COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

No. SJ-2021-0129

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

v.

DISTRICT ATTORNEY FOR HAMPDEN COUNTY,
Respondent

RESPONDENT'S OPPOSITION TO PETITION FOR RELIEF PURSUANT TO G.L. c. 211 §3 and c.231A §1

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STATEMENT OF THE ISSUES

1. Where the Springfield Police Department is and has been the focus of external and internal investigations by several government and private agencies, should this Court intervene to order the Hampden County District Attorney's Office to conduct an additional investigation—even assuming that such an order would not violate the separation of powers doctrine—before the HCDAO has exhausted its legal efforts to obtain the information developed by those other agencies?

2. May the petitioners circumvent the usual fact-finding process with affidavits containing conclusory, misleading, unproved, and sometimes demonstrably incorrect allegations of misconduct to obtain their desired expansion of the Commonwealth's disclosure obligations as enunciated in *Matter of a Grand Jury Investigation*, 485 Mass. 641 (2020), as well as other relief far broader than that granted by this Court in the drug lab cases where chemists' admitted misconduct affecting tens of thousands of defendants?

3. Have the petitioners demonstrated that they have standing to pursue the remedies they seek?

INTRODUCTION

A series of conclusory allegations, mostly untethered to specific cases and often factually and legally misleading—or worse, simply untrue—should not serve as the basis for this court to effect sweeping change by judicial fiat. At its core, this petition does not ask this Court to determine whether there are deficiencies in the Springfield Police Department (SPD) in need of reform—there most certainly are. It does not seek a ruling that defendants are entitled to the disclosure of exculpatory evidence—again, this is beyond dispute. Rather, this petition and the supporting affidavits from defendants and defense counsel solicit an unprecedented level of judicial involvement in the operation of a district attorney's office and a complete abrogation of the bedrock principle that the law is developed through decisions based on the facts in individual cases.

This petition, while nominally directed at the Hampden County District Attorney (HCDAO), is in fact an attempt by the petitioners to exploit the Supreme Judicial Court's superintendence power over the judicial system to effect sweeping organizational and legal changes that are not within control of the Hampden County or any other district attorney. While the petitioners' desire for these changes may in some instances be salutary, laudable, and—at least with respect to uncovering misconduct or untruthfulness—even shared by the HCDAO, this

petition cannot be the instrument of such reforms. The petitioners' requests for relief are, quite simply, legally, procedurally, and factually flawed.

Petitioners' first goal is to have this Court order the HCDAO to conduct a wide-ranging, top-to-bottom investigation of the SPD, accompanied by a comprehensive reform of the department's policies and practices. In essence, the petitioners seek to apply and extend the results in the drug lab cases to the present situation. Indeed, the petitioners' demand for relief in the form of a "thorough[] investigation by the Commonwealth into the scope and timing of SPD misconduct" (Petition at 25) tracks precisely this Court's language in *Commonwealth v Cotto*, 471 Mass. 97 (2015), that, "[i]t is imperative that the Commonwealth thoroughly investigate the timing and scope of Farak's misconduct at the Amherst drug lab." 471 Mass. at 116.

Fortunately, the SPD, whatever its failings, is neither the Hinton nor the Amherst drug lab, and Gregg Bigda[1] is neither Annie Doohkan nor Sonja Farak. The unique considerations in the drug lab cases that occasioned the active involvement of this Court are not presented by this petition. The petitioners have

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[1] Bigda is an oft-criticized member of the SPD Narcotics Unit who is currently under indictment for an incident involving the arrest of three juveniles in February 2016. (Corrected Record Appendix (C.R.A.) 00007, fn. 5; C.R.A. 00028; C.R.A. 00198; C.R.A. 00409; C.R.A. 00414 ¶27).

neither established "egregious misconduct"[2] nor demonstrated that there are tens of thousands of potentially affected defendants. There have already been multiple internal and external investigations of various SPD officers. The HCDAO has filed a federal civil suit seeking any exculpatory information available from the DOJ investigation. There are on-going discussions between the Department of Justice (DOJ) and the SPD regarding a consent decree. The SPD has asked former Supreme Judicial Court Justice Roderick Ireland to assist in remedying any issues. Nothing in this petition suggests that this Court should take the additional, extraordinary step of intervening in the day-to-day operations of the HCDAO by prescribing how the office should fulfill its constitutional responsibilities.

The second prong of the petition seeks a broad expansion of this Court's decision in *Matter of a Grand Jury Investigation*, 485 Mass. 641 (2020), to encompass petitioners' view of what should constitute *Brady* material. As discussed *infra* at 27, the affidavits submitted by petitioners are simply a "wish list" of ways in which they hope the law will evolve rather than a showing that HCDAO systematically fails to comply with any established law. The

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[2] One of the unique features of the drug lab cases was that each had admissions of wrongdoing from the chemist herself. See *Commonwealth v. Scott*, 467 Mass. 336, 339 (2014) (citing Dookhan's interview with Massachusetts State Police investigators); *Committee for Public Counsel Services v. Attorney General,* 480 Mass. 700, 718 (2018) (noting Farak's three-day appearance before a Hampshire County grand jury).

pronouncements sought by petitioners raise significant legal and practical issues that would dramatically change the operation of trial courts and district attorneys' offices throughout the Commonwealth. While the petitioners, criminal defendants and defense attorneys, are understandably desirous of virtually unlimited disclosures, which they characterize as *Brady* material, the propositions they advance are not embodied in current law. Perhaps some of the entitlements they assert may eventually be adopted by this Court; if so, the development of these important constitutional principles should come not in response to a general prayer for relief by defense attorneys, but rather in the time-honored tradition of deciding individual cases on a fully developed factual record, with opportunity for transparent and public exposition of the issues.[3]

The petition is supported by seventeen affidavits from criminal defense attorneys who are predominantly either current and former employees of the Committee for Public Counsel Services (CPCS) or bar advocates in Hampden County. Four of those affidavits do not identify a single case, but instead make

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[3] Indeed, many of the issues raised in this petition are already under study by this Court's Standing Advisory Committee on the Rules of Criminal Procedure. See *Committee for Public Counsel Services v. Attorney General*, 480 Mass. at 705. The petitioners attempt here to circumvent those established rule-making procedures. The Court's Advisory Committee process allows input from various stakeholders, as well as public comment on proposed rules amendments, thus providing an opportunity for reasoned debate about competing interests.

generalized, unsubstantiated, and non-specific accusations of prosecutorial misconduct. (C.R.A. 00070-71 (Raring); C.R.A. 00249-00252 (Madden); C.R.A. 00542-543 (Rogers); C.R.A. 00552-554 (Hoose)).

The remaining thirteen affidavits identify a total of seventeen cases, which *in the affiants' opinions* are problematic. Of those cases, three were tried to a verdict, resulting in one conviction that was affirmed on appeal (C.R.A. 00450 ¶¶22-23 (Puryear)), one conviction that is the subject of a pending motion for a new trial (C.R.A. 00557 ¶28 (Nicoletti)), and one acquittal (C.R.A. 00414 ¶27 (Ryan)). Two cases were resolved with agreed dispositions from which the purportedly aggrieved defendant has not sought relief, one receiving a one-year period of probation (C.R.A. 00039 ¶15 (Nolen)), and one continued without a finding (C.R.A. 00175 ¶7 (Druzinsky)). One case was "closed" in some unspecified manner (C.R.A. 00410 ¶29 (Auer)), and seven were dismissed by the HCDAO. (C.R.A. 00177 ¶24 (Druzinsky); C.R.A. 0243 ¶7 (Vidal); C.R.A. 00399 ¶4 (Farrell); C.R.A. 00400 ¶9 (Fleischner); C.R.A. 00409 ¶22 (Auer); C.R.A. 00412 ¶15 (Ryan); C.R.A 00041 ¶32 (Nolen)). Four cases remain pending with pre-trial procedures ongoing that should adequately protect the rights of those defendants. (C.R.A. 00041 ¶26 (Nolen); C.R.A. 000177 ¶25 (Druzinsky); C.R.A. 00225 ¶5 (O'Connor); C.R.A. 00545 ¶8 (Murdock)). None of these affiants identifies a particular exculpatory document that the HCDAO improperly failed to

disclose. Yet, on the basis of these seventeen cases, upon which are heaped countless unfounded and conclusory allegations, the petitioners seek relief of a scope never before contemplated in this Commonwealth—even when this Court was faced with some 24,000 "Dookhan defendants"—and in the process unfairly and baselessly malign the HCDAO and potentially undermine public confidence in its operations.

ARGUMENT

I. EVEN IF SUCH AN ORDER WOULD NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE, THIS COURT SHOULD NOT INTERVENE TO ORDER THE HAMPDEN COUNTY DISTRICT ATTORNEY'S OFFICE TO CONDUCT AN "INVESTIGATION" BEFORE IT HAS BEEN ALLOWED ACCESS TO INFORMATION DEVELOPED BY OTHER AGENCIES.

A. The HCDAO Is Fully Compliant with its Constitutional Obligation, Which is to Make Reasonable Inquiries to Locate and Disclose Exculpatory Evidence, Rather than to Supervise an Independent Governmental Agency.

The Commonwealth's obligation to "conduct an investigation" is premised on a prosecutor's "duty to learn of and disclose to a defendant any exculpatory evidence that is 'held by agents of the prosecution team.'" *Commonwealth v. Cotto*, 471 Mass. 97, 112 (2015). This obligation does not contemplate a broad fact-finding mission such as that undertaken by police departments or grand juries but rather has the specific objective to identify already-existing exculpatory evidence

for disclosure in pending cases. A prosecutor is not charged with general supervisory, oversight, or investigatory responsibility for independent governmental agencies such as local police departments; much less is he granted power to control the activities of those agencies.

The specter of Dookhan/Farak looms large over this petition, and unfairly so. There is no denying the impact of those sordid chapters in Massachusetts legal history on the rights of criminal defendants across the Commonwealth over many years. However, the present petition attempts to leverage the deplorable conduct of those lab chemists to induce this Court to interfere with the administration of the HCDAO and to expand the scope of required *Brady* disclosures based on myriad conclusory and misleading allegations.

