COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

Suffolk, ss. **No. SJ-2021-0129**

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

Petitioners,

v.

DISTRICT ATTORNEY FOR HAMPDEN COUNTY,

Respondent

REPORT OF SPECIAL MASTER

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I. Introduction

This matter was referred to me by order of the single justice (Wendlandt, J.), on April 14, 2022. Pursuant to that order, I submit this report. I have derived the nature of the case and procedural history from the docket and filings, and have found facts from: (a) documents in the record, including affidavits; (b) facts agreed to by the parties in their Joint Statement of Agreed Facts and Contested Material Facts filed on February 2, 2022, in Petitioners' Proposed Findings of Subsidiary Facts filed on May 26, 2022, Respondent's Proposed Subsidiary Material Facts filed on June 16, 2022, and Petitioners' response thereto filed on July 15, 2022; and (c) testimony presented at evidentiary hearings held on September 9, 14, 15, and 21, 2022.

I have adopted assertions in affidavits if agreed to or supported by documents in the record, or if supported by admissible and credible live testimony. I have disregarded assertions in affidavits that consist of conclusions, generalizations, or arguments, or that appear not to reflect personal knowledge. Regarding factual assertions supported only by news media reports, I have adopted them if agreed to, or if limited to the fact of or timing of media coverage; I have not relied on news media reports as a basis for finding disputed facts.

Much of the disagreement between the parties has centered on interpretation or characterization of documents or of events reflected in documents; in such instances, I have relied on the documents themselves. I have not referenced certain stipulated facts that I deem immaterial to the issues presented.

The evidence presented at evidentiary hearings consisted of the testimony of eleven attorneys, nine of whom had submitted affidavits. I will discuss my findings regarding that

testimony in the context of the particular topics or incidents addressed. As to disputed facts, I have applied a preponderance of the evidence standard to evidence I have found credible.

II. Nature of the Action and Procedural History

Petitioners initiated this action by filing a petition and record appendix in the Supreme Judicial Court for Suffolk County on April 6, 2021. Respondent filed its response on April 29, 2021. Petitioners filed a Corrected Petition and record appendix on May 18, 2021, to which respondent filed its opposition on May 28, 2021, with its own record appendix on June 3, 2021. With leave of court, petitioners filed a reply brief on June 11, 2021. Thereafter, the parties filed various affidavits, accompanied by exhibits, and each side filed three status reports as ordered by the single justice, accompanied by additional exhibits.

The Corrected Petition alleges, in substance, that multiple officers of the Springfield Police Department (SPD) have engaged in extensive and egregious misconduct, including repeated use of excessive force, filing false reports, and perjury; and that Respondent Hampden County District Attorney's Office (the DAO) has an ongoing duty to learn of such misconduct and to disclose it in both pending and past criminal cases involving those officers, and has failed to do so. Regarding this allegation, the Corrected Petition relies in substantial part on a report issued by the United States Department of Justice in July of 2020 (the DOJ Report), to be discussed further *infra*. The Corrected Petition also alleges that as a matter of general practice the DAO has taken an unduly narrow view of its disclosure obligations, and has failed to comply with its duty to seek out and provide exculpatory information.

Petitioners invoke the superintendence power of this Court over the judicial branch under G. L. c. 211, § 3; and the Declaratory Judgment Act, G. L. c. 231, § 1. They draw an analogy to this Court's rulings in *Commonwealth* v. *Cotto*, 471 Mass. 97 (2015), and *Commonwealth* v.

Ware, 471 Mass. 85 (2015), addressing the extraordinary circumstances arising from misconduct by chemical analysts at the Commonwealth's drug laboratories.

Petitioners call upon this Court to: (1) issue rulings defining the Commonwealth's[1] obligation to investigate[2] and disclose police misconduct; (2) hold that the Commonwealth has failed to meet that obligation with respect to SPD; (3) establish a deadline for the Commonwealth to say whether it will investigate; and (4) order interim evidentiary relief for the benefit of defendants in pending and future criminal cases involving SPD.[3] In addition, petitioners urge the Court to "assess" the DAO's discovery practices, and provide "guidance."[4]

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[1] In discussing the proposed remedy, and in the prayer for relief, the Corrected Petition refers to "the Commonwealth" rather than specifically to the DAO, suggesting that some entity of the Commonwealth other than the DAO might investigate. On my inquiry at a status conference on May 5, 2022, counsel reported that the Attorney General is aware of this case and has not expressed interest in taking any role. As I will discuss further *infra*, the Attorney General has undertaken criminal prosecution of certain SPD officers in connection with one incident of alleged misconduct and the officers' reports relating to that incident.

[2] At p. 26 of the Corrected Petition, petitioners provide the following description of the investigation that, in their view, the Commonwealth should undertake: "The Commonwealth should, at a minimum, review all reports written or modified since 2013 in which it was alleged that force was used by an SPD employee, review all judicial findings questioning the credibility of SPD officers, and review all cases where the HCDAO filed a *nolle prosequi* after learning of possible SPD misconduct. . . . The Commonwealth should be required to provide periodic public reports of its findings, which would allow for the scope of the investigation to be tailored to emerging recommendations from the single justice, and to create a list of cases affected by any misconduct in order to ensure that impacted defendants will be notified."

[3] At pp. 26-27, the Corrected Petition describes the proposed interim relief as follows: "Such 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."

[4] At p. 32, the Corrected Petition sets forth the following prayer for relief: "1. With respect to the Commonwealth's duty to investigate SPD misconduct, the Court should: a. declare that the

After a series of hearings, interim orders, and status reports, on February 22, 2022, pursuant to the Third Interim Order of the single justice (Wendlandt, J.), the parties filed a "Joint Statement of Agreed Facts and Contested Material Facts," a "Joint Statement of Legal Issues," additional exhibits, and additional status reports. These filings revealed continuing disagreement as to facts, legal issues, and the propriety of the Court considering the petition as presented or ordering any of the relief sought.

On April 14, 2022, the single justice issued the Order of Reference, appointing me as special master. The order directs the special master to "determine which relevant facts have been agreed to by the parties," "make any and all findings of fact and credibility determinations, beyond the facts agreed to by the parties, that she deems necessary and relevant to resolution of the legal issues raised by the petitioners in their petition, the legal issues raised by the respondents in their opposition to the petition, the legal issues that the parties have agreed are raised for this case, and any other legal issues that the special master deems necessary and relevant to resolution of the case," and report to the Court. The order of reference also invites me to make "any recommendations or conclusions of law."

Commonwealth's duty to thoroughly investigate the timing and scope of SPD misconduct has been triggered; b. require the Commonwealth to notify the Court whether it intends to undertake such an investigation and, if so, whether it has identified an impartial entity to do so, see *Cotto*, 471 Mass. at 115; and c. provide criminal defendants the interim evidentiary relief necessary to ensure the integrity of the criminal proceedings. 2. With respect to the Commonwealth's duty to disclose SPD misconduct, the Court should: a. assess the HCDAO's discovery practices for compliance with the constitution, this Court's case law, and the rules governing disclosure; and b. provide guidance to the HCDAO and all district attorneys concerning their obligations when confronted with evidence of egregious police misconduct.
3. With respect to further proceedings, the Court should retain jurisdiction over this case in order to consider and impose any further remedies that may be warranted following the Commonwealth's investigation, or lack thereof."

Pursuant to the order of reference, I conducted status conferences on May 5, 2022, June 22, 2022, and August 23, 2022; received proposed findings and responses thereto on May 27, June 16, and July 15, 2022; conducted evidentiary hearings on September 9, 14, 15, and 21, 2022; and heard closing arguments on September 28, 2022. I now submit this report of my findings of fact, conclusions, and recommendations.

III. The Parties

Petitioners are two organizations of lawyers who represent defendants in criminal cases in Springfield; two individual lawyers who represent defendants in such cases; and two individuals who have been defendants in such cases.

A. Lawyers and Lawyer Organizations

The Committee for Public Counsel Services (CPCS) is the statewide entity, established pursuant to G. L. c. 211D and under the supervisory authority of this Court, that is responsible for providing representation to all indigent defendants in criminal cases, either directly through public counsel, or indirectly through private counsel serving as appointed bar advocates. Lawrence Madden is currently the Attorney-in-Charge of its Springfield office, which has about twenty in-house lawyers, each of whom handles 30-60 cases at a time. CPCS makes efforts to inform its attorneys of matters that may be important to their work, including new case law and information about officers involved in cases. It has recently embarked on an effort to develop a database of information that may provide exculpatory evidence in cases handled by its attorneys.

Hampden County Lawyers for Justice (HCLJ) serves as the bar advocate program providing private counsel for indigent defendants in Hampden County under a contract with CPCS. David Hoose was one of the founders of HCLJ, and served as its president until June of 2022. HCLJ has approximately 150 attorney members, who represent approximately 75 percent

of indigent criminal defendants in Hampden County. It has four supervising attorneys, who are responsible for training and oversight of others, including regular performance assessments. HCLJ has recently begun to develop an internal system for collecting and disseminating information it obtains that may be relevant to cases its members handle. Meredith Ryan and Kelly Auer are attorneys who serve as bar advocates through HCLJ. Attorney Ryan is presently a board member and vice president of HCLJ.

CPCS, HCLJ, Attorney Ryan, and Attorney Auer all allege that the DAO has a general practice of failing to fulfill its duty to obtain and disclose exculpatory information, particularly information relating to the credibility of Springfield police officers. They allege that that failure undermines their ability to represent their clients effectively, and compels them to expend time and resources in efforts to identify and obtain information that should be disclosed without such efforts. Attorney Auer also alleges that her expenditure of billable time in fiscal year 2020 seeking discovery of exculpatory evidence triggered a CPCS audit, which required her to spend an additional eight hours for which she was not compensated. As will be discussed further *infra*, I do not find that allegation to be supported by credible evidence.

B. Chris Graham

Petitioner Chris Graham is a Black man who resides in Springfield. Early on the morning of July 2, 2017, an altercation occurred between Graham and two white men, off-duty SPD Officer Remington McNabb[5] and off-duty correction officer Adam Parfumi. An unknown number of others observed and/or participated in parts of the altercation, and at one point Parfumi either fell or was knocked to the ground. According to Graham, McNabb assaulted him, pointed a gun at him, picked up a second gun from the ground, and then falsely reported that

[5] McNabb was not assigned to the Narcotics Bureau, which was the focus of the DOJ Report.

Graham had assaulted Parfumi with that gun, and that McNabb had removed that gun from Graham's person. According to the arrest report later submitted by SPD officer Brendan O'Brien, who responded to the scene, as well as the later trial testimony of McNabb and Parfumi, Graham pulled a gun and put it to Parfumi's chest; McNabb persuaded Graham to lower the gun; and then McNabb recovered the gun from Graham, while an unidentified person knocked Parfumi to the ground. McNabb used his cellular telephone to call the SPD dispatcher for assistance. On-duty officers responded and arrested Graham on charges of assault and battery with a dangerous weapon, carrying a firearm without a license, and possession of a loaded firearm.

An unidentified person called 911 during the incident. The caller stated that "some guy's knocked . . . out on the floor, and then his buddy pulled a gun on a bunch of people, and he still has the gun right now." The caller described a vehicle, and then, in response to the dispatcher's question about "the assailants there, the subjects," the caller said, "I think a black dude got knocked down on the floor." Then, "it's not the black, no it is not. The driver is the black male. . . . He's not the one. But someone was on the floor, and then his . . . friend just pulled a gun and started pointing [at] people."

In context, in my view, this statement is clearly exculpatory, in that the caller identified the person who "pulled a gun and started pointing [at] people" as not "the black male," but rather the "buddy" or "friend" of the person on the ground. The person on the ground was Parfumi, and the person with him, whom a bystander might identify as his "buddy" or "friend," was McNabb.

Graham's trial counsel did not know of any 911 recording, and did not make a discovery request for any that may have existed.[6] She also did not request any Computer Aided Dispatch

[6] Graham's trial counsel is a member of HCLJ, but was retained in Graham's case.

(CAD) log that may have existed. A CAD log shows telephone calls to the police dispatcher, including calls to 911 or to other recorded dispatch lines, and dispatch activity in response; if no such calls or activity have occurred regarding an incident, no CAD log exists. The CAD log for this case shows a call at 2:10 a.m. for "Assist Officer." A narrative entered by the "call taker" recites: "off duty called in with a disturbance and is requesting an assist." The next call shown is from an "unknown" caller, at a specified telephone number, at 2:11 a.m. The log indicates that Officer Brendan O'Brien was dispatched at 2:11:53 a.m., and arrived at 2:13:14 a.m.

The prosecutor, like defense counsel, did not have either the CAD log or the 911 recording, and did not know that either existed. ADAs do not routinely receive either, but can obtain either or both from SPD upon request. They make such requests if they have reason to believe that a telephone call or calls occurred in connection with an incident, so as to generate a log and recording. The form an ADA uses to make the request requires entry of the "call" number assigned to an incident, and also provides a field for entry of the date and time. An incident, for this purpose, is identified by a "call" number. That label refers not to a telephone call, but to a request for police service, which can come in any of various forms. Each request for a 911 recording sets off a search process in the SPD Communications Unit, where personnel listen to recordings at or around the time requested. If there is no recorded call identified at the requested time, the search process extends through a broader period, consuming police time and thereby slowing responses to other requests.

In the Graham case, the prosecutor did not make any request for a CAD log or 911 recording. Had he requested the CAD log, he would have received it and learned of the recorded 911 call, at 2:11 a.m., from an unidentified person, with a telephone number shown. He could then have requested the 911 recording with a precise time, and would have received it. The

caller's telephone number would then have been available to the prosecutor, and to defense counsel upon disclosure by the prosecutor.

The parties have devoted considerable attention to whether the prosecutor should have known or inferred that a 911 call had occurred. Petitioners point to the call number shown on the arrest report, "Call #: 17-139244." As discussed *supra*, this number refers not to a telephone call, but to a call for service. It would not have informed the prosecutor that any telephone call occurred.

Petitioners also contend that the prosecutor should have known that there was a 911 call because the arrest report, as well as McNabb's later testimony, indicated that McNabb called the dispatcher for assistance. The evidence does not support that contention; the evidence indicates, rather, that McNabb called a direct line to the dispatcher, not 911.[7]

Nevertheless, in my view, the information that both the prosecutor and defense counsel had provided at least reason to suspect the likelihood of a 911 call, such that both of them should have inquired. As described in the police report, the incident occurred outdoors in a public place, late at night, and involved numerous people, likely generating considerable noise. The probability that someone would have called 911 in such circumstances seems high. The police report provides a "Date/Time Reported" at 2:10 a.m., and an "Arrest Date/Time" of 2:20 a.m. A request for a CAD report and a 911 recording within that narrow window would hardly have set off a resource-intensive search.

