

**COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT**

Suffolk, ss.

No. SJ-2021-0129

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

PETITIONERS' OBJECTIONS TO REPORT OF SPECIAL MASTER

Pursuant to Mass. R. Civ. P. 53(h)(2), Petitioners submit objections to the Report of Special Master dated October 18, 2022. The Report contains factual findings, legal conclusions, and conclusions involving mixed issues of law and fact. Petitioners are grateful for the Special Master's important work and have endeavored to limit their objections to statements that are "clearly erroneous, mutually inconsistent, unwarranted by the evidence before the master as a matter of law or are otherwise tainted by error of law." See Mass. R. Civ. P. 53(h)(1). Cf. *Commonwealth v. Charles*, 466 Mass. 63, 76 (2013) (discussing standard of review). Petitioners understand that the Special Master's legal conclusions will be subject to independent judicial review. *Id.* In a few instances, Petitioners suggest additional findings that are not inconsistent with the Special Master's findings. See Mass. R. Civ. P. 53(h)(1).

Petitioners renew their request for a status hearing. Petitioners also respectfully submit that guidance from the full court about the issues presented here is all the more necessary because the U.S. Department of Justice just announced a pattern or practice investigation into the Worcester

Police Department in order to “assess whether WPD engages in a pattern or practice of excessive force or engages in discriminatory policing based on race or sex.”¹

I. OBJECTIONS TO FACTUAL FINDINGS

Petitioners object to the following findings of fact. See Mass. R. Civ. P. 53(h)(1). To assist the Court’s review of these objections, Petitioners have placed in bold challenged language from the Special Master’s Report, where applicable.

Pg. 4, Line 5-6: “Respondent filed its **response** on April 29, 2021.”

OBJECTION: Respondent did not file a substantive response on April 29, 2021. Instead, on that date, the DAO moved for an extension of time to respond to the Petition. *See* Dkt. No. 17. The DAO filed its Opposition on May 28, 2021. Report of Special Master at 4.

RELIEF REQUESTED: This sentence should be deleted.

Pg. 7, Lines 11-14: “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.”

OBJECTION: Chapter 211D of the General Laws, CPCS’s enabling statute, does not place CPCS under the supervisory authority of the SJC or the judiciary.

RELIEF REQUESTED: Because the words “and under the supervisory authority of this Court” are clearly erroneous, Petitioners ask that they be deleted.

¹ Exhibit A, U.S. Dep’t of Justice, Justice Department Launches Civil Investigation of Worcester Police Department (Nov. 15, 2022), at <https://www.justice.gov/usao-ma/pr/justice-department-launches-civil-investigation-worcester-police-department>.

Pg. 10, Lines 8-9: “The prosecutor, like defense counsel, did not have either the CAD log or the 911 recording, and did not know that either existed.”

OBJECTION: This statement is clearly erroneous because it purports to make a finding about what the trial prosecutor in Mr. Graham’s criminal case did not know. That prosecutor neither testified nor submitted an affidavit in this case, and thus there is no competent evidence of what he did not know. Instead, at trial in Mr. Graham’s case, the prosecutor asserted that an off-duty police officer called 911 and then elicited testimony that the officer placed calls to dispatch, demonstrating knowledge that at least one recorded call was made. Report of Special Master at 11 n. 7. Moreover, the Commonwealth conceded in its opposition to Mr. Graham’s motion for a new trial that the CAD sheet was in its constructive possession. Commonwealth’s Opposition to Defendant’s Motion for a New Trial, *Commonwealth v. Graham*, No. 1779CR00403 (Hampden Sup. Ct.), C.R.A. 1633.

RELIEF REQUESTED: To achieve alignment with the master’s determination to limit the factual findings to assertions based on the personal knowledge of witnesses rather than hearsay, see Report of Special Master at 3, and to avoid statements about Mr. Graham’s criminal case that are incorrect as a matter of law, all findings as to the knowledge of the prosecutor in Mr. Graham’s criminal case should be deleted.

Pg. 10, Lines 15-19: “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.”

OBJECTION: This statement, which was provided through the testimony of First Assistant DA Fitzgerald and objected to by Petitioners, is based on hearsay and falls outside Fitzgerald’s personal knowledge. See 9/15/22 Hrg. Tr. at 773:14-19 (Fitzgerald: “I have been to the communications. It wasn’t specifically to find out what was involved. It was specifically because they needed us to be more specific about what we were asking for, because the volume of calls was becoming overwhelming, and they couldn’t respond quickly enough.”). No personnel from the Springfield Police Department (“SPD”) or City of Springfield (“City”) testified or submitted evidence as to the practices of the SPD communications department.

RELIEF REQUESTED: To achieve alignment with the master’s determination to limit the factual findings to assertions based on the personal knowledge of witnesses, see Report of Special Master at 3, all references to the internal practices of the SPD Communications Unit should be deleted.

Pg. 11, Lines 8-11: “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.”

OBJECTION: This finding is clearly erroneous. SPD Officer McNabb’s calls to dispatch were witness statements subject to mandatory discovery. Mass. R. Crim. P. Rule 14(a)(1)(A)(vii). Officer McNabb’s calls to dispatch and the 911 call appear in a single audio file bearing call number 17-139244 – the same call number appearing in Mr. Graham’s arrest report. Tab 51 of Fitzgerald Vol. 2, Dkt. No. 104 (Oct. 7, 2022).

It does not appear to be in dispute that the prosecutor knew of Officer McNabb’s calls to dispatch. Report of Special Master at 11 n. 7. If the prosecutor had disclosed McNabb’s calls, as Rule 14 required, he would also have disclosed the 911 call. But he made no such disclosures.

RELIEF REQUESTED: This paragraph should be deleted.

Pg. 13, Lines 3-5: “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.”

OBJECTION: This finding is clearly erroneous. At the hearing on September 14, 2022, counsel for the DAO specifically asked Mr. Graham’s trial counsel whether she had “want[ed] the district attorney to have the statement that he [Mr. Graham] gave to the IIU.” 9/14/22 Hrg. Tr. at 353:22-24. In response, she testified: “The way I look at it is there’s no reason to not provide a statement. . . . So this wasn’t a tactical design by myself. It’s just something that I neglected to do.” *Id.* at 354:1-10.

RELIEF REQUESTED: These sentences should be deleted.

Pg. 13, lines 17-18: “[Mr. Graham] **was sentenced to** and served 18 months of incarceration and **one month of probation,** and paid certain fees.”

OBJECTION: The statement with respect to probation is clearly erroneous. Mr. Graham was sentenced to 18 months of incarceration and one year of probation. *Commonwealth v. Graham*, No. 1779CR00403 (Hampden Sup. Ct. April 5, 2018). He served the 18 months of incarceration but only one month of probation before the motion for new trial was granted. Ex. 40, Court Docket in *Commonwealth v. Graham*, as of May 25, 2022, Suppl. Decl. of

Matthew Horvitz, Dkt. No. 79 (May 26, 2022); see also Graham Aff., C.R.A. 33.

RELIEF REQUESTED: This sentence should be amended as follows: “He was sentenced to 18 months of incarceration and one year of probation, and was ordered to pay certain fees. Graham served the 18 months, paid the fees, and served one month of probation before his new trial motion was allowed.”

Pg. 14 n. 8: “That said, it does not follow that Graham would have avoided conviction if the 911 caller had testified at trial. . . . **Whether the outcome would have been different is impossible to determine.**”

OBJECTION: These statements are at least in considerable tension with, if not directly contrary to, to the findings of Judge Sweeney, who granted Mr. Graham’s new trial motion. Judge Sweeney held that had counsel obtained the 911 call, “it is reasonable to conclude that the jury verdict would likely have been different.” HDA R.A. 20. Judge Sweeney also found:

- (1) “The Commonwealth’s case was thin, as it rested on the credibility of two witnesses with inconsistent and facially unrealistic accounts of the incident; accounts that were contradicted by the credible unimpeached testimony of Bosworth.” HDA R.A. 20.
- (2) “The information in the IIU report, and particularly the 911 caller’s account in that report, would have substantially bolstered the defense that the defendant had no gun and effectively undermined the credibility of [Officers] McNabb and Pafumi.” *Id.*

Neither the Petitioners, nor the DAO, presented argument or evidence as to the issue of materiality for the newly discovered evidence in Mr. Graham’s case.

