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

BRIEF OF MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS-APPELLANTS

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

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Appellate Procedure Rule 17(c)(1) and Supreme Judicial Court Rule 1:21, I certify that amicus curiae Massachusetts Association of Criminal Defense Lawyers is a nonprofit organization, that it does not issue any stock or have any parent corporation, and that no publicly held corporation owns stock in it.

/s/ Luke Ryan
Luke Ryan

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PREPARATION OF AMICUS CURIAE BRIEF

Pursuant to Appellate Procedure Rule 17(c)(5), I certify that (A) no party or party's counsel authored any of this brief; (B) no party or party's counsel, or any other person or entity, other than the amicus curiae, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief; and (C) neither amicus curiae nor its counsel represents or has represented one of the parties to the present appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

/s/ Luke Ryan
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STATEMENT OF INTEREST

The **Massachusetts Association of Criminal Defense Lawyers ("MACDL")** is an incorporated association of more than 1,000 experienced trial and appellate lawyers who are members of the Massachusetts Bar and who devote a substantial part of their practices to criminal defense. MACDL is dedicated to protecting the rights of the citizens of the Commonwealth guaranteed by the Massachusetts Declaration of Rights and the United States Constitution. MACDL seeks to improve the criminal justice system by supporting policies and procedures to ensure fairness and justice in criminal matters. MACDL devotes much of its energy to identifying, and attempting to avoid or correct, problems in the criminal justice system. It files amicus curiae briefs in cases raising questions of importance to the administration of justice.

INTRODUCTION

Three years ago, when the Department of Justice (DOJ) found a pattern and practice of excessive force by officers in the Narcotics Bureau of the Springfield Police Department (SPD), it uncovered a "lapse of systemic magnitude in the criminal justice system,"[1] while casting a cloud over countless police-civilian encounters. Despite this Court's longstanding rule that the burden of ascertaining the scope of government misconduct should not "be shouldered by defendants,"[2] the Hampden County District Attorney's Office (HCDAO) has elected to blame defense attorneys for lingering questions concerning the factual foundation for the DOJ's findings.[3]

Petitioners' reply ably dispels the myth of a disinterested defense bar sitting "idly by."[4] Given the irrefutable proof furnished by Petitioners of defense efforts to acquire and make use of police misconduct evidence,[5] MACDL will focus on two other HCDAO misconceptions: (1) the information Petitioners seek is all but

[1] *Commonwealth v. Scott*, 467 Mass. 336, 352 (2014).
[2] *Commonwealth v. Cotto*, 471 Mass. 97, 112 (2015) (citing *Scott*, 467 Mass. at 353).
[3] *See, e.g.*, Respondent-Appellee Br. at 39 ("Petitioners and defense counsel . . . have done nothing to help themselves or their clients.").
[4] *Id.* at 5.
[5] Petitioner-Appellant's Reply Br. at 6-9 (citations omitted).

certain to be legally inconsequential and (2) allegations of systemic brutality have been debunked by the so-called "Kent Report."

ARGUMENT

I. A Prosecutor's Obligation to Disclose Misconduct by Prosecution Team Members Does Not Depend on the Admissibility of Such Evidence.

In its brief, the HCDAO fixates on the "long and potentially impassable road" from obtaining "impeachment evidence of dubious admissibility" to introducing such evidence at trial. Respondent-Appellee Br. at 5 n.4, 37; *see also id.* at 36 (criticizing Petitioners for ignoring "prohibitions in Sections 608 and 404, Mass. G. Evid."); *id.* at 43 (citing the "long and tortuous path" to "the development of admissible evidence" and "successful argument that such evidence is admissible"). Underlying these pronouncements about admissibility is a presumption that defendants suffer no prejudice when evidence of prosecution team member misconduct goes undisclosed. The thinking here seems to be that if producing information pertaining to police officer untruthfulness does defendants no good, prosecutors should err on the side of caution by withholding (or at least not aggressively pursuing) such evidence given the damage its disclosure can do to officer reputations.[6]

[6] *See id.* at 41-43.