[7] It appears that the prosecutor had some confusion on this point at the time of trial. In his opening statement he said that McNabb "was able to use his own cell phone to call 911 and ask for other officers to respond." Officer McNabb did not testify that he called 911. He testified, "I get my phone out and I'm trying to call our dispatch at the station for backup . . . Finally I get a hold of dispatch . . . ."

Soon after his arrest and release, and with the assistance of his trial counsel, Graham made a complaint to the SPD Internal Investigations Unit (IIU). In an interview with the IIU investigator on July 14, 2017, which trial counsel attended, Graham reported that McNabb and others assaulted him at the time of the arrest and at the police station thereafter; that he requested and was denied medical attention; and that after his release, SPD officers stopped him repeatedly without cause.

The IIU investigator interviewed McNabb, Parfumi, and multiple officers who had responded to the scene or participated in the booking. The investigator also obtained photographs and video recordings from cameras showing both the booking dock and the booking desk. The statements of the various officers were consistent with McNabb's account of the event, and neither the video recording nor the photographs showed any injury to Graham, or otherwise corroborated his version of events.

However, the IIU investigator also obtained the 911 recording, called the recorded telephone number, and interviewed the unidentified caller. According to the IIU report, the 911 caller said that the only person with a gun was "the white guy," whom the caller referred to as the "buddy" of the "white guy" who was on the ground.

The DAO had no knowledge of the IIU investigation, and would not ordinarily have knowledge of such investigations. Graham's defense attorney, despite having assisted him with the IIU complaint, did not obtain the report of the IIU investigation, and thus did not obtain this statement of the 911 caller. Counsel could have obtained it by, first, making a public records request to SPD, which would have elicited limited information indicating the existence of the IIU investigation. Counsel could then have made a motion to the Court under M. R. Crim. P. 17, for issuance of a subpoena directing SPD to submit the IIU investigation report to the clerk.

Production in that form would have made it available to counsel for both sides. Inconsistencies between Graham's interview with the IIU investigator and his later trial testimony would then have been available to the prosecutor for cross-examination. Graham's trial counsel testified before me on September 14, 2022. She was not asked, and did not say, whether she had made a strategic choice not to seek the IIU report.

Graham's case was tried to a jury in Superior Court before Judge Constance Sweeney, on April 4-5, 2018. No physical evidence connected Graham to the gun. McNabb, Parfumi, and a third SPD officer testified, describing the event in accord with the arrest report. Graham and a civilian witness, who was previously unknown to Graham, testified for the defense.
The civilian testified that he came out of a nearby bar and saw Graham "up against his car with a cop holding a gun to him, patting him down," and then watched while officers arrested Graham, searched his car, and drove off with him. He testified that he did not see Graham with a gun, and did not see the officer remove a gun from Graham. In brief cross-examination, the prosecutor elicited that "the very first time [the witness] laid eyes on Mr. Graham, he was pushed up against a car with an officer with his gun out on him."

The jury acquitted Graham of the assault charge, but convicted him of the firearms charges. He was sentenced to and served 18 months of incarceration and one month of probation, and paid certain fees. He also lost his employment as a result of the conviction.

During Graham's incarceration, his appellate counsel obtained the IIU file, learned of the 911 recording, and requested it of the DAO, which obtained and provided it. Based on the information thus obtained, appellate counsel moved for a new trial. Trial counsel did not submit an affidavit in connection with the motion. In a decision dated December 30, 2019, after Graham had completed his sentence, Judge Sweeney allowed the motion on the ground of

ineffective assistance of trial counsel in the failure to obtain the 911 recording and interview the caller. Judge Sweeney called those failures "inexcusable," "unreasonable," and "serious inattention." Judge Sweeney's decision did not comment on the ADA's failure to obtain and disclose the 911 recording.

After Judge Sweeney's decision, the firearms charges remained pending until March 31, 2021, when the DAO filed a notice of *nolle prosequi*. The *nolle prosequi* form said: "the defendant was previously convicted of these indictments at Trial. Upon Appeal, those convictions were vacated, and a new trial was ordered. During the pendency of the Appeal, the defendant completed the period of incarceration that he was sentenced to after the Trial. In light of these facts, the Commonwealth has elected not to prosecute this case further."

Graham alleges that the DAO's failure to obtain and disclose the 911 recording and the IIU investigation report undermined his defense at trial, leading to conviction and incarceration that he would not otherwise have experienced.[8] Graham also alleges that the *nolle prosequi*, as distinct from dismissal with prejudice, leaves him at continuing risk of further prosecution, and that he has experienced repeated unwelcome interactions with SPD officers since his initial arrest. He does not allege that he has moved any court to order dismissal with prejudice on any ground. The petition in this case does not seek that relief or any relief specifically for Graham.

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[8] As indicated *supra*, in my view the 911 recording was exculpatory, and the information available to both sides provided reason to inquire and to learn of its existence. That said, it does not follow that Graham would have avoided conviction if the 911 caller had testified at trial. The caller, like the civilian witness who did testify, would have been subject to cross-examination, which could have addressed the caller's opportunity and ability to observe each part of the interaction, any possible bias, and all other aspects of credibility. Whether the outcome would have been different is impossible to determine. Similarly, the existence of conflicting versions of the event does not in itself establish that the police version is false, or that police misconduct occurred.

C. Jorge Lopez

Jorge Lopez was a defendant in two criminal cases in Hampden County Superior Court. The first, 1979CR00143, charged narcotics and firearm violations; officers of the SPD Narcotics Division participated in the arrest. The second, 1979CR00307, charged armed robbery and two counts of assault with a dangerous weapon. On June 1, 2022, Lopez pled guilty to all charges, and received concurrent sentences of five years to five years and one day in state prison.

CPCS Attorney Katherine Murdock was appointed to represent Lopez in the first case on April 22, 2019. After the issuance of the DOJ Report in July of 2020, Attorney Murdock embarked on efforts to obtain discovery to determine whether the Narcotics Bureau officers involved in Lopez's case may have been implicated in the conduct described in the Report. Those efforts triggered a series of proceedings before the Superior Court (McDonough, J.) between January of 2021 and March of 2022, including hearings on Lopez's motions for discovery under M. R. Crim. P. 14, and motions by each side seeking subpoenas to SPD under M. R. Crim. P. 17.[9] Some rulings in those proceedings were favorable to Lopez's position; others not. Among the Superior Court's rulings was an order on January 13, 2022, that SPD produce IIU files on ten officers. Also, on March 17, 2022, the Court ordered the DAO to make specified inquiries of the IIU, and corresponding disclosures. In response to these orders, on April 11, 2022, Lopez's counsel received access to more than 1,000 pages of documents.

While Attorney Murdock was in the process of reviewing these materials, Lopez informed her that he had received a plea offer in the robbery case that he wanted to accept, if he could obtain a concurrent sentence in the drug case. The DAO agreed to reduce the highest

[9] The DAO filed the first Rule 17 motion, requesting the Court to require SPD to produce a document referred to as the "Kent Report," to be discussed further *infra*. The defense later adopted that motion. The Court denied the request. Lopez moved for reconsideration of that ruling, but resolved the case by plea while that motion was pending.

charge in the drug case, so as to eliminate a mandatory minimum higher than the recommendation offered in the robbery case, but did not agree to recommend that the sentences run concurrently. Counsel presented the matter to a judge at a conference pursuant to M. R. Crim. P. 12, and the judge indicated an intention to give concurrent sentences. As indicated *supra*, on June 1, 2022, Lopez pled guilty to all charges, bringing his cases to a close. The petition in this case does not seek any relief specifically for Lopez.

D. Respondent

The respondent in this action is the Hampden County District Attorney's Office. District Attorney Anthony Gulluni took office at the beginning of 2015. In the seven calendar years completed since then, the office has handled 131,789 newly initiated cases. Annual case filings have ranged from 20,105 in 2015, to 15,498 in 2021, with a generally decreasing trend. The DAO prosecutes cases in the Superior Court, District Court, and Juvenile Court. Numbers of cases initiated in recent years in each court department, as indicated on the Trial Court's public webpage, have been as follows:

Year	Superior Court	District Court	Juvenile Court
2018	589	18,436	964
2019	516	18,722	590
2020	362	16,117	444
2021	432	14,655	411

https://public.tableau.com/app/profile/drap4687/viz/MassachusettsTrialCourtChargesDashboard/LeadCharges.

As of the evidentiary hearing in this case on September 15, 2022, the DAO has some eighty prosecutors, 26 support staff, and 28 victim-witness advocates. Among the support staff are two investigators, both retired police offices, whose primary functions are to serve subpoenas, sit in on witness interviews, review jail call recordings, and the like. Jennifer

Fitzgerald serves as First Assistant District Attorney, and has since 2013, before DA Gulluni took office. She held various positions in the DAO before that, and has practiced criminal law, including as a defense attorney, since 1987.

IV. The DOJ Report, Civil Action, and Consent Decree

On July 8, 2020, the Civil Rights Division of the United States Department of Justice and the United States Attorney's Office for the District of Massachusetts jointly issued a 28-page report entitled "Investigation of the Springfield, Massachusetts Police Department's Narcotics Bureau." The DOJ Report states that the investigation began on April 13, 2018, covered a period of six years beginning in 2013, and included review of "over 114,000 pages" of materials, as well as interviews with SPD officers, City officials, lawyers, and community members. The Report recites at the outset that DOJ "does not serve as a tribunal authorized to make factual findings and legal conclusions binding on, or admissible in, any court, and nothing in this Report should be construed as such. Accordingly, this Report is not intended to be admissible evidence and does not create any legal rights or obligations."

The overall conclusion of the report is that "there is reasonable cause to believe that Narcotics Bureau officers engage in a pattern or practice of excessive force in violation of the Fourth Amendment of the United States Constitution." "Specifically," the report says, the investigation "identified evidence that Narcotics Bureau officers repeatedly punch individuals in the face unnecessarily, in part because they escalate encounters with civilians too quickly, and resort to unreasonable takedown maneuvers that, like head strikes, could reasonably be expected to cause head injuries."[10] The report attributes this pattern or practice to "systemic deficiencies

[10] After release of the DOJ report, SPD disbanded the Narcotics Bureau, transferred its officers, and assigned narcotics enforcement to a newly created Firearms Investigation Unit, which also handles warrant apprehension, vice crimes, property cataloguing and storage, and licensing.

in policies, accountability systems, and training," in the Springfield Police Department, including insufficient reporting requirements, which enable officers to "routinely avoid reporting any use of hands-on force or to submit vague and misleading reports." The Report further states that the investigators found examples "where Narcotics Bureau officers falsified reports to disguise or hide their use of force." The Report bases this conclusion on what its authors deem to be inconsistencies among arrest reports, use-of-force reports, prisoner injury files, photographs, video-recordings, and IIU investigations.

Further, the report states, supervisors "fail to effectively review uses of force" that officers report, and deficiencies in the Department's "broader systems of accountability" exacerbate these issues. As an example of such deficiencies, the report notes the failure of senior command staff to report questionable force incidents to the IIU, despite a policy requiring them to do so, along with a lack of "critical content" in IIU reports, resulting in no sustained findings of excessive force in the six-year period reviewed. The report states also that, although the investigation focused on the Narcotics Bureau, "our conclusion is supported by evidence of other SPD officers escalating encounters and employing head strikes without justification."

The Report describes incidents that "have raised public concern regarding force and accountability issues . . . within the Narcotics Bureau in particular," along with other incidents that, in the view of the investigators, involve use of excessive force and/or inadequate or false reports. In total, the report describes some 23 incidents.[11] The Report does not provide names, dates, locations, case numbers, or other identifying information for any of the incidents; in some instances, the report uses initials that it identifies as pseudonyms.

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[11] The precise number of incidents is difficult to determine because, as discussed further *infra*, the report does not identify the incidents, and some of the descriptions appear to overlap.

Two of the incidents described are recognizable from materials in the record of this case or otherwise publicly available. One such incident resulted in federal indictment of former Officer Gregory Bigda for civil rights violations in connection with his arrest of three juveniles on the night of February 26-27, 2016. The arrest arose from the theft of an unmarked police vehicle. Bigda interrogated the juveniles at the Palmer police station. The interrogation was video-recorded over some nine hours. Part of the recording is embedded in the Corrected Petition. That portion of the recording reveals that Bigda interrogated the juveniles without a parent or other interested adult present, that he used profane and racist language, and that he threatened the juveniles with both physical violence and planting of evidence to subject them to lengthy incarceration. Bigda's statements to the juveniles included repeated assertions that he could engage in the threatened conduct and "get away with it."

The video shows Officer Luke Cournoyer present; Cournoyer does not join in Bigda's conduct, but he does not intervene to stop it, nor did he report it. Officer Jose Robles was in the dispatch room during the interrogation, and was in a position to see and hear parts of it. Like Cournoyer, he did not intervene, and did not report it until the IIU directed him to submit a report after the video became public in September of 2016. Although the federal indictment alleged that Bigda kicked one of the juveniles, that conduct does not appear in the video recording, and apparently was alleged to have occurred at a different location.[12]

The DAO requested the video of the interrogation from the Palmer Police Department on February 29, 2016, received it on March 14, 2016, and made it available to counsel for the three

[12] The United States Attorney first obtained an indictment against former Officer Stephen Vigneault for kicking the juvenile, then dismissed the charge against Vigneault on January 22, 2020, after the juvenile identified Bigda as the one who kicked him.

juveniles, who retrieved it from the DAO on April 25, 2016. The ADA assigned to prosecute the juveniles viewed the video in July of 2016, in preparation for trial, and brought it to the attention of his supervisor, who informed the First Assistant ADA. The video became the subject of media reports in September, 2016. Since October, 2016, the DAO has disclosed the video in all cases in which Bigda was involved. Initially, the DAO requested non-disclosure orders to protect the identities of the juveniles; it abandoned that practice since the video has been widely disseminated. At the time of the DOJ Report, the federal indictment against Bigda was pending. He was acquitted on December 13, 2021. He is no longer employed by SPD.

Multiple SPD officers and officers from other police departments participated in the arrest of the juveniles. A Wilbraham officer wrote a supplemental report in which he stated that he saw a plainclothes Springfield officer kick one of the juveniles. He did not identify the officer. The DAO disclosed the Wilbraham officer's report to counsel for the three juveniles, but did not disclose it to counsel in any other cases. The DAO's view, as articulated by First Assistant DA Fitzgerald, is that without identification of an officer whose testimony might be subject to impeachment based on the Wilbraham report, the DAO cannot identify any set of cases in which to make disclosure. The Wilbraham report is included in the materials being distributed to attorneys in the process that is now on-going, discussed *infra*.

