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.

RESPONDENT'S RESPONSE TO PETITIONERS' OBJECTIONS TO REPORT OF SPECIAL MASTER

Pursuant to the order of this Court dated December 14, 2022, Respondent submits the following responses to Petitioners' objections to the Report of Special Master dated October 18, 2022. Respondent maintains that the Special Master's Report accurately reflects the testimony and documentary evidence in the record, and has limited its responses to Petitioners' objections that would materially or importantly alter the Special Master's work. The Respondent further opposes Petitioners' continued attempts to relitigate issues decided adversely to them by the Special Master, and to create new findings that the Special Master decline to make. The Respondent takes no position on Petitioners' numerous other objections and suggested additions or edits, and leaves those to the discretion of this Court.

Respondent further objects to the Petitioners' suggestion that "guidance from the full court about the issues presented here is all the more necessary because the U.S. Department of Justice just announced an investigation into the Worcester Police Department in order to 'assess whether WPD engages in a pattern or practice of excessive force or engages in discriminatory policing based on race or sex.'" That DOJ investigation has just begun, and involves different issues, a

different police department, and a different county. The Respondents should not be required to litigate issues based on a news release proffered by Petitioners after the issuance of the Special Master's report. To the extent that Petitioners have concerns about events in Worcester County, those should be addressed in some other forum or lawsuit.

I. RESPONSES TO PETITIONERS' OBJECTIONS TO FACTUAL FINDINGS

Pg. 10, Lines 8-9: "The prosecutor, like defense counsel, did not have either the CAD log or the 911 recording, and did not know that either existed."

OBJECTION:	This statement is clearly erroneous because it purports to make a finding about what the trial prosecutor in Mr. Graham's criminal case did not know. That prosecutor neither testified nor submitted an affidavit in this case, and thus there is no competent evidence of what he did not know. Instead, at trial in Mr. Graham's case, the prosecutor asserted that an off-duty police officer called 911 and then elicited testimony that the officer placed calls to dispatch, demonstrating knowledge that at least one recorded call was made. Report of Special Master at 11 n. 7. Moreover, the Commonwealth conceded in its opposition to Mr. Graham's motion for a new trial that the CAD sheet was in its constructive possession. Commonwealth's Opposition to Defendant's Motion for a New Trial, *Commonwealth v. Graham*, No. 1779CR00403 (Hampden Sup. Ct.), C.R.A. 1633.
RELIEF REQUESTED:	To achieve alignment with the master's determination to limit the factual findings to assertions based on the personal knowledge of witnesses rather than hearsay, see Report of Special Master at 3, and to avoid statements about Mr. Graham's criminal case that are incorrect as a matter of law, all findings as to the knowledge of the prosecutor in Mr. Graham's criminal case should be deleted:
RESPONSE:	This statement is not clearly erroneous; in fact, it is true. The existence of a CAD log and a 911 recording, which were in the custody of the Communications Unit of the SPD (although legally in the Commonwealth's constructive possession) is not inconsistent with the undisputed evidence that the trial prosecutor did not actually have either one in his possession. Further, the prosecutor's reference in opening statement to a 911 call (CRA 1612) was a generic reference to the calls for help made by Officer McNabb. Officer McNabb's actual testimony was that the calls were made to "dispatch" (CRA 1614-1615). Neither Graham's counsel on the new trial motion nor Petitioners in this proceeding offered any evidence that the prosecutor knew that the number Officer McNabb called was recorded.

Pg. 10, Lines 15-19: "Each request for a 911 recording sets off a search process in the SPD Communications Unit, where personnel listen to recordings at or around the time requested. If there is no recorded call identified at the requested time, the search process extends through a broader period, consuming police time and thereby slowing responses to other requests."

OBJECTION: This statement, which was provided through the testimony of First Assistant DA Fitzgerald and objected to by Petitioners, is based on hearsay and falls outside Fitzgerald's personal knowledge. See 9/15/22 Hrg. Tr. at 773:14-19 (Fitzgerald: "I have been to the communications. It wasn't specifically to find out what was involved. It was specifically because they needed us to be more specific about what we were asking for, because the volume of calls was becoming overwhelming, and they couldn't respond quickly enough."). No personnel from the Springfield Police Department ("SPD") or City of Springfield ("City") testified or submitted evidence as to the practices of the SPD communications department.

RELIEF REQUESTED: To achieve alignment with the master's determination to limit the factual findings to assertions based on the personal knowledge of witnesses, see Report of Special Master at 3, all references to the internal practices of the SPD Communications Unit should be deleted.

RESPONSE: This objection states no permissible basis under Rule 53. First Assistant Fitzgerald has been to the Communications Unit and seen the systems involved. Further, the factual finding, which is correct, is relevant for the non-hearsay purpose of explaining why it was not the routine practice of the HCDAO to request 911 calls in every case, and thus why there was no prosecutorial misconduct in the *Graham* case.

Pg. 11, Lines 8-11: "Petitioners also contend that the prosecutor should have known that there was a 911 call because the arrest report, as well as McNabb's later testimony, indicated that McNabb called the dispatcher for assistance. The evidence does not support that contention; the evidence indicates, rather, that McNabb called a direct line to the dispatcher, not 911."

OBJECTION: This finding is clearly erroneous. SPD Officer McNabb's calls to dispatch were witness statements subject to mandatory discovery. Mass. R. Crim. P. Rule 14(a)(1)(A)(vii). Officer McNabb's calls to dispatch and the 911 call appear in a single audio file bearing call number 17-139244 – the same call number appearing in Mr. Graham's arrest report. Tab 51 of Fitzgerald Vol. 2, Dkt. No. 104 (Oct. 7, 2022).

It does not appear to be in dispute that the prosecutor knew of Officer McNabb's calls to dispatch. Report of Special Master at 11 n. 7. If the prosecutor had disclosed McNabb's calls, as Rule 14 required, he would also have disclosed the 911 call. But he made no such disclosures.

RELIEF REQUESTED: This paragraph should be deleted.

RESPONSE: The Special Master has cited the testimony correctly. See CRA 1614-1615. Further, Petitioner's contention that the prosecutor should have been alerted by the arrest report to the existence of a 911 call is refuted by the testimony and actions of both Graham's trial counsel and post-conviction counsel, neither of whom was alerted by the entry that Petitioners claim should have alerted the trial prosecutor. Neither Graham's counsel on the new trial motion nor Petitioners in this proceeding offered any evidence that the prosecutor knew that the number Officer McNabb called was recorded.