In *Matter of a Grand Jury Investigation*, 485 Mass. 641 (2020), this Court flatly rejected the argument that prosecutors had "no obligation to disclose the petitioners' false statements because their prior misconduct would not be admissible in evidence at trial in any unrelated criminal case." *Id.* at 651.[7] As Chief Justice Gants explained, a "judge has the discretion to decide whether the credibility of a police officer is a critical issue at trial and whether the officer's prior false statements in a separate matter might have a significant impact on the result of the trial, such that the prior misconduct should be admitted in the interest of justice." *Id.* at 651-52.[8] Putting aside the question of whether "prior false statements might be admissible," *Matter of a Grand Jury Investigation* made it clear that such evidence must be disclosed given its tendency to inspire a more in-depth "probe" into the veracity of officer representations in the "unrelated criminal case." *Id.* at 652-53.

This notion, that inadmissible proof of wrongdoing might lead to the acquisition of outcome-altering exculpatory evidence, is hardly farfetched.[9] A

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[7] The Court also stressed that any errors "on the side of caution" should result in disclosure. *Matter of a Grand Jury Investigation*, 485 Mass. at 650 (citation omitted).

[8] *See also id.* at 653 ("[T]he ultimate admissibility of the information is not determinative of the prosecutor's *Brady* obligation to disclose it.").

[9] Indeed, even in the backward-looking, post-conviction realm, the majority of federal appeals courts recognize that undisclosed inadmissible evidence may not only be favorable but "material." *See Ellsworth v. Warden*, 333 F.3d 1, 5 (1st Cir.

recent example of this phenomenon can be found in "one of the biggest scandals in the Commonwealth's justice system in decades." *Commonwealth v. Caliz*, 486 Mass. 888, 889 (2021).

In *Committee for Pub. Counsel Servs. v. Attorney Gen.*, 480 Mass. 700 (2018) (*CPCS*), the critical undisclosed evidence consisted of certain "mental health records" recovered by state police investigators during a search of Sonja Farak's vehicle. *Id.* at 711. When this so-called "assorted lab paperwork" first came to light, the litigation that ensued had nothing to do with whether Farak's diary card admissions could be characterized as an "account of [her] medical

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2003) (en banc) ("[W]e think it plain that evidence itself inadmissible *could* be so promising a lead to strong exculpatory evidence that there could be no justification for withholding it." (emphasis in original)); *United States v. Gil*, 297 F.3d 93, 104 (2d Cir. 2002) (citing *United States v. Gleason*, 265 F. Supp. 880, 886 (S.D.N.Y.1967), for the proposition that the "prosecution's duty of disclosure as affirmed in *Brady*, cannot be limited to materials or information demonstrated in advance to be competent evidence" (citation and quotation marks omitted)); *Dennis v. Secretary, Pa Dept. of Corrections*, 834 F.3d 263, 307 (3rd Cir. 2016) (finding state court "characterization of admissibility as dispositive under *Brady* was an unreasonable application of, and contrary to, clearly established law as defined by the United States Supreme Court"); *United States v. Sipe*, 388 F.3d 471, 485 (5th Cir. 2004) ("Evidence may be material under *Brady* even though it is inadmissible." (citation omitted)); *United States v. Paulus*, 952 F.3d 717, 724 (6th Cir. 2020) ("[T]he district court determined that because the letter was inadmissible, it couldn't be *Brady* material. That is flatly wrong." (citation omitted)); *United States v. Price*, 566 F.3d 900, 913 n.14 (9th Cir. 2009); *United States v. Velarde*, 485 F.3d 553, 563 (10th Cir. 2007); *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999) ("Inadmissible evidence may be material if the evidence would have led to admissible evidence."); *but see Hoke v. Netherland*, 92 F.3d 1350, 1356 n.3 (4th Cir. 1996) (ruling that inadmissible evidence, as a matter of law, is "immaterial" for *Brady* purposes).

history." *Commonwealth v. Dargon*, 457 Mass. 387, 396 (2010) (citing Mass. G. Evid. § 803(4)). "These records were significant" due, in large part, to the fact they "revealed that Farak was receiving treatment for drug addiction and that her treatment providers likely would have more information about the scope of Farak's drug use and theft at the lab." *CPCS*, 480 Mass. at 711-12.

As it turned out, this additional information featured detailed admissions of wrongdoing memorialized by Farak's clinicians during years of individual therapy sessions. *See Commonwealth v. Cotto & Related Cases*, 2017 WL 4124972, at *5-10 (Mass. Sup. Ct. June 26, 2017) (chronicling "the evidence of Farak's addiction and drug tampering . . . derived from the records of Farak's mental health treatment providers"). Once again, the probative value of these new revelations overshadowed any questions about the grounds for their admission.