The other recognizable incident described in the DOJ Report was an altercation between a group of off-duty officers not assigned to the Narcotics Bureau, and a group of civilians, in April of 2015, outside an establishment known as Nathan Bill's. SPD Captain Trent Duda, then head of the Detective Bureau, investigated the incident, and referred it to IIU Sgt. William Andrew, who also investigated, and each of them compiled a report. In October of 2015, SPD referred the matter to the DAO to determine whether to bring criminal charges. From the time of

the referral, nearly a year passed before the DAO obtained from SPD the full file of the IIU investigation, including witness interviews, video surveillance footage, and other supporting materials. The DAO, after its review, concluded that it lacked probable cause to bring criminal complaints against any officers, because the evidence did not sufficiently identify the perpetrators of criminal acts.

The DAO issued a report of its evaluation on February 2, 2017, and posted its report on its public website on that date. District Attorney Gulluni gave interviews on the topic with multiple news media outlets, and the matter was the subject of news media reports in February of 2017 and over the next several months.[13] The DAO has provided its report and the Duda and Andrew reports to media outlets in response to public records requests.[14] Other than by those means, the DAO has not provided its report to counsel in any cases. As explained by First Assistant DA Fitzgerald, in the absence of evidence sufficient to support a determination that any particular officer committed any offense, the DAO has concluded that it cannot identify a set of cases in which the information might provide potentially exculpatory material.

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[13]The evidence leaves some uncertainty as to exactly which news media reports, or portions of them, appeared when. A print-out of an on-line article from MassLive bears a date of February 3, 2017, but reports an event "in March." The only sense I can make of this is that on-line articles tend to be updated over time, so that different versions of an article appear at different times.

[14] Here again there is some uncertainty as to timing. The record includes a series of correspondence between February 22, 2017, and April 4, 2017, regarding an appeal by a MassLive reporter to the Secretary of State from a refusal by the City of Springfield to produce these reports in response to public records requests. Petitioners suggest that it is implausible that MassLive would have pursued such an appeal if the DAO was already providing the reports. The precise timing is uncertain, but it is clear that these reports were publicly disseminated at least from April of 2017. The evidence does not indicate whether or to what extent the materials released were redacted.

Having concluded that it could not bring any charges from the Nathan Bill's incident, the DAO referred the matter to the United States Attorney, who in turn referred it to the Massachusetts Attorney General. The Attorney General's office (AGO) presented the matter to a special statewide grand jury. Some of the SPD officers who were called to the grand jury declined to testify on 5th Amendment grounds. The AGO provided no information to the DAO about those refusals.

On March 27, 2019, the special statewide grand jury issued indictments against fourteen SPD officers,[15] charging them variously with assault crimes, perjury, filing false reports, and conspiracy.[16] The AGO notified the DAO of the indictments immediately after their issuance. At the DAO's request, in early April the AGO provided a letter describing the charges against each officer, but did not provide grand jury minutes, copies of the indictments, or other underlying materials.[17] Since then, the DAO has provided the AGO's letter regarding each of the officers to defense counsel in each case involving each indicted officer. Soon after the indictments, counsel for each of the officers notified the DAO that they would not appear in response to subpoenas, relying on their 5th Amendment rights. As a result, the DAO could not prosecute cases in which the testimony of any of these officers would be necessary.

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[15] Officers Basovskiy, Billingsley, Bortolussi, A. Cicero, C. Cicero, D'Amour, Diaz, Gentry-Mitchell, Lewis, Nguyen, Perez, Rodriguez, Wadjula, and Williams.

[16] A news media account shortly after the indictments reported that the AGO had obtained video surveillance footage that the DAO had not, showing aspects of the incident that did not appear in the video the DAO had reviewed. The evidence before me does not address that point.

[17] Indictments, unless sealed by court order, are publicly available in each court file. No evidence suggests that these indictments were ever sealed. Grand jury minutes are sealed by law, subject to certain exceptions.

As of the most recent information provided to me, nearly all of the charges arising from the Nathan Bill's incident have been resolved. Officers Daniel Billingsley and Christian Cicero were convicted after trial of three counts of assault and battery each.[18] Other charges against Officer Billingsley ended in acquittal or required findings of not guilty, and the AGO filed a *nolle prosequi* of the charge of conspiracy against him. Other charges against Officer Cicero also ended in acquittal or required findings of not guilty, but one charge of conspiracy remains pending against him. Officer Jose Diaz was acquitted of eight charges at trial, and the AGO filed a *nolle prosequi* of the charge of conspiracy, but a charge of intimidation of a witness remains pending against him. Charges of filing a false report, perjury, and intimidation of a witness remain pending against Officer Shavonne Lewis. Charges against Officer Derrick Gentry-Mitchell of perjury and filing a false report are stayed pending the Commonwealth's appeal from an order of dismissal of a charge against him of intimidation of a witness.[19] All charges against the other eight officers have been resolved by acquittal, required finding, dismissal by the court, or *nolle prosequi*.

Upon issuance of the indictments, SPD placed the fourteen officers on leave. In April of 2020, it reinstated five of them, including Lewis and Gentry-Mitchell. The record does not disclose the present duty status of the others, although there is evidence that some of them, including Officer Igor Basovskiy, have been involved in cases since the conclusion of the charges against them.

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[18] The evidence does not indicate what if any disciplinary action the SPD has taken as a result of those convictions.

[19] The appeal is Appeals Court No. 2022-P-0323. As of this writing, the Commonwealth has filed its brief, and the deadline for appellee's brief has been extended to November 30, 2022.

A third incident described in the DOJ Report that appears to be recognizable from public sources resulted in a January 2016 indictment of a former Narcotics Bureau evidence officer for stealing cash from the evidence room. The DOJ Report indicates that the former officer died while that matter was pending.[20]

The DOJ Report sets out a detailed critique of SPD policies relating to use of force and reporting, as well practices in supervisory review, complaint procedures, IIU investigations, and discipline. The DOJ's critique relies in part on statements of community members, and on a decision denying summary judgment in a civil case against the City.[21] The report attributes failures in IIU investigations to "lack of adequate policies, guidance, and training for officers regarding how to conduct internal investigations." The critique also extends to the structure and practices of the Community Police Hearing Board (CPHB), including lack of training and

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[20] Defense Attorney Thomas O'Connor believes he has identified one of the incidents described in the DOJ Report, at pp. 12-13, as a case in which he was appointed in late 2019 or early 2020 to represent a juvenile. One of the officers involved in Attorney O'Connor's case was among the civil defendants in the Bradley case, to be discussed *infra.* After that officer was found liable in that case, the DAO sent notice of the civil judgment and underlying materials to Attorney O'Connor. He did not find the information useful to his defense of the juvenile. The juvenile case was tried in 2021, ending in a required finding. Attorney O'Connor attributes the result to inadequate identification.

[21] The civil case, *Douglas* v. *City of Springfield*, U.S. Dist. Ct. No. 14-30210-MAP (D. Mass. Jan. 1, 2017), 2017 WL 123422, will be discussed further *infra*. The Report indicates that the case was settled for $60,000 in 2017. Records of the Community Police Hearing Board (CPHB), to be discussed further *infra*, confirm that settlement. Citing news media sources, the report states that Springfield paid "over $5.25 million in police misconduct settlements between 2006 and 2019," compared with $249,000 for Bridgeport, Connecticut, and $817,000 for Lowell, cities of size comparable to Springfield. The CPHB records, to be discussed further *infra*, do not confirm the total cited in the Report.

resources.[22] The Report concludes with a set of recommendations for changes in policies and practices in the Narcotics Bureau and SPD as a whole.

Among the materials the DOJ report cites is an April, 2019, report issued by the Police Executive Research Forum (PERF), under contract with the City of Springfield. At the City's request, PERF compared SPD's internal investigations processes with national guidelines issued by DOJ in 2008, which PERF described as "best practices." PERF found significant departures from those guidelines, and recommended changes to address them. PERF also recommended changes in the structure and practices of the CPHB, an automated data collection system to improve the handling of civilian complaints and to support the development of an early intervention system, and other changes to improve SPD's procedures. PERF's focus was on policies and practices. PERF did not review individual case files or reports, and made no findings or conclusions regarding individual incidents or officers.

On April 13, 2022, DOJ filed suit against the City of Springfield in the United States District Court for the District of Massachusetts, alleging that SPD "had engaged in a pattern or practice of conduct by law enforcement officers that deprives persons of rights, privileges, and immunities secured and protected by the Constitution and laws of the United States." Simultaneously with the filing of the complaint, DOJ and the City filed a 69-page settlement

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[22]The CPHB was a civilian body created by executive order of the Mayor of Springfield to hear allegations of police misconduct after investigation by the IIU, and make findings and recommendations. The DAO had no role in the CPHB. On March 1, 2022, in accord with the decision of this Court in *City Council of Springfield* v. *Mayor of Springfield*, 489 Mass. 184 (2022), the Mayor announced the appointment of a five-member Board of Police Commissioners, with authority to conduct disciplinary hearings and determine disciplinary matters. That body has superseded the CPHB.

agreement. By order dated April 29, 2022, the Court approved the settlement agreement and entered it as a consent decree.

The agreement does not acknowledge any violation of law. It recites that the parties have entered into it "[i]n the interest of avoiding costly and protracted litigation." The agreement expresses the City's commitment to "ensuring that police services in Springfield are delivered in a manner that is constitutional and effective at protecting the public and officers alike . . . including by improving . . . force policies and reporting practices; increasing accountability; providing officers with appropriate training; and increasing transparency." It goes on to provide in detail for policies to be adopted by SPD regarding use of force, foot pursuits, vehicle pursuits, training, reporting, documentation, supervision, complaint processes, investigations, discipline, data collection and analysis, the use of body cameras, community outreach, and other topics. The agreement provides for appointment of a jointly selected "Compliance Evaluator" to oversee and report on its implementation, using specified outcome measures. The agreement does not address any issue regarding SPD's disclosure of exculpatory information to the DAO or to counsel or parties in any case.

V. The DAO's Disclosures, Brady Policies, and Actions in Response to the DOJ Report

The DAO was aware of the DOJ's intention to investigate before the investigation began; in 2017 DOJ invited the DAO to attend a meeting at which DOJ provided some information about its intentions, but it did not invite the DAO to participate in the investigation. The DAO next heard about the matter from news media reports when the Report was issued in July of 2020, and in a telephone call from a DOJ attorney soon after. First Assistant DA Fitzgerald read the report, and began a series of efforts, to be described *infra*, to obtain the underlying information. The DAO also sent the report to CPCS and HCLJ, with letters dated August 12, 2020, asking them to share the report with attorneys who were or had represented clients in

matters involving SPD. Over the following months, the DAO sent letters to CPCS and HCLJ updating them on efforts to obtain the information underlying the DOJ report.

As cases described herein reflect, starting well before the DOJ report, the DAO has made efforts to disclose to defense counsel, and/or to make public, information in its possession regarding criminal charges against police officers and admitted or established acts of dishonesty. Until recently, however, the DAO did not have a formal policy or systematic practice regarding such disclosures, or for seeking out information not in its possession regarding such topics.

Beginning in September of 2019 and continuing through November of 2020, the ACLU Foundation of Massachusetts (ACLUM) made a series of public records requests to the DAO, seeking information about policies and practices regarding disclosure of information about SPD officers "known or suspected to have committed an offense," investigations on the subject, training of ADAs, "credibility assessments" of officers, docket numbers of cases dismissed "due to a determination that an officer gave false statement(s) or testimony," and related material. After release of the DOJ report, these requests also sought communications with federal officials about the report.

The DAO responded initially by letter dated September 21, 2019, providing the following: (a) federal grand jury minutes with names of individual officers redacted; (b) letters from the US Attorney, dated June 12, 2019, enclosing redacted grand jury minutes from the federal investigation that led to indictments of Officers Vigneault and Bigda (these will be discussed further *infra*); (c) an internal memorandum dated May 13, 2019, regarding disclosure of certain information from the Bradley civil case; and (d) letters from the AGO regarding indictments of officers in connection with the Nathan Bill's incident. The DAO's letter stated that "there are no records revealing any training administered to attorneys . . . and/or SPD

officers" regarding disclosure obligations, "no written 'policies procedures, and/or analyses" on that subject, and no "record which represents credibility assessments of SPD officers." As for emails relating to allegations of police misconduct, the letter stated that "there is no feasible search method for this item." As for records relating to any investigation, the letter took the position that the request called for materials exempt from disclosure under the public records law.

In a further response dated July 31, 2020, the DAO stated that it does not "track or maintain a list" of materials related to allegations of police or prosecutorial misconduct, or of cases in which such allegations arise, and does not have any "protocol, list, or document relating to police officers . . . that have been or must be the subject of discovery notices."[23]

The DAO provided an internal memorandum from the chief of the DAO's Appeals Unit to all ADAs, informing them of a jury verdict in the Bradley civil case finding two officers liable for civil rights violations, and alerting them to their obligation to disclose that information, and underlying materials, to defense counsel in all cases originating since the date of the incident that gave rise to the civil case, in which either of these officers had testified or authored a report or would be potential witnesses. The memo states that the DAO is in the process of reviewing closed case files in which these officers were involved, so as to make disclosure in those cases.[24]

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[23] As will be discussed further *infra*, as of that time the DAO had begun to compile a database of materials for disclosure. The grand jury minutes provided with the response were the first items in the database.

[24] The plaintiff in the civil case was Daniel Bradley, who was stopped on August 25, 2015, and charged with assault and battery on a police officer, resisting arrest, and disorderly conduct. Bradley alleged that the officers stopped him without probable cause, forcibly removed him from his vehicle, physically assaulted him, and made a false criminal complaint against him. These allegations may correspond to an incident described in the DOJ report at p. 15, with the pseudonym "A.E."

Within days after issuance of the DOJ Report, the DAO sent it to CPCS and HCLJ, and embarked on a series of communications, by telephone and letter, with DOJ and the US Attorney's office seeking information underlying the report.

On August 6, 2020, ACLUM wrote to the DAO, citing the DOJ Report along with "longstanding concerns about, and reports of, pervasive misconduct among SPD officers." The August 6 letter characterized the DAO's previous responses to the public records requests as "remarkable," "rais[ing] serious questions about whether your office's response to this situation is adequate as a matter of law." The letter asserted that "your office has access to the same information made available to the DOJ," that other DAs "commonly maintain *Brady* lists . . . and routinely make broad disclosures," and that "the Commonwealth is duty-bound to investigate [the] misconduct [described in the DOJ Report], including the extent of the misconduct, and disclose it to defendants in both pending and closed cases." The letter posed a series of questions relating to the DAO's actions in response to the DOJ report, and more generally to the DAO's disclosure practices.

