prosecutors in supervisory roles take their responsibilities more seriously when it comes to the disclosure of exculpatory evidence.

II. THE BOARD SHOULD FIND THAT FOSTER ENGAGED IN CONDUCT INVOLVING DISHONESTY AND/OR DECEIT IN VIOLATION OF MASS. R. PROF. C. 8.4(c) BY DRAFTING AND SENDING AN "INTENTIONALLY VAGUE" AND "MISLEADING" LETTER THAT "MISLED" THE COURT.

Among the charges Bar Counsel lodged against Foster concerning her letter to the Honorable Jeffrey Kinder[12] was the assertion that she engaged in conduct in violation of Mass. R. Prof. C. 8.4(c).[13] The SHO rightly concluded that Foster's "letter was one more act demonstrating her gross incompetence and lack of diligence[,]" and that her "statements misled Judge Kinder, were prejudicial to the administration of justice, and reflect adversely on her fitness to practice." Hearing Report, at ¶ 378. He did not find, however, that Foster's conduct also violated Rule 8.4(c). The Board should find that Foster clearly offended Rule 8.4(c), and it should recommend a sanction that is at least as severe as the one-year-and-one day suspension recommended by the SHO.

In the spring and summer of 2013, following news of Farak's nefarious activities at the drug lab in Amherst, multiple criminal defense attorneys were clamoring for discovery. *See* Hearing Report, at ¶ 150. To bring order and ensure consistency, Judge Kinder consolidated the matters in the Hampden Superior Court and scheduled an evidentiary hearing for September 9, 2013. *Id.* at ¶ 151. Significantly, Judge Kinder issued an Order making clear that, *inter alia*, a crucial purpose of the September 9th hearing was to explore "'the timing and scope of Ms. Farak's alleged criminal conduct[.]'" *Id.* at ¶ 152, quoting Exhibit 292.

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[12] At all relevant times, Judge Kinder served as a Superior Court judge. In 2015, he was appointed to the Appeals Court.

[13] *See* Petition, at ¶ 151 ("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), 4.1(a), 8.4(c), 8.4(d) and 8.4(h). Alternatively, Foster made her misleading statements with reckless disregard for their truth in violation of Mass. R. Prof. C. 8.4(c), (d) and (h).")

When Foster appeared before Judge Kinder at the September 9th hearing, she was woefully unprepared. *See*, *e.g.*, Hearing Report, at ⁋ 213 (concluding that "[m]inimal 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.") Most strikingly, Judge Kinder asked Foster directly whether she had "personally reviewed" Ballou's file, and Foster admitted that she had not. *Id.* at ⁋ 211. In this manner, Judge Kinder "strongly implied that she should have been familiar with Ballou's file," *Id.* at ⁋ 246, and he ordered that all of the documents that Foster had claimed to be privileged were to be produced for his *in camera* inspection by September 18, 2013. *See id.* at ⁋⁋ 212, 221, 222 & 224. It was abundantly clear to Foster that Judge Kinder expected *somebody* (if not her) to review Ballou's file. *Id.* at ⁋ 228.

In response to Judge Kinder's order, Foster drafted and sent the following letter on September 16, 2013:

> 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

Id. at ⁋ 269 (emphasis added).

"Contrary to the letter's assertion," as the SHO found as a matter of fact, "no one had reviewed Ballou's file and no one had determined whether every document in his possession had already been disclosed." Hearing Report, at ⁋ 275 (emphases added). As the SHO further concluded, there was "no evidence that Ballou ever referenced documents in his 'possession[,]'" and "Foster's addition of this gloss to the discrete category of documents in his 'file' was reckless and misleading." *Ibid.* "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." *Id.* at ⁋ 278. In the words of the SHO, Foster "obscured the truth". *Ibid.* While the SHO concluded that "Foster's dissembling statements in her letter to Judge Kinder were not knowing false statements of material fact[,]" he also found that "[s]he deliberately obscured who had allegedly reviewed Ballou's file[.]" Hearing Report, at ⁋ 378. Indeed, the SHO repeatedly emphasized that Foster was "intentionally vague" in her letter that misled Judge Kinder. *See id.* at ⁋ 274 ("I do not credit Foster's testimony that she was not trying to be intentionally vague in her September 16 letter."); *id.* at ⁋ 276 ("I find that the statements in Foster's letter were not only misleading but intentionally vague."); *id.* at ⁋ 354 ("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.")

