

**COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT**

Suffolk, ss.

No. SJ-2021-

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.

PETITION FOR RELIEF PURSUANT TO G. L. c. 211, § 3 AND c. 231A, § 1

Martin M. Fantozzi (BBO #554651)
Matthew P. Horvitz (BBO #664136)
Abigail Fletes (BBO #707177)
GOULSTON & STORRS PC
400 Atlantic Avenue
Boston, MA 02110
(617) 482-1776
mhorvitz@goulstonstorrs.com

Somil Trivedi*
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION, INC.
915 15th St., NW
Washington, DC 20005
(202) 715-0802
strivedi@aclu.org

Ezekiel Edwards*
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION, INC.
125 Broad Street, 18th Fl.
New York, NY 10004-2400
(212) 549-2610
eedwards@aclu.org

**pro hac vice application pending*

Matthew R. Segal (BBO #654489)
Jessica J. Lewis (BBO #704229)
Daniel L. McFadden (BBO #676612)
William C. Newman (BBO #370760)
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF MASSACHUSETTS, INC.
211 Congress Street
Boston, MA 02110
(617) 482-3170
msegal@aclum.org

Rebecca Jacobstein (BBO #651048)
Mitchell Kosht (BBO #706334)
COMMITTEE FOR PUBLIC COUNSEL
SERVICES
100 Cambridge Street, 14th Floor
Boston, MA 02110
(617) 910-5726
rjacobstein@publiccounsel.net

*Counsel for the Committee for Public Counsel
Services*

April 6, 2021

TABLE OF CONTENTS

Issues Presented	4
Introduction	5
Factual Background	8
I. The DOJ found that SPD Narcotics Bureau officers routinely use excessive force and submit false, vague, or misleading police reports.	8
A. The DOJ found that SPD officers use excessive force.	9
B. The DOJ found substantial evidence that SPD officers submit false, vague, or misleading reports.	9
II. Evidence of a systemic problem within the SPD predated the DOJ Report.	10
A. In October 2018, after years of unchecked egregious misconduct, the DOJ indicted then-SPD Sergeant Gregg Bigda.	10
B. In March 2019, after the HCDAO failed to find probable cause, the state Attorney General secured indictments against 14 SPD officers for egregious misconduct.	12
C. For years, indictments, civilian complaints, and lawsuits have alleged that SPD officers use excessive force and falsify reports.	14
III. The Commonwealth has not fully investigated or disclosed SPD misconduct.	15
A. The Commonwealth has not ascertained the full scope and gravity of the SPD’s misconduct.	15
B. The HCDAO has routinely failed to disclose <i>Brady</i> evidence related to police misconduct.	17
IV. Petitioners	20
Argument	22
I. To protect the rights of defendants and ensure the proper administration of justice, the Court should hold that the Commonwealth must investigate the SPD’s misconduct and impose interim remedies while an investigation proceeds.	22
A. The Commonwealth must fully investigate evidence of egregious misconduct by a member of the prosecution team.	22
B. The existing evidence of SPD misconduct is sufficient to trigger the Commonwealth’s duty to investigate.	24
C. The Court should ensure that the Commonwealth discharges its duty to investigate systemic SPD misconduct.	25
II. To guarantee the proper administration of justice, the Court should ensure that the HCDAO is fulfilling its obligations to disclose SPD misconduct.	27

A. District attorneys must adequately disclose evidence of officer misconduct in every case and must notify defendants when new misconduct is discovered.	27
B. The HCDAO does not appear to be fulfilling its disclosure obligations.....	28
C. The Court should exercise its superintendence powers to assure the HCDAO’s compliance with its disclosure obligations.....	30
Conclusion	32

ISSUES PRESENTED

(1) There is abundant public evidence that Springfield Police Department (“SPD”) officers have frequently and with impunity engaged in excessive force and false reporting. Does this evidence trigger the Commonwealth’s duty to investigate, *see, e.g., Commonwealth v. Cotto*, 471 Mass. 97 (2015); *Commonwealth v. Ware*, 471 Mass. 85 (2015), and if so, should this Court exercise its superintendence powers to ensure that an appropriate investigation is undertaken and that defendants’ rights are protected while the investigation unfolds?