The DAO responded by producing copies of correspondence showing its efforts to obtain the information underlying the DOJ report. In letters dated August 19, 2020, to the United States Attorney and the DOJ, the DAO requested all reports and related materials referred to in the DOJ Report as showing inconsistency, falsehood, or use of excessive force. The DAO's letter cited the DAO's obligations of disclosure to defendants in pending and post-conviction cases. The letter summarized previous telephone communications between the offices beginning days after the release of the Report, in which the DAO repeatedly requested these materials, and the federal officials repeatedly refused to provide them. United States Attorney Andrew E. Lelling responded, by letter dated October 29, 2020, declining to provide any materials, stating that the

materials "belong to and originated with" the SPD, that SPD had produced them to federal officials under a confidentiality agreement, and that the documents are available to the DAO from SPD. Lelling characterized that letter as the "final agency decision."

On May 19, 2021, the DAO filed suit in the United States District Court for the District of Massachusetts against the then Acting United States Attorney, seeking judicial review of the denial of its requests for access to "the 'false' or 'falsified' Springfield Police Department reports and attendant photographs or video/digital images, records" referenced in the DOJ Report. Gulluni *v.* Mendell, C.A. No. 3:21-CV-30058-NMG. The DAO's complaint asserted that it needs the materials to fulfill its responsibility to "disclose to an individual charged with a crime . . . any known relevant, material, exculpatory evidence in its possession, custody or control." The complaint sought an order that the United States Attorney provide: "(1) A copy of all Springfield Police Department reports, including, but not limited to incident reports, investigative reports, arrest reports, use-of-force reports, or contents of a 'prisoner injury file' . . . determined as examples where Narcotics Bureau officers falsified reports to disguise or hide their use of force[;] (2) A copy of all Springfield Police Department reports, including, but not limited to incident reports, investigative reports, arrest reports, use-of-force reports, or contents of a 'prisoner injury file' (as described in the Report, at 7), determined as '. . . a pattern or practice . . . . [where] officers made false reports that were inconsistent with other available evidence, including video and photographs . . . . ,' and; (3) A copy of all photographs, or video/digital material determined as inconsistent with any Springfield Police Department officers' reports, including, but not limited to incident reports, investigative reports, arrest reports, use-of-force reports, or contents of a 'prisoner injury file.'"

The U.S. Attorney defended the suit on the grounds that (a) the documents are the property of SPD, which provided them under a confidentiality agreement, and are available to the DAO from SPD; (b) DOJ's identification of "false" or "falsified" reports is work-product; and (c) the material is subject to investigatory privilege. Additional points made in the U.S. Attorney's opposition to the DAO's motion for summary judgment were that "there were only three incidents as to which Defendant made a determination . . . that there was untruthfulness on the part of the SPD's Narcotics Bureau," that the "investigation was of the use of excessive force and not of untruthfulness, and it was of the Narcotics Bureau and not SPD as a whole," and that the DAO and SPD would have to conduct their own investigation "for other instances of untruthfulness or other Brady information" even if the DOJ were to release the documents sought.

On September 6, 2022, the federal court (Gorton, J.), issued a memorandum of decision and order granting summary judgment for the defendant. Applying the arbitrary and capricious standard applicable to the case under the federal Administrative Procedure Act, and giving deference to the executive branch decision to withhold documents, as required under that Act, the court ruled that the standard was not met. As of the most recent information provided to me, the DAO is deciding whether to appeal.

Meanwhile, the DAO pursued efforts to obtain the records from SPD. In a letter to SPD Commissioner Cheryl Clapprood, dated December 2, 2020, the DAO asserted that SPD's "production or disclosure of 'false' or 'falsified' Springfield Police Department reports and attendant photographs or video/digital material" are necessary for the DAO to meet its "constitutional, statutory, and ethical obligations." The DAO requested that SPD provide all reports "where Narcotics Bureau officers 'falsified reports to disguise or hide their use of

force,'" all reports where "officers made false reports that were inconsistent with other available evidence . . .," and all "photographs, or video/digital material that is inconsistent with" SPD reports.

City Solicitor Edward M. Pikula responded by letter dated December 10, 2020, stating that the City had produced over 114,000 pages of documents to DOJ, and that DOJ had not provided "any identifying information" as to the incidents described in its Report. He advised that the Commissioner had assigned personnel to review the report in an effort to identify the incidents, and that effort was on-going. Pikula expressed the SPD's disagreement with some of the statements in the report, along with its acknowledgment of the need for reforms and its initiation of efforts to make changes in accord with the DOJ's recommendations, with the assistance of former Chief Justice Roderick Ireland. The letter concluded by stating that "[all of the materials supplied" to the DOJ "are available for review by your office in a reasonable format and on a reasonable schedule in a phased production, similar to the process followed with the" DOJ.

After further communication by telephone and email, the DAO responded by letter of March 11, 2021, requesting that SPD provide whatever materials it had identified as "'false' or 'falsified.'" The DAO cited its obligation to "pursue the ends of justice," but stated that that obligation "does not direct or allow me . . . to recreate a civil investigation that was conducted by another law enforcement agency through the authority of specific federal law," such that "the purpose, scope, and timing of the DOJ investigation . . . cannot, legally or practically, be replicated by my office."

After further communication by email, City Solicitor Pikula sent a letter to the First Assistant DA, dated July 2, 2021. Pikula reiterated the lack of identifying information in the

DOJ report, and the SPD's willingness to provide the DAO with access to everything the DOJ reviewed. He explained that the SPD had given the DOJ direct access to its record management system, and stated that he was uncertain whether "our IT professionals are able to accurately track what information [DOJ] accessed." Pikula stated further that "a report was prepared by Deputy Chief Kent but I believe it is confidential as protected by the work-product doctrine as an internal memorandum prepared for the purpose of discussing potential litigation strategy." This was the first time the City disclosed to the DAO the existence of the Kent report.

Pikula proceeded to set forth a summary of each incident described in the DOJ report, indicating that sixteen of those incidents "could be reasonably identified." He attached an appendix of some 700-800 pages of reports of the sixteen identified incidents, requesting that the documents not be released unless redacted of CORI or privileged information. He qualified that the records provided "are not exhaustive as to each incident" but were provided with the intent to identify the incidents described to the extent SPD was able. The other incidents described in the DOJ Report, he indicated, SPD had been unable to identify.

With the information and documents provided, the DAO embarked on a process of identifying officers named in the documents as somehow involved in these incidents, then identifying some 8000 pending or past cases involving those officers, then attempting to identify the attorney of record in each case and find addresses for them, and then providing to each attorney the documents related to each of that attorney's cases.[25]

Identifying attorneys and finding their addresses has been challenging; the information may or may not be in the DAO's case database or in MassCourts, and multiple attorneys may

[25] The documents have been provided through links to electronic files, or on compact disks, except in two instances when attorneys requested and received paper documents.

have appeared in a case at various times. When no attorney address is available from these sources, the next source to consult is the Board of Bar Overseers website, but even that may lack information for an attorney who has moved out of state or is otherwise inactive. When the DAO is unable to find an attorney's address, the DAO sends the material to CPCS. For Juvenile Court cases, the DAO has no access to MassCourts records, and must rely on its own database or paper files.

The process is intensive and time consuming, and as of the most recent information provided to me, it is still ongoing and is likely to take at least several more months. The DAO has not yet begun a process of attempting to notify defendants who have represented themselves, and has not determined how to go about that other than to consult Registry of Motor Vehicles records. Of the several thousand letters sent, about twelve have generated calls to the DAO seeking further information, or assistance with accessing links, which an administrative assistant at the DAO has provided.

As an initial step toward notification, on August 26, 2021, the DAO provided Pikula's letter and the appended material (redacted "to protect possible criminal histories and personal information") to the CPCS Attorney-in-Charge and the president of HCLJ, saying in its cover letter that it was providing the material in this manner, "so that it can be disseminated as widely and quickly as possible." The DAO's letter pointed out that some of the incidents described in the DOJ report "remain unidentifiable," and further noted the City's refusal to provide the Kent report.

Since then, as the DAO has identified attorneys and found addresses for them, it has sent them standard form letters, enclosing materials identified as related to a pending or closed case in which that attorney represented a defendant. The standard form letter is headed "Notice of

Potentially Exculpatory Information," and informs the recipient that the attached (or linked) documents "were provided in response to the [DAO's] request that the Springfield Police Department provide our office with any documents in their possession that might contain potentially exculpatory, *Brady*, material including any reports from incidents described in the DOJ report dated July 8, 2020. These materials have been redacted to protect possible criminal histories and personal information." Some of the redactions cover entire pages. None of the recipients has asked the DAO for unredacted copies. The standard letter takes no position on whether any of the material is exculpatory, or on how it may be so. The CPCS Springfield office has received several hundred of these letters, and has referred them to CPCS's "special projects unit."

Meanwhile, the DAO continues to press the City for the Kent report, without success. In a letter dated August 24, 2021, City Solicitor Pikula elaborated on the work-product claim, explaining that Kent had been assigned to prepare his report in anticipation that DOJ would sue the City based on the incidents described in the DOJ Report. His letter advised that the City and DOJ "have been actively participating in settlement negotiations since the issuance of the [DOJ] report," that he hoped and expected to reach a settlement agreement, and that he did not "wish to jeopardize those discussions or compromise our bargaining position by release of the [Kent] report." He stated, "I have provided you with the underlying factual information that the report is based on in the appendix to my letter of July 2, 2021, but not the report itself which provides analysis, impressions, or opinions." He reiterated that "the records are by no means exhaustive, but simply used as a reference to identify the cases, officers, and individuals involved."

The DAO responded by letter dated September 1, 2021, setting forth a list of 30 officers it had identified as having some involvement in the incidents reflected in the materials provided,

and asking that the City "carefully check the SPD files to assure me that you have produced all potentially exculpatory information regarding these 30 officers." The list included Deputy Chief Kent. The letter expressed disagreement with the City's position regarding Kent's report, and informed Pikula that "all of our disclosures will inform defense counsel that the report exists and that it is not within the control of our office so that any defendant who seeks the report can file the appropriate motions under Rule 17."

In a letter to the DAO dated October 14, 2021, CPCS conveyed its dissatisfaction with the DAO's disclosures. Expressing greatest concern for "those defendants who are currently in custody," the letter stated that "it is vital that all relevant defendants be identified by name and date of birth and the docket number of the relevant case," so that CPCS "can determine who among them is in custody and then immediately assign counsel to represent those incarcerated individuals." As for other defendants, citing *Bridgeman* v. *Dist. Attorney*, 476 Mass. 298, 331 (2017), the letter took the position that "notice should be sent directly to them, not only their former attorneys," who may "not receive the notice or have little incentive to act on it," and who should not bear the burden of "locating and notifying every former client among the more than 8,000 cases identified by your office as being potentially affected by the misconduct of Springfield police officers." Further, the letter stated, again citing *Bridgeman*, notices to defendants must be "clear, instructive, and accessible," explaining the reason for the notice and directing inquiries to CPCS, and indicating in multiple languages that the notice is important and should be translated. Further, the letter asserted, the discovery "should include any and all exculpatory evidence," but should not consist of "'open file' or discovery dump" of "a voluminous mass of evidence." The DAO, the letter asserted, "has a duty to both fully

investigate the misconduct at the Springfield Police Department and to produce exculpatory evidence in a clear and usable form."

On that basis, CPCS requested that the DAO (1) "include in the list of relevant defendants those whose cases were pending at the time of the incident identified in the DOJ Report"; (2) provide to CPCS a spreadsheet with names and dates of birth of relevant defendants and docket numbers; (3) notify non-custody defendants, not their counsel of record; (4) include in such notices the docket number of the case, names of officers, and "an explanation that the officers were found by the DOJ to have committed misconduct and this fact may be relevant to the defendant's case"; (5) direct defendants to contact CPCS, stating that CPCS can provide representation at no cost, and include its contact information.

First Assistant DA Fitzgerald replied by letter dated November 18, 2021, declining to adopt CPCS's requests. The letter distinguished the Sonja Farak and Annie Dookhan situations, pointing out that the two chemical analysts had admitted their own misconduct and had provided "a factual description of its contours" by their guilty pleas, and that in *Matter of a Grand Jury Investigation*, 485 Mass. 641 (2020), the first Massachusetts case imposing a *Brady* obligation for information that might affect credibility in unrelated cases, "the involved officers admitted under oath to making untruthful statements." The letter asserted that "the allegations of police misconduct raised by the DOJ report remain just those – allegations – which have for the most part neither been admitted by the participants (including some whose identity has not been definitely established) nor adjudicated by any fact finder." The letter pointed out further that Farak and Dookhan's actions "directly affected an element of the drug offense charged in each case," while the matters in issue here involve "collateral impeachment evidence." Ultimately, the letter concluded, "we believe that the steps we are taking with regard to the DOJ report fully

comport with our *Brady* obligations. To the extent an individual lawyer in a specific case believes otherwise, the full panoply of procedures and remedies provided by the Massachusetts Rules of Criminal Procedure remain available."

After the settlement agreement and consent decree between DOJ and the City, the DAO renewed its effort to obtain the Kent report. In a letter dated May 4, 2022, to newly appointed City Solicitor (former District Court Judge) John Payne, the DAO argued that the settlement should obviate any need to withhold the report as work-product, and reiterated its need for access to fulfill its disclosure obligations. Payne did not respond until August 24, 2022, when he reiterated in an email that the City would not provide the report. As of the close of evidence in this matter, the DAO does not have and has not seen the Kent report, nor has the Kent report been disclosed to any defense counsel.

The City's work-product claim as to the Kent report has become an issue in both civil and criminal cases in Superior Court, and in criminal cases in District Court. All the judges who have ruled on the issue have upheld the claim. In one District Court case, Commonwealth v. Bruno-Villanueva, 1923CR004823, at a hearing on a Rule 17 motion that did not mention the Kent report, and in the absence of any representative of the City, defense counsel orally requested an order that it be produced. The ADA objected only on the ground that the City had not been notified. The judge ordered it produced by September 14, 2022. The City has not produced the report, and has indicated to the DAO its intention to move for reconsideration. Bruno-Villaneuva is the brother of the juvenile represented by Attorney O'Connor in the case referenced *supra*, as arising from the incident Attorney O'Connor believes corresponds to the description at pp. 12-13 of the DOJ Report.

The DAO continues to make disclosures to defense counsel in cases involving officers identified as involved in the incidents described in the DOJ report. The record does not identify any case in which defendants have sought to admit any of these materials in evidence at trial, or any case in which defendants have filed motions for post-conviction relief based on these materials.

In 2021, the DAO adopted a practice of sending annual letters to police departments requesting that they "provide names and supporting information of any officers" charged with or convicted of any crime, found to be untruthful or to have committed misconduct "that implicates the officer's credibility," to "engage in a pattern of bias, racial profiling, or discrimination," to "use excessive or unreasonable force," or any who has been the subject of an investigation resulting in a finding "that the officer engaged in conduct that potentially constitutes *Brady* material."

