COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Suffolk, ss. No. SJ-2021-0129

CHRIS GRAHAM, JORGE LOPEZ, MEREDITH RYAN, KELLY AUER, COMMITTEE FOR PUBLIC COUNSEL SERVICES, and HAMPDEN COUNTY LAWYERS FOR JUSTICE,
Petitioners,

v.

DISTRICT ATTORNEY FOR HAMPDEN COUNTY,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR RELIEF PURSUANT TO G. L. c. 211, § 3 AND c. 231A, § 1

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INTRODUCTION

Petitioners allege egregious government misconduct by the Springfield Police Department (SPD) has gone uninvestigated by the Commonwealth and under-disclosed by the Hampden County District Attorney's Office (HCDAO). The HCDAO's Opposition confirms all this is true.

The HCDAO does not claim that anyone on the Commonwealth's behalf is trying to ascertain the full scope of the SPD misconduct. In consequence, the HCDAO will not say whether it believes SPD misconduct found by Department of Justice actually happened. The HCDAO also never claims that it adequately discloses exculpatory evidence. The HCDAO concedes that, nearly a year after the DOJ's July 2020 report, it still has not secured access to SPD documents that the DOJ obtained, and thus is not disclosing that exculpatory evidence to the people it prosecutes. *See* Opp. at 16-18; Complaint ¶ 74, *Gulluni v. U.S. Att'y for the Dist. of Mass.*, No. 3:21-cv-30058 (D. Mass. May 19, 2021).

Rather than offer a plan for remedying these problems, the HCDAO largely blames others. According to the HCDAO, petitioners have unfairly requested a court order requiring the HCDAO to investigate the SPD's wrongdoing and the DOJ has unfairly prevented the HCDAO from disclosing potentially exculpatory evidence to defendants. Opp. at 12-14, 16-18. Neither claim is correct.

The Petition does not seek an order specifically requiring the HCDAO to investigate the SPD. Instead, consistent with *Commonwealth v. Cotto*, 471 Mass. 97 (2015), petitioners contend that the Commonwealth must investigate the full scope of SPD misconduct. Petitioners have not insisted that a particular entity must conduct the Commonwealth's investigation, just that it must be done, and that the additional remedies should be imposed if it is not.

In contrast and during the ordinary course of trials, the disclosure of all exculpatory evidence known to members of the HCDAO's prosecution team, including police officers, is a task that falls

to the HCDAO for it is the HCDAO, and not the DOJ, that has SPD officers on its prosecution teams. The HCDAO must collect and disclose relevant evidence of misconduct by officers on those teams, and thus *known* to those officers, because the officers are considered subject to the control of the HCDAO, and not the DOJ, as a matter of law. *Commonwealth v. Beal*, 429 Mass. 530, 531-32 (1999). When the HCDAO complains that the DOJ has not disclosed documents from the SPD, what the HCDAO is actually saying is that it has chosen to include SPD officers on its prosecution teams without requiring SPD to turn over the same documents it provided to the DOJ.

On one complaint, however, the HCDAO has a point: the Petition indeed fails to provide a complete picture of SPD's misconduct or the HCDAO's disclosure practices. Opp. at 32-34, 41-42. Petitioners' counsel readily concede that we have not fully uncovered all of the SPD's misconduct. Nor, despite our best efforts—including public records requests and months of investigation that preceded the filing of this case—have we fully ascertained the HCDAO's policies and practices concerning the disclosure of exculpatory evidence about SPD officers. That is precisely why petitioners filed this case and why this Court's intervention is so desperately needed. If there was ever a hope that the Commonwealth would solve these problems without orders from this Court, the Opposition has thoroughly extinguished it.

ARGUMENT

I. The HCDAO agrees that the Commonwealth has not investigated longstanding, egregious SPD misconduct.

The HCDAO agrees there has been no comprehensive investigation into SPD misconduct revealed in the DOJ Report or elsewhere. Far from representing that anyone on the Commonwealth's behalf has been tasked with "thoroughly investigat[ing] the timing and scope of [SPD] misconduct," *Cotto*, 471 Mass. at 115, the HCDAO posits only that a former Chief Justice of this Court has been asked "to assist in remedying any issues." Opp. at 4. Yet the HCDAO does not dispute that it has a duty not only to disclose but also to "learn of" exculpatory evidence. Opp. at 13

(quoting *Cotto*, 471 Mass. at 112). To the extent the HCDAO nevertheless resists the Petition's request for a thorough investigation of the SPD's misconduct, it misunderstands both what the Petition requests and how the *Cotto* investigation unfolded.