It is clear from even a cursory review of the record that petitioners' allegations in this case are simply not comparable to the unique and extreme circumstances that prompted this Court to fashion some unusual remedies in the drug lab cases. The volume of cases involved is different by orders of magnitude. There is no finding in this record that any government misconduct occurred, much less any indication that the cited examples are not amenable to individual adjudication based on an examination of the specific facts of each case. Although police misconduct is unacceptable and must be disclosed if it affects even a single

defendant, the discrete and comparatively small number of cases at issue here do not create a situation in any way analogous to the drug lab cases.[4]

This Court has recognized that the sheer volume of cases involving the drug labs raised not simply logistical concerns, in the form of the burden on district attorney's offices, defense lawyers, and the courts, but presented a likely evidentiary barrier to assessing the impact of the misconduct in a particular case. This Court noted that:

> even if Dookhan herself were to testify in each of the thousands of cases in which she served as primary or secondary chemist*, it is unlikely that her testimony, even if truthful, could resolve the question whether she engaged in misconduct in a particular case*. What is reasonably certain, however, is that her misconduct touched a great number of cases.

Commonwealth v. Scott, 467 Mass. 336, 352 (2014) [emphasis added].[5] This observation was central to this Court's decision to recognize a "conclusive presumption that egregious government misconduct occurred" in those cases. *Id*.

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[4]The affiants failed in their affidavits to provide names, dates, or other information, which impeded the HCDAO's ability to identify the cases about which affiants complain and to respond to their allegations. After extensive research, the office believes that the total number of cases covered by the thirteen affidavits citing examples is approximately seventeen. The lack of identifying details for most of the cases raises serious questions about both the merits of petitioners' allegations and whether they are genuinely interested in having this Court review the facts of those cases.

[5] This was not simply speculation on the part of the Court; Dookhan herself told investigators that she likely could not identify which samples she had properly tested and which she had not. *Id*. at 339.

However, even the creation of that conclusive presumption did not eliminate the need for individual defendants to make some showing that their cases had been affected by the misconduct. See, *Commonwealth v. Ruffin*, 475 Mass. 1003 (2016) (guilty plea not vacated for defendant whose plea preceded the signing of the drug certificate, as any misconduct was unrelated to the decision to enter the plea).

Further, unlike the drug lab cases, which each involved a single type of misconduct in a single location by a single actress, the alleged misconduct at issue here involves more than a dozen officers and a variety of allegations. The scope of the allegations belies a single root cause, and thus defies a unitary solution. The fact-intensive nature of the allegations and the need for tailored individual responses clearly demonstrate that the matter is not susceptible of global resolution.

The relief sought by the petitioners in this case far exceeds anything this Court ordered even in the extreme conditions created by the wrongdoing in the drug labs. Although attorneys for the Dookhan and Farak defendants repeatedly pressed this Court to fashion a global remedy, this Court consistently, steadfastly, and appropriately resisted their invitation. See, e.g., *Bridgeman v. District Attorney for the Suffolk Dist*., 476 Mass. 298 (2017) (Bridgeman II); *Bridgeman v. District Attorney for the Suffolk Dist*., 471 Mass. 465 (2015) (Bridgeman I); *Commonwealth v. Cotto*, 471 Mass. 97 (2015); compare *Committee for Public*

Counsel Services v. Attorney General, 480 Mass. 700, 725 (2018) (dismissal with prejudice of all cases involving Farak defendants warranted because egregious government misconduct included not only lab chemist but assistant attorneys general). However, even in *Committee for Public Counsel Services*, where the Court ordered dismissal of all Farak cases, it declined to adopt standing orders of the type sought by petitioners here. 480 Mass. at 734. There has been no showing that a case-by-case analysis and resolution—the continually expressed preference of this Court—would not adequately protect the rights of Hampden County defendants. Such an approach "preserves the ability of these defendants to vindicate their rights through case-by-case adjudication, respects the exercise of prosecutorial discretion, and maintains the fairness and integrity of our criminal justice system." *Bridgeman II,* 476 Mass. at 326. There is no justification in this case for standing orders that were deemed unwarranted even in the face of "egregious misconduct" by government lawyers in *Bridgeman*—a finding completely absent here.

The Springfield Police Department (SPD) has approximately 500 officers who make several thousand arrests per year. The department has a special Narcotics Bureau, with twenty-four officers and five supervisors. (C.R.A. 00006). The officers assigned to the Narcotics Bureau have been the subject of numerous

complaints and legal proceedings.[6] (C.R.A. 00028). In 2019, the department was evaluated by the Police Executive Research Forum, which made a number of suggestions to bring the department into compliance with best practices. (C.R.A. 00576-00593). In July 2020, the DOJ released a report on its comprehensive investigation of the SPD, which spanned more than two years and involved review of more than 114,000 documents and interviews with dozens of witnesses. (C.R.A. 00003-00029). The report's principal conclusion was that "there is reasonable cause to believe that Narcotics Bureau officers engage in a pattern or practice of excessive force in violation of the Fourth Amendment of the United States Constitution." (C.R.A. 00004). Although the report identifies a number of troubling incidents, it does not contain *any* officer names, dates or other details that would identify the incidents in question. (See, e.g., C.R.A. 00014-00017). Thus, while it is apparent that there are aspects of the SPD's operation that raise serious questions, those operational concerns are already being addressed. (R.A. 00008).

The petitioners return to the *Cotto* playbook, asking the Court to "hold that the Commonwealth's duty to thoroughly investigate SPD misconduct has been triggered," to "set a deadline for the Commonwealth to say whether anyone on its behalf will undertake that investigation," and to order that the investigation "begin

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[6] The DOJ report describes certain factors unique to the Narcotics Bureau that resulted in many of the incidents. (C.R.A. 00017-00018).

promptly… and be completed in an expeditious manner."[7] (Petition at 26). Yet the scope of the investigation demanded by petitioners dwarfs that contemplated in *Cotto*. The petitioners suggest that the HCDAO should, *at a minimum*:

- Review all reports written or modified since 2013 in which it was alleged that force was used by an SPD employee;
- Review all judicial findings questioning the credibility of SPD officers;
- Review all cases where the HCDAO filed a *nolle prosequi* after learning of possible SPD misconduct; and
- Provide periodic public reports of its findings.[8]

It is clear that these demands contemplate much more than the type of inquiry required to enable the HCDAO to "learn of and disclose" exculpatory evidence. *Commonwealth v. Cotto*, 471 Mass. at 112. Even assuming legislative

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[7] The petitioners do not reveal their definition of "expeditious," but it is worth noting that the DOJ investigation, backed by all the resources of the federal government, took more than two years.

[8] Again, petitioners mistake the role of the HCDAO. The HCDAO's obligation is to make sufficient inquiry to identify and disclose exculpatory evidence, not to keep CPCS, the ACLU, or anyone else apprised of the steps it takes to fulfill that obligation. Further, such inquiries often involve competing considerations, such as the need for confidentiality, the privacy rights of uninvolved individuals, the special protection of juveniles, and the need to avoid undue publicity that might taint a future jury pool. The disclosure resulting from a prosecutor's inquiry is the provision of exculpatory evidence to affected defendants and their counsel, not the public dissemination of such evidence or the manner in which it was obtained.

funding for an undertaking of this magnitude, petitioners offer no explanation for how the HCDAO would be authorized to conduct such an investigation, why it would be reasonable to repeat work that has been already performed by the DOJ,[9] or how the office might identify all of the reports, findings and cases fitting this broad description. Further, the proposed "investigation" is not directed toward the facts of any specific case, or even limited to the conduct of officers who are still with the SPD—much less to those who have previously testified or are currently potential witnesses in Hampden County cases. Thus, it is clear that what petitioners seek is not simply to have the HCDAO learn of exculpatory information subject to disclosure in specific cases, but rather to conduct a full-scale investigation of another Commonwealth agency. The HCDAO has neither the resources nor the responsibility to conduct a full-scale investigation to ferret out every instance of misconduct—however distant or peripheral and of whatever type—by each of the SPD's 500 officers, nor does it have the authority to order petitioners' desired reforms within the SPD. In that regard, petitioners' complaints

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[9] It also bears mention that with one possible exception, where an affiant claims that the facts as reported in the DOJ report align with his client's case—although he admits that the initials do not match (C.R.A. 00225 ¶5 (O'Connor))—none of the other affiants claim to be aware of any impact of the alleged misconduct found by the DOJ on any past or pending cases. Typical of the petitioners' affidavits, Affiant O'Connor does not identify this case to enable the HCDAO to investigate or rebut his claim.

and demands are properly directed to the SPD and its administration, and not to the HCDAO or this Court.

There is no indication that there has been any change in the standard established in *Cotto* that a prosecutor's "investigation" is intended to identify existing exculpatory material to be disclosed, not to "gather evidence" that might be helpful to the defense. In a recent murder case involving a Federal Bureau of Investigation report that contained information from a potential witness who claimed to have participated with the defendant in the killing, this Court rejected the defendant's claim that the Commonwealth had an obligation to investigate the possibility that the defendant was not alone at the time of the crime. The Court held:

> The Commonwealth had no obligation to investigate the FBI report. "While the prosecution remains obligated to disclose all exculpatory evidence in its possession, *it is under no duty to gather evidence" or to conduct further investigation "that may be potentially helpful to the defense." Commonwealth v. Wright*, 479 Mass. 124, 140, 92 N.E.3d 1175 (2018), quoting *Commonwealth v. Lapage*, 435 Mass. 480, 488, 759 N.E.2d 300 (2001). As quoted above, the FBI report references that Screw told Wolfe that the defendant shot the victim, and that Screw witnessed the murder. Nonetheless, assuming, without deciding, that the FBI report constitutes exculpatory evidence, the prosecutor satisfied his legal duty by providing the report to the defense prior to trial.

Commonwealth v. Moffat, 486 Mass. 193, 199 (2020) [emphasis added]. As it did with the FBI report in *Moffat*—incidentally, also a Hampden County case—the

HCDAO has provided the DOJ report to both of the organizations named as petitioners in this action, thereby enabling them to take whatever steps they deem appropriate to protect their clients' rights.[10] (C.R.A. 00224, 00250).

The District Attorney for Hampden County shares the concern of the petitioners regarding the potentially exculpatory nature of the "false" or "falsified" police reports claimed to have been identified in the July 8th DOJ Report.[11] In the nine months since the DOJ Report's release, he has repeatedly and inexplicably been denied disclosure of any identifying details or specific information underlying the DOJ's conclusions by both the United States Department of Justice and the United States Attorney for the District of Massachusetts. Assistant District Attorneys cannot review or disclose information that is not within their case file(s), or in the possession, custody, or control of members of the prosecution team. See *Commonwealth v. Ayala*, 481 Mass. 46 (2018) (no duty to obtain or disclose information in possession of federal government, where federal agents did not assist in the prosecution of the case); *Commonwealth v. Beal*, 429 Mass. 530, 531-

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[10] Given the lack of identifying details in the DOJ report, the HCDAO had no way to determine the individual cases where disclosure would be required. The District Attorney therefore attempted to give notice to as many defense counsel as possible by disseminating the report to the heads of the two petitioner organizations.