Pg. 13, Lines 3-5: "Graham's trial counsel testified before me on September 14, 2022. **She was not asked, and did not say,** whether she had made a strategic choice not to seek the IIU report." Tr. 356-368

OBJECTION: This finding is clearly erroneous. At the hearing on September 14, 2022, counsel for the DAO specifically asked Mr. Graham's trial counsel whether she had "want[ed] the district attorney to have the statement that he [Mr. Graham] gave to the IIU." 9/14/22 Hrg. Tr. at 353:22-24. In response, she testified: "The way I look at it is there's no reason to not provide a statement.....So this wasn't a tactical design by myself. It's just something that I neglected to do." *Id.* at 354:1-10.

RELIEF REQUESTED: These sentences should be deleted.

RESPONSE: This finding is not clearly erroneous, as the testimony of Graham's defense counsel is ambiguous and in part, non-responsive. The question asked about the substantive content of the Graham's statements to the IIU, which were contradicted by other witnesses as well as by physical and documentary evidence. The Special Master might plausibly have rejected defense counsel's testimony as not credible, and found that no reasonable defense lawyer would have wanted Graham's statement to come to the attention of the prosecutor. This inference would be particularly warranted in light of Graham's decision to testify in his own defense, a decision that would have been practically foreclosed had the prosecutor been in possession of Graham's statements to the IIU. See e.g., 9/14/22 Tr. at 356-368

Pg. 14 n. 8: "That said, it does not follow that Graham would have avoided conviction if the 911 caller had testified at trial **Whether the outcome would have been different is impossible**

to determine."

OBJECTION: These statements are at least in considerable tension with, if not directly contrary to, to the findings of Judge Sweeney, who granted Mr. Graham's new trial motion. Judge Sweeney held that had counsel obtained the 911 call, "it is reasonable to conclude that the jury verdict would likely have been different." HDA R.A. 20. Judge Sweeney also found:

(1) "The Commonwealth's case was thin, as it rested on the credibility of two witnesses with inconsistent and facially unrealistic accounts of the incident; accounts that were contradicted by the credible unimpeached testimony of Bosworth." HDA R.A. 20.

(2) "The information in the IIU report, and particularly the 911 caller's account in that report, would have substantially bolstered the defense that the defendant had no gun and effectively undermined the credibility of [Officers] McNabb and Pafumi." *Id.*

Neither the Petitioners, nor the DAO, presented argument or evidence as to the issue of materiality for the newly discovered evidence in Mr. Graham's case.

RELIEF REQUESTED: Because this footnote is unwarranted by the evidence before the Special Master or otherwise tainted by errors of law, it should be deleted.

RESPONSE: This objection states no permissible basis under Rule 53, as it simply argues that the Special Master should have afforded additional weight to Judge Sweeney's findings. The Special Master's observation is entirely accurate: there is no way at this time to determine what the jury's verdict would have been under the counterfactual assumption that the 911 caller testified. At most, different observers could reach different conclusions. The Special Master was warranted in making this finding based on the evidence at the hearing, which included factors apparently not considered by Judge Sweeney. For example, Judge Sweeney did not address the potential harm to Graham's credibility (and the resulting impact on his decision to testify at trial) if the jury heard not just the 911 caller—which was largely duplicative of what she referred to as "the credible unimpeached testimony of Bosworth"—but also the numerous statements made by Graham to the IIU which were clearly contradicted by other evidence. See e.g., 9/14/22 Tr. at 356-368.

Pg. 15, n.9: "**The DAO filed the first Rule 17 motion, requesting the Court to require SPD to produce a document referred to as the "Kent Report,"** to be discussed further *infra***. The defense later adopted that motion.** The Court denied the request. Lopez moved for reconsideration of that ruling, but resolved the case by plea while that motion was pending."

OBJECTION: This finding is clearly erroneous because the DAO's Rule 17 motion in Mr. Lopez's case did not seek the Kent Report. To the contrary, when counsel for Mr. Lopez filed a proposed order that would have required the City of Springfield to produce the report, the DAO objected. See Commonwealth's Opposition to Def. Motion for Clarification Order, *Commonwealth v. Lopez*, No. 1979CR00143 (Hampden Sup. Ct. Nov. 22, 2019), C.R.A. 1109-110. Defense counsel then filed a Rule 17 motion specifically seeking the Kent Report. See Def. Mot. for Third Party Records, *Commonwealth v. Lopez* (Feb. 3, 2022), C.R.A. 1156. The Court denied that motion. Ex. 38, Endorsement on Mot. for Third Party Records in *Commonwealth v. Lopez*, Suppl. Decl. of Matthew Horvitz, Dkt. No. 79 (May 26, 2022). Defense counsel moved for reconsideration of that ruling. *Id.* at Ex. 39, Def. Mot. for Reconsideration in *Commonwealth v. Lopez*. That motion was pending when Mr. Lopez resolved the case by plea.

RELIEF REQUESTED: Petitioners request footnote 9 be deleted, or in the alternative amended to read: "Mr. Lopez filed a Rule 17 Motion for the Kent Report on February 3, 2022. The Court denied the motion. Lopez moved for reconsideration of that ruling, but resolved the case by plea while that motion was pending."

RESPONSE: The Special Master's finding is correct. The HCDAO in fact filed the first Rule 17 motion on May 6, 2021, seeking to obtain documents from the SPD. The Commonwealth's motion used the precise language of defendant Lopez's request to the HCDAO. Docket No. 83, Supplemental Affidavit of Jennifer Fitzgerald, Ex. 3, Paper No. 37; Hearing Ex. 63. The Petitioners have never taken the position that Lopez's initial request did not include the Kent report. It was not until many months later that Lopez's counsel filed her own Rule 17 motion.

Pg. 19 n.12: "[Gregg Bigda] is no longer employed by SPD."

OBJECTION: This sentence is clearly erroneous because it is not supported by the evidence before the Special Master and is contradicted by public records. The City of Springfield's Open Payroll records list Gregg Bigda as a police officer with an annual salary of $72,072. See Pet'rs' Reply to Respondent's Proposed Findings of Subsidiary Facts, Dkt. No. 86 (July 15, 2022), ¶ 78.l, citing to https://www.springfield-ma.gov/finance/checkbook-payroll. According to the City's payroll records, as of July 22, 2022, Officer Bigda had been paid $40,194 as of that date for 2022, and as of October 14, 2022, the records reflect that an additional $16,632 had been paid, for a total of $56,826 so far in 2022. See *id.*

RELIEF REQUESTED: Petitioners request that this sentence be deleted.

RESPONSE: This sentence appears not in the location cited by Petitioners, but at the end of the first paragraph on page 20, and is entirely accurate. Docket No. 83, Supplemental Affidavit of Jennifer Fitzgerald, paragraph 22. Petitioners

cite, and incorrectly interpret, a website listing payments made by the City of Springfield to various individuals. Such payments may be made for a variety of reasons, including back pay. See Back pay for suspended Springfield Police Officer Gregg Bigda presents conundrum for City Hall after his acquittal on civil rights charges - masslive.com . There was no evidence that Bigda has performed any police work or offered any court testimony since the time of his federal indictment.