Having accepted this Court's recommendation to "thoroughly investigate the timing and scope of Farak's misconduct," *Commonwealth v. Cotto*, 471 Mass. 97, 115 (2015), the Commonwealth became the first litigant to elicit testimony concerning Farak's disclosures to treatment providers while questioning her at the grand jury. *CPCS*, 480 Mass. at 718 & 718 n.8. A year later, at a consolidated hearing for nine "Farak defendants" who filed motions for post-conviction relief, the records furnished by Farak's treatment providers, along with the records recovered from Farak's automobile, were officially offered as evidence. No

prosecutor objected to the admission of these documents; in fact, they came in as exhibits to a jointly proposed set of facts. *See Cotto & Related Cases*, 2017 WL 4124972, at *2.

Following Judge Richard J. Carey's conclusion that the car records had been intentionally suppressed, *id.* at *34-35, every District Attorney in the Commonwealth agreed to voluntarily vacate convictions in "every case in which Farak had signed the drug certificates." *CPCS*, 480 Mass. at 704. What began with arguably inadmissible diary cards ended with the dismissal of over 24,000 drug charges.[10]

II. The HCDAO's Reliance on a Report Prepared by a Police Officer with an Obvious Stake in the Outcome of this Litigation Makes Petitioners' Case for Relief More Compelling.

Though the magnitude of the Amherst Drug Lab scandal was in some respects unprecedented, unearthing it followed a familiar process. Proof of government wrongdoing in one case eventually resulted in closer scrutiny of conduct in other, unrelated cases. *Cf. Commonwealth v. Scott*, 467 Mass. 336, 338-39 (2014) (discussing how Annie Dookhan violation of an "internal protocol" turned out to be "the proverbial tip of the iceberg"). Malfeasance initially depicted

[10] *See* Report of the Special Master, No. SJ-2017-347 (Sept. 23, 2019), *available at* https://www.aclum.org/sites/default/files/20190923_report_of_special_master.pdf (last visited Aug. 29, 2023).

as aberrant[11] subsequently came to be seen as systemic. *Cf. Matter of a Grand Jury Investigation*, 485 Mass. at 643 ("Prompted by [a] videotape [of one incident], the district attorney initiated a criminal investigation" that "resulted in a grand jury returning fifteen indictments" against a Fall River police officer "for crimes involving four separate arrestees").

The impetus for the litigation now before this Court is not government wrongdoing in a single case. By definition, a pattern and practice of excessive force constitutes government wrongdoing in many. None of the parties to this proceeding know how many. And absent additional information about the cases that led the DOJ to charge a violation of 34 U.S.C. § 12601, that figure is destined to remain unknown.[12]

None of this seems to concern the HCADO – at least, not anymore. Back in January 2022, the HCDA took the position that the DOJ's "refusal to correctly and fully identify the incidents underlying its report [was] trampling on the

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[11] *See, e.g.*, Zach Howard, "Massachusetts crime lab chemist charged with evidence tampering," REUTERS (Jan. 20, 2013) ("On its face, the allegations against [Sonja Farak] do not implicate the reliability of testing done or fairness to defendants." (quoting Attorney General Martha Coakley)), https://www.reuters.com/article/us-usa-massachusetts-crimelab/massachusetts-crime-lab-chemist-charged-with-evidence-tampering-idUSBRE90J0F720130120 (last visited Aug. 31, 2023).

[12] It may go without saying that the ongoing anonymity of certain alleged perpetrators of police misconduct has made it impossible to give closer scrutiny to the testimony and use of force of these officers in the years since the DOJ published its report.

constitutional rights of thousands of individual defendants.[13] Now, the HCDAO mockingly refers to "the incidents in the DOJ report" as "the tip of some massive iceberg, careening toward Hampden County defendants and threatening to deprive them of their constitutional rights."[14]

This is more than a change in tone. The HCDAO has essentially cast its lot with SPD Deputy Chief Steven Kent (Kent) and embraced his irredeemably flawed critique of the "factual underpinnings of the DOJ report." R4:168.