As Rule 8.4(c) provides, "[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Even if Foster did not intentionally make an affirmative misrepresentation, *see* Hearing Report, at ⁋ 275 ("Foster may have assumed that Kaczmarek had done a review, but did not phrase her letter to say that."), the SHO still found that she intentionally sought to obscure the truth, *i.e.,* that she was dishonest

and/or deceitful. *See*, *e.g.*, Hearing Report, at ¶ 278 (concluding that Foster acted "intentionally"); *id.* at ¶ 378 (concluding that Foster acted "deliberately"). While the Rules of Professional Conduct offer no definition of "dishonesty" and "deceit", Foster's misconduct fits well within the common understanding of those words. *See* Dishonest, Black's Law Dictionary (11th ed. 2019) (defining "dishonest" to include "not involving straightforward dealing"); *id.* at Deceit (defining "deceit" to include "[t]he act of intentionally leading someone to believe something that is not true"). In short, Foster's intentional conduct violated Rule 8.4(c). *See Matter of Moore*, 442 Mass. 285, 292 n.10 (2004) (concluding that attorney who omitted information regarding his previous resignation from the Connecticut bar while a disciplinary investigation was pending and provided misleading employment history acted "with the intent to mislead and deceive" in violation of predecessor to Rule 8.4(c) notwithstanding attorney's claim his answers were "literally true.")

III. KACZMAREK'S UNPRECEDENTED PROSECUTORIAL MISCONDUCT CALLS FOR DISBARRMENT.

The disciplinary hearing established that Kaczmarek was the principal actor in the unprecedented prosecutorial misconduct that tarnished the reputation of criminal prosecutors and undermined the integrity of the Massachusetts criminal justice system. Indeed, the SHO concluded that Kaczmarek committed forty (40) separate rule violations, *see* BC's Sanction Brief, pp. 15-16, and found eight (8) different aggravating factors. *See* note 14 *infra*. The SHO recommended that Kaczmarek receive a two-year suspension, but his search for applicable precedent was futile, he failed to fashion an appropriate sanction for the circumstances of the case and he did not adequately take into account all of the aggravating factors. The Board should recommend that Kaczmarek be disbarred.

A. The SHO's Recommended Sanction Failed To Factor In All The Applicable Aggravating Factors.

Before settling upon a recommended sanction for Kaczmarek, the SHO first weighed factors in mitigation and aggravation. *See* Sanction Report, pp. 13-15. The scale was decidedly tipped, as the SHO "did not find any mitigating factors as to Kaczmarek[,]" *id.* pg. 13, at ¶ 38, while he specifically identified a bevy of aggravating factors.[14] But he did not consider additional aggravating factors of considerable weight. For instance, while the SHO recognized that "[a]nother aggravating factor as to Foster is that the 'victims' -- criminal defendants either awaiting trial or who pleaded guilty or had been found guilty of drug offenses where the alleged drugs had been tested by Farak -- were vulnerable[,]" *id.* pg. 12, at ¶ 35 (emphasis added), he did not mention this as an aggravating factor applicable to Kaczmarek. *See id.* pp. 13-15, at ¶¶ 41-48. *See also* BC's Sanction Brief, pg. 5 (arguing that vulnerability was aggravating factor applicable to each of Respondents).

