

**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.

**PETITIONERS' NOVEMBER 22, 2021
STATUS REPORT AND REQUEST FOR STATUS CONFERENCE**

Petitioners submit this report pursuant to this Court's Second Interim Order dated October 8, 2021. As set forth below, the Commonwealth still has not adequately investigated and disclosed the entirety of the egregious misconduct committed by Springfield Police Department officers, and case-by-case litigation in the trial courts is proving incapable of overcoming that problem. Petitioners therefore request a status conference to address these unresolved issues.

It has been more than a year since the U.S. Department of Justice reported that SPD officers engage in a pattern or practice of excessive force in violation of the U.S. Constitution and routinely falsify or submit vague or misleading reports to conceal the misconduct. C.R.A. 3-30. To date, the SPD has provided the Hampden County District Attorney's Office with only a 712-page batch of documents that, by the City of Springfield's own account, is incomplete. It is, the City concedes, a curated subset of the documents in its possession that relate only to the misconduct highlighted in the DOJ report. The curator of these documents is a former lieutenant of the SPD Narcotics Bureau who is himself implicated by the DOJ report, and who authored a secret report that neither the HCDAO nor defendants nor Petitioners in this case have seen. Yet the HCDAO's September 2021 submissions

indicated that neither it nor anyone else on the Commonwealth's behalf was planning to undertake any further investigation or disclosures, beyond passing on to defense lawyers the legally inadequate documentation the City has been willing to provide. *See* HCDAO Sept. 2021 Status Report at 7 (limiting "Future Action Items" to disclosing "the SPD documents" that the City had already disclosed, and "pursu[ing] release of the DOJ documents," without pledging to pursue additional documents from the SPD).

Events since September appear to confirm that the HCDAO has followed through on this commitment to do less than the law requires. Though it is apparent that more evidence exists than has been disclosed, the HCDAO has passed along the SPD's incomplete records to defense lawyers without either taking a position as to whether those documents are exculpatory or committing to any further investigation or disclosures. This would be an acceptable state of affairs if the Commonwealth and HCDAO were mere couriers, charged with delivering documents from the City to the defense bar. But they are not the postal service; they are the leaders of prosecution teams. And with that power comes a due process responsibility that they are failing to fulfill.

I. The HCDAO's 712-page disclosure failed to discharge its obligations to disclose all exculpatory material in criminal cases.

Shortly before the parties submitted their September status reports, the HCDAO provided the heads of the Committee for Public Counsel Services Springfield Public Defender Division office and the Hampden County Lawyers for Justice with a packet of approximately 712 pages of documents obtained from the City following an internal review by the SPD into its own misconduct. These documents correspond with some, but not all, of the examples of misconduct described in the DOJ report. *See* Petr.'s Sept. 2021 Status Report, Exhibit B. Petitioners are not aware of any other disclosures of SPD misconduct related to the DOJ report that the HCDAO has made since July 2020.

The City acknowledges that the materials disclosed are (1) related only to incidents revealed in the DOJ report, not all misconduct, and (2) even then, only a subset of the documents available concerning those incidents. *See* Ex. 1, City Solicitor Pikula Letter (July 2, 2021). There are additional records concerning these incidents that have not been produced, such as records of incidents that were described in the DOJ report which have yet to be identified. *See id.* These include an incident where an individual submitted a complaint with photographs of injuries she alleges to have sustained after officers slammed her wrist into a car dashboard, *see id.*; and records relating to the systemic pattern of misconduct found by the DOJ. The DOJ also found evidence that units of the SPD which the DOJ did not investigate engaged in a similar pattern of misconduct. *See* C.R.A. 4, 7, 13. But Petitioners are not aware of the disclosure of records related to this misconduct, even though the HCDAO's disclosure obligations are not limited by the scope of the DOJ report. *See United States v. Burnside*, 824 F. Supp. 1215, 1258 (N.D. Ill. 1993) (“It should never be the law that by maintaining ignorance, [a prosecutor] can fulfill the government’s due process obligation when the facts known not only warrant disclosure but should prompt further investigation”).

