

Commonwealth of Massachusetts
Supreme Judicial Court

No. SJC-13386

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

v.

DISTRICT ATTORNEY OF HAMPDEN COUNTY,
Respondent-Appellee

REPLY BRIEF FOR PETITIONERS-APPELLANTS

ON RESERVATION AND REPORT FROM
THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

Martin M. Fantozzi (BBO #554651)
Matthew P. Horvitz (BBO #664136)
Abigail Fletes (BBO #707177)
GOULSTON & STORRS PC
400 Atlantic Avenue
Boston, MA 02110
(617) 482-1776
mhorvitz@goulstonstorrs.com

Jessica J. Lewis (BBO #704229)
Daniel L. McFadden (BBO #676612)
William C. Newman (BBO #370760)
Mary F. Brown (BBO #710788)
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF MASSACHUSETTS, INC.
One Center Plaza, Suite 850
Boston, MA 02108
(617) 482-3170
jlewis@aclum.org

*Counsel for Hampden County Lawyers for
Justice, Kelly Auer, Meredith Ryan, Chris
Graham, and Jorge Lopez*

Matthew R. Segal (BBO #654489)
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
One Center Plaza, Suite 850
Boston, MA 02108
(617) 299-6664
msegal@aclu.org

*Counsel for Hampden County Lawyers for
Justice, Kelly Auer, Meredith Ryan, Chris
Graham, and Jorge Lopez*

Rebecca Jacobstein (BBO #651048)
COMMITTEE FOR PUBLIC COUNSEL
SERVICES
75 Federal Street, 6th Floor
Boston, MA 02110
(617) 910-5726
rjacobstein@publiccounsel.net

*Counsel for the Committee for Public Counsel
Services*

TABLE OF CONTENTS

TABLE OF CONTENTS	2
TABLE OF AUTHORITIES.....	3
INTRODUCTION.....	5
ARGUMENT	6
I. The issues presented here cannot be resolved without this Court’s intervention.	6
A. Defense attorneys have not sat idle.....	6
B. Ordinary litigation has not remedied, and will not remedy, the HCDAO’s failure to learn of and disclose exculpatory evidence.	9
II. This Court can and should hold that the Commonwealth has a duty to investigate the SPD’s systemic misconduct.....	11
A. The HCDAO does not meaningfully dispute the SPD’s systemic misconduct.	12
B. The HCDAO misunderstands the duty to investigate.....	14
C. The HCDAO misapprehends Petitioners’ requested relief.....	15
III. The HCDAO’s disclosure practices are not faithful to the law.	18
IV. The HCDAO offers no defense of its practice of allowing the SPD to determine what exculpatory evidence it will withhold.	21
V. Standing is no obstacle to deciding this case.	22
CONCLUSION	22
CERTIFICATE OF COMPLIANCE.....	24
CERTIFICATE OF SERVICE	24
ADDENDUM	25

TABLE OF AUTHORITIES

Cases

<i>Berger v. United States</i> , 295 U.S. 78 (1935)	5
<i>Comm. for Pub. Counsel Servs. v. Attorney Gen.</i> , 480 Mass. 700 (2018)	15, 17
<i>Commonwealth v. Beal</i> , 429 Mass. 530 (1999)	6
<i>Commonwealth v. Camacho</i> , 483 Mass. 645 (2019)	18
<i>Commonwealth v. Cotto</i> , 471 Mass. 97 (2015).....	13, 14, 15, 17
<i>Commonwealth v. Cuffee</i> , SJC-13333 (argued Jan. 6, 2023).....	12
<i>Commonwealth v. DiGiambattista</i> , 442 Mass. 423 (2004)	17
<i>Commonwealth v. Hallinan</i> , 491 Mass. 730 (2023).....	18
<i>Commonwealth v. McFarlane</i> , SJC-13430	8
<i>Commonwealth v. Moffat</i> , 486 Mass. 193 (2020)	15
<i>Commonwealth v. Ware</i> , 471 Mass. 85 (2015).....	6, 13
<i>Giglio v. United States</i> , 405 U.S. 150 (1972)	20
<i>Gulluni v. Levy</i> , No. 22-1862 (1st Cir. June 9, 2023)	18
<i>Horne v. Flores</i> , 557 U.S. 433 (2009)	22
<i>Kyles v. Whitley</i> , 514 U.S. 419 (1995).....	20
<i>Matter of Grand Jury Investigation</i> , 485 Mass. 641 (2020)	5

