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 FOR PETITIONERS-APPELLANTS

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

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CORPORATE DISCLOSURE STATEMENT

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INTRODUCTION

In July 2020, following years of misconduct by the Springfield Police Department (SPD), the U.S. Department of Justice (DOJ) issued a report finding a pattern or practice of excessive force by the SPD Narcotics Bureau. The DOJ also found substantial evidence that SPD officers wrote false or misleading reports to hide their excessive force. In essence, the DOJ found that SPD officers hit people, lied about it, and helped prosecute the people they hit and lied about.

Then a strange thing happened: nothing.

The Hampden County District Attorney's Office (HCDAO), which prosecutes people based on assertions made by SPD officers, did not investigate this misconduct. Nor did any other Commonwealth agency. No entity assessed whether, in fact, SPD officers had engaged in a pattern or practice of misconduct. No one assessed whether, to justify their own excessive force, SPD officers engendered wrongful convictions for crimes like assault and battery on a police officer, resisting arrest, or disorderly conduct. No one has assessed whether wrongful convictions stemming from the misconduct persist today.

Although misconduct evidence existed, the HCDAO failed to make new disclosures of exculpatory evidence to criminal defendants in the wake of the DOJ Report. Some of it, like a "binder" of evidence regarding an infamous 2015 assault by off-duty SPD officers and a 2016 report alleging that an SPD officer

"kicked [a handcuffed teenager] in the face," sat in the HCDAO's offices. R3:474-476, 529, 753. Other misconduct evidence remained with the SPD, undisclosed. In October 2020, a former Narcotics Bureau supervisor—now SPD Deputy Chief—claimed to have identified "all" incidents cited by the DOJ, and to have reviewed "all" underlying SPD documents, while writing a "rebuttal" of the DOJ Report. R4:141, 150. To be clear, the "rebuttal" is no investigation; it is self-serving advocacy seeking to downplay police misconduct, prepared by an officer implicated in that misconduct. Yet the "rebuttal" confirms that the SPD could, and did, collect evidence relating to the DOJ Report.

The HCDAO did not start disclosing any of these SPD documents until August 2021, long after the alleged misconduct occurred and months after Petitioners filed this lawsuit. But those belated disclosures were far from complete. The SPD repeatedly warned the HCDAO that its disclosures are "not exhaustive." R4:183, 410. The SPD also withheld certain documents altogether; for example, it withheld the "rebuttal" from October 2020 until March 2023.[1] Yet the HCDAO concluded that its job, in the testimony of its First Assistant District Attorney, began and ended with providing what the SPD "give[s] me." R3:395.

[1] See Resp't Motion to Expand the Record at 2, Dkt. No. 8.

All of this is contrary to law. When a prosecution team member's apparent misconduct casts doubt on prior convictions or ongoing cases, the Commonwealth must investigate. *Comm. for Pub. Counsel Servs. v. Attorney Gen.*, 480 Mass. 700, 702 (2018) (*CPCS v. AG*); *Commonwealth v. Cotto*, 471 Mass. 97, 108 (2015). When the police possess exculpatory evidence, the prosecutor must seek to disclose all of it—rather than a curated, "not exhaustive" selection. See *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). And when the police withhold evidence, the prosecutor is responsible for that withholding as a matter of law. *Commonwealth v. Murray*, 461 Mass. 10, 19 (2011); *United States v. Osorio*, 929 F.2d 753, 762 (1st Cir. 1991).

If the prosecution will not or cannot comply with these obligations, it must dismiss affected cases; it cannot prosecute people without disclosing exculpatory evidence. Indeed, in federal litigation against the DOJ, the HCDAO concedes that failing to obtain exculpatory evidence underlying the DOJ Report "would be contrary to the constitutional rights of an untold number of defendants." Brief of Anthony Gulluni at 23, *Gulluni v. Rollins*, No. 22-1862 (1st Cir. filed Mar. 9, 2023).

Petitioners agree. They are criminal defense organizations, lawyers, and former defendants who have been directly harmed by the failure to investigate and disclose SPD misconduct. As explained below, Petitioners ask this Court to

take concrete steps to rectify ongoing violations of the constitutional rights of criminal defendants.

ISSUES PRESENTED

1. Whether the July 2020 report by the Department of Justice, together with other evidence of misconduct by the Springfield Police Department, triggered the Commonwealth's duty to investigate and, if so, what that duty entails.

2. When an investigating agency alleges that a police department in the Commonwealth engaged in a pattern or practice of misconduct, what evidentiary disclosures must state prosecutors make to satisfy the duty to "learn of and disclose to a defendant any exculpatory evidence that is 'held by agents of the prosecution team'" in matters involving that police department.

3. What obligations the prosecution has when a police department in the Commonwealth declines to turn over exculpatory evidence concerning police officers who are members of prosecution teams.

4. Whether each of the Petitioners has standing to bring this case and invoke the Court's superintendence power.

STATEMENT OF THE CASE

On April 6, 2021, pursuant to G. L. c. 211, § 3 and c. 231A, § 1, Petitioners filed a petition against the Hampden County District Attorney in the Supreme Judicial Court for Suffolk County, alleging the under-investigation and under-disclosure of evidence reflecting misconduct by SPD officers. R1:18, 32. On April 19, 2022, the Single Justice appointed a Special Master to make findings of fact and credibility determinations. R1:155. On October 18, 2022, following a four-day evidentiary hearing, the Special Master issued a report. R3:640, 642. Petitioners filed certain objections to that report, R3:716, and the HCDAO responded to those objections. R3:754. On January 30, 2023, without accepting the Special Master Report, the Single Justice reserved and reported the case. R3:779.

Petitioners are the Committee for Public Counsel Services (CPCS), Hampden County Lawyers for Justice (HCLJ), defense attorneys Meredith Ryan and Kelly Auer, and former defendants Chris Graham and Jorge Lopez.

CPCS must provide representation to all indigent defendants in Hampden County. G. L. c. 211D, § 1 et seq. It contracts with HCLJ, which serves as the bar advocate program in Hampden County, to provide private counsel to indigent defendants. R6:74. SPD misconduct and the HCDAO's disclosure practices impact these organizations' ability to provide effective representation because

the Commonwealth's failure to fully investigate and disclose police misconduct violates their clients' rights and harms the organizations themselves.

Attorneys Ryan and Auer represent defendants who qualify for appointed counsel in Hampden County. R6:77, 81. Their clients have been impacted by SPD misconduct. R4:419, 431.

Petitioners Graham and Lopez cases were impacted by the SPD misconduct and the HCDAO's non-disclosure practices. R3:136-137, 647-650.

STATEMENT OF FACTS[2]

I. SPD officers engaged in egregious, systemic misconduct, the full extent of which remains unknown.

Substantial evidence, including the July 2020 DOJ Report, indicates that SPD officers engaged in egregious misconduct that has yet to be fully investigated. Petitioners address some of that evidence here.

A. Evidence of egregious SPD misconduct predates the DOJ Report.

For years, publicly available evidence pointed to egregious, systemic misconduct by the SPD, including several notorious incidents. R4:9. Some of these incidents led to the DOJ's investigation into the SPD, the DOJ's sole pattern or practice investigation of any police department during the Trump

[2] Additional facts are presented as they arise in the argument section.

administration, and are mentioned in its report. *Id*.; see also Christy E. Lopez, *DOJ Police Pattern-or-Practice Investigations*, CRIM. JUST., Spring 2022, at 34, 36.

1. The 2015 assault of Black men outside Nathan Bill's Bar by SPD officers

In April 2015, multiple SPD officers participated in a violent assault outside of Nathan Bill's Bar & Restaurant in Springfield that included kicking and punching the victims about the head. R5:255. The SPD subsequently prepared two reports about the incident. R3:660; R5:165, 239. The reports state that witnesses picked Officers Christian Cicero and Daniel Billingsley out of photo arrays and gave statements implicating them in the assault; Cicero was captured by a nearby surveillance camera; and both officers called out of work the next day, with one citing a broken toe. R5:167, 173, 203, 205, 209. The SPD referred the matter to the HCDAO in 2015, but provided only one of its reports. R3:472-473. A year later, the SPD invited the HCDAO to obtain a second report through a public records request, which the HCDAO did. R3:472, 475; R5:256. Overall, the HCDAO collected a binder full of evidence regarding this incident. R3:472.

In February 2017, the HCDAO released a report, which it placed on its website but did not provide to criminal defendants, finding that it lacked probable cause to prosecute any officer. R3:470, 660; R5:255. In this litigation,

First Assistant District Attorney Jennifer Fitzgerald testified that she believed SPD officers had committed crimes, but that the SPD had made a mess of investigating them. R3:243, 471. The DOJ later reviewed the incident and referred it to the Massachusetts Attorney General. R5:117.

The Massachusetts Attorney General brought charges against 14 officers. R3:661; R5:117. Of those, Billingsley and Cicero were convicted of assault and battery, and Officer Jose Diaz was convicted of misleading investigators. *Commonwealth v. Billingsley*, No. 1979CR00155 (Hampden Sup. Ct.); *Commonwealth v. Cicero*, No. 1979CR00158 (Hampden Sup. Ct.); *Commonwealth v. Diaz*, No. 1979CR00349 (Hampden Sup. Ct.). Charges against two other officers remain pending. *Commonwealth v. Lewis*, Nos. 1979CR00348 and 1979CR00163 (Hampden Sup. Ct.); *Commonwealth v. Gentry-Mitchell*, No. 1979CR00164 (Hampden Sup. Ct.).

2. The physical, mental, and racial abuse of teenagers in Palmer

In February 2016, during an arrest of two Latino teenagers in Palmer, a Wilbraham Police Department officer reported that after one teenager was handcuffed without incident, "a plain clothes Springfield Police Officer . . . kicked [him] in the face." R5:267. Later, Palmer police cameras captured SPD Narcotics Bureau officer Gregg Bigda, "interrogating" the juveniles by, among other things, threatening to crush one of their skulls and "fucking get away with

it" and "stick a fucking kilo of coke in [one of the teen's] pockets and put [him] away for fucking fifteen years." R3:658; R4:6-7.

The HCDAO did not prosecute Bigda. There was a split of opinion at the HCDAO whether the threats were misconduct or just "sophomoric behavior." R3:366. First Assistant Fitzgerald testified that she did not regard it as misconduct when, during the interrogation, Bigda told one of the teenagers: "Welcome to the white man's world." R3:521. In 2018, Bigda was charged federally with excessive force, abusive interrogation, and writing a false report. Indictment, *United States v. Bigda*, No. 3:18-cr-30051 (D. Mass. Oct. 25, 2018). Despite the video evidence,[3] Bigda was acquitted in December 2021. R3:659.

3. SPD admissions of misconduct during Palmer investigation

In this litigation, the Special Master found that, during a federal grand jury investigation into the Palmer incident, three SPD officers admitted to misconduct:

- Former officer Luke Cournoyer testified that he filed a false report regarding the incident and that officers consumed alcohol while on-duty;
- Detective Edward Kalish testified that he gave the SPD Internal Investigations Unit (IIU) false information regarding the incident; and

[3] See *Springfield detective Gregg Bigda interrogates teens in jail cell* (Full video), MASSLIVE (Nov. 6, 2016), https://www.youtube.com/watch?v=r1i3a0-qhME&ab_channel=MassLive.

- Deputy Chief Steven Kent acknowledged giving "false information to the IIU and false testimony to the grand jury regarding officers drinking while on duty."

R3:695.

4. Judicial findings discrediting SPD officers

Other evidence, including judicial findings, points to SPD officers giving false or unrealistic accounts of events. In 2017, a U.S. magistrate judge suggested that certain SPD officers "were prepared to be untruthful when it suited their purposes." *Douglas v. City of Springfield*, 2017 WL 123422, at *10 (D. Mass. 2017) (adopting report and recommendation). In 2018, responding to testimony by SPD Officer Felix Aguirre, a superior court judge stated that she had "really never been so taken aback . . . [by] a police officer really making it up as he went." R5:377-378. In 2019, a district court judge found "substantial incongruity" between accounts given by SPD Officers Igor Basovskiy and John Wajdula about "how the defendant was shot," which "defie[d] the objective evidence and almost belie[d] common sense." R5:409-410. Also in 2019, in allowing Petitioner Graham's new trial motion based on his counsel's failure to discover exculpatory evidence withheld by the prosecution, the superior court noted that the prosecution's case "rested on the credibility of two [law enforcement] witnesses," one of whom was SPD Officer Remington McNabb, who gave "inconsistent and facially unrealistic accounts." R6:248, 255.

5. Evidence that officers file false reports to hide excessive force

Evidence was presented below that SPD officers involved in excessive force incidents regularly bring three charges against defendants, regarded by some defense attorneys as the Springfield "Trifecta": resisting arrest, disorderly conduct, and assault and battery on a police officer. R3:61-62. In recent years, SPD officers have been criminally charged after filing false reports that led to one or more of these charges being filed against their victims. For example, SPD Officer Angel Marrero charged a high school student with assault and battery on a police officer and resisting arrest, but surveillance video showed that Marrero initiated the contact by grabbing the student's neck and pushing him against a wall. *Commonwealth v. Marrero*, No. 1917CR002396 (Holyoke Dist. Ct. Sept. 23, 2020) (finding Marrero guilty of assault and battery and falsifying a police report).[4] In another incident, SPD Officer Jefferson Petrie brought assault and resisting charges against a man who entered SPD headquarters to dispute a parking ticket, but Petrie admitted to facts sufficient for a finding of guilty on one count of assault and battery after video surfaced showing Petrie initiated the contact by grabbing the man's neck.

[4] See also Dan Glaun, *Video contradicts police report on arrest of Springfield student in High School of Commerce hallway*, MASSLIVE (Feb. 27, 2019), https://www.masslive.com/news/2019/02/video-contradicts-police-report-on-arrest-of-springfield-student-in-high-school-of-commerce-hallway.html.

Commonwealth v. Bellamy, No. 1723CR004817 (Springfield Dist. Ct.); Tender of Plea, *Commonwealth v. Petrie*, No. 1923CR002448 (Springfield Dist. Ct. March 9, 2020).[5] In both cases, the officers portrayed the arrestee as guilty of a crime that they did not commit.

B. The U.S. Department of Justice determined that SPD Narcotics Bureau officers engaged in a pattern or practice of excessive force and filed false reports.

The DOJ opened an investigation into the SPD Narcotics Bureau in April 2018. R4:6. On July 8, 2020, the DOJ issued a report finding reasonable cause to believe that Narcotics Bureau officers engage in a pattern or practice of excessive force in violation of the Fourth Amendment. R4:5-6.

The DOJ Report was based on "an extensive review of documentary evidence" collected from the SPD. R4:11-13. Based on that review, the DOJ found that "Narcotics Bureau officers resort to force when there is no legal justification to do so, and that in situations where force is justified, Narcotics Bureau officers use force that is more severe and dangerous than is reasonable." R4:13. Specifically, the DOJ found evidence that officers

[5] See also Dan Glaun, *Jerry Bellamy Went to Springfield Police HQ to Dispute Parking Ticket; Was Grabbed by Throat, Tackled by Officers in Confrontation*, MASSLIVE (Feb. 19, 2019), https://www.masslive.com/news/2019/02/jerry-bellamy-went-to-springfield-police-hq-to-dispute-parking-ticket-was-grabbed-by-throat-tackled-by-officers-in-confrontation.html.

"repeatedly punch individuals in the face unnecessarily . . . and resort to unreasonable takedown maneuvers that . . . could reasonably be expected to cause head injuries." R4:6. The DOJ found that "it is not uncommon for Narcotics Bureau officers to write false or incomplete narratives that justify their uses of force." R4:22. The DOJ also found evidence suggesting that SPD officers outside of the Narcotics Bureau engaged in similar misconduct and operated under the same "systemic deficiencies in policies, accountability systems, and training." R4:6, 9, 15.

In support of those findings, the DOJ described approximately 23 incidents, R3:657, which it cautioned were "not atypical." R4:17. Although the DOJ used pseudonyms, R4:16 (at n.20), its descriptions matched certain incidents discussed above, including the assault at Nathan Bill's bar and Bigda's interrogation in Palmer. R4: 6-7, 9. The DOJ also cited the following incidents:

- An officer "punched . . . a 17-year-old youth[] as he rode a motorbike past a group of Narcotics Bureau officers," and one officer punched the youth's brother "in the face." R4:16-17. The brother, whose prosecution is ongoing, was charged with assault and battery on a police officer, resisting arrest, and disorderly conduct. *Commonwealth v. Bruno-Villanueva*, No. 1923CR004823 (Springfield Dist. Ct.); R3:677.

- "[V]ideo footage show[ed] . . . officers rush[] into a store and immediately hit S.L. in the face." R4:18. The DOJ found that even if the SPD officers "did announce themselves or issue a command, they failed to provide S.L. with any time to react to the officers and surrender before he was hit." *Id*. This was a reference to Shazam Suarez, who was prosecuted for assault and battery on a police officer

and resisting arrest, among other crimes, until his defense lawyer gained access to the surveillance video that, the DOJ found, "directly contradicted" the officers' reports. See R4:22; *Commonwealth v. Suarez*, No. 1623CR004276 (Springfield Dist. Ct.).[6]

- Officers "delivered multiple punches to V.A.'s face," breaking his nose. R4:16. Although the officers alleged that V.A. had initially pushed one of the officers and ran away, the DOJ found that V.A. was "non-assaultive" when the officers later caught up to him and started punching him. *Id*.

The DOJ could not interview individual officers about those incidents, or anything else, because "Narcotics Bureau command staff and officers were unwilling to engage in one-on-one interviews." R4:11. In April 2022, the DOJ and SPD entered into a settlement agreement resolving a complaint alleging a pattern or practice of unlawful conduct. R4:33-101; see also R4:102-103. That settlement does not address the issues presented here.

II. The Commonwealth has not investigated the systemic misconduct of SPD officers.

The HCDAO concedes that the DOJ Report implicates an unknown number of cases, "past, present, and future." R5:38. Yet, as the Special Master found, "[i]t is undisputed that neither the HCDAO nor any other entity of the

[6] Compare R4:258-259 (police report in Suarez's case), with Stephanie Barry, *Defense Attorney: Video Disputes Springfield Police Report on Drug Suspect's Arrest*, MASSLIVE (Dec. 8, 2016) (video of Suarez's arrest), https://www.masslive.com/news/2016/12/videos_muddies_springfield_pol.html.

Commonwealth" has investigated, or is investigating, the DOJ's allegation that the SPD Narcotics Bureau engaged in a pattern or practice of excessive force that was enabled, in part, by false reporting. R3:199, 706.

The HCDAO has given multiple reasons for not investigating. First Assistant Fitzgerald testified that investigating SPD misconduct would keep the HCDAO from its "actual job" of prosecuting people. R3:382. She testified that SPD officers would resist being investigated and may give "inconsistent" statements. R3:382. The HCDAO has also claimed that it lacks the authority and resources to investigate. R4:178.