RELIEF REQUESTED: Because this footnote is unwarranted by the evidence before the Special Master or otherwise tainted by errors of law, it should be deleted.

Pg. 15, Lines 8-12: “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”

OBJECTION: This finding is clearly erroneous insofar as it states that the relevant proceedings began in January 2021. On October 26, 2020, Attorney Murdock filed Defendant’s Motion for Exculpatory Information Regarding

Relevant Police Witnesses, requesting that the Court order the DAO to obtain certain evidence regarding the Narcotics Bureau officers in Mr. Lopez’s case. See Court Docket in *Commonwealth v. Lopez*, No. 1979CR00143 (Hampden Sup. Ct.), Dkt. No. 82 (June 16, 2022); see also *Murdock Aff.*, C.R.A. 547 at ¶ 20. A hearing was held on that motion on November 18, 2020. *Id.*

RELIEF REQUESTED: The second sentence in the above-quoted language should be modified as follows: “Those efforts triggered a series of proceedings before the Superior Court (McDonough, J.) between November of 2020 and March of 2022.”

Pg. 15, n.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.”

OBJECTION: This finding is clearly erroneous because the DAO’s Rule 17 motion in Mr. Lopez’s case did not seek the Kent Report. To the contrary, when counsel for Mr. Lopez filed a proposed order that would have required the City of Springfield to produce the report, the DAO objected. See Commonwealth’s Opposition to Def. Motion for Clarification Order, *Commonwealth v. Lopez*, No. 1979CR00143 (Hampden Sup. Ct. Nov. 22, 2019), C.R.A. 1109-110. Defense counsel then filed a Rule 17 motion specifically seeking the Kent Report. See Def. Mot. for Third Party Records, *Commonwealth v. Lopez* (Feb. 3, 2022), C.R.A. 1156. The Court denied that motion. Ex. 38, Endorsement on Mot. for Third Party Records in *Commonwealth v. Lopez*, Suppl. Decl. of Matthew Horvitz, Dkt. No. 79 (May 26, 2022). Defense counsel moved for reconsideration of that ruling. *Id.* at Ex. 39, Def. Mot. for Reconsideration in *Commonwealth v. Lopez*. That motion was pending when Mr. Lopez resolved the case by plea.

RELIEF REQUESTED: Petitioners request footnote 9 be deleted, or in the alternative amended to read: “Mr. Lopez filed a Rule 17 Motion for the Kent Report on February 3, 2022. The Court denied the motion. Lopez moved for reconsideration of that ruling, but resolved the case by plea while that motion was pending.”

Pg. 19 n.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.”

OBJECTION: To the extent that this footnote is read to suggest a sequential ordering in the indictments issued against Officers Vigneault and Bigda thus adopting

the hearsay testimony of First Assistant DA Fitzgerald, see 9/21/22 Hrg. Tr. at 831:3-7 (“I learned primarily from sources other than directly by the Federal Government that they had indicted initially Officer Steven Vigneault for the kicking and then later indicted Officer Gregg Bigda for the kicking”), Petitioners note that the indictments for excessive force against both officers were issued on October 25, 2018. Indictment, *USA v. Bigda et al.*, No. 3:18-cr-30051 (D. Mass. Oct. 25, 2018).

RELIEF Petitioners request that the word “first” be deleted from footnote 12.
REQUESTED:

Pg. 19 n.12: “[Gregg Bigda] is no longer employed by SPD.”

OBJECTION: This sentence is clearly erroneous because it is not supported by the evidence before the Special Master and is contradicted by public records. The City of Springfield’s Open Payroll records list Gregg Bigda as a police officer with an annual salary of \$72,072. See Pet’rs’ Reply to Respondent’s Proposed Findings of Subsidiary Facts, Dkt. No. 86 (July 15, 2022), ¶ 78.1, citing to <https://www.springfield-ma.gov/finance/checkbook-payroll>. According to the City’s payroll records, as of July 22, 2022, Officer Bigda had been paid \$40,194 as of that date for 2022, and as of October 14, 2022, the records reflect that an additional \$16,632 had been paid, for a total of \$56,826 so far in 2022. See *id.*

RELIEF Petitioners request that this sentence be deleted.
REQUESTED:

Pg. 22, Lines 12-13: “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.”

OBJECTION: This statement is clearly erroneous. During the evidentiary hearing on September 15, 2022, Attorney Meredith Ryan testified, without contradiction, that the DAO never informed her “that Officer Basovski was charged in connection with the Nathan Bill’s incident.” 9/15/22 Hrg. Tr. at 638:10-13; see also Ryan Aff. ¶¶ 10-11, C.R.A. 412. First Assistant DA Fitzgerald conceded that while it was the intent of the DAO to disclose the AGO’s letters in every relevant case, she could not confirm that a letter was provided in every case and it was possible that they missed some. 9/15/22 Hrg. Tr. at 808: 9-12.

RELIEF The sentence should be amended to read: “Since then, the DAO intended to
REQUESTED: provide the AGO’s letter regarding each of the officers to defense counsel
in each case involving each indicted officer.”

Pg. 27, Lines 16-21: “The DAO responded [to ACLUM’s public records request] initially by letter dated September 21, 2019, providing the following: (a) **federal grand jury minutes** with names of individual officers redacted; . . . (c) an internal memorandum dated May 13, 2019, **regarding disclosure of certain information from the Bradley civil case.**”

OBJECTION: These statements are both clearly erroneous.

With respect to (a), the DAO did not provide, and has never purported to provide, federal grand jury minutes to the American Civil Liberties Union of Massachusetts (ACLUM). See Letter from DAO Records Officer Joseph Pessolano to ACLU Attorney Lewis, dated Sept. 21, 2019, C.R.A. 1100-101.

With respect to (c), the record cannot support a finding that the internal memorandum provided by the DAO on September 21, 2019, concerned the *Bradley* civil case. The internal memorandum, dated May 13, 2019, was highly redacted in order to protect the name of grand jury witnesses; such a process is inconsistent with the procedure in a civil case. *Id.* After a public records request filed by ACLUM on November 23, 2022, ACLUM received from the DAO an internal memorandum dated October 9, 2020, concerning the *Bradley* civil case. See Memorandum from Kate McMahon to Hampden County Assistant District Attorneys (Oct. 9, 2020), C.R.A. 239.

RELIEF REQUESTED: Petitioners request that subsection (a) be deleted and subsection (c) be modified as follows: “an intra-agency memorandum dated May 13, 2019 regarding disclosure of grand jury materials to defense attorneys.”

Pg. 28 n.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.”

OBJECTION: As noted in the preceding objection, the DAO did not provide federal grand jury minutes to ACLUM.

RELIEF REQUESTED: Petitioners request that “provided with the response” be deleted; instead, Petitioners suggest that the sentence may read “The federal grand jury were the first items in the database.”

Pg. 29, Lines 1-3: “**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.”

OBJECTION: The finding that the DAO sent the DOJ Report “[w]ithin days” to CPCS and HCLJ is clearly erroneous. The DOJ Report was released on July 8, 2020. C.R.A. 3-30. The DAO sent the DOJ Report to CPCS and HCLJ over a month later on August 12, 2020. Report of Special Master at 26. This transmittal came only after ACLUM and CPCS sent the DAO a letter on August 6, 2020, which, as the Special Master notes, raised concerns about the DAO’s response to the DOJ Report. *Id.* at 29.

RELIEF REQUESTED: Petitioners request this sentence be deleted. On Page 29, following the paragraph describing the ACLUM and CPCS letter of August 6, 2020, a sentence could be added stating: “After receiving the August 6 letter outlining concerns from the ACLU of Massachusetts and CPCS, the DAO sent the DOJ Report to CPCS and HCLJ.”