McCleskey v. Kemp,
481 U.S. 279 (1987)I7

Milke v. Ryan,
711 F.3d 998 (9th Cir. 2013)2I

Smith v. Cain,
565 U.S. 73 (2012)2I

Strickler v. Greene,
527 U.S. 263 (1999)20

Vaughn v. United States,
93 A.3d 1237 (D.C. 2014)2I

Statutes

G. L. c. 12, § 27I6

G. L. c. 34B, §§ 1, 4I6

Other Authorities

Barry, SJC to hear ACLU lawsuit against Hampden District Attorney’s Office
over evidence handling, MassLive (Feb. 1, 2023)I4

INTRODUCTION

The prosecution’s core duty is “not that it shall win a case, but [instead, to see] that justice shall be done.” *Matter of Grand Jury Investigation*, 485 Mass. 641, 657 (2020) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). But not in the Hampden County District Attorney’s Office. There, the “mission” is “to prosecute criminals,” Resp. Br. 30, as long as those criminals are not also police officers. Perhaps that is why the HCDAO’s brief mainly maligns criminal defense lawyers, instead of expressing concern that the HCDAO may have wrongfully convicted people by relying on Springfield Police Department officers who manufactured charges to hide their own wrongdoing.

The July 2020 DOJ Report alleged that SPD officers engaged in a pattern or practice of excessive force hidden by false reporting. It is undisputed that those officers brought (and still bring) charges that hinge on whether they, or instead the arrestee, was the aggressor. R3:411, 428, 476. It is undisputed that the HCDAO has not investigated any incidents—not one—in the wake of the DOJ Report. R3:199, 706. It is undisputed that the HCDAO also failed to disclose any documents in response to the DOJ Report—again, not one—until after Petitioners sued. R3:428-429; R4:179-180. And it is undisputed that the HCDAO’s belated disclosures are still not exhaustive, Pet. Br. 44, and include evidence of SPD wrongdoing that the HCDAO possessed, but withheld, for years, *id.* at 40-43.

That is not rhetoric; it's the record. And this record establishes that the under-investigation and under-disclosure of SPD misconduct warrants action by this Court to protect the rights of Hampden County defendants.

ARGUMENT

I. The issues presented here cannot be resolved without this Court's intervention.

The HCDAO claims, without evidence, that defense attorneys have “sat idly by” instead of pursuing or using evidence of SPD misconduct. Resp. Br. 5-6. Those claims are untrue. What is true is that in spite of all that the defense bar has done, the HCDAO still fails to look into police misconduct and disclose exculpatory evidence. This Court's intervention is needed.

A. Defense attorneys have not sat idle.

The HCDAO alleges that defense attorneys have done nothing to obtain or use evidence of SPD misconduct, and that this supposed nonchalance proves that such misconduct is unworthy of further investigation or disclosure. Resp. Br. 5-6, 19-20, 30-31. Action or inaction by defense attorneys cannot relieve prosecutors of their own duty to learn of and disclose potentially exculpatory evidence. See *Commonwealth v. Ware*, 471 Mass. 85, 95 (2015) (citing *Commonwealth v. Beal*, 429 Mass. 530, 532 (1999)). Regardless, these allegations are unfounded.

The HCDAO asserts that “[n]o one has even requested unredacted copies of the [SPD] documents.” Resp. Br. 19. That is not true. Days after filing its brief in

this case, the HCDAO filed a petition *detailing its own opposition to a defendant’s October 2022 request for unredacted copies of those documents*. See Add:86, 88, *Commonwealth v. Morales*, SJ-2023-0258 (June 28, 2023) (“*Morales* Petition”).¹ In opposing that request, the HCDAO claimed that the materials were heavily redacted before the HCDAO received them, which is not true. Compare *id.* at 4, with R3:176. The HCDAO also claims that “[n]o defendant has . . . sought additional discovery” about this evidence. Resp. Br. 5. But, again, the HCDAO’s *Morales* petition rebuts its *Graham* brief; the *Morales* petition mentions cases where defendants cited the *Graham* litigation in seeking additional discovery.²