[11] It is important to note that the DOJ is not obligated to respond to a state court subpoena for this material. See *United States ex. rel. Touhy v. Ragen*, 340 U.S. 462 (1951); 5 U.S.C. § 301, and related regulations at 28 C.F.R. § 16.21 et. seq.

532 (1999) (duty of disclosure extends only to information known to "those individuals acting, in some capacity, as agents of the government in the investigation and prosecution of the case"); see also *Commonwealth v. Donahue*, 396 Mass. 590, 597-602 (1986) (discussing considerations in determining responsibility of state prosecutor to obtain information from federal government).

Neither the alleged misconduct of unnamed Springfield Police officers referenced in the DOJ Report nor the lack of disclosure of this potentially exculpatory material is in any way attributable to the District Attorney for Hampden County. Nor does any alleged misconduct by members of the SPD justify petitioners' reckless, unfounded, and harmful public proclamations of prosecutorial misconduct aimed at the HCDAO. Instead, these vague and unsubstantiated and claims serve only to undermine public confidence in the HCDAO and to malign unfairly the many conscientious staff members who work diligently and earnestly to fulfill their ethical obligations while serving the public. The District Attorney for Hampden County is not complicit in any claimed systemic lapse at the SPD, nor is he responsible for refusal of the DOJ and the United States Attorney for the District of Massachusetts to provide relevant documents.[12] Rather, the District Attorney for Hampden County has aggressively

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[12] The SPD, which has indicated a willingness to cooperate, and which obviously has an interest in remedying any deficiencies that may exist within the department,

sought the disclosure of the documents upon which the DOJ relied. (R.A. 00211-00218; HDA R.A. 001-003 ¶¶4-6). The DOJ's consistent stonewalling of the HCDAO's efforts to obtain potentially exculpatory information has prompted the recent filing of a federal suit seeking to compel the DOJ to disclose the factual bases for its findings.[13] What the petitioners think that the District Attorney could add at this stage to the extensive evaluations and investigations that have already been done is unclear, and still less clear is how the HCDAO can make its contribution without knowing the scope of the previously completed investigation and the facts underlying its findings.

B. This Court Should Decline Petitioners' Invitation to Assume Responsibility for the Operations of the HCDAO

G.L. c. 211 §3 confers upon this Court "the general superintendence of the administration of all courts of inferior jurisdiction, including, without limitation, the prompt hearing and disposition of matters pending therein . . . However, this superintendence power "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 . . . ."

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has likewise not been permitted access to the particulars of the DOJ's findings. (C.R.A. 00215).

[13] *Gulluni v. United States Attorney for the District of Massachusetts*, Docket No. 3:21-cv-30058

G. L. c. 211 §3. The Court will employ its G. L. c. 211 § 3 powers only when a party demonstrates "both a *substantial claim* of a violation of his *substantive rights and irremediable error*, such that he cannot be placed in status quo in the regular course of appeal." *Schipani v. Commonwealth*, 382 Mass. 685, 686 (1980) (*quoting Morrissette v. Commonwealth*, 380 Mass. 197, 198 (1980) [emphasis added]). "'[T]he rights of criminal defendants are generally fully protected through the regular appellate process.'" *Morrissette*, 380 Mass. at 198. Compare *Commonwealth v. Cousin*, 484 Mass. 1042 (2020) (single justice did not abuse her discretion in reaching merits of motion for recusal, which involved "an objective appearance of partiality").

The superintendence powers conferred by statute, *see* G.L. c. 211 § 3, permit this Court to exercise its powers over all lower courts, but do not extend to the supervision or administration of the executive branch. See, *Doe v. Sex Offender Registry Bd.*, 480 Mass. 212, 221 n.3 (2018) (superintendence authority of Supreme Judicial Court only empowers Court to exercise superintendence over courts of inferior jurisdiction, not executive agencies). In addition to prescribing the manner of investigation that the HCDAO should be ordered to conduct, petitioners suggest that the office should be required to create a "list of cases affected by any misconduct," (Petition at 26) and that it should be responsible for SPD files not in its possession or control (Petition at 29). This Court has expressly

recognized that it does not have the power to require any district attorney to promulgate specific *Brady* policies. *Matter of a Grand Jury Investigation*, 485 Mass. at 658. Nevertheless, that—among many other things—is precisely what the petitioners are asking this Court to do.

Not content with these proposed sweeping decrees, the petitioners also seek what they describe as "interim evidentiary relief," which they suggest should 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,[14] as well as appropriate jury instructions, in cases where SPD Narcotics Bureau officers are members of the prosecution team; limitations on the admission of police reports at G. L. c. 276, § 58A and probation violation hearings; limitations on SPD officers refreshing their recollections with police reports; and other relief that the Court deems fit.

(Petition at 26-27). The staggering breadth of this request—as well as its lack of specificity—leaves the HCDAO unable to respond. There has been no showing of any circumstances that would justify the abandonment of well-established

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[14] This suggestion completely ignores the DOJ's own statement about the limitations of its report: "The Department of Justice does not serve as a tribunal authorized to make factual findings and legal conclusions binding on, or admissible in, any court, and nothing in the Report should be construed as such. Accordingly, this Report is not intended to be admissible evidence and does not create any legal rights or obligations." (C.R.A. 00004, fn.2).

evidentiary principles in favor of creating new hearsay exceptions, abrogating statutory provisions, or formulating jury instructions based purely on what the petitioners speculate might have happened in a relatively small number of cases. The lack of detail or legal authority for petitioners' suggestions reflects their lack of merit.

The petitioners are engaged in a massive and very public effort to tar the HCDAO with the SPD's brush. While one or more SPD officers are often members of the prosecution team in cases arising from Springfield arrests or investigations, the HCDAO and the SPD are separate agencies with independent administrative structures. The HCDAO is not the SPD's keeper, nor is it responsible for the supervision of its officers' performance of their duties. The HCDAO does not participate in SPD internal affairs investigations and does not systematically or routinely have access to the results of these investigations or resulting discipline records. It cannot decide whether or how SPD officers should be punished, and has no voice in whether these officers should be reinstated after a suspension or termination. Without attempting to excuse SPD's alleged conduct, that conduct cannot be said to reflect on the District Attorney or his performance and awareness of his discovery obligations, much less to justify this Court's intervention in the administration of the HCDAO. Its ongoing efforts to obtain relevant information demonstrate that the HCDAO is acutely aware of its

obligations, and consistently meets or exceeds constitutional requirements. There is no basis for this Court to interfere with that process.

II. THE PETITIONERS MAY NOT CIRCUMVENT THE USUAL FACT-FINDING PROCESS WITH CONCLUSORY AND MISLEADING ALLEGATIONS OF MISCONDUCT TO OBTAIN RELIEF OF AN UNPRECEDENTED NATURE.

A. This Court's Recent Decision in *Matter of a Grand Jury Investigation* Expanded the Scope of a Prosecutor's Obligations, But There Are Significant Unresolved Questions About Its Application

In the early years after *Brady v. Maryland*, 373 U.S. 83 (1963), most court decisions dealt with the obligation to disclose exculpatory evidence developed in connection with the specific case at hand. Thus, common complaints were that inconsistent witness statements, police reports, and similar investigative materials were not properly disclosed. See e.g., *Commonwealth v. Wilson*, 357 Mass. 49, 59 (1970) (police report); *Commonwealth v. Cook*, 364 Mass. 767, 771 (1974) (police dispatcher's description of robbers); *Commonwealth v. Rooney*, 365 Mass. 484, 491 (1974) (witness statements); *Commonwealth v. Donahue*, 369 Mass. 943, 953 (1976) (grand jury testimony); *Commonwealth v. Buckman*, 461 Mass. 24, 36 (2011) (DNA evidence). The recognition of a duty to disclose exculpatory evidence generated in connection with unrelated cases is a relatively recent development, and one that raises many novel and difficult questions involving competing policy considerations. This Court's first real foray into the area of

unrelated misconduct came last fall in *Matter of Grand Jury Investigation,* 485 Mass. 641 (2020). In that case, this Court began to define the contours of an expanded duty to disclose in unrelated cases. In response to a question referred by the single justice, the Court held:

> we conclude that where a prosecutor determines from information in his or her possession that a police officer lied to conceal the unlawful use of excessive force, whether by him- or herself or another officer, or lied about a defendant's conduct and thereby allowed a false or inflated criminal charge to be prosecuted, the prosecutor's obligation to disclose exculpatory information requires that the information be disclosed to defense counsel in any criminal case where the officer is a potential witness or prepared a report in the criminal investigation.

485 Mass. at 658.

The extension of the duty to disclose exculpatory information to unrelated cases raises many theoretical and logistical questions that are not implicated where the evidence at issue is developed in connection with an investigation into the pending charges. In the latter case, the pertinent details are almost entirely contained in or apparent from a review of the Commonwealth's case file or discussion with witnesses, and it is usually a simple matter of collecting and disclosing materials such as police reports, witness statements, and laboratory results that are held by other members of the prosecution team. Where the potentially exculpatory material relates to another case, however, the process is much less straightforward.

As this Court has noted, there is no checklist that can identify all potential sources of exculpatory evidence. *Committee for Public Counsel Services v. Attorney General*, 480 Mass. at 733. It is therefore incumbent on the prosecutor to think critically in each case about the scope of the inquiry required to locate information that must be disclosed. The process of identifying such information in unrelated cases is exponentially more difficult and fraught with opportunity for both legitimate disagreements and inadvertent oversights. Further, the lack of case law in this emerging area leaves many questions about the scope of the required search and disclosure that are as yet unanswered. For example:

- When is a police officer a "potential witness" in a case? Does this designation include officers that the Commonwealth does not intend to call at trial? Does it include every officer present while a search warrant is executed—even if the officer's role is limited to standing outside a building? May a defendant trigger a duty of disclosure by expressing a tentative intention to call an officer who is not on the prosecution's witness list?

- Is the duty to disclose information in unrelated cases limited to " a police officer [who lies] to conceal the unlawful use of excessive force, whether by him- or herself or another officer, or lie[s] about a defendant's conduct and thereby allowed a false or inflated criminal charge to be prosecuted"? If not, what other types of unrelated misconduct[15] will trigger the duty?

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[15] See e.g., *Matter of Grand Jury Investigation*, 485 Mass. at 653 (discussing various types of misconduct and their potential implications); see also, *Commonwealth v. Lopes*, 478 Mass. 593, 606 (2018) (noting that officer's dishonesty, although resulting in departmental suspension, "did not result in a criminal conviction or even a criminal charge")

- What is the nature and quantum of "information in his or her possession" that should prompt a prosecutor to determine that unrelated misconduct has occurred?[16] And how far does the prosecutor's "possession" extend for this purpose? Is the prosecutor charged with knowledge of every document in any file in the office? With information in unrelated police department files? Internal investigations conducted by police department? Personnel files for each potential witness? Does "possession" require inquiry about information not in the prosecutor's "possession"?