Pg. 22, Lines 12-13: "Since then, the DAO **has provided** the AGO's letter regarding each of the officers to defense counsel in each case involving each indicted officer."

OBJECTION: This statement is clearly erroneous. During the evidentiary hearing on September 15, 2022, Attorney Meredith Ryan testified, without contradiction, that the DAO never informed her "that Officer Basovskiy was charged in connection with the Nathan Bill's incident." 9/15/22 Hrg. Tr. at 638:10-13; see also Ryan Aff. ¶¶ 10-11, C.R.A. 412. First Assistant DA Fitzgerald conceded that while it was the intent of the DAO to disclose the AGO's letters in every relevant case, she could not confirm that a letter was provided in every case and it was possible that they missed some. 9/15/22 Hrg. Tr. at 808: 9-12.

RELIEF REQUESTED: The sentence should be amended to read: "Since then, the DAO intended to provide the AGO's letter regarding each of the officers to defense counsel in each case involving each indicted officer."

RESPONSE: First Assistant Fitzgerald testified that it was the office's policy to provide the AGO letter either by leaving it with discovery at the front desk for retrieval by defense counsel, or by giving it in hand to defense counsel at a court appearance. 9/15/22 Tr. at 806-807. The Special Master was warranted in adopting this testimony and in rejecting the testimony of Attorney Ryan (who is both a party to this case and a board member and officer of HCLJ, see Special Master's Report at 8), as she did with other affiants. See e.g., Special Master's Report at 49, fn 33, 51, fn34, and 67.

Pg. 27, Lines 16-21: "The DAO responded [to ACLUM's public records request] initially by letter dated September 21, 2019, providing the following: (a) **federal grand jury minutes** with names of individual officers redacted; . . . (c) an internal memorandum dated May 13, 2019, **regarding disclosure of certain information from the Bradley civil case**."

OBJECTION: These statements are both clearly erroneous.

With respect to (a), the DAO did not provide, and has never purported to provide, federal grand jury minutes to the American Civil Liberties Union of Massachusetts (ACLUM). See Letter from DAO Records Officer Joseph Pessolano to ACLU Attorney Lewis, dated Sept. 21, 2019, C.R.A. 1100-101.

With respect to had, the record cannot support a finding that the internal memorandum provided by the DAO on September 21, 2019, concerned the *Bradley* civil case. The internal memorandum, dated May 13, 2019, was highly redacted in order to protect the name of grand jury witnesses; such a process is inconsistent with the procedure in a civil case. *Id.* After a public records request filed by ACLUM on November 23, 2022, ACLUM received from the DAO an internal memorandum dated October 9, 2020, concerning the *Bradley* civil case. See Memorandum from Kate McMahon to Hampden County Assistant District Attorneys (Oct. 9, 2020), C.R.A. 239.

RELIEF REQUESTED: Petitioners request that subsection (a) be deleted and subsection (c) be modified as follows: "an intra-agency memorandum dated May 13, 2019 regarding disclosure of grand jury materials to defense attorneys."

RESPONSE: As the September 19, 2019 letter cited by Petitioners demonstrates, the HCDAO provided to the ACLUM twenty-one letters identifying the grand jury minutes in its possession. CRA 1100. If paragraph (a) is to be modified, it should not be stricken, but rather amended to reflect that the ACLUM was provided with *a list* of the available grand jury minutes, rather than the minutes themselves (which had already been provided to CPCS and the HCLJ, and were regularly being provided to defense counsel, HDA R.A. 11-12; Hearing Exs. 21, 22).

With respect to paragraph (c), Petitioners omitted the actual memorandum from their filings, and so it is not part of the record.

Pg. 28 n.23: "As will be discussed further *infra*, as of that time the DAO had begun to compile a database of materials for disclosure. The grand jury minutes **provided with the response** were the first items in the database."

OBJECTION: As noted in the preceding objection, the DAO did not provide federal grand jury minutes to ACLUM.

RELIEF REQUESTED: Petitioners request that "provided with the response" be deleted; instead, Petitioners suggest that the sentence may read "The federal grand jury were the first items in the database."

RESPONSE: See previous response. The HCDAO provided a list of the available federal grand jury minutes to the ACLUM.

Pg. 29, Lines 1-3: "**Within days** after issuance of the DOJ Report, the DAO sent it to CPCS and HCLJ, and embarked on a series of communications, by telephone and letter, with DOJ and the US Attorney's office seeking information underlying the report."

OBJECTION: The finding that the DAO sent the DOJ Report "[w]ithin days" to CPCS and HCLJ is clearly erroneous. The DOJ Report was released on July 8, 2020. C.R.A. 3-30. The DAO sent the DOJ Report to CPCS and HCLJ over a month later on August 12, 2020. Report of Special Master at 26. This transmittal came only after ACLUM and CPCS sent the DAO a letter on August 6, 2020, which, as the Special Master notes, raised concerns about the DAO's response to the DOJ Report. *Id.* at 29.

RELIEF REQUESTED: Petitioners request this sentence be deleted. On Page 29, following the paragraph describing the ACLUM and CPCS letter of August 6, 2020, a sentence could be added stating: "After receiving the August 6 letter outlining concerns from the ACLU of Massachusetts and CPCS, the DAO sent the DOJ Report to CPCS and HCLJ."

RESPONSE: The Special Master's finding is supported by the record. Not only did the HCDAO send the publicly available and widely reported DOJ report to CPCS and HCLJ, as of July 20, 2020, ten days after the report was issued, First Assistant Jennifer Fitzgerald made a telephone call to the Civil Rights Division of the United States Attorney's Office, her first of numerous communications attempting to obtain the data on which the DOJ report was based. See HDA R.A. 002-004.

Pg. 29, Lines 15-16: "The DAO **responded** [to the August 6 ACLUM and CPCS letter] by producing copies of correspondence showing its efforts to obtain **the information** underlying the DOJ report."

OBJECTION: This statement is clearly erroneous insofar as it suggests that the DAO responded directly in writing to the ACLUM and CPCS letter of August 6, 2020, and insofar as it suggests that the DAO has at any time requested all (as opposed to just certain) information underlying the DOJ Report. In fact, the DAO never responded directly to the Aug. 6 letter. The correspondence referenced by the Special Master's Report was provided by the DAO to HCLJ and CPCS on August 20, 2020, in a letter that did not purport to respond to the August 6 letter. See Aug. 20, 2020 Letter from First Assistant DA Fitzgerald to Springfield PDD Attorney in Charge Madden, C.R.A. 276. That Aug. 20 letter described a request by the DAO to the DOJ for certain SPD documents—namely, those reflecting false statements, but not those reflecting excessive force. See *id.*; Aug. 19, 2020 Letter from District Attorney Gulluni to Assistant Attorney General Dreiband, C.R.A. 230-31.