The errors continue:

- The HCDAO insists “Petitioners offered no evidence that any defendant or counsel has ever attempted to use the DOJ information—or even to obtain additional or clarifying information.” Resp. Br. 19. That is untrue.³
- The HCDAO insists “[n]o defendant has sought sanctions against the HCDAO” for *Brady* violations. Resp. Br. 5. That is untrue.⁴
- The HCDAO insists “[n]o defendant has sought a new trial . . . on the grounds of undisclosed police misconduct.” Resp. Br. 5. A case pending

¹ Other defendants have also sought the unredacted records. See, e.g., Add:149, Motion, *Commonwealth v. Soto*, No. 1979CR00528 (Oct. 31, 2022); Add:113, Motion, *Commonwealth v. Rivera*, No. 2179CR00348 (Mar. 2, 2023).

² See Add:98, *Morales* Petition; Add:25, Motion for Discovery, *Commonwealth v. Candelario*, No. 1823CR009596 (Mar. 3, 2023); Add:125, Motion for Discovery, *Commonwealth v. Salaam*, No. 2079CR00075 (Apr. 10, 2023).

³ See R3:136-137 (petitioner Lopez’s discovery motion “in response to the DOJ Report”).

⁴ See Add:154, Order, *Commonwealth v. Torres-Villaronga*, No. 2023CR003228 (Dec. 7, 2021).

in this Court proves otherwise.⁵

- The HCDAO insists “the record is undisputed” that no defendant has tried to use adverse judicial findings. Resp. Br. 43. Again, that is untrue.⁶

But there is more. Contrary to the HCDAO’s citation-free claims, Resp. Br. 5, defendants have moved to stay proceedings in response to the HCDAO’s post-*Graham* disclosures,⁷ moved for the Kent Rebuttal,⁸ moved for discovery of information regarding police misconduct,⁹ moved for discovery of the Nathan Bill’s investigatory materials,¹⁰ moved for further inquiry into and discovery of exculpatory materials implicated by the DOJ Report,¹¹ moved under Mass. R. Crim. P. 17 for additional evidence from the police,¹² and moved for prior findings that an officer’s testimony was not credible. R5:350-351; see also R3:702.

⁵ *Commonwealth v. McFarlane*, SJC-13430.

⁶ See R5:357-358 (discussing defense motion relating to adverse credibility finding).

⁷ See Add:158-160, Motion for Stay, *Commonwealth v. Vasquez*, No. 2179CR00295 (Aug. 11, 2022).

⁸ See Add:51-53, Memorandum of Law, *Commonwealth v. Collazo*, No. 2279CR00079 (Jan. 30, 2023); Add:2-6, Memorandum of Law, *Commonwealth v. Bruno*, No. 1923CR004823 (Feb. 10, 2022); R7:178 (Petitioner Lopez’s motion seeking the Kent Rebuttal).

⁹ See Add:55-56, Motion to Discover Exculpatory Information, *Commonwealth v. Haynes*, No. 2079CR00018 (May 13, 2021).

¹⁰ See Add:9-10, Memorandum of Law, *Commonwealth v. Burris*, No. 1723CR001930 (July 12, 2022).

¹¹ See R3:702-703; Add:128-135, Motion for Exculpatory Information, *Commonwealth v. Santiago*, No. 1979CR00285 (Nov. 15, 2021).

¹² See Add:119, Rule 17 Motion, *Commonwealth v. Rivera-Cruz*, No. 2079CR00101 (Oct. 18, 2022).

The defense bar also brought this case. As Attorney David Hoose testified below, the “indigent citizens of Hampden County, are largely voiceless in this. . . . [I]t was important that I, as president of the Hampden County Lawyers for Justice, give them a voice.” R2:591-592.

B. Ordinary litigation has not remedied, and will not remedy, the HCDAO’s failure to learn of and disclose exculpatory evidence.

Beyond demonstrating that police misconduct evidence is vitally important to defendants, the defense bar’s efforts also demonstrate that, contrary to the HCDAO’s claims, the issues presented cannot be resolved in the trial courts, and therefore warrant this Court’s intervention. Resp. Br. 37-40.