A. The Opposition misunderstands the investigation requested in the Petition.

The Opposition rests on a mistaken belief that petitioners seek an order for *the District Attorney* to investigate the SPD. Based on this misapprehension, the HCDAO interposes a number of concerns, including separation of powers. Opp. at 1. But the Petition does not request an order requiring the HCDAO, or any other specific entity, to perform the investigation. It argues that *the Commonwealth* has a duty to investigate and asks this Court to call upon the Commonwealth, as it did in *Cotto*, to say whether anyone on its behalf will fulfill that duty. Pet. at 22-25. HCDAO is not only counsel to, but part of the Commonwealth.[1] As the agency that handles criminal cases involving the SPD, the HCDAO can implement any relief this Court orders in criminal cases while an investigation does or does not proceed.

B. The SPD's egregious misconduct has triggered the Commonwealth's duty to investigate.

The immediate question is whether the SPD's misconduct triggered the Commonwealth's legal duty to investigate. The answer is yes. The abundant documentation of SPD misconduct, including the DOJ Report, demonstrates misconduct sufficient to require the Commonwealth to investigate its full scope and gravity. Pet. at 22-24. Here, that misconduct was egregious. *Cf. Matter of a Grand Jury Investigation*, 485 Mass. 641, 652 (2020) ("Concealing police brutality against an arrestee, whether by the officer or a fellow officer, or making false statements that might lead to an unjust conviction are for law enforcement officers the equivalent of high crimes and misdemeanors.");

[1] The district attorneys' offices are agencies or arms of the Commonwealth. G.L. c. 34B, §§ 1, 4 (1999); *see, e.g.*, *Hammel v. Norfolk Cnty. Dist. Att'y's Off.*, No. CV 18-10734-ADB, 2018 WL 3614138, at *3 (D. Mass. July 27, 2018) (district attorney's office considered an arm of the State).

Commonwealth v. Mello, 90 Mass. App. Ct. 1117, at *2 (2016) (officer's affirmative failure to fully and completely recount in a police report his own misbehavior in contributing to an assault "strikes at the integrity of the prosecution as a whole.").

Although the HCDAO does not concede egregious misconduct by the SPD, neither does it meaningfully dispute evidence that such misconduct has occurred. Instead, it advances various explanations, obstacles, and excuses for why well-publicized misconduct has not been investigated, *see* Opp. at 7-8, 13-14, 16, 18, 20-21, 30-31, and concludes that this absence of a Commonwealth-led investigation is not the HCDAO's problem. *See* Opp. at 17-18, 21.

The HCDAO is mistaken. An agency can avoid learning the full scope of the SPD's misconduct or it can include SPD officers in its prosecution teams, but it cannot do both. *See Comm. for Pub. Couns. Servs. v. Att'y Gen.*, 480 Mass. 700, 723 (2018) ("a prosecutor's duty to *learn of* and disclose to a defendant any exculpatory evidence that is held by agents of the prosecution team…" includes "chemists working in State drug laboratories") (emphasis added); *United States v. Osorio*, 929 F.2d 753, 761 (1st Cir. 1991) ("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"). Contrary to the HCDAO's claims, no one is asking it to take on "general supervisory" or "oversight" of the SPD. *See* Opp. at 8. In the Hinton and Amherst drug lab scandals, for example, it was incumbent on the Commonwealth to ascertain the full extent of the egregious government misconduct—not supervise or oversee the Department of Public Health.

The HCDAO concedes that it is now prosecuting people—people like Petitioner Jorge Lopez and, until recently, Petitioner Chris Graham—without disclosing SPD misconduct. To this day, for example, it claims to have "no way to determine the individual cases where disclosure [of the DOJ Report] would be required." Opp. at 16, n.10. Because SPD officers are acting "as agents of the [Commonwealth] in the investigation and prosecution" of criminal cases, they are "considered

'subject to the prosecutor's control.'" *Beal*, 429 Mass. at 531. It is therefore the Commonwealth's job to investigate and disclose this SPD misconduct.