Pg. 29, Lines 15-16: “The DAO **responded** [to the August 6 ACLUM and CPCS letter] by producing copies of correspondence showing its efforts to obtain **the information** underlying the DOJ report.”

OBJECTION: This statement is clearly erroneous insofar as it suggests that the DAO responded directly in writing to the ACLUM and CPCS letter of August 6, 2020, and insofar as it suggests that the DAO has at any time requested all (as opposed to just certain) information underlying the DOJ Report. In fact, the DAO never responded directly to the Aug. 6 letter. The correspondence referenced by the Special Master’s Report was provided by the DAO to HCLJ and CPCS on August 20, 2020, in a letter that did not purport to respond to the August 6 letter. See Aug. 20, 2020 Letter from First Assistant DA Fitzgerald to Springfield PDD Attorney in Charge Madden, C.R.A. 276. That Aug. 20 letter described a request by the DAO to the DOJ for certain SPD documents—namely, those reflecting false statements, but not those reflecting excessive force. See *id.*; Aug. 19, 2020 Letter from District Attorney Gulluni to Assistant Attorney General Dreiband, C.R.A. 230-31.

RELIEF REQUESTED: Petitioners request the sentence be modified as follows: “On or about August 20, 2022, the DAO produced copies of correspondence showing its efforts to obtain certain information underlying the DOJ report.”

Pg. 35, Lines 6-7: “None of the recipients [of the redacted exhibits associated with the Kent Report] has asked the DAO for unredacted copies.”

OBJECTION: Defense attorneys have sought the unredacted exhibits. See, e.g., Motion for Clarification of Exculpatory Information Provided by the Commonwealth and for Additional Discovery Regarding Police Witnesses, *Commonwealth v. Morales*, No. 2079CR00287 (Hampden Sup. Ct. filed Oct. 12, 2022); Defendant’s Motion for Clarification of Exculpatory Information Provided by the Commonwealth and for Additional Discovery Regarding Police Witnesses, *Commonwealth v. Soto*, No. 1979CR00528 (Hampden Sup. Ct., filed Oct. 31, 2022).

RELIEF REQUESTED: Petitioners request that this sentence be deleted.

Pg. 44, Line 3: “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.”

OBJECTION: The case name is *Commonwealth v. Labobe*. See Dkt. No. 92, ¶ 6; 9/21/22 Hrg. Tr. at 852:3.

RELIEF REQUESTED: To correct the typographical error, Petitioner request “Ladobe” be replaced with “Labobe.”

Pg. 45, n. 30: “These two officers [Basovskiy and Wajdula] were among those who were later indicted in connection with the Nathan Bills incident, and have since been acquitted of those charges.”

OBJECTION: Officers Basovskiy and Wajdula were not acquitted. The Attorney General’s Office entered notices of *nolle prosequi* for all charges against them. *Commonwealth v. Basovskiy*, No. 1979CR00154 (Hampden Sup. Ct. March 12, 2020); *Commonwealth v. Wajdula*, No. 1979CR00346 (Hampden Sup. Ct. Nov. 24, 2021).

RELIEF REQUESTED: Petitioners request the sentence be amended as follows: “These two officers were among those who were later indicted in connection with the Nathan Bill’s incident, and the Commonwealth entered notices of *nolle prosequi* on all charges against both officers.”

Pg. 48, Line 18-19: “The recording was played during Attorney **Druzinski’s** testimony at the evidentiary hearing before me on September 9, 2022.”

Pg. 49, Line 1: “Attorney **Druzinsky** did not make any further request for video.”

Pg. 49, n.33: “Asked about this inaccuracy, Attorney **Druzinsky** attributed it to “oversight.” . . . I do not base any findings on Attorney **Druzinsky’s** affidavit.”

Pg. 50, Lines 18-19: “The 911 recording was played at the hearing before me on September 9, 2022, during Attorney **Druzinsky’s** testimony.”

Pg. 50, Line 23: “Attorney **Druzinsky** requested Brady material . . .”

OBJECTION: This attorney’s name is spelled Druzinsky.

RELIEF Petitioner respectfully request the correction of the spelling of Attorney
REQUESTED: Druzinsky’s name.

Pg. 56, Line 3: “The judge (**Wrenn, J.**) denied the motion to dismiss” in *Commonwealth v. Gaskins*, 1779CR00494 (Hampden Sup. Ct.).

OBJECTION: Judge Callan, not Judge Wrenn, denied the motion to dismiss in
Commonwealth v. Gaskins, 1779CR00494. C.R.A. 457.

RELIEF Petitioners request that this sentence be amended to state “(Callan, J.)”.
REQUESTED:

Pg. 58, Lines 9-11: “The DAO has not made a practice of disclosing officers’ claims of privilege. The **record does not indicate when or how the DAO learned of those claims.**”

OBJECTION: The record indicates that six officers invoked their 5th Amendment rights against self-incrimination during the Nathan Bill’s investigation and that this information can be found in the IIU report authored by Sgt. Andrew. See C.R.A. 394-95. Fitzgerald conceded during her testimony that the DAO obtained files containing this information between August 2015 and February 2017 via a public records request. See 9/21/22 Hrg. Tr. at 972.

RELIEF Petitioners request the deletion of the sentence: “The record does not
REQUESTED: indicate when or how the DAO learned of those claims.”

Pg. 71, Lines 12-13: “Lopez’s conviction occurred upon his guilty plea, **after his counsel obtained full access to information about the officers involved.**”

OBJECTION: This finding is clearly erroneous. Mr. Lopez’s criminal defense lawyer, Attorney Katherine Murdock, testified that she had not received all of the evidence she had sought regarding potential misconduct of the officers involved in the case. 9/15/22 Hrg. Tr. at 686:21-22. For example, a motion filed by Attorney Murdock seeking the Kent Report was pending when Mr. Lopez pleaded guilty. Ex. 39, Def. Mot. for Reconsideration in *Commonwealth v. Lopez*, Horvitz Suppl. Decl., Dkt. No. 79 (May 26, 2022).

RELIEF REQUESTED: Petitioners request that the words “after his counsel obtained full access to information about the officers involved” be deleted.

II. OBJECTIONS IN WHICH PETITIONERS PROPOSE FINDINGS OF FACT

With respect to the following two objections, Petitioners propose the Report also be modified to add factual findings that would clarify the facts, and which are not inconsistent with the Special Master’s Report. See Mass. R. Civ. P. 53(h)(1).

Pg. 21, Lines 11-14: “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.”

OBJECTION: Petitioners object to this finding on the grounds that whether evidence is “sufficient to support a determination that any particular officer committed any offense” is a legal conclusion unsupported by the record.

It is undisputed that four men were assaulted outside of Nathan Bill’s Bar on April 8, 2015, by off-duty SPD officers. See Report of Special Master at 23 (detailing the convictions of SPD Officers Daniel Billingsley and Christian Cicero). It is further undisputed that, as early as July 26, 2016, the DAO had in its possession information that connected specific officers to the event, including witness identification statements, information that officers asserted their rights against self-incrimination during questioning by police investigators, and information that certain officers called out sick from work the day after incident. See generally DAO Island Pond Assault Findings (Feb. 2, 2017), C.R.A. 312-320; Duda Special Report to Comm’r Barbieri (Aug. 14, 2015), C.R.A. 54-69; Andrew Report to Comm’r Barbieri (Aug. 3, 2015), C.R.A. 322-395.

In addition, notwithstanding the DAO's decision that it lacked sufficient grounds to prosecute officers in connection with the Nathan Bill's incident, First Assistant DA Fitzgerald testified that by February 2017 she knew that Officers Billingsley and Christian Cicero had been present at the incident, that Billingsley called out of work the next day with a "severe headache," and that Officer Cicero missed the next two days of work with a broken toe before going on leave. 9/21/22 Hrg. Tr. at 973-977. Fitzgerald conceded during her testimony that the DAO obtained files containing this information between August 2015 and February 2017, yet the DAO did not regularly disclose those files to criminal defense attorneys even in cases involving Officers Billingsley and Cicero. *Id.* at 977-78.