RELIEF REQUESTED: Petitioners request the sentence be modified as follows: "On or about August 20, 2022, the DAO produced copies of correspondence showing its efforts to obtain certain information underlying the DOJ report."

RESPONSE The Special Master's finding is supported by the evidence. The purpose of Rule 53 is not to permit a dissatisfied party to edit findings to include its preferred language.

Pg. 35, Lines 6-7: "None of the recipients [of the redacted exhibits associated with the Kent Report] has asked the DAO for unredacted copies."

OBJECTION: Defense attorneys have sought the unredacted exhibits. See, e.g., Motion for Clarification of Exculpatory Information Provided by the Commonwealth and for Additional Discovery Regarding Police Witnesses, *Commonwealth v. Morales*, No. 2079CR00287 (Hampden Sup. Ct. filed Oct. 12, 2022); Defendant's Motion for Clarification of Exculpatory Information Provided by the Commonwealth and for Additional Discovery Regarding Police Witnesses, *Commonwealth v. Soto*, No. 1979CR00528 (Hampden Sup. Ct., filed Oct. 31, 2022).

RELIEF REQUESTED: Petitioners request that this sentence be deleted.

RESPONSE: This finding accurately recites the evidence in the record. The motions now cited by Petitioners are not part of the record in this case, and were never been presented to the Special Master. In fact, the *Soto* motion was filed two weeks after the Special Master issued her report. From the time HCDAO began to provide these exhibits to defense organizations and counsel in August 2021 through the time of the hearing in September 2022, no one requested unredacted copies, despite the HCDAO's indication that it was willing to address any requests for redactions. 9/15/22 Tr. at 733;

Hearing Exhibits 19, 20 ("…we are prepared to respond promptly to any motions seeking the redacted information.").

Pg. 71, Lines 12-13: "Lopez's conviction occurred upon his guilty plea, **after his counsel obtained full access to information about the officers involved**."

OBJECTION:	This finding is clearly erroneous. Mr. Lopez's criminal defense lawyer, Attorney Katherine Murdock, testified that she had not received all of the evidence she had sought regarding potential misconduct of the officers involved in the case. 9/15/22 Hrg. Tr. at 686:21-22. For example, a motion filed by Attorney Murdock seeking the Kent Report was pending when Mr. Lopez pleaded guilty. Ex. 39, Def. Mot. for Reconsideration in *Commonwealth v. Lopez*, Horvitz Suppl. Decl., Dkt. No. 79 (May 26, 2022).
RELIEF REQUESTED:	Petitioners request that the words "after his counsel obtained full access to information about the officers involved" be deleted.
RESPONSE:	The Special Master's finding is not clearly erroneous. The Springfield Police Department produced more than 1000 pages of information, containing the full IIU files and other documentation about the ten officers. See Hearing Ex. 3, Supplemental Affidavit of Jennifer Fitzgerald, Paragraph 26 and Exhibit 2.

II. OBJECTIONS IN WHICH PETITIONERS PROPOSE FINDINGS OF FACT

With respect to the following two objections, Petitioners propose the Report also be modified to add factual findings that would clarify the facts, and which are not inconsistent with the Special Master's Report. See Mass. R. Civ. P. 53(h)(1).

Pg. 21, Lines 11-14: "As explained by First Assistant DA Fitzgerald, in the absence of evidence sufficient to support a determination that any particular officer committed any offense, the DAO has concluded that it cannot identify a set of cases in which the information might provide potentially exculpatory material."

OBJECTION: Petitioners object to this finding on the grounds that whether evidence is "sufficient to support a determination that any particular officer committed any offense" is a legal conclusion unsupported by the record.

It is undisputed that four men were assaulted outside of Nathan Bill's Bar on April 8, 2015, by off-duty SPD officers. See Report of Special Master at 23 (detailing the convictions of SPD Officers Daniel Billingsley and Christian Cicero). It is further undisputed that, as early as July 26, 2016, the DAO had in its possession information that connected specific officers to the event, including witness identification statements, information that officers asserted their rights against self-incrimination during questioning by police investigators, and information that certain officers called out sick from work the day after incident. See generally DAO Island Pond Assault Findings (Feb. 2, 2017), C.R.A. 312-320; Duda Special Report to Comm'r Barbieri (Aug. 14. 2015), C.R.A. 54-69; Andrew Report to Comm'r. Barbieri (Aug. 3, 2015), C.R.A. 322-395.

In addition, notwithstanding the DAO's decision that it lacked sufficient grounds to prosecute officers in connection with the Nathan Bill's incident, First Assistant DA Fitzgerald testified that by February 2017 she knew that Officers Billingsley and Christian Cicero had been present at the incident, that Billingsley called out of work the next day with a "severe headache," and that Officer Cicero missed the next two days of work with a broken toe before going on leave. 9/21/22 Hrg. Tr. at 973-977. Fitzgerald conceded during her testimony that the DAO obtained files containing this information between August 2015 and February 2017, yet the DAO did not regularly disclose those files to criminal defense attorneys even in cases involving Officers Billingsley and Cicero. *Id.* at 977-78.

RELIEF REQUESTED: Petitioners suggest that the sentence be changed as follows: "According to First Assistant DA Fitzgerald, the DAO concluded that it cannot identify a set of cases in which the information might provide potentially exculpatory material."

In addition, to ensure accuracy and completeness, Petitioners request that the following findings be added to the Special Master's Report:

- The Special Report authored by SPD Sgt. Andrew, which was in the possession of the DAO no later than Feb. 2, 2017, see generally DAO Island Pond Assault Findings, C.R.A. 312-20 (summarizing aspects of Andrew's report), states the following regarding SPD Officer Christian Cicero:
    - Officer C. Cicero appears on surveillance video in the vicinity of Nathan Bill's Bar prior to the assault. Andrew Report, C.R.A. 329, 366.
    - Witnesses picked Officer C. Cicero out of photo arrays. *Id.* at 330.

- Witnesses, including SPD officers, described Officer C. Cicero as being present in the bar, *id.* at 332-33, 335; at the scene of the assault, *id.* at 333; and as one of the officers who participated in the assault, *id.* at 362.
- Approximately four hours after the assault, Officer C. Cicero reported that he would not report for duty due to a broken toe. *Id*. at 330, 371-72.
- When questioned about this incident, Officer C. Cicero repeatedly invoked his Fifth Amendment rights against self-incrimination. *Id*. at 339, 354, 395.