Moreover, as Bar Counsel highlighted to the SHO, "[n]ot only did Respondents' misconduct occur within the criminal justice system, but as ministers of justice their violations of the Rules of Professional Conduct are particularly offensive to that system." BC's Sanction Brief, pg. 4. *See also Matter of Marshard*, 34 Mass. Att'y Disc. R. 283, 298 (2018) ("While Rule 4.2 plays an important role in protecting litigants in all types of cases, we note its special significance in criminal law, where the balance of power tilts strongly in favor of the government.") This point was further emphasized by some of the very cases relied upon by the SHO. *See Matter of Kurtzrock*, 138 N.Y.S. 3d 649, 665-66 (N.Y. App. Div. 2d Dept 2020) ("In

[14] The SHO expressly identified the following aggravating factors as to Kaczmarek: (i) experience; (ii) "Kaczmarek displayed no remorse, admitted no wrongdoing, and showed no appreciation for her role in what occurred"; (iii) lack of candor; (iv) multiple disciplinary violations; (v) improper motive; (vi) misleading colleagues; (vii) "behavior that hew[ed] towards 'calculated corruption'"; and (viii) significant harm. *See* Sanctions Report, pp. 13-15, at ¶¶ 41-48 (internal citation omitted).

considering the appropriate discipline to impose, we find that a substantial factor in aggravation is that the respondent's misconduct occurred in his capacity as a prosecutor, a public officer."); *Lawyer Disciplinary Bd. v. Busch*, 233 W.Va. 43, at Syllabus point 7 (2014) ("'Ethical violations by a lawyer holding a public office are viewed as more egregious because of the betrayal of the public trust attached to the office."), quoting *Committee on Legal Ethics v. Roark*, 181 W.Va. 260 at Syllabus point 3 (1989); *In re Howes*, 52 A.3d 1, 21 (D.C. 2012) ("We further find respondent's misconduct aggravated by his status as a prosecutor. The determination of an appropriate disciplinary sanction has heightened significance in the context of a prosecutor's fitness to practice law, because the prosecutor's violation of ethical rules is compounded by his additional duty to the public.") Yet, rather than considering Respondents' status as prosecutors to be an aggravating factor, the SHO tempered his recommended sanctions precisely because Respondents were prosecutors.[15] *See* Sanction Report, pg. 16 ("I do not find any of the respondents here to be entitled to, or deserving of, the sanctions at the far ends of the spectrum. Their conduct, no matter how troublesome at some levels, should be viewed in the context that they were all public servants working in the stressful criminal justice system.") In so doing, the SHO erred.

[15] As apparent justification, the SHO noted that "'[f]or both prosecutors and agency counsel, stress also results from the public attention that many of their cases attract -- more so than most cases in the private sector.'" Sanction Report, pg. 16, quoting Supreme Judicial Court's Steering Committee on Lawyer Well-Being's Report to the Justices, submitted on July 15, 2019, pg. 9. But as he rightly observed elsewhere:

> The respondents chose to work for the AGO, an office which is constantly in the news and which does not shy away from conflict and limelight. Publicity comes with the job. That the publicity is not always good, and that as high-profile actors its agents might be subject to criticism, and even scorn or ridicule, is not a mitigating factor.

Id. pg. 5, at ⁋ 6.

Finally, the SHO should also have considered the virtually unprecedented notoriety generated by these disciplinary matters and the underlying facts as a compelling aggravating factor.[16] *See* BC's Sanction Brief, pp. 5-6, citing *Matter of Nissenbaum*, 34 Mass. Att'y Disc. R. 410, 444-45 (2018); *Matter of Holzberg*, 12 Mass. Att'y Disc. R. 200, 204-05 (1996); *Matter of Ryan*, 6 Mass. Att'y Disc. R. 275, 277 (1990); *Matter of O'Donnell*, 5 Mass. Att'y Disc. R. 279, 281 (1987); *Matter of Killam*, 388 Mass. 619 (1983). Given that the public's perception of the bar and its confidence in the legal system lies at the heart of the disciplinary rules and process, *see Matter of Curry*, 450 Mass. 503, 521 (2008), Kaczmarek's role in the enduring negative publicity should enhance her sanction. After all, "[w]ithout the public's trust that lawyers and judges act in good faith and strictly within the bounds of our laws and professional norms, the rule of law has little practical force." *Id.* at 521.