- Under what circumstances does a judge's finding that a police officer's testimony was not credible trigger an obligation to disclose in unrelated cases? Is there a difference between a trial court decision declining to credit an officer's testimony and an affirmative finding that the officer lied?[17] What if the finding is not reduced to

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[16] This question was raised in *Matter of a Grand Jury Investigation* where, as was the case with Farak and Dookhan, the wrongdoers admitted that they had made false reports. 485 Mass. at 644.

[17] The case reports are rife with situations where an officer's testimony was not credited. See *Commonwealth v. Jones-Pannell*, 472 Mass. 429, 433 fn. 5 (2015) (judge "clearly indicated that he did not find all of the testimony credible"); *Commonwealth v. Bacon*, 381 Mass. 642, 643 (1980) (trial judge found event testified to by officers "did not take place"); *Commonwealth v. Allen*, 91 Mass. App. Ct. 1113, 2017 LEXIS 315 *5 fn. 5 (judge credited testimony in some respects and discredited it in others); *Commonwealth v. Alicia*, 83 Mass. App. Ct. 1120, 2013 LEXIS 335 *4, fn. 3 (motion judge did not credit officers' testimony); *Commonwealth v. Matos*, 78 Mass. App. Ct. 156, fn. 3 (2010) (court did not credit officer's testimony); *Commonwealth v. Hayes*, 25 Mass. L. Rptr. 487, 2009 LEXIS 139 *3 (Mass. Super. 2009) (expressly discrediting officers' testimony); *Commonwealth v. Alves*, 14 Mass. L. Rptr. 248, 2001 LEXIS 605 *22 (Mass. Super. 2001); see also *Commonwealth v. Smith*, 86 Mass. App. Ct. 1105 (2014) (judge may or may not have credited officer's testimony); *Commonwealth v. Spagnolo*, 17 Mass. App. Ct. 516, 518) (unclear whether judge's failure to mention uncontradicted testimony was inadvertent or a sign that it was not credible). For example, in a case cited by Affiant Matthew Fleischner, the trial judge declined to credit an officer's testimony that he stopped the defendant because his license plated was obscured by dirt. (C.R.A. 00402-00405). Does each and every finding of this type now require disclosure?

writing? [18] Is every prosecutor in a large district attorney's office charged with knowledge of every oral comment a judge makes from the bench? Given the potential professional implications of being singled out for disclosure, does the involved officer have any ability to contest the black mark against him or her?[19]

- Where a police officer and a defendant have given conflicting testimony and the defendant is acquitted, is the prosecutor required to disclose that information in future cases involving the officer?[20] How should the prosecutor determine whether the acquittal was based on a finding that the officer lied, as opposed to some other determination that the prosecution did not meet its burden of proof?

- Is the obligation to disclose misconduct once discovered retroactive? How far back in time does the duty extend? To every closed case involving the affected officer? To cases where the charged criminal conduct preceded the prosecution's knowledge of the evidence? To cases where the charged criminal conduct preceded the officer's misconduct?[21]

- Does a mere allegation of misconduct trigger a duty to disclose? An indictment or a civil suit?[22] What if a nolle prosequi is subsequently

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[18] This is not hypothetical; two of the "findings" cited by petitioners' affidavits were oral decisions from the bench, and are not in the HCDAO's possession. (C.R.A. 00040 ¶25; C.R.A. 00247-00248).

[19] Another unique aspect of the Dookhan and Farak cases was the availability of the chemists' own statements confirming their wrongdoing, essentially removing legitimate doubt about whether misconduct in fact occurred. Similarly, in *Matter of a Grand Jury Investigation,* the officers themselves admitted their misconduct in immunized testimony. 485 Mass. at 644.

[20] See Affidavit of Meredith Ryan, who apparently assumes that such a duty exists (C.R.A. 00411 ¶17).

[21] See, e.g. *Commonwealth v. Freeman*, 442 Mass. 779, 790 (2004) (Commonwealth did not engage in wrongdoing by failing to disclose a plea agreement that had not been finalized at the time of trial).

[22] This question is raised by the Attorney General's March 2019 indictment of fourteen officers in connection with the Nathan Bill's incident. Indictments against four of the officers have already been dismissed by the court or "nol

filed, or the officer is acquitted? What if the civil suit results in a defense verdict for the officer? Must the prosecutor check civil dockets for names of witnesses, or search out deposition testimony given in civil suits?

- Does the duty to disclose include internal prosecution memos reviewing charging decisions? Does the duty exist even where a decision is made not to charge an officer?[23] If so, does it depend on why the officer was not charged?

It would be tempting to dismiss these questions as the musings of a law professor, but a fair reading of the petitioners' submissions suggests that they would have this Court answer "yes" on all counts—without the benefit of a specific factual scenario or of advocacy from different stakeholders. Further, the enumerated list is obviously not exhaustive, and it is likely that individual cases will raise additional questions in the future.

Even where the obligation to disclose is settled, the exculpatory nature of particular evidence may not be immediately apparent, particularly when the

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prossed," while others remain pending. No indictment has resulted in a conviction or guilty plea to date. (HDA R.A. 008 ¶13; HDA R.A. 037). The dismissals resulted from decision by the trial court that the evidence presented to the grand jury by the Attorney General's Office (AGO) was insufficient as a matter of law under *Commonwealth v. McCarthy*, 385 Mass. 160 (1982). (HDA R.A. 038-056). Following these rulings, the AGO filed statements of *nolle prosequi* as to two more defendants.

[23] See e.g., C.R.A. 0039 ¶9; C.R.A. 0250 ¶6, suggesting disclosure requirement applies to HCDAO internal memorandum regarding decision not to charge in the Nathan Bill's incident, which contained no primary source material. (HDA R.A. 006-007 ¶¶9-11).

defense theory in a case may be unknown to the prosecutor or as-yet unformulated by the defense attorney. See *Matter of a Grand Jury Investigation*, 485 Mass. at 650; *Commonwealth v. Earl*, 362 Mass. 11, 14 (1972), citing *United States v. Keogh*, 391 F.2d 138, 148 (2d Cir. 1968) ("circumstances demonstrate that at most there was on the part of the prosecution a "[f]ailure to appreciate the use to which the defense could place [sic] evidence"). A striking example of such a subtle and seemingly innocuous fact is the use by one of the Farak defendants's counsel of a reference to a Saturday Patriots game to identify the year of certain notes.[24] See *Commonwealth v. Cotto*, 2017 Mass. Super. LEXIS 129 *40 (June 26, 2017). The duty of disclosure does not eliminate the need for zealous and creative advocacy of this type on the part of defense counsel. And a prosecutor who might once have considered "open file" disclosure[25] as the gold standard can no longer rely on such

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[24] Whatever the other flaws in the handling of the case, it is difficult to argue that a reasonable prosecutor should recognize that a reference to a Patriots football game on Christmas Eve was potentially exculpatory because it might identify the year of certain events.

[25] Under an "open file" policy, the entire contents of the prosecutor's file are made available to the defendant. See *Strickler v. Greene*, 527 U.S. 263, 276 (1999). While "open file" discovery has some advantages, it has also come under criticism. See, e.g., Brian P. Fox, *An Argument Against Open-File Discovery in Criminal Cases*, 89 Notre Dame L. Rev. 425 (2014) (risk that prosecutor might overwhelm defense with sheer quantity of material). See also, *Commonwealth v. Sutton*, SJ-2019-0316, Opinion of Kafker, S.J. (October 17, 2019) (prosecutor has affirmative duty to identify documents containing exculpatory evidence rather than simply to make voluminous files available to defense).

a process to satisfy constitutional standards, since the potential sources of exculpatory evidence in unrelated cases are both virtually limitless and uncategorized.[26] Often, non-disclosure results not from "tacking too close to the wind," *Kyles v. Whitley*, 514 U.S. 419, 439 (1995), but from a simple inability to read the mind and divine the intentions of defense counsel.

The District Attorney for Hampden County acknowledges and applies the constitutional, statutory, ethical, and procedural rules of the courts of the Commonwealth to each case in the office. This includes a commitment to take appropriate steps diligently and expeditiously to disclose egregious police misconduct, past or present, to defense counsel in any case where the officer is a potential witness or prepared a report in the criminal investigation of the defendant's case. Such so-called "*Brady/Giglio*"[27] measures are implemented office-wide, and utilized by all trial and appellate assistant district attorneys in Hampden County on a daily basis. (HDA R.A. 005 ¶7; HDA R.A. 034-035).

More specifically, since this Court's September 2020 advisory to the Commonwealth's prosecutors regarding the adoption of a *Brady*/*Giglio* policy to

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[26] See *Committee for Public Counsel Services v. Attorney General*, 480 Mass. at 705

[27] See *Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963).

assist prosecutors in learning of potential impeachment information,[28] the District Attorney for Hampden County has convened a working group of experienced prosecutors to formulate policy, review individual cases, and provide guidance to all assistant district attorneys. (HDA R.A. 005 ¶7). The HCDAO has also sent a request to all Hampden County police chiefs, including the commissioner of the SPD, requesting the disclosure of the type of information in the approved federal *Giglio* policy. (HDA R.A. 006 ¶7). Further, the District Attorney for Hampden County has retained the services of Robert J. Cordy, a former associate justice of this Court, to work with him in reviewing current discovery policies and practices, and developing, where necessary, new office policies and best practices surrounding *Brady* obligations (HDA R.A. 006 ¶8).

To be clear, the District Attorney wholeheartedly embraces the constitutional underpinning of *Matter of a Grand Jury Investigation*, and does not doubt that such a disclosure obligation does and should exist. Likewise, the District Attorney does not suggest that the fact that disclosure may be difficult or even burdensome somehow reduces the Commonwealth's obligation. Rather, the point is that even the best-intentioned offices may on occasion founder on the limitations imposed by state-dictated record-keeping systems and the simply

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[28] See *Matter of a Grand Jury Investigation*, 485 Mass. 641 (2020).

unavoidable need to rely on the efficiency and good faith of outside custodians such as police departments.[29] Further, given the evolving state of the law, there will inevitably be good-faith disagreements between prosecutors and defense attorneys about the proper parameters for disclosure in a given case; a prosecutor's opposition to a request made pursuant to Rule 14, Mass. R. Crim. P., is a permitted procedural device, and not a violation of *Brady* principles. And, of course, defendants have available to them a subpoena under Rule 17, Mass. R. Crim. P., to obtain exculpatory evidence in the custody of third parties. Thus, while the principle underlying the disclosure obligations enunciated in *Matter of Grand Jury* is unassailable, the operationalization of those obligations is much more difficult. The Court's opinion appropriately left for another day the resolution of questions not presented by the facts of the case.