(2) In light of the evidence of egregious misconduct within the SPD, as well as the deficient discovery and disclosure practices of the Hampden County District Attorney’s Office (“HCDAO”) set forth in this Petition, should this Court exercise its superintendence powers to issue appropriate guidance to ensure that the HCDAO complies with its disclosure obligations?

INTRODUCTION

The criminal legal system in Hampden County is in crisis. In a scenario that has become all too familiar, criminal cases have likely been tainted by the egregious misconduct of agents of the Commonwealth who are members of the prosecution team. But this time the agents did not work in drug labs. They worked, and in many cases still work, in the Springfield Police Department. And their apparent method of tainting cases is not dry-labbing; it is violently assaulting people and then lying about it. Yet the Commonwealth has not implemented the robust system of investigation, disclosure, and notice developed in the drug lab context. Instead, it appears to have proceeded with business as usual. Petitioners—individuals who have been prosecuted based on the word of SPD officers, criminal defense lawyers, and indigent defense organizations—now ask this Court to exercise its superintendence powers to clarify that the Commonwealth’s duty to investigate and disclose egregious government misconduct applies with equal or greater force when that misconduct is committed by police officers rather than chemists.

The Commonwealth must safeguard the rights of the defendants it prosecutes and the integrity of the legal system it commands. When egregious government misconduct occurs, the Commonwealth cannot bury its head in the sand. Rather, it must fulfill two obligations. First, it must investigate. *Commonwealth v. Cotto*, 471 Mass. 97, 115 (2015); *Commonwealth v. Ware*, 471 Mass. 85, 95 (2015). Second, it must disclose the evidence of misconduct, including any evidence that emerges from the compulsory investigation. *Bridgeman v. Dist. Att’y for Suffolk Dist.*, 476 Mass. 298, 315 (2017) (*Bridgeman II*); *Matter of a Grand Jury Investigation*, 485 Mass. 641, 652 (2020); *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

The SPD’s rampant misconduct has triggered these important duties. In July 2020, the U.S. Department of Justice found reasonable cause to believe that, between 2013 and 2019, SPD officers engaged in a pattern or practice of excessive force in violation of the U.S. Constitution, and created

false reports to conceal that misconduct. R.A. 2, U.S. Dep’t Justice, Civil Rights Div. & U.S. Atty’s Office Dist. of Mass., *Investigation of the Springfield, Massachusetts Police Department’s Narcotics Bureau* (Jul. 8, 2020) (“DOJ Report”). In one incident noted by the DOJ, an individual referred to as F.D. was pulled from his car and then, according to officers’ reports, simply “placed” or “escorted” to the ground. R.A. 14. Contrarily, F.D. reported that he was “kicked in the face and upper body area 10-12 times, with multiple officers taking turns.” *Id.* Photos supported F.D.’s report, revealing “serious force and multiple points of impact.” *Id.* Twelve officers were involved in this arrest in which the arrestee was not resisting and which, according to the DOJ, began when F.D.—after being pursued by an *unmarked* vehicle carrying multiple officers *in plainclothes*—“failed to stop because he did not know he was being chased by officers.” R.A. 14-15. The DOJ report suggests that this incident may reflect a larger pattern or practice of excessive force. R.A. 9, 16.

This pattern or practice directly bears on the administration of justice. The state and federal constitutions guarantee persons charged with crimes the right to receive from prosecutors all evidence that would tend to mitigate their guilt, impeach the credibility of a government witness, or call into question an element of the prosecutor’s version of events. Evidence concerning the use of excessive force by police officers and their falsification of reports fall within this right.

The Commonwealth does not appear to be satisfying its duties to investigate and disclose SPD officer misconduct. First, despite countless egregious incidents and the DOJ Report, the Commonwealth has neither conducted nor announced its intent to conduct a comprehensive investigation of the SPD. Second, despite indicators of systemic problems within the SPD—including criminal indictments of officers, residents’ complaints alleging excessive force and falsified reports, and cases that have exposed untrue officer testimony—the Commonwealth does not appear to be adequately disclosing information about the SPD officers on whose word it relies to obtain search warrants, bring charges, and secure convictions. Given the Commonwealth’s inaction, it has

fallen to criminal defendants, defense lawyers, and defense organizations, including Petitioners, to expend their time and resources to do something that they are in no position to do: figure out the extent of the wrongdoing within the SPD. As the Court has said, “we cannot expect defendants to bear the burden of a systemic lapse.” *Bridgeman v. Dist. Att’y for the Suffolk Dist.*, 471 Mass. 465, 487 (2015) (*Bridgeman I*). The burden belongs to the Commonwealth.