Sometime in 2020 or 2021, the DAO formed a "Brady Working Group," to formulate policies and practices regarding disclosure of potentially exculpatory information, and to address questions arising in cases. The group consists of high-level supervisory personnel in the DAO, and has engaged retired Justice Robert J. Cordy as a consultant. Based on the work of that group, and after consultation with Justice Cordy, in August of 2022 the DAO adopted a seven-page "Brady Policy."

That document, which is provided to each police chief with the 2022 version of the DAO's annual letter, sets out the law regarding a prosecutor's obligations to disclose exculpatory information, including information affecting the credibility of material witnesses. It describes the DAO's procedures to meet those obligations, including the creation of a database of "possible exculpatory and impeachment material concerning law enforcement agency

employees." The policy states that "[t]he relevance of the disclosed information may still be litigated if appropriate, but it is this Office's policy to err on the side of disclosure." The policy provides for review of disclosure questions by the DAO's "Exculpatory Evidence Team," with notice to the law enforcement agency employee in question "where appropriate," and an opportunity for that person to provide written submissions, "such as a document outlining the employee's version of events."

The policy provides that law enforcement agency employees are to be included in the database based on conduct or circumstances in a list of categories, including: criminal conviction or continuance without a finding; an open criminal case; a finding of civil liability for conduct related to performance of duties; a finding of having tampered with or mishandled evidence; a finding of having lied about use of excessive force; a finding of deceit or intentional falsehood or reckless disregard for truth; a finding by a judge of falsehood or reckless disregard for truth in a warrant application, a *Franks* hearing, or a trial; a finding of falsehood about a defendant's conduct allowing prosecution of a false or inflated charge; and a finding of having used excessive force, lied about the use of excessive force, committed an act of purposeful deceit, mishandled or tampered with evidence, or engaged in a pattern of bias, racial or ethnic profiling, or discrimination.

The DAO's policy does not include judicial findings of falsehood in hearings on motions to suppress, or other pre-trial proceedings except those specified. As explained in the testimony of First Assistant DA Fitzgerald, the DAO determines whether to include such findings based on a combination of whether the evidence presented at the motion hearing was complete, and whether the DAO agrees with the judicial finding.

The DAO has also developed an internal database of so-called *Brady* material, available to all ADAs through a Sharefile system, indexed by officer names. The database began in late 2018 or early 2019 with the federal grand jury transcripts the DAO received at that time, to be discussed further *infra.* The database includes the letters received from the AGO regarding the Nathan Bill's incident, the 700-800 pages of materials identified by SPD as relating to incidents discussed in the DOJ report, and other materials. The DAO has developed a system of flagging its internal files for cases requiring disclosure of such materials by means of physical stickers on file jackets. No officer has been removed from the database since being placed in it.

VI. Civil Litigation, Judgments, and Settlements

The petition cites judgments and settlements against the City in cases alleging misconduct by police officers. The DAO has no role in civil litigation against the City or its officers, and the City does not routinely notify the DAO of such cases, although the DAO has at times received notice of judgments in such cases. The 2018 annual report of the CPHB provides a list of 54 civil cases disposed during the period 2006 through 2018. The list shows 32 cases settled in amounts ranging from $1,000 to $1,400,000, with a total amount of settlements of $4,828,903 in that period.[26] Of those not settled, the list shows 21 resolved by dismissal, finding of lack of probable cause, or defense verdict.[27] One case appears as resolved by "P's Hear. on Dam." in the amount of $85,003. An additional list of 15 cases pending as of the end of 2018 indicates that five of those cases were resolved in 2019 prior to issuance of the CPHB report: one by jury verdict for the plaintiff in the amount of $250,000, one settled for $12,000, one settled

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[26] In one of these cases, the list indicates "Pltf jdgmt/settled after" in the amount of $1,000,000.

[27] The list includes Massachusetts Commission Against Discrimination complaints, indicating that the settlement figures may include cases brought by employees alleging discrimination as well as complaints brought by civilians.

for $8,000, one dismissed on summary judgment, and one by jury verdict for the defense. The lists provide names and docket numbers of the civil cases, which would enable a reader to consult publicly available court records.

Among the cases that appear on these lists are Douglas v. Springfield, U.S.D.C. CV14-30210-MAP, and Vigneault v. Springfield, Superior Court No. 1779CV00060. Douglas is the case referenced in the DOJ report and settled for $60,000, as indicated *supra*. Vigneault appears on the CPHB list of cases pending as of the end of 2018.[28] In each of these two cases, a judge denied a defense motion for summary judgment, issuing a memorandum of decision that, in accord with the well-established standard applicable to such a motion, did not find facts or evaluate credibility, but considered all evidence in the light most favorable to the non-moving party and drew all inferences in favor of that party. These decisions do not establish any facts, but rule as a matter of law that the evidence offered, considered in that manner, suffices to establish a genuine dispute of material fact. For purposes of this case, the significance of these decisions is that they alert a reader to the existence of evidence that, if believed, indicates misconduct, including untruthfulness, by certain officers.[29]

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[28] Vigneault, a former SPD Narcotics Bureau officer, alleged in substance that he was forced out in retaliation for having reported instances of misconduct by Officer Bigda and others, including drinking on duty, using excessive force, and filing false reports. Vigneault's allegations include an account of the incident in which Bigda interrogated the juveniles. Vigneault alleged that other officers blamed him for the theft of the unmarked police vehicle, because he had left it running while he went into a shop to pick up pizza. Counsel have indicated that the case has been settled. News media accounts in April 2022 report a settlement amount of $350,000.

[29] Among the evidence the judge referred to in the Vigneault decision denying summary judgment was that five SPD officers refused to answer questions in depositions based on "extremely broad" assertions of their 5th Amendment rights. One of the five was Steven Kent, who later became Deputy Chief of SPD and authored the report discussed *supra*. Kent did answer questions at a later deposition in the case.

VII. Judicial Credibility Findings and Other Matters Relating to Officer Credibility

The petition alleges that the DAO has failed to make disclosures of instances when judges have found testimony of SPD officers not credible, or when other evidence reflects untruthfulness by SPD officers. The record indicates the following.

On August 28, 2018, Superior Court Judge Constance Sweeney held a hearing in the cases of Commonwealth v. Morales and Commonwealth v. Santiago, 1779CR00375 and 1779CR00376, to announce her findings and rulings after an earlier evidentiary hearing on a motion to suppress evidence seized in a search of a vehicle. The evidence included testimony of SPD Officer Felix Aguirre, regarding the SPD policy on towing and inventory of vehicles. Judge Sweeney stated that "his testimony plainly stated was not credible, . . . I don't believe what Officer Aguirre testified to, plain and simple." She characterized his version of the events leading to the search as "a fanciful tale," "a made up tale." She went on to say that "I'm really stressing this because . . . I've really never been so taken aback, no matter the seriousness of the issue before me, of a police officer really making it up as he went, quite frankly." Judge Sweeney further stated that "[e]ven if [his testimony] was credible, the burden would not have been met insofar as once the law was applied, it would have failed as a matter of law." She also did not credit most of the testimony of defendant Santiago, so that she had to rely primarily on dispatch logs and other materials submitted. Based on that evidence, she ruled that the inventory was unlawful, and allowed the motion to suppress. The case ended with the DAO's filing of notices of *nolle prosequi* as to all charges against both defendants on November 1, 2018.

The DAO conducted its own evaluation, and concluded that Officer Aguirre had misunderstood, but did not misrepresent, the SPD's policy on towing and inventory. On that

basis, the DAO has not disclosed Judge Sweeney's findings regarding Officer Aguirre's testimony in other cases involving him.

In a decision issued April 19, 2018, in Commonwealth v. Ladobe, 1779CR00208, and two companion cases, Superior Court Judge Michael Callan allowed a motion to suppress evidence seized by State Police in a traffic stop on the Massachusetts Turnpike. The trooper justified the stop on the ground that the vehicle's license plate was too dirty to be legible. The evidence at the hearing included a photograph taken from a Turnpike surveillance camera. Based on the photograph, Judge Callan found that the license plate was not so dirty as to be illegible, and on that basis found no reasonable suspicion to justify the stop. The DAO filed a *nolle prosequi* as to all three cases on April 24, 2018. The DAO conducted its own evaluation, and concluded that the trooper had not lied; what was legible in a still photograph would not necessarily be legible on a vehicle traveling at highway speed. On that basis, the DAO has not disclosed Judge Callan's finding as to the trooper's testimony in other cases.

On January 29, 2019, Springfield District Court Judge Charles Groce held a hearing in the case of Commonwealth v. Perez, 1923CR00353. The defendant faced charges of domestic assault, assault with a dangerous weapon against two police officers, and other offenses. The matter before the court on that date was the Commonwealth's petition for pre-trial detention based on dangerousness. Attorney Ivonne Vidal was appointed to represent Defendant Perez. She has filed an affidavit in this case, and testified before me on September 9, 2022.

At the hearing on the dangerousness petition, the Commonwealth offered police reports, recordings of interviews, and other materials, but no live witnesses. The two responding officers, Igor Basovskiy and John Wajdula, were on administrative leave pursuant to SPD policy

pending investigation of any officer-involved shooting.[30] Attorney Vidal did call the two officers, as well as a defense investigator. Her purpose, as she testified, was to challenge the Commonwealth's contention that the defendant's failure to follow police orders indicated his dangerousness.

According to the testimony of the two officers, they responded to a call reporting that the defendant was demanding entrance to a woman's home against her wishes, having returned after an earlier altercation with two women in the home. When the officers confronted the defendant outside the rear of the home, he was drunk and belligerent, and was shouting and banging on the rear door. He threatened to shoot the officers; "kept going to his waistband and his pockets"; "kept pacing around, turning around"; and "charged" and "lunged" toward the officers while holding a black object (later identified as a cell phone). In response, the officers testified, both of them shot the defendant multiple times.

The defense investigator described the defendant's wounds on his buttocks and his neck, described the physical characteristics of the location, and presented photographs of both. The materials in evidence included accounts of the shooting from the defendant and one of the women in the home; according to these versions, as described by the judge in his later findings, the defendant was attempting to run away from the officers at the time of the shooting.

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[30] These two officers were among those who were later indicted in connection with the Nathan Bill's incident, and have since been acquitted of those charges. As discussed *supra*, as of early 2017, well before the time of the hearing before Judge Groce, the DAO had completed its investigation of that incident, decided not to prosecute, and posted its report on its website. Although the incident and the DAO's report had received considerable publicity, Attorney Vidal had only a general awareness of allegations that police had assaulted civilians, and that the DAO had decided not to prosecute. She was not aware of alleged involvement by these two officers in that incident, nor did she make any inquiry of the DAO on that topic.

In findings and rulings stated on the record on February 7, 2019, the judge found that the defendant was dangerous to the women in the apartment, and that no conditions of release would reasonably assure their safety; accordingly, he allowed the petition for pretrial detention. After acting on the matter before him, the judge proceeded to "offer something unsolicited that has weighed upon my mind." The judge observed that the point he intended to address was not dispositive of the matter before him, but that "the version offered by the police [is] not consistent with the physical evidence, specifically the locations of the defendant's gunshot wounds, nor is their version consistent with [the civilians'] percipient witness account. . . . [T]here is a substantial incongruity between the officers' version of how the defendant was shot and the location of the defendant's gunshot wounds on his body. This incongruity defies the objective evidence and almost belies common sense." The judge urged that the matter "receive a most thorough and impartial scrutiny specifically by the Commonwealth. The conduct of the police here and their reports and their representations as to what happened must be looked into thoroughly because irrespective of the defendant's criminal history or my ruling here today, this gentleman is entitled to just that."

The Perez prosecution ended on June 17, 2019, after a final-pretrial conference for which both the civilian witnesses and the police officers had been summoned and failed to appear.[31] As Attorney Vidal was then aware through notice from the DAO, the two officers were at the time under indictment in connection with the Nathan Bill's incident. The DA filed a *nolle*

[31] It was common practice in the Springfield District Court at the time for the DAO to summon witnesses to the final pre-trial conference, so as to assess the witnesses' willingness to proceed and thereby determine whether the case was ready for trial.

prosequi, stating as grounds that, "There is insufficient evidence to warrant further prosecution," and that "The victim is opposed to continued prosecution of this case."

Pursuant to its standard policy regarding any officer-involved shooting, SPD conducted an investigation, and then referred the matter to the DAO to consider whether any charges should be brought. The material considered in the investigation included ballistics analysis, photographs, and measurements of relevant locations at the scene. SPD concluded that the shooting was lawful, and the DAO agreed. On that basis, the DAO has not disclosed Judge Groce's comments regarding the shooting in other cases.

The officers were not called to testify in other cases while on leave during the pendency of their indictments, but are involved in cases now pending, including some with Officer Basovskiy in which Attorney Vidal is defense counsel. She is not aware of any case that has come to trial with Officer Basovskiy as a witness, or of any case in which the defense has attempted to offer evidence regarding Judge Groce's comments.

On April 22, 2008, Superior Court Judge Tina Page issued a decision after an evidentiary hearing on motions to suppress in the case of Commonwealth v. Reyes, 0779CR00028, and two companion cases, involving narcotics charges. She allowed the motions, finding that Officer Mark Templeman had made deliberately false statements in his report and in his affidavit in support of a search warrant. The DAO, then under the administration of District Attorney William Bennett, filed notices of *nolle prosequi* in the three cases on June 26, 2008. The DAO has not made a practice of disclosing Judge Page's findings regarding Officer Templeman in other cases, and has offered him as a witness regularly, including as an expert on the narcotics trade. Former HCLJ President David Hoose, who represented Reyes, has not distributed Judge Page's opinion among defense attorneys as potential impeachment material, has never called

upon the DAO to do so, and is unaware of any court ever having allowed its use for impeachment.

In 2017, SPD Officer Angel Marrero, who served as a school resource officer, was charged with assault and battery and filing a false report, as a result of an incident involving a 15-year-old student. The DAO prosecuted the case. Marrero was convicted of both charges, and SPD terminated his employment. Petitioners do not contend that Marrero has testified or filed a report in any criminal case since the initiation of the criminal charges against him, and the DAO reports that he has not.

In Commonwealth v. Cooper-Griffith, 1823CR006541, defendant was charged in the District Court with disorderly conduct, resisting arrest, and assault and battery on a police officer. The assault and battery charge was based on Officer Christian Cicero's report that Cooper-Griffith had spit on his leg and boot "while on the booking dock" outside the booking room at the SPD station. Attorney Jamie Druzinsky, then one year out of law school, represented Cooper-Griffith on a pending probation violation, and was appointed to represent him on these charges.