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[29] One affiant, Jamie Rogers, criticizes Hampden for being less efficient in discovery compliance than the Northwestern District, where he now represents defendants. (C.R.A. 00542-0053). The case volume in the two districts is nowhere comparable, and the caseload per staff member in Hampden is many times higher than in the Northwestern District. See Court Data, Metrics & Reports | Mass.gov (last accessed 5/26/2021); http://cthrupayroll.mass.gov/#!/year/2021/, last accessed 5/26/2021. While this would, of course, not excuse non-compliance with constitutional obligations, the HCDAO has many more requests it must fulfill with many fewer staff, and thus it would be unreasonable to expect comparable turn-around times. Further, once documents are requested from outside custodians such as police departments, the HCDAO must await that agency's response. It does not stretch the imagination to believe that smaller police departments in the Northwestern District may respond more efficiently than the SPD.

Yet the petitioners here seek not only to resolve all of these unsettled questions in favor of themselves and their clients, but to have their expansive view of the sea change effected by *Matter of a Grand Jury Investigation* apply retroactively for some unspecified period of time. In so doing, petitioners attempt to bypass the normal judicial process of case-by-case analysis to obtain a sweeping declaration that they are entitled to anything they deem exculpatory—and that a prosecutor who dares to oppose a defense request has committed a constitutional error. While the stated basis for their entitlement to such extraordinary relief is the HCDAO's alleged systemic disregard of its discovery obligations, an examination of the affidavits submitted by petitioners reveals a striking lack of support for this accusation.

B. The Petitioners' Affidavits Provide No Basis for this Court to Find that the Hampden County District Attorney Withholds Exculpatory Evidence

The petition for relief is accompanied by seventeen affidavits from criminal defense lawyers, who purport to have knowledge of systemic failures in the HCDAO. However, the petitioners' affidavits are long on conclusory allegations and short on substance. (C.R.A. 00039 ¶18; C.R.A. 00225 ¶3; C.R.A. 249 ¶2; C.R.A. 00252 ¶16; C.R.A. 00406 ¶¶2-3; C.R.A. 00409 ¶24; C.R.A. 00411 ¶6; C.R.A. 00542-543 ¶¶6-7). Virtually devoid of names, dates, or other identifying information, they appear carefully calculated to cast aspersions on the HCDAO while leaving it completely unable to respond or dispute the allegations. For

example, Affiant Thomas O'Connor states that an unnamed assistant district attorney told him "off the record" that one of the officers involved in one of his unidentified cases "was a known liar due to the fact that he was found to have lied in another case." (R.A. 00225 ¶6). The petitioners' attorneys, experienced litigators, and this affiant, an experienced criminal defense attorney, cannot possibly expect this Court to act based upon this type of anonymous and unsubstantiated allegation, nor can they expect the HCDAO to fashion any reasonable response. It is clear that this statement and the similarly vague allegations made by the various affiants are designed to prevent, rather than promote, a full exposition of the facts underlying the petitioners' claims. Such statements have no evidentiary weight, and cannot serve as the basis for any decision by this Court. Petitioners' resort to this type of attack on the HCDAO reflects the overall lack of merit in their petition.

Further, there is a complete lack of support for the proposition that the HCDAO is actually in possession of any documents that it improperly failed to disclose. See *Commonwealth v. Johnson*, 486 Mass. 51, 65-66 (2020) (no evidence that witness was induced to testify in exchange for favorable treatment of son); *Commonwealth v. Jewett*, 442 Mass. 356, 363, fn. 6 (2004) (defendant could not identify any specific document that the prosecutor failed to disclose). Many of petitioners' conclusory allegations pertain to documents related to cases brought by

other governmental agencies, such as the United States Attorney and the Massachusetts Attorney General. (C.R.A.00039 ¶¶10-12; C.R.A. 00108-00111; C.R.A. 00249 ¶11; C.R.A. 00412 ¶11). While petitioners complain about the lack of disclosure of information relating to the indictments in connection with the Nathan Bill's case, that information is held by the Attorney General, who obtained and is prosecuting the indictments.[30] (HDA R.A. 008 ¶¶12-14). Likewise, the testimony of several SPD officers, was given to a *federal* grand jury. (HDA R.A. 011-012 ¶¶20-21; HDA R.A. 029-033). The HCDAO is not privy to federal investigations, and therefore has no way to learn that such testimony has occurred, let alone know its substance—unless and until someone with knowledge elects to share that information.[31] These agencies are not members of the HCDAO, and

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[30] That four of the indictments have already been dismissed by the Attorney General (including two for lack of evidence under *Commonwealth v. McCarthy*, 385 Mass. 160 (1982), and none of the others has yet resulted in either a plea or a conviction, (HDA R.A. 008 ¶13; HDA R.A. 037-056), underscores another difficulty in determining the time at which information becomes exculpatory, and whether it remains so forever.

[31] Despite its potentially exculpatory nature, the United States Attorney did not provide a transcript of this testimony to the HCDAO until January 2019, after a request from the HCDAO, which had been notified of the testimony by an attorney for the City of Springfield, who in turn learned of it when it was shown to a witness during a deposition in a civil case involving one of the officers. (HDA R.A. 008 ¶13; HDA R.A. 30-31). Far from representing a constitutional violation of a *Brady* obligation, this sequence of events demonstrates a willingness to provide disclosures even before the duty to do so was established in *Matter of a Grand Jury Investigation*. (HDA R.A. 11-12 ¶¶20-21; HDA R.A. 034-035).

thus their files are not within the scope of a Rule 14 request to the HCDAO. *Commonwealth v. Torres*, 479 Mass. 641, 647 (2018) (attorney general's documents not within prosecutor's control).

A common theme of the affidavits is that the affiants believe that "the "Hampden County District Attorney's Office (HCDAO) lacks sufficient *Brady* protocols to effectively meet their [sic] obligations to defendants before the Court." (R.A. 00036 ¶5). Passing the question of whether Affiant Nolen, who has been a public defender since 2012, and has apparently never worked as a prosecutor, much less supervised or administered a district attorney's office, is qualified to opine on these issues, the affidavit is completely without factual support. The affidavit also fails even to mention several of the HCDAO's *Brady* policies that are included in the record. (C.R.A. 00416; C.R.A. 00239-00242).

The principal example cited by Affiant Nolen is yet another unnamed case, where, in April 2017, he claims he learned on the day of trial about a pending civil suit[32] against an officer who was scheduled to testify. Despite Affiant Nolen's

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[32] This civil suit arises out of an incident at Nathan Bill's bar, which involved a number of on- and off-duty members of the SPD. The HCDAO's decision not to charge in this incident, as well as associated issues, is prominent among the defense lawyers' complaints. It bears noting that, as Affiant Nolen admits, the assistant district attorney—who, of course, was not involved in the civil suit—did not conceal this information, but rather raised it by way of a motion *in limine*. (C.R.A. 00038 ¶7). On the current state of the law, it is unclear that a prosecutor is obligated to disclose a pending, unresolved civil suit against a witness—or how the

admitted awareness of this information, he did not request additional time to investigation, but rather advised his client to accept an agreement to a one-year probation sentence. (C.R.A. 00039). Although he claims that his lack of access to the exculpatory statements "from and about" [33] Billingsley "significantly limited" his ability to advise his client about the proposed plea agreement, Affiant Nolen has never sought additional discovery and has never filed a motion for relief from that agreement. In essence this defense lawyer seeks to retain for his client the benefit of an extremely favorable disposition, while simultaneously disparaging the operation of the HCDAO.

The second case cited by Affiant Nolen (Docket No. Redacted by Petitioners) involves a defendant indicted for possession of heroin with intent to distribute. Again, the affidavit fails to identify any existing exculpatory evidence in the prosecutor's possession, and fails to suggest that Affiant Nolen has requested any relief from the court in this pending case. Rather, he simply complains that he will have to "devote time and resources to searching for the relevant case and transcripts and/or audio" related to a police witness. (C.R.A. 00040-00041 ¶25).

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prosecutor might be aware of or in possession of materials generated in connection with that civil suit.

[33] There is no evidence of any such statements by or about Officer Billingsley, whose asserted intent to claim a Fifth Amendment privilege led to the reduction in the charges.

This complaint completely misunderstands the prosecutor's obligation under *Brad*y, which is to disclose exculpatory facts in the "possession of the prosecution team," and not to serve as a defense investigator or paralegal by tracking down court records in the possession of a third party. See, e.g., *Matter of a Grand Jury Investigation*, 485 Mass. at 653 (suggesting that disclosure of police officer's prior untruthful statement about use of force or defendants' conduct "may cause *defense counsel, or his or her investigator, to probe more deeply* into the prior statements and conduct of the officer" [emphasis added]). It is clear that the duty to disclose does not encompass a broader duty to conduct a full investigation on behalf of the defense. To the extent that Affiant Nolen believes there has been misconduct by the Commonwealth, his remedy is to bring it to the attention of the trial court.

The affidavit alleges in summary that, "[i]n my experience, the ADA's handling of this case [involving Billingsley], including the lack of full and open disclosures concerning an officer accused of misconduct, is typical of the HCDAO and continues to impact my cases on behalf of other cases." (C.R.A. 00039 ¶18). There is no possible way for the HCDAO to respond to this type of generalization, and this Court should give it no weight.

The petitioners' affidavits also contain bold and unsubstantiated assertions about the current state of the law. In addition to criticizing the HCDAO with broad and non-specific allegations, including those which purport to divine the thought

process of the prosecutor,[34] Affiant Madden contends, without citation to any authority, that, "[t]he finding of a lack of credibility by a judge is exculpatory evidence." (C.R.A. 00252 ¶14). While there may be merit to that argument in particular circumstances, its application has many nuances relating to the nature of the finding, the context of the credibility dispute, and the role of the witness at issue. See *supra* at 25. The proper way to resolve these difficult questions is for the affiant or the lawyers he supervises to present them for resolution by a court on a complete and specific factual record.