For instance, the HCDAO says that its policy of withholding adverse credibility determinations should be adjudicated “in the ordinary course.” Resp. Br. 43. But when will that be? Defendants who are unaware of relevant credibility determinations, due to the HCDAO’s policy of withholding them, will not know to litigate the issue. And defendants who learn of those determinations may be told that they have nothing left to litigate. In a recent case where SPD Officer Aguirre was a potential witness, the defendant learned that the HCDAO had withheld a judicial finding that Aguirre lied on the stand. Add:136, Memo, *Commonwealth v. Soto*, 1979CR00528 (Jul. 27, 2022). The Superior Court agreed that the prior ruling “found that Officer Aguirre lied,” but refused to order the HCDAO to disseminate that ruling in Aguirre’s other cases, holding that it lacked

the authority to do so. R3:703; Add:147-148, Order, *Commonwealth v. Soto*, 1979CR00528 (Sept. 27, 2022).

The “ordinary course” also proved inadequate for the clients of Attorneys Thomas O’Connor and John Greenwood, whose exasperated testimony the HCDAO portrays as proof that defense attorneys think SPD misconduct is “not worth their time.” Resp. Br. 20-21, 43. O’Connor and Greenwood represented brothers whose cases are flagged in the DOJ Report: a juvenile who was struck while riding a motorbike, and his brother who was punched in the face. R4:186, 215-218. They had reason to be exasperated. O’Connor testified that he told “three different assistant district attorneys” that his client’s case was in the DOJ Report, yet the HCDAO’s disclosures failed to address that fact. R2:199. Greenwood testified that he received “disk after disk after disk” that failed to address the DOJ’s findings. R3:18-22, 63-64. Instead of investigating the DOJ’s account, the HCDAO continued prosecuting both brothers and then wrote a legal brief chastising their lawyers’ exhaustion. Resp. Br. 20-21.

Attorneys, including petitioner Ryan, have even sought rulings that the Commonwealth must investigate SPD misconduct. But the HCDAO has argued, and judges have ruled, that trial judges cannot grant these motions.¹³

¹³ See Add:59, Motion, *Commonwealth v. Montanez*, No. 2023CR002017 (Jan. 21, 2022); Add:71, Opposition, *Commonwealth v. Montanez*, No. 2023CR002017 (May 20,

The HCDAO also argues that petitioner Lopez’s case shows that the system is working “as intended.” Resp. Br. 12. To the contrary, Lopez’s counsel had to conduct a multi-year discovery quest that relied heavily on revelations from this litigation. Lopez’s case involved eight to 10 officers from the Narcotics Bureau. R3:147. The indictment was returned in March 2019, and discovery litigation began by October 2020. R7:10-13. By then, unbeknownst to Lopez’s counsel, the SPD possessed the Kent Rebuttal and related documents, which included information about officers in Lopez’s case. R3:149; R4:140-41. By March 2021, the HCDAO knew of the Kent documents. R4:179. But the HCDAO fought Lopez’s discovery requests, including by seeking this Court’s review of a discovery order. R7:15. Lopez’s counsel did not gain access to the Kent documents until after Petitioners filed this case and the documents were finally given to CPCS. R3:148. She did not receive the documents directly from the HCDAO until *after* Lopez reached a plea deal in June 2022, R3:150, and she never received the Kent Rebuttal, R3:144.

II. This Court can and should hold that the Commonwealth has a duty to investigate the SPD’s systemic misconduct.

Citing egregious SPD misconduct alleged by the DOJ and corroborated elsewhere, Petitioners have asked this Court to hold that the Commonwealth has a duty to investigate, and to require the HCDAO to say who, if anyone, will

2022); Add:81, Order, *Commonwealth v. Montanez*, No. 2023CR002017 (May 25, 2022); Add:127, Order, *Commonwealth v. Santana*, No. 1823CR001217 (Oct. 25, 2021).

discharge that duty. Pet. Br. 35. In response, the HCDAO proudly asserts that it never has and it never will investigate the DOJ Report, a position it defends by misstating the facts and the law.

