

**COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH**

No. SJC-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 THIRD INTERIM STATUS REPORT
FEBRUARY 7, 2022**

Pursuant to the Third Interim Order of the Single Justice dated December 8, 2021, the Respondent, District Attorney of Hampden County, submits the following report on the status of matters related to this Petition. Respondent does not read this Court's order as requesting additional briefing or legal argument, but remains ready to explain and support these positions if the Court so requests.

Other Indispensable or Desirable Parties.

It is the Respondent's position that this petition should be denied without need for additional parties or proceedings. The Petitioners have not demonstrated

any wrongful conduct by Respondent. To the extent that the Petitioners' allegations allege wrongdoing by other parties or entities, the appropriate course of action would be the filing of an action against those parties or entities. The current petition seeks no relief which could or should be ordered as to the Respondent.

Petitioners' Standing.

It is Respondent's position that none of the six petitioners has demonstrated standing, as follows:

- a) Petitioner Chris Graham is not a defendant in a pending criminal case, and has asserted no injury other than his subjective but unfounded concern that, despite its statement that it did not intend to pursue the firearms charge against Graham (who had already served his full sentence on that charge), the HCDAO might nevertheless reindict him on that charge. See Joint Statement of Material Facts (hereafter "SMF") ¶¶ 183-186.
- b) Petitioner Jorge Lopez's case has been under active management in the Superior Court, which has recently ordered the Springfield Police Department to provide him with all documents to which he originally claimed entitlement. His counsel then filed an expanded Rule 17 motion,

- which will be heard by the presiding Superior Court judge in March 2022. See SMF ¶¶ 118-148.
- c) Petitioner Kelly Auer’s claimed injury is that she expended \$7500 (141 hours) of time in litigating a discovery motion not against the Respondent, but against the *Springfield Police Department*. She has alleged no injury related to any identifiable wrongful conduct of the HCDAO. See SMF ¶¶ 190-193.
 - d) Petitioner Meredith Ryan has alleged no injury related to any identifiable wrongful conduct of the HCDAO. See SMF ¶194.
 - e) Petitioners Committee for Public Counsel Services and Hampden County Lawyers for Justice have not shown that there exists “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 organizational standing under *Planned Parenthood League of Mass., Inc. v. Bell*, 424 Mass. 573, 578 (1997). See SMF, *passim*.

Availability of Relief under G. L. c. 231A, § 1, and G. L. c. 211, § 3.

Petitioners have made no showing to justify extraordinary relief under G. L. c. 231A, § 1, and G. L. c. 211, § 3. To the contrary, the record before the Single Justice, and particularly more recent events as detailed in the Joint Statement of

Material Facts demonstrates beyond dispute that the issues raised by petitioner Lopez, as well as by other individual defendants who are not parties to this petition, are being argued, briefed, and decided in the ordinary course according to the Massachusetts Rules of Criminal Procedure. See, e.g., SMF ¶¶ 118-162, 229-235. Petitioners have cited no case where proceedings in the trial court, with the concomitant availability of appellate review, are inadequate to address a defendant's claim of entitlement to exculpatory evidence. Indeed, in every case cited by Petitioners, both the Commonwealth and the defendant have apparently accepted the court's ruling, as neither has moved for reconsideration nor sought interlocutory review. *Id.*

The Petitioners' claim to extraordinary relief is premised on their allegation that the HCDAO "has routinely failed to disclose *Brady* evidence related to police misconduct." Petition, III.B, page 17. However, as the Petitioners admit, none of the sixteen defense lawyers who submitted affidavits can identify a single case where any court has found that the HCDAO has wrongfully failed to disclose exculpatory evidence regarding misconduct by the SPD. SMF ¶¶ 193-208. After a presumably exhaustive search befitting the serious allegations they have leveled

against Respondent,¹ Petitioners have only identified three² cases where a court has found that the HCDAO improperly failed to disclose exculpatory evidence. These trials in these three cases occurred in 2001, 2016 and 2018, and thus span a period of more than twenty years. Most notably, none of these cases involved a failure to disclose alleged misconduct by the SPD, which is the entire focus of Petitioner's