The HCDAO also overlooks that the prosecution team's duty to learn of egregious misconduct is not limited to previously documented misconduct. The HCDAO disclaims a general obligation to "gather evidence" for the defense, citing a case involving allegedly exculpatory statements made by people who were *not* part of the prosecution team. Opp. at 15 (citing *Commonwealth v. Moffat*, 486 Mass. 193, 199 (2020)). But where, as here, a member of the prosecution team commits misconduct, it is the Commonwealth's duty to gather evidence of that misconduct, even when the misconduct is known only to the government actor who committed it. *See, e.g.*, Office of the Attorney General, Investigative Report Pursuant to *Commonwealth v. Cotto*, 471 Mass. 97 (2015), at 3-4 (Apr. 1, 2016) (the "*Cotto* Report") (misconduct and drug use known only to a state chemist was nevertheless subject to the Commonwealth's disclosure obligation).

C. The need for an investigation is just as compelling here as it was in *Cotto*.

In attempting to distinguish *Cotto*, the HCDAO suggests that the "magnitude" and "volume" of tainted Amherst drug lab cases was known, and that Sonja Farak admitted misconduct *before* this Court held that the Commonwealth's duty to investigate had been triggered. Opp. at 4 n.2, 8-9, 25 n.16, 26 n.19. In fact, it was the other way around.

The record in *Cotto* identified only "at least eight known cases" implicated by Ms. Farak's conduct. 471 Mass. at 110. The magnitude of that scandal was not uncovered, and Farak did not admit wrongdoing to the grand jury, until *after* this Court held that the Commonwealth's duty to investigate had been triggered by "the absence of a thorough investigation into the matter by the Commonwealth." *Id.* at 108. That is, these were revelations arising from a "Post-*Cotto* Investigation." *See Cotto* Report at 3. This Court explained that the duty to undertake that investigation arose when only a tiny fraction of Farak's misconduct was known. *Commonwealth v. Ware*, 471 Mass. 85, 95 (2015)

(holding the Commonwealth's duty to investigate triggered after compromised evidence discovered in only *two* drug cases).

Here, despite the HCDAO's euphemistic insistence on admitting only that the SPD has "issues," Opp. at 4, there is abundant evidence of egregious misconduct: the DOJ Report; the seventeen cases presented in the Petition, *see* Opp. at 9 n.4; the criminal charges against SPD officers; and numerous media reports.[2] This is far greater than the two cases that should have triggered an investigation of Sonja Farak's misconduct. *Ware*, 471 Mass. at 95.

II. The HCDAO's uncertainty about its disclosure obligations underscores the need for this Court's guidance.

Although styled as an Opposition to the Petition, the various admissions and misapprehensions in the HCDAO's submission could more accurately be characterized as a cry for help. Petitioners respectfully submit that this Court should answer it.

After almost a year since the DOJ issued its report, and much longer since the underlying misconduct occurred, the Opposition reveals that the HCDAO systematically fails to disclose evidence of SPD misconduct to the people it prosecutes. Opp. at 16-18; *Gulluni*, No. 3:21-cv-30058, at 20 ¶ 74. The Opposition devotes substantial attention to the HCDAO's efforts to obtain these documents from the DOJ, rather than from the SPD. The HCDAO does not dispute that its prosecutors have a duty to disclose exculpatory evidence, including "in any criminal case where the officer is a potential witness or prepared a report in the criminal investigation." Opp. at 23 (quoting *Matter of Grand Jury Investigation*, 485 Mass. at 658). Likewise, it is well established that "the responsibility for obtaining and disclosing [*Brady*] evidence remains the duty of the prosecutor, and

[2] The HCDAO implies that the petitioners have withheld case information. Opp. at 9 n.4. Not true. As explained in *Petitioners' Motion for Protective Order Under SJC 1:24 or, in the Alternative, for an Impoundment Order*, filed on May 17, 2021, the petitioners "contacted the HCDAO's counsel and provided relevant docket numbers" in most of the cases, and "attempted to reach agreement with the HCDAO that neither party would disclose the docket number, name of the case, or any other information that may identify non-parties. But the HCDAO … declined to agree to that request."

not the police officer," even when the evidence is "known only to police officers." *Haley v. City of Boston*, 657 F.3d 39, 49 (1st Cir. 2011). Indeed, the whole *Brady* system is predicated on the Supreme Court's conclusion that "the prosecutor has the means to discharge the government's *Brady* responsibility if he will." *Kyles v. Whitley*, 514 U.S. 419, 438 (1995).