- In addition, the Sgt. Andrew Report states the following regarding SPD Officer Daniel Billingsley:
  - Witnesses, including SPD officers, identified Officer Billingsley as being present at Nathan Bill's Bar on the night of the assault. *Id*. at 327, 332, 337, 350, 353, 358-59, 361-62, 383, 390.
  - Victim-witnesses picked Officer Billingsley out of photo lineups, stating he was present in the bar and during the assault. *Id*. at 322, 342, 357.
  - Officer Billingsley called out sick from work the day after the assault, claiming "severe migraines." *Id*. at 330, 371.
  - When asked for a statement, Officer Billingsley invoked his Fifth Amendment rights against self-incrimination. *Id*. at 339, 354, 394.

RESPONSE: The Special Master's finding is accurate, as it sets forth the analysis that the HCDAO uses to make determinations, as explained by First Assistant Fitzgerald.

The issues relating to the remaining findings proposed by the Petitioners were thoroughly litigated in front of the Special Master. Petitioners submitted proposed findings of fact to the Special Master on two separate occasions. Docket Nos. 78, 86. The Special Master's Report demonstrates that she considered all of the evidence carefully, and made the findings she deemed warranted. Petitioners now attempt to create findings that the Special Master declined to make, which would completely defeat the purpose of the Special Master. The Petitioners' proposed findings select certain statements from various reports that they deem significant, while

ignoring the many contradictory statements and identifications described in the report. Further, as the Special Master found, these reports relate to an incident which was widely publicized in the local media. The HCDAO conducted a thorough review of the incident, and determined that it did not find probable cause to bring charges. CRA 44-52. When the Attorney General's Office decided to indict fourteen officers, the HCDAO provided defense counsel with the information about the indictments that was in its possession. HDA R.A. at 8-9, paragraphs 13-15. There is no evidence that any defense counsel pursued exculpatory evidence from the Attorney General's Office.

Pg. 33, Lines 6-7: "This [letter of July 2, 2021] **was the first time** the City disclosed to the DAO the existence of the Kent report."

OBJECTION: This finding is clearly erroneous. The Kent Report is dated October 2, 2020. See Pikula Aff., C.R.A. 1155. Although First Assistant DA Fitzgerald *initially* testified that she had not known of the Kent Report's existence until receiving a letter from Former City Solicitor Ed Pikula dated July 2, 2021, she later acknowledged writing emails to Mr. Pikula memorializing the fact that he had disclosed the existence of the Kent Report to her during a phone call in March 2021. Compare 9/15/22 Hrg. Tr. at 729:13-15, with 9/21/22 Hrg. Tr. at 923-25; Exhibit B, Fitzgerald Emails with Pikula.

RELIEF REQUESTED: Petitioners request that this sentence be modified to read: "This letter also mentioned the existence of the Kent Report."

In addition, to ensure accuracy and completeness, Petitioners request that the following findings be added to the Special Master's Report:

- SPD Deputy Chief Steven Kent reviewed police department records in an attempt to identify the dates of incidents, police officers, and other individuals referenced in the DOJ Report, and he generated a report dated October 2, 2020. Pikula Aff., C.R.A. 1154-155.
- During a phone call on March 16, 2021, the City informed the DAO of the existence of Deputy Chief Kent's report, as well as certain documents associated with it. See 9/21/22 Hrg. Tr. at 924:1-9; Exhibit B, Fitzgerald Emails with Pikula.

RESPONSE: The Special Master's finding is accurate. The March conversation concerned the HCDAO's ongoing attempt to identify the documents underlying the DOJ report, and an "internal memorandum" that "referenced" those documents. There was no disclosure by the City that Kent had prepared an analytical report, or indeed, any document that went beyond attempting to identify documents forming the basis of the DOJ report. 9/21/2022 Tr. at 924.

For the same reason, the Petitioners' proposed additional finding is not true. The HCDAO first learned of the existence of the "Kent Report" in the July 2, 2021 letter. Since that time, the City has consistently and successfully resisted efforts to compel its disclosure on the basis of a work-product privilege, and no one in the HCDAO's office has seen it. Special Master's Report at 38.

III. OBJECTIONS TO STATEMENTS INVOLVING LEGAL CONCLUSIONS

Petitioners object to the following ultimate statements that appear to involve legal conclusions or, at a minimum, mixed questions of law and fact subject to de novo review. See *Charles*, 466 Mass. at 76. To the extent these statements involve pure findings of fact, Petitioners object to them as clearly erroneous.

Pg. 67, Line 6: "The DAO **lacks the capacity** to do [an investigation] while performing its statutory functions."

OBJECTION: An agency's obligation to investigate wrongdoing by members of its prosecution teams is a legal question, irrespective of capacity. See, e.g., *Commonwealth v. Tucceri*, 412 Mass. 401, 407-08 (1992) ("[T]he duties of a prosecutor to administer justice fairly, and particularly concerning requested or obviously exculpatory evidence, go beyond winning convictions").

To the extent this statement is a factual finding concerning the DAO's capacity, it is not supported by the DAO's own account of its actions. First Assistant DA Fitzgerald testified that investigating SPD misconduct would take away from the DAO's "actual job" of prosecuting cases. See 9/21/22 Hrg. Tr. at 879:8-10. In addition, she suggested that SPD officers simply

will not cooperate with investigations. See *id.* at 879:21-22 (Fitzgerald: "[I[t's unlikely that they [SPD officers] would speak to us again. And I'm not sure what the statements would be, whether they would be consistent or inconsistent inconsistent")

RELIEF REQUESTED: Petitioners request that this sentence be deleted.

RESPONSE: The Special Master's finding is accurate, and is based on the testimony from First Assistant Fitzgerald that the office does not have the resources to repeat the DOJ investigation, and that it would be "irresponsible, both ethically and physically" to divert resources from the thousands of cases that the office files each year. 9/21/2022 Tr. at 879. The remaining testimony from First Assistant Fitzgerald on this issue reflects additional reasoning for the office's decision to devote its limited resources to prosecuting crimes, as the DOJ has already conducted a massive investigation, and that the HCDAO is unlikely to be able to replicate that investigation, much less uncover significant new information. Id.

Pg. 67-68, Lines 1-2: "The Corrected Petition alleges that the DAO 'has routinely failed to disclose Brady evidence related to police misconduct.' The facts do not support this allegation. [P]etitioners have shown failures by the DAO to disclose exculpatory information in six cases."