Attorney Druzinsky filed a motion seeking an order that the SPD produce "footage from the surveillance camera in the booking area." He received and reviewed a video recording, and showed it to the ADA prosecuting the case. The recording was played during Attorney Druzinski's testimony at the evidentiary hearing before me on September 9, 2022. It shows the booking desk and the area in front of, behind, and to the sides of it, from a perspective above and behind the desk. The entrance to the room from the booking dock is visible, but the dock itself is

not.[32] No spitting appears. Attorney Druzinksy did not make any further request for video; he believed, according to his testimony, that his request for "the booking area" was broad enough to encompass the location referred to in the police report.[33]

The case was resolved on February 15, 2019, by a negotiated plea. Cooper-Griffith admitted sufficient facts on the charges of disorderly conduct and resisting arrest, and also admitted the probation violation, and the DAO filed a *nolle prosequi* on the charge of assault and battery on a police officer. The DAO has made no determination as to whether Officer Cicero's allegation regarding spitting was true or not.

As discussed *supra*, Officer Cicero is among those who were later indicted in connection with the Nathan Bill's incident, and is one of the two who were convicted of assault and battery. At the time of Attorney Druzinsky's representation of Cooper-Griffith, he was generally aware of that incident and the allegations that police had assaulted civilians. He did not have information about alleged involvement of Officer Cicero.

In December 2018, Attorney Druzinsky was appointed in the case of Commonwealth v. Williams, Springfield District Court 1823CR9270. Williams was charged with interfering with police, resisting arrest, and assault and battery on a police officer. According to the report submitted by Officer Basovskiy, officers had been dispatched in response to a 911 call

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[32] A surveillance camera exists on the booking dock, and attorneys receive video from it on request.

[33] I do not question the sincerity of Attorney Druzinsky's belief on this point, particularly in light of his level of experience at the time. I do question his attention to accuracy in preparing his affidavit for submission in this case. His affidavit asserts that Officer Cicero's report said that the defendant had spit on him "at the booking desk." Asked about this inaccuracy, Attorney Druzinksy attributed it to "oversight." As will be discussed *infra*, he gave a similar explanation for a second factual inaccuracy in his affidavit relating to another case, Commonwealth v. Williams. I do not base any findings on Attorney Druzinksy's affidavit.

describing an illegal U-turn causing a near-accident, after which, according to the caller, two men exited the vehicle and one brandished a firearm, causing the caller to drive away. The dispatcher had provided identifying information about the vehicle and its owner, including the owner's history of firearm charges. The caller met the officers at the location where the dispatcher had directed them, and they located and stopped the vehicle, secured the driver, and then ordered Williams to exit. He resisted being handcuffed and reached for his waistband, leading to a struggle with officers, during which Officer Basovskiy received a scrape to his knee and a tear to his clothing. A photograph attached to the report shows the injury to Officer Basovskiy's knee. No firearm was recovered.

Attorney Druzinsky's affidavit recites a contrary version of the incident, without reference to any source. According to the affidavit, "Officer Basovskiy assaulted Mr. Williams, dragging him out of the vehicle in which he was a passenger. Officer Basovskiy claimed that an anonymous 911 caller, who explicitly refused to give their identity, alleged that someone in the vehicle Mr. Williams was a passenger in, possessed weapons." Nothing in the record indicates that Mr. Williams, or Attorney Druzinsky on his behalf, ever gave this version to the DAO or SPD, or ever made a complaint to SPD, the DAO, or anyone else regarding his treatment by police.

The 911 recording was played at the hearing before me on September 9, 2022, during Attorney Druzinksy's testimony. The caller identifies herself by first and last name and telephone number. Asked about the inaccuracy in his affidavit, Attorney Druzinsky responded that he "made a mistake" and may have "confused the issue with another case."

After receiving notice from the DAO of Officer Basovskiy's indictment in March, 2019, in connection with the Nathan Bill's incident, Attorney Druzinksy requested "Brady material

related to Officer Basovskiy." The DAO responded that no such disclosure was required, because it would not call Basovskiy at trial. Attorney Druzinsky filed a motion for disclosure. The motion was never heard or ruled on, because the DAO filed a *nolle prosequi* on August 10, 2020, reciting that "The Commonwealth has weighed the alleged conduct against the Defendant's lack of criminal history, the age of the case, and the scheduling challenges posed by the ongoing pandemic."

Petitioner Attorney Kelly Auer filed an affidavit in this action dated April 2, 2021, and a supplemental affidavit dated July 12, 2021, to correct certain dates in her first affidavit. She testified before me on September 9, 2022. Her affidavit describes two Springfield District Court cases in which, she contends, SPD officers committed misconduct against her client and made false reports, and the DAO resisted her efforts to obtain information: Commonwealth v. Livernois, 1523CR09099, and Commonwealth v. Wilkinson, 1623CR04190.[34]

The Livernois case began on November 3, 2015. According to the report of Officer Luke Cournoyer, he and other Narcotics Bureau officers observed Livernois engage in what they believed to be a drug transaction. Livernois and others entered a vehicle as officers approached. Seeing Livernois appear to reach for his waistband, Detective Robles began to remove Livernois from the vehicle and directed him to "show me your hands." Livernois refused to comply while reaching behind his back, and struck and pushed Robles. Other officers responded and, according to Officer Cournoyer's report, "were forced to take Mr. Livernois to the ground where he continued to struggle by clenching his arms beneath his body while flailing back and forth."

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[34] Attorney Auer's affidavit, like some of the others discussed herein, presents what appears to be her clients' versions of events as if those versions were established fact, without identifying the source, and without acknowledging any factual dispute. Her affidavit recites other matters that appear to come from other unidentified sources, or that constitute her generalized opinions and conclusions. I do not base findings on these statements.

During the struggle, the report continues, "Officers observed Mr. Livernois drop an item on the ground from his right hand." Officers recovered the item and identified it as a bag of marijuana, and found additional bags of marijuana in the vehicle. After taking Livernois into custody, according to the report, officers observed abrasions to the side of his face and back of his hands. Five officers filed reports describing the injuries to Livernois, accompanied by photographs that appear to show a scrape to the right side of his forehead.

The version of the event set forth in Attorney Auer's affidavit is that eight officers "pulled [Livernois] out the car door while he was allegedly rolling a joint." Officer Robles handcuffed him, "put him on his knees, and then pushed his face into the dirt as he kneeled on his back." Officer Bigda picked him up "by his throat and slammed him against the cruiser, hitting him in his face with his fists repeatedly." According to this version, Livernois received multiple bruises all over his body, including his face, which his sister documented in photographs later that night after his release.[35] The affidavit does not say, nor did Attorney Auer testify, that Livernois or his attorney ever made a complaint to SPD or anyone else regarding the officers' conduct.

Livernois was charged with assault and battery on a police officer and resisting arrest. He was not charged with any drug offense. The docket reflects appointment of a series of attorneys; Attorney Auer was the third, appointed on June 3, 2016. Having seen news media reports of allegations against Narcotics Unit officers, Attorney Auer embarked on a series of efforts to obtain information about the officers, including records of IIU investigations and disciplinary histories. The DAO responded that it did not have such records, and referred her to

[35] No photographs accompany the affidavit or have been provided.

SPD. She made a public records request, which was denied. She then filed a series of motions under M. R. Crim. P. 17 seeking orders to the SPD, and then motions for clarification and reconsideration of the court's orders. Livernois submitted an affidavit dated May 25, 2017, in support of one of these motions. As far as the record discloses, the first time his account of the incident was disclosed to anyone other than his counsel was in that affidavit. Ultimately, after a series of proceedings, Attorney Auer received the IIU reports in March of 2018.

A number of times during the course of the proceedings, Livernois failed to appear, and the case was dormant until he was apprehended and brought to court. Attorney Auer was reappointed after several of those intervals, but a different attorney was appointed on March 8, 2019, when Livernois appeared after his last apprehension. By the time the case came before the court for a pretrial hearing on April 3, 2019, several of the officers involved were under indictment in connection with the Nathan Bill's incident. At that point, the DAO filed a *nolle prosequi*, and the case ended.

The Wilkinson matter, also referenced in Attorney Auer's affidavit and testimony, began on June 4, 2016. According to the report of Officer Anthony Cicero, he and another officer were dispatched to a location outside a bar on a report of "a large crowd gathering." Off-duty Officer James D'Amour told the responding officers that a man had come out of the bar with others, approached, screamed at Officer D'Amour unprovoked "about a car," and struck Officer D'Amour in the face with a closed fist, causing a laceration that required stitches. While the officers were speaking, Michael Wilkinson, Andrew Wilkinson's father, approached them. He apologized for his son's actions, and gave Officer D'Amour his business card, which led police to identify his son as Andrew Wilkinson. Officer D'Amour later made a report to a detective and

identified Andrew Wilkinson from a photo array. Photographs of Officer D'Amour show stitches and bruises near his eye.

Andrew Wilkinson was arrested and charged with assault and battery. On June 6, 2016, Attorney Auer was appointed to represent him. According to Attorney Auer's affidavit, three individuals "jumped in front of [Wilkinson's] truck in the parking lot and threatened to strike his vehicle with a hockey stick." When Wilkinson got out of the vehicle, "one of the individuals went to hit him with the hockey stick, and [Wilkinson] struck one of the individuals in self-defense. Immediately afterward he was struck on the side of his head with the hockey stick." Wilkinson identified one of the three as Officer Edward Kalish.

With Attorney Auer's assistance, Wilkinson filed a complaint with the IIU, which eventually led to a hearing before the CPHB. Attorney Auer hoped that the CPHB would adopt Wilkinson's version of the incident, and that its finding would vindicate him in the criminal case. For that reason, she did not file any motions, and either sought or acquiesced in a series of court dates without substantive activity.[36] The CPHB ruled against Wilkinson's complaint. At that point, the parties agreed on a disposition, and on July 13, 2017, Wilkinson admitted sufficient facts and received a continuance without a finding. Sometime later, both the DAO and Attorney Auer learned of Kalish's testimony before the federal grand jury in 2018, in which he acknowledged having failed to provide accurate reporting to the IIU regarding the 2016 incident with the juveniles.

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[36] Attorney Auer's affidavit says: "For 12 or 13 months, I went through the same sort of litigation exercise described above [regarding the Livernois case] to try to secure the records of the officers involved." In her testimony, Attorney Auer acknowledged that she did not, in fact, file any motions in the Wilkinson case. She testified that she drafted motions in anticipation of filing them. I make no finding as to the credibility of that testimony, since her drafting of unfiled motions is immaterial to any matter in issue.

As indicated *supra*, Attorney Auer alleges that intransigence by the DAO caused her to have to spend excessive time pursuing information, which triggered a CPCS audit of her hours for 2020. The evidence does not support that allegation. She has offered no evidence regarding any time spent in 2020 (or in 2019, the latter half of which was in fiscal year 2020). In the Livernois case, in 2016-2018, Attorney Auer sought information that the DAO did not have, and was referred to SPD; the series of motion proceedings that ensued was between her and SPD.[37] In the Wilkinson case, in 2016-2017, Attorney Auer filed no motions, having made a strategic decision to delay the case in the hope of vindication from the CPHB. When that strategy failed, she negotiated a resolution. Whatever caused CPCS to audit Attorney Auer's time charges for 2020, it was not the conduct of the DAO in these two cases, or in any cases identified in this record.

In October of 2017, CPCS Attorney Anna-Marie Puryear was appointed to represent the defendant in Commonwealth v. Gaskins, 1779CR00494, on a charge in the Superior Court of distribution of cocaine. Based on observations of her investigator, Attorney Puryear formed the theory that shade from trees in the location of the incident would have prevented the SPD officer from making the observations he reported. A judge allowed Attorney Puryear's motion to use SPD's low-light binoculars to view the area, but by the time she was able to do so, the City's Parks and Recreation Department had trimmed the trees. Attorney Puryear learned through a public records request that the Department had done so at the request of an SPD sergeant. She made a motion to dismiss the charge against her client as a sanction for what she contended was

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[37] In her testimony Attorney Auer stated, "I don't understand the line being drawn between the DA and the City . . . they're all state actors." She included the court clerk among the "state actors," attributing some of the delay in the Livernois case to the clerk having lost some of the records SPD produced.

police misconduct in causing the trees to be trimmed rather than preserved as evidence. The DAO contended that the tree trimming was for the purpose of installation of a camera, not for any reason relating to the case. The judge (Wrenn, J.) denied the motion to dismiss, ruling that "the highly suspicious timing of the cutting shall be fair game at trial." The case proceeded to trial, resulting in conviction. The conviction was affirmed on appeal in a memorandum and order under Appeals Court Rule 1:28. The panel held that the trial judge had provided an adequate remedy by "allowing the defendant to present evidence of the police involvement in the timing of the tree work and crafting jury instructions that addressed the issue." *Commonwealth v. Gaskins*, 99 Mass. App. Ct. 1103 (2020).

In the Spring of 2018, in connection with the investigation that led to the federal indictment of former Officer Bigda, seven Springfield police officers testified before a federal grand jury. Some of them had initially refused to testify based on claims of 5th Amendment privilege, and then later testified under grants of immunity. Officer Luke Cournoyer acknowledged having filed a false report with the IIU regarding the use of alcohol by officers on duty, and regarding whether he had heard that an officer had kicked one of the juveniles.[38] Detective Edward Kalish acknowledged having given false information to the IIU regarding the incident. Deputy Chief Steven Kent, who was then a member of the Narcotics Bureau, acknowledged having given false information to the IIU and false testimony to the grand jury regarding officers drinking while on duty.

Officer Jose Robles and Lieutenant Alberto Ayala were questioned about whether officers shared their reports among themselves before submitting them. Robles testified that it

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[38] Cournoyer testified to the grand jury that Officer Vigneault had told him on the night of the event that Vigneault had kicked the juvenile.

was common practice to do so, “just in case I forget something. . . so, basically, my report won’t conflict with their report.” Ayala testified similarly, that officers would share reports to “correct mistakes,” in case an officer forgot something, or in case a report “doesn’t make sense,” and would make changes based on input from other officers.

At the time these officers gave their testimony, the DAO had no knowledge of the grand jury investigation. The DAO learned of it in December of 2018, from an SPD Captain, who had learned of it from the Springfield City solicitor, who learned of it from a deposition in a civil case. The City Solicitor had obtained transcripts of the testimony of Officers Kalish, Ayala, Robles, Kent, and Cournoyer, and provided them to the DAO on December 13, 2018. By email dated December 17, 2018, the DAO instructed all ADAs that “effective immediately you should not move forward with, or dispose of, any criminal matters involving” any of these five officers, and that the DAO “is going to begin disseminating potentially exculpatory information about these officers as soon as it is possible,” but the process “may take several days.” ADAs were instructed to speak with supervisors about any cases needing action during the process.[39]

On December 18, 2018, the DAO notified CPCS and HCLJ, and began to disseminate the transcripts to defense counsel in cases involving these officers. The DAO also made a written request to the US Attorney for all of the transcripts. The US Attorney obtained permission from a federal judge to disclose them to the DAO with redactions, and did so in April and June of 2019. Since that time, the DAO has continued to disclose the transcripts to defense counsel in cases involving any of these officers.