After the DOJ issued its report, or following other disclosures of SPD misconduct, the HCDAO could have insisted that the SPD immediately turn over the relevant documents. Taking a cue from the federal government, the HCDAO could have instructed its line prosecutors to "have candid conversations with the [law enforcement officers] with whom they work regarding any potential *Giglio* issues," including by asking them to disclose any instances of excessive force or false reporting that might have been found, or missed, by the DOJ. *See* U.S. Dept. of Justice, Justice Manual, Tit. 9-5002.[3] The HCDAO could have explained that if the SPD refused to cooperate, it would need to report the SPD's behavior to the courts and might well be compelled to dismiss cases. But the HCDAO does not represent that it has done any of these things.

Instead, the HCDAO declines to say what, precisely, its disclosure policies *are*. The Opposition reveals that, more than a half century after *Brady*, the HCDAO is still "formulat[ing] policy." Opp. at 30. What is more, the HCDAO posits numerous questions about its disclosure obligations, the answers to which the HCDAO purports not to know. *Id.* at 24-27. It is apparently

[3] *See also id.* at Tit. 9-5.100 ("Prosecutors will receive the most comprehensive potential impeachment information by having both the candid conversation with the agency employee and by submitting a request for potential impeachment information to the investigative agency."). Federal prosecutors' obligation to disclose exculpatory or impeachment includes information about police misconduct in other cases – regardless of the format and whether previously reduced to writing. *See* David W. Ogden, Dept. of Justice, *Guidance for Prosecutors Regarding Criminal Discovery* (Jan 4, 2010), available at https://www.justice.gov/archives/dag/memorandum-department-prosecutors. Candid conversations are the currency of this realm. Lanny A. Breuer, Dept. of Justice, *Criminal Division Policy Regarding Discovery Practices* at 9-10 (Oct. 18, 2020), available at https://www.justice.gov/sites/default/files/criminal/legacy/2015/04/08/2010criminal-division-discovery-policy.pdf. For examples of these questions see *Brady* and *Giglio* Policy, "Candid Conversation Guide," Dept. of Law and Pub. Safety, N.J. Office of the Attorney General, available at https://www.nj.gov/oag/dcj/pdfs/policies/LPS_Brady-Giglio-Policy_June-2019_Form-A.pdf.

unsure when police officers are considered "potential witnesses;"[4] when instances of police officers lying must be disclosed; the amount of information a prosecutor must have to determine whether misconduct has occurred; what constitutes prosecutorial "possession" of information about misconduct; when information must be disclosed when a police officer's testimony is found not credible or inconsistent; and so on. *Id.* These are important questions. The HCDAO's uncertainty about them underscores the necessity of the Petition's consideration by the full Court.

Having conceded these fundamental and systemic lapses with its disclosure practices, the HCDAO devotes much of the Opposition to quibbling about the facts of individual cases. Although the HCDAO has spotted inadvertent errors with facts in individual cases,[5] none of those factual issues are relevant to the HCDAO's confusion about its own disclosure obligations.

For example, the HCDAO correctly notes that Petitioner Graham's conviction was overturned partly because his trial counsel failed to request evidence possessed by the SPD's Internal Investigations Unit after it followed up on a 911 call, evidence which tended to confirm that the charges against Graham had been trumped up by SPD officers. Opp. at 40; HDA RA 19-20. But it

[4] For example, the HCDAO presents its refusal to disclose evidence Officer Basovskiy's prior indictment resulting from the Nathan Bill's assault as a good-faith dispute about whether he was an essential witness in the case. Opp. at 39. At the same time, the HCDAO does not dispute that Officer Basovskiy assaulted the defendant by pulling him through a car window during an illegal search. CRA 178. It is difficult to understand how Officer Basovskiy was not "a potential witness." Opp. at 39.