Furthermore, the records that have been disclosed contain internal discrepancies, as well as discrepancies with the DOJ report. The records also reference additional potentially exculpatory information that has not been disclosed and, in some instances, contradict the arrest and police reports. For example¹:

- Numerous pages in the materials are redacted, with no indication about the grounds for such redactions. Although private, medical, and other personal identifying information appear to have been redacted, there are other redactions which are not identifiable and may contain additional relevant information. *See, e.g.*, Ex. 1, HCDAO Exhibit List, Exs. 6, 8, 14, at 455-61, 494-99, 641-50.
- In one August 2013 incident involving excessive force, police reports refer to an unidentified co-conspirator and state that “both officers believe that they will be able to identify this subject” and “will seek a warrant” at a later date. *See id.*, Ex. 6, at 447-48. But no additional

¹ Relevant excerpts of these documents are attached hereto as Exhibit 1.

information or reports about this co-conspirator, a potential witness to police misconduct, was provided. *See id.*

- Arrest and police reports contained in the 712-page batch refer to additional materials *not* contained in that batch, which may be exculpatory. These include dispatch recordings and booking videos from a February 2013 incident that reveal severe injuries resulting from officers' excessive force, when the arrest records minimize these injuries and report only "minor injuries." *Compare* DOJ report at 14, *with* Ex. 1, HCDAO Exhibit List, at Ex. 9. In another example, security camera footage from a June 2016 incident was excluded that, according to the DOJ report, contradicts the arrest and police reports. *Compare* DOJ report at 14, 18, *with* Ex. 1, HCDAO Exhibit List, at Ex. 8.
- The materials contain a complaint concerning excessive force by SPD Officer Matthew Reif. *See id.*, Ex. 16, at 694-95, 697-99. This complaint was not disclosed in the DOJ report.
- The materials also contain a document listing various SPD officers and the number of complaints alleged against them. *Id.* at 696. No documents about any of these complaints were provided.

These discrepancies highlight two issues: (1) there are many gaps and missing documents containing exculpatory information that can be identified solely within this single batch of documents, and (2) the disclosure of documents that are outside of the DOJ report illustrates not only that the DOJ report was underinclusive, but that the Commonwealth is capable of identifying other incidents of misconduct outside the scope of the DOJ's investigation. In short, the disclosure of these 712 pages represents a start to understanding the full scope and gravity of the egregious misconduct committed by SPD officers, yet, based on the individual notices being provided to defense attorneys, the HCDAO seems to be treating it as the end.²

II. The HCDAO's notices to defense attorneys, which do not appear to go beyond the 712-page batch, are wholly inadequate.

Petitioners have made a good faith effort to understand the HCDAO's discovery practices, and have been unable to detect disclosures of SPD misconduct relating to the DOJ report that go

² As noted in Petitioners' September 2021 status report, the HCDAO's pending lawsuit against the U.S. Attorney's Office for the District of Massachusetts seeks only the SPD records that, in the DOJ's view, reflect "false" or "falsified" reporting, along with any attendant photographs or video/digital images. *See* Complaint at 28-29, *Gulluni v. Mendell*, C.A. No. 3:21-cv-30058-NMG, ECF No. 1 (D. Mass May 19, 2021).

beyond the single batch of documents previously supplied by the City. Yet, as noted above and in letters from City Solicitor Pikula, the SPD (1) has not provided all of the records with respect to the incidents it has identified, (2) is not confident of the accuracy of those identifications, and (3) did not identify all of the incidents from the DOJ report. In effect, the HCDAO is conceding that it is not presently disclosing all exculpatory evidence in the possession of its prosecution team. According to a recent letter from the HCDAO to CPCS, the HCDAO appears to be justifying this practice by assuming, without investigating, that the DOJ's findings are "just . . . allegations." *See* Ex. 5, Nov. 18 Letter from ADA Fitzgerald to CPCS Deputy Chief Counsel.

a. The HCDAO's disclosures rely on the City's hopelessly flawed collection process.