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[39] An email series from December 18, 2019, through January 9, 2019, reflects an inquiry from one ADA to a supervisor on such a matter. The supervisor’s advice was that “cases in which Luke [Cournoyer] is our main or even a necessary witness are no longer viable.” Since his acknowledgement of the falsehoods, Cournoyer has been assigned to desk duties, such that he does not participate in arrests.

In the Vigneault civil action referenced *supra*, in his September 13, 2021, decision denying summary judgment, the judge noted, among other evidence, that five SPD officers invoked their 5th Amendment privilege in depositions. The DAO had no role in that civil case, and nothing in the record indicates that it had any awareness of the case, or of any deposition testimony in it, until petitioners cited it in this case. The DAO has made no disclosures about those 5th Amendment claims.

Six other officers invoked their 5th Amendment privilege during the IIU investigation of the Nathan Bill's incident. As discussed *supra*, the DAO has disclosed the indictments arising from that incident in cases involving the indicted officers since early April of 2019. The DAO has not made a practice of disclosing the officers' claims of privilege. The record does not indicate when or how the DAO learned of those claims.

Petitioners also point to complaints to the CPHB alleging falsehoods by SPD officers. They cite 2018-19 detailed quarterly reports of the CPHB, which petitioners read as reflecting "at least ten" such complaints in that period. The detailed quarterly reports, published and available on-line, list dozens of complaints, with a brief description of the allegations of each, and the outcomes of some; in some cases no outcome appears, or the outcome is "hearing," perhaps indicating that the complaint was still pending as of the date of the report. As I read the reports, they reflect complaints reviewed or otherwise acted on during the reporting period, as well as complaints received during that period. Earlier dates appear for many of the complaints, and some complaints are listed multiple times, apparently at various stages of the process. My review has identified eight complaints alleging falsehood by SPD officers, with one sustained;

the disposition shown for that one is "retraining." The others show outcomes of "not sustained" or "hearing," or show no outcome.[40]

VIII. Judicial Findings of Failure to Disclose Exculpatory Evidence

Petitioners cite three appellate decisions in which courts have found that the DAO failed to make timely disclosure of exculpatory evidence: *Commonwealth v. Rodriguez-Nieves*, 487 Mass. 171 (2021); *Commonwealth v. Santana*, 465 Mass. 270 (2013); and *Commonwealth v. Williams*, 99 Mass. App. Ct. 1128 (2021). None of these rulings involved police misconduct or credibility of police officers. *Rodriguez-Nieves*, tried in 2016, involved a civilian witness's changed account from pre-trial statements to trial testimony. *Williams,* tried in 2018, involved ballistics reports linking the gun used in the crime to subsequent shootings while the defendant was in custody. *Santana,* tried in 2001, involved a civilian witness's inability to identify the defendant on the day before the witness's identification at trial.

Petitioners also cite two Superior Court decisions. In Commonwealth v. Fonseca-Colon, No. 1479CR000877, a Superior Court judge dismissed an indictment because of the prosecutor's failure to present to the grand jury video-recordings of interviews of a civilian witness in which the witness gave conflicting statements. After the dismissal, the Commonwealth presented the matter to the grand jury again, and obtained a new indictment, No. 1679CR000800. Trial of that case resulted in acquittal.

Petitioners cite another Superior Court decision, providing a copy with the name and docket number redacted. The 2021 decision (Mason, J.) grants a motion to vacate a guilty plea entered in 2015, because the prosecutor had failed to disclose that Sonja Farak had been the

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[40] The reports I have been able to identify as alleging falsehood are numbers PI-17-011 (not sustained), PI-18-028 (not sustained), PI-18-021 (no outcome shown), SO-18-223 (no outcome shown), SO-16-223 (sustained – retraining), SO-19-028 (hearing), PI-19-029 (not sustained), SO-16-215 (hearing).

analyst who tested the substance underlying a previous conviction that formed the basis for a habitual offender charge. The judge found the prosecutor's conduct "at best, grossly negligent," and also faulted defense counsel for failing to notice the absence of the drug certificate for that case in the discovery he had received.

Petitioners have provided a list of other cases in which they contend, but no court has found, that the DAO has failed to disclose exculpatory evidence. Among these are the 8000 cases in which the DAO has been sending information to attorneys based on involvement of officers identified as involved in any of the incidents the SPD has identified as among those described in the DOJ report; cases involving officers who were involved in the "unidentified incidents from the DOJ report"; cases involving officers involved in the Nathan Bill's incident; and cases involving the officers who gave the federal grand jury testimony described *supra.*

IX. The DAO's filing of Notices of *Nolle Prosequi*

Petitioners contend that the DAO has made a practice of filing notices of *nolle prosequi* when it learns of police misconduct. Petitioners disclaim any contention that the DAO does so for the purpose of avoiding disclosure, although some of the affidavits of defense counsel advance that contention.[41] Petitioners acknowledge that the filing of a *nolle prosequi* is proper when a prosecutor concludes that the available and credible evidence would not support conviction, and that it occurs in many other circumstances as well, including when a victim or necessary witness is unwilling or unavailable to proceed, as part of a negotiated resolution, or otherwise. Petitioners' position on this point, as most recently articulated to me, is that

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[41] The affidavit of Attorney Lawrence Madden, Attorney-in-Charge of CPCS's Springfield office, says the following at paragraph 18: "I am aware of cases in my office where the HCDAO has filed a *nolle prosequi* to avoid turning over exculpatory evidence about a police officer." He identifies no such cases.

disposition of individual cases in this manner indicates the inadequacy of the criminal process to resolve the issues petitioners raise, and the consequent necessity of relief from this Court.

Petitioners provide a list of some 22 cases. Eight of them (listed as 1, 2, 3, 4, 6, 7, 10, and 21) are discussed *supra*.

As to case no. 5, Commonwealth v. Slade, 1823CR005268, court records show that the DAO filed a notice of *nolle prosequi* on November 12, 2019, prior to a scheduled hearing on a motion to suppress. As defense Attorney Meredith Ryan knew at the time, Officer Igor Basovskiy, who would have been a necessary witness, was under indictment in connection with the Nathan Bill's incident.

Case no. 8, Commonwealth v. Woods, 1579CR00960, presented five narcotics charges. The DAO filed a *nolle prosequi* on four of the charges after police lost the drugs that were the subject of those charges, and the court ordered dismissal of the fifth charge when necessary police witnesses were unavailable on the date scheduled for trial, one due to injury and one due to military deployment. The DAO has not disclosed the officers' loss of evidence in other cases involving those officers.

Cases no. 11, 12, 13, 14, 15, 16, 17, 18, and 19 all involved Officer Gregory Bigda and/or Officer Luke Cournoyer. After learning of, and disclosing, Officer Bidga's conduct toward the juveniles in 2016, and Officer Cournoyer's testimony to the federal grand jury in 2018, the DAO has filed notices of *nolle prosequi* in all cases that would require testimony of these officers. Petitioners contend that one of these, no. 11, Commonwealth v. Suarez, 1623CR004276, matches the incident described in the DOJ report at p. 18, in which, according to DOJ, a surveillance video belies the arrest report, and shows officers using force against the defendant. The record does not indicate whether any authority (other than DOJ) has investigated this incident.

In case no. 9, Commonwealth v. Bellamy, 1723CR004817, after viewing a video recording of the incident, the DAO prosecuted the officer on charges of assault and battery with a dangerous weapon, assault and battery, and filing a false report. The officer pled guilty, received a continuance without a finding, and now has a desk assignment. The DAO has identified this officer as one as to whom it would make disclosures if he were to be a witness.

In case no. 20, Commonwealth v. Booker, 1179CR00569, the DAO filed a notice of *nolle prosequi* in 2011. The record provides no information about the circumstances.

As to case no. 22, Commonwealth v. Perez, 0917CR002642, the arresting officer, who was with the Holyoke Police Department, was prosecuted and convicted of cocaine distribution and sentenced to incarceration.

X. Discovery Rulings in Pending and Recent Trial Court Cases

Petitioners point to pending or recent Trial Court cases in which judges have made varied rulings on motions seeking discovery based on the DOJ Report. One such case is Commonwealth v. Lopez, discussed *supra*. Petitioners recite at length the positions taken by the DAO and SPD, and comments of the judge, in hearings on discovery motions in that case; they contend that the DAO and SPD have pointed fingers at each other, to the detriment of defendant's rights, and that the Trial Court needs guidance from this Court. As indicated *supra*, the Lopez case was resolved by plea on June 1, 2022.

Varied rulings have occurred on motions in other cases. The DAO's position in these cases has generally been that M. R. Crim. P. 17 is the appropriate method for defendants to obtain information from SPD that is not in the possession, custody, or control of the DAO or any member of the prosecution team. Court rulings have generally affirmed that position, in some instances requiring the DAO to make inquiries of police witnesses.

In Commonwealth v. Burge, 2123CR003221, District Court Judge Sabbs ordered the DAO to disclose occasions when an officer has been "deemed by a Court" or by "Police Administration" to have used excessive force, provided a false report, or given a false statement or false testimony. Judge Sabbs also ordered the DAO to disclose any final civil judgment against an officer, and to inquire of all ADAs to identify cases in which a *nolle prosequi* was filed "due to police misconduct," and to disclose such cases. Before the DAO could comply with the order, the parties reached an agreed disposition. Based on that agreement, the DAO filed a *nolle prosequi* on a count of domestic assault and battery, citing the alleged victim's opposition to continued prosecution. The DAO agreed to convert a count of resisting arrest to a civil infraction, for which the defendant admitted responsibility.

Another case cited is that of Bryan Fernandez, Springfield District Court No. 2123CR5616, in which defense counsel filed a motion seeking orders requiring the prosecution to pose specified questions to each of 21 officers and certify that it had done so; that each officer submit a certification or affidavit answering each of the listed questions under oath; and that the prosecution identify and disclose cases in which judges had allowed motions to suppress after officers testified, and filing of notices of *nolle prosequi* in such cases. Judge Sabbs denied most of the requests, but allowed discovery of "any case where a *nolle prosequi* was filed because there was evidence of police misconduct by one of the subject officers, including false reports and excessive force." The parties resolved the case on March 16, 2022; the DAO filed a *nolle prosequi* as to ten charges, and the defendant pled guilty to five charges.

The record reflects five other cases in which defendants have filed similar motions, relying on the DOJ report: the Superior Court cases of Isaiah Santiago and Israel Soto, and the District Court cases of Luis Torres-Villaronga and Carlos Santana. In the Santiago case,

1979CR00285, the Court (Mulqueen, J.) ordered that the DAO inquire of "those actively involved in the investigation and/or prosecution of the instant case" for "any exculpatory information concerning the instant case," and disclose any information received, as well as any information "in its possession, custody, or control . . . concerning the honesty/credibility of any such persons." The Court otherwise denied the motion, stating that the defendant must obtain any information from third parties through Rule 17.

In the Soto case, 1979CR000528, on September 27, 2022, the Court (Flannery, J.) denied a motion for disclosure of Judge Sweeney's findings regarding Officer Aguirre (which defense counsel in the case already had), as well as requests for an order that the DAO "search all its files, and speak to all its witnesses, without limitation or qualification, in search of evidence of untrue statements," and order such evidence disclosed "in all other cases." Judge Flannery ruled the requests "vague, overly broad, unduly burdensome, and beyond the Commonwealth's duty of "reasonable inquiry," quoting *Commonwealth* v. *Frith*, 458 Mass. 434, 440-441 (2010).

In the Torres-Villaronga case, 2023CR003228 the Court (Santaniello, J.), ordered the DAO to inquire of each officer about any "civil police misconduct lawsuit," but otherwise denied the motion. In the Santana case, 1823CR0001217, the Court (Sabb, J.) endorsed the motion with the same rulings as in the Fernandez case. The record does not indicate that defendants have sought appellate review of rulings on discovery motions in any of these cases.

XI. Proposed Rule Revision

On May 19, 2022, this Court published for comment a proposed revised version of M. R. Crim. P. 14, drafted by the Standing Advisory Committee on the Rules of Criminal procedure. The Court's notice invites comments submitted on or before October 14, 2022.

The proposed rule provides a definition of "the prosecution team," to include "[p]ersonnel of police departments or other law enforcement agencies who were or are involved in the investigation of the case, before or after charges were issued, or were or are involved in the prosecution of the case." It codifies the prosecutor's duty to disclose information favorable to the defense that is in the possession, custody or control of a member of the prosecution team, as so defined. It provides a broad definition of such information, including information that would "[c]ast doubt on the credibility of the testimony of any witness the prosecutor anticipates calling," or "[c]orroborate the defense version of facts or call into question a material aspect of the prosecution's version of facts, even if this aspect is not an element of the prosecution's case." The proposed rule provides examples of such information, including "[a]ny crime, charged or uncharged, committed by [a prosecution] witness, if known to the prosecutor, prosecuting office, or any member of the prosecution team." The proposed rule does not explicitly address whether a judicial finding of false testimony by a police witness in an unrelated proceeding constitutes information that would "[c]ast doubt on the credibility of" the officer as a witness in future matters.

The proposed rule requires the prosecutor in each case: to "inform each member of the prosecution team whom the prosecutor has reason to believe may be in possession of materials subject to this rule of the discovery and preservation obligations required by this rule, and to inquire of each such person as to the existence of any such materials"; to "collect and to disclose to the defense all items and information required by this rule that are in the possession, custody, or control of the prosecutor, the prosecuting office, or any member of the prosecution team"; and to notify the defense of the existence of any information subject to disclosure that cannot be

promptly copied or made available, as well as any such material that has been destroyed or that a member of the prosecution team will not provide the prosecutor.

XII. Factual Conclusions

The Corrected Petition sets forth factual allegations, legal arguments, and conclusions in a manner that is difficult to untangle. I have attempted to recite the subsidiary facts that are either stipulated or proved by the evidence, and that appear to be relevant to the legal issues raised. Based on those subsidiary facts, I will now address the factual conclusions – or ultimate facts – alleged in the petition, to the extent I can separate them from the petitioners' arguments of law.

The Corrected Petition asserts that "evidence of a systemic problem within the SPD predated the DOJ report." The facts show adjudicated or established acts of misconduct by about a dozen SPD officers over a period of about a decade. I include in this category Officer Bigda's conduct toward the juveniles, and that of those who were present and did not intervene or report the conduct, as well as the false testimony or reports reflected in the federal grand jury minutes. I also include the conduct of Officers Cicero and Billingsley in the Nathan Bill's incident that resulted in their convictions, and the conduct that resulted in criminal convictions of Officer Marrero in connection with the juvenile matter and of the officer involved in the Bellamy matter, as well as the conduct that has resulted in civil judgments against certain officers (but not settlements).