Other affidavits simply complain that the HCDAO on occasion avails itself of procedural avenues for the resolution of discovery disputes, rather than simply acquiescing to every defense demand. For example, Affiant Jamie Druzinsky, a CPCS attorney since 2017, describes an incident where an assistant district attorney declined to produce exculpatory material as to an officer whom the

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[34] For example, Affiant Madden asserts that he "is aware of cases in my office where the HCDAO filed a *nolle prosequi* to avoid turning over exculpatory evidence about a police officer." (C.R.A. 00252 ¶¶18-21). He cites no specific cases, gives no basis for his alleged knowledge, and does not explain how he knows what motivated the filing of a *nolle prosequi* in any given case. See C.R.A. 00175 ¶6 (prosecution dismissed one charge after video shown to ADA) and C.R.A. 177 ¶¶23-24 (suggesting dismissal was related to unwillingness to produce exculpatory evidence, when *nolle prosequi* (HDA R.A. 022) clearly shows otherwise). It is important to recall that *post hoc non ergo propter hoc.*

prosecution believed to be a non-essential witness. (C.R.A. 00177 ¶20).[35] This is a legitimate ground for objection, and was then the subject of a motion under Rule 14, Mass. R. Crim. P. The HCDAO did file a statement of *nolle prosequi* before the motion was heard; [36] however, there is no basis for a claim of bad faith or other misconduct by a prosecutor simply because there is a disagreement about a witness's role in the case. In particular, there is no indication that the witness at issue either authored a police report or was a potential witness. See *Matter of a Grand Jury Investigation*, 485 Mass. at 658. Similarly, Affiant Jamie Rogers contends—with no specific instances given—that the HCDAO "would frequently oppose" his Rule 14 motions (C.R.A. 00542-00543). Far from demonstrating a *Brady* violation, an opposition filed pursuant to court rules is the prescribed and proper way for an ethical prosecutor to bring a legitimate dispute to the attention of the trial judge.

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[35] Since the affidavit gives no identifying information or date, it is unclear when these events occurred in relation to the *Grand Jury* opinion. It appears that the assistant district attorney may have been prescient about the Court's description of the witnesses to whom the disclosure obligation applied.

[36] Contrary to the implication of Affiant Druzinsky that the August 10, 2020 dismissal was somehow related to a failure to produce exculpatory evidence, (C.R.A. 177 ¶¶23-24), the statement of *nolle prosequi* filed by the HCDAO clearly indicates that the basis for the discretionary decision to dismiss the charges was the combination of the "defendant's lack of criminal history, the age of the case, and the scheduling challenges posed by the ongoing pandemic." (HAD. R.A. 022).

In addition, many of the affidavits are incomplete, inconsistent, illogical, misleading, or occasionally patently false. While the District Attorney will not attempt in this submission to identify every flaw in these affidavits, here follows a sampling of the more egregious and troubling statements:

- Affidavit of Chris Graham (C.R.A. 00031-00034). Affiant Graham, who was convicted on a firearms charge in April 2018, claims in paragraph 17 that, "[a] Motion for a New Trial was filed on my behalf and granted *because the Commonwealth failed to produce this witness's statements*" [emphasis added]. This statement is untrue. In fact, the basis for the new trial, both as asserted by petitioner's appellate counsel and as found by the trial judge, was that his defense counsel was ineffective. Judge Sweeney's opinion focuses on the many available grounds of defense that were not explored by defense counsel, and is in no way critical of the Commonwealth. (See HDA R.A. 020-021).

- Affidavit of MarySita Miles (C.R.A. 00035-00037). While it might be plausible to excuse petitioner Graham's misunderstanding about the grounds on which he sought and received a new trial, the same leniency cannot be granted to Affiant Miles, the lawyer who brought the motion. Affiant Miles details a number of failures, attempting to attribute them to the Commonwealth,[37] when in fact the court's ruling clearly laid these deficiencies at the doorstep of defense counsel, whose conduct the court called "inexcusable." (See HDA R.A. 020-021).

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[37] Although not clear from the affidavit, the exculpatory evidence with respect to the race of the person holding the gun came not from the original 911 tape, but from a later statement given by the 911 caller to the SPD Internal Investigations Unit, which was investigating a complaint made by the defendant. (C.R.A. 00036-037 ¶16; C.R.A. 00039; ¶9; HDA R.A. 018-019). The internal investigation materials were never in the possession of the HCDAO, and should have been the subject of a Rule 17 motion by defense counsel, who was aware of the investigation, as she accompanied the defendant to an interview. (C.R.A. 00035, ¶8, HDA R.A. 18, 20).

- Affidavit of Nicholas Raring. This affiant complains that he "very rarely" receives a "Use of Force Report" in discovery, and on the occasions when he has received such reports, he doesn't "remember that it ever contained more than a paragraph or two that appeared to be cut and pasted from the main police report narrative." (C.R.A. 00070-00071). In fact, this affidavit demonstrates that the HCDAO *is* complying with its obligations, as the DOJ report specifically notes that: 1) the SPD created very few use-of-force reports, including just ten generated by the Narcotics Unit over a five-year period; 2) that many arrest reports refer to a use of force that is not documented anywhere else; and 3) that the reports "regularly use rote and pat language to justify their uses of force without providing individualized descriptions." (C.R.A. 00011, 00019, 00022). The obligation of the HCDAO is to produce what exists, not to create that which does not exist. The affiant's complaint is properly directed to the SPD, the source of these use-of-force reports.

- Affidavit of Jamie Druzinsky. This affidavit recites a phrase from an internal memorandum from the HCDAO documenting the basis for the decision not to charge officers involved in the "Nathan Bill's" incident, stating that, "the victim [Jozelle Ligon] 'describes the man who punched him, who the Internal Investigations Unit report identified as [SPD Officer] Christian Cicero.'" However, the affiant omits the important next sentence from that memorandum, which states that, "[*t]his identification contradicts* Jackie Ligon's identification of Daniel Billingsley as responsible for the same behavior, the punching of Jozelle Ligon, and *also contradicts* Jozelle Ligon's previous videotaped interview with Major Crimes. No photographic array is shown to Jozelle Ligon on August 1, 2015 [the date of the description cited by Affiant Druzinsky, and no identification process is described in the Internal Investigations Unit report." (R.A. 00050 [emphasis added]). No authority is cited for the proposition that the HCDAO is required to disclose its own internal memoranda that recite the existence of conflicting information. It also bears mention that, although Christian Cicero, the officer "identified," was indicted on charges arising from this incident two days before the defendant accepted a plea to reduced charges,[38]

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[38] This is yet another case where a defense attorney claims a lack of disclosure, yet advised a client to accept a plea with knowledge of the relevant facts, and has never moved for relief from the plea agreement. See Nolen Affidavit. (C.R.A. 00039 ¶¶14-16).

those charges were *nol prossed* by the Attorney General's office three months later. (C.R.A. 00183-185).[39]

- Affidavit of Thomas O'Connor, Jr. This affiant complains about a lack of disclosure of exculpatory evidence in a case where he represents the defendant, which he suggests is one of the incidents identified in the DOJ report. However, he admits that his client's initials are different from those in the DOJ report, and provides absolutely no means by which the HCDAO can identify the case or respond to the allegations. (C.R.A. 00225 ¶5).

- Affidavit of Kelly Auer. In one of the few cases where an affidavit contains sufficient detail to identify the case, Affiant Auer cites a case of alleged non-disclosure involving an arrest for which Bigda was present,[40] which she identifies as occurring in November 2016. (C.R.A. 00406 ¶5). In fact, this arrest occurred one year earlier, in November 2015. (HDA R.A. 023). Even giving Affiant Auer the benefit of the doubt that this is an innocent mistake or typographical error, the difference is significant. The misconduct which led to Bigda's indictment occurred in February 2016, several months *after* the date of the arrest at issue, rather than several months before the arrest, and was not discovered until July 2016.[41] The retroactive application of a duty to disclose is an issue of monumental importance to the criminal justice system. If prosecutors are required to look back in time, the duty of disclosure may be almost limitless—and in fairness to them, they should be so instructed by this Court. The time sequence in this case demonstrates yet another unresolved question raised by *Matter of a Grand Jury Investigation*.

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[39] In addition to the question of whether an internal HCDAO memorandum must be disclosed, this case raises the interesting, but unresolved, questions of whether and when charges against a police witness must be disclosed, e.g., does an otherwise unsubstantiated and arguably contradictory statement potentially giving rise to an inference of misconduct require disclosure, and whether the subsequent dismissal of those charges also affects any duty to disclose.

[40] This arrest raises another unanswered question about the scope of the obligation as described in *Matter of a Grand Jury Investigation*; Bigda did not write a report, but is simply one of seven officers listed in the police report as present. His role is not otherwise described and so there is no indication that he is a "potential witness." (HDA R.A. 026).

[41] See *Commonwealth v. Villatoro*, 76 Mass. App. Ct. 645, 650 (2010) ("we do not impose a duty on prosecutors based upon events that have not yet transpired").

Further, although the DVDs involving Bigda were widely disseminated in the fall of 2016,[42] Affiant Auer did not file a Rule 17 motion—the proper vehicle for obtaining such discovery—to request the involved officers' personnel files until May 2017. (R.A. 00407-00408 ¶¶11-18).

- Affidavit of Kelly Auer. Another case cited by Affiant Auer raises similar questions related to the potential retroactivity of disclosures. However, by her description, her client's case was "closed" in July 2017, while the exculpatory federal grand jury testimony by SPD officer Edward Kalish that she claims was not disclosed was given in April 2018 (R.A. 00408 ¶13). Apart from the timing, this, as Affiant Auer notes, was a federal grand jury investigation, and therefore not in the possession of or even known to the HCDAO until December 2018 (HDA R.A. 011 ¶¶20-21). Upon learning of the existence of the testimony, the HCDAO began to disclose it in cases where Kalish was involved (R.A. 00249 ¶3; HDA R.A. 011-012 ¶22; HDA R.A. 034-036).

- Affidavit of Anna-Marie Puryear. This affidavit attempts to relitigate issues that have been decided adversely to Affiant Puryear's client in both the Superior and the Appeals Court. The allegations involved the trimming of two trees that—unknown to the prosecutor—Affiant Puryear intended to claim obscured a police officer's view. (C.R.A. 00447-00448). The trial judge permitted Affiant Puryear to explore the timing of the request to trim the trees at trial; the jury nevertheless convicted the defendant, the conviction was affirmed on appeal, and further appellate review was denied by this Court. *Commonwealth v. Gaskins*, 99 Mass. App. Ct. 1103 (2020), further appellate review denied, 486 Mass. 1114 (2021). As the reviewing courts found, there is no evidence that the HCDAO or any member of the prosecution team was aware of the request to trim the trees, failed to disclose exculpatory evidence in its possession, or otherwise committed any misconduct.

- Affidavit of Jamie Rogers. Affiant Rogers, who was employed by Springfield CPCS until 2016, claims that he "routinely had to fight to obtain" body-camera footage in the Springfield District Court. (C.R.A.