Petitioner Chris Graham’s case demonstrates the individual and systemic consequences of under-investigating and under-disclosing police misconduct in Springfield. On the night Mr. Graham was celebrating a managerial job promotion, an off-duty correctional officer damaged Mr. Graham’s vehicle. After Mr. Graham spoke with the officer and another off-duty SPD officer who was accompanying him, the SPD officer struck Mr. Graham in the face and had Mr. Graham arrested. Then SPD officers prepared a police report falsely alleging that Mr. Graham had assaulted and pulled a gun on the off-duty SPD officer and his companion. With only his word against the SPD and with scant evidence against him, Mr. Graham was acquitted of the assault but was convicted of firearms charges and spent 18 months incarcerated. Later, in a disturbing twist, an internal affairs complaint that Mr. Graham filed with the SPD revealed a 911 call from a witness to the incident. In the 911 call, this witness said that the person with the gun was “white.” The off-duty SPD officer is white; Mr. Graham is Black. After demonstrating that this exculpatory evidence had not been disclosed before he was convicted, Mr. Graham secured post-conviction relief in December 2019. The Commonwealth nevertheless held the charges over Mr. Graham’s head until, in March 2021, it filed a *nolle prosequi*. R.A. 29-32, Graham Aff.; R.A. 33-35, Miles Aff.; R.A. 39, Nolen Aff.

But this is not justice, either for Mr. Graham or for countless others like him. Mr. Graham wrongly served an 18-month sentence and subsequent probation, lost his job, and is still in peril. He could again face an unjust prosecution because his case was not dismissed with prejudice and his *nolle prosequi* was not accompanied by any admission of government misconduct. Other individuals in

Springfield are also in peril. They confront prosecutions in which SPD misconduct is not investigated and disclosed, but instead exploited or swept under the rug—including by the filing of a *nolle prosequi*. At its best, this system forces defendants and their lawyers to spend time and resources doing the Commonwealth’s job—*i.e.*, investigating SPD misconduct. At its worst, this system wrongly convicts and incarcerates people like Chris Graham for crimes they did not commit.

Petitioners therefore ask the Court to exercise its superintendence powers to (1) hold that the duty to investigate has been triggered and issue orders related to that investigation; (2) ensure that the HCDAO’s disclosure practices are adequate; and (3) make interim orders, as outlined below, to ensure that defendant’s rights are protected during the investigation.

FACTUAL BACKGROUND

I. The DOJ found that SPD Narcotics Bureau officers routinely use excessive force and submit false, vague, or misleading police reports.

In the Trump administration’s sole pattern-and-practice finding against any police department in the country, the DOJ found reasonable cause to believe that SPD Narcotics Bureau officers engaged in a pattern or practice of excessive force in violation of the Fourth Amendment, and that they submitted false, vague, or misleading reports to conceal that force. R.A. 2, 16, 20. The DOJ also found evidence suggesting that SPD officers outside of the Narcotics Bureau engaged in similar misconduct, and operated under the same “systemic deficiencies in policies, accountability systems, and training.” R.A. 2, 5, 11.

A. The DOJ found that SPD officers use excessive force.

The DOJ “identified evidence that Narcotics Bureau officers repeatedly punch individuals in the face unnecessarily . . . and resort to unreasonable takedown maneuvers that . . . could reasonably be expected to cause head injuries.” R.A. 2. Among DOJ’s “not atypical” examples are the following:

- Approximately 12 officers, including non-Narcotics-Bureau officers, pulled an arrestee from a vehicle, causing “serious head injuries” despite their own reports indicating the arrestee was under control the entire time. Officers reported that the arrestee sustained only a “minor injury.” To the contrary, “booking photos show significant swelling in his right forehead area” from officers’ use of force and the arrestee’s head striking the pavement. R.A. 15.
- Video footage shows officers rushing into a store and immediately hitting an individual in the face; that individual was standing, looking down at a piece of paper in his hand. The security camera footage “directly contradicted aspects of the reports of Narcotics Bureau officers.” R.A. 14, 18.
- Narcotic Bureau officers in an unmarked car engaged in vehicle pursuit without activating their lights. Once the individual’s car was caused to stop, one officer’s report describes “extracting [the individual] through the passenger side door and pron[ing him] face down onto the pavement.” Another officer’s narrative states that the individual sustained minor abrasions to right side of his face. The DOJ found that these reports “are plainly contradicted by the photographs . . . which clearly show several contusions and dark bruising on the right side of his face, a large black eye, a gash on the bridge of his nose, and additional abrasions on the left side of his face and the left side of his nose.” In addition, a civilian witness stated “she saw officers kick [the individual] in the head and body.” R.A. 14, 18.