It should be noted that when the DOJ accused Narcotics Bureau officers of "repeatedly punch[ing] individuals in the face unnecessarily" and "falsif[ying] reports to disguise or hide their use of force," R4:006, Kent's rebuttal could have served as the backbone of a defense. Alternatively, the SPD could have followed Kent's recommendation to present his findings "to the public" to rectify "erroneous" beliefs of "widespread abusive behavior and wholesale nonconformance to good police practices." R4:168.

Rather than rely upon the Kent Report in a court of law or public opinion, the City of Springfield took extraordinary steps to keep its contents secret. During a phone call on March 16, 2021, City Solicitor Edward Pikula (Pikula) advised the HCDAO's First Assistant that Kent had prepared an "internal memorandum" about

[13] *Gulluni v. Mendell*, 21-cv-30058-NG, Dkt. No. 19, Mem. in Supp. of Pl.'s Mot. for Summ. J. 6 (filed Jan. 31, 2022).
[14] Respondent-Appellant Br. at 21.

the DOJ Report but declined to produce the document by invoking the work product doctrine. R4:179.

In a follow-up letter dated August 24, 2021, Pikula once again ruled out disclosing "the report by Deputy Kent." R4:409. This time, he explained his reasons for seeking protection under Mass. R. Civ. P. 26(a)(3). "The City and DOJ ha[d] been actively participating in settlement negotiations" that Pikula hoped would result in an "agreement between the parties in the near future." R4:410. According to Pikula, the release of Kent's report ran the risk of "jeopardiz[ing] those discussions or compromis[ing] [the City's] bargaining position." *Id.*

Eight months later, this plan to keep the Kent Report under wraps produced the desired result. The SPD managed to sidestep a fight over facts by pledging to make "systemic changes in areas such as training and/or reporting practices" and promising to pay the costs of a "Compliance Evaluator" as part of a court-approved consent decree. R4:037, R4:075.

The City's reluctance to do battle based on Kent's rebuttal is not difficult to comprehend. As Petitioners have pointed out, Kent "is a former Narcotics Bureau supervisor, . . . who is among the officers implicated by the DOJ Report, . . . , who previously confessed to lying to IIU investigators and grand jurors, . . . , and who has been the subject of numerous complaints and civil rights lawsuits."[15] While the

[15] Petitioners-Appellants Br. at 24-25.

HCDAO now credits Kent with revealing "countless . . . cognitive errors in the DOJ's work,"[16] the unacknowledged bias in Kent's rebuttal is breathtaking.

For example, Kent repeatedly faults the DOJ for omitting key details pertaining to Justin Douglas,[17] a civil rights plaintiff who received a $60,000 settlement after alleging that "several Narcotics Bureau officers punched [him] in the jaw, beat him up, and hit him multiple times with the butt of a pistol." R4:030. At no point in his "careful analysis"[18] of this case does Kent note the seemingly pertinent fact that he himself was one of the defendants. *See Douglas v. Bigda*, 14-30210-MAP, 2017 WL 123422, at *4 (D. Mass. Oct. 14, 2016) (noting how "[i]n addition to the instant case, Kent ha[d] been sued for excessive use of force in two other cases, each of which resulted in a settlement").[19]

Earlier in the rebuttal, Kent decries the DOJ's unwillingness to give "members of the narcotics bureau" credit for assisting in the investigation of Kevin Burnham (Burnham),[20] a former evidence officer who was indicted for stealing nearly $400,000 in cash "obtained from more than 170 drug cases." R4:010. Missing from Kent's lament is any mention of yet another lawsuit Kent faced for

[16] Respondent-Appellee Br. at 23.
[17] *See* R4:164-66.
[18] Respondent-Appellee Br. at 24.
[19] It should be noted that undersigned counsel represented the plaintiff in one of these excessive force suits, *see Ververis v. Kent*, 13-CV-30175-MAP, as well as another plaintiff who successfully sued Kent for *Brady* violations, *see infra*.
[20] *See* R4:144.

suppressing material evidence of Burnham's longstanding scheme. *See generally* *Penate v. Kaczmarek*, 17-cv-30119-KAR, 2018 WL 4654708 (Sept. 27, 2018) (denying Kent's motion dismiss).[21]

Contrary to his recent claims in the media, Kent is not "completely objective" on the subject of police misconduct in Springfield.[22] Indeed, as Kent himself conceded, "If there was a big problem" in the Narcotics Bureau "some of it would have been occurring right under [his] nose."[23]

The problem here goes beyond "the messenger."[24] Kent's unmistakable message is that gang members, people with mental health issues, and individuals with criminal histories cannot be the victims of police brutality – particularly if

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[21] *See also* Peter Goonan, "Springfield settlements include $170,000 tied to drug lab scandal, police evidence room theft," MASSLIVE (Dec. 9, 2020), https://www.masslive.com/news/2020/12/springfield-settlements-include-170000-tied-to-drug-lab-scandal-police-evidence-room-theft.html (last visited Aug. 31, 2023).