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[42] Affiant Auer also incorrectly gives this date as October 2017, a year after the DVD disclosure occurred. (C.R.A. 00407 ¶11; HDA R.A. 009-010 ¶¶17-19).

00542 ¶6). This is impossible, since none of the three police departments within the jurisdiction of that court had body cameras in 2016.

- Affidavit of Katherine Murdock. Affiant Murdock's entire six-page affidavit details the proceedings in the on-going case of petitioner Jorge Lopez. (C.R.A. 00544-00549). Her account reflects no instance of non-disclosure, but rather a disagreement with the legal positions taken by the HCDAO, particularly with respect to internal investigation evidence not within its possession. There is no indication that these issues cannot be resolved by the Superior Court in accordance with the applicable procedural rules.

The affidavits also seem to find fault with the current state of the law and the SPD's willingness to submit discovery disputes for decision by trial court judges. For example, in one rare case where an affidavit supplies pertinent details, Affiant Auer recounts a lengthy effort to obtain the SPD's internal investigation records. (C.R.A. 00407-00408). However, her description of the proceedings comports precisely with the law as established by this Court in *Commonwealth v. Wanis*, 426 Mass. 639 (1998), and *Commonwealth v. Rodriguez*, 426 Mass. 647 (1998). Both cases state quite clearly that the prosecution must produce only those internal records that are already in its possession. The proper vehicle for the defendant to obtain internal records in the custody of the police department is through a motion made pursuant to Rule 17, Mass. R. Crim P. Affiant Auer's apparent complaints are first, that the HCDAO asked her to follow the procedure prescribed by this Court, as it did not possess the requested documents, and second, that the SPD chose to litigate in response to her Rule 17 request. Affiant Ryan similarly

complains that the HCDAO will not produce internal investigation records that are not in its "custody or control," and instead expects defense counsel to follow the procedures established in *Wanis* and *Rodriguez*. (C.R.A. 00413-00414, ¶¶22-26). There is no legal principle that requires the HCDAO to accede blindly to all defense demands for discovery, or to accept defendants' legal interpretations even when they are unsupported by the law.

Further, the affidavits clearly establish that disclosures are in fact being made. For example, Affiant Madden, the Attorney-in-Charge of the CPCS Springfield Public Defender division, details six instances of general disclosures[43] of potentially exculpatory material made by the HCDAO in less than three years. (C.R.A. 00249-00250 ¶3). Affiant Ryan lists several disclosures in unrelated cases. (C.R.A. 00414 ¶27). See also C.R.A. 00407-408 ¶¶11, 13; C.R.A. 00234 ¶¶17-18; HDA R.A. 009 ¶15; HDA R.A. 010 ¶19; HDA R.A. 012 ¶22; HDA R.A. 034-035).

As is apparent from the appendix materials, Officer Gregg Bigda, a former member of the SPD Narcotics Unit, is a principal figure in some of the cited cases. And, as acknowledged by some of the affiants (C.R.A. 00409 ¶11; C.R.A. 00414

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[43] These are examples of potential misconduct unrelated to specific cases, some occurring even before this Court's opinion in *Matter of a Grand Jury Investigation*. The HCDAO has always routinely disclosed individual case materials to each defense attorney.

¶27), the HCDAO disclosed to many defense attorneys in unrelated cases a video of Bigda's troubling interactions with three juvenile arrestees.[44] What does not appear in the petitioners' submission, however, is the sequence of events by which that video came to be disclosed—a chronology which demonstrates that the HCDAO is not simply aware of its *Brady* obligations, but is diligent in fulfilling its duties, perhaps even beyond what is constitutionally required.

The incident during which the video was recorded occurred on February 27, 2016, during a booking interview of three juveniles who were arrested in Palmer, Massachusetts, and charged with stealing an unmarked police cruiser. The interview was videotaped and recorded on a DVD. A total of nine DVDs, covering approximately nine hours, were created as a result of the arrest. Buried in those nine hours was an audiovisual record of Bigda's interaction with the juveniles, lasting approximately fifteen minutes, which depicts him threatening and physically assaulting the juveniles.[45] (HDA R.A. 009-010 ¶¶16-17).

Two days after the arrest, on February 29, 2016, the Juvenile Unit of the District Attorney's office requested all of the DVDs from the Palmer Police

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[44] This incident is recounted in some detail at pages 10-11 of the petition, with no acknowledgement of the HCDAO's role in uncovering this misconduct, which the three juveniles' defense attorneys had completely overlooked.

[45] Bigda has been indicted and is awaiting trial as a result of these events. (C.R.A. 00004; 00407 ¶9).

Department as part of its routine practice to obtain exculpatory information for disclosure. The DVDs were received by the Juvenile Unit of the District Attorney's office on or about March 14, 2016. In accordance with its usual practice, the HCDAO notified the three defense counsel that the DVDs were available at the front desk, and they were retrieved by counsel on April 25, 2016. In the ensuing months, none of the defense lawyers ever contacted the District Attorney's Office about the contents of the videos. (HDA R.A. 009-010 ¶¶16-17).

On July 11, 2016, the assistant district attorney assigned to prosecute the matter sat down to watch all nine hours of video as part of his preparation for trial. When he saw the interaction between Bigda and the juveniles, he immediately brought the video to the attention of his supervisor. This young ADA's diligence in watching hours of video that the defense team had apparently not seen fit to review, and his proactive approach to reporting what he had noticed, led to the widespread disclosure of the video to defense counsel in many Hampden County cases, and was crucial to the federal indictment of Bigda.[46] (HDA R.A. 009-010 ¶¶16-17).

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[46] It is also noteworthy that this disclosure in unrelated cases predated by nearly four years this Court's explicit guidance in *Matter of a Grand Jury Investigation*, 485 Mass. 461 (2020).

Evidence of the conscientious attention to its disclosure obligations is found elsewhere in the record. For example, shortly after this Court's decision in *Matter of a Grand Jury Investigation*, Kate McMahon, Chief of the HCDAO Appeals Unit, prepared a memo to all assistant district attorneys outlining the new case law and its application to specific civil findings with regard to two SPD officers, Joseph Dunn and Daniel Moynahan. This memo contained explicit instructions about the disclosure of this information. (C.R.A. 00239-00242). Petitioners have cited no example of non-compliance with those directives.

Another example of such office-wide directives occurred with respect to federal grand jury testimony of several SPD officers, which, unknown to the HCDAO was given in April 2018. The HCDAO learned of the testimony from the Springfield City Solicitor, and immediately began to disclose it. (C.R.A.00254; HDA R.A. 011-012 ¶¶20-22; HDA R.A. 029-036). These are not the actions of an office where there is a culture of systemic non-disclosure.

Finally, the affidavits seem to take issue with the HCDAO's charging decisions, which are quite plainly beyond the scope of this Court's review. (Petition at 12-13). The decisions about whether to file charges and what charges to file are peculiarly within the discretion of the HCDAO, and are not a proper subject of this petition. See *Commonwealth v. Cheney*, 440 Mass. 568, 574 (2003). Worse yet, however, as with many of the petitioners' other allegations

against the HCDAO, this one is unfounded. There are numerous cases where SPD officers have been charged for wrongful conduct.[47] Neither petitioners nor any other citizen of the Commonwealth has an enforceable legal right to see any particular individual charged.

But perhaps even more telling than what the petitioners' affidavits assert is what they do not. Despite multiple vague and conclusory accusations, none of the affiants has cited a single case where any court has found that HCDAO improperly withheld exculpatory evidence. If the situation were as claimed, a reasonable observer would expect that defense attorneys would be making motions for new

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[47] See, e.g., *Commonwealth v. Davis*, Springfield District Court No. 2123CR000042 (Springfield police officer charged with assault and battery and assault and battery on a pregnant person); C*ommonwealth v. Petrie*, Springfield District Court, No. 1923CR00224 (Springfield police officer charged with assault and battery); *Commonwealth v. Pietrucci*, (Springfield District Court No. 1923CR 01929) (Springfield police officer charged with assault and battery); *Commonwealth v. Marrero*, (Springfield District Court No. 1823CR003287) (Springfield police officer charged with making a false report and assault and battery); *Commonwealth v. Figueroa*, Hampden Superior Court No. 1879CR00236 (Springfield police officer indicted aggravated rape); *Commonwealth v. Mitchell*, Hampden Superior Court No. 1879CR00235 (Springfield police officer indicted for aggravated rape); *Commonwealth v. Cintron*, Hampden Superior Court No. 1879CR00299 and 1879CR00322 (Springfield police officer indicted for sexual offenses against female teenagers and witness intimidation). S*ee, e.g*., *Commonwealth v Asher*, 471 Mass. 580 (2015) (Springfield police officer, working narcotics detail, convicted for the beating of an unarmed civilian during traffic stop and arrest for narcotics violations).

trial or for sanctions constantly, and winning handily. The absence of these type of anecdotes speaks volumes.

In essence, the petitioners would have this Court accept everything they assert as gospel, and to impose remedies accordingly. Yet the record clearly reflects that the claimed facts are often incorrect or incomplete, and law is stated as petitioners wish it might be, rather than as it currently is.

III. THIS PETITION IS NOT THE APPROPRIATE VEHICLE FOR THE REMEDIES SOUGHT BY PETITIONERS.

A. There is No Showing of Any Cognizable Injury to Any of the Petitioners, Who Are Without Standing to Seek Relief and Present No Actual Controversy for Decision by this Court.

The lack of standing is not simply a technicality, but a matter of subject matter jurisdiction. *Doe v. The Governor,* 381 Mass. 702, 705 (1980). Far from elevating form over substance, the standing requirement preserves the courts' scarce resources for matters of controversy between parties whose interests are directly affected by the claimed harm. See *Bonan v. City of Boston*, 398 Mass. 315, 320 (1986); *In re Care & Protection of Sharlene*, 445 Mass. 756, 771 (2006); *Commonwealth v. Lawson*, 79 Mass. App. Ct. 322, 325 n.3, *rev. denied*, 460 Mass. 1105 (2011). Injuries that are speculative, remote, and indirect are insufficient to confer standing. *Perella v. Massachusetts Tpk. Auth.*, 55 Mass. App. Ct. 537, 539 (2002). "Not every person whose interests might conceivably be adversely affected

is entitled to [judicial] review. . . . To have standing in any capacity, a litigant must show that the challenged action has caused the litigant injury." *Ginther v. Comm'r of Ins.*, 427 Mass. 319, 323 (1998) (citations omitted). None of the named petitioners here have demonstrated that there is a current controversy affecting their rights that is appropriate for resolution by this Court.