The facts also show a number of unadjudicated allegations of misconduct, as reflected in the DOJ Report, in civil litigation that has not resulted in judgments, in complaints to the IIU and/or the CPHB, and in conflicting versions of events resulting in arrests and charges. Whether these unadjudicated allegations are more numerous, frequent, serious, or credible than those

against police in other jurisdictions, or at other times, has not been established, and is impossible to determine from this record.

The Corrected Petition goes on to allege that "the Commonwealth has not fully investigated or disclosed SPD misconduct." It is undisputed that neither the DAO nor any other entity of the Commonwealth has conducted an investigation of the type or scope that petitioners seek. The DAO lacks the capacity to do so while performing its statutory functions. The record does not establish whether any other entity of the Commonwealth has that capacity. Whether the DAO or any other Commonwealth entity has an obligation to do so is a question of law.

The SPD, through its IIU, has investigated at least some of the incidents alleged, although without the transparency, and apparently without the comprehensiveness, that petitioners urge. In the opinion of DOJ, the SPD lacks adequate procedures, policies, standards, and training to conduct effective investigations and discipline. Nevertheless, it is the SPD that has the resources and the authority to investigate the conduct of its officers, and has the responsibility to discipline officers for misconduct, and to remove officers from service, or reassign them to limited roles, when appropriate. The record reflects some instances when it has done so, but leaves substantial room for doubt about the adequacy of these efforts. The reforms promised under the consent decree may lead to improvements in this regard. Nothing in this record indicates whether the IIU would address past incidents under newly adopted procedures. As to disclosure, the record indicates that SPD has disclosed the results of some but not all IIU investigations to the DAO when it identifies evidence of misconduct, and the DAO has disclosed information it has received from SPD to defense counsel when it concludes that the information is exculpatory.

The Corrected Petition alleges that the DAO "has routinely failed to disclose Brady evidence related to police misconduct." The facts do not support this allegation. After full

opportunity to present evidence through documents and testimony, petitioners have shown failures by the DAO to disclose exculpatory information in six cases. Graham is one of them, as discussed *supra*. The exculpatory information in that case may or may not show police misconduct; what it shows is evidence of an independent witness's version that supports Graham's version and does not support the police version. The five other instances petitioners cite in which courts have found failures to disclose, over a period of some 20 years, do not involve police misconduct.

The evidence does establish areas of disagreement between petitioners and the DAO as to what constitutes exculpatory evidence requiring disclosure. The most significant area of disagreement relates to judicial findings. Petitioners contend that all judicial findings discrediting testimony of a police witness must be disclosed. The DAO applies a narrower standard, considering disclosure warranted only when the finding is of deliberate deception, and is made at trial or at certain other specified proceedings, or when the DAO agrees with the finding after its own evaluation. This disagreement presents a question of law, ultimately for this Court to resolve. How the Court should do so – whether through rulemaking, review of application of rules in individual cases, or issuance of a declaration in this case, is a question at the heart of this matter.

I will offer my views on this point for the Court's consideration. Judges make findings regarding the credibility of witnesses constantly. The process of making such findings requires evaluating the witnesses' opportunity to observe and relate, accuracy of memory, perception, and description, any potential bias, and all other factors bearing on credibility, and then weighing the testimony against any evidence that may lead in different directions. Such findings tend to be expressed in phrases such as "I credit," "I do not credit," "I find [certain evidence] more

credible," and the like. This kind of language does not express a conclusion that a witness has lied, and does not bear on the credibility of the witness in other matters.

On rare occasions, a judge concludes, and states, that a police witness has intentionally, deliberately, given false testimony. Findings of that nature should be tracked and disclosed, no matter the nature of the proceeding or the DAO's agreement or disagreement. Such findings may or may not be admissible in evidence to impeach the witness in unrelated matters; that is a question for the judge in such future matters. Such findings should be disclosed so that defense counsel has the opportunity to make that effort, and the future judge has the opportunity to rule. I recognize that this standard means that every police officer's career is on the line every time the officer testifies before any judge. That result, in my view, is inherent in the serious responsibility each police officer accepts in taking on the role.

The evidence also establishes that, until recently, the DAO did not have any formal policy regarding disclosures of exculpatory information,[42] any established mechanism for training and supervising prosecutors on the topic, or a fully developed database to track and compile information. The DAO has made substantial progress in each of these areas. Its disclosure policy adopted in August of 2022 is largely, although not entirely, consistent with the proposed revised Rule 14 this Court has published for comment. The main difference I note, aside from the much greater level of detail in the proposed rule, is that the proposed rule, unlike the DAO policy, requires the prosecutor to inquire of members of the prosecution team in each case, including police witnesses, as to the existence of exculpatory information, including

[42] The evidence includes a one-page excerpt from a manual compiled by the Massachusetts District Attorneys Association at some unidentified time before the events in issue here. Apparently this document received some degree of distribution within the DAO, but was never officially adopted as its policy.

information regarding their own conduct and history. The DAO has adopted a practice of sending annual letters to police chiefs reminding them of the need for disclosure, but that is not the same as individual inquiry of witnesses in each case.

Finally, although the petition itself does not address this topic, petitioners have devoted substantial attention to the DAO's practices in filing notices of *nolle prosequi.* As the facts set forth *supra* indicate, the record does not show that the DAO has ever done so to avoid disclosing police misconduct, or that the DAO's practice in this regard is in any way unusual or improper.

XIII. Issues of Law

The parties have agreed that this case raises the following four issues:

1. Has the DOJ Report, together with other evidence of misconduct by the SPD, triggered the Commonwealth's duty to investigate and, if so, what does that duty entail?

2. When a police department has been alleged by an investigating agency to have engaged in a "pattern or practice" of misconduct, what evidentiary disclosures must a state prosecutor make in order to satisfy the duty to "learn of and disclose to a defendant any exculpatory evidence that is 'held by agents of the prosecution team'" in matters involving that police department? See *Cotto*, 471 Mass. at 112.

3. What obligations does the prosecution have when a police department declines to turn over exculpatory evidence concerning police officers who are members of prosecution teams?

4. Do the Petitioners have standing to bring this case and invoke the Court's superintendence power?

Petitioners pose a fifth question: "If the duty to investigate has been triggered, should any interim measures be imposed while the investigation proceeds?"

Respondents pose a list of additional questions regarding the scope and implications of any duty that might be recognized in response to the first three questions.

I will address the fourth issue, regarding standing, and will offer some comments on the other issues, rearranging the sequence of the issues in a manner that I think most logical.

A. Standing

A party has standing to assert a claim if the party has a personal interest in the outcome. An organization may assert representational standing if individuals whose personal rights are at stake face some genuine obstacle to asserting the claim. *Planned Parenthood League of Massachusetts* v. *Bell*, 424 Mass. 573, 578 (1997). Here, the persons whose individual rights are at stake would be criminal defendants in pending cases, or past cases that resulted in conviction, where exculpatory evidence exists regarding police conduct, which such defendants do not have, and cannot pursue through requests and motions, because they do not know it exists. None of the petitioners here meets that description. Graham and Lopez are no longer defendants. Graham's conviction has been vacated, and Lopez's conviction occurred upon his guilty plea, after his counsel obtained full access to information about the officers involved. The lawyers and lawyer organizations are not and have not been defendants.

By definition, however, a person whose personal rights are at stake would face a genuine obstacle to bringing the claim, since such a person would have no knowledge of being in that position. CPCS and HCLJ, by virtue of their organizational functions, are proper representational parties for such persons. Accordingly, I recommend that the Court recognize representational standing of the two organizational petitioners, and dismiss the four individual petitioners.

B. Issue No. 3

Issue No. 3, as posed by the parties, is "What obligations does the prosecution have when a police department declines to turn over exculpatory evidence concerning police officers who

are members of prosecution teams?" The issue arises in this case primarily in connection with the Kent report, which SPD has refused to divulge to the DAO, or to anyone else.[43]

Proposed Rule 14, if adopted, will clarify that a prosecutor's obligation of disclosure applies to information in the possession, custody, or control of any member of the prosecution team. Proposed Rule 14.1(a)(1) defines that group to include "all persons under the prosecuting office's direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecuting office or have done so in the case." Thus, under Proposed Rule 14.1(a)(1)(A), the prosecution team includes police personnel "who were or are involved in the investigation of the case, before or after charges were issued, or were or are involved in the prosecution of the case." It does not include the entire police department, nor does it include a municipal law department. Proposed Rule 14.1(a)(2)(D) provides a clear answer to the question of what a prosecutor must do if a member of the prosecution team refuses to provide information subject to disclosure: the prosecutor "has a duty to promptly notify the defense of the destruction of the items or the refusal to provide the information."

Here, it appears that the only persons in possession of the Kent report are Deputy Chief Kent himself, those in higher positions in SPD, and the City Solicitor and members of his staff. Deputy Chief Kent would be a member of the prosecution team in a case in which he is or has been involved in the investigation or prosecution, but not in other cases. It appears unlikely that anyone in a higher position than his at SPD, or anyone in the office of the City Solicitor, would have that status in any case.

[43] The record also makes reference to, but provides little information about, certain cover letters the City Solicitor sent to DOJ with information in connection with the DOJ investigation. The City has never provided those to the DAO or, apparently, to anyone else.

Regardless of whether the Kent report is in the possession of any member of any prosecution team in any case, the DAO has notified defense counsel, widely and routinely, that the report exists and that the City has refused to provide it. That is exactly what the proposed rule would require. No need or occasion appears for this Court to address this issue in any manner other than the exercise of its rulemaking authority.

C. Issues No. 1 and 2

These two issues, as delineated by the parties, in my view are inextricably linked, and are at the heart of this case. The parties have defined the issues thus:

"Has the DOJ Report, together with other evidence of misconduct by the SPD, triggered the Commonwealth's duty to investigate and, if so, what does that duty entail?"

"When a police department has been alleged by an investigating agency to have engaged in a 'pattern or practice' of misconduct, what evidentiary disclosures must a state prosecutor make in order to satisfy the duty to 'learn of and disclose to a defendant any exculpatory evidence that is 'held by agents of the prosecution team' in matters involving that police department? See *Commonwealth* v. *Cotto*, 471 Mass. 97, 112 (2015)."

Cotto, along with *Ware*, recognized a duty of the Commonwealth to "conduct a thorough investigation" of the conduct of chemical analyst Sonja Farak. *Cotto*, 471 Mass. at 112; *Ware*, 471 Mass. at 95. The situation presented here differs from the Farak matter, and the earlier Dookhan matter, in two fundamental respects. First, in those matters, no prosecutor or other official or entity was called upon to adjudicate allegations, or to evaluate conflicting versions of events, and determine the truth; Farak and Dookhan each admitted her own misconduct, and ultimately pled guilty to criminal charges based on the conduct. The question needing investigation was the time period of the misconduct, so as to identify the cases in which it had

occurred, and the defendants affected. Second, the misconduct of the chemical analysts related directly to an essential element of each affected case: the identity of the substance each defendant was charged with possessing or distributing. Thus, the misconduct was in itself ground to vacate each conviction and dismiss each charge as to each defendant affected.

Here, with certain exceptions discussed *supra*, which the DAO has addressed, the misconduct is alleged, not admitted, established, or adjudicated. The investigation petitioners seek would go well beyond gathering information; it would extend to making determinations of truth or falsity, and then making disclosures based on those determinations. Were some Commonwealth entity to conduct such an investigation, and disclose its results, the information it would provide to defendants would not, as in the Farak and Dookhan matters, warrant automatic or presumptive dismissal of charges or vacatur of convictions. Rather, the information would provide material for potential impeachment of police witnesses based on their conduct in other cases. The Farak and Dookhan matters are substantially different from the circumstances presented here, and do not provide a model for addressing this situation.

More direct guidance about the duty to disclose information potentially affecting witness credibility appears in *Matter of a Grand Jury Investigation*, 485 Mass. 641 (2020), where the court held that a prosecutor must disclose a police officer's admission to making false police reports to defense counsel in all cases in which that officer's credibility would be in issue. The Court's discussion of the obligation to disclose exculpatory information emphasized that the obligation extends to any information that may "tend to impeach the credibility of a prosecution witness." *Id*. at 649, quoting *Commonwealth* v. *Collins*, 386 Mass. 1, 8 (1982).

The exculpatory evidence in *Matter of a Grand Jury Investigation* was testimony of police officers to a grand jury convened by the District Attorney. No investigation was

necessary for the District Attorney to obtain the evidence, nor was the District Attorney called upon to evaluate conflicting versions of any event. Thus, although the case is clear as to the duty of disclosure, it does not assist in determining what duty a prosecutor may have to learn of exculpatory information by investigating disputed allegations and/or evaluating their truth, so as to identify any disclosures that may be required.

The issue presented here is not entirely new. Prosecutors routinely review evidence and allegations relating to cases charged, so as to determine whether to proceed with a prosecution, or instead, file a *nolle prosequi*, and either prosecute the officer, refer the matter to another prosecuting authority, and/or refer the matter to the police department for internal investigation and possible discipline. The record here provides several examples in which the DAO has done so.

What is new here is the scope and source of the allegations of misconduct. No case that has been brought to my attention presents allegations of a pattern and practice of misconduct in a police department, made by a law enforcement entity after extensive investigation. The parties, and indeed the judiciary, the entire criminal bar, and all law enforcement agencies would benefit from this court's guidance as to who has what duties in such circumstances, and what consequences might flow in criminal cases from any failure to perform such duties.

Whether this case presents a proper mechanism for providing such guidance is open to considerable doubt. A ruling in this case would be divorced from any particular set of facts in any particular criminal case. On the other hand, it is difficult to envision how the issues presented here would or could arise in an individual criminal case. Indeed, as the discussion of standing, *supra*, suggests, the criminal cases in which these issues would have most

significance would be those in which the defendant lacks the information necessary to present the matter to a court for ruling.

The rulemaking process, through which this Court usually addresses systemic issues, has the benefit of widespread input, both at the drafting stage and through public comment. Proposed Rule 14 illustrates that process, and would go a long way toward addressing many of the issues that have been the subject of disagreement in this litigation. If the Court does decide to address the merits of this case, I recommend that it invite broad input from the full range of those potentially affected, through *amicus curiae* filings.

XIV. Conclusion

This case presents novel issues in unusual circumstances. I am honored to have had the privilege of participating in it, and hope that my efforts assist the Court in its challenging task.

Judith Fabricant, C.J. (ret.)
Special Master

October 18, 2022