The DOJ also identified “multiple incidents in which officers used head strikes following a pursuit, even when officer reports suggest the subject was already subdued.” R.A. 13. “Tellingly, a former Narcotics Bureau officer reported that people know that if you mess with SPD or try to run, you ‘get a beat down.’ Incident reports [the DOJ] reviewed support this officer’s observation.” *Id.*

B. The DOJ found substantial evidence that SPD officers submit false, vague, or misleading reports.

The DOJ identified “substantial evidence” that for at least six years: (1) Narcotics Bureau officers failed to report use-of-force incidents; (2) where force did get reported, officers often used vague language; and (3) officers made false reports. R.A. 16. When comparing “the narratives

Narcotics Bureau officers reported in prisoner injury files with other available evidence regarding the same incident,” the DOJ found multiple incidents in which available evidence—such as photographs and/or videos—discredited the officers’ narrative. R.A. 17-18. These multiple incidents of false reporting “indicate that it is not uncommon for Narcotic Bureau officers to write false or incomplete narratives.” R.A. 18-19. The findings “raise *substantial* concern that there are other uses of unreasonable force that are falsely reported.” R.A. 19 (emphasis added).

In addition, the DOJ found evidence that the SPD underreported uses of force, noting that many of the 5,000 arrest reports that the DOJ reviewed referenced uses of force that were not documented elsewhere. R.A. 16-17. “For example, in reviewing all of the Narcotics Bureau’s 2017 arrest reports where the narrative indicates that the prisoner was likely to have been injured at the hands of an officer, booking sergeants only completed SPD-276 forms 11% of the time[.]” R.A. 11 n.4.¹ *See also* R.A. 69, Raring Aff. (noting that where he did receive a Use of Force Report, it rarely “contained more than a paragraph or two that appeared to be cut and pasted from the main police report narrative”).

II. Evidence of a systemic problem within the SPD predated the DOJ Report.

Criminal indictments, community complaints, newspaper articles, and lawsuits alleging excessive force and false reporting reveal widespread systemic misconduct in the SPD.

A. In October 2018, after years of unchecked egregious misconduct, the DOJ indicted then-SPD Sergeant Gregg Bigda.

In 2014, the City of Springfield reportedly paid \$60,000 to settle a federal civil rights lawsuit which alleged, among other things, that now-former SPD Sergeant Gregg Bigda pistol-whipped the handcuffed plaintiff. R.A. 76, Dugan Arnett, *‘One of the worst police departments in the country’: Reign of*

¹ SPD-276 forms document an arrested person’s injuries. G. L. c. 276, § 33 (“Whenever a person is arrested for a crime and is taken to or confined in a jail, police station or lockup, the officer in charge thereof shall immediately examine the prisoner, and if he finds any bruises, cuts or other injuries shall forthwith make a written report thereof”).

brutality brings a reckoning in Springfield, The Boston Globe (July 25, 2020). At the time of the 2014 lawsuit, Bigda had been the subject of 25 civilian complaints. Stephanie Barry, *Federal judge: Lawyers in Springfield police brutality lawsuit may argue department failed to supervise, discipline officers*, MASSLIVE (Oct. 18, 2016).² Of those, thirteen accused him of excessive force, including an allegation that he once dragged an innocent man he mistook for a suspect out of a car window. *Id.* Yet the SPD never investigated or disciplined the seven officers involved in that incident, and “Bigda stated in a November 2015 deposition that he had never been disciplined over 20 years with the police department.” *Id.* It does not appear that the HCDAO investigated either.