No one else has done anything resembling an investigation. On October 2, 2020, SPD Deputy Chief Kent completed a document that he entitled: "*Rebuttal to the Department of Justice Investigation of the Springfield, Massachusetts Narcotics Bureau*." R4:140 (hereafter "Kent Rebuttal"). Kent is a former Narcotics Bureau[7] supervisor, R1:418, who is among the officers implicated by the DOJ Report, R4:416, who previously confessed to lying to IIU investigators and grand jurors, R3:695, and who has been the subject of

[7] In July 2021, the SPD disbanded the Narcotics Bureau and reassigned its officers to a newly created "Firearms Investigation Unit." R4:36-037.

numerous complaints and civil rights lawsuits.[8] Unsurprisingly, Kent concluded that the DOJ Report is "erroneous." R4:167.

Three aspects of the Rebuttal are noteworthy. First, Kent stated that he was "able to identify and review all of the cited incidents" in the DOJ Report, and "all existing documentation" concerning those incidents. R4:141, 150. Second, Kent asserted that some officers that the DOJ accused of misconduct were not in the Narcotics Bureau. R4:150. Third, although Kent expressed a desire that his Rebuttal be "exposed to the public," R4:168, the City asserted that it was work product and withheld it from criminal defendants until March 2023. R4:410; R7:125.

III. Until Petitioners filed this lawsuit, the HCDAO made no disclosures in consequence of the DOJ Report.

The HCDAO has said that "the findings of the DOJ report create an ethical obligation for the Hampden District Attorney's Office to provide any potentially exculpatory material to defendants in cases in which these officers may be involved."[9] Yet the HCDAO did not obtain any such material from the SPD between July 2020, when the DOJ issued its report, and July 2021, well after

[8] See R1:256 (n.2 – listing five lawsuits against Kent), 275-277 (IIU Report for Kent).

[9] See https://hampdenda.com/hampden-district-attorney-anthony-d-gulluni-files-lawsuit-against-the-u-s-department-of-justice/.

Petitioners filed this case. R3:671-672. This is unsurprising given that, as the Special Master found, *until August 2022*, the HCDAO had no formal policies or training regarding the disclosure of exculpatory evidence to defendants. R3:708. That is, it had no policies requiring any particular disclosures; no mechanism for training prosecutors on their obligations; and no systems to track constitutionally required misconduct information. *Id*.; see also R4:107-110, 124.

A. Before this lawsuit, the HCDAO did not obtain any documents from the SPD in response to the DOJ Report.

After receiving the DOJ Report, the HCDAO asked the DOJ, but not the SPD, for documents underlying the DOJ's finding that SPD officers made false reports—not those involving excessive force.[10] R4:137-138. The DOJ declined and, in August and October of 2020, told the HCDAO they could acquire those documents from the SPD. R4:137; R5:22. In August 2020, CPCS and the ACLU of Massachusetts also urged the HCDAO to investigate the SPD. R4:130.

On December 2, 2020, the HCDAO finally wrote the SPD, but only to request reports the DOJ deemed "'false' or 'falsified.'" R4:171-173. Former City Solicitor Edward Pikula wrote back on December 10, 2020, stating, "As I am

[10] The Special Master found that the HCDAO asked the DOJ for records relating to the use of excessive force. R3:668. The record shows otherwise. R4:137-138.

sure you are aware, shortly after receipt of the [DOJ] Report, the Police Commissioner assigned personnel to review the incidents described" therein. R4:175. Solicitor Pikula stated that the SPD had identified some incidents "with a reasonable degree of certainty," and offered to provide the HCDAO with materials relating to those incidents. R4:175-176. The HCDAO did not write back to Solicitor Pikula until March 2021. R4:177.

First Assistant Fitzgerald further emailed Solicitor Pikula also in March, and they then spoke by phone. R4:179-181, 182. They discussed Deputy Chief Kent's "internal memorandum," which Pikula declined to provide. R4:179.[11] Pikula said he was willing to "identify" the documents that Kent referenced and to disclose "cover letters" that the City had sent the DOJ. *Id.* Nevertheless, Pikula did not provide any of those documents, and Fitzgerald did not follow up, until after Petitioners filed this lawsuit. R3:429; R4:180.

B. After being sued, the HCDAO obtained some documents.

Petitioners filed this case on April 6, 2021. R1:18. On April 8, First Assistant Fitzgerald emailed Solicitor Pikula about Kent's "internal memorandum," the documents associated with that memorandum, and the

[11] The Special Master found, and the HCDAO has argued, that the City did not disclose the existence of "the Kent report" to the HCDAO until July 2021. That is not so. Compare R3:672, 768, with R4:179-180.

cover letters that the City had sent to the DOJ. R4:179-180. In May 2021, the HCDAO sued the U.S. Attorney in federal court to obtain SPD reports the DOJ deemed false or falsified. R5:6.[12] And on July 2, 2021, after the Single Justice scheduled a status hearing in this case, see R1:19, Pikula sent Fitzgerald a letter purporting to identify some of the incidents from the DOJ Report and enclosing some of the documents "utilized in preparing [Kent's] work product" from October 2020. See R4:183; R4:140.

Solicitor Pikula told the HCDAO, repeatedly, that the documents enclosed with his July 2021 letter were "not exhaustive as to each incident." R4:183; see also R4:410 ("by no means exhaustive"). And while Deputy Chief Kent claimed that he identified "all" incidents and reviewed "all" documents, R4:141, 150, Pikula's letter did not say that. It purported to address 19 of the 23 incidents in the DOJ Report. R4:184-193. In an August 2021 letter, Pikula offered to make Kent available to meet with the HCDAO, R4:410, but the HCDAO declined. R4:416. Instead, in August 2021, the HCDAO began sending defense organizations redacted versions of the documents enclosed with Pikula's July 2021 letter. R3:673; see also R4:412, 414. And in September 2021, the HCDAO

[12] The federal district court granted summary judgment to the U.S. Attorney, and the case is now on appeal. See *Gulluni v. Rollins*, No. 22-1862 (1st Cir. docketed Nov. 10, 2022).

began sending letters to individual defense attorneys with some of the redacted materials and without either Pikula's letter or any mention that the provided materials were non-exhaustive as to the incident. See R4:419-420.

C. The HCDAO systematically withholds evidence.

In her testimony below, First Assistant Fitzgerald acknowledged that, by distributing only the non-exhaustive documents from Solicitor Pikula's July 2021 letter, the HCDAO decided to "simply provide[] what the City provided." R3:199. As noted in part II.B of the Argument below, that is also the HCDAO's practice in other cases. See, e.g., R3:648, 650 (prosecutor in Petitioner Graham's case failed to disclose "clearly exculpatory" 911 recording despite having information that a 911 recording likely existed); R3:697 (the HCDAO has not made a practice of disclosing when officers invoke their Fifth Amendment rights in response to questioning about their conduct).

But the HCDAO also withholds evidence that *is* provided to it. For example, the HCDAO intentionally withholds pretrial judicial findings of officer dishonesty when the HCDAO disagrees with those findings. R3:224-225; R3:567-570. The HCDAO has also acknowledged that it withholds its "binder" on the Nathan Bill's incident, purportedly because the SPD made a mess of the identification process, R3:243; as well as the report regarding the Palmer

incident, purportedly because the HCDAO did not know which of two SPD officers allegedly kicked the handcuffed teenager. R3:529.

SUMMARY OF THE ARGUMENT

I. The DOJ's misconduct findings concerning the SPD triggered the Commonwealth's duty to thoroughly investigate the timing and scope of that misconduct, but no one on behalf of the Commonwealth has done so. As in *Cotto*, this Court should set a deadline for the Commonwealth to say whether it will investigate SPD officer misconduct and provide a blueprint for an adequate investigation and disclosure process. Given that the DOJ and SPD agree that the incidents of excessive force described in the DOJ Report include officers outside of the Narcotics Bureau, this investigation should not be limited to former Narcotics Bureau officers. (Pp. 31-37)

II. The HCDAO has constitutionally inadequate inquiry and disclosure practices. The HCDAO does no more than provide what the police gives them and has otherwise disregarded its duty to notify individual defendants and CPCS of exculpatory information. (Pp. 37-50)

III. The HCDAO has prosecuted cases when members of the prosecution team were withholding potentially exculpatory evidence, including the Kent Rebuttal. This is improper. Prosecutors have multiple means

at their disposal to compel the production of exculpatory evidence and, if they are unsuccessful, the case must be dismissed. (Pp. 51-55)

IV. Petitioners all have standing because all have been harmed by the under-investigation and under-disclosure of SPD misconduct. (Pp. 55-60)

ARGUMENT

I. The Commonwealth must investigate SPD misconduct.

The Commonwealth is "duty-bound to investigate" wrongdoing by a member of the prosecution team, *CPCS v. AG*, 480 Mass. at 702, particularly wrongdoing that "cast[s] serious doubt on the integrity" of the evidence used to convict people. *Cotto*, 471 Mass. at 108. Here, the DOJ Report casts doubt on the integrity of evidence—namely, the word of SPD officers—that the HCDAO uses to convict people of crimes like assault and battery on a police officer, resisting arrest, and disorderly conduct. Every day, in criminal courts across Hampden County, when a law enforcement agency speaks, prosecutors listen. Yet, when a law enforcement agency said that SPD officers engaged in a pattern or practice of excessive force, and lied about it, the HCDAO did not listen. Nor did anyone else on the Commonwealth's behalf. This is contrary to law.

A. When members of a prosecution team commit egregious misconduct, the Commonwealth has a duty to investigate.

When information "suggest[s]" that a prosecution team member engaged in egregious misconduct, the Commonwealth has "a duty to conduct a thorough

investigation to determine the nature and extent of [the] misconduct, and its effect both on pending cases and on cases in which defendants already had been convicted." *Commonwealth v. Ware*, 471 Mass. 85, 95 (2015); see *Cotto*, 471 Mass. at 112. Defendants have a right to know that there was evidence of misconduct in their cases. See *Bridgeman v. Dist. Attorney for Suffolk Dist.*, 476 Mass. 298, 315 (2017) (*Bridgeman II*). And evidence of prior misconduct by government witnesses is always important to criminal defendants because "if disclosed and used effectively, it may make the difference between conviction and acquittal." *United States v. Bagley*, 473 U.S. 667, 676 (1985).

In *Ware*, this Court held that the Commonwealth's duty to investigate the timing and scope of Sonja Farak's misconduct commenced when the State Police were notified that *two cases* may have been compromised. 471 Mass. at 95. After that investigation revealed significant misconduct by Farak at the Amherst state lab, a single justice of this Court agreed that "the district attorney was obliged" to investigate Farak's time at the Hinton lab, even though it preceded all confirmed instances of her misconduct. Add. at 8, 12, *Commonwealth v. Sutton*, SJ-2019-0316, Memorandum of Decision and Judgment (Oct. 17, 2019).

Unduly narrow inquiries will not discharge the Commonwealth's duty. With respect to Farak's misconduct, this Court held that spending "a few days"

examining the evidence immediately at the Commonwealth's disposal, and then retesting four samples that seemed to have been tampered with, was inadequate. See *Ware*, 471 Mass. at 96. Later, when the Attorney General's Office "undertook to examine the scope" of the misconduct, it convened two grand juries and reviewed more than 4,700 records, including drug lab records, emails, bank records, and telephone records. *CPCS v. AG,* 480 Mass. at 718. After this more robust investigation, the number of known cases involving misconduct jumped from eight, *Cotto*, 471 Mass. at 111, to more than 16,000. Add. at 18, *Committee for Pub. Counsel Servs. v. Attorney Gen.*, SJ-2017-347, Report of Special Master at 4 (Sept. 23, 2019).

B. The DOJ Report, together with other evidence, has triggered the Commonwealth's duty to investigate, which it has failed to fulfill.

Whatever the threshold for triggering the Commonwealth's duty to investigate, the misconduct at issue here far exceeds it. And whatever the requisite scope of that investigation, the Commonwealth has not conducted it.

1. The duty to investigate has been triggered

The DOJ did more than "suggest[]" misconduct by the SPD. *Ware*, 471 Mass. at 96. It charged that "SPD's Narcotics Bureau Engage[d] in a Pattern or Practice of Unreasonable Force in Violation of the Fourth Amendment." R4:13. And it alleged misconduct in more than just two or even eight cases. The DOJ

provided 23 examples of unlawful force and several examples of records falsified to hide that unlawful force. R5:104. If "eight cases are eight cases too many," *Cotto*, 471 Mass. at 111, then so are 23. So is a pattern or practice.

Where there is a pattern or practice of excessive force, together with attempts to cover it up, there may also be wrongful convictions. This Court has repeatedly overturned convictions based upon newly discovered impeachment evidence. See, e.g., *Commonwealth v. Pope*, 489 Mass. 790 (2022); *Commonwealth v. Caldwell*, 487 Mass. 370 (2021); *Commonwealth v. Rodriguez-Nieves*, 487 Mass. 171 (2021). And for good reason. A witness's tendency to lie or conceal the truth may, if unchallenged, enable them to persuade a factfinder to convict an innocent person. This is particularly true when police witnesses may be motivated to charge a victim with crimes they did not commit in order to conceal their own police brutality.

Once the DOJ Report made plain what already should have been obvious to the Commonwealth, the Commonwealth was duty-bound to determine the nature and extent of SPD misconduct, including which cases were impacted.

2. The Commonwealth has not discharged its duty to investigate

No one on behalf of the Commonwealth has investigated the allegations of SPD misconduct. R3:706. While the HCDAO requested some documents from both the DOJ and the SPD, this limited inquiry does not fulfill the

Commonwealth's obligation to "conduct a thorough investigation." *Ware*, 471 Mass. at 95. And the HCDAO has not argued, nor could it, that either the DOJ Report or the Kent Rebuttal discharged the Commonwealth's duty to investigate. The HCDAO has never accepted that the DOJ Report is accurate. R3:562-563. And the Kent Rebuttal, written by a former Narcotics Bureau supervisor who is himself implicated by the DOJ Report, reads like a Festivus-style airing of grievances with the DOJ, rather than a serious effort to uncover wrongdoing.

C. The Commonwealth's investigation should track the officers and charges implicated in SPD misconduct.

Consistent with *Cotto*, this Court should hold that the Commonwealth's duty to investigate has been triggered, and require the HCDAO to say by a particular deadline who, if anyone, will investigate. Several considerations should guide the investigation.

First, the Commonwealth must determine which cases are implicated by the DOJ's findings. At a minimum, this would mean reviewing every case where a defendant was charged with resisting arrest, disorderly conduct, or assault and battery on a police officer. This review, starting from at least 2013, should not be limited to cases involving former Narcotics Bureau officers because, as the DOJ notes and the Kent Rebuttal confirms, the DOJ Report implicates

officers outside that Bureau. Cases where excessive force is found should be vacated and dismissed.

Second, the Commonwealth must determine which officers are implicated by the DOJ's findings. Given the dishonesty found by the courts and the DOJ, the Commonwealth should also review all judicial findings questioning the credibility of SPD officers. See *Milke v. Ryan*, 711 F.3d 998, 1008 (9th Cir. 2013) ("judicial determinations that [an officer] lied in performing his official functions and violated suspects' constitutional rights would have been highly relevant where the state's case rested on his testimony"). For those officers who filed false reports or were found dishonest by a court, the Commonwealth should move to vacate those convictions where the evidence was insufficient, absent the discredited officer's testimony, to convict. See *Murray*, 461 Mass. at 23 n.10 ("in the case of important witnesses, even minor bases for impeachment are exculpatory").

Third, this Court should institute remedies until the investigation is complete. Relief could include the creation and monitoring of a thorough *Brady* list of officers with misconduct issues; ensuring that defendants receive evidence as it becomes available; a judicial presumption in favor of the admissibility of the DOJ Report; jury instructions tailored to cases where former SPD Narcotics Bureau officers are members of the prosecution team;

limitations on the admission of police reports at hearings under G. L. c. 276, § 58A, or for alleged probation violations; and other relief that the Court deems fit. This relief will ensure that defendants in ongoing cases based on evidence proffered by SPD officers are afforded fair and constitutional proceedings. And it may be especially necessary if SPD officers resist questioning, as First Assistant Fitzgerald hypothesized they would. See R3:382.

II. To satisfy its duty to disclose, the HCDAO must obtain all evidence of misconduct, notify defendants, and disclose a list of affected cases.

Even when the duty to conduct a *Cotto*-style investigation has not been triggered, the prosecution has a duty to inquire into, collect, and disclose evidence that resides with members of its prosecution teams, including the police. See *Strickler v. Greene*, 527 U.S. 263, 281 (1999); *Kyles v. Whitley*, 514 U.S. at 437. But the HCDAO has admitted that it does not do that. First Assistant Fitzgerald testified that "we have simply provided what the City provided." R3:199. This is apparently because, in dealing with the SPD, she believes the HCDAO merely "ha[s] to provide all of th[e] information that they give me." R3:395. But that is the rule for people who are *not* members of the prosecution team; a prosecutor's disclosure obligations are far more stringent with respect to information held by their own team members. As explained below, the

HCDAO's misunderstanding of its legal obligations has led, unsurprisingly, to violations of those obligations.

A. The HCDAO must learn of and disclose exculpatory evidence possessed by prosecution team members, especially those accused of misconduct.

"Under the due process clause of the Fourteenth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights, a prosecutor must disclose exculpatory information to a defendant that is material either to guilt or punishment." *Matter of Grand Jury Investigation*, 485 Mass. 641, 646 (2020), citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963). This includes evidence bearing on a witness's credibility. See *Giglio v. United States*, 405 U.S. 150, 154 (1972) (government must turn over evidence affecting credibility); *Commonwealth v. Ellison*, 376 Mass. 1, 22 (1978) (same). In Massachusetts, "prosecutors have more than a constitutional duty to disclose exculpatory information; they also have a broad duty under Mass. R. Crim. P. 14(a)(1)(iii) to disclose any facts of an exculpatory nature" regardless of materiality. *Matter of Grand Jury Investigation*, 485 Mass. at 649-650 (internal quotations omitted). And long before *Matter of Grand Jury*, this duty encompassed evidence that a witness has "an impeachable past." *United States v. Bender*, 304 F.3d 161, 164 (1st Cir. 2002), quoting *Osorio*, 929 F.2d at 761.

Prosecutors cannot discharge this duty by "simply provid[ing] what the [police] provide[.]" See R3:199. Prosecutors are "inescapabl[y]" responsible for disclosing all exculpatory evidence held by members of their prosecution teams, even if that evidence is known only to those members. *Kyles*, 514 U.S. at 437-438. See also *Commonwealth v. Frith*, 458 Mass. 434, 441 (2010) (incumbent on prosecutor to ask police whether *all* discoverable materials relating to case have been given to the Commonwealth). "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." *Mastracchio v. Vose*, 274 F.3d 590, 600 (1st Cir. 2001).