OBJECTION: The undisputed record in this case establishes, among other things, that in roughly 8,000 cases the DAO failed to disclose evidence, that the DAO disclosed that evidence only after this lawsuit was filed, and that its disclosures are still incomplete. Whether those and other facts constitute "routine" nondisclosure is a legal question, and, regardless, the Special Master's finding of six cases of nondisclosure is clearly erroneous.[2]

The "six cases" finding overlooks the systemic withholding of exculpatory evidence across numerous cases, which has been established through undisputed evidence in this case:

(1) *Nondisclosure of documents relating to the DOJ Report until after this lawsuit was filed.* As the Special Master notes, the DAO is now

disclosing, in "some 8000 pending or past cases," hundreds of pages of documents that the City has identified as being related to the incidents described in the DOJ report. Report of Special Master at 33. It is undisputed that these documents were not disclosed before this lawsuit was filed, including while now-closed criminal cases were pending. *Id.* at 32-33. It is undisputed that the City had gathered these documents by October 2020. Pikula Aff., C.R.A. 1155. It is undisputed that the City disclosed the existence of these documents to the DAO by March 2021. Exhibit B, Fitzgerald Emails with Pikula. Yet is undisputed that the documents were not disclosed in the "8000 pending or past cases" until after Petitioners filed this lawsuit. Report of Special Master at 33.

It is also undisputed that at least some of these previously-withheld documents were in the DAO's actual possession—not just its constructive possession, custody, or control—for years. These documents include:

(a) *The Wilbraham Police Report Concerning the Palmer Incident*. It is undisputed that, from March 2016 until embarking its ongoing notice process in 2021, the DAO possessed but did not regularly disclose a "supplemental report" by a Wilbraham police officer stating that "he saw a plainclothes Springfield officer kick one of the juveniles" in Palmer. Report of Special Master at 20; Exhibit A, Fitzgerald Email to Barbieri. First Assistant DA Fitzgerald testified that, although the DAO possessed the Wilbraham police report since March 2016, it did not regularly disclose it to criminal defendants until that report, together with a broader set of documents concerning the Palmer incident, were sent by Former City Solicitor Pikula with his letter dated July 2, 2021. See 9/21/22 Hrg. Tr. at 1021-27.

[2] Petitioners believe the six cases referenced by the Special Master are: *Commonwealth v. Rodriguez-Nieves*, 487 Mass. 171 (2021); *Commonwealth v. Santana*, 465 Mass. 270 (2013); *Commonwealth v. Williams*, 99 Mass. App. Ct. 1128 (2021); *Commonwealth v. Graham*, No. 1779CR00403 (Hampden Sup. Ct.); *Commonwealth v. Fonseca-Colon*, No. 1479CR000877 (Hampden Sup. Ct); and a 2021 decision by Judge Mason in the Hampden Superior Court, see Ex. 27, Decl. of M. Horvitz, Dkt. No. 62 (Feb. 22, 2022).

(b) *The Nathan Bill's Files and Binder*. First Assistant DA Fitzgerald testified that, in connection with the DAO's February 2017 report explaining its decision not to charge officers in connection with the Nathan Bill's incident, she possessed and reviewed numerous records, including a "detective bureau file," "an IIU file," and a "binder" containing "witness statements . . . police reports . . . video from the location," and "medical records." 9/21/22 Hrg. Tr. at 968-69. Those records included information about Officer Billingsley calling out of work with a headache and Officer Christian Cicero calling out with a broken toe. *Id.* at 976-77. But it is undisputed that, prior to August 2021, the DAO never disclosed any of that evidence or its own February 2017 report to criminal defendants; it only posted the February 2017 report to its web site. *Id.* at 973, 977-80, 1023. First Assistant DA Fitzgerald testified that in her view it was appropriate not to disclose the SPD reports because the SPD made a mess of the identification process. 9/15/22 Hrg. Tr. at 799:14-16. Beginning in August 2021, the DAO began to turn over certain documents to criminal defendants regarding the Nathan Bill's incident; but rather than turn over everything in its possession, it turned over only the materials that Former City Solicitor Pikula included with his July 2, 2021 letter to the DAO. See 9/15/22 Hrg. Tr. at 1023-26.

(2) *The Kent Report*. It is undisputed that the Kent Report has been withheld from October 2, 2020, through today, including in cases in which Deputy Chief Kent was a member of the prosecution team. Petitioner Ryan, for example, has received letters from the DAO informing her both that she has litigated cases in which Kent was a member of the prosecution team and that Kent may be implicated in the misconduct flagged by the DOJ Report, but she has not received a copy of the Kent Report. 9/15/22 Hrg. Tr. at 672-673. The DAO knew about the Kent Report by March 16, 2021, Exhibit B, Fitzgerald Emails with Pikula, yet failed to inform defense counsel about the report and underlying documents until at least August 26, 2021. Ex. B, Letter from First Assistant DA Fitzgerald to Springfield PDD Attorney in Charge Madden, Pet'rs Status Report, Dkt. No. 48 (Sept. 16, 2021).

(3) *Falsified SPD Reports.* The DOJ found evidence that SPD Narcotics Bureau officers falsify police reports, and thereafter, the DAO attempted to obtain the evidence that was the basis of this finding. See Report of Special Master at 29-31 (describing the DAO's communications with and lawsuit against federal agencies). To date, no entity in the Commonwealth has identified all of the incidents described in the DOJ Report. See *id.* at 33. In its federal filings, the DAO described that an untold number of cases have been affected by the

DAO's failure to independently discover this evidence. See Memorandum in Support of Plaintiff's Motion for Summary Judgment at 1, *Gulluni v. Mendell*, No. 3:21-cv-30058 (D. Mass. Jan. 31. 2022).

(4) *Evidence of Unlawful Force*. The DAO does not appear to construe its obligation to disclose exculpatory evidence to include evidence of unlawful force. See, e.g., Complaint at 28-29, *Gulluni v. Mendell*, No. 3:21-cv-30058, ECF No. 1 (D. Mass May 19, 2021) (seeking only records from the DOJ investigation reflecting false reporting). For example, Attorney David Hoose testified regarding his client's civil case alleging excessive force, *Ververis v. Kent*, No. 3:13CV30175 (D. Mass. 2015), in which video evidence showed officers, including Steven Kent, forcibly remove his client from a car and drag him through the snow. 9/14/22 Hrg. Tr. at 537-539; see also Pet. at 14; Pet'rs First Status Report at 4 n.2. Attorney Hoose testified he is unaware of the DAO disclosing information to defense about this incident in cases in which the involved officers serve as members of the prosecution team. 9/14/22 Hrg. Tr. at 539:15-20. When questioned, First Assistant DA Fitzgerald stated that "everything that occurred on the video was described by Officer Kent in his written report, including his treatment of the defendant," 9/21/22 Hrg. Tr. at 834:16-19.