RELIEF
REQUESTED:

Petitioners suggest that the sentence be changed as follows: "According to First Assistant DA Fitzgerald, the DAO concluded that it cannot identify a set of cases in which the information might provide potentially exculpatory material."

In addition, to ensure accuracy and completeness, Petitioners request that the following findings be added to the Special Master's Report:

- The Special Report authored by SPD Sgt. Andrew, which was in the possession of the DAO no later than Feb. 2, 2017, see generally DAO Island Pond Assault Findings, C.R.A. 312-20 (summarizing aspects of Andrew's report), states the following regarding SPD Officer Christian Cicero:
 - o Officer C. Cicero appears on surveillance video in the vicinity of Nathan Bill's Bar prior to the assault. Andrew Report, C.R.A. 329, 366.
 - o Witnesses picked Officer C. Cicero out of photo arrays. *Id.* at 330.
 - o Witnesses, including SPD officers, described Officer C. Cicero as being present in the bar, *id.* at 332-33, 335; at the scene of the assault, *id.* at 333; and as one of the officers who participated in the assault, *id.* at 362.
 - o Approximately four hours after the assault, Officer C. Cicero reported that he would not report for duty due to a broken toe. *Id.* at 330, 371-72.
 - o When questioned about this incident, Officer C. Cicero repeatedly invoked his Fifth Amendment rights against self-incrimination. *Id.* at 339, 354, 395.
- In addition, the Sgt. Andrew Report states the following regarding SPD Officer Daniel Billingsley:

- Witnesses, including SPD officers, identified Officer Billingsley as being present at Nathan Bill’s Bar on the night of the assault. *Id.* at 327, 332, 337, 350, 353, 358-59, 361-62, 383, 390.
- Victim-witnesses picked Officer Billingsley out of photo lineups, stating he was present in the bar and during the assault. *Id.* at 322, 342, 357.
- Officer Billingsley called out sick from work the day after the assault, claiming “severe migraines.” *Id.* at 330, 371.
- When asked for a statement, Officer Billingsley invoked his Fifth Amendment rights against self-incrimination. *Id.* at 339, 354, 394.

Pg. 33, Lines 6-7: “This [letter of July 2, 2021] **was the first time** the City disclosed to the DAO the existence of the Kent report.”

OBJECTION: This finding is clearly erroneous. The Kent Report is dated October 2, 2020. See *Pikula Aff.*, C.R.A. 1155. Although First Assistant DA Fitzgerald *initially* testified that she had not known of the Kent Report’s existence until receiving a letter from Former City Solicitor Ed Pikula dated July 2, 2021, she later acknowledged writing emails to Mr. Pikula memorializing the fact that he had disclosed the existence of the Kent Report to her during a phone call in March 2021. Compare 9/15/22 Hrg. Tr. at 729:13-15, with 9/21/22 Hrg. Tr. at 923-25; Exhibit B, Fitzgerald Emails with Pikula.

RELIEF REQUESTED: Petitioners request that this sentence be modified to read: “This letter also mentioned the existence of the Kent Report.”

In addition, to ensure accuracy and completeness, Petitioners request that the following findings be added to the Special Master’s Report:

- SPD Deputy Chief Steven Kent reviewed police department records in an attempt to identify the dates of incidents, police officers, and other individuals referenced in the DOJ Report, and he generated a report dated October 2, 2020. *Pikula Aff.*, C.R.A. 1154-155.
- During a phone call on March 16, 2021, the City informed the DAO of the existence of Deputy Chief Kent’s report, as well as certain documents associated with it. See 9/21/22 Hrg. Tr. at 924:1-9; Exhibit B, Fitzgerald Emails with Pikula.

III. OBJECTIONS TO STATEMENTS INVOLVING LEGAL CONCLUSIONS

Petitioners object to the following ultimate statements that appear to involve legal conclusions or, at a minimum, mixed questions of law and fact subject to de novo review. See *Charles*, 466 Mass. at 76. To the extent these statements involve pure findings of fact, Petitioners object to them as clearly erroneous.

Pg. 67, Line 6: “The DAO lacks the capacity to do [an investigation] while performing its statutory functions.”

OBJECTION: An agency’s obligation to investigate wrongdoing by members of its prosecution teams is a legal question, irrespective of capacity. See, e.g., *Commonwealth v. Tucceri*, 412 Mass. 401, 407-08 (1992) (“[T]he duties of a prosecutor to administer justice fairly, and particularly concerning requested or obviously exculpatory evidence, go beyond winning convictions”).

To the extent this statement is a factual finding concerning the DAO’s capacity, it is not supported by the DAO’s own account of its actions. First Assistant DA Fitzgerald testified that investigating SPD misconduct would take away from the DAO’s “actual job” of prosecuting cases. See 9/21/22 Hrg. Tr. at 879:8-10. In addition, she suggested that SPD officers simply will not cooperate with investigations. See *id.* at 879:21-22 (Fitzgerald: “[I]t’s unlikely that they [SPD officers] would speak to us again. And I’m not sure what the statements would be, whether they would be consistent or inconsistent”).

RELIEF REQUESTED: Petitioners request that this sentence be deleted.

Pg. 67-68, Lines 1-2: “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. [P]etitioners have shown failures by the DAO to disclose exculpatory information in six cases.”

OBJECTION: The undisputed record in this case establishes, among other things, that in roughly 8,000 cases the DAO failed to disclose evidence, that the DAO disclosed that evidence only after this lawsuit was filed, and that its disclosures are still incomplete. Whether those and other facts constitute

“routine” nondisclosure is a legal question, and, regardless, the Special Master’s finding of six cases of nondisclosure is clearly erroneous.²

The “six cases” finding overlooks the systemic withholding of exculpatory evidence across numerous cases, which has been established through undisputed evidence in this case:

- (1) *Nondisclosure of documents relating to the DOJ Report until after this lawsuit was filed.* As the Special Master notes, the DAO is now disclosing, in “some 8000 pending or past cases,” hundreds of pages of documents that the City has identified as being related to the incidents described in the DOJ report. Report of Special Master at 33. It is undisputed that these documents were not disclosed before this lawsuit was filed, including while now-closed criminal cases were pending. *Id.* at 32-33. It is undisputed that the City had gathered these documents by October 2020. *Pikula Aff.*, C.R.A. 1155. It is undisputed that the City disclosed the existence of these documents to the DAO by March 2021. Exhibit B, Fitzgerald Emails with Pikula. Yet is undisputed that the documents were not disclosed in the “8000 pending or past cases” until after Petitioners filed this lawsuit. Report of Special Master at 33.

It is also undisputed that at least some of these previously-withheld documents were in the DAO’s actual possession—not just its constructive possession, custody, or control—for years. These documents include:

- (a) *The Wilbraham Police Report Concerning the Palmer Incident.* It is undisputed that, from March 2016 until embarking its ongoing notice process in 2021, the DAO possessed but did not regularly disclose a “supplemental report” by a Wilbraham police officer stating that “he saw a plainclothes Springfield officer kick one of the juveniles” in Palmer. Report of Special Master at 20; Exhibit A, Fitzgerald Email to Barbieri. First Assistant DA Fitzgerald testified that, although the DAO possessed the Wilbraham police report since March 2016, it did not regularly disclose it to criminal defendants until that report, together with a broader set of documents concerning the Palmer incident, were sent by Former City Solicitor Pikula with his letter dated July 2, 2021. See 9/21/22 Hrg. Tr. at 1021-27.

² Petitioners believe the six cases referenced by the Special Master are: *Commonwealth v. Rodriguez-Nieves*, 487 Mass. 171 (2021); *Commonwealth v. Santana*, 465 Mass. 270 (2013); *Commonwealth v. Williams*, 99 Mass. App. Ct. 1128 (2021); *Commonwealth v. Graham*, No. 1779CR00403 (Hampden Sup. Ct.); *Commonwealth v. Fonseca-Colon*, No. 1479CR000877 (Hampden Sup. Ct); and a 2021 decision by Judge Mason in the Hampden Superior Court, see Ex. 27, Decl. of M. Horvitz, Dkt. No. 62 (Feb. 22, 2022).