[5] For example, Affiant Rogers erroneously included "dash-mounted or body-worn camera footage" in a list of mandatory discovery items which he regularly struggled to obtain from the HCDAO. CRA 542. This error, however, does not even vitiate the broader point of the sentence it is in, much less the thrust of the affidavit. In other instances, the HCDAO's quibbles are incorrect. For example, it states that the charges against SPD Officer Christian Cicero, who was involved in the Nathan Bill's bar incident, "were *nol prossed* by the Attorney General's office" and this thus raises the question of whether the HCDAO has an obligation to disclose dismissed charges. Opp. at 41-42. However, Officer Cicero was indicted in superior court prompting the *nol prosse* of the district court charges. His charges are still pending in superior court. See *Commonwealth v. Cicero*, 1979CR00158, Hampden Sup. Ct. (last docket entry: June 2, 2021). If the HCDAO cannot keep track of officers under indictments that made national news in its filings before the SJC, there are serious questions about its ability to track less prominent but still exculpatory misconduct in lower courts.

is equally true that *the fact of SPD officers trumping up charges* is egregious government misconduct. This was known to SPD officers who were members of the prosecution team, imputable to the HCDAO from the outset of the case, and not affirmatively disclosed by the HCDAO to Graham's counsel. *See* Mot. for New Trial and Memorandum of Law in Support, *Commonwealth v. Graham*, No. 1779CR00403, Papers 39 and 40 (Hampden Sup. Ct. May 23, 2019) (addressing the Commonwealth's failure to disclose exculpatory evidence). Relying on *Commonwealth v. Wanis*, 426 Mass. 639 (1998), and *Commonwealth v. Rodriguez*, 426 Mass. 647 (1998), the HCDAO appears to believe that it has no obligation to learn of and disclose egregious SPD misconduct if some of that misconduct is memorialized in IIU files. *See* Opp. at 44-45, 53-54, 40 n.37. But that is not right. As shown above, regardless of whether the HCDAO has an obligation to disclose *IIU files* describing egregious misconduct by SPD officers who serve on the HCDAO's prosecution teams, it has an obligation to learn of and disclose *the misconduct itself*.

The HCDAO's failure to appreciate this distinction between disclosing IIU files and disclosing misconduct is a worrisome sign not only about its handling of Graham's case, but also about its ongoing handling of SPD misconduct. Given the evidence that Graham was arrested and prosecuted based on false allegations by an SPD officer, and the fact that the court found that the SPD officer gave a "facially unrealistic account[] of the incident [that was] contradicted by" other "credible, unimpeached testimony," HDA R.A. 20, the law is clear that, in any unrelated cases where the officer is a potential witness, exculpatory information about his behavior "should be disclosed to [the] unrelated defendants so that the trial judge may rule on its admissibility if the defendant were to seek its admission." *Matter of a Grand Jury Investigation*, 485 Mass. at 653. Yet the HCDAO nowhere acknowledges its obligation to disclose this information nor states that it has done so. *See* Opp. at 40 n.37.

III. Petitioners have standing to challenge the practices of the HCDAO and seek the relief requested under G.L. c. 211, § 3.

The HCDAO's challenge to petitioners' standing is misguided. In general, "to have standing in any capacity, 'a litigant must demonstrate the challenged action has caused the litigant injury,'" *Brantley v. Hampden Div. of Prob. & Fam. Ct. Dep't*, 457 Mass. 172, 181 (2010), quoting *Slama v. Attorney Gen.*, 384 Mass. 620, 624 (1981), and that the public defendant has breached a duty owed to him. *Sullivan v. Chief Just. for Admin. & Mgmt. of Trial Ct.*, 448 Mass. 15, 21 (2006). Further, "[t]he complained-of injury must be a direct and ascertainable consequence of the challenged action." *Id.* Here, each Petitioner satisfies the requirements of standing.