(5) *Withholding of Adverse Credibility Determinations.* As the Special Master correctly notes, the DAO withholds adverse credibility findings by judges concerning SPD officers in other cases involving those officers. See Report of the Special Master at 43-47, 68. For example, First Assistant DA Fitzgerald testified that the DAO's practice was to decline to disclose a judge's pretrial adverse credibility findings concerning a police officer in other cases involving that officer unless the DAO concluded that the judge's adverse credibility findings were *correct*. See 9/21/22 Hrg. Tr. at 1000, 1065-67. Although the total number of affected cases is unknown, three such cases in which a judge made an adverse finding which the DAO has not disclosed are:

(a) *Commonwealth v. Santiago*, No. 1779CR00376 (Hampden Sup. Ct.): Superior Court Judge Sweeney stated that SPD Officer Aguirre's testimony was a "fanciful" and "made up tale" during a motion hearing, Report of Special Master at 43, but the DAO did not disclose that finding in other cases involving Officer Aguirre because the DAO concluded that the finding was "more of an opinion of the judge" that the office "disagreed with." 9/21/22 Hrg. Tr. at 1067.

(b) *Commonwealth v. Reyes*, No. 0779CR00028 (Hampden Sup. Ct.), in which Ret. Superior Court Judge Page found that SPD Officer Mark Templeman made deliberately false statements in

his report and search warrant affidavit. Report of Special Master at 47.

(c) *Commonwealth v. Perez*, No. 1923CR00353 (Springfield Dist. Ct.), in which District Court Judge Groce stated that the testimony offered by SPD Officers Basovskiy and Wajdula "defies the objective evidence and almost belies common sense." *Id.* at 46.

In addition to the systemic non-disclosures discussed above, Petitioners presented proof that evidence was withheld in the following individual cases:

(6) *Commonwealth v. Cooper-Griffith*, No. 1823CR006541 (Springfield Dist. Ct.): The DAO failed to turn over the video of the booking dock where it alleged that Mr. Cooper-Griffith committed assault and battery on Officer Christian Cicero, even though a surveillance camera exists on the booking dock. See Report of Special Master at 48-49 & n.32.[3] As the Special Master notes, Attorney Druzinsky also did not receive any information about Officer Cicero's involvement in the Nathan Bill's Bar incident. See Report of Special Master at 49.

(7) *Commonwealth v. Williams*, No. 1823CV009270 (Springfield Dist. Ct.): The DAO failed to turn over any information from its Nathan Bill's Bar investigation regarding Officer Basovskiy. After Attorney Druzinsky filed a motion seeking that information, a *nolle prosequi* was entered on all counts. See 9/9/22 Hrg. Tr. at 88-93; Report of Special Master at 50-51.

(8) *Commonwealth v. Lopez*, 1979CR00143 (Hampden Sup. Ct): The DAO received *Brady* material from the SPD regarding the DOJ Report in July 2021, but at no point during the pendency of the Lopez case, did the DAO turn over any of these materials to Attorney Murdock, even though, as the Special Master notes, "After the issuance of the DOJ Report in July of 2020, Attorney Murdock embarked on efforts to obtain discovery to determine whether the Narcotics Bureau officers involved in Lopez's case may have been implicated in the conduct described in the Report." See Special Master Report at 15; 9/9/22 Hrg. Tr. at 684-687; Ex. B, Letter from Springfield City Solicitor Edward Pikula to Hampden County Assistant DA Fitzgerald (July 2, 2021),

[3] The Report of the Special Master includes a discussion of Attorney Druzinsky's testimony concerning his understanding of where his client, Mr. Cooper-Griffith, allegedly spat on Officer Cicero and whether his discovery request for video from the "booking area" was broad enough to encompass the "booking dock." See Report of the Special Master at 48-49; see also 9/9/22 Hrg. Tr. at 55-57 (Druzinsky's testimony on this point). Regardless, with or without a request from Mr. Cooper-Griffith's counsel, because the DAO contended that the crime occurred on the booking dock, SPD surveillance video of the booking dock was subject to mandatory discovery under Mass. R. Crim. P. 14(a)(1)(A)(iii) (exculpatory evidence) and/or (a)(1)(A)(vii) (photographs and other tangible objects).

Pet'rs Status Report (Sept. 16, 2021). Attorney Murdock was aware of the materials, which she described as a "hodgepodge" and "hard to make a ton of sense of," because they were sent to the CPCS Springfield PDD office, but they were never provided to her in her case. 9/15/22 Hrg. Tr. at 704-06.

(9) *Commonwealth v. [redacted]*, (Springfield Juv. Ct.), which was identified by Deputy Chief Kent as one of the cases described in the DOJ Report as involving excessive force and false reporting and in which the DAO provided no evidence of the same to defendant. See Report of Special Master at 24 n.20, 38; O'Connor Aff. at ¶ 5, C.R.A. 225-26.

(10) *Commonwealth v. Soto*, No. 1979CR00528 (Hampden Sup. Ct.), in which it is undisputed that the DAO failed to disclose an adverse credibility finding regarding SPD Officer Aguirre. See Report of Special Master at 43-44.

(11) *Case Identified in the DOJ Report.* Attorney Ivonne Vidal testified that the SPD, through Deputy Chief Kent, identified her client's case as having been described in the DOJ Report. 9/9/22 Hrg. Tr. at 133-134. Attorney Vidal testified that after her client's case was over, she received previously undisclosed documents about her client's case in the batch of documents received from the DAO. 9/9/22 Hrg. Tr. at 133-134.

RELIEF REQUESTED: Petitioners request that the Special Master's finding with respect to "six cases" be deleted, and that any characterization of the adequacy of the DAO's disclosure practices be deferred to the full court because it is a mixed question of law and fact.[4]

RESPONSE: The Special Master's finding accurately reflects the totality of the evidence, including that the facts do not support Petitioners' allegation that the HCDAO "routinely" fails to disclose exculpatory evidence. Special Master's Report at 67. The Petitioners' proposed findings simply reflect their continued attempt to relitigate issues decided adversely to them by the Special Master, and to impose their own view of what the law should require prosecutors to do.

[4] In alleging that the DAO "ha[d] routinely failed to disclose *Brady* evidence related to police misconduct," the Corrected Petition that Petitioners' pre-litigation investigation of the DAO had turned up "no formal policies or procedures" capable of ensuring the consistent disclosure of exculpatory evidence; no case in which the DAO had disclosed "adverse judicial findings regarding [an] officer's credibility" in other cases involving that officer; and no cases in which the DAO disclosed the Nathan Bill's reports, even though they included evidence of misconduct by Officers Billingsley and Cicero. Pet. at 17-20. Elsewhere, the Corrected Petition raised a concern that the DAO had not, as of May 2021, disclosed the "excessive force and misleading reports identified by the DOJ." *Id.* at 29. The evidence that has emerged in this litigation has now validated all of those concerns—and more.