To obtain the information for which they are inescapably responsible, prosecutors have a duty of inquiry. See *Commonwealth v. Martin*, 427 Mass. 816, 823 (1998). In every criminal case, the prosecution must make "reasonable inquiry" as to whether all discoverable materials, including impeachment materials, have been provided. Mass. R. Crim. P. 14(a)(3). "'Reasonableness' is the only limitation on the prosecutor's duty of inquiry." *Frith*, 458 Mass. at 440-441. Prosecutors cannot avoid finding exculpatory information "simply by declining to make reasonable inquiry." *Osorio*, 929 F.2d at 761. Due process entails "continued vigilance" by the prosecutor to review materials for

exculpatory evidence. *Commonwealth v. Daniels*, 445 Mass. 392, 403-404 (2005).

Those are the rules for all criminal cases. It follows that the prosecution must inquire more pointedly, and delve more deeply, when a law enforcement agency has accused prosecution team members of a pattern or practice of misconduct. Yet, in Hampden County, the opposite has happened.

B. The HCDAO has withheld and continues to withhold exculpatory evidence.

Contrary to certain conclusions by the Special Master, R3:706, the record demonstrates that the HCDAO has routinely failed to disclose *Brady* evidence related to police misconduct.

1. The HCDAO withheld its Nathan Bill's files

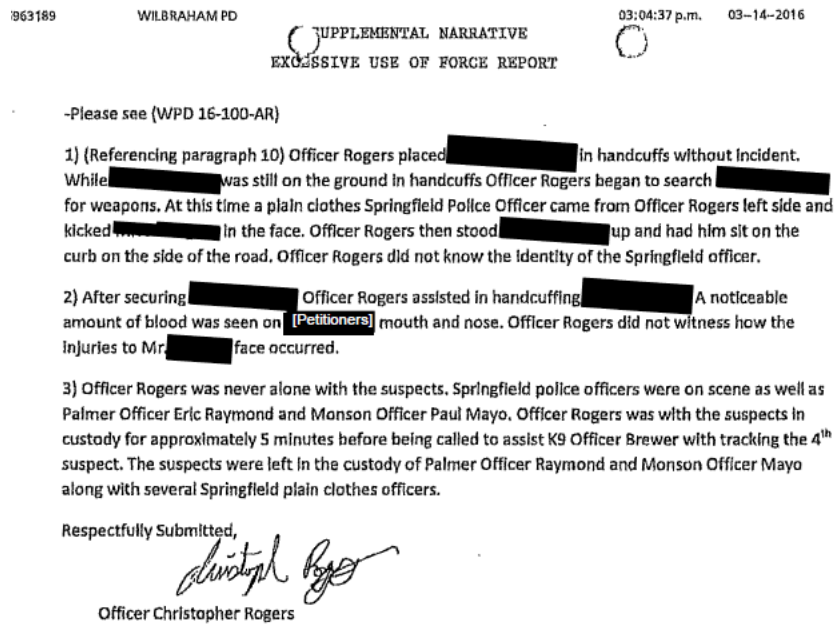
First Assistant Fitzgerald testified that, since at least 2017, the HCDAO has withheld its "binder" of evidence on the Nathan Bill's incident when it prosecutes defendants in cases involving Officers Billingsley, Cicero, and other implicated officers. R3:475-476, 479-483. The withheld evidence includes a detective bureau file, an IIU file, witness statements, police reports, video, and medical records. R3:471-472. A defense attorney armed with those withheld materials would have been able to connect at least Officers Billingsley and Cicero to the incident. See R3: 478-479, 482-483. First Assistant Fitzgerald

justified the decision to hold back that evidence because, in her opinion, the SPD made a mess of the identification process. R3:243. However, the HCDAO continued to withhold this evidence even after the Attorney General's Office indicted specific officers in 2019; the HCDAO decided just to pass along a letter from the Attorney General's Office describing the charges. R3:661; R6:5.

A subset of the Nathan Bill's materials long withheld by the HCDAO are now being disclosed to defense attorneys, apparently because Solicitor Pikula included them with his July 2021 letter. R4:185, 193.

2. The HCDAO withheld evidence relating to the Palmer incident.

First Assistant Fitzgerald testified that from March 2016 until August 2021, except in the cases of the specific teenagers arrested in Palmer, the HCDAO withheld the following Wilbraham police report accusing a plainclothes SPD officer of kicking a handcuffed teenager in the face. R3:376, 526-533, 659.



963189 WILBRAHAM PD 03:04:37 p.m. 03-14-2016

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 [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

Fitzgerald acknowledged that the alleged kicker was likely one of two SPD officers: Gregg Bigda or Steven Vigneault. R3:529-530. But Fitzgerald testified that the HCDAO will not turn over evidence of SPD violence that could have been committed by one of two officers, absent a determination by the SPD that *both* officers violated SPD policy. R3:531-532. Fitzgerald said she was "hoping for an investigation" that would determine whether Bigda or Vigneault did the kicking, R3:531, but apparently it never occurred to the HCDAO to conduct that investigation itself.

Like the Nathan Bill's materials, the HCDAO began disclosing the Wilbraham report, and other reports about the Palmer incident, only after Solicitor Pikula included them with his July 2021 letter. See R3:527-532. The HCDAO had previously and widely disclosed the interrogation video, but only

after a more limited disclosure process that one court called "borderline prosecutorial misconduct." Stephanie Barry, *Hampden Superior Court Judge Rebukes Prosecutor for Handling of Videos Featuring Suspended Springfield Detective Threatening Teens*, MASSLIVE (Oct. 4, 2016).[13]

3. The HCDAO withheld evidence following the DOJ Report

Before Petitioners filed this case in April 2021, the HCDAO did not secure any new evidence from the SPD concerning the misconduct discussed in the July 2020 DOJ Report. R5:113. That failure would have been unlawful even if the HCDAO had not known about any withheld evidence. See, e.g., *Mastracchio*, 274 F.3d at 600.

But the HCDAO did know. The City told the HCDAO by at least December 2020 that the SPD had identified certain incidents from the DOJ Report. R4:176. By March 2021, the HCDAO knew that Kent had written an "internal memorandum." R4:179. Before this lawsuit was filed, the HCDAO neither obtained these documents nor, to Petitioners' knowledge, told a single defendant or defense attorney of their existence.[14]

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[13] https://www.masslive.com/news/2016/10/hampden_superior_court_judge_r_3.html.

[14] The undersigned counsel did not know of the Kent Report's existence when we filed this case, and still did not know its title when this case was reserved and reported in January 2023.

4. The HCDAO is withholding evidence relating to the DOJ Report.

The HCDAO knows that its disclosures based on Solicitor Pikula's July 2021 letter are not exhaustive because the City has repeatedly told it so. R4:183-184, 410. Yet the HCDAO has stood pat. It has even rejected the SPD's offer to produce additional documentation and to meet with Kent concerning his Rebuttal. R4:410; R4:416-417.

For example, Solicitor Pikula's July 2021 letter disclosed SPD documents relating to the case of S.L., who the DOJ found was improperly struck in the face by SPD officers. R4:190-191, 253-272. Kent's rebuttal argues that the SPD used appropriate force because an officer "called to [S.L.] by name," R4:154, but fails to mention the DOJ's finding that video evidence reveals that officers "failed to provide S.L. with any time to react to the officers and surrender before he was hit." R4:18, 022. The SPD has a copy of this video. R4:154. But Pikula's July 2021 letter omitted it, and the HCDAO's ongoing disclosures to defense lawyers do not include it.[15]

The HCDAO also resists discovery about SPD misconduct in other ways. In Petitioner Lopez's case, an attorney for the SPD stated that the Commonwealth did not comply with its Rule 14 obligations to inquire of

[15] See n. 6, *supra*, for the video.

individual officers. R7:72, 140-141. In *Commonwealth v. Fernandez*, the Commonwealth objected to having officers sign a statement under the pains and penalties of perjury that they turned over all exculpatory evidence. R5:345.

5. The HCDAO systematically withholds adverse credibility determinations

First Assistant Fitzgerald testified that, when judges make pretrial adverse credibility findings concerning police officers, the HCDAO withholds those findings in other cases if *the HCDAO* decides the trial judge was wrong. R3:224-226, 503, 679. Thus, the HCDAO does not disclose Justice Sweeney's finding that Officer Aguirre's testimony was a made-up, fanciful tale, because the HCDAO "disagreed with" it. R3:570.

6. The HCDAO has withheld recorded evidence

First Assistant Fitzgerald testified that Hampden County prosecutors do not automatically receive recorded calls, such as 911 calls, from the SPD. R3:216-217, 649. This practice has led to at least one wrongful conviction, that of Petitioner Chris Graham.

Graham was convicted on a firearms charge and served 18 months' imprisonment before his motion for new trial was granted for ineffective assistance of counsel. R6:248. In his case, prosecutors failed to turn over, and his counsel failed to discover, an exculpatory 911 call in which the caller stated

that the person with the gun was ***not*** the Black male. R6:218, 221-222; R3:648. Graham is a Black male, and SPD Officer McNabb, who was off-duty and drew his firearm during the incident, is white. R3:647. Noting that the incident occurred in public in front of "numerous people," the Special Master concluded that "information that both the prosecutor and defense counsel had provided at least reason to suspect the likelihood of a 911 call, such that both of them should have inquired." R3:650.

In addition, the prosecutor had evidence, and called officers to testify, that Officer McNabb called dispatch to request assistance. R6:140, 142, 152-54, 156, 159. Those calls were recorded, and their disclosure was required by Mass. R. Crim. P. 14(a)(1)(A)(vii). If the HCDAO had disclosed the two dispatch calls, as the rules required, then it would also have disclosed the exculpatory 911 call, because *all three calls were saved on a single audio file and assigned a single call number (#17-139244)*, R6:218-227 which appeared, conveniently, on Graham's arrest report. R6:140; see also R6:189. But the HCDAO did no such thing.

Similarly, in *Commonwealth v. Cooper-Griffith*, the HCDAO charged the defendant with assault and battery on a police officer based on Officer Cicero's allegation that the defendant spat on him in the police station's booking dock. R5:301. The booking dock has a camera, R3:494, and video of the alleged crime was subject to mandatory discovery. See, e.g., Mass. R. Crim. P. 14(a)(1)(A)(vii)

(requiring disclosure of photographs and other tangible objects). Yet the HCDAO unlawfully withheld the booking dock video, assertedly because the defendant's discovery motion for video evidence used the term "booking area" instead of the magic words "booking dock." R3:687-688.

C. The Commonwealth must notify both impacted defendants and CPCS of misconduct, but it has not done so.

Where there is evidence of egregious government misconduct in a criminal case, the Commonwealth must take "reasonable steps to remedy that misconduct." *Bridgeman II*, 476 Mass. at 315. "Those reasonable steps include the obligation to timely and effectively notify the defendant of egregious misconduct affecting the defendant's criminal case." *Id*. Thus, following the Amherst lab scandal, the HCDAO sent notice directly to defendants, provided defendants with information about obtaining post-conviction counsel, and shared a case list with CPCS. *Id.* at 308, 329-330. Here, the HCDAO has refused to do any of those things. See R3:676.

After identifying approximately 8,400 cases involving officers implicated by the documents reviewed by Kent, R5:61, the HCDAO did not notify defendants themselves. Instead, the HCDAO decided to send disclosures to the last attorney of record in MassCourts. R3:672-673. Most of these letters went

out the summer of 2022, long after some of the cases were prosecuted. R3:673-674.

This process was neither timely nor effective. The attorney listed in MassCourts may not have been the defendant's trial counsel, R3: 446, and may not be available to serve as postconviction counsel. The HCDAO could not find addresses for all attorneys; for example, some had retired, moved out of state, or taken jobs as clerks. See R3:183-185; R4:447-448. Unfortunately, some had died. See R3:179; R4:447. And no information is currently known about whether pro se defendants received notice at all. R3:185-186. Further, the HCDAO has refused to disclose a case list to CPCS, R4:425, contrary to this Court's acknowledgment that CPCS's ability to "identify clients and to assign them attorneys . . . is crucial to the administration of justice." *Bridgeman v. Dist. Attorney for Suffolk Dist.,* 471 Mass. 465, 480 (2015).

In effect, the HCDAO's notice letters assigned the defense bar the task of investigating the SPD. The notice letters list websites where defense attorneys can download highly redacted versions of the documents that accompanied Solicitor Pikula's July 2021 letter. See, e.g., R4:429; R4:230-252. The notice letters do not reveal the provenance of these documents. See, e.g., R4:429. They do not pass along the City's admonition that the documents are "not

exhaustive." *Id.* And they take no position on whether any of the enclosed documents are "exculpatory or relevant." *Id*.

In *CPCS v. AG*, petitioners CPCS and HCLJ requested a standing order providing that if a prosecutor knew or had reason to know of misconduct in a particular case, they would have 90 days to generate a case list. 480 Mass. at 733-734. Here, where no notice effort began until after Petitioners filed this case and where the HCDAO still refuses to share its case list or provide meaningful notice to defendants, that standing order is worth revisiting.

D. This Court's precedent on internal affairs files should be reconsidered.

This Court has held that exculpatory evidence can be withheld from criminal defendants if it resides exclusively with a police department's internal affairs division. See *Commonwealth v. Rodriguez*, 426 Mass. 647, 648 (1998); *Commonwealth v. Wanis*, 426 Mass. 639, 643 (1998). That rule does not apply where, as here, the withheld evidence at issue appears to have been available to prosecution team members within the SPD, or the HCDAO, or both. Indeed, Deputy Chief Kent, a member of multiple HCDAO prosecution teams, accessed Internal Investigations Unit (IIU) files to prepare his rebuttal. R4:142, 155, 163.

But, to the extent that this case implicates *Wanis* and *Rodriguez*, those cases should be reconsidered. To start, they are contrary to federal appellate

court decisions holding that the prosecution's duty to learn of *Brady* material extends to files in the police department's internal affairs division. *United States v. Brooks,* 966 F.2d 1500, 1504 (D.C. Cir. 1992). The U.S. Court of Appeals for the Ninth Circuit deemed it contrary to clearly established federal law when prosecutors failed to disclose, among other things, findings in an internal affairs report that the state's key law enforcement witness had attempted to extort sex from a female motorist and then lied about it. *Milke*, 711 F.3d at 1007.

Similarly, the American Bar Association's standards now require the disclosure of anything in the possession of "any law enforcement agency"—not just the specific officers—"that has participated in investigating or prosecuting the case." A.B.A. Standards for Criminal Justice: Discovery, Standard 11-1.1 (h) (4th Ed., adopted Aug 2020). In *Wanis*, this Court cited *Commonwealth v. St. Germain,* 381 Mass. 256 (1980), which had relied on an older A.B.A. Standard requiring a more limited disclosure of information in the possession or control of those who "participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to his office." *Id*.at 261 n.8, citing A.B.A. Standards for Criminal Justice, Standards Relating to Discovery and Procedure Before Trial 2.1(d) (Approved Draft 1970).

III. The HCDAO cannot prosecute a case while a member of the prosecution team withholds exculpatory evidence.

Beyond withholding evidence and beyond failing to make sufficient inquiry with the SPD, the HCDAO has also acquiesced to the SPD's outright refusal to disclose potentially exculpatory evidence. This evidence has included the Kent Rebuttal, the cover letters that the SPD sent to the DOJ, and whatever Solicitor Pikula means when he says that the disclosures have been "by no means exhaustive." R4:410. Time and again, when the SPD balks, the HCDAO relents. Or, as First Assistant Fitzgerald put it, when the HCDAO requests exculpatory evidence from the SPD, it is "asking" not "telling." See R3:433, 546. Similarly, citing a draft amendment to Mass. R. Crim. P. 14, the Special Master concluded that when a prosecution team member withholds evidence, it is sufficient for the prosecution to notify the defense of this withholding. R3:711.

The HCDAO's practice and the Special Master's conclusion, contradict federal case law and prior decisions of this Court. This Court should reiterate that prosecutors may not continue prosecuting cases when the police resist disclosing evidence, and the Court should ensure that prosecutors have the tools and incentives necessary to overcome that resistance.

A. Withholding of evidence by the police is attributable to the prosecution.

The law is clear: prosecutors are responsible for the withholding of evidence by any member of the prosecution team. *Kyles*, 514 U.S. at 437-438. This is true even when a prosecution team member refuses to cooperate with the prosecutor:

> [T]he 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.

Osorio, 929 F.2d at 762.

The HCDAO appears to be confused about this. See R3:397. Throughout this case, the HCDAO has emphasized that it does not "control" how police officers do their jobs. R3:166.; see also R1:86 ("The HCDAO is not the SPD's keeper"). However, "[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." *Murray*, 461 Mass. at 19.

B. The HCDAO acquiesces to the SPD's withholding of evidence.

The HCDAO has violated these principles by acceding to the SPD's withholding of documents and has done so most obviously with respect to the

Kent Rebuttal. The SPD withheld the rebuttal for over two years—from October 2020 until March 2023—leaving criminal defendants in the dark about how the SPD compiled the non-exhaustive documents that have served as the sole disclosures that the HCDAO has made pursuant to the DOJ Report. Withholding that rebuttal based on an assertion that it was "attorney work product" appears to have been, to put it mildly, a stretch. Kent is not an attorney. He served on multiple HCDAO prosecution teams, obliging the disclosure of any exculpatory evidence in his possession. And his Rebuttal nowhere says that it was prepared for attorneys or for litigation. To the contrary, it ends with a call to make it public. R4:168; see generally *Commonwealth v. Bing Sial Liang*, 434 Mass. 131, 132 (2001) (a claim of work product privilege does not excuse the Commonwealth of its obligation to disclose exculpatory information).

All along, the HCDAO understood that the work product theory was not a lawful basis to withhold the Rebuttal, but the HCDAO never filed a legal pleading seeking a court order for its disclosure. R4:426-427, 471; R3:436. It left that job to defendants.[16] That is, the HCDAO chose to prosecute those defendants despite knowing that they lacked access to potentially exculpatory

[16] The Special Master erroneously found that the HCDAO moved for Kent's report in Petitioner Lopez's criminal case. R3:654 n. 9. In fact, the HCDAO opposed Lopez's request for the Kent report. R7:116.

evidence to which, by the HCDAO's own account, they were entitled. The HCDAO also chose to embark on a flawed disclosure process built entirely on "not exhaustive" SPD documents that—unbeknownst to defense counsel, defendants, and judges—were drawn from documents that Kent deemed *inconsistent* with the DOJ Report. No wonder they were not exhaustive.

C. This Court should instruct prosecutors to overcome the withholding of evidence by their team members.

If a prosecution team member withholds potentially exculpatory evidence in a criminal case, the case must be dismissed. See *Commonwealth v. Liebman*, 379 Mass. 671, 675 (1980) (ordering district attorney to take appropriate steps to secure federal grand jury minutes and "if he fails to do so, the indictment is to be dismissed with prejudice"). Cf. *Commonwealth v. Washington W.*, 462 Mass. 204, 216 (2012) (dismissal with prejudice proper where prosecutor's willful failure to comply with discovery order prejudiced juvenile's right to fair trial).