A. The HCDAO does not meaningfully dispute the SPD’s systemic misconduct.

In 2022, the SPD entered into a settlement agreement with the DOJ, in which it “agree[d] that the DOJ’s findings raise issues of importance to the City that should be addressed.” R4:37. Earlier this year, the HCDAO seemingly acknowledged to this Court that the DOJ Report should carry weight when defendants seek discovery.¹⁴ But now the HCDAO seeks to portray the DOJ Report as “fool’s gold.” Resp. Br. 21. This change of heart is misguided.

The HCDAO does not deny that SPD officers brutally kicked and abusively interrogated juveniles in Palmer or that SPD officers assaulted people outside Nathan Bill’s bar or that video evidence contradicted SPD reports attempting to justify unreasonable uses of force. Pet. Br. 22-23; R4:22. Instead, the HCDAO attempts to rebut only one specific allegation of misconduct in the DOJ Report; it disputes that an officer “punched” a juvenile riding a motorbike—Attorney O’Connor’s client—because an SPD report says the officer used “his arm,” in self-defense, to strike the boy in the “head and shoulder.” Resp. Br. 22.

¹⁴ Oral Argument at 36:56 to 37:07, *Commonwealth v. Cuffee*, SJC-13333 (argued Jan. 6, 2023), https://boston.suffolk.edu/sjc/pop.php?csnum=SJC_13333.

That account shades the facts. The DOJ’s concern was not just whether the officer had curled his hand into a fist, but rather that *clotheslining a juvenile riding a motorbike* was unreasonably dangerous. R4:16-17. The HCDAO also fails to mention the DOJ’s finding that another SPD officer punched the juvenile’s brother—Attorney Greenwood’s client—and that “[n]one of the other officers at the scene corroborated” his asserted justification for doing so. R4:17.

The HCDAO argues that a more thorough discrediting of the DOJ Report can be found in the October 2020 Kent Rebuttal, which it calls “the precise type of investigation Petitioners seek.” Resp. Br. 24. This is not a serious argument.

When the Commonwealth has evidence of egregious misconduct by a team member, it must conduct “a thorough investigation to determine the nature and extent of [the] misconduct,” including its effect on pending and closed cases. *Ware*, 471 Mass. at 95; *Commonwealth v. Cotto*, 471 Mass. 97, 112 (2015). That is neither what the SPD says it asked Kent to do, nor what he did. R4:141, 169-170. Kent wrote a “rebuttal” attacking the DOJ and defending SPD officers he had supervised. R4:140-168. The Rebuttal does not claim that Kent spoke with a single witness. In fact, when Attorney Greenwood tried to question Kent—the same Greenwood the HCDAO accuses of indifference to exculpatory evidence, Resp. Br. 21—the court refused that request because it found that “[Kent] never questioned any of the

Springfield officers” who, according to the DOJ, assaulted Greenwood’s client. Add:8, Order, *Commonwealth v. Bruno-Villanueva*, 1923CR004823 (Dec. 21, 2022).

Kent’s rebuttal was apparently so persuasive that the SPD hid it, illegally, until after a reporter obtained it.¹⁵ But even if a self-serving rebuttal could cast doubt on the DOJ Report, that would just make the DOJ’s conclusions “debatable.” Resp. Br. 21. And that would be a reason for the Commonwealth to investigate *further*, not to avoid investigating *at all*.

B. The HCDAO misunderstands the duty to investigate.

The HCDAO argues that, even if SPD officers have committed egregious misconduct, *Cotto* and *Ware* “established” that the Commonwealth’s duty to investigate does not include “gather[ing] evidence.” Resp. Br. 25. That is incorrect.

The *Cotto* investigation involved extensive evidence-gathering. The investigation followed this Court’s decision deeming it “imperative that the Commonwealth thoroughly investigate the timing and scope of Farak’s misconduct.” *Cotto*, 471 Mass. at 115. The Court pointed to the Hinton Lab scandal, where “the systemic nature of [Annie] Dookhan’s misconduct only came to light following a thorough investigation of the Hinton drug lab by the State police

¹⁵ Barry, SJC to hear ACLU lawsuit against Hampden District Attorney’s Office over evidence handling, MassLive (Feb. 1, 2023) (“The Republican has obtained a copy of that [Kent] memo”), <https://www.masslive.com/news/2023/02/sjc-to-hear-aclu-lawsuit-against-hampden-district-attorneys-office-over-evidence-handling.html>.

detective unit of the Attorney General’s office.” *Id.* at 111. The Court required the Commonwealth to say if it would conduct the investigation, *id.* at 115, which the Commonwealth confirmed and then did. It convened two grand juries and examined multiple witnesses, including Farak, which in turn influenced the scope of relief later provided to defendants. See *Comm. for Pub. Counsel Servs. v. Attorney General*, 480 Mass. 700, 718, 728 (2018) (“*CPCS v. AG*”).

