

**COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT**

Suffolk, ss.

No. SJ-2021-0129

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

v.

DISTRICT ATTORNEY FOR HAMPDEN COUNTY,
Respondent.

PARTIES' RESPONSE TO QUESTION 1 OF THE THIRD INTERIM ORDER

The parties submit this statement pursuant to item 1 of the Court's Third Interim Order. The parties were unable to agree on a list of agreed legal issues, but they have reached agreement on 4 contested material legal issues—i.e., legal issues on which the parties disagree. Those issues appear in Part A below. Petitioners and Respondent also propose, in Parts B and C respectively, their own lists of additional contested material legal issues.

Petitioners respectfully request that the issues listed in Parts A and B below be answered by this Court or reserved and reported to the full court. Respondent respectfully suggests that the record before the Court demonstrates that no party has standing to bring the claims asserted, and that there is no basis for the Court to exercise its powers under G.L. c. 211, § 3.

A. Parties' Joint Statement of Contested Material Legal Issues

1. Has the DOJ Report, together with other evidence of misconduct by the SPD, triggered the Commonwealth's duty to investigate and, if so, what does that duty entail?
2. When a police department has been alleged by an investigating agency to have engaged in a "pattern or practice" of misconduct, what evidentiary disclosures must a state prosecutor make in order to satisfy the duty to "learn of and disclose to a defendant

any exculpatory evidence that is ‘held by agents of the prosecution team’” in matters involving that police department? See *Commonwealth v. Cotto*, 471 Mass. 97, 112 (2015).

3. What obligations does the prosecution have when a police department declines to turn over exculpatory evidence concerning police officers who are members of prosecution teams?
4. Do the Petitioners have standing to bring this case and invoke the Court’s superintendence power?

B. Petitioners’ Statement of Proposed Contested Legal Issues

Petitioners filed this case in April 2021 out of concern that, following the July 2020 report about the Springfield Police Department by the U.S. Department of Justice (“DOJ Report”), the Commonwealth was not meeting its obligations to fully investigate and disclose egregious misconduct by the Springfield Police Department. Petitioners believe that events since the filing of the petition have narrowed the issues. For example, there appears to be no dispute that when egregious government conduct triggers a duty to investigate, as in *Commonwealth v. Cotto*, the duty can be discharged by the Commonwealth and does not necessarily need to be discharged by the District Attorney for the district where the misconduct occurred. But Petitioners believe that, in addition to the four questions listed in Part A above, the following additional question implicates fundamental disagreements between the parties and is ripe for review, by the single justice or by the full court, on the present record:

5. If the duty to investigate has been triggered, should any interim measures be imposed while the investigation proceeds?

Petitioners also acknowledge that some of the questions proposed by Respondent in Part C below are potentially relevant to the issues in this case. But Petitioners believe that many of those questions are either subsumed within the questions posed in Parts A and B, not framed in a neutral manner, or not sufficiently material to warrant resolution by the full court.

C. Respondent’s Statement of Proposed Contested Legal Issues

As detailed in the HCDAO’s Third Status Report, the Respondent does not believe that any of the petitioners have demonstrated that the outcome of this case will affect a legally protected interest that any of them possess, and that the record before the Court demonstrates that the issues raised by petitioners, as well as by other criminal defendants not party to this action, are being handled routinely and appropriately in the ordinary course of trial court proceedings.

Nevertheless, underlying Petitioners’ statement of material facts are legally unsupported assumptions and assertions about the scope of Respondent’s duty to disclose exculpatory evidence. Respondent continues to maintain that issues about the scope of the duty should be reserved for decision on appropriate individual factual records. However, if the Court chooses to address them in this form, the cases cited by petitioners raise numerous theoretical and practical questions as set forth in Part B below.