Thus, it should have come as no surprise that, in early 2016, while interrogating two teenagers *on camera* in holding cells at the Palmer Police Station, Bigda threatened to: crush one of the teen’s skulls and “fucking get away with it”; charge one of the teens with murder and “fucking make it stick”; and “stick a fucking kilo of coke in [one of the teen’s] pockets and put [him] away for fucking fifteen years.” R.A. 2-3. In 2018, the DOJ charged Bigda with one count of deprivation of rights under color of law by way of excessive force, two counts of deprivation of rights under color of law by way of abusive interrogation, and one count of writing a false report. Indictment, *United States v. Bigda*, No. 3:18-cr-30051 (D. Mass. Oct. 25, 2018). The indictment also alleges that Bigda (i) kicked one of the teens in the head; (ii) spat on him; and (iii) said, “welcome to the white man’s world.” R.A. 2.

At the outset of the video, seemingly in an effort to demonstrate his willingness to use violence, Bigda showed the juvenile that the other juvenile’s blood was on Bigda’s shoe. Bigda pointed to his other foot and said: “That’ll be yours on this shoe.” R.A. 74.

² https://www.masslive.com/news/2016/10/federal_judge_lawyers_for_plai.html



Explaining how he would get away with this unlawful force, Bidga, knowing he was being recorded, told one of the juveniles that if he doesn't write it in a report, then "it never fucking happened."³ Bidga's claim was not without merit.

B. In March 2019, after the HCDAO failed to find probable cause, the state Attorney General secured indictments against 14 SPD officers for egregious misconduct.

In April 2015, multiple current and former SPD officers were involved in a violent incident at Nathan Bill's Bar & Restaurant. According to one of the victims, the incident began when an SPD officer believed that a Black man whistled at the officer's girlfriend. Adeel Hassan, *14 Officers Indicted on Assault or Cover-Up Charges in Beating of Black Men*, N.Y. TIMES (Mar. 28, 2019)⁴; R.A. 85-86, Mem. of Dec. and Order on Def[s] Motion to Dismiss at 3-4, *Commonwealth v. Diaz*, No. 1979CR00156 (Dec. 17, 2019) (describing the initial encounter between the parties). After this individual left the bar with three friends, six police officers pursued the group. *Id.* The officers then "allegedly beat[]

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

⁴ <https://www.nytimes.com/2019/03/28/us/springfield-police-black-men-fight-lawsuit.html>

and kicked” the four men, causing them to “sustain significant injuries . . . , some permanent.” R.A. 108, Press Release, *Office of Att’y Gen. Maura Healey, Fourteen Springfield Police Officers Charged in Connection With Assault Near Bar and Cover up Afterwards* (Mar. 27, 2019) (“AGO Press Release”).

The AGO alleges that, after this assault, nine SPD officers “were a part of a long-standing and ongoing cover up[.]” *Id.* Officers are accused of lying to SPD’s Internal Investigations Unit (“IIU”); lying in front of the grand jury; lying to authorities; and lying in police reports. *Id.* The initial police report, for example, falsely stated that one of the victims “only sustained ‘minor cuts and scrapes’”; in fact, he had suffered a broken leg and other injuries. Dan Glaun, *12 Springfield officers facing investigation in beating of men outside bar*, MASSLIVE (Oct. 16, 2016).⁵ The City paid the victims \$885,000 in settlement of their federal civil rights claims. Hassan, *supra*.

In February 2017, Hampden County District Attorney Anthony Gulluni found no probable cause to charge the officers. R.A. 41-50, Nolen Aff. Ex. 1: District Attorney Anthony Gulluni, Office of Hampden Cty. Dist. Att’y, *Findings and Determinations Relative to Criminal Charges: April 8, 2015, Island Pond Road Assault* (Feb. 2, 2017). These findings failed to address inconsistencies in the police reports and overlooked that two of the officers who were most clearly and consistently identified as being at the attack called to relieve themselves of duty within hours of it, reporting “migraines” and a broken toe, respectively. R.A. 256, Madden Aff. Despite acknowledging that the four victims “were beaten about their body and face by fists, shod feet, and quite possibly dangerous weapons,” District Attorney Gulluni concluded that their “admitted alcohol consumption,” and “lack of legally sound and positive identifications...hamstr[ung] the Commonwealth from initiating a criminal complaint or indictment.” R.A. 49, Nolen Aff. Ex. 1.