(b) *The Nathan Bill's Files and Binder.* First Assistant DA Fitzgerald testified that, in connection with the DAO's February 2017 report explaining its decision not to charge officers in connection with the Nathan Bill's incident, she possessed and reviewed numerous records, including a "detective bureau file," "an IIU file," and a "binder" containing "witness statements . . . police reports . . . video from the location," and "medical records." 9/21/22 Hrg. Tr. at 968-69. Those records included information about Officer Billingsley calling out of work with a headache and Officer Christian Cicero calling out with a broken toe. *Id.* at 976-77. But it is undisputed that, prior to August 2021, the DAO never disclosed any of that evidence or its own February 2017 report to criminal defendants; it only posted the February 2017 report to its web site. *Id.* at 973, 977-80, 1023. First Assistant DA Fitzgerald testified that in her view it was appropriate not to disclose the SPD reports because the SPD made a mess of the identification process. 9/15/22 Hrg. Tr. at 799:14-16. Beginning in August 2021, the DAO began to turn over certain documents to criminal defendants regarding the Nathan Bill's incident; but rather than turn over everything in its possession, it turned over only the materials that Former City Solicitor Pikula included with his July 2, 2021 letter to the DAO. See 9/15/22 Hrg. Tr. at 1023-26.

(2) *The Kent Report.* It is undisputed that the Kent Report has been withheld from October 2, 2020, through today, including in cases in which Deputy Chief Kent was a member of the prosecution team. Petitioner Ryan, for example, has received letters from the DAO informing her both that she has litigated cases in which Kent was a member of the prosecution team and that Kent may be implicated in the misconduct flagged by the DOJ Report, but she has not received a copy of the Kent Report. 9/15/22 Hrg. Tr. at 672-673. The DAO knew about the Kent Report by March 16, 2021, Exhibit B, Fitzgerald Emails with Pikula, yet failed to inform defense counsel about the report and underlying documents until at least August 26, 2021. Ex. B, Letter from First Assistant DA Fitzgerald to Springfield PDD Attorney in Charge Madden, Pet'rs Status Report, Dkt. No. 48 (Sept. 16, 2021).

(3) *Falsified SPD Reports.* The DOJ found evidence that SPD Narcotics Bureau officers falsify police reports, and thereafter, the DAO attempted to obtain the evidence that was the basis of this finding. See Report of Special Master at 29-31 (describing the DAO's communications with and lawsuit against federal agencies). To date, no entity in the Commonwealth has identified all of the incidents described in the DOJ Report. See *id.* at 33. In its federal filings, the DAO described that an untold number of cases have been affected by the

DAO's failure to independently discover this evidence. See Memorandum in Support of Plaintiff's Motion for Summary Judgment at 1, *Gulluni v. Mendell*, No. 3:21-cv-30058 (D. Mass. Jan. 31, 2022).

- (4) *Evidence of Unlawful Force*. The DAO does not appear to construe its obligation to disclose exculpatory evidence to include evidence of unlawful force. See, e.g., Complaint at 28-29, *Gulluni v. Mendell*, No. 3:21-cv-30058, ECF No. 1 (D. Mass May 19, 2021) (seeking only records from the DOJ investigation reflecting false reporting). For example, Attorney David Hoose testified regarding his client's civil case alleging excessive force, *Ververis v. Kent*, No. 3:13CV30175 (D. Mass. 2015), in which video evidence showed officers, including Steven Kent, forcibly remove his client from a car and drag him through the snow. 9/14/22 Hrg. Tr. at 537-539; see also Pet. at 14; Pet'rs First Status Report at 4 n.2. Attorney Hoose testified he is unaware of the DAO disclosing information to defense about this incident in cases in which the involved officers serve as members of the prosecution team. 9/14/22 Hrg. Tr. at 539:15-20. When questioned, First Assistant DA Fitzgerald stated that "everything that occurred on the video was described by Officer Kent in his written report, including his treatment of the defendant," 9/21/22 Hrg. Tr. at 834:16-19.
- (5) *Withholding of Adverse Credibility Determinations*. As the Special Master correctly notes, the DAO withholds adverse credibility findings by judges concerning SPD officers in other cases involving those officers. See Report of the Special Master at 43-47, 68. For example, First Assistant DA Fitzgerald testified that the DAO's practice was to decline to disclose a judge's pretrial adverse credibility findings concerning a police officer in other cases involving that officer unless the DAO concluded that the judge's adverse credibility findings were *correct*. See 9/21/22 Hrg. Tr. at 1000, 1065-67. Although the total number of affected cases is unknown, three such cases in which a judge made an adverse finding which the DAO has not disclosed are:
- (a) *Commonwealth v. Santiago*, No. 1779CR00376 (Hampden Sup. Ct.): Superior Court Judge Sweeney stated that SPD Officer Aguirre's testimony was a "fanciful" and "made up tale" during a motion hearing, Report of Special Master at 43, but the DAO did not disclose that finding in other cases involving Officer Aguirre because the DAO concluded that the finding was "more of an opinion of the judge" that the office "disagreed with." 9/21/22 Hrg. Tr. at 1067.
- (b) *Commonwealth v. Reyes*, No. 0779CR00028 (Hampden Sup. Ct.), in which Ret. Superior Court Judge Page found that SPD Officer Mark Templeman made deliberately false statements in

his report and search warrant affidavit. Report of Special Master at 47.

- (c) *Commonwealth v. Perez*, No. 1923CR00353 (Springfield Dist. Ct.), in which District Court Judge Groce stated that the testimony offered by SPD Officers Basovskiy and Wajdula “defies the objective evidence and almost belies common sense.” *Id.* at 46.

In addition to the systemic non-disclosures discussed above, Petitioners presented proof that evidence was withheld in the following individual cases:

- (6) *Commonwealth v. Cooper-Griffith*, No. 1823CR006541 (Springfield Dist. Ct.): The DAO failed to turn over the video of the booking dock where it alleged that Mr. Cooper-Griffith committed assault and battery on Officer Christian Cicero, even though a surveillance camera exists on the booking dock. See Report of Special Master at 48-49 & n.32.³ As the Special Master notes, Attorney Druzinsky also did not receive any information about Officer Cicero’s involvement in the Nathan Bill’s incident. See Report of Special Master at 49.
- (7) *Commonwealth v. Williams*, No. 1823CV009270 (Springfield Dist. Ct.): The DAO failed to turn over any information from its Nathan Bill’s investigation regarding Officer Basovskiy. After Attorney Druzinsky filed a motion seeking that information, a *nolle prosequi* was entered on all counts. See 9/9/22 Hrg. Tr. at 88-93; Report of Special Master at 50-51.
- (8) *Commonwealth v. Lopez*, 1979CR00143 (Hampden Sup. Ct): The DAO received *Brady* material from the SPD regarding the DOJ Report in July 2021, but at no point during the pendency of the Lopez case, did the DAO turn over any of these materials to Attorney Murdock, even though, as the Special Master notes, “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.” See Special Master Report at 15; 9/9/22 Hrg. Tr. at 684-687; Ex. B, Letter from Springfield City Solicitor Edward Pikula to Hampden County Assistant DA Fitzgerald (July 2, 2021),

³ The Report of the Special Master includes a discussion of Attorney Druzinsky’s testimony concerning his understanding of where his client, Mr. Cooper-Griffith, allegedly spat on Officer Cicero and whether his discovery request for video from the “booking area” was broad enough to encompass the “booking dock.” See Report of the Special Master at 48-49; see also 9/9/22 Hrg. Tr. at 55-57 (Druzinsky’s testimony on this point). Regardless, with or without a request from Mr. Cooper-Griffith’s counsel, because the DAO contended that the crime occurred on the booking dock, SPD surveillance video of the booking dock was subject to mandatory discovery under Mass. R. Crim. P. 14(a)(1)(A)(iii) (exculpatory evidence) and/or (a)(1)(A)(vii) (photographs and other tangible objects).