Petitioner Chris Graham. Mr. Graham was convicted of possession of a firearm on April 5, 2018. He was granted a new trial on December 30, 2019, not, as he and his lawyer would have this Court believe, because the prosecution failed to disclose exculpatory evidence, but because his trial counsel was ineffective. (HDA R.A. 013-021). A *nolle prosequi* was entered on the remaining charge against him on March 25, 2021. In an attempt to bring himself within the standing requirements, Graham complains that the charge was dismissed without prejudice, leaving him open to future prosecution—of which there is no indication and no likelihood, or that he may be subject to some future criminal charges (C.R.A. 00041). Neither of those hypothetical concerns creates a present controversy suitable for resolution by this Court.

"Ordinarily, litigation is considered moot when a party who claimed to be aggrieved ceases to have a personal stake in its outcome." *Blake v. Massachusetts Parole Bd.*, 369 Mass. 701, 703 (1976). Petitioner Graham does not have an indictment or criminal complaint pending in any court in Hampden County. Based

upon his affidavit, prosecution of Graham's most recent criminal matter terminated on March 25, 2021. (C.R.A. 00033).[48] Unfounded speculation that his case may be refiled or that he "faces the risk of prosecution … that the [SPD] might improperly cause [charges] to be brought against him" for future unspecified conduct by unnamed police officers, (Petition at 20; C.R.A. 00033), does not trigger the constitutional, statutory or procedural rights afforded a criminal defendant. *Cole v. Chief of Police of Fall River*, 312 Mass. 523, 526 (1942) (mootness applies with "special force" where an adjudication is sought regarding a constitutional issue, as "it is almost the undeviating rule of the courts, both state and federal – not to decide constitutional questions until the necessity for such decision arises in the record before the court.").

The requirement of a real controversy or stake in the outcome is an essential part of the judicial system. Courts decline to hear moot cases, in part, because "only factually concrete disputes are capable of resolution through the adversary process." *Lockhart v. Attorney Gen.,* 390 Mass. 780, 783 (1984); *Bunker Hill Distrib., Inc. v. Dist. Attorney for Suffolk Cty.*, 376 Mass. 142, 144-145 (1978) (no actual controversy, as required by G.L. c. 231A, §1, where the district attorney had

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[48] The entry of a *nolle prosequi* terminates that indictment. *Commonwealth v. Miranda*, 415 Mass. 1, 6 (1993). *See* Mass. R. Crim. P. 16 (a), ("Dismissal by the Prosecution").

not threatened to prosecute the petitioner under the obscenity statute). Where, as here, a moot issue has become a "theoretical dispute," *Silverman's Liquor Mart, Inc. v. Licensing Bd. For City of Boston,* 384 Mass. 524, 530-531 (1965), or is not apt to evade review if it arises again, *Blake v. Massachusetts Parole Bd.*, 369 Mass. at 708, it is not ripe for review. His petition should be dismissed. *Comm. for Pub. Counsel Servs. v. Attorney Gen.*, 480 Mass. 700, 722 (2018), citing *Lawyers' Comm. for Civil Rights & Econ. Justice v. Court Adm'r of the Trial Court*, 478 Mass. 1010 (2017) (upholding single justice's dismissal of petition as moot where "no further effective relief [could] be granted").

Petitioner Jorge Lopez. Mr. Lopez is currently held on drug charges pending in Hampden County. His lawyer has made a variety of discovery requests, which are being litigated under the supervision of Superior Court Associate Justice Edward McDonough. There is no indication that the normal process is incapable of resolving these discovery disputes, and therefore there is no need for this Court to become involved in Mr. Lopez's case at this stage.[49] *Roberts v. Hingham Div.*

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[49] In fact, the Commonwealth, believing that the Superior Court's order was inconsistent with *Commonwealth v. Wanis*, 426 Mass. 639 (1998), attempted to obtain interlocutory review from a Single Justice of this Court, *Commonwealth v. Lopez*, Docket No. SJ-2021-0122. The Single Justice declined to review the order, ruling that "the Commonwealth has not demonstrated that this case presents exceptional circumstances requiring the exercise of the court's superintendence power." (Slip opinion, page 2). This same principle should apply to the petitioners' present request for intervention in the Mr. Lopez's case.

of Dist. Court Dep't, 486 Mass. 1001 (2020) (petitioner, a criminal defendant, had alternative avenues to seek the relief he requested in connection with the criminal case against him).

Petitioner individuals Meredith Ryan and Kelly Auer and petitioner organizations Committee for Public Counsel Services and Hampden County Lawyers for Justice. Petitioners Ryan and Auer are attorneys who state that they commonly represent criminal defendants in Hampden County. Their complaints attack the law established by this Court, and not the conduct of the HCDAO. For example, Auer's claimed injury is that she was required to expend $7500 worth of time in pursuing internal investigation materials from the SPD. (C.R.A. 00408-00409 ¶¶14-21). However, as her affidavit makes clear, she was seeking internal SPD investigation materials, which are not in the possession of the HCDAO. In fact, the process about which Affiant Auer complains so bitterly is precisely that set forth in *Commonwealth v. Wanis*, 426 Mass. 639 (1998), and *Commonwealth v. Rodriguez*, 426 Mass. 647 (1998).

The asserted interest of these petitioners is that the alleged improper practices of the HCDAO make its work more difficult or time-consuming. (C.R.A. 00040-00041 ¶25; C.R.A. 00410 ¶26; C.R.A. 00414 ¶¶28). Yet, as noted above, the affiants have failed to identify even a single specific instance of improper practice, and instead rely on vague and conclusory allegations. Several of the

examples that can be identified are directed at the HCDAO's reliance on existing law, particularly with respect to the SPD's internal investigations not in the possession of the District Attorney. (C.R.A. 00413 ¶23-26). Fatal to these petitioners' claim for relief is their failure to show that their rights are being affected by some illegal or unconstitutional practice of the HCDAO. *See Massachusetts Ass'n of Indep. Ins. Agents & Brokers v. Comm'r of Ins.,* 373 Mass. 290, 292, 293 (1977) (need for both standing and an actual controversy).

The absence of any allegation of a specific injury is also fatal to the organizational claims. Lacking any legal cognizable injury, these indigent defense organizations might attempt to assert "representational standing." See *Comm. for Pub. Counsel Servs. v. Chief Justice of the Trial Court*, 484 Mass. 431, 447 (2020) (given the "urgent and unprecedented" situation of the COVID-19 pandemic, petitioner legal associations, as representatives of incarcerated individuals, established standing to bring claim). However, this Court has recognized that "'standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy.'" *Enos & Others v. Sec'y of Envtl. Affairs*, 432 Mass. 132, 135 (2000), quoting *Pratt v. Boston*, 396 Mass. 37, 42-43 (1985). Representative standing requires that "there must be some genuine obstacle that renders the third party unable to assert the allegedly affected right on his or her own behalf.'" *Comm. For Pub. Counsel Servs.*, 484 Mass. at 447, quoting *Planned Parenthood*

League of Massachusetts, Inc. v. Bell, 424 Mass. 573, 578 (1997). This is plainly not the case here, where the justice system provides multiple avenues for relief, both pre- and post-conviction.[50] The petitioners' claims fail not just because they have failed to show any specific controversies, but they have advanced no factual reasons why the named petitioners and unnamed defendants could not pursue available remedies in their own names. See *Barbara F. v. Bristol Div. of the Juvenile Court Dep't*, 432 Mass. 1024, 1025 (2000). *Compare Planned Parenthood League of Massachusetts, Inc. v. Bell*, 424 Mass. 573, 578-579 (1997) (abortion clinic had representational standing to seek injunctive relief against protester, where privacy concerns of patients made it difficult for patients to assert their rights).

Without minimizing the importance of identifying and disclosing potentially exculpatory information of egregious police misconduct in Hampden County, and particularly at the SPD Narcotics Bureau, petitioners' claims are factually distinguishable in urgency and scope from those cases in which representative standing has been granted by this Court. C*omm. for Pub. Counsel Servs. v. Chief Justice of the Trial Court*, 484 Mass. at 447 (COVID-19 pandemic); *Comm. for*

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[50] Indeed, petitioners Graham and Lopez are proof positive of the availability of such relief. Graham successfully obtained a new trial and subsequent dismissal of the charges against him, while Lopez is pursuing various remedies in his pending Superior Court case.

Pub. Counsel Servs., v. Attorney Gen., 480 Mass. 700 (2018) (Farak defendants). See *Bridgeman v. Dist. Att'y for Suffolk Dist.*, 471 Mass. 465 (2015) (Bridgeman I) (indigent defense organization permitted to intervene where its interests were directly related to petitioner's claim and did not attempt to add matters that were independent or wholly unrelated to the relief sought by the petitioners). The DOJ report does not provide a basis for this Court to invoke its extraordinary powers of superintendence relief to allow criminal defense lawyers and indigent defense organizations to redefine established case law or procedural rules governing the fact-specific analysis of whether a particular document is "exculpatory" to an individual defendant. Based on the breadth of the petitioners' claims, it is conceivable that every defendant prosecuted in Hampden County for some undefined period in the past might attempt to seek relief. See *Commonwealth v. Harris*, 487 Mass. 1016, 1017-1018 (2021) (distinguishing claims related to the pandemic, which might affect "every prisoner in the Commonwealth" from Dookhan's misconduct, which affected a large, but still definable class).

So too, and for similar reasons, petitioners' claim pursuant to G.L. c. 231A §1 fails. "The requirement of 'standing' is not avoided by a prayer for declaratory relief." *Doe v. Governor*, 381 Mass. 702, 704 (1980). Simply, G.L. c. 231A does not provide an independent statutory basis for standing. *Id*. at 135. And as to establishing an actual controversy, this Court has consistently said that

"[c]onclusory allegations as to official duties or potential future conflicts will not do; [i]t requires clear allegations of specific facts to state a case for any relief, or show that any real controversy exists, based upon abuse of … official discretion.'" *Samuels Pharmacy, Inc. v. Bd. of Registration in Pharmacy*, 390 Mass. 583, 591-592 (1980), quoting *Penal Insts. Comm'r for Suffolk Cty. v. Comm'r of Corr.,* 382 Mass. 527, 531 (1981).

There is no question that there are uncertainties regarding the scope of prosecutors' *Brady* obligations, particularly after *Matter of a Grand Jury Investigation*. However, the District Attorney suggests that this guidance and clarification should be done thoughtfully, publicly, by the appropriate court committees, and on complete and appropriate factual records in cases where the issues are squarely presented and all competing voices may be heard.

CONCLUSION

For the foregoing reasons, the respondent, Hampden County District Attorney's Office, respectfully requests that the petition be dismissed and that judgment enter declaring that the petitioners are not entitled to relief.

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