But prosecutors have tools that can help them avoid this outcome. They can issue subpoenas or file motions for third-party records under Mass. R. Crim. P. 17, and then review the documents. They can move for sanctions. See, e.g., Add. at 41, Mot. For an Order Holding the Philadelphia Police in Contempt for Failing to Comply with Subpoena Duces Tecum, and Compelling Production of

Potential *Giglio* Material, *Commonwealth v. Gilliam*, No. MC-51-CR-0019780-2020 (Pa. Ct. Common Pleas, Aug. 11, 2021). They can even convene grand juries, as the Commonwealth did for the Amherst drug lab scandal. What they cannot do is proceed as if due process is optional.

IV. All Petitioners have standing.

Petitioners have standing because each has shown a personal or representative interest in this litigation's outcome. In general, "to have standing in any capacity, 'a litigant must show that the challenged action has caused the litigant injury,'" *Brantley v. Hampden Div. of Prob. & Fam. Ct. Dep't*, 457 Mass. 172, 181 (2010), quoting *Slama v. Attorney Gen.*, 384 Mass. 620, 624 (1981), and that the public defendant has breached a duty owed to him. *Sullivan v. Chief Just. For Admin. & Mgmt. of Trial Ct.*, 448 Mass. 15, 21 (2006). Further, "[t]he complained-of injury must be a direct and ascertainable consequence of the challenged action." *Id.*

Each Petitioner satisfies these requirements because when the Commonwealth under-investigates and under-discloses police misconduct, they must expend resources to try to acquire the evidence themselves, and they must litigate criminal cases without all evidence to which they are legally entitled. Indeed, in its federal lawsuit against the DOJ, the HCDAO argues that it has representative standing to assert the interests of criminal defendants in

accessing potentially exculpatory SPD documents held by the DOJ. R5:82-83. That argument is wholly inconsistent with the HCDAO's claim that criminal defendants, and the attorneys who represent them, lack standing to seek those documents—and more—from the HCDAO.

A. Petitioners Graham and Lopez have standing.

Petitioners Graham and Lopez have standing because the HCDAO prosecuted them without disclosing all of the evidence to which they were entitled. Although their cases are no longer active, that only shows that the under-investigation and under-disclosure of SPD misconduct fits the exception to standing requirements for issues that are "capable of repetition yet evading review." *Superintendent of Worcester State Hosp. v. Hagberg*, 374 Mass. 271, 274 (1978). Courts invoke this doctrine "where the issue [is] one of public importance, where it [has been] fully argued on both sides, where the question was certain, or at least very likely, to arise again in similar factual circumstances, and especially where appellate review could not be obtained before the recurring question would again be moot." *Lockhart v. Attorney Gen.*, 390 Mass. 780, 783 (1984).

Graham was prosecuted based on SPD officers' allegations. R3:648. The HCDAO failed to obtain and disclose what the Special Master called "clearly exculpatory" evidence, *id.*, that could have helped Graham establish his

innocence. R6:255-256. Both circumstances could reoccur. Indeed, the Commonwealth discontinued his case by filing a *nolle prosequi* on the stated grounds that Graham completed the period of incarceration (but not probation) to which he was sentenced, see R6:135; R1:425, but Graham is potentially subject to renewed charges. Cf. *Wynne v. Rosen*, 391 Mass. 797, 801 (1984) (discussing impact of *nolle prosequi* in context of malicious prosecution standard).

Lopez was prosecuted based on evidence by SPD Narcotics Bureau officers and accepted a plea. R7:19, 21. He did not receive all of the officer misconduct evidence he requested. R3:143-144. Lopez has standing based on the due process harms he suffered after the HCDAO secured indictments against him.

B. The defense organizations and attorneys have standing.

The organizational and defense attorney petitioners have standing because a core issue in this case is whether they and their clients—and not the Commonwealth and the HCDAO—will bear the burden of adequately investigating and fully disclosing SPD misconduct. See R3:769 (stating that the HCDAO "does not have the resources to repeat the DOJ investigation, and that it would be 'irresponsible, both ethically and physically' to divert resources from the thousands of cases that the office files each year"). By sending out

letters to CPCS, HCLJ, and defense attorneys implicitly calling on *them* to ascertain whether the enclosed documents reflect police misconduct and whether more such documents exist, see R4:428-470, the HCDAO constrains defense organizations and attorneys to spend time and resources on work that are properly the duty of the Commonwealth and the HCDAO to undertake. See *New England Div. of Am. Cancer Soc'y v. Comm'r of Admin.*, 437 Mass. 172, 177 (2002) (organizational plaintiffs had standing where government defendants' actions forced them to alter their programs, and where organizations stood to benefit if their suit was successful).

CPCS and HCLJ are statutorily and contractually obligated, respectively, to provide effective representation for indigent defendants in Hampden County. *See* G. L. c. 211D, § 1 et seq.; R6:74. Their work is frustrated, and their resources are diverted, because the Commonwealth has not investigated the full scope of SPD misconduct, the HCDAO does not adequately disclose exculpatory evidence, and the HCDAO has not supplied a list of impacted cases. See *CPCS v. AG*, 480 Mass. at 703 (allowing petition from CPCS and HCLJ claiming of "misconduct by the district attorneys and members of the Attorney General's office" affecting numerous defendants); *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 379 (1982) (organizational plaintiff established

standing by showing diversion of resources to counteract allegedly unlawful action or frustration of organization's mission).

These organizations also have representative standing given that individual defendants cannot assert their claims because they have not been notified that they were denied access to exculpatory evidence. Cf. *Comm. for Pub. Counsel Servs. v. Chief Just. of the Trial Ct.,* 484 Mass. 431, 447, *aff'd as modified,* 484 Mass. 1029 (2020) (CPCS had representative standing to bring claims on behalf of clients affected by coronavirus pandemic); *Planned Parenthood League of Massachusetts v. Bell*, 424 Mass. 573, 578 (1997) (organization may assert standing if individuals whose personal rights are at stake face some genuine obstacle to asserting the claim).

Petitioners Ryan and Auer have standing based on their obligations to provide effective representation to their clients, who are criminal defendants in Hampden County. See *Eisenstadt v. Baird,* 405 U.S. 438, 445 (1972) (unique professional relationship between client and advocate "act[ing] to protect the [client's] rights" conferred standing); *Leigh v. Bd. of Registration in Nursing,* 399 Mass. 558, 561 (1987) (same). Each of them has received notice letters from the HCDAO because they represent or have represented defendants in cases involving officers implicated by the DOJ Report, including Deputy Chief Kent. See R4:419; R4:438-444.

Moreover, the Court has relaxed its standing rules where dismissing the case "would work a manifest injustice to nonparties," *Brantley,* 457 Mass. at 175, where the case presents important issues that "affect nonparties and were capable of repetition, yet evading review," *id.* at 180, or where "substantive rights may not survive the delays inherent in the normal appellate process." *Planned Parenthood League of Massachusetts, Inc. v. Operation Rescue*, 406 Mass. 701, 708 (1990).

After all, "[i]t makes little sense to dismiss the case today, leaving the constitutionality of the current protocols in question, knowing that they continue directly to affect many litigants in Hampden each day." *Brantley,* 457 Mass. at 183. That is the situation here.

CONCLUSION

Petitioners respectfully request that this Court hold that: (1) the Commonwealth has a duty to investigate the officers and cases implicated by the DOJ report; (2) prosecutors must actively seek out and disclose all exculpatory information regarding police officers that is held by a police department; (3) prosecutors cannot prosecute criminal cases when their team members withhold evidence; and (4) Petitioners have standing.

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Dated: April 18, 2023

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the Massachusetts Rules of Appellate Procedure. This brief was prepared in Athelas, 14-point font, using Microsoft Word 2010, and contains 10750 words. Compliance with the length limits of Rule 20 was ascertained using the Word Count function in Microsoft Word.

04/18/23
Date

/s/ Jessica J. Lewis
Jessica J. Lewis

CERTIFICATE OF SERVICE

I, Jessica Lewis, do hereby certify under the penalties of perjury that on this 18th day of April, 2023, I caused a true copy of the foregoing document to be served by electronic filing through the CM/ECF system on the following counsel:

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ADDENDUM

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Part III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES

Title I COURTS AND JUDICIAL OFFICERS

Chapter 211 THE SUPREME JUDICIAL COURT

Section 3 SUPERINTENDENCE OF INFERIOR COURTS; POWER TO ISSUE WRITS AND PROCESS

Section 3. The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue all writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws.

In addition to the foregoing, the justices of the supreme judicial court shall also have general superintendence of the administration of all courts of inferior jurisdiction, including, without limitation, the prompt hearing and disposition of matters pending therein, and the functions set forth in section

3C; and it may issue such writs, summonses and other processes and such orders, directions and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration; provided, however, that general superintendence shall not include the authority to supersede any general or special law unless the supreme judicial court, acting under its original or appellate jurisdiction finds such law to be unconstitutional in any case or controversy. Nothing herein contained shall affect existing law governing the selection of officers of the courts, or limit the existing authority of the officers thereof to appoint administrative personnel.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. SJ-2019-0316

MIDDLESEX SUPERIOR COURT
NO. 0481CR00986

COMMONWEALTH vs. EUGENE SUTTON.

MEMORNADUM OF DECISION AND JUDGMENT

The respondent, Eugene Sutton, pleaded guilty to possession of a class A substance (heroin), and conspiracy with intent to distribute a class A substance, in March 2006.[1] In June 2018, he filed a motion in the Superior Court seeking an order vacating his convictions and dismissing the underlying indictments with prejudice, pursuant to Mass. R. Crim. P. 30 (b). He also filed a related motion for postconviction discovery, pursuant to Mass. R. Crim. P. 30 (c)(4). In his motions, Sutton argued that the Commonwealth had failed to investigate the conduct of chemist Sonja Farak while she was employed at the William A. Hinton State Laboratory Institute

[1] Sutton was sentenced to a term of incarceration, followed by a period of probation. In December 2010, his probation was revoked and he was sentenced to serve five to ten years in State prison.

(Hinton lab).[2] Farak was the primary chemist who tested the substance in his case, at the Hinton lab, on June 17, 2004.[3] In July 2018, Sutton filed a third motion, which incorporated the two prior motions, seeking records directly from the Office of the Inspector General (OIG) and the Department of Public Health (DPH), pursuant to Mass. R. Crim. P. 17.[4]

In a series of orders (collectively, discovery orders), a Superior Court judge ultimately concluded that -- in the circumstances present here -- the OIG is a member of the "prosecution team" for purposes of a prosecutor's duty, under Mass. R. Crim. P. 14, to disclose exculpatory evidence. The judge ordered the OIG to "make its full files regarding its review of the Hinton [l]ab available to the District Attorney and facilitate the District Attorney's complete review of

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[2] "Sonja Farak was a chemist for the Department of Public Health from July, 2003, until January 19, 2013. During the first years of her employment, she worked at the William A. Hinton State Laboratory Institute in the Jamaica Plain section of Boston. After that, [beginning in August 2004] Farak worked at the Department of Public Health's State Laboratory Institute in Amherst." Commonwealth v. Cotto, 471 Mass. 97, 98 n.1 (2015). See Committee for Pub. Counsel Servs. v. Attorney Gen., 480 Mass. 700, 706 (2018).

[3] Former Hinton lab chemist Annie Dookhan's egregious misconduct is described elsewhere. See e.g., Bridgeman v. District Attorney for the Suffolk Dist., 476 Mass. 298, 300 (2017). Sonja Farak's egregious misconduct at the State Laboratory Institute in Amherst (Amherst lab), also has been chronicled. See e.g. Committee for Pub. Counsel Servs., 480 Mass. 700; Cotto, 471 Mass. 97; Commonwealth v. Ware, 471 Mass. 85 (2015). The sample in Sutton's case was analyzed in June 2004, by Farak while she worked briefly at the Hinton lab. Sutton is not, therefore, among the defendants whose cases have been affected by the protocols established to address Dookhan's misconduct at the Hinton lab or Farak's misconduct at the Amherst lab.

[4] The judge allowed, as unopposed, Sutton's Mass. R. Crim. P. 17 motion for disclosure of records from DPH. After initially denying without prejudice Sutton's motion for disclosure of records from the OIG under that rule, he subsequently denied the motion as moot.

them."[5] He also ordered the district attorney to produce any exculpatory information, including exculpatory information within the OIG's files. That production specifically was to include:

> "'copies of all investigative reports concerning any investigations directed toward determining whether Ms. Farak engaged in malfeasance at the Hinton [l]ab, including all statements of such chemist in that regard,' as well as all information regarding the extent of the OIG's review of Farak's performance while at the Hinton lab."

If there was no responsive information, the district attorney was ordered to so state. Temporary protective orders were entered. In response to the judge's order, the OIG identified and made available to the district attorney its files regarding its review of the Hinton lab. Those materials consist of 22.3 gigabytes of electronic data, and sixty-three file boxes -- approximately 141,000 pages of paper records.

The district attorney declined to review the OIG's files, indicating instead that it had or would make those files available to Sutton on an "open file" basis. The district attorney argued that "[t]he defendant must have full access to the OIG's investigatory file to be able to evaluate the scale, scope, focus and methodology of the investigation." The judge rejected the open file discovery approach. He ordered the district attorney to review the OIG's files for exculpatory information, in light of its "core duty . . . 'to administer justice fairly,'" Committee for Pub. Counsel Servs. v. Attorney Gen., 480 Mass. 700, 730 (2018), quoting Commonwealth v. Tucceri, 412 Mass. 401, 408 (1992), and in view of the OIG's "legitimate concerns."

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[5] The OIG contends is not subject to disclosure obligations under Mass. R. Crim. P. 14, because it is not part of the "prosecution team" for purposes of Mass. R. Crim. P. 14. It also alleges that various evidentiary privileges and confidentiality protections shield it from discovery requests. See G. L. c. 12A, § 13; Mass. G. Evid, § 515 (2015) (investigatory privilege). It nonetheless sought to resolve the matter by filing motions for in camera review of certain documents and a protective order, so the judge could review the documents the OIG thought might be responsive to the discovery order. The judge concluded, however, that the OIG failed to demonstrate adequate reason for in camera review. Instead, the judge issued a temporary protective order prohibiting Sutton from disclosing any OIG material received from the district attorney.

The Commonwealth has now filed a petition in the county court, pursuant to G. L. c. 211, § 3, challenging the discovery orders. By its petition, it seeks relief from the discovery orders to the extent that they order the district attorney to:

> "(1) promptly conduct a complete review of the OIG's massive file related to its investigation into the Hinton Laboratory; (2) identify and evaluate for the defendant whether any information in the OIG's files might be 'exculpatory' in the sense that it might be useful to him in developing his post-conviction claim; and (3) furnish the defendant with those OIG documents that would support such a claim."[6]

The district attorney represents that it "is not aware of any specific exculpatory evidence to support" Sutton's claim that the Commonwealth failed to investigate Farak's conduct at the Hinton lab. It contends that it has satisfied its discovery obligations by providing Sutton with "complete, unfettered open-file access to all materials that are in the Middlesex District Attorney's Office's possession, custody or control that relate in any way to the defendant." The

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[6] The Commonwealth challenges the mechanism of discovery, not Sutton's right to it under Mass. R. Crim. P. 30 (c)(4). In that regard, the judge ruled that "the facts alleged here show that Farak's misconduct began almost immediately upon her transfer to the Amherst Lab from the Hinton [l]ab, and that her drug testing output while at the Hinton [l]ab was suspiciously high." For purposes of Mass. R. Crim. P. 30 (c)(4), the judge concluded that Sutton made a sufficient showing that the discovery he seeks is reasonably likely to "uncover evidence that might warrant granting" his motion to vacate his guilty pleas. Ware, 471 Mass. at 94, quoting Commonwealth v. Daniels, 445 Mass. 392, 407 (2005). See Commonwealth v. Murray, 461 Mass. 10, 19 (2011) (under rule 30, a new trial may be ordered if the government has failed to disclose exculpatory evidence).

[7] In summary, Farak was arrested, indicted, and pleaded guilty to multiple counts of tampering with evidence, stealing controlled substances, and unlawful possession of controlled substances. See Cotto, 471 Mass. 97. After Cotto, the Attorney General conducted an investigation of Farak's conduct in Amherst, which culminated in a report known as the Caldwell Report. The report indicates that Farak first stole methamphetamine standards for personal use in late 2004 or early 2005. In early 2009, she began to steal from police-submitted samples. Although Farak testified before the grand jury, under the protection of an immunity order, that while working at the Hinton lab she did not take standards for personal use, did not have access to them, and did not take police-submitted samples, Judge Carey "did not credit her testimony regarding the reliability of her analysis or the extent of her addiction and her use of police-submitted samples, given the evidence that she had lied to her therapist in order to downplay her substance abuse." Committee for Pub. Counsel Servs., 480 Mass. at 719.

district attorney also states that "it has no objection to the court making the complete OIG files immediately available to the defendant for his review subject to any protective order that the motion judge may impose," and would "stipulate to any non-contested facts relating to the OIG's investigation." Both the OIG and Sutton oppose the district attorney's approach. The OIG contends it is not part of the "prosecution team," for purposes of Mass. R. Crim. P. 14, and that its files contain confidential, privileged and work product protected information. Sutton argues that an open file approach in this case is unfairly burdensome, and that the district attorney properly was ordered to produce only the portion of the OIG's files that may be exculpatory, not the entire "massive file."

Discussion. Although the court rarely has "allowed Commonwealth appeals of interlocutory matters under our supervisory powers," Commonwealth v. Hernandez, 471 Mass. 1005, 1006 (2015), it is appropriate to do so here. Given the claims that have been raised, the breadth of misconduct in both the Hinton and Amherst labs, and the impact that misconduct has had within the Commonwealth, I exercise my discretion under G. L. c. 211, § 3, to review Superior Court's discovery orders. See generally Commonwealth v. Ware, 471 Mass. 85, 93 (2015). With respect to those orders, the Commonwealth's petition does not claim that it was not obligated to investigate Farak's conduct at the Hinton lab. To the extent the Commonwealth relies on the OIG's review of the Hinton lab to satisfy its obligation to investigate Farak's conduct, the Superior Court judge properly concluded that it is obliged to obtain the OIG's files regarding that review, to review those files, and to produce any exculpatory information to Sutton. Cf. Commonwealth v. Cotto, 471 Mass. 97, 112 (2015) ("burden of ascertaining whether Farak's misconduct at the Amherst drug lab has created a problem of systemic proportions is not one that should be shouldered by defendants in drug cases").