The AGO did not find these to be insurmountable obstacles to figuring out what really happened. After conducting its own investigation, the AGO indicted fourteen current and former

⁵ https://www.masslive.com/news/2016/10/springfield_police_officers_un.html

SPD officers in March 2019 on a variety of charges, including assault and battery with a dangerous weapon, conspiracy, witness intimidation, perjury, and filing a false police report. R.A. 106-109. Charges against ten of the officers remain pending; remarkably, the SPD reinstated five of those officers. They were re-suspended only after intervention by Springfield's Mayor. Stephanie Barry, *Reinstatement of officers involved in Nathan Bill's case was a 'mistake,' Springfield Mayor Domenic Sarno says; officers will be suspended, again*, MASSLIVE (Jun. 16, 2020).⁶

C. For years, indictments, civilian complaints, and lawsuits have alleged that SPD officers use excessive force and falsify reports.

Public records going back almost a decade are replete with instances of SPD misconduct. In January 2011, the City of Springfield paid \$175,000 to settle a claim after a group of SPD officers hit the plaintiff repeatedly through his car window before pulling him out of it, placing him in a chokehold, and causing him to temporarily lose consciousness. Arnett, *supra*; Stephanie Barry, *Springfield police brutality trial alleging Michael Ververis of Connecticut was pulled from car and beat to begin in February*, MASSLIVE (Jan. 18, 2015).⁷

Between 2016 and 2019, the Community Police Hearing Board ("CPHB") reviewed 68 complaints alleging that SPD officers used excessive force. *See* R.A. 110-172, CPHB YTD Detail Reports 2016-2019. At least sixteen of these complaints included allegations that officers struck someone's head. *Id.* In addition, between 2018 and 2019, CPHB received ten complaints about SPD officers falsifying reports. *See* R.A. 152-172. These complaints are not anomalous. In a civil lawsuit against the City of Springfield and its officers, U.S. Magistrate Judge Robertson cited inferential evidence that several SPD officers "were prepared to be untruthful when it suited their purposes." *Douglas v. City of Springfield*, 2017 WL 123422, at *10 (D. Mass. Jan. 12, 2017).

⁶ <https://www.masslive.com/news/2020/06/reinstatement-of-officers-involved-in-nathan-bills-case-was-a-mistake-springfield-mayor-domenic-sarno-says-officers-will-be-suspended-again.html>

⁷ https://www.masslive.com/news/2015/01/springfield_police_brutality_trial_michael_ververis.html

Video footage bears this out. In at least four instances where officers accused individuals of crimes such as assault and battery on a police officer and resisting arrest, video evidence demonstrated that not only were the charges fabricated, but the officers were the aggressors.⁸

III. The Commonwealth has not fully investigated or disclosed SPD misconduct.

Although the incidents described above are numerous, the full extent of SPD misconduct is unknown. That is because, despite lawsuits, indictments, news articles, judicial findings, and the DOJ Report, the Commonwealth has not investigated the full scope and gravity of misconduct within the SPD. Nor has the HCDAO established sufficient policies within its own agency to ensure that misconduct is discovered and disclosed to defendants.

A. The Commonwealth has not ascertained the full scope and gravity of the SPD's misconduct.

To date, no comprehensive investigation has been conducted, and none appears to be underway, to determine the full scope and impact of the SPD's misconduct. In fact, far from agreeing that the DOJ report is a reason for the Commonwealth to investigate *further* than the DOJ has gone, two key agencies have apparently found it difficult to agree on whether the

⁸ See Dan Glaun, *Jerry Bellamy went to Springfield Police HQ to dispute parking ticket; was grabbed by throat, tackled by officers in confrontation*, MASSLIVE (Feb. 19, 2019), <https://www.masslive.com/news/2019/02/jerry-bellamy-went-to-springfield-police-hq-to-dispute-parking-ticket-was-grabbed-by-throat-tackled-by-officers-in-confrontation.html> (report alleged defendant swung first whereas video shows SPD Officer Petrie shoving and grasping the defendant's neck without provocation); Dan Glaun, *Video contradicts police report on arrest of Springfield student in High School of Commerce hallway*, MASSLIVE (Feb. 27, 2019), <https://www.masslive.com/news/2019/02/video-contradicts-police-report-on-arrest-of-springfield-student-in-high-school-of-commerce-hallway.html> (report alleged student walked up and pushed officer whereas video shows "[SPD Officer] Marrero move[d] toward the student, grab[bed] him by the back of the neck and pushe[d] him up against the side of the hallway"); Stephanie Barry, *Defense attorney: Video disputes Springfield police report on drug suspect's arrest*, MASSLIVE (Dec. 8, 2016), <https://www.masslive.com/news/2016/12/videos-muddies-springfield-pol.html> (report alleged defendant struck first whereas video footage shows that the police walked in and tackled him); R.A. 176–179, *Druzinsky Aff. Ex. 1 and 2* (report alleged defendant spit on officer but video shows that never happened).