Petitioner Graham has standing because has been prosecuted based on the SPD's false allegations, the HCDAO failed to disclose evidence that could have helped to establish his innocence, and these things could reoccur. *See Superintendent of Worcester State Hosp. v. Hagberg*, 374 Mass. 271, 274 (1978) (court has discretion to decide issues that are moot when they are "capable of repetition yet evading review"). Graham's concerns about further punishment are especially justified in light of the HCDAO's ongoing refusal to acknowledge that either it or the SPD did anything wrong in his case.

Petitioner Lopez may suffer due process harms from the HCDAO's decision to prosecute him without obtaining potentially exculpatory evidence. Although the trial court has ordered the Commonwealth to produce exculpatory material related to SPD Narcotics Bureau officers involved in Lopez's case, CRA 548-49, Murdock Aff., the Commonwealth cannot disclose what it has not undertaken to discover. *See* Commonwealth's R. 17 Motion, *Commonwealth v. Lopez*, No. 1979CR00143 (Hampden Sup. Ct. May 6, 2021) (noting the HCDAO's request that the court delegate to the SPD a duty to "make reasonable inquiry" and turn over exculpatory records). Thus, the HCDAO cannot credibly contend that Lopez will have access to the exculpatory evidence to which he is entitled. *See* Opp. at 53. The HCDAO also cannot credibly claim that Lopez lacks

standing to invoke this Court's superintendence power in a petition against the HCDAO, given that the HCDAO recently invoked this Court's superintendence power in a petition against *him*. *See* Commonwealth's Petition for Relief, *Commonwealth* v. *Lopez*, SJ-2021-0122, (Mar. 31, 2021).

Petitioners CPCS and HCLJ have standing because they are statutorily and contractually obligated, respectively, to provide effective representation for indigent defendants in Hampden County. Their work is frustrated, and resources are diverted, to the extent that the Commonwealth has not investigated the full scope of SPD misconduct and to the extent that the HCDAO's practices fail to ensure the adequate disclosure of exculpatory evidence.[6] *See, e.g.*, *Comm. for Pub. Couns. Servs.*, 480 Mass. at 703 (allowing c. 211, § 3 petition to hear CPCS and HCLJ claims of "misconduct by the district attorneys and members of the Attorney General's office" affecting numerous defendants); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (organizational plaintiff may establish standing by showing a diversion of organizational resources to identify or counteract the allegedly unlawful action or frustration of the organization's mission). This injury is on-going.

These organizations also have representative standing, given the challenges and potential for retaliation faced by individual defendants who may wish to allege that the SPD has committed misconduct against them or that the HCDAO has failed to disclose exculpatory evidence. *Cf. Comm. for Pub. Couns. Servs. v. Chief Just. of Trial Ct.*, 484 Mass. 431, 447, *aff'd as modified*, 484 Mass. 1029 (2020) (holding that CPCS had representational standing to bring claims on behalf of clients affected by the coronavirus pandemic).

Petitioners Ryan and Auer have ethical obligations to provide effective representation to their clients and thus have standing for the reasons analogous to those advanced by CPCS and

[6] *See* CRA 553, ¶¶ 3-4, Hoose Aff.; *id.* 250, ¶¶ 4-6, 11, 14, 16-17, 18-21 Madden Aff. They divert resources to counteract there practices. *See id.* 553, ¶¶ 5-6, Hoose Aff.; *id.* 251, ¶ 13, Madden Aff.

HCLJ.[7] *See Eisenstadt v. Baird*, 405 U.S. 438, 445 (1972) (unique professional relationship between client and advocate "act[ing] to protect the [client's] rights" conferred standing); *Leigh v. Bd. of Registration in Nursing*, 399 Mass. 558, 561 (1987) (same). These injuries also are on-going.

Finally, the Court has allowed exceptions to the standing rules where dismissal of the case "would work a manifest injustice to nonparties," *Brantley*, 457 Mass. at 175, where the case presents important issues that "affect nonparties and were capable of repetition, yet evading review," *id.* at 180, or where "substantive rights may not survive the delays inherent in the normal appellate process," *id.* at 183-84. *See also Planned Parenthood League of Massachusetts, Inc. v. Operation Rescue*, 406 Mass. 701, 708 (1990). In those circumstances, the Court has considered whether the interests of justice and considerations of basic fairness and of judicial economy counsel that it should review the alleged infringement of rights notwithstanding a petitioner's lack of standing. *Brantley*, 457 Mass. at 182-83. "It makes little sense to dismiss the case today, leaving the constitutionality of the current protocols in question, knowing that they continue directly to affect many litigants in Hampden each day." *Id.* at 183.