Pg. 73, Lines 1-5: "Regardless of whether the Kent report is in the possession of any member of any prosecution team in any case, the DAO **has notified defense counsel, widely and routinely**, that the report exists and that the City has refused to provide it. That is exactly what the proposed rule would require. **No need or occasion appears for this Court to address this issue in any manner other than the exercise of its rulemaking authority**."

OBJECTION: The highlighted factual findings in the above-quoted sentences are clearly erroneous, and Petitioners object to the legal conclusion that proposed changes to Rule 14 resolve the third question jointly presented by the parties in this case.

With respect to the finding of "wide[] and routine[]" disclosure that the Kent Report exists and the City has refused to provide it, the DAO's notice letters to defense counsel do not say that. Instead, it is undisputed that the DAO's notice letters to individual defense lawyers do not mention the Kent Report; do not disclose that the linked-to documents are associated with the Kent Report, do not disclose that the documents "are not exhaustive" to each incident, and do not disclose that the City has refused to provide the Kent Report. See Tab 9 of Ryan Binder, Dkt. No. 104 (Oct. 7, 2022); Tab D of Selected Respondent Hearing Exhibits, Exs. 16-18, Dkt. No. 100 (Sept. 19, 2022).

Moreover, the DAO revealed that it has not established a process to distribute the documents to juvenile defendants or pro se defendants. Report of Special Master at 33-34; see also 9/15/22 Hrg. Tr. at 741:1-4 (describing ongoing issue with sending disclosure documents to attorneys who now serve in the judiciary).

With respect to the legal issue, the current proposed amendments to Rule 14 do not negate the need for this Court's guidance as to what prosecutors must do when a member of the prosecution team withholds exculpatory evidence. Proposed Rule 14.1(a)(2)(D) would permit a prosecutor to "notify the defense" when a member of the prosecution team withholds exculpatory evidence. This proposal is contrary to case law making the prosecutor responsible for the withholding of evidence by any member of the prosecution team. *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995) ("the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable"); *Mastracchio v. Vose*, 274 F.3d 590, 600 (1st Cir. 2001) ("When any member of the prosecution team has information in his possession that is favorable to the defense, that information is imputable to the prosecutor"). When a member of the prosecution team withholds exculpatory evidence, it is not sufficient for the prosecutor simply to tell the defense that the prosecution team is violating the law.

In fact, the First Circuit has squarely considered and rejected the very approach that Proposed Rule 14.1(a)(2)(D) seems to invite:

> [I]t would be no adequate response for trial counsel [for the government] to suggest negligence on the part of the case agent or the relevant investigative agency. Trial counsel is the member of the government team who is an officer of the court. In this sense, it may be a form of insubordination if the investigative agents working on the case for trial counsel are not forthcoming in satisfying the government's disclosure obligations. **But the prosecutor is duty bound to demand compliance with disclosure responsibilities by all relevant dimensions of the government. Ultimately, regardless of whether the prosecutor is able to frame and enforce directives to the investigative agencies to respond candidly and fully to disclosure orders, responsibility for failure to meet disclosure obligations will be assessed by the courts against the prosecutor and his office**.

United States v. Osorio, 929 F.2d 753, 762 (1st Cir. 1991) (emphasis added); see also *Commonwealth v. Murray*, 461 Mass. 10, 19 (2011) ("A police officer is subject to the prosecutor's control when he acts as an agent of the government in the investigation and prosecution of the case").

Because "notify[ing] the defense" is insufficient as a matter of law when a member of the prosecution team withholds exculpatory evidence, this Court's guidance is needed on the full extent of the prosecutor's obligations in that circumstance. That issue is squarely presented here. The City has withheld the Kent Report and other documents. Yet, according to First Assistant DA Fitzgerald, the DAO's practice is: "I think it's fair to say we have simply provided what the City provided." See 9/15/22 Hrg. Tr. at 755.

RELIEF REQUESTED: Petitioners request the deletion of these sentences from the Report and that the third question presented be reserved and reported to the full court.

RESPONSE: The Special Master's finding accurately reflects the totality of the evidence. The Petitioners' proposed findings simply reflect their continued attempt to relitigate issues decided adversely to them by the Special Master, and to impose their own view of what the law should require prosecutors to do. This request in addition attempts to litigate Petitioners' dissatisfaction with the extensive revision to Rule 14, Mass. R. Crim. P. that was developed through the rule-making process with input from all stakeholders, and which is now open to public comment. This case is not the forum for the Petitioners to attempt to rewrite Rule 14 to comport with their world view.

Pg. 74, Lines 11-13: "Rather, the information would provide material for potential impeachment of police witnesses based on their conduct in other cases. The Farak and Dookhan matters are substantially different from the circumstances presented here, and do not provide a model for addressing this situation."

OBJECTION: The statement that the evidence of excessive force and false reporting by SPD officers is only "impeachment" evidence is incorrect as a matter of law. The DOJ report described 23 incidents where it alleges that officers engaged in excessive force, and some unlawful uses of force are described as having been concealed by false reporting. See Report of Special Master at 18. Therefore, in at least those 23 cases, defendants may have been convicted, accepted pleas, or otherwise been subject to criminal process based on false reporting that may have accused them of crimes of which they are innocent. At least one of those 23 cases remains pending as of this writing. See *Commonwealth v. Bruno-Villanueva*, No. 1923CR004823 (Springfield Dist. Ct.).

In addition, excessive force may be admissible substantively in certain types of cases pursuant to *Commonwealth v. Adjutant*, 443 Mass. 649 (2005), and proof of false reporting could be relevant to a threshold showing for a *Franks* hearing.

RELIEF REQUESTED: Petitioners request that the quoted sentences be replaced by the following sentences: "The undisclosed evidence may provide information that would tend to show that officers used excessive or unnecessary force in some cases, provided false statements in individual cases, including as to the issue of the use of force, and would also provide material for potential impeachment of these officers in other cases in which those officers are members of the prosecution team."

RESPONSE: Once again, the Petitioners are attempting to relitigate issues decided adversely to them by the Special Master, and to impose their own view of what the law should require prosecutors to do. The Special Master has correctly noted that the drug lab cases involved misconduct that related to an essential element of the crime charged. This entire proceeding involves an attempt by Petitioners to expand the obligations of prosecutors as established in Matter of a Grand Jury, 485 Mass. 641 (2020), which concerned the disclosure of specific types of misconduct in unrelated cases.

Respectfully submitted

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