Pet’rs Status Report (Sept. 16, 2021). Attorney Murdock was aware of the materials, which she described as a “hodgepodge” and “hard to make a ton of sense of,” because they were sent to the CPCS Springfield PDD office, but they were never provided to her in her case. 9/15/22 Hrg. Tr. at 704-06.

- (9) *Commonwealth v. [redacted]*, (Springfield Juv. Ct.), which was identified by Deputy Chief Kent as one of the cases described in the DOJ Report as involving excessive force and false reporting and in which the DAO provided no evidence of the same to defendant. See Report of Special Master at 24 n.20, 38; O’Connor Aff. at ¶ 5, C.R.A. 225-26.
- (10) *Commonwealth v. Soto*, No. 1979CR00528 (Hampden Sup. Ct.), in which it is undisputed that the DAO failed to disclose an adverse credibility finding regarding SPD Officer Aguirre. See Report of Special Master at 43-44.
- (11) *Case Identified in the DOJ Report*. Attorney Ivonne Vidal testified that the SPD, through Deputy Chief Kent, identified her client’s case as having been described in the DOJ Report. 9/9/22 Hrg. Tr. at 133-134. Attorney Vidal testified that after her client’s case was over, she received previously undisclosed documents about her client’s case in the batch of documents received from the DAO. 9/9/22 Hrg. Tr. at 133-134.

RELIEF
REQUESTED:

Petitioners request that the Special Master’s finding with respect to “six cases” be deleted, and that any characterization of the adequacy of the DAO’s disclosure practices be deferred to the full court because it is a mixed question of law and fact.⁴

⁴ In alleging that the DAO “ha[d] routinely failed to disclose *Brady* evidence related to police misconduct,” the Corrected Petition that Petitioners’ pre-litigation investigation of the DAO had turned up “no formal policies or procedures” capable of ensuring the consistent disclosure of exculpatory evidence; no case in which the DAO had disclosed “adverse judicial findings regarding [an] officer’s credibility” in other cases involving that officer; and no cases in which the DAO disclosed the Nathan Bill’s reports, even though they included evidence of misconduct by Officers Billingsley and Cicero. Pet. at 17-20. Elsewhere, the Corrected Petition raised a concern that the DAO had not, as of May 2021, disclosed the “excessive force and misleading reports identified by the DOJ.” *Id.* at 29. The evidence that has emerged in this litigation has now validated all of those concerns—and more.

Pg. 71, Lines 7-11: “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 [of standing].”

OBJECTION: Petitioners have extensively briefed the issue of standing and incorporate those arguments here, including the arguments that this matter meets the capable of repetition yet evading review standard and citations to Supreme Court case law allowing attorneys third-party standing to assert the interests of their clients. See, e.g., Pet’rs Reply Brief, Dkt. No. 40 (June 11, 2021); Pet’rs Third Status Report, Dkt. No. 67 (July 15, 2022).

The standing of Petitioners Auer and Ryan to raise the issues presented in this case—including the adequacy of the DAO’s disclosure practices—is further supported by the evidentiary hearing, which established that they have recently received letters from the DAO in open and closed cases, which provide exculpatory material that was previously undisclosed, which is still “by no means exhaustive,” and which fail to disclose the Kent Report even in cases where Kent served on the prosecution team. 9/15/22 Hrg. Tr. at 672-73; Redacted Fitzgerald Letters to Defense Counsel, Tab 25, Fitzgerald Vol. 1, Dkt. No. 104 (Oct. 7, 2022).

RELIEF REQUESTED: Petitioners respectfully request that the question of standing be decided in their favor as to each petitioner or, in the alternative, reserved and reported to the full court.

Pg. 72, Lines 1-2: “The issue [question presented number 3] arises in this case **primarily in connection with the Kent report**, which SPD has refused to divulge to the DAO, or to anyone else.”

OBJECTION: Petitioners seek to offer additional context for this statement. The third question jointly proposed by the parties asks the Court to address the prosecution’s obligations when a police department declines to turn over exculpatory evidence concerning police officers who are members of prosecution teams. The record evidence implicating that question goes beyond the Kent Report and includes:

- (1) The City withheld not only the Kent Report, but the documents associated with the Kent Report, from October 2, 2020, to July 2, 2021. The withholding of those documents is squarely presented for review by the full court because the documents were disclosed by the City to the DAO only after this lawsuit was filed in April 2021. Compare *Pikula Aff.*, C.R.A. 1155 (stating Kent Report is dated October 2, 2020), with Ex. B, Letter from Springfield City Solicitor Edward Pikula to Hampden County Assistant DA Fitzgerald (July

2, 2021), Pet’rs Status Report (Sept. 16, 2021) (providing documents associated with Kent Report).

- (2) The City has told the DAO that its document disclosures are, to this day, “by no means exhaustive,” which means the City has yet to disclose all the exculpatory evidence in its possession. See Report of the Special Master at 35; *Drumgold v. Callahan*, 707 F.3d 28, 38 (1st Cir. 2013) (“law enforcement officers have a correlative duty to turn over to the prosecutor any material evidence that is favorable to a defendant”).
- (3) As the Special Master notes, the City has never turned over what First Assistant DA Fitzgerald has described as “the cover letters [the City] sent to the DOJ outlining the documents [the City] provided to [the DOJ].” 9/21/22 Hrg. Tr. at 925; see Report of Special Master at 72 n.43.
- (4) More generally, the DAO has acknowledged that when it sought the Kent Report and associated documents from the City, it was “asking,” not telling. 9/21/22 Hrg. Tr. at 930 (testimony of Jennifer Fitzgerald); see also *id.* at 1043 (testimony of Jennifer Fitzgerald that the DAO is “asking,” not telling, when seeking 911 calls). Guidance from the full court about whether the prosecution must do more than ask for documents withheld by a police department would be helpful to the administration of criminal justice.

RELIEF REQUESTED: The third question presented should be reserved and reported to the full court, and the sentence quoted above should be amended as follows: “The issue arises in this case in connection with, among other things, the Kent Report”

Pg. 73, Lines 1-5: “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.**”

OBJECTION: The highlighted factual findings in the above-quoted sentences are clearly erroneous, and Petitioners object to the legal conclusion that proposed changes to Rule 14 resolve the third question jointly presented by the parties in this case.

With respect to the finding of “wide[] and routine[]” disclosure that the Kent Report exists and the City has refused to provide it, the DAO’s notice letters to defense counsel do not say that. Instead, it is undisputed that the DAO’s notice letters to individual defense lawyers do not mention the Kent

Report; do not disclose that the linked-to documents are associated with the Kent Report, do not disclose that the documents “are not exhaustive” to each incident, and do not disclose that the City has refused to provide the Kent Report. See Tab 9 of Ryan Binder, Dkt. No. 104 (Oct. 7, 2022); Tab D of Selected Respondent Hearing Exhibits, Exs. 16-18, Dkt. No. 100 (Sept. 19, 2022).

Moreover, the DAO revealed that it has not established a process to distribute the documents to juvenile defendants or pro se defendants. Report of Special Master at 33-34; see also 9/15/22 Hrg. Tr. at 741:1-4 (describing ongoing issue with sending disclosure documents to attorneys who now serve in the judiciary).

With respect to the legal issue, the current proposed amendments to Rule 14 do not negate the need for this Court’s guidance as to what prosecutors must do when a member of the prosecution team withholds exculpatory evidence. Proposed Rule 14.1(a)(2)(D) would permit a prosecutor to “notify the defense” when a member of the prosecution team withholds exculpatory evidence. This proposal is contrary to case law making the prosecutor responsible for the withholding of evidence by any member of the prosecution team. *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995) (“the prosecution’s responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable”); *Mastracchio v. Vose*, 274 F.3d 590, 600 (1st Cir. 2001) (“When any member of the prosecution team has information in his possession that is favorable to the defense, that information is imputable to the prosecutor”). When a member of the prosecution team withholds exculpatory evidence, it is not sufficient for the prosecutor simply to tell the defense that the prosecution team is violating the law.