¹ Both the ACLU and individual lawyers from Goulston and Storrs, have posted press releases on their websites accusing the HCDAO of “complicity” in “years of misconduct” at the SPD. See <https://www.goulstonstorrs.com/matthew-p-horvitz/news/>; <https://www.goulstonstorrs.com/martin-m-fantozzi/news/>; <https://www.goulstonstorrs.com/abigail-fletes/>; <https://www.goulstonstorrs.com/press-releases/aclu-calls-for-investigation-into-years-of-springfield-police-misconduct-hampden-da-complicity/>; <https://www.aclum.org/en/media/news-updates> (release dated 4/6/2021), all last accessed on 2/19/2022. The unsubstantiated allegation that the HCDAO routinely fails to disclose exculpatory evidence pales in comparison to this public accusation that the District Attorney himself is an active participant in police misconduct.

² See, e.g., *Commonwealth v. Rodriguez-Nieves*, 487 Mass. 171 (2021); *Commonwealth v. Williams*, 99 Mass. App. Ct. 1128 (2021); *Commonwealth v. Santana*, 465 Mass. 270 (2013). Petitioners cite two other cases that are irrelevant to the allegations here. *Commonwealth v. Fonseca-Colon* involved the dismissal of an indictment pursuant to *Commonwealth v. O'Dell*, and not a failure of the HCDAO to disclose exculpatory evidence to a criminal defendant. SMF ¶207. The other, not identified by Petitioners but described at SMF ¶197 and Horvitz Decl. Ex. 27, involved a child rape case where a ten-year-old drug conviction was offered as a predicate offense for sentencing enhancement as a habitual offender. Neither the assistant district attorney nor Affiant Raring, the defendant's lawyer whom the court said was not “blameless,” realized that the predicate conviction involved a drug certificate signed by Sonia Farak, and therefore should not have been used for enhancement. A motion to withdraw the plea was allowed. As the court's opinion demonstrates, this case arose out of the unique circumstances of the drug lab cases, and is not evidence of any pattern of non-disclosure by the HCDAO.

argument in this case.³ While the HCDAO would obviously prefer to have *zero* such cases, perfection is difficult to achieve in an office that is responsible for 18,000-20,000 cases each year. SMF ¶¶167-168. There is no evidence that the track record of the HCDAO in this regard is any different from that of other district attorneys.

Further, to the extent a petitioner or any other defendant claims entitlement to exculpatory evidence, such a claim is dependent on many individual factors, such as the date and nature of the charged offense, the identity of the potential police witnesses involved, the type of misconduct such officers allegedly committed, the status of any adjudicatory proceeding to establish such misconduct, and the particular documents which are claimed to be exculpatory as to that defendant. Such fact-specific adjudications are not appropriate for global resolution in this petition.

Finally, although this Court noted in *Matter of a Grand Jury Investigation* that the test for disclosure is not whether the information is ultimately admissible in court, the question of admissibility cannot be ignored. As the record in this case

³ Petitioner's statement of facts includes a number of paragraphs unrelated to the holding in *Matter of a Grand Jury Investigation*, discussing alleged misconduct that has nothing to do with an officer who lied to conceal the use of excessive force to prosecute a false or inflated charge. See, e.g., SMF ¶¶11, 16-17, 19-24, 27-30, This conduct was fully investigated by the United States Attorney's Office—resulting in numerous grand jury transcripts that have been disclosed by the HCDAO—and resulted in no criminal charges.

demonstrates, enormous amounts of public and private resources are being devoted to litigating disclosure issues, with no evidence that any of those disclosures have actually affected any past or ongoing case. Respondent does not argue that disclosure and admissibility are co-extensive, but does maintain that they are not completely independent. The attempts by petitioners and their criminal defendant clients to obtain sweeping discovery of documents from unrelated cases—complete files on 20 police officers in Petitioner Lopez’s case, and 21 officers in *Commonwealth v. Fernandez*—squander the limited resources of the courts, the HCDAO, and even CPCS itself, in pursuit of a fishing expedition which has yet to yield a single minnow. See SMF ¶¶ 118-162, 252-253.