As a threshold matter, the HCDAO has begun to send notices and sections of the 712-page document batch to the defense attorneys of record in criminal cases. *See, e.g.*, Ex. 2, Letters from ADA Jennifer Fitzgerald to Petitioner Kelly Auer and Attorney Ivonne Vidal. The notices do not inform the receiving attorneys whether the materials are being disclosed because the SPD officer involved in the identified case used excessive force, if the officer filed a false report to cover up excessive force, or both. Instead, the notices state that the HCDAO is sending the documents "without taking a position as to whether the information or the officer's described conduct is actually exculpatory." *See id.* And although the HCDAO is telling defense attorneys that they "might" receive additional documents as the HCDAO "continue[s] to identify incidents and defendants impacted," *id.*, the HCDAO does not disclose what efforts it or any other Commonwealth agency is undertaking, if any, to identify such incidents and defendants. Its prior status report in this case implies that there are none. *See id.*

Far from representing that it has adequately disclosed egregious SPD misconduct, the HCDAO has declined to take a position on whether there is even a single document within the 712-page batch, or omitted from it, that the Commonwealth is obligated to disclose as exculpatory

evidence. *See id.* The practical consequence of this approach, as Petitioners noted in their September submissions, is that the HCDAO has effectively deferred to the City’s decisions about what is exculpatory—a prosecutorial duty which cannot be outsourced.

The HCDAO’s agnostic approach to documents received from the City appears to be consistent with its approach to exculpatory evidence more generally. On September 20, 2021, the HCDAO sent CPCS Springfield PDD Attorney-in-Charge Larry Madden 15 pages of discovery that appears to relate to the State Police, including a police report and 11 pages of redactions. *See* Ex. 3. But it is unclear who authored the report—it is signed by Trooper Shink, but titled “Narrative of Officer Robert Mariani”—and the HCDAO provided no explanation as to why it may be exculpatory.

b. The HCDAO’s practices appear to rely on the supposition that the DOJ findings are “just . . . allegations,” and that excessive force and false reporting by police officers cannot call convictions into question.

Petitioner CPCS has raised concerns about the HCDAO’s disclosure practices, but the HCDAO has declined to modify them. On October 14, 2021, Vanessa Vélez, Deputy Chief Counsel of the Private Counsel Division of CPCS, which oversees the assignment of post-conviction counsel, wrote District Attorney Gulluni to request a list of and identifying information for all impacted defendants, so that CPCS could begin assigning counsel for them. *See* Ex. 4. The letter also explained that notice was required to go to the defendants—not the attorneys who may no longer represent them, or even practice criminal defense in Hampden County—and that the letter must provide additional context. Deputy Chief Counsel Vélez’s letter pointed out that letters disclosing egregious government misconduct must, at a minimum, “be clear, instructive, and accessible,” “describe the reason for the notice,” and “direct any defendant inquiries to CPCS.” *Id.* (citing *Bridgeman v. Dist. Attorney for Suffolk Dist.*, 476 Mass. 298, 319 (2017)).

The HCDAO responded by a letter dated November 21, 2021, declining to provide a defendant list or take any other step urged by Deputy Chief Counsel Vélez. *See* Ex. 5. The HCDAO

argued that the contents of the DOJ report are “just . . . allegations,” because they have not “been admitted” by SPD officers or “adjudicated by any fact finder.” *Id.* The HCDAO also argued that “the vast majority” of the DOJ’s “allegations” involve the use of excessive force after the conduct allegedly justifying the defendant’s arrest. *Id.*

It is unclear how the HCDAO can argue that the DOJ has made unresolved “allegations,” and *also* dispute the Commonwealth’s duty to investigate and resolve those allegations. Nor is it clear why unconstitutional violence and rampant false reporting by police officers would not implicate elements of criminal cases; officers’ claims about what a defendant did and who initiated a violent encounter, as in Petitioner Graham’s case, can be severely undermined by a revelation that an officer tends to hit people and tell falsehoods. *See, e.g., Commonwealth v. St. Germain*, 381 Mass. 256, 262 n.10 (1980) (citations omitted) (“prosecuting attorneys [should] become accustomed to disclosing all material which is even possibly exculpatory”); *see also In the Matter of a Grand Jury Investigation*, 485 Mass. 641, 653 (2020) (“the ultimate admissibility of the information is not determinative of the prosecutor’s *Brady* obligation to disclose it”).³

III. Individual criminal cases are not solving the Commonwealth’s systemic failure to discharge its investigative and disclosure obligations.