A. Duty to investigate. Once the Commonwealth was alerted to the broad scope of Farak's misconduct at the Amherst lab, the Superior Court judge recognized that the Commonwealth had a duty "conduct a thorough investigation" of Farak's conduct at the Hinton lab, and to determine the effect of any misconduct "on pending cases and on cases in which defendants already had been convicted of crimes involving controlled substances that Farak had analyzed." Ware, 471 Mass. at 95 (Commonwealth obligated to investigate Farak's misconduct at Amherst lab, in part because Farak part of "prosecution team"). The Commonwealth's G. L. c. 211, § 3, petition does not challenge that conclusion. Farak worked at the Hinton lab for a relatively short period, from May 2003 until August 2004, but that tenure immediately preceded her work at the Amherst lab. Given the enormity of the "cloud that has been cast over the integrity of the work" performed by Farak during the entirety of her tenure at the Amherst lab, the district attorney was obliged to ascertain whether Farak also engaged in misconduct at the Hinton lab.[7] Cotto, 471 Mass. at 96. See Committee for Pub. Counsel Servs., 480 Mass. at 734-735. As the chemist who analyzed the evidence in Sutton's case, Farak was a member of the "prosecution team," and the district attorney has a duty to search for and produce to Sutton

[7] In summary, Farak was arrested, indicted, and pleaded guilty to multiple counts of tampering with evidence, stealing controlled substances, and unlawful possession of controlled substances. See Cotto, 471 Mass. 97. After Cotto, the Attorney General conducted an investigation of Farak's conduct in Amherst, which culminated in a report known as the Caldwell Report. The report indicates that Farak first stole methamphetamine standards for personal use in late 2004 or early 2005. In early 2009, she began to steal from police-submitted samples. Although Farak testified before the grand jury, under the protection of an immunity order, that while working at the Hinton lab she did not take standards for personal use, did not have access to them, and did not take police-submitted samples, Judge Carey "did not credit her testimony regarding the reliability of her analysis or the extent of her addiction and her use of police-submitted samples, given the evidence that she had lied to her therapist in order to downplay her substance abuse." Committee for Pub. Counsel Servs., 480 Mass. at 719.

exculpatory evidence within its possession, custody or control concerning Farak. See Mass. R. Crim P. 14 (a)(1)(A).

The Commonwealth appears to presume that its investigatory obligation was satisfied by the OIG's review of the Hinton lab.[8] It points to the cost (approximately $6.2 million),[9] duration (fifteen months), and volume of data (sixty-three file boxes, and 22.3 gigabytes of electronic data) comprising that OIG's review, as well as statements in the OIG's March 4, 2014, report to the effect that the OIG had conducted a "top to bottom" review of the laboratory and that former chemist Annie Dookan was the sole bad actor. As the Commonwealth argued in opposition to the defendant's motion to vacate his convictions, the OIG's "finding that Dookhan was the only bad actor necessarily involves assessment of whether there were other bad actors."

The OIG, however, appears now to have distanced itself from that conclusion. Notwithstanding the statements in its March 4, 2014, report, it explains that it did not seek to

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[8] At Governor Patrick's request, the OIG "agreed to conduct an independent, top-to-bottom review of the [Hinton] Drug Lab." It "determined that its mission was to conduct a comprehensive investigation of the operation and management of the Hinton Drug Lab from 2002 until its closure in 2012." In March, 2014, the OIG finished its "primary review" and published the 121-page Hinton Report. The report concluded that the Hinton lab was "plagued by mismanagement, informal procedures and inconsistent testing protocols," and made "findings with respect to Annie Dookhan, despite the fact that Dookhan was not the focus of the OIG's investigation." The report stated that Dookhan was the only chemist who acted with deliberate malfeasance, and indicated that the OIG "did not find evidence that any other chemist at the Drug Lab committed any malfeasance with respect to evidence testing or knowingly aided Dookhan in her malfeasance." According to the OIG, "the OIG reviewed the evidence and followed it where it led . . . while the OIG's investigation was not focused on any specific individual, where the evidence pointed to individual misfeasance, the OIG stated so in its report." Some samples were retested, where the OIG identified possible inconsistencies: "drug samples for which the chemists had run multiple tests with inconsistent results."

[9] According to the OIG, the "cumulative legislative appropriation for the Hinton Lab Reserve Fund, available to all agencies, was $30 million." See St. 2013, c. 3, § 2A, line 1599-0054. The OIG's cost was approximately $6.2 million, of which $4.3 million was spent for a database used by multiple agencies.

determine whether anyone (other than Dookhan) engaged in any misconduct or malfeasance in the lab, but rather conducted a "high-level review of the lab's operation and management, and not an investigation specifically targeted at any individual's conduct." Put another way, the OIG states that, "[w]hile the OIG followed the evidence and information where it led, at no time did the OIG state, believe or suggest that its investigation was intended to -- or could -- substitute the separate obligations of prosecuting authorities to discover and produce exculpatory evidence." That being said, the OIG further represents that it has "made a good-faith effort to identify the principal documents relating to Sonja Farak . . . and it has provided those documents to the District Attorney." Thus, to the extent the district attorney relies on the OIG's investigation to satisfy the Commonwealth's duty to investigate Farak's conduct at the Hinton lab, as discussed below, it must review the OIG's files to identify the documents relevant to the investigation on which it relies, and produce them according to the two-step procedure the judge ordered. If warranted, it may, of course, stipulate that no such documents exist.

B. Mechanism of production: Mass. R. Crim. P. 14. The district attorney's obligation arises under Mass. R. Crim. P. 14, the rules of professional conduct, and the due process clauses of the Federal and State constitutions. See Committee for Pub. Counsel Servs., 480 Mass. at 730-732. See also Commonwealth v. Ayala, 481 Mass. 46, 56 (2018). In Commonwealth v. Torres, 479 Mass. 641, 647 (2018), quoting Commonwealth v. Beal, 429 Mass. 530, 532 (1999), the court explained that

> "Rule 14 adopts a practical test for determining what information must be disclosed: information that is 'in the possession, custody, or control of the prosecutor.' See Mass. R. Crim. P. 14 (a)(1)(A). 'The prosecutor's duty [to disclose exculpatory information] does not extend beyond information held by agents of the prosecution team.'"

The duty to disclose extends to information not only in the prosecutor's possession, but also information in the possession of "others acting on the government's behalf in the case." Kyles v. Whitley, 514 U.S. 419, 437 (1995). See also Brady v. Maryland, 373 U.S. 83, 87-88 (1963); Commonwealth v. Martin, 427 Mass. 816, 823-824 (1998). It includes an obligation to learn of exculpatory evidence "held by agents of the prosecution team." Ware, 471 Mass. at 95, quoting Beal, 429 Mass at 532.

The Commonwealth contends that the judge erred in ordering the district attorney's office to review and produce exculpatory evidence from the OIG's "massive" records, pursuant to Mass. R. Crim. P. 14. Since the rule applies only to records held by the "prosecution team," i.e., individuals and entities that are within the prosecutor's control and "individuals acting, in some capacity, as agents of the government in the investigation and prosecution of the case," and the OIG is an independent agency, the district attorney suggests that it cannot be required either to obtain or to review the OIG's records. In its view, the burden should fall on the defendant to obtain any exculpatory information. Commonwealth v. Thomas, 451 Mass. 451, 454 (2008), citing Beal, 429 Mass. at 532. See also Commonwealth v. Daye, 411 Mass. 719, 733-734 (1992); Martin, 427 Mass. at 824.

Although the agency analysis is complicated by the statutory independence of the OIG, I conclude that the district attorney essentially added the OIG onto its prosecution team for the purposes of Mass. R. Crim. P. 14(a)(1)(A) and 30(c)(4), by relying on the OIG's review to satisfy the Commonwealth's obligation to determine whether Farak engaged in misconduct at the Hinton lab, when she tested the evidence in Sutton's case. If the district attorney had conducted an independent investigation into Farak's conduct at the Hinton lab, Mass. R. Crim. P. 14 clearly would impose an affirmative duty to disclose any exculpatory information; the fact that the

district attorney appears to have relied on another agency to conduct the investigation requires nothing less. In view of this reliance by the district attorney on the OIG's review, and the OIG's cooperation with the district attorney in producing the information (albeit pursuant to a court order), placing the burden on the prosecutor to obtain the OIG files related to the investigation on which it relies is appropriate.[10] See Commonwealth v. Scott, 467 Mass. 336, 349 (2014); Commonwealth v. Lykus, 451 Mass. 310, 327 (2008). As the motion judge ruled, the district attorney may not be effectively "relieved from its discovery obligations by delegating them to another agency." For analogous reasons, the district attorney must also bear the burden of identifying exculpatory or potentially exculpatory information. In sum, the district attorney, by relying on the OIG's review to perform the Commonwealth's investigative responsibility, assumed the obligation to disclose any exculpatory information discovered during that review, pursuant to Rule 14.

With respect to the claim that Sutton could obtain the records either by means of Mass. R. Crim. P. 17 or through the "open file" discovery proposed by the district attorney, I discern no error in the motion judge's analysis. As the motion judge determined: "Forcing Sutton to rely on Rule 17 rather than Rule 14 would inappropriately relieve the government of its burden to search for and produce exculpatory evidence and impose on Sutton the burden of justifying the disclosure of specific, admissible evidence." Moreover, I agree with the judge "had Rule 14 not applied, Rule 17 would have required the production Sutton seeks," making question of production itself academic.

[10] The OIG argues that a motion pursuant to Mass. R. Crim. P. 17 and 30, is the proper vehicle for a defendant to obtain documents from third parties. Because the district attorney relies on an investigation concluded by another agency, however, it is the district attorney's obligation to obtain and produce any exculpatory evidence under Mass. R. Crim. P. 14.

I also discern no error in the judge's analysis regarding the district attorney's insistence on an "open file" approach. Although "open file" discovery may be permissible in some contexts, the motion judge was not required to permit it here. The duty to disclose exculpatory information is based on the prosecutor's "core duty . . . 'to administer justice fairly.'" Committee for Pub. Counsel Servs., 480 Mass. at 730, quoting Tucceri, 412 Mass. at 408. The prosecutor has an affirmative obligation to search for and produce exculpatory evidence, and not to leave it buried in a massive data dump on the defendant. See Emmet v. Ricketts, 397 F. Supp. 1025, 1043 (N.D. Ga. 1975) (prosecutor's constitutional "duty to produce exculpatory evidence may not be discharged by 'dumping' [even in good faith] a voluminous mass of evidence"). See also United States v. Hsia, 24 F. Supp.2d 14, 29-30 (D.D.C. 1998). The already documented egregious misconduct of Farak, which is properly attributed to the government, and the comparative resources of the district attorney's office and the defendant, provide further support for the motion judge's decision.

Placing the burden on the district attorney to identify any exculpatory information also accommodates the OIG's objection that its files contain records that are not relevant to Sutton's claim, and may contain personal information protected from disclosure by State privacy laws or by privilege -- such as personnel files for dozens of lab employees, including those who joined the lab years after Farak left. The OIG also suggests that the files contain criminal offender record information (CORI) related to numerous defendants whose evidence was tested at the Hinton lab, OIG internal communications and deliberations protected by the attorney-client privilege, and other potentially confidential information. The judge acted within his discretion,

in view of the confidentiality concerns articulated by the OIG, and in light of the volume of the documents.[11]

Finally, the motion judge's discovery orders do not require the district attorney to conduct the subjective type of analysis that was rejected in Commonwealth v. Thomas, 451 Mass. 451 (2008). The Commonwealth is required to produce exculpatory evidence, as it is always and automatically required to do, specifically including "investigative reports concerning any investigations directed toward determining whether Ms. Farak engaged in malfeasance at the Hinton laboratory, including all statements of such chemist in that regard, as well as all information regarding the extent of the OIG's review of Farak's performance while at the Hinton lab." If there are no such reports, the Commonwealth may indicate that as well.

Conclusion. Having reviewed the Commonwealth's G. L. c. 211, § 3, petition, it is hereby ORDERED that the Commonwealth's petition for relief, pursuant to G. L. c. 211, § 3, is denied. The motion judge neither abused his discretion nor otherwise erred in ordering the Middlesex District Attorney's office to review the OIG's file concerning its review of the Hinton lab and to produce particular categories of documents, pursuant to Rule 14. Given the magnitude of the document review at issue, the Commonwealth shall have thirty days after the entry of this order to comply with the Superior Court judge's discovery orders. It is further ORDERED that the stay of the Superior Court proceedings is vacated.

Scott L. Kafker
Associate Justice

Entered: October 17, 2019

[11] In recognizing this confidentiality concern, I do not, however, in any way adopt the argument of the OIG that its documents are protected by a blanket privilege against disclosure. I reject this argument for essentially the same reasons as the motion judge. Whatever confidentiality rights the OIG has in these documents must "yield" to the defendant's constitutional rights to a fair trial.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO: SJ-2017-347

COMMITTEE FOR PUBLIC COUNSEL SERVICES & others[1]

vs.

ATTORNEY GENERAL & others[2]

Report of the Special Master

Judd J. Carhart, Special Master in this matter reports as follows:

1. On February 28, 2018, this Honorable Court appointed Judd J. Carhart as Special Master to assist Justice Gaziano in the dismissal of certain convictions that had been tainted by the conduct of Sonja Farak (Farak) in her capacity as a chemist at the State Drug Lab.

2. A working group, consisting of representatives from several District Attorneys' offices, the Attorney General's office, the Committee for Public Counsel Services, the American Civil Liberties Union of Massachusetts, the Massachusetts Probation Department, the Trial Court Administrative Office and the Information Technology Department of the Trial Court, the Superior, District, Boston Municipal and Juvenile Courts, was established in order to facilitate the dismissal of those cases subject to dismissal.

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[1] Hampden County Lawyers for Justice, Inc., Herschelle Reaves, and Nicole Westcott.

[2] District Attorney for Berkshire County, District Attorney for Bristol County, District Attorney for the Cape and Islands, District Attorney for Essex County, District Attorney for Hampden County, District Attorney for Middlesex County, District Attorney for Norfolk County, District Attorney for the Northwestern District, District Attorney for Plymouth County, District Attorney for Suffolk County, and District Attorney for Worcester County.

3. Initially, this Court ordered that all cases in which Farak had signed the certificate of analysis be dismissed with prejudice. Concurrently, the Court ordered that a protocol, similar to that used in the case of Bridgeman v. District Attorney for the Suffolk District, 476 Mass. 298 (2017) (Bridgeman), be employed in order to effectuate the dismissals. (Docket Entry #130, 2/27/2018) (Farak I defendants)

4. Subsequently, this Court enlarged the class of defendants entitled to relief as a result of Farak's misconduct by defining those defendants as " Farak defendants, as defined by the Full Court, to include "all defendants who pleaded guilty to a drug charge, admitted to sufficient facts on a drug charge, or were found guilty of a drug charge, where (i) Farak signed the certificate of analysis (Farak I defendants), (ii) the conviction was based on methamphetamine and the drugs were tested during Farak's tenure at the Amherst lab, or (iii) the drugs were tested at the Amherst lab on or after January 1, 2009, and through January 18, 2013, regardless of who signed the certificate of analysis." This Court then ordered the dismissal of all convictions of "Farak defendants." (Docket Entry #226, 11/13/2018).

5. Later, on March 6, 2019, the Full Court held that so-called "Ruffin defendants," who pled guilty before receiving a signed drug certificate, are not exempt from the relief ordered by the Full Court in October 2019.

6. The working group employed a protocol similar to the one used in the Bridgeman case in order to identify and certify that those cases which should be dismissed were, in fact, dismissed. The group, pursuant to this Court's Order, established a list for both Farak I and Farak II cases in order to facilitate the dismissal of the appropriate cases.

- "Farak I," generally refers to defendants for whom Farak signed the certificate of analysis, for which the Respondent District Attorneys began generating lists

before the Full Court's decision in October 2018; and

- "Farak II," refers to all other "Farak defendants as defined by the Full Court's October 2018 decision and March 2019 ruling.

7. The Respondent District Attorneys generated lists of Farak I and Farak II defendants with charges that were ordered dismissed by the Full Court.

8. Various means of notification were employed, including newspaper and radio ads, social media and notification letters in an effort to notify all affected defendants of their rights. A notice letter, intended to notify all Farak defendants of their rights was prepared and approved by the Single Justice (Gaziano, J.). The notice letter was mailed to Farak I defendants in March 2019, and it was subsequently sent to Farak II defendants in May 2019. A copy of the notice letter is attached hereto and marked as Exhibit 1, and it also appears (in English and eight other languages) at https://www.mass.gov/info-details/drug-lab-cases-information.

9. Pursuant to the Full Court's decision, the Attorney General's Office is bearing the entire financial burden associated with notifying affected defendants. See Committee for Public Counsel Services v. Attorney General, 480 Mass. 700, 730 n. 13 (2018). The Attorney General's Office and counsel for the Petitioners have entered into an agreement as to notice, which is attached hereto and marked as Exhibit 2.

10. The Information Technology department (IT) of the Trial Court worked diligently to certify that all cases which were the subject of this Court's Order were, in fact, dismissed.

11. Despite the many different ways in which cases are docketed in the various courts of the Commonwealth, the IT department was able to identify and quantify those cases which were the subject of this Court's Order. A memorandum from James Morton of the Trial

Court, attached hereto as Exhibit 3, states that a total of 24,853 charges were submitted by the District Attorneys. The Trial Court's Judicial Information Services Department (JISD) ran a report of Farak I and Farak II dispositions in MassCourts showing that 24,075 charges were dismissed in 16,449 cases. Of the 778 charges submitted by the District Attorneys that were not captured in the JISD report:

- 192 charges were dismissed in sealed cases which had been manually updated.
- 151 charges did not result in dismissals because they correlated with charges that either were not a 94C offense or the charge number did not match a charge number in MassCourts; each of these charges was reviewed to ensure that no additional disposition update was necessary.
- 435 charges were not updated because the listed charge had previously been updated with a non-adverse disposition; it was then determined that 28 of those charges should have received either the Farak I or Farak II disposition, and those 28 charge dispositions were manually updated.

Accordingly, this process has confirmed the dismissal of 24,295 charges.[3]

12. The Probation Department ensured that all defendants' records were updated to reflect the dismissals. This was a time-consuming process, much of which had to be done by hand, that was nonetheless accomplished quickly and efficiently.

13. The Department of Criminal Justice Information Services also updated their protocols to ensure that all defendants' records accurately reflected the dismissals entered by the

[3] These totals do not reflect charges that were vacated and dismissed with prejudice pursuant to a motion for new trial filed in individual cases, as opposed to this litigation.

Probation Department.

14. The difficulty in dismissing all Farak cases from the various District Courts was compounded by the fact that many District Courts use varying means of docketing cases, including manual notation of docket entries. A copy of a memorandum prepared by Attorney Zachary Hillman counsel for the District Court, which outlines the procedures used to effectuate the Court's Order is attached hereto and marked as Exhibit 4.

15. A proposed protocol, to be used by the Trial Court in anticipation of any future Farak cases, was prepared by the District Attorneys and the Trial Court and is attached hereto and marked as Exhibit 5A. A copy of the proposed notice, pursuant to the protocol, is attached hereto and marked as Exhibit 5B. The proposed notice of dismissal, to be used by the Trial Court in any future Farak cases, was prepared by the Trial Court in conjunction with the District Attorneys. Pursuant to the proposed protocol, if a District Attorney identifies a case that should have been included in the list for vacatur and dismissal, the District Attorney shall file a motion with the appropriate court in order to vacate and dismiss the relevant charges. The Trial Court will then issue notice pursuant to the protocol. A copy of all such pleadings will be served upon the appropriate Probation Department.