To be clear: *Cotto* called for an investigation *before* Farak admitted misconduct, and Farak’s subsequent admissions exist only because the ensuing investigation *gathered evidence*. Compare Resp. Br. 32, with Office of the Attorney General, Investigative Report Pursuant to *Commonwealth v. Cotto*, 471 Mass. 97 (2015), at 3-5 (Apr. 1, 2016). And *Commonwealth v. Moffat*, 486 Mass. 193 (2020), on which the HCDAO relies, is inapposite. That case rejected a claim that the prosecution had a duty to gather evidence concerning potential witnesses who were *not* on the prosecution team. *Id.* at 198-199.

C. The HCDAO misapprehends Petitioners’ requested relief.

Petitioners have proposed that an investigation by the Commonwealth should track certain officers and charges implicated in the DOJ Report. Petitioners also have proposed interim remedies addressed to evidentiary issues and jury instructions, Pet. Br. 35-37, a proposal strengthened by the HCDAO’s

suggestion that SPD officers will resist being investigated. R3:382. The HCDAO’s opposing argument makes three fundamental errors.

First, the HCDAO says Petitioners want to know, “pointless[ly],” if the HCDAO presently “intends to investigate the SPD.” Resp. Br. 30. Not so. Petitioners well understand the HCDAO’s incuriosity about SPD misconduct and, thus, have *never* argued that the HCDAO must be the entity to investigate. Compare Resp. Br. 29 n.16, with R1:58; R3:644. Rather, Petitioners argue that, as in *Cotto*, this Court should hold that the Commonwealth is duty-bound to investigate the SPD’s misconduct and require the HCDAO to say whether anyone on the Commonwealth’s behalf will discharge that duty.¹⁶ Pet. Br. 31. The HCDAO’s retort—that this argument “seek[s] to steal yet another page from *Cotto*,” Resp. Br. 30—is just a colorful way of saying that it tracks precedent.

Second, the HCDAO’s separation-of-powers concerns are both premature and overblown. They are premature because, if this Court announces a duty to investigate, there is every reason to think the Commonwealth will discharge that duty, as it did after *Cotto*. Although the HCDAO asserts that the Attorney General’s Office “has . . . seen no need for further investigation,” Resp. Br. 31, Petitioners are unaware of any AGO statement to that effect.

¹⁶ The HCDAO can be required to answer on the Commonwealth’s behalf because district attorneys represent the Commonwealth in criminal cases, G. L. c. 12, § 27, and are also arms of the Commonwealth. G. L. c. 34B, §§ 1, 4.

The HCDAO's concerns are overblown because, even absent government misconduct, this Court has "the authority to regulate the presentation of evidence in court proceedings," including by crafting instructions cautioning jurors about certain evidence. *Commonwealth v. DiGiambattista*, 442 Mass. 423, 444-446 (2004). That authority expands when the Commonwealth does not "fulfil its duty to 'learn of and disclose'" exculpatory evidence. *CPCS v. AG*, 480 Mass. at 702 (quoting *Cotto*, 471 Mass. at 112, 120). In that circumstance, the Court can alter discovery practices, *Cotto*, 471 Mass. at 114, and order dismissals and sanctions, *CPCS v. AG*, 480 Mass. at 725-731 & n.13. Here, given the Commonwealth's ongoing failure to investigate SPD misconduct, and given that SPD officers implicated in the misconduct are still offering evidence in criminal cases, interim measures would appropriately guard against wrongful convictions and sentences. Pet. Br. 36-37.