Petitioners have seen no evidence that the systemic problems described in the Petition and status reports are being resolved, or are even susceptible to resolution, through discovery practice in individual cases. Instead, while attorneys are attempting to obtain discovery on SPD misconduct in

³ The City is reportedly in negotiations with the DOJ to implement certain reforms, which tends to contradict any suggestion that the DOJ’s findings lack merit. *See* Paul Tuthill, *Springfield City Council approves \$5 million fund to settle police misconduct cases*, WAMC (Nov. 16, 2021), at <https://www.wamc.org/news/2021-11-16/springfield-city-council-approves-5-million-fund-to-settle-police-misconduct-cases>.

their cases, those attempts have not only proven inefficient, they are simply incapable of filling the gap of the insufficient investigation. *See, e.g.*, Ex. 6, Springfield District Court Discovery Motion.

The HCDAO has acknowledged an obligation to “make inquiry” into whether police officers involved in a case have used excessive force, written false or misleading reports, or given false testimony. *See* Ex. 7, Opposition by ADA Todd Hobbs. This is an obligation that, at least in Petitioner Lopez’s case, the City has argued that the HCDAO is not fulfilling. *See* Ex. 9, Murdock First Supp. Aff., ¶ 15(b) & Exhibit G. Further still, the HCDAO opposes any requirement to certify that it has made specific inquiries, *see* Ex. 7, and takes a narrow view of what that inquiry entails. For example, the HCDAO contends that it need not inquire as to whether an officer “has been the subject of an adverse credibility determination by any court,” or even disclose prior cases in which *the HCDAO itself* filed a *nolle prosequi* “because of evidence of police misconduct.” *Id.* Although a district court judge (Sabbs, J.) recently required the HCDAO to inquire and disclose cases in which a *nolle prosequi* was filed because of evidence of police misconduct, it denied a request for evidence that an officer gave testimony that was deemed not credible. *See* Ex. 8, Ruling on Discovery Motion

But even when a court has ordered the production of exculpatory records related to SPD misconduct, as has occurred in the prosecution of Petitioner Lopez, it has resulted only in finger-pointing and buck-passing by government agencies—not the production of documents. *See* Ex. 9, Murdock First Supp. Aff., ¶¶ 3, 4, 9-17, 19. In March 2021, in response to a Rule 14 motion, the superior court ordered the disclosure of any known instances where any police officer, who is a member of the prosecution team, has been found by a court or by police internal affairs to have made a false report or statement with regard to any arrest or any criminal or internal affairs investigation. *See id.* at ¶ 6, Exhibit C. The court ordered that the HCDAO both make reasonable inquiry of the head of the SPD internal investigations unit and produce any documents already in the custody of the HCDAO. *Id.*

In response to that order, the HCDAO has not turned over any evidence beyond, just today, the mere summaries of the officers' IIU histories. Instead, after unsuccessfully petitioning for relief from this Court, *see* Murdock First Supp. Aff. ¶ 8, Ex. D, it filed a Rule 17 motion in superior court for third-party records from the SPD. *See id.* at ¶¶ 9-13. But the SPD has argued that it "cannot comply" with an order to search its files for the exculpatory records, *see id.* at ¶ 11 & Ex. F, and that, to find exculpatory records for just this one case, it may need to hire a third party. *See id.* ¶ 12. It seems unlikely that these complications arise in the search for evidence when HCDAO and the SPD expect to find materials that are inculpatory rather than exculpatory; only when it comes to upholding disclosure obligations to defendants do the two agencies become perfect strangers.

The superior court, in turn, has held multiple status hearings and has attempted to work with the SPD to devise a plan to search its files, making clear that the Commonwealth does not gain the benefit of making the SPD's files non-searchable. *See id.* ¶¶ 10, 11, 15, 17, 18. But the result remains the same. Since it entered its order on March 17, 2021, not a single record has been turned over to Petitioner Lopez beyond the IIU summaries. *See id.* at ¶ 16. The superior court judge even stated that it had welcomed the HCDAO's petition to this Court because case law in this area "has been coming down faster than we can keep up with" and the courts "would appreciate all the guidance we can get from [the Supreme Judicial Court] on this issue." *See id.* at ¶ 11(a). In addition, the superior court noted that SJC guidance may be appropriate given the lack of uniformity with how judges are handling the discovery issues. *See id.* at ¶ 15(c) & Exhibit G.

Conclusion

Petitioners respectfully request a status conference so that these issues can be more fully addressed.

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