Officer Petrie later pled guilty to assault in March 2020. In September 2020, Officer Marrero was found guilty of one misdemeanor count of falsifying a report and one misdemeanor count of assault and battery; he received one year of probation.

Commonwealth’s prosecutors will receive all of the SPD documents on which the DOJ relied. In December 2020, the HCDAO asked the SPD to identify and turn over any “falsified” records, “false reports,” and other materials “inconsistent with any [SPD] officers’ reports.”⁹ R.A. 209-211, Letter from District Attorney Gulluni to Commissioner Cheryl Clapprood (Dec. 2, 2020). In response, by way of a letter from the City Solicitor, the SPD declined to engage in what it characterized as “a wholesale provision of voluminous materials,” and instead offered to have “members of the Police Department . . . meet with prosecutors . . . to review specific materials.” R.A. 212-214, Letter from Springfield City Solicitor Edward Pikula to Hampden District Attorney Gulluni (Dec. 10, 2020). The HCDAO’s response accepts the SPD’s assertion that it is “unable to provide . . . the specific SPD materials determined to be ‘false’ or ‘falsified’ by the DOJ,” and accepted a meeting, seemingly in lieu of the provision of the documents that the HCDAO had requested. R.A. 215-216, Letter from Hampden District Attorney Gulluni to Springfield City Solicitor Edward Pikula (Mar. 11, 2021).¹⁰

Similarly, following a request for information by undersigned counsel in August 2020, *see* R.A. 217-221, the HCDAO wrote the defense bar to say only that the DOJ found SPD officers to have engaged in misconduct, and that all Springfield defendants must be given the DOJ Report. *See* R.A. 222, Letter from District Attorney Gulluni to Hampden County Lawyers for Justice (Aug. 12, 2020). But the letters attached no other exculpatory evidence. *Id.* To date, even in cases seemingly flagged by the DOJ Report, Petitioners are aware of no disclosures that have been made to individual defendants about whether the DOJ’s finding *are true*, or whether they impact defendants’ cases. R.A. 234, O’Connor Aff.

⁹ This exchange between the City and the HCDAO is consistent with the DOJ’s findings that the “SPD does not have adequate systems in place to detect, address, and prevent officer misconduct,” and that “[i]nvestigations of misconduct allegations are inadequate.” R.A. 22-27.

¹⁰ Citing federal regulations, the DOJ has declined to provide the materials on which it relied, and which are presumably in the custody of the SPD. R.A., 238-239, Letter from District Attorney Anthony Gulluni to Eric Dreiband (Aug. 19, 2020).

B. The HCDAO has routinely failed to disclose *Brady* evidence related to police misconduct.

In response to public records requests, the HCDAO has revealed that it lacks internal mechanisms and policies by which to ensure its compliance with constitutional and ethical disclosure obligations. *See generally* R.A. 242-247, Letter from Joseph Pieropan to Lean Rizkallah (Jul. 31, 2020). It has reported maintaining no available list of SPD officers known or suspected to have committed an offense. *Id.* at R.A. 245. It has no formal policies or procedures concerning its attorneys' obligations under *Brady*, Rule 14, S.J.C. Rule 3:07, or Massachusetts Professional Conduct Rule 3.8(d).¹¹ *Id.* It has no written systems to track whether *Brady* disclosures are made in appropriate cases. *Id.*

The record indicates that such disclosures are, in fact, not being made. Petitioners are not aware of a single instance where the HCDAO, after learning of false statements by police officers that led to adverse judicial findings regarding the officer's credibility, disclosed that judicial finding in other cases. R.A. 252-253, Vidal Aff.; R.A. 257, Madden Aff. Even in those cases where blatantly false statements led the HCDAO to file a *nolle prosequi*, the Petitioners are not aware that the HCDAO has ever disclosed those false statements in future cases with the same officers. R.A. 258, Farrell Aff.; R.A. 257, Madden Aff.; R.A. 173-175, Druzinsky Aff.; R.A. 260, Fleischner Aff.; R.A. 265-269, Auer Aff.; R.A. 270-273, Ryan Aff.