Third, although styled as concern about a "sweeping" investigation, Resp. Br. 27, the HCDAO's remaining protests are more properly understood as a "fear of too much justice." *McCleskey v. Kemp*, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting). The simple truth is that the DOJ Report alleged a pattern or practice of excessive force that, combined with false reporting, may have caused wrongful

convictions. If the HCDAO dislikes Petitioners' proposed investigative parameters, it can propose different ones.¹⁷

But the HCDAO has proposed, instead, no investigation whatsoever. That stance contradicts the principle that has guided this Court through multiple wrongful conviction outbreaks: that defendants must not “wrongly . . . bear the burden of a systemic lapse that . . . is entirely attributable to the government.” *Commonwealth v. Hallinan*, 491 Mass. 730, 748 (2023) (quoting *Commonwealth v. Camacho*, 483 Mass. 645, 650 (2019) (internal quotation marks omitted).

III. The HCDAO's disclosure practices are not faithful to the law.

The HCDAO does not dispute that it lacked formal *Brady* policies until August 2022. But, by its own account, both before August 2022 and to this day, evidence of police misconduct must run a proverbial gauntlet to reach defendants in Hampden County. Misconduct will not be disclosed if: documenting it would require “gather[ing] evidence,” Resp. Br. 25; R5:346; the police department declines to “give[]” it to the HCDAO, R3:395; the misconduct could have been committed by one of two officers, Resp. Br. 13-14; or there is no disclosure “rule” specifically addressing the misconduct. Resp. Br. 14. *Brady* demands more.

¹⁷ The DOJ reports that on June 2, 2023, it sent the City of Springfield a letter identifying as many as 17 previously unidentified incidents. Brief for Appellee at 3, *Gulluni v. Levy*, No. 22-1862 (1st Cir. June 9, 2023). The Commonwealth's investigation should include them.

The HCDAO argues that Petitioners must be wrong to accuse it of unlawfully withholding entire categories of evidence, because “no court” has yet deemed that withholding unlawful. Resp. Br. 13-15. But the full extent of its withholding of evidence has only been revealed by this litigation.

Nathan Bill’s. The HCDAO does not mention First Assistant Fitzgerald’s revelation, during her September 2022 testimony, that the HCDAO possessed an investigative “binder” on the Nathan Bill’s incident that it routinely withheld in cases involving officers identified in witness statements contained in that binder. Pet. Br. 40-41. The HCDAO maintains that it can suppress evidence about “an officer who cannot be identified,” Resp. Br. 14-15 & n.9, but that argument does not apply here: the HCDAO withheld its Nathan Bill’s binder even though it identified SPD Officers Daniel Billingsley and Christian Cicero and even after they were indicted. R3:475-476, 479-483, 660.

The Palmer incident. The HCDAO does not deny Fitzgerald’s further revelation that the HCDAO withheld evidence concerning the incident in Palmer, including the Wilbraham police report stating that a plainclothes SPD officer kicked a child. Pet. Br. 41-42; R3:527-528. Unlike the interrogation video, the Wilbraham report implicated the SPD in the commission, and therefore the cover-up, of physical abuse. R3:365, 527-530. The HCDAO claims to be confused about what “rule” required this report’s disclosure. Resp. Br. 14. The rule is *Giglio*

v. United States, 405 U.S. 150 (1972). The HCDAO seeks to minimize this *Giglio* violation by stating that “Bigda began to refuse to testify,” Resp. Br. 13, but that did not happen until after he was indicted in October 2018. R3:351; R1:37. The HCDAO had the Wilbraham report by March 2016. R3:527.

The HCDAO also restates its view that misconduct by an “unidentified” officer need not be disclosed. Resp. Br. 14. Given its blinkered view of the duty to investigate, the HCDAO is saying that if a law enforcement agency accuses unidentified SPD officers of wrongdoing—as a Wilbraham officer did in 2016, and as the DOJ did in 2020—the HCDAO can refrain from “gather[ing] evidence” to identify the officers, then refrain from disclosing the misconduct on the ground that the officers are “unidentified.” This is a remarkable position.

Withholding of Evidence After the DOJ Report. It is undisputed that, when Petitioners filed this case in April 2021, the HCDAO had not disclosed any evidence to defendants in response to the July 2020 DOJ Report. It is undisputed that the HCDAO’s subsequent disclosures are “by no means exhaustive.” R4:410. Yet the HCDAO nowhere defends its insistence that it is not responsible for exculpatory evidence held by the SPD because it is “not the SPD’s keeper.” Pet. Br. 52; R1:86. No defense is given because none is possible. See *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (duty to disclose includes evidence known only to police); *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (same).