[22] Stephanie Barry, "Controversial 'rebuttal' to 2020 DOJ report assailing narcotics unit released by Springfield official," MASSLIVE (Apr. 5, 2023), https://www.masslive.com/news/2023/04/controversial-rebuttal-to-2020-doj-report-assailing-narcotics-unit-released-by-springfield-officials.html (last visited Aug. 31, 2023).

[23] *Id. Right under Kent's nose* is less a figure of speech and more of a literal description as to the location where some of the Narcotics Bureau's biggest problems occurred. For one case Kent described as "instantly recognizable," R4:154, the police report features an account of Kent and a handcuffed suspect "falling to the floor . . . twice before Lt. Kent was finally able to control him." R4:259. As the DOJ Report notes, "security camera footage directly contradicted" another officer's claim that the altercation began when the suspect "struck [the officer] in the face with a closed fist." R4:022.

[24] Respondent-Appellee Br. at 24.

they are eventually found guilty of a crime offense. *See* R4:152-54. It should go without saying that police misconduct is impermissible in all cases and places – including the so-called "highest crime and gang infested areas in the city." R4:152.[25] Individuals who commit crimes do not forfeit their Fourth Amendment right to be free from excessive force.

Moreover, just as "a judgement or settlement in a civil suit" does not "automatically" mean an officer engaged in misconduct, dispositions in criminal cases are sometimes less a reflection of the actual facts and more a product of circumstances "over which a [criminal] defendant . . . has no control." R4:167. These factors include:

- "the economic advantage of a pretrial disposition versus the cost of proceeding to trial;"
- "the skill and aggressiveness of the attorneys' involved;"
- "the disposition of pretrial motions;"
- "the social climate for or against police at the time;" and
- "the quality of witnesses."

[25] *See Commonwealth v. Evelyn*, 485 Mass. 691, 709 (2020) ("The characterization of an area as 'high crime' cannot justify the diminution of the civil rights of its occupants." (citation omitted)); *see also* Grunwald & Fagan, *The End of Intuition-Based High-Crime Areas*, 107 CAL. L. REV. 345, 352 (2019) ("The racial composition of the area and the identity of the officer are stronger predictors of whether an officer deems an area high crime than the crime rate."), *cited in Commonwealth v. Torres-Pagan*, 484 Mass. 34, 42 (2020).

Id.

One might add that the risk of a wrongful conviction increases when a defendant is denied access to evidence demonstrating an arresting officer's "propensity for violence"[26] and/or proclivity "to fabricate or exaggerate the criminal conduct of the accused."[27]

CONCLUSION

For the foregoing reasons, MACDL respectfully urges this Court to grant the relief requested by Petitioners to ensure that the Commonwealth fulfills its obligations to investigate and disclose exculpatory evidence.

Respectfully submitted,

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[26] *Commonwealth v. Adjutant*, 443 Mass. 649, 662 (2005).
[27] *Matter of a Grand Jury Investigation*, 485 Mass. 641, 653 (2020).

CERTIFICATE OF COMPLIANCE

I hereby certify that, to the best of my knowledge, this brief complies with the Massachusetts Rules of Appellate Procedure Rules 16(a)(13) (addendum), 16(e) (references to the record), Rule 20, and Rule 21, that pertain to the filing of briefs. Exclusive of the exempted portions of the brief, as provided in Mass. R. App. P. 20(a)(2)(D), the brief contains 3009 words. The brief has been prepared in proportionally spaced typeface using Microsoft Word, version 1808, build 10730.20205 in 14 point Times New Roman font. The undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

September 1, 2023

/s/ Luke Ryan
Luke Ryan

CERTIFICATE OF SERVICE

Pursuant to Massachusetts Appellate Rule of Procedure 13(2), I certify that on September 1, 2023, I made service of this brief upon the attorneys of record for each party via the Electronic Filing System and first-class mail.

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