1. THRESHOLD ISSUES RELATIVE TO PETITIONERS’ STANDING AND THE APPLICABILITY OF G.L. c.211 §3.

1. Whether the outcome in this case would affect any legally protected interest of Chris Graham?
2. Whether the outcome of this case would affect any legal protected interest of Jorge Lopez?
3. Whether the outcome of this case would affect any legally protected interest of Kelly Auer?
4. Whether the outcome of this case would affect any legally protected interest of Meredith Ryan?
5. Whether CPCS has established that there is “some genuine obstacle that renders the third party unable to assert the allegedly affected right on his or her own behalf” so as to establish organization standing under *Planned Parenthood League of Mass., Inc. v. Bell*, 424 Mass. 573, 578 (1997).
6. Whether HCLJ has established that there is “some genuine obstacle that renders the third party unable to assert the allegedly affected right on his or her own behalf” so as to establish organization standing under *Planned Parenthood League of Mass., Inc. v. Bell*, 424 Mass. 573, 578 (1997).

7. Whether the Petitioners' record supports their allegation that the HCDAO systematically fails to disclose exculpatory evidence?

8. Whether the Petitioners' record supports their allegation that any petitioner's rights will not be adequately protected by the normal appellate process, thus warranting relief under G.L. c.211 §3?

2. ISSUES IF THE COURT DETERMINES THAT PETITIONERS HAVE STANDING AND THAT RELIEF IS APPROPRIATE UNDER G.L. c.211 §3

1. Whether the Petitioners' record supports their claim that this Court should expand the scope of required *Brady* disclosures in a petition brought under G.L. c.211 §3, rather than by relying on the usual rule-making process and/or the development of the common law?

2. In what ways does the doctrine of separation of powers limit this Court's ability to dictate the activities and operations of the HCDAO?

3. To what extent, if any, does a state court prosecutor have an obligation to conduct an investigation into alleged police misconduct beyond that required 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)?

4. Does the prosecution have a duty to investigate for the purpose of creating exculpatory evidence beyond that which already exists and is "held by agents of the prosecution team," *Commonwealth v. Cotto* 471 Mass. 97, 112 (2015); *Commonwealth v. Moffat*, 486 Mass. 193, 199 (2020)?

5. In the absence of a criminal conviction, a civil judgment, or an admission by the officer under oath, under what circumstances and by what means, if any, should a prosecutor "determine" whether an officer has "lied to conceal a police officer's use of excessive force, or lied about a defendant's conduct and thereby allowed a false or inflated criminal charge to be prosecuted." Specifically, do any of the following events trigger a duty to disclose:

- (a) A trial judge's disbelief of an officer's testimony on an issue
- (b) A trial judge's express finding that officer lied
- (c) The materiality of the officer's testimony to the issue being decided
- (d) Contradictory testimony of a defendant, an eyewitness?, or another officer?
- (e) An officer's invocation of a Fifth Amendment privilege in a civil case or a criminal case?

6. Does the prosecutor's obligation to disclose potentially exculpatory evidence in unrelated cases extend to situations other than that announced in *Matter of a Grand Jury Investigation* that an officer "lied to conceal a police officer's use of excessive force, or lied about a defendant's conduct and thereby allowed a false or inflated criminal charge to be prosecuted." If so, what other types of exculpatory evidence must be disclosed to defendants in unrelated cases?

7. If such an obligation exists, under what circumstances must disclosure be made:

- (a) Upon learning of an allegation of misconduct by an officer, such as a civilian complaint or a CPHB complaint, regardless of whether it has been heard or substantiated?
- (b) Upon learning that a civil suit alleging misconduct has been filed against an officer?
- (c) Upon learning that an officer has been indicted for a crime, and if so, any crime?
- (d) Does the disclosure obligation continue if a civil case is settled without a finding or admission of officer misconduct?
- (e) Does the disclosure obligation continue if the officer is acquitted of criminal charges?

8. Does the prosecutor have an obligation to monitor the dockets and proceedings in civil cases and CPHB hearings to learn of proceedings involving police witnesses?

9. To what extent, if any, does the prosecutor's disclosure obligation apply retroactively to cases:

- a) where the charged conduct occurred before the date of police misconduct?
- b) where the charged conduct occurred before the date of discovery of police misconduct?
- c) that were disposed of before the date of police misconduct?
- d) that were disposed of before the date of discovery of police misconduct?

Dated: February 22, 2022

Respectfully submitted,
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