In fact, the First Circuit has squarely considered and rejected the very approach that Proposed Rule 14.1(a)(2)(D) seems to invite:

[I]t would be no adequate response for trial counsel [for the government] to suggest negligence on the part of the case agent or the relevant investigative agency. Trial counsel is the member of the government team who is an officer of the court. In this sense, it may be a form of insubordination if the investigative agents working on the case for trial counsel are not forthcoming in satisfying the government’s disclosure obligations. **But the prosecutor is duty bound to demand compliance with disclosure responsibilities by all relevant dimensions of the government. Ultimately, regardless of whether the prosecutor is able to frame and enforce directives to the investigative agencies to respond candidly and fully to disclosure orders, responsibility for failure to meet disclosure obligations will be assessed by the courts against the prosecutor and his office.**

United States v. Osorio, 929 F.2d 753, 762 (1st Cir. 1991) (emphasis added); see also *Commonwealth v. Murray*, 461 Mass. 10, 19 (2011) (“A police officer is subject to the prosecutor’s control when he acts as an agent of the government in the investigation and prosecution of the case”).

Because “notify[ing] the defense” is insufficient as a matter of law when a member of the prosecution team withholds exculpatory evidence, this Court’s guidance is needed on the full extent of the prosecutor’s obligations in that circumstance. That issue is squarely presented here. The City has withheld the Kent Report and other documents. Yet, according to First Assistant DA Fitzgerald, the DAO’s practice is: “I think it’s fair to say we have simply provided what the City provided.” See 9/15/22 Hrg. Tr. at 755.

RELIEF REQUESTED: Petitioners request the deletion of these sentences from the Report and that the third question presented be reserved and reported to the full court.

Pg. 74, Lines 3-4: “[T]he misconduct [of chemists Annie Dookhan and Sonja Farak] was in itself ground to vacate each conviction and dismiss each charge as to each defendant affected.”

OBJECTION: This legal conclusion is incorrect. The Supreme Judicial Court never held that the misconduct of chemists Annie Dookhan or Sonja Farak, without more, was sufficient grounds to vacate any conviction or dismiss any charge. See *Bridgeman v. Dist. Attorney for the Suffolk Dist.*, 476 Mass. 298, 325-326, 328 (2017) (calling on DAs to dismiss “large numbers” of Dookhan cases because defense resources would otherwise “be overwhelmed,” and allowing DAs to decline to move to vacate convictions where they could “certify that, if a motion for a new trial were allowed, the district attorney could produce evidence at a retrial, independent of Dookhan’s signed drug certificate or testimony, sufficient to permit a rational jury to find beyond a reasonable doubt that the substance at issue was the controlled substance alleged in the complaint or indictment”); *CPCS v. Attorney General*, 480 Mass. 700 (2018) (relying on combination of chemist and attorney misconduct).

RELIEF REQUESTED: Petitioners request this sentence be deleted.

Pg. 74, Lines 11-13: “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.”

OBJECTION: The statement that the evidence of excessive force and false reporting by SPD officers is only “impeachment” evidence is incorrect as a matter of law. The DOJ report described 23 incidents where it alleges that officers engaged in excessive force, and some unlawful uses of force are described as having been concealed by false reporting. See Report of Special Master at 18. Therefore, in at least those 23 cases, defendants may have been convicted, accepted pleas, or otherwise been subject to criminal process based on false reporting that may have accused them of crimes of which they are innocent. At least one of those 23 cases remains pending as of this writing. See *Commonwealth v. Bruno-Villanueva*, No. 1923CR004823 (Springfield Dist. Ct.).

In addition, excessive force may be admissible substantively in certain types of cases pursuant to *Commonwealth v. Adjutant*, 443 Mass. 649 (2005), and proof of false reporting could be relevant to a threshold showing for a *Franks* hearing.

RELIEF REQUESTED: Petitioners request that the quoted sentences be replaced by the following sentences: “The undisclosed evidence may provide information that would tend to show that officers used excessive or unnecessary force in some cases, provided false statements in individual cases, including as to the issue of the use of force, and would also provide material for potential impeachment of these officers in other cases in which those officers are members of the prosecution team.”

Respectfully submitted on November 17,
2022,

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**COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT**

Suffolk, ss.

No. SJ-2021-0129

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

v.

DISTRICT ATTORNEY FOR HAMPDEN COUNTY,
Respondent.

CERTIFICATE OF SERVICE

I hereby certify that, on November 17, 2022, I served a copy of the foregoing, with exhibits, through email on the following counsel of record for the Respondents:

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EXHIBIT A



Department of Justice

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FOR IMMEDIATE RELEASE

November 15, 2022

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JUSTICE DEPARTMENT LAUNCHES CIVIL INVESTIGATION OF WORCESTER POLICE DEPARTMENT

BOSTON – The United States Attorney’s Office for the District of Massachusetts and the Justice Department announced today that it has opened a pattern or practice investigation into the Worcester Police Department (WPD). This civil investigation will assess whether WPD engages in a pattern or practice of excessive force or engages in discriminatory policing based on race or sex. The investigation will include a comprehensive review of policies, procedures, trainings, investigatory files, and data. The investigation will also include a review of WPD’s systems of accountability, including its systems to address misconduct complaints and discipline. The Department will also evaluate how WPD officers interact with the public, collect evidence, and complete investigations.

“The City of Worcester is a thriving and vital part of our District and we work closely every day with its Police Department. Worcester police officers have a challenging job of ensuring the safety of the Worcester community. This often means responding to or encountering tense and at times dangerous conflicts and situations. I am well aware that the overwhelming majority of officers serve and do their jobs with honor, pride, restraint and distinction,” said United States Attorney Rachael S. Rollins. “The purpose of this civil investigation is to determine – through objective and thorough examination – whether or not there is an overall pattern or practice of conduct that violates the Constitution or federal law. This is the beginning of the process. We will go where the facts take us. You will hear from me at the end of the investigation, irrespective of outcome. Our ultimate goal is to ensure that policing in Worcester is constitutional, safe, and effective all while the civil rights of their residents remain intact. We thank the City of Worcester, and specifically Chief Steven Sargent, for their cooperation and collaboration in this matter.”

“Based on information provided to the Justice Department, we find significant justification to investigate whether the Worcester Police Department engages in a pattern or practice of racially discriminatory and gender-biased policing, and uses excessive force,” said Assistant Attorney General Kristen Clarke of the Justice Department’s Civil Rights Division. “Ensuring that our law enforcement officers act in a constitutional and non-discriminatory manner is among the highest priorities of the U.S. Department of Justice. Our pattern or practice investigations are a key tool in our efforts to ensure community safety and promote constitutional policing across the country. We look forward to working with officials towards the shared goals of ensuring constitutional, effective policing and fostering greater trust between law enforcement officers and the community members they serve.”

The investigation is being conducted pursuant to the Violent Crime Control and Law Enforcement Act of 1994, which prohibits state and local governments from engaging in a pattern or practice of conduct by law enforcement officers that deprives individuals of rights protected by the Constitution or federal law. The statute allows the Department to remedy such misconduct through civil litigation. The Justice Department will be assessing law enforcement practices under the Fourth and Fourteenth Amendments to the United States Constitution, as well as under the Safe Streets Act of 1968 and Title VI of the Civil Rights Act of 1964.

This is the second investigation of a Massachusetts law enforcement agency conducted pursuant to this statute. In 2018, the Justice Department opened an investigation of the Springfield Police Department, which was resolved by a consent decree in 2022.

Prior to this announcement, Department Officials informed Worcester Police Chief Steven Sargent, Worcester Mayor Joseph Petty and Worcester Acting City Manager Eric Batista of the investigation. They pledged to cooperate with the investigation. As part of this investigation, Department officials will reach out to members of the public to learn about their experiences with WPD.

The Special Litigation Section of the Department of Justice Civil Rights Division in Washington, D.C. and the U.S. Attorney's Office for the District of Massachusetts will jointly conduct this investigation. Individuals with relevant information are encouraged to contact the Department of Justice via email at community.wpd@usdoj.gov or by toll free phone at 888-221-6023. Individuals can also report civil rights violations regarding this or other matters using the Civil Rights Division's reporting portal, available at <https://civilrights.justice.gov/>.