Adverse Credibility Determinations. The petition alleged, and the HCDAO has now admitted, the withholding of these determinations. R3:679, 707. They are “highly relevant” where the Commonwealth’s case relies on an officer’s testimony, *Milke v. Ryan*, 711 F.3d 998, 1008 (9th Cir. 2013), and the HCDAO cannot withhold them because it does not “trust the conclusions,” *Vaughn v. United States*, 93 A.3d 1237, 1255 (D.C. 2014) (citing *Smith v. Cain*, 565 U.S. 73, 75-76 (2012)).

Recordings. The HCDAO has much to say about petitioner Graham’s trial counsel. Resp. Br. 10. But it musters no explanation for how it prosecuted Graham without disclosing the audio file containing three recorded calls: the two calls to dispatch knowingly made by the SPD officer who accused Graham of having a gun and the 911 call suggesting that only the SPD officer had a gun. Pet. Br. 45-46. Nor does it explain how it prosecuted Mr. Cooper-Griffith for allegedly spitting on Officer Cicero while disclosing neither the video from the pertinent SPD camera nor its Nathan Bill’s binder implicating Officer Cicero. *Id.* at 40, 46-47.

IV. The HCDAO offers no defense of its practice of allowing the SPD to determine what exculpatory evidence it will withhold.

The parties jointly proposed the third question presented, but the HCDAO does not brief it. That question asks what prosecutors must do “when a police department declines to turn over exculpatory evidence,” R1:26, and it arose because the SPD confessed to withholding evidence, including the Kent Rebuttal

and whatever the SPD has in mind when it says its disclosures have been “not exhaustive.” Pet. Br. 51-55; R4:183.

Although the HCDAO hides behind the Special Master’s Report, Resp. Br. 7 n.5, the fact remains that First Assistant Fitzgerald wrote emails memorializing that she knew, by March 2021, about Kent’s report and associated documents. R4:179-181. And the fact remains that the HCDAO accedes to the SPD’s withholding of evidence. R3:395, 166-167; R1:86; Pet. Br. 51-55. Yet, despite offering no legal defense of these practices, the HCDAO nowhere represents that it will voluntarily reconsider them.

V. Standing is no obstacle to deciding this case.

All petitioners have standing. Notably, the HCDAO has largely abandoned its argument that CPCS and HCLJ lack standing. Resp. Br. 45. Because those petitioners unquestionably have standing, the Court need not decide if the individual petitioners do. *Horne v. Flores*, 557 U.S. 433, 446 (2009).

CONCLUSION

Petitioners respectfully ask that the Court grant the relief requested in the opening brief.

Respectfully Submitted:

/s/ Matthew R. Segal

Jessica J. Lewis (BBO #704229)
Daniel L. McFadden (BBO #676612)
William C. Newman (BBO #370760)
Mary F. Brown (BBO #710788)
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF MASSACHUSETTS,
INC.
One Center Plaza, Suite 850
Boston, MA 02108
(617) 482-3170
jlewis@aclum.org

Matthew R. Segal (BBO #654489)
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
One Center Plaza, Suite 850
Boston, MA 02108
(617) 299-6664
msegal@aclu.org

Martin M. Fantozzi (BBO #554651)
Matthew P. Horvitz (BBO #664136)
Abigail Fletes (BBO #707177)
GOULSTON & STORRS PC
400 Atlantic Avenue
Boston, MA 02110
(617) 482-1776
mhorvitz@goulstonstorrs.com

*Counsel for Chris Graham, Jorge Lopez,
Hampden County Lawyers for Justice,
Kelly Auer, and Meredith Ryan*

/s/ Rebecca Jacobstein

Rebecca Jacobstein (BBO #651048)
COMMITTEE FOR PUBLIC COUNSEL
SERVICES
75 Federal Street, 6th Floor
Boston, MA 02110
(617) 910-5726
rjacobstein@publiccounsel.net

*Counsel for the Committee for Public
Counsel Services*

Dated: July 14, 2023