16. It is the opinion of the Special Master that all means of identifying and dismissing the relevant Farak cases have been made and that, to the extent possible, all Farak cases subject to the Court's Order have been dismissed.

17. It is also the opinion of the Special Master that that notice campaign, which included defendant-specific letters and paid advertisements in traditional and social media, has been an effective and appropriate means of notifying Farak defendants of their rights. One exception may be Farak defendants who have been deported; they have not been specifically

identified, and it is the Special Master's understanding that counsel for the Petitioners continue to investigate whether notice to these defendants is possible.

Respectfully submitted,

Judd J. Carhart
Special Master

EXHIBIT 1

SUPREME JUDICIAL COURT

BOSTON, MASSACHUSETTS 02108

FIRST LAST
123 MAIN STREET
ANYTOWN, USA

February 28, 2019

Dear Mr./Ms. Last,

I am a judge on the Supreme Judicial Court, the highest court in Massachusetts. I am writing to tell you that the court has dismissed certain conviction(s) or other disposition(s) against you, and that the court has also dismissed the underlying charge(s). The dismissed convictions are shown on the attached page(s), listed by court, docket number, count, and charge.

Why is the court dismissing these convictions?
A chemist named Sonja Farak engaged in serious misconduct involving her work at a state drug lab. Your case includes one or more drug convictions affected by Ms. Farak. The court has now dismissed the conviction(s). This dismissal is final and permanent, which means you cannot be prosecuted again for any charge that has been dismissed.

What happens next?
Your criminal record has been updated to remove the conviction(s). The removal of a conviction may provide important benefits to you related to employment, housing, immigration, and more.

However, your record has not been sealed. You can find more information about sealing your record at **www.masslegalhelp.org/cori.**

In addition, you might have other charges in the same case that were not dismissed and that remain on your record. You may want to speak to a lawyer about whether these convictions can also be undone.

You might also have paid money because of these convictions, such as fines, court fees, probation fees, or restitution. You may want to speak to a lawyer about whether you are entitled to have any money returned to you.

If you have any questions about this letter, including how to get a lawyer to help you, you may contact the Committee for Public Counsel Services (the state public defender agency) by calling its confidential Drug Lab Case Hotline at **888-999-2881**, or by visiting its website: **www.publiccounsel.net/dlclu**. You may also find information on the court's website: **www.mass.gov/courts/druglab.**

Sincerely,

Frank M. Gaziano
Associate Justice

SUPREME JUDICIAL COURT

BOSTON, MASSACHUSETTS 02108

FIRST LAST
123 MAIN STREET
ANYTOWN, USA

XXX de febrero, 2019

Estimado(a)

Soy juez del Tribunal Supremo de Justicia, el tribunal de mayor rango en Massachusetts. Escribo para decirle que el tribunal ha desestimado cierta(s) condena(s) (*convictions*) u otra(s) disposicion(es) que había contra usted, y que también ha desestimado las acusaciones incluidas. Las condenas desestimadas aparecen en la(s) página(s) anexa(s), organizadas por tribunal, número del caso, y por número y descripción de la acusación.

¿Por qué el tribunal ha desestimado estas condenas?
La química Sonja Farak cometió una grave falta de conducta profesional al realizar su trabajo en un laboratorio de drogas del estado. El caso de usted incluye una o más condenas de drogas que fueron afectadas por la Sra. Farak. El tribunal ya ha desestimado esta(s) condena(s). Esta desestimación es definitiva y permanente, lo cual quiere decir que usted no puede ser procesado(a) de nuevo por cualquier acusación que haya sido desestimada.

¿Qué sucederá ahora?
Su historial de antecedentes penales (*criminal record*) ha sido actualizado para eliminar la(s) condena(s). La eliminación de una condena puede traerle importantes ventajas en cuanto al empleo, vivienda, inmigración, etc.

Sin embargo, no se ha cerrado, o sea, "sellado", el acceso a su historial de antecedentes penales. Para más información de cómo sellar su historial, vea **www.masslegalhelp.org/cori.**

Además, puede haber otras acusaciones dentro del mismo caso que no fueron desestimadas y que siguen en su historial. Para averiguar si es posible eliminar estas condenas también, consulte a un abogado.

Usted a lo mejor pagó dinero debido a estas condenas, como por ejemplo en forma de multas, costos judiciales, costos de probatoria o de restitución. Consulte a un abogado para ver si tiene derecho a que le devuelvan alguna cantidad de dinero.

Para cualquier pregunta sobre esta carta, incluido cómo conseguir la ayuda de un abogado, póngase en contacto con el Committee for Public Counsel Services (Comité de Servicios de Defensores Públicos), la agencia estatal de defensores públicos, llamando a la Línea de Información sobre los Casos del Laboratorio de Drogas al **888-999-2881**, o visitando su sitio web: www.publiccounsel.net/dlclu . También puede encontrar información en el sitio web del tribunal: www.mass.gov/courts/druglab .

Atentamente,

Frank M. Gaziano
Juez Asociado

Notice

English: This is an official court document. If you cannot read it in English, please visit www.mass.gov/courts/druglab for a translated version, or have it translated.

Aviso

Español: este es un documento oficial del tribunal. Se incluye la traducción en español. La traducción también se encuentra disponible en www.mass.gov/courts/druglab.

Aviso

Português: este é um documento jurídico oficial. Se você não souber ler inglês, mande traduzir, ou então acesse www.mass.gov/courts/druglab para ler uma tradução.

Avi

Kreyol Ayisyen: Sa a se dokiman ofisyèl tribinal la. Si'w pakab li'l an Kreyol, tanpri vizite www.mass.gov/courts/druglab pou yon kopi ki deja tradwi, oswa fè tradwi li.

Thông báo

Tiếng Việt: Đây là giấy tờ chính thức của tòa. Nếu bạn không thể đọc bằng tiếng Anh, vui lòng vào trang mạng www.mass.gov/courts/druglab để đọc bản dịch, hoặc nhờ người dịch sang tiếng Việt.

កំណត់សំគាល់

ខ្មែរ ៖ ន ១០០:តទីជាឯកសារផ្លូវការរបស់តុលាការ។ នបើនលក-អ្នកម ិ អាចអា ភាសាអ្នប់នតលសជា ទមក្តនៅ នមើលនពៅ www.mass.gov/courts/druglab ន ើមបីអា ឯកសារជាភាសាខ្មែរ ឬរកអ្នកណាម្នកប់ជួយបក ្រប ជូ ។

Внимание

Русский: Это официальный судебный документ. Если Вы не можете прочитать его по-английски, найдите его перевод на www.mass.gov/courts/druglab или пусть Вам его переведут.

تنويه

هذه وثيقة رسمية صادرة بموجب المحكمة. إذا كنت لا تستطيع قراءتها باللغة الانكليزية يرجى زيارة الموقع الالكتروني التالي www.mass.gov/courts/druglab للحصول على نسخة مترجمة أو قم بأيجاد شخص ليترجمها لك.

EXHIBIT 2

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Suffolk, SS

SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY
No. SJ-2017-347

COMMITTEE FOR PUBLIC COUNSEL SERVICES & others

v.

ATTORNEY GENERAL of MASSACHUSETTS & others

AGREEMENT ON NOTICE TO FARAK DEFENDANTS

On October 11, 2018, the Full Court held that individuals entitled to dismissals are those in whose case: (i) Farak signed the certificate of analysis ("Farak I defendants"); (ii) the conviction was based on methamphetamine and the drugs were tested during Farak's tenure at the Amherst lab; or (iii) the drugs were tested at the Amherst lab on or after January 1, 2009, and through January 18, 2013, regardless of who signed the certificate of analysis (together with (ii), "Farak II defendants"). *See Committee for Public Counsel Services v. Attorney General*, 480 Mass. 700, 729 (2018). On March 6, 2019, the Full Court ordered that so-called "*Ruffin* defendants," who pled guilty before receiving a signed drug certificate, are not exempt from this relief.

The Respondents, represented by the Attorney General's Office ("AGO"), and the Petitioners submit this agreement pertaining to providing notice to these Farak defendants.

1. The parties arranged for the Court to provide notice to Farak defendants through letters approved by the Single Justice. To that end, Respondents contracted with a vendor to mail individualized, case-specific notice letters to Farak defendants under Justice Gaziano's signature.

2. Initial notice letters for Farak I defendants were mailed in March 2019.

3. Initial letters for Farak II and *Ruffin* defendants were mailed in May 2019.

4. Respondents instructed the vendor to search for, and send the letters to, current addresses for the defendants (as distinct from last known addresses that might appear on court papers from years ago). Respondents also arranged for the vendor to undertake a subsequent mailing of individualized, case-specific notice letters to defendants whose initial letters were not delivered or returned as undeliverable.

5. Respondents also arranged, via coordination with the Department of Correction and the Probation Department, for individualized, case-specific notices to be sent to defendants who were incarcerated in Massachusetts at the time of the mailings.

6. In addition, attempts to notify Farak defendants were made through various forms of public notice: newspapers, radio,

and social media. Petitioners and the Respondents have also agreed to produce notecards and flier notices for distribution and posting at locations throughout the Commonwealth, focusing on areas of Western Massachusetts. The above mentioned materials include contact information for the Committee for Public Counsel Services ("CPCS") Drug Lab Crisis Litigation Unit.

7. CPCS has agreed to distribute these materials to appropriate locations in their communities. The AGO has agreed to distribute these materials to probation and courthouse clerk's offices in Western Massachusetts. They have also been posted in the prisons, through the Department of Correction, and the Attorney General's Office is taking steps to have them posted in the county jails, through the individual sheriff's departments.

8. Consistent with the Full Court's October 2018 decision, the AGO will "bear the entire financial burden associated with notifying those affected defendants that their cases have been dismissed." *CPCS*, 480 Mass. at 730 n.13.

9. The Petitioners and the Respondents memorialize the payment agreement as part of this Notice. The ACLU of Massachusetts, as counsel for petitioners Hampden County Lawyers for Justice, Herschelle Reaves, and Nicole Westcott have paid

the third parties with whom it has contracted for services relating to notice, except for the cost of notecard and flier notices, which has been assumed directly by the AGO. The AGO, in turn, has reimbursed ACLUM in the full dollar amount expended to all such vendors to effectuate notice, consistent with the Full Court's rulings. That reimbursement totals $64,505.20.

10. As indicated below, the Special Master appointed by the Single Justice has reviewed and endorsed this agreement.

Respectfully submitted,

For the Respondents,

/s/ Thomas Caldwell

Thomas A. Caldwell, BBO 651977
Assistant Attorney General
for the Attorney General
One Ashburton Place
Boston, MA 02108
thomas.caldwell@state.ma

For Petitioners Hampden County Lawyers for Justice, Herschelle Reaves, and Nicole Westcott,

/s/ Matthew Segal

Matthew R. Segal, BBO 654489
American Civil Liberties Union
Foundation of Massachusetts, Inc.
211 Congress Street
Boston, MA 02110
msegal@aclum.org

For Petitioner Committee for
Public Counsel Services,

/s/ Rebecca Jacobstein

Rebecca Jacobstein, BBO 651048
Committee for Public Counsel Services
44 Bromfield Street
Boston, MA 02108
rjacobstein@publiccounsel.net

DATED: September 11, 2019

Endorsed by:

Special Master Judd J. Carhart
Associate Justice, Massachusetts Appeals Court (Ret.)
DATED: 9/17/19

EXHIBIT 3

MEMORANDUM

TO: Judd Carhart

FROM: James Morton

DATE: August 26, 2019

RE: Farak I and Farak II/Ruffin Charges and Cases

A final count of charges dismissed by order of Justice Gaziano is seen below and on the attached spreadsheet. Many of the individual charges were dismissed in MassCourts by an automated script that was developed by the Trial Court Judicial Information Services Department, and the associated paper dockets on those cases were updated manually. The autoscript was run on District Court cases, Boston Municipal Court cases and Juvenile Court cases. Those charges that were not updated by the automated script were dismissed in MassCourts by staff from the Superior Court, District Court, Boston Municipal Court and the Juvenile Court Departments using a manual process, and the associated paper dockets were also updated.

Farak I, Farak II and Ruffin Charges (August 13, 2019)

A total of 24,853 charges were submitted by the District Attorney's Offices for review by the Trial Court.

The total number of charges that were updated by the automated script are broken down below:

Farak I:	11,552
Farak II:	12,186
Farak – Ruffin:	1,115
	24,075 + 778 Difference = 24,853

The script written by the Trial Court Judicial Information Services Department updated in MassCourts the charges that the District Attorneys' Offices identified as meeting the requirements to be dismissed per order of the Court, with the exception of Superior Court charges, as the Superior Court Department elected not to have the automated script applied to their cases. After the Judicial Information Services Department ran the automated script against the lists submitted by the District Attorney's Offices, a total of 24,075 charges were dismissed in MassCourts, and the paper dockets were updated accordingly. During this same time period, the Massachusetts Probation Department updated the individuals Criminal Offense Record Information and dismissed the charges that qualified under Justice Gaziano's order.

A total of 778 charges from the lists submitted by the District Attorney's Offices do not appear on a list of charges with a Farak I or Farak II disposition . After a careful review of these charges by the Trial Court, particularly Zachary Hillman, Administrative Office of the District Court with assistance from Susanne O'Neil, Norfolk County District Attorney's Office, an accounting of the 778 charges is below:

Sealed cases: **192**
These charges were identified as charges that had previously been sealed, and as a result, were not captured by the automated script. The charges were subsequently updated manually and a review indicates that the correct docket entry has been made on the charges.

Charges not found in MassCourts using information provided by District Attorneys: **151**
These charges were identified as charges that were not updated via the automated script for one of two reasons: (1) the charge identified on the District Attorneys' list was not a 94C offense; or (2) the charge number identified on the District Attorneys' list did not match an existing charge number in MassCourts. These cases were reviewed by court staff and were manually updated to ensure that the appropriate docket entry was made on the correct charge number.

Charges previously dismissed: **435**
These charges had already been dismissed at the time the automated script was run. These charges were likely vacated and dismissed during earlier litigation, or were charges not identified by the District Attorneys that had been identified by the automated script when the script was run for the identified time period. The charges were not updated a second time, as the dispositions on the specified charges were already accurate.

Summary of Record Count Stats for Farak I, Farak II and Ruffin Charges Revised 8/20/2019

	Category	Number of charges
A	Total number of charges submitted by DAs	24,853
	Number of charges on Farak I DA list	11,552
	Number of charges on Farak II DA list	12,186
	Number of charges on Farak-Ruffin DA list	1,115
B	Total DA lists charges updated in MC with AM Lab disposition	24,075
C	Difference	778
	DA list missng internal case id. Couldn't be updated by script	192
	Charges not found in MassCourts using information provided. Couldn't be updated by script.	**151
	Charges found in MassCourts with AM Lab disposition	**435
C	Courts disposed charges with AM Lab disposition but not attributed to DA list	294

*See exception worksheet 1 (778)
*See exception worksheet 1 (778)
*See exception worksheet 1 (778)

*See exception worksheet 2 (294)

**Revised on 8/20/2019, 41 charges moved from row#15 to row#14
**Revised on 8/20/2019, 41 charges moved from row#15 to row#14

EXHIBIT 4

TO: The Honorable Judd Carhart; Jim Morton

FROM: Zachary Hillman

DATE: July 5, 2019

RE: Status update regarding Farak I and Farak II lists

The following is a status update of those District Court charges on the Farak I and Farak II lists that were identified as subject to being vacated and dismissed pursuant to the Supreme Judicial Court's order. As of the drafting of this memorandum, the District Court has completed the vacating and dismissing of all cases identified by the District Attorneys' as subject to the Farak I and Farak II (and Ruffin) orders. This includes the updating of both the electronic MassCourts dockets as well as the paper dockets. According to the Judicial Information Service Department (JISD), a total of 8383 District Court charges on 6191 cases have been vacated and dismissed pursuant to the Farak I order, and 9442 District Court charges on 7424 cases have been vacated and dismissed pursuant to the Farak II (and Ruffin) order.

The total number of charges that were vacated and dismissed as identified above include those charges that were updated in MassCourts with the automatic update to the MassCourts docket as well as charges that were manually updated in MassCourts. Manual updates were made, for example, to sealed charges as well as to charges for which the automatic docket update could not be completed, such as where a charge on the District Attorneys' original list of charges that were subject to the Court's Farak I and Farak II orders had been misidentified (so called "exception" charges). In those instances, court staff provided a list of those exception charges for which the automatic docket update could not be completed to the District Attorneys' offices, which reviewed each exception charge and identified to the District Court those exception charges that were subject to the Supreme Judicial Court's order. The District Court then updated those charges accordingly.

EXHIBIT 5A

Proposed Process for Later Identified Charges

In the instance that a Farak charge or charges are identified that, for whatever reason, were not vacated and dismissed pursuant to the SJC's order, the District Attorney should notify the Clerk's Office and Probation Office in the court where the charges were disposed. Clerk's Office staff will enter the specific "Farak disposition" on the MassCourts docket and on the paper docket, where applicable. The Clerk's Office will mail a Notice of Dismissal to the defendant. A sample Notice of Dismissal is attached.

The Executive Office of the Trial Court will send a communication to Clerks' Offices with specific instructions on docketing and the generation of the Notice of Dismissal.

EXHIBIT 5B

Notice of Dismissal Amherst Laboratory	DOCKET NUMBER 0000CR001234	Trial Court of Massachusetts District Court

CASE NAME

Commonwealth vs. Defendant

NAME AND ADDRESS OF DEFENDANT

Name
Street Address
City, State, Zip Code

POLICE DEPARTMENT OF OFFENSE

POLICE DEPARTMENT

COURT NAME & ADDRESS

District Court
Street Address
City, State, Zip Code
Phone Number

TO THE PARTY IN THIS MATTER:

The court has dismissed the conviction(s) listed below effective December 13, 2018.

A chemist named Sonja Farak engaged in serious misconduct involving her work at the state drug lab. Your case includes one or more drug convictions affected by Ms Farak. The court has now dismissed the conviction(s). This dimissal is final and permanent, which means you cannot be prosecuted again for any charge that has been dismissed.

Your criminal record has been updated to remove the conviction(s). The removal of a conviction may provide important benefits to you related to employment, housing immigration, and more. However, your record has not been sealed. You can find more information about sealing your record at www.masslegalhelp.org/cori.

In addition, you might have other charges in the same case that have not been dismissed and that remain on your record. You may want to speak to a lawyer about whether these convictions can also be undone. You might also have paid money because of these convictions, such as fines, court fees, probation fees or restitution. You may want to speak to a lawyer about whether you are entitled to have any money returned to you.

If you have any questions about this letter, including how to get a lawyer to help you, you may contact the Committee for Public Counsel Services (the state public defender agency) by calling 888-999-2881 or by visiting its website: www.publiccounsel.net. You may also find information on the court's website: www.mass.gov/courts/druglab.