IV. The remedies sought are appropriate, necessary, and within this Court's authority.

The DOJ Report, plus the other evidence in the Petition, leaves no doubt that egregious misconduct by members of the prosecution team has touched an untold number of cases in Springfield. This Court does not shy away from giving directives to the executive branch in these circumstances because "where there is egregious misconduct attributable to the government in the investigation or prosecution of a criminal case, the government bears the burden of taking reasonable steps to remedy that misconduct." *See Bridgeman v. Dist. Att'y for Suffolk Dist.*, 476 Mass. 298, 315 (2017). It is therefore entirely appropriate for this Court to require, as it did in the drug lab

[7] Petitioners Ryan and Auer have each had to devote substantial resources to counteract the lack of access to exculpatory material resulting from HCDAO's practices. *See* CRA 412, ¶¶ 10-16, 23-26, 28, Ryan Aff; *id.* 408, ¶ 14-23, 27 Auer Aff.

context, that "the Commonwealth thoroughly investigate the timing and scope of [the SPD's] misconduct. . . in order to remove the cloud that has been cast over the integrity of the work performed [by that department], which has serious implications for the entire criminal justice system." *Cotto*, 471 Mass. at 115.

To ensure that this duty is satisfied with respect to the SPD's misconduct, this Court's order may take many forms. It could, for example, specify a date by when "the Commonwealth shall notify the [Court] whether it intends to undertake such an investigation." *See Cotto*, 471 Mass at 115 (allowing one month). If the Commonwealth declines to investigate, the Court could impose remedies to resolve the due process violations, which is certainly within this Court's authority. *See* Pet. at 26, 32. The Court could also impose interim remedies now. In the drug lab context, when the "scope of Dookhan's purported misconduct [was] not yet known," *Commonwealth v. Charles*, 466 Mass. 63, 64-65 (2013), this Court concluded that "[i]t is incumbent on us, at the early stages of this unfolding situation, to address uncertainties regarding the propriety of the procedures that have been implemented by the Superior Court." *Id.* at 89; *see, e.g.*, *Commonwealth v. Scott*, 467 Mass. 336, 353 (2014) (fashioning "special evidentiary rule" to create conclusive evidentiary presumption). Interim remedies are necessary and appropriate to protect the rights of defendants whose cases are proceeding—right now—on the suspect word of Springfield police officers without constitutionally required disclosures. Each proposed remedy[8] falls squarely within this court's inherent judicial authority "to regulate the presentation of evidence in court proceedings," *Commonwealth v. DiGiambattista*, 442 Mass. 423, 444-45 (2004), and each is authorized under this Court's "general

[8] *See* Pet. at 26-27 (interim "relief could include the creation and monitoring of a thorough Brady list of officers with misconduct issues; ensuring that defendants receive evidence as it becomes available; a judicial presumption in favor of the admissibility of the DOJ Report, as well as appropriate jury instructions, in cases where SPD Narcotics Bureau officers are members of the prosecution team; limitations on the admission of police reports at G.L. c. 276, § 58A and probation violation hearings; limitations on SPD officers refreshing their recollections with police reports; and other relief that the Court deems fit").

superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein." G.L. c. 211, § 3. Each remedy is also consistent with this Court's determination that "in the wake of government misconduct that has cast a shadow over the entire criminal justice system, it is most appropriate that the benefit of our remedy inure to defendants." *Bridgeman* , 471 Mass. at 476 (citing *Scott*, 467 Mass. at 352).

CONCLUSION

For the reasons stated above and in the Petition, this Court or the full Court, upon reservation and report, should provide comprehensive remedies to mitigate ongoing violations of defendants' rights in Hampden County.

Dated: June 11, 2021

Respectfully submitted,

/s/ Jessica J. Lewis

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** pro hac vice application pending*

CERTIFICATE OF SERVICE

I certify that on June 11, 2021, I served the attached Reply to counsel for the Respondent via email:

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