The Kent Report.

In *Commonwealth v. Jorge Lopez*, the Respondent HCDAO (not Petitioner Lopez) took the initiative to file a Rule 17 request to the Springfield Police Department to obtain documents referenced in the Kent Report. After extended proceedings, including prolonged opposition by the City of Springfield, the City has been ordered to produce unredacted IIU files for ten officers to the Commonwealth and defense counsel. Nearly a month after that order, and almost a year after the Commonwealth’s motion, Lopez’s counsel finally filed her own Rule 17 request to the SPD, now seeking files for an additional ten officers. See SMF ¶148.

In addition, approximately five other defendants have filed Rule 14 requests seeking production of the Kent Report—despite counsels’ awareness that it is not in the possession of the HCDAO. The trial court rulings have varied, but no court has ordered the HCDAO to provide the Kent Report—which, of course, it does not have. The HCDAO further expects that some defendants will file Rule 17 motions seeking production of the Kent Report from the City, that the issue will be litigated between those defendants and the City, and that the trial courts will issue appropriate orders. The HCDAO is also aware that in a civil case frequently cited by the petitioners, a Superior Court judge has upheld the City’s claim that the Kent Report is protected by a work product privilege. *Vigneault v. City of Springfield, et al.*, No. 1779-00060 (Hampden Super. Ct.), 11/12/2021, Paper No. 110.0 (Wilkins, J.). See SMF ¶96.

Status of Disclosure of “Brady/Giglio material” Relating to Incidents Described in the DOJ’s 2020 Report.

In accordance with the procedure described in its Second Interim Status Report, the HCDAO has identified defense counsel and obtained their addresses for approximately one-half of the 8,383 individual defendants in cases where any of the 31 identified SPD officers were involved. The process of identifying

counsel and verifying a current address is continuing, and is expected to take 40-50 additional business days.

Once the 8,383 addresses are located, a mail merge will be created to send cover letters and materials to all those identified. Because there are different exhibits pertaining to each officer, 8,383 individual CDs will be burned, each containing the exhibits specific to that defendant and involved officers. Then labels will be printed and the HCDAO can begin the again time-consuming process of stuffing envelopes and mailing the final “products” to each of the 8,383 counsel/defendants.

With respect to any impact on past or pending cases, there were 36 individual defendants involved in incidents described in the DOJ Report that have been presumptively identified. Counsel for those defendants received the SPD documents related to the officers involved in their cases in August 2021. None of the 36 defendants has sought a new trial or to vacate a plea on the basis of the “newly disclosed” evidence. The HCDAO is also disclosing these exhibits on an ongoing basis as new cases involving one or more of those officers arise.

Although the potentially exculpatory material related to the incidents described in the DOJ report has been widely disseminated to the Hampden County Bar, including to the defense counsel for the 36 defendants involved in the incidents described in the report and the two organizations named as petitioners in

this case, no defendant has yet sought post-trial relief or attempted to use any of that material at trial. SMF ¶¶252-253. Based on the office’s experience with the “Bigda” disclosure of the videotaped interrogation,⁴ the HCDAO anticipates that the 8,383 disclosures will have an actual impact on very few cases.

The Federal Civil Lawsuit.

In accordance with the scheduling order of the United States District Court, the District Attorney filed a motion for summary judgment on January 31, 2022, seeking an order that the United States Attorney produce or identify the documents supporting the conclusions expressed in the July 8, 2020 report. The United States is required to file a response and cross motion by April 1, 2022, the District Attorney must file his reply by May 2, 2022, and the government must file a final reply by May 23, 2022.

⁴ The HCDAO estimates that the video was distributed to more than 1200 defendants and resulted in approximately a half dozen attempts to use the material at trial, most of which were rejected by the trial judge. No appellate litigation resulted from any rulings related to the Bigda video.

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Respectfully submitted,
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