OFFENSE COUNTS

Count	Offense Description	Date of Offense
1	DRUG, POSSESS CLASS B c94C §34	01/01/2000
2	DRUG, POSSESS CLASS C c94C §34	01/01/2000

DATED	CLERK-MAGISTRATE
DATE	Clerk-Magistrate

OFFICE OF THE DISTRICT ATTORNEY
PHILDELPHIA COUNTY
By: Patricia Cummings
Assistant District Attorney
Supervisor, Conviction Integrity Unit
Three South Penn Square
Philadelphia, PA 19107
(215) 686-8747

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
CRIMINAL SECTION TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
	:	
v.	:	Case No. MC-51-CR-0019780-2020
	:	
	:	
DONTAY GILLIAM	:	
	:	

MOTION FOR AN ORDER HOLDING THE PHILADEPLHIA POLICE DEPARTMENT IN CONTEMPT FOR FAILING TO COMPLY WITH SUBPOENA *DUCES TECUM*, AND COMPELLING PRODUCTION OF POTENTIAL *GIGLIO* MATERIAL

The Commonwealth, through its attorney, LAWRENCE S. KRASNER, District Attorney, and his assistant, PATRICIA CUMMINGS, moves for an order holding the Philadelphia Police Department ("PPD") in contempt for failure to comply with a subpoena *duces tecum* served in the above-captioned case on May 21, 2021, and compelling the PPD to produce specified categories of potential *Giglio* information to the District Attorney's Office ("DAO") in all ongoing criminal cases.[1]

[1] It is important to note at the outset the distinction between disclosure of potential *Giglio* information versus admissibility of that information during a criminal proceeding. In fact, while the DAO takes its legal and ethical obligation to disclose such information seriously, the DAO also instructs/informs its ADAs and PPD officers that "[d]isclosure does not equal admissibility and, where appropriate, the ADA will object to the admissibility of the disclosed evidence through written motions. Where appropriate, the DAO will also seek protective orders to protect the privacy concerns of officers." Mission Statement and Request for Compliance Regarding Police Misconduct Disclosure (*Giglio* Information), attached hereto as Exhibit A, at 5.

Background

1. On May 21, 2021, the DAO properly served a subpoena *duces tecum* upon the PPD in the above-captioned case, seeking production of potential *Giglio* material concerning Police Officer Richard Fitzgerald, a potential Commonwealth witness. This subpoena is attached hereto as Exhibit B.

2. The subpoena was properly served on the custodian of records for the PPD and was sent as part of a larger batch of subpoenas *duces tecum*, which concerned officers who were potential witnesses in cases with court dates between June 1, 2021 and June 30, 2021. These subpoenas were served as attachments to emails sent on May 21, 2021, accompanied by a cover letter explaining the legal basis for the subpoenas. The emails and cover letter are attached hereto as Exhibit C.[2]

3. The subpoenas specifically request that the PPD produce all documents responsive to the DAO's "Mission Statement and Request for Compliance Regarding Police Misconduct Disclosure (*Giglio* Information)," referred to hereafter as the "*Giglio* Protocol."[3]

4. This motion is being filed in the instant case, *Commonwealth v. Gilliam*, and in the below five other cases where subpoenas were served concerning officers who are potential Commonwealth witnesses:

a. *Commonwealth v. Gonzalez*, Case No. CP-51-CR-0001197-2020, a case currently pending before the Honorable Timika Lane.

b. *Commonwealth v. King*, Case No. CP-51-CR-0008689-2019, a case currently pending before the Honorable Timika Lane.

[2] The cover letter was mistakenly dated May 21, 2020 rather than May 21, 2021.
[3] While the DAO did not individually attach this document to each subpoena in the voluminous batch, the PPD has been provided this document, attached hereto as Exhibit A, on numerous occasions in the past.

c. *Commonwealth v. Mendozza*, Case No. CP-51-CR-0001330-2020, a case currently pending before the Honorable Charles Ehrlich.

d. *Commonwealth v. Monroe*, Case No. MC-51-CR-0008125-2021, a case which is not currently assigned to a judge.

e. *Commonwealth v. Watson*, Case No. CP-51-CR-0008632-2018, a case currently pending before the Honorable Mia Perez.

5. All of these cases have been relisted for new court dates that are subsequent to the filing date of these motions.

6. The DAO took the unusual step of subpoenaing records from another law enforcement agency, and now makes this unprecedented request for the Court's intervention, after having failed for three-and-a-half years to obtain adequate disclosure of potential *Giglio* material from the PPD through cooperative means.

7. Since 2018, the DAO has made numerous, good-faith attempts to obtain the PPD's cooperation in transmitting potential *Giglio* material to the DAO. To illustrate, despite being legally unnecessary, the DAO has complied with the PPD's demand that individual requests for information be made as to each officer who is a potential Commonwealth witness in pending criminal prosecutions.

8. The DAO has also repeatedly provided the PPD with copies of the *Giglio* Protocol (Ex. A), which informs law enforcement agencies of their obligation to disclose *Giglio* information *and* delineates specific categories of potential *Giglio* information sought by the DAO.

9. Nonetheless, the PPD has consistently failed to make adequate disclosures of responsive information.

10. The PPD's protracted failure to comply with repeated requests by the DAO for potential *Giglio* material has likely resulted in the DAO's failure to comply with its constitutional obligations in an unknown number of criminal cases. In certain cases, the DAO has specifically identified a failure to disclose tied directly to the PPD's noncompliance. For example, in 16 criminal cases the DAO subpoenaed Police Officer Carlos Buitrago where the DAO failed to disclose *Giglio* information concerning him—having not been made aware by the PPD, in spite of three separate requests for information, that charges including falsification of documents had been sustained against him.

11. Not only has the PPD made unilateral decisions to withhold plainly responsive information, such as the sustained charges against Officer Buitrago, but, in the instances where it has made disclosures, it has withheld relevant documents and/or heavily redacted them.[4]

12. The PPD's preemptive decisions regarding what they are obligated to disclose to the DAO has meant that sometimes, the DAO is unable to determine what impact the misconduct has on a given officers' credibility as a potential witness and whether disclosure to the defense is required. And, given the constitutional principle that when making disclosure decisions, prosecutors should err on the side of disclosure, it is possible some information may have been inaccurately treated as *Giglio* information.

The DAO is Obligated to Learn Of, and Disclose, Material Favorable Evidence in the Possession of Law Enforcement Agencies

13. Under the United States Constitution, the District Attorney's Office ("DAO") is required to learn of material evidence favorable to the accused that is in the possession of other

[4] In 2018, in the midst of discussions with the PPD regarding the DAO's *Giglio* policy, the PPD unilaterally adopted a redaction policy pertaining to any responsive document they would produce to the DAO, and they unilaterally decided that the only Internal Affairs Division document they would produce is the "Conclusion" section of investigation memoranda. A copy of the redaction policy and a sample "Conclusion" section are both attached as Exhibits D and E.

law enforcement agencies, and make disclosure of it to the defense. *See Kyles v. Whitley*, 514 U.S. 419, 437 (1995); *Commonwealth v. Roney*, 79 A.3d 595, 607–08 (Pa. 2013).

14. This includes not just evidence that is exculpatory, but also information that may be used for impeachment, i.e. *Giglio* material. *See, e.g.*, *United States v. Perdomo*, 929 F.2d 967, 970–71 (3d Cir. 1991).

15. Thus, the prosecutor must investigate and disclose favorable evidence that is contained in police files, including personnel files and records of disciplinary investigations, which are considered, as a matter of law, to be in the District Attorney's possession. *See Roney*, 79 A.3d at 608; *Kyles*, 514 U.S. 437–38.

16. Failure to disclose *Giglio* material in the possession of the prosecution, even if not known to the individual prosecutor handling a case, may jeopardize a conviction: "whether the nondisclosure [is] a result of negligence or design, it is the responsibility of the prosecutor." *Giglio v. United States*, 405 U.S. 150, 154 (1972).

17. The DAO must be able to review all evidence that is *potentially* materially favorable to the accused in order to determine whether it meets the materiality threshold, and, if so, make disclosure of it. The Supreme Court has exclusively assigned to the prosecutor both the discretion and the burden to "gauge the likely net effect of all [] evidence and make disclosure when the point of [materiality] is reached." *Kyles*, 514 U.S. at 437.

18. This duty is not only exclusive to prosecutors, but is also nondelegable due to the nature of their role. Prosecutors, who are charged with the responsibility over "all criminal and other prosecutions, in the name of the Commonwealth," 16 P.S. § 4402(a), are "forced to make judgment calls about what would count as favorable evidence, owing to the very fact that the

character of a piece of evidence as favorable will often turn on the context of the existing or potential evidentiary record." *Kyles*, 514 U.S. at 438–39.

19. As the Third Circuit has recognized, "[t]he police are not equipped to perform this role." *Gibson v. Superintendent of N.J. Dep't of L. & Pub. Safety*, 411 F.3d 427, 443 (3d Cir. 2005).[5]

20. The DAO prosecutes thousands of cases each year, and cannot expeditiously do so if each line prosecutor is forced to individually subpoena the Philadelphia Police Department ("PPD") for potential *Giglio* information and engage in motion practice to enforce the subpoenas.

21. Accordingly, the DAO has sought to implement "procedures and regulations . . . to insure communication of all relevant information on each case to every lawyer who deals with it." *Giglio*, 405 U.S. at 154.

[5] In *United States v. Dent*, the Third Circuit held that to comply with *Brady*, the prosecution does not need to "make the [personnel] file available for the defendant's general perusal," but rather "need only direct the custodian of the files to inspect them for exculpatory evidence and inform the prosecution of the results of that inspection, or, alternatively, submit the files to the trial court for *in camera* review." 149 F.3d 180, 191 (1998). Seven years later, in *Gibson*, the Third Circuit recognized that "[t]he police are not equipped" to "weigh the materiality of all favorable evidence and disclose such evidence when it is reasonably probable that it will affect the result of the proceedings." 411 F.3d at 443.

The DAO's "Mission Statement and Request for Compliance Regarding Police Misconduct Disclosure (*Giglio* Information)," referred to in the accompanying motion as the "*Giglio* Protocol," heeds the procedure outlined in *Dent*, relying upon the PPD's records custodian to conduct a thorough inspection of the personnel files. Consistent with *Gibson*, it does not rely upon the PPD to make materiality determinations, and instead seeks several categories of information that may constitute material favorable evidence—reserving the prerogative to make legal determinations as to whether that bar is met. Nonetheless, this protocol has not worked, as the PPD has failed to produce information that plainly constitutes potential *Giglio* material and is clearly responsive to the DAO's requests, such as sustained charges for falsification of information. This leads the DAO to seek judicial intervention.

22. Specifically, the DAO has created a Police Misconduct Disclosure Database that transmits potential *Giglio* information concerning police officers to Assistant District Attorneys.[6] To ensure it is comprehensive, the DAO has developed its *Giglio* Protocol, which informs law enforcement agencies, including the PPD, of the categories of information it seeks.

23. Just as it is the DAO's responsibility and prerogative to make case-specific determinations as to whether information must be disclosed under *Giglio*, the DAO must make judgments as to what information should be included in its Police Misconduct Disclosure Database.

24. In discussing *Giglio*-information management systems, the Supreme Court has noted that "determining the criteria for inclusion or exclusion requires *knowledge of the law*." *Van de Kamp v. Goldstein*, 555 U.S. 335, 348 (2009) (emphasis added). Making decisions about management of *Giglio* information within the Office is a quintessentially prosecutorial function, and this is underscored by such decisions' being shielded from civil liability by absolute prosecutorial immunity. *See id.* at 348–49.

25. The Supreme Court has expressly warned prosecutors against "tacking too close to the wind" in withholding evidence, *see Kyles*, 514 U.S. at 439, and has even recognized that an open-file policy "may increase the efficiency and the fairness of the criminal process." *Strickler v. Greene*, 527 U.S. 263, 283 n.23 (1999). The Court has explicitly instructed that "[b]ecause we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, *the*

[6] This *database* is not a *list*, in the sense that trial unit prosecutors do not have access to view all the information contained in the *database*. Instead, when prosecutors use an electronic portal to generate court notices for a police witness to appear at trial, the database will inform the prosecutor if there is qualifying misconduct that must be disclosed to the defense.

prudent prosecutor will resolve doubtful questions in favor of disclosure." *United States v. Agurs*, 427 U.S. 97, 108 (1976) (emphasis added).

26. The DAO's constitutional obligation to ensure transmission of *Giglio* material to the defense thus requires that DAO be able to obtain all potential *Giglio* material in the possession of the PPD, and transmit it to line prosecutors handling individual cases. Given the judgment calls involved, dependent upon knowledge of both the law and the facts of cases, the DAO cannot rely on the PPD to determine what must be disclosed under *Giglio.* Accordingly, the DAO must obtain broad categories of potential *Giglio* material in order to effectively comply with its constitutional obligations.

27. Where potential *Giglio* information does exist, the PPD must produce all relevant underlying documents, so that the DAO can accurately assess its impact upon the officers' credibility and whether it constitutes material favorable evidence that the DAO is constitutionally required to disclose. Lacking complete information, the DAO will err on the side of disclosure to comply with its constitutional obligations, and be wary of calling officers as witnesses where it is unable to fully assess the allegations against them. It is in the PPD's own interest, to avoid unnecessary disclosure of personnel information that the DAO would not otherwise produce, that it make complete disclosures to the DAO.

The DAO Has the Authority to Subpoena Potential *Giglio* Material

28. The Commonwealth has the authority, under the Rules of Criminal Procedure, to issue a subpoena compelling a "witness [] to appear before the court at the date, time, and place specified, and to bring any items identified or described." Pa. R. Crim. P. § 107.

29. While it is unusual for the DAO to subpoena a fellow law enforcement agency, it has been recognized in the context of the defense seeking such records that a "subpoena *duces*

tecum [is] the proper means to secure information in [police] personnel files." *Commonwealth v. Mejia-Arias*, 734 A.2d 870, 875 (Pa. Super. 1999).

30. There is no statutory privilege under Pennsylvania law protecting police personnel files from disclosure.

31. The DAO is not required to make any specific showing that the requested information will in fact include *Giglio* material. While a *defendant* subpoenaing law enforcement personnel files "must be able to articulate a reasonable basis for his request," *Mejia-Arias*, 734 A.2d at 876;[7] *accord Commonwealth v. Blakeney*, 946 A.2d 645, 661 (Pa. 2008), the DAO, on

[7] The Superior Court in *Mejia-Arias* incorrectly observed that "personnel files may not be *Brady* material if they are not material within the possession or control of the Commonwealth, *i.e.*, *the District Attorney*," and then proceeded with an analysis grounded in the "accused's rights of confrontation and compulsory process" under the Pennsylvania Constitution. 734 A.2d at 874 (emphasis added).

The Superior Court's 1999 opinion in *Mejia-Arias* cited *Commonwealth v. McElroy*, 665 A.2d 813, 818 (Pa. Super. 1995), *appeal denied*, 674 A.2d 1073 (Pa. 1996) for this position, but also cited Wayne R. LaFave, *Criminal Procedure* § 20.7(e), at 893–894 (2d ed.1992) as recognizing contrary authority. The *Mejia-Arias* Court did not address the 1995 opinion, *Kyles v. Whitley*, 514 U.S. 419 (1995), which dispositively held that exculpatory and impeaching information in police files must be disclosed to the defense.

In 2001 the Pennsylvania Supreme Court discussed *Kyles* at length, holding that "the prosecution's *Brady* obligation clearly extends to exculpatory evidence in the files of police agencies of the same government bringing the prosecution" and abrogating the entire line of cases that held exculpatory and impeaching information in police files were not subject to *Brady*. *See Commonwealth v. Burke*, 781 A.2d 1136, 1142 (Pa. 2001) (abrogating *Commonwealth v. Gribble*, 703 A.2d 426 (Pa. 1997); *Commonwealth v. Montgomery*, 626 A.2d 109 (Pa. 1993); *Commonwealth v. Colson*, 490 A.2d 811 (Pa. 1985); *Commonwealth v. Bonacurso*, 455 A.2d 1175 (Pa. 1983); *Commonwealth v. Piole*, 636 A.2d 1143 (Pa. Super. 1994); *Commonwealth v. Battiato*, 619 A.2d 359 (Pa. Super. 1993); *Commonwealth v. Rakes*, 581 A.2d 212 (Pa. Super. 1990)). Although not explicitly abrogated by *Burke*, this portion of *Mejia-Arias* is no longer good law.

Additionally, the case from which the "reasonable basis" standard articulated in *Mejia-Arias* appears to stem, *Commonwealth v. Gartner*, 381 A.2d 114 (Pa. 1977), arose in a context where compliance with the prosecution's *Brady* obligation was likely presumed. In *Gartner*, the prosecutor had responded to a defense *Brady* request by representing that all exculpatory material had been disclosed, yet the defense still sought inspection, by the court, of the entire police investigatory file. *Id.* at 120. The court held that the defendant was only entitled to court inspection "when there exists at least reason to believe the inspection would lead to the discovery of evidence helpful to the defense." *Id.* This standard was articulated in a context where prosecutorial compliance with *Brady* could be presumed, and then imported into the case law on defense subpoenas of police personnel files.

the other hand, has a constitutional obligation to obtain such information to determine whether it must be disclosed under *Giglio*. As explained above, the District Attorney's Office is "forced to make judgment calls about what would count as favorable evidence," *Kyles*, 514 U.S. at 438–39, and this requires reviewing a large volume of potentially favorable evidence.

32. While the DAO recognizes that it is certainly unusual for it to subpoena another law enforcement agency, the subpoenas at issue here are no different from any others that respond to the "need to develop all relevant facts in the adversary system," and so serve "'the twofold aim [of criminal justice] [] that guilt shall not escape or innocence suffer.'" *United States v. Nixon*, 418 U.S. 683, 709 (1974) (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)) (first alteration in the original). *See also Trump v. Vance*, 140 S. Ct. 2412, 2431 (2020) (". . . no citizen, not even the President, is categorically above the common duty to produce evidence when called upon in a criminal proceeding"). Accordingly, the PPD was obligated to provide an adequate response to the DAO's subpoenas, which they failed to do.

The Court Is Empowered to Hold the PPD in Contempt

33. To prevent needless, repeated litigation of subpoenas in future cases, this Court should enter an order holding the PPD in contempt and directing them to produce potential *Giglio* material to the DAO in all ongoing criminal cases. Furthermore, the Court should, for a specified period of time, monitor the PPD's compliance.

34. "A willful refusal to comply with a subpoena *duces tecum* is a direct affront to the dignity and authority of the court," and "may be dealt with either by criminal contempt, civil contempt or both." *Grubb v. Grubb*, 473 A.2d 1060, 1063 (Pa. Super. 1984).

35. "[A] court may [] proceed civilly to coerce compliance for the benefit of the party who has caused the subpoena to issue." *Id.*

36. Holding a party in civil contempt requires proof "(1) that the contemnor had notice of the specific order or decree which he is alleged to have disobeyed; (2) that the act constituting the contemnor's violation was volitional; and (3) that the contemnor acted with wrongful intent." *Epstein v. Saul Ewing, LLP*, 7 A.3d 303, 318 (Pa. Super. 2010) (citation omitted).