B. The SHO Applied An Incorrect Standard Of Law.

Bar Counsel requested the SHO to recommend Kaczmarek's disbarment. *See* BC's Sanction Brief, pp. 15-20. Instead, the SHO decided that a two-year suspension was sufficient. *See* Sanction Report, pg. 25. But it is evident that in his search for an appropriate sanction to recommend for Kaczmarek, the SHO was looking through the wrong lens.

At the outset, the SHO recognized that "[w]here there is no obvious precedent, the Court 'must establish independently a sanction adequate to address the seriousness of the misconduct, to reassure the bar and the public that such conduct is completely contrary to the oath of office taken by every lawyer, and to underscore that, when it is uncovered, such conduct will be treated with the utmost severity.'" Sanction Report, pg. 15, quoting *Matter of Foley*, 439 Mass. 324,

[16] As Bar Counsel noted, "the events were so outrageous that they were documented in a Netflix miniseries titled, 'How to Fix a Drug Scandal[.]'" BC's Sanction Brief, pg. 6. Public interest did not wane when the disciplinary hearings commenced. For instance, "[o]n October 20, 2020, a local radio station, WBUR, sought permission from the Board to record the proceedings[,]" which request was eventually granted. Hearing Report, pg. 3.

339 (2003). He then correctly observed that "[a]ll parties agree that Massachusetts provides no precedent for determining appropriate sanctions in a case of this type." *Id.* pg. 16. When it came to recommending a sanction for Kaczmarek, however, the SHO nevertheless felt constrained. As he explained in his report, "I have cited above case law to the effect that I need not strive to find 'perfectly analogous cases,' but must urge a sanction not markedly different from one given to others similarly situated." *Id.* pg. 24 (emphasis added). As the SHO applied the wrong standard, his recommended sanction should be rejected.

The Supreme Judicial Court has repeatedly indicated that the "markedly disparate" standard of review is by definition inapplicable, "where the case is unique or involves a matter of first impression and is therefore not comparable to previous cases[.]" *Matter of Foley*, 439 Mass. at 333 (2003). *Accord Matter of Moore*, 442 Mass. at 290 n.8. And as the SHO noted, there is no debate that the depth and breadth of Kaczmarek's prosecutorial misconduct was unprecedented. Hence, as opposed to struggling to square Kaczmarek's discipline with nonexistent similarly situated cases, the SHO should have given greater regard "to reassur[ing] the bar and the public that such conduct is completely contrary to the oath of office taken by every lawyer, and to underscore that, when it is uncovered, such conduct will be treated with the utmost severity." *Matter of Foley*, 439 Mass. at 339.

The SHO collected a series of cases where the attorney's misconduct warranted a two-year suspension. *See* Sanction Report, pg. 24, citing *Matter of Segal*, 430 Mass. 359 (1999); *Matter of Oberhauser*, 37 Mass. Att'y Disc. R. __ (2021); *Matter of Harris-Daley*, 34 Mass. Att'y Disc. R. 177 (2018); *Matter of Friery*, 28 Mass. Att'y Disc. R. 337 (2012). The SHO opined that the conduct at issue in those cases, "while different, [was] certainly no worse than Kaczmarek's." Sanction Report, pg. 24 (emphasis added). That is a monumental

understatement, since the misconduct in those cases does not come anywhere close to the level of Kaczmarek's 40 separate rule violations that caused "spectacular harm[,]" *id.* pg. 17, to well over 8,000 people and the criminal justice system itself. Hearing Report, at ¶ 358. Had the SHO searched for cases where the misconduct was worse than Kaczmarek's, he would done so in vain. Not even the out-of-state cases that the SHO located where the attorneys were disbarred involved misconduct rising to Kaczmarek's level. *See* Sanction Report, pg. 22, citing *Matter of Pertler*, 948 N.W.2d 146 (MN 2020) (stipulation to disbarment, where failure to disclose exculpatory evidence affected 27 criminal cases); *id.* pg. 24 n.6, citing *Matter of Howes*, 52 A.3d 1, 17-18 (D.C. App. 2012) (prosecutor disbarred for misusing witness vouchers and for failing to disclose voucher payments to defense counsel and Court).