¹¹ In October 2020, the HCDAO circulated an interoffice memorandum intended to notify its attorneys of their disclosure obligations with regards to civil verdicts against two SPD officers, Joseph Dunn and Daniel Moynahan, for federal civil rights violations, including excessive force. *See* R.A. 248-251, Memo. from Kate McMahon to Assistant District Attorneys (Oct. 9, 2020). The civil lawsuit was brought after a jury acquitted the plaintiff of the assault and battery on a police officer and resisting arrest charges brought by the HCDAO. This memo states that, pursuant to *In the Matter of a Grand Jury Investigation*, 485 Mass. 641 (2020), prosecutors are required to disclose information about officers who either lied in order to conceal an unlawful use of force or lied about a defendant's use of force and allowed a false or inflated charged to be prosecuted. *Id.* Petitioners have no records of disclosures being made concerning officers other than the two discussed in the memo.

The HCDAO further revealed that its office “does not track or maintain a list of documents” which relate to any of the following:

- indictments or criminal investigations related to allegations of police or prosecutorial misconduct;
- written complaints made to the HCDAO regarding police or prosecutorial misconduct;
- officers or prosecutors accused of misconduct; or
- cases in which evidence was suppressed and/or verdicts were overturned due to police and/or prosecutorial misconduct.

See R.A. 242-247, Letter from Joseph Pieropan to Lean Rizkallah (Jul. 31, 2020). The HCDAO also disclosed that it has no “protocol, list, or document relating to police officers (and their departments) that have been or must be the subject of discovery notices as required to comply with [its] constitutional duties[.]” *See id.* Instead, the HCDAO has made occasional, limited disclosures “to the defense bar” (or by sending a letter to CPCS’s Springfield Attorney-in-Charge or David Hoose at Hampden County Lawyers for Justice) in instances where misconduct evidence has been provided by outside agencies or actors. R.A. 254-257, Madden Aff. And that’s it. R.A. 255; *cf.* R.A. 266, Auer Aff.; R.A. 270-271, Ryan Aff.

In short, for at least the better part of a decade, the HCDAO has neglected to learn of and disclose evidence of SPD misconduct. *See* R.A. 305-309, Puryear Aff. (noting the HCDAO’s failure to investigate why, one day after attorney Puryear secured an order to borrow low-light binoculars from the SPD in order to assess whether an SPD officer could have observed an alleged crime at a certain location, an SPD sergeant contacted the City Forrester to request that trees be trimmed in that location); R.A. 38-39, Nolen Aff. (counsel Googled name of officer and found exculpatory evidence undisclosed by the HCDAO); R.A. 33-34, Miles Aff. (HCDAO’s failure to disclose 911 tape and subsequent witness statement led to new trial); R.A. 260, Fleischner Aff. (counsel independently discovered video evidence contradicting officer testimony about a traffic stop); R.A.

235, O'Connor Aff. (noting ADA statement about prior false statement of officer and lack of disclosure). Indeed, Petitioner Graham's case exemplifies the SPD's and HCDAO's failure to make disclosures of exculpatory evidence that are routinely made by other district attorneys' offices. R.A. 310, Rogers Aff.

But even when the SPD has given exculpatory evidence to the HCDAO, the HCDAO has failed to disclose it. For example, pursuant to its investigation into the Nathan Bill's Bar assault, the HCDAO received two sets of reports from the SPD. *See* R.A. 41-50, Nolen Aff. Ex. 1 (repeatedly citing a Major Crimes report by Captain Trent Duda and an Internal Affairs Report by Sgt. William Andrew). Petitioners have been unable to identify any case in which those reports have been disclosed as *Brady* material. R.A. 255, Madden Aff.; R.A. 174, Druzinsky Aff.; R.A. 37, Nolen Aff.; R.A. 270-271, Ryan Aff. These reports, both dated August 2015, include the following:

- Officer Christian Cicero was identified