37. As shown below, these elements have been met here. The PPD was provided with subpoenas clearly delineating the categories of documents sought, yet failed to comply. Had the PPD sought, in good faith, to contest the subpoenas, they should have moved to quash, yet they did not. Instead, the PPD intransigently made an utterly deficient production.

38. "Courts have broad discretion in fashioning and administering a remedy for civil contempt." *Mulligan v. Piczon*, 739 A.2d 605, 611 (Pa. Cmwlth. 1999), *aff'd*, 779 A.2d 1143 (Pa. 2001).

39. As the history of the DAO's attempts to obtain potential *Giglio* material from the PPD demonstrates, the PPD's obstructionism is likely to continue, and will likely prevent the DAO from complying with its constitutional disclosure obligations. Accordingly, the Court should employ its discretion to issue a comprehensive remedy that would obviate the need to return to court for such motion practice again.

40. The Court should, beyond directing the PPD to make an adequate response to the May 21, 2021 subpoenas, order as part of its contempt remedy that the PPD produce the requested categories of potential *Giglio* material in *all* ongoing criminal cases, and monitor its compliance for a specified period of time. The broad discretion afforded to courts in fashioning civil contempt remedies permits the Court to take these steps.

41. Such an order would harmonize with the policies of other jurisdictions attentive to their constitutional disclosure obligations.

42. For example, in Virginia, a recently-amended statute requires chief law enforcement officers to provide "to the attorney for the Commonwealth access to all records, *including police reports, disciplinary records, and internal affairs investigations*, relating to wrongful arrest or use of force complaints, or other complaints that a person has been deprived of the rights, privileges, or immunities secured or protected by the laws of the United States and the Commonwealth . . ." Va. Code Ann. § 19.2-201 (emphasis added).

43. Likewise, the United States Department of Justice's *Justice Manual* requires "federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all the members of the prosecution team," including "federal, state, and local law enforcement officers," and given that the Department has authority over federal law enforcement, they presumably comply. U.S. Dep't of Justice, *Justice Manual* § 9-5.001 ("Policy Regarding Disclosure of Exculpatory and Impeachment Information") (2020), available at https://www.justice.gov/jm/jm-9-5000-issues-related-trials-and-other-court-proceedings.

44. Elsewhere, police departments have *partnered* with district attorneys' offices and established streamlined procedures for the transmission of potential *Giglio* material. A recent report by a leading research institute on prosecutorial practices, which urges that "all prosecutors' offices should implement a mechanism to track police misconduct," cites memoranda of understanding entered into between district attorneys' offices and law enforcement agencies for the transmission of such information in multiple jurisdictions. Institute for Innovation in Prosecution at John Jay College, *Tracking Police Misconduct: How*

Prosecutors Can Fulfill Their Ethical Obligations and Hold the Police Accountable, at 4, 5, 5 n.12 (2021), available at https://static1.squarespace.com/static/5c4fbee5697a9849dae88a23/t/60ddf2955e591d1e4f2e2132/1625158294057/FINAL+Tracking+Police+Misconduct+Guide.pdf.

45. Once again, while the DAO recognizes the serious nature of this motion, it seeks the Court's assistance to resolve what it has sought, unsuccessfully, to obtain for over three years through cooperative means: potential *Giglio* material it must review, and in certain instances disclose, in order to fulfill its constitutional obligations.

46. Through ordering a contempt remedy that obviates the need for further motion practice, the Court will enable the DAO to expeditiously proceed in meeting its obligations, and resolve more promptly the thousands of criminal cases it handles each year.

The PPD's Response to the May 21, 2021 Subpoenas is Inadequate

47. Following proper service of the subpoenas on May 21, 2021, the PPD did not move to quash, nor did it make any communication to the DAO—verbal or written—contesting the subpoenas, seeking to narrow their scope, or requesting clarification.

48. Instead, on June 2, 2021, the PPD responded to the subpoenas by emailing 17 electronic files to the DAO. *See* Emails from PPD dated June 2, 2021, attached hereto as Exhibit F. These files contain 4,254 "negative" responses, representing that no responsive information was found, and 377 "positive" responses. They also include 99 responses indicating that no new information was found for officers as to whom potential *Giglio* information had been previously disclosed, and 16 responses indicating that potentially qualifying investigations had been disposed such that they were no longer responsive.

49. The PPD's production is overwhelmingly inadequate.

The PPD's Production in the Instant Case

50. The DAO's subpoena *duces tecum* in *Commonwealth v. Gilliam* seeks potential *Giglio* material concerning Police Officer Richard Fitzgerald. Exhibit B.

51. PO Fitzgerald is a potential Commonwealth witness in this case, a prosecution for Violation of the Uniform Firearms Act ("VUFA") and possession of marijuana with intent to distribute. PO Fitzgerald and another officer followed the car of the target of the investigation and later conducted surveillance of him.

52. A prior IAD investigation had sustained a charge that PO Fitzgerald falsified police paperwork in relation to a 2014 incident.

53. PO Fitzgerald had claimed in a Confidential Informant Voucher and Contact Form that he conducted a drug buy himself, but the drug buy had actually been made by a civilian, who was not a registered confidential informant. Different addresses were listed for where the drug buy occurred on the affidavit of probable cause and the voucher sheet.

54. The use of an unregistered individual was itself a violation of a PPD directive, which also resulted in a sustained finding against PO Fitzgerald. The IAD additionally noted that PO Fitzgerald's explanation for proceeding in this manner "lack[ed] credibility."

55. The PPD's response to the DAO's May 21, 2021 subpoena, attached hereto as Exhibit G, inaccurately states that "there was nothing in this employee's history meeting the criteria required."

56. The PPD had previously provided the DAO with the above-referenced information concerning PO Fitzgerald, but failed to include it in its subpoena response.

57. This indicates that the PPD did not conduct a diligent search, as required by the subpoenas, else the previously provided information would have been referenced.

58. Furthermore, the PPD's responses to requests for potential *Giglio* information have never included underlying documents concerning the IAD investigation as to PO Fitzgerald.

General Problems with the PPD's Response in Other Cases

59. In numerous other cases, the PPD has omitted potential *Giglio* information, such as sustained Internal Affairs Division ("IAD") charges involving dishonesty, that are plainly responsive to the subpoenas.

60. In some cases, the PPD has provided the DAO with the "Conclusion" section of an IAD memorandum, but has failed to produce the remaining sections of the memorandum or other relevant underlying documents, and has heavily redacted those that are included in the production. This often leaves the DAO unable to accurately assess the allegations against the officers.

61. In an effort to assess the resulting harm from the deficient responses, the DAO, on August 2, 2021, subpoenaed the Defender Association of Philadelphia for records concerning a sample of nine officers, including five at issue in the cases where this motion is being filed. The DAO received from them copies of IAD memoranda, attached hereto as Exhibit H.

62. It is noteworthy that, notwithstanding the defense's burden of articulating a "reasonable basis" for requests of personnel files, the PPD produced *full* IAD memoranda to the Defender Association, in multiple instances with no redactions, yet provided the DAO with heavily redacted, truncated versions.

Specific Problems with the PPD's Responses in Other Cases

63. The subpoena response at issue in *Commonwealth v. Gilliam*, the above-captioned case, is but one example of the inaccuracies and/or deficiencies in the PPD's production. It has

been selected, along with those in the five other cases where this motion is being filed, to illustrate the gross inadequacy of the PPD's response.

64. In the below sample of cases, and numerous others, the PPD failed to comply with the clear terms of the May 21, 2021 subpoenas.

65. The DAO's subpoena *duces tecum* in *Commonwealth v. King*, a case in which this motion is also being filed, seeks potential *Giglio* material concerning Police Officer Jose Innamorato. Exhibit I.

66. PO Innamorato appears to be a crucial Commonwealth witness in *Commonwealth v. King*, a Violation of the Uniform Firearms Act ("VUFA") prosecution.

67. PO Innamorato has alleged that on October 16, 2019, he heard a metal object hit the sidewalk by a spot where the defendant, Brian King, was standing. After the defendant had left that spot, another officer, who arrived subsequent to PO Innamorato, recovered a firearm. PO Innamorato appears to be the only officer to have witnessed its being dropped by the defendant.

68. The PPD's response to the subpoena, attached hereto as Exhibit J, is deficient.

69. It fails to include relevant underlying documents and is rife with redactions, exemplifying the PPD's practice of unilaterally deciding to limit, where they do decide to make a disclosure, the amount of potential *Giglio* material received by the DAO.

70. This practice prevents the DAO from making informed assessments regarding the information's impact upon the officer's credibility as a potential Commonwealth witness, and whether disclosure to the defense is constitutionally required.

71. The PPD disclosure includes two cover pages as to PO Innamorato. The document indicates that a PBI hearing was held concerning him on September 5, 2012, and that

he was given the penalty of "Training and Counseling," but it does not disclose the formal charge against him.

72. Attached to the cover page of the document is the "Conclusion" section of an IAD memorandum. It states that an investigation of an allegation of physical abuse, by unknown officers, revealed departmental violations by PO Innamorato. It does not, however, explicitly identify the violations.

73. The memorandum goes on to note that although PO Innamorato denied taking two individuals out of their vehicle and handcuffing them, he had actually initiated the investigation into the vehicle and one of the individuals. It then states that both individuals were handcuffed when they were transported to a police station in the rear of a vehicle, possibly implying that it is likely that PO Innamorato *had* in fact removed and handcuffed them. The document also notes that PO Innamorato should have prepared a "75-48A" form as the officer initiating the investigation.

74. The PPD did not produce the remaining sections of the IAD memorandum (i.e. the "Allegation" and "Investigative Analysis" sections), reports from the IAD's investigation, transcript of the PBI hearing concerning PO Innamorato, or any police reports concerning the underlying incident.

75. The DAO is left to speculate as to what the charge against PO Innamorato was, what the specific factual predicate was for it, and whether PO Innamorato in fact engaged in dishonesty.

76. Prior to the instant subpoena, the DAO previously submitted requests to the PPD for potential *Giglio* information as to PO Innamorato twice—on November 21, 2018 and September 8, 2020 (Ex. K). Although PPD responded to the prior requests, the PPD's responses

failed to produce responsive information (Ex. L), though the PBI hearing as to him had been held years prior.

77. As with PO Innamorato, disclosures as to PO Gilberto Gutierrez, attached hereto as Exhibit M, do not include relevant underlying documents and are heavily redacted.

78. The PPD's disclosures include two cover pages concerning PO Gutierrez, which indicate that a PBI hearing was held, concerning a "Neglect of Duty" charge against him, on September 16, 2020. Attached to these cover pages is the "Conclusion" section of an IAD memorandum, which states that departmental violations had been sustained against PO Gutierrez for falsification of information.

79. Per the memorandum, PO Gutierrez wrote a report claiming that security footage depicted a suspect vandalizing a car. The redactions suggest that PO Gutierrez's report "implied" that a particular, named individual was the perpetrator. "Gutierrez admitted that the video was too blurry to see [redacted] vandalize [redacted] vehicle."

80. The PPD failed to produce the remaining sections of the IAD memorandum, transcript of the PBI hearing, any reports from the IAD's investigation, or any documents from the underlying criminal case in which PO Gutierrez committed the misconduct described. Furthermore, though the wording of the produced IAD memorandum and the redactions suggest that PO Gutierrez falsely identified a specific, named individual as the perpetrator, however, this redaction-laden document alone does not allow the DAO to reach this conclusion with certainty.

81. The DAO had previously submitted requests to the PPD for potential *Giglio* information concerning PO Gutierrez four times—on September 15, 2018, November 21, 2018, September 19, 2019, and February 3, 2020 (Ex. N). Not one of the PPD's responses to the four requests include any responsive information (Ex. O). The IAD case number for the investigation

concerning him indicates that it was opened in 2018, meaning that—at the very least—it predated the PPD's responses to the DAO's September 19, 2019 and February 3, 2020 requests.

82. In other instances, the PPD failed to disclose not just the underlying documents, but qualifying findings against officers.

83. Since 2018, and prior to issuing the May 21, 2021 subpoenas, the DAO had issued multiple requests for potential *Giglio* information concerning PO Trang Le, PO Marc Marchetti, and PO Kevin Klein, but the PPD consistently failed to make a complete disclosure of qualifying information known to them.

84. Finally, following the PPD's most recent responses, the DAO obtained, via subpoena, material from the Defender Association of Philadelphia that clearly should have been disclosed. *See* DAO's Subpoena to Defender Association of Philadelphia, dated Aug. 2, 2021, attached hereto as Exhibit P.

a. *Police Officer Trang Le (Badge #3373, Payroll #269492).* An Internal Affairs Division ("IAD") investigation sustained that PO Le and her partners improperly entered a home. During the course of the investigation, they claimed that a supervisor had given them permission to enter. It appears that this claim was false, as the supervisor denied any knowledge and eight officers did not recall any officer requesting such permission. PO Le is the alleged victim in *Commonwealth v. Monroe*, Case No. MC-51-CR-0008125-2021, one of the cases in which this motion is being filed. This prosecution is for a misdemeanor assault that was allegedly committed against PO Le while she was off-duty, and so she appears to be a key Commonwealth witness.

b. *Police Officers Marc Marchetti (Badge #2418, Payroll #242967) and Kevin Klein (Badge #1737, Payroll #268655).* An IAD investigation sustained that the officers threatened to take the cell phone of a civilian who was filming a police interaction, which violated a PPD directive. PO Marchetti is a potential witness in *Commonwealth v. Watson*, Case No. CP-51-CR-0008632-2018, one of the cases where this motion is being filed. A pedestrian stop of the defendant was conducted by PO Marchetti, who did a search for warrants, and found that one was outstanding for this case, a prosecution for child rape.

85. As to another five officers—PO Walter Bartle, PO Aquil Byrd, PO Sean Cahill, Sgt. James Schuck, and Sgt. Brian Waters—the PPD previously provided potential *Giglio* information concerning them, but in its responses to the May 21, 2021 subpoenas represented that nothing qualifying was found.[8] This indicates that the PPD did not conduct a diligent search, as required by the subpoenas, else the previously provided information, detailed below, would have been referenced. Furthermore, the PPD's responses to requests for potential *Giglio* information have never included underlying documents concerning the IAD investigations as to these officers.

a. *Police Officer Walter Bartle (Badge #9402, Payroll #228636).* An IAD investigation sustained that PO Bartle struck an individual in the head with a

[8] The PPD's responses to requests for information concerning officers are often inconsistent and contradicted by subsequent responses.

For instance, after disclosing information concerning PO Bartle, PO Cahill, PO Fitzgerald, Sgt. Schuck, and Sgt. Waters, on September 28, 2018, the PPD sent responses stating "Previously disclosed. Nothing additional." as to all five officers on February 14, 2020 (as well as on September 30, 2019 as to PO Bartle and Sgt. Waters). These were subsequently followed by "Nothing Meeting Criteria" responses as to all five officers.

hand-held radio. Bartle denied the allegation, but it appears this denial was false, as three independent witnesses observed the incident.

b. *Police Officer Aquil Byrd (Badge #1462, Payroll #243690).* An IAD investigation sustained a complaint for physical abuse, in relation to PO Byrd's striking a person in a store. This incident was documented on video. PO Byrd was also found to have committed a department violation by failing to submit documentation of the stop of the victim or the resulting use of physical force. PO Byrd was prosecuted by the DAO, and the case was resolved through a diversion program.

c. *Police Officer Sean Cahill (Badge #7229, Payroll #247404).* In 2014, PO Cahill was tried and acquitted in the United States District Court for the Eastern District of Pennsylvania on a charge of making a false statement to the FBI, exculpating an officer who was alleged to have ordered a civilian to take off their clothes while the officer masturbated. There was also an IAD investigation, which sustained an allegation that PO Cahill had committed criminal conduct.

d. *Sergeant James Schuck (Badge #867, Payroll #154557).* An IAD investigation sustained that Sgt. Schuck falsified information, in the case involving PO Richard Fitzgerald discussed above. Sgt. Schuck made a false statement in a memorandum to the PPD's Office of Professional Responsibility about an informant that PO Fitzgerald had used in the drug buy. IAD also sustained that Sgt. Schuck failed to properly supervise PO Fitzgerald and other subordinates. Sgt. Schuck is a potential witness in another of the cases where this motion is being filed, *Commonwealth v. Gonzalez*, Case No. CP-51-CR-0001197-

2020, which is pending before this Court. In that case, Sgt. Schuck was present at a scene where a search warrant was executed, resulting in the recovery of $1.9 million worth of heroin as well as 584 grams of cocaine.

e. *Sergeant Brian Waters (Badge #7598, Payroll #258839).* An IAD investigation sustained a charge that Sgt. Waters physically abused an individual by driving a car into him.[9] Sgt. Waters denied having done this, but this denial was apparently false, as eight out of ten witnesses saw this individual get struck by a police vehicle, which Sgt. Waters admitted to driving. Sgt. Waters is a potential witness in *Commonwealth v. Mendozza*, Case No. CP-51-CR-0001330-2020. In this case, where the defendant is charged with possession with intent to distribute, Sergeant Waters was the one, among a group of officers, to identify the defendant on the street from a description that had been provided over a radio call.

Conclusion

86. This Court is empowered, through holding the PPD in contempt, to fashion remedies to compel the PPD's compliance with its obligation to disclose potential *Giglio* material to the DAO, and obviate the need for repeated motion practice to enforce subpoenas.

87. Specifically, we suggest that the Court order the PPD to disclose the categories of potential *Giglio* material identified in the *Giglio* Protocol (Ex. A) and monitor that compliance during a specified period of time determined by the Court. Such an order would preserve judicial resources, allow the DAO to more adequately assess the credibility of officers who are potential

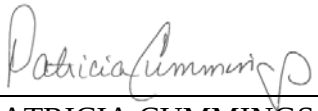
[9] The documents subpoenaed from the Defender Association (Ex. H) include over 250 pages of underlying documents from the IAD investigation, which were never provided by the PPD in its responses to the DAO's requests.

witnesses in cases the DAO is asked to prosecute and ensure prompt disclosure to defendants of information to which they are constitutionally entitled.

WHEREFORE, for the foregoing reasons, the Commonwealth respectfully requests that the Court enter an order holding the Philadelphia Police Department in contempt for failure to comply with the subpoena *duces tecum* served upon it in the above-captioned case on May 21, 2021, and compelling it to produce specified categories of potential *Giglio* material to the District Attorney's Office in all ongoing criminal cases.

Respectfully submitted,

LAWRENCE S. KRASNER
DISTRICT ATTORNEY



PATRICIA CUMMINGS
ASSISTANT DISTRICT ATTORNEY

Date: August 11, 2021

VERIFICATION

The undersigned hereby verifies that the facts set forth in the foregoing motion are true and correct to the best of my knowledge, information, and belief. This verification is made subject to penalties for unsworn falsification to the authorities under 18 Pa. C.S. Section 4904.

PATRICIA CUMMINGS
ASSISTANT DISTRICT ATTORNEY

Date: August 11, 2021