It must not escape attention that Kaczmarek's prosecutorial misconduct shook the foundation of the criminal justice system in a manner never experienced before. *See* BC's Sanction Brief, pp. 2 & 3. Literally thousands of criminal cases were affected by her intentional refusal to disclose multiple pieces of exculpatory evidence over an extended period of time. *See generally Commonwealth v. Claudio*, 484 Mass. 203, 208 (2020); *Committee for Pub. Counsel Servs. v. Attorney Gen.,* 480 Mass. 700, 704-05 & 725 (2018); Hearing Report, at ¶ 358. It can hardly be imagined that a prosecutor's failure to disclose exculpatory evidence could visit greater harm upon so many people or inflict more damage to the public's perception of our system of justice.[17] In other words, Kaczmarek's sanction will set the ceiling for all future prosecutorial misconduct cases in Massachusetts; and a ceiling of a two-year suspension is much too low. "In

[17] Bar Counsel pointed to the so-called "Duke Lacrosse case" as an example of a prosecutor's misconduct, including the failure to disclose exculpatory evidence, that greatly affected the public's perception of the criminal justice system and led to disbarment. *See* BC's Sanction Brief, pp. 18-20 & Addendum A thereto. While the SHO found the prosecutor's misconduct in that case more outrageous than Kaczmarek's, *see* Sanction Report, pp. 22 & n.5, he did not appear to appreciate that the effects of Kaczmarek's misconduct were more widespread.

this case, disbarment is the only sanction that will reassure the public that the kinds of nefarious conduct at issue here have no place in the attorney's repertoire or in our courts." *Matter of Crossen*, 450 Mass. 533, 581 (2008). It also is the appropriate sanction "to ensure that the [drug lab scandal] episode (or anything like it) remains sui generis." *Id.* at 537.[18]

REQUEST FOR ORAL ARGUMENT

Pursuant to Section 3.50(b) of the Rules of the Board of Bar Overseers, Bar Counsel hereby requests the Board to permit oral argument in the appeal of the above-captioned matters. This appeal presents important questions concerning unprecedented prosecutorial misconduct that has aroused significant public interest. Oral argument will serve to ensure that this appeal is based on a complete presentation of the parties' arguments, and that any questions or concerns from the Board are adequately addressed.

[18] *Matter of Crossen*, 450 Mass. 533 (2008) is part of the trilogy of disciplinary cases (along with *Matter of Curry*, 450 Mass. 503 (2008) and *Matter of Donahue*, 22 Mass. Disc. R. 193 (2006)), which recent memory calls to mind as the only other situation where a truly unprecedented level of attorney misconduct had such a profound impact on the public's perception of the bar. Bar Counsel called these cases to the attention of the SHO, *see* BC's Sanction Brief, pp. 17-18, but he did not address them in his sanction analysis.

CONCLUSION

Based on the foregoing, Bar Counsel respectfully asks the Board to:

1. Grant Bar Counsel's Request for Oral Argument;

2. Recommend the sanction of a suspension for Verner's misconduct;

3. Conclude that Foster violated Mass. R. Prof. C. 8.4(c), and recommend a sanction of at least one year and one day; and

4. Recommend the sanction of disbarment for Kaczmarek's misconduct.

RESPECTFULLY SUBMITTED,

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Dated: December 17, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of December 2021, I served Bar Counsel's Consolidated Brief on Appeal and Request for Oral Argument via email to:

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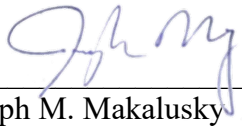
/s/ 
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