For more information on the U.S. Attorney's Office's Civil Rights Unit, please visit www.justice.gov/usao-ma/civil-rights. Additional information about the Civil Rights Division of the Justice Department is available on its website at www.justice.gov/crt. Information specific to the Civil Rights Division's Police Reform Work can be found here: <https://www.justice.gov/crt/file/922421/download>.

###

EXHIBIT B

**“Fitzgerald Emails with Pikula,”
Tab 18 of Fitzgerald Vol. 1, Dkt. No. 104 (Oct. 7, 2022)
(already entered into Record)**

From: [Fitzgerald, Jennifer \(DAA\)](#)
To: [Pikula, Edward](#)
Subject: RE: [External] FW: Scan from PrimeLink
Date: Monday, April 26, 2021 4:32:05 PM

Wonderful! Thank you!

-----Original Message-----

From: Pikula, Edward <epikula@springfieldcityhall.com>
Sent: Monday, April 26, 2021 3:50 PM
To: Fitzgerald, Jennifer (WES) <jenfitzgerald@MassMail.State.MA.US>
Subject: RE: [External] FW: Scan from PrimeLink

CAUTION: This email originated from a sender outside of the Commonwealth of Massachusetts mail system. Do not click on links or open attachments unless you recognize the sender and know the content is safe.

Thank you Jen. I will finalize them and get you the response we discussed by the end of the week.

Edward M. Pikula
City Solicitor

Springfield Law Department
36 Court Street – Room 210
Springfield, MA 01103
(413) 787 6085
epikula@springfieldcityhall.com

-----Original Message-----

From: Fitzgerald, Jennifer (DAA) [<mailto:jennifer.fitzgerald@state.ma.us>]
Sent: Monday, April 26, 2021 3:46 PM
To: Pikula, Edward
Subject: RE: [External] FW: Scan from PrimeLink

Good afternoon Ed,

Just checking in to see if you have any idea as to when I might expect the information we discussed during our phone call on March 16th. I understood you would send a cover letter outlining the documents you provided to the DOJ and additionally, you would confirm that they had access to the department's record management system and that you do not know what information they accessed. I also understood that you did not want to provide us with work product documents that were produced at your request from Deputy Chief Kent but you were willing to identify the documents he referenced in his internal memorandum. Again, if I have misunderstood please let me know otherwise I look forward to hearing from you soon!

Jennifer

Jennifer N. Fitzgerald
First Assistant
Hampden District Attorney's Office
50 State Street
Springfield, MA 01103
Direct Line: 413 505-5627
Fax: 413 781-4745

Jennifer.Fitzgerald@state.ma.us

-----Original Message-----

From: Fitzgerald, Jennifer (WES)
Sent: Thursday, April 8, 2021 4:02 PM
To: 'Pikula, Edward' <epikula@springfieldcityhall.com>
Subject: RE: [External] FW: Scan from PrimeLink

Hi Ed,

I thought I would follow up on our conversation from back on March 16th. I know how busy you are but I wanted to confirm you still planned on sending me the cover letters you sent to the DOJ outlining the documents you provided to them as well as an explanation as to how they accessed documents during their two year review and what the Springfield Police Department then reviewed and drafted once the DOJ report had been completed. If I have misunderstood or you have reconsidered please let me know. I look forward to working with you!
Jennifer

Jennifer N. Fitzgerald
First Assistant
Hampden District Attorney's Office
50 State Street
Springfield, MA 01103
Direct Line: 413 505-5627
Fax: 413 781-4745
Jennifer.Fitzgerald@state.ma.us

-----Original Message-----

From: Pikula, Edward [<mailto:epikula@springfieldcityhall.com>]
Sent: Monday, March 15, 2021 4:45 PM
To: Fitzgerald, Jennifer (WES) <jenfitzgerald@MassMail.State.MA.US>
Subject: RE: [External] FW: Scan from PrimeLink

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Thank you. Are you available tomorrow to discuss the logistics to coordinate?

Edward M. Pikula
City Solicitor

Springfield Law Department
36 Court Street - Room 210
Springfield, MA 01103
(413) 787 6085
epikula@springfieldcityhall.com

-----Original Message-----

From: Fitzgerald, Jennifer (DAA) [<mailto:jennifer.fitzgerald@state.ma.us>]
Sent: Monday, March 15, 2021 4:25 PM
To: Pikula, Edward
Subject: [External] FW: Scan from PrimeLink

Dear Attorney Pikula,

Attached please find correspondence from District Attorney Gulluni regarding the DOJ investigation of the Springfield Police Department. Let me know if you have any questions or concerns, I look forward to hearing from you at your earliest convenience.

Jennifer

Jennifer N. Fitzgerald
First Assistant
Hampden District Attorney's Office
50 State Street
Springfield, MA 01103
Direct Line: 413 505-5627
Fax: 413 781-4745
Jennifer.Fitzgerald@state.ma.us

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EXHIBIT C

**“Fitzgerald Email to Barbieri,”
Tab 10 of Fitzgerald Vol. 1, Dkt. No. 104 (Oct. 7, 2022)
(already entered into Record)**

FW: Arrest of Juvenile [REDACTED] - Springfield PD, Wilbraham Pd, Palmer PD

Barbieri, John

Tue 3/22/2016 1:14 PM

To: Cheetham, Robert <RCheetham@springfieldpolice.net>; Brown, Larry <LBrown@springfieldpolice.net>; Andrew, William <WAndrew@springfieldpolice.net>;

Cc: Fitzgerald, Jennifer (DAA) <jennifer.fitzgerald@state.ma.us>;

@ 1 attachment

Scanned from a Xerox Multifunction Device.pdf;

Report from DA - regarding IIU investigation

John R. Barbieri
Police Commissioner
Springfield Police Department
130 Pearl Street
Springfield, MA 01105
413.787.6313

-----Original Message-----

From: Fitzgerald, Jennifer (DAA) [mailto:jennifer.fitzgerald@state.ma.us]

Sent: Tuesday, March 22, 2016 12:46 PM

To: Barbieri, John

Subject: Arrest of Juvenile [REDACTED] - Springfield PD, Wilbraham Pd, Palmer PD

Dear Commissioner,

The DA asked that I send you the attached reports which detail the recent arrest of three juveniles and include an allegation of excessive force from Wilbraham Police Officer Christopher Rogers against an unknown, plain clothed Springfield police officer.

Please feel free to contact me after you have had an opportunity to review the documents and as always, let me know if I can provide you with any additional information.

Jennifer

Jennifer N. Fitzgerald
First Assistant
Hampden County District Attorney's Office
50 State Street
Springfield, MA 01103
Direct Line (413) 505-5627

Facsimile (413) 781-4745
Jennifer.Fitzgerald@state.ma.us

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SUPPLEMENTAL NARRATIVE
EXCESSIVE USE OF FORCE REPORT

-Please see (WPD 16-100-AR)

1) (Referencing paragraph 10) Officer Rogers placed [REDACTED] in handcuffs without incident. While [REDACTED] was still on the ground in handcuffs Officer Rogers began to search [REDACTED] for weapons. At this time a plain clothes Springfield Police Officer came from Officer Rogers left side and kicked [REDACTED] in the face. Officer Rogers then stood [REDACTED] up and had him sit on the curb on the side of the road. Officer Rogers did not know the identity of the Springfield officer.

2) After securing [REDACTED] Officer Rogers assisted in handcuffing [REDACTED]. A noticeable amount of blood was seen on [REDACTED] [Petitioners] mouth and nose. Officer Rogers did not witness how the injuries to Mr. [REDACTED] face occurred.

3) Officer Rogers was never alone with the suspects. Springfield police officers were on scene as well as Palmer Officer Eric Raymond and Monson Officer Paul Mayo. Officer Rogers was with the suspects in custody for approximately 5 minutes before being called to assist K9 Officer Brewer with tracking the 4th suspect. The suspects were left in the custody of Palmer Officer Raymond and Monson Officer Mayo along with several Springfield plain clothes officers.

Respectfully Submitted,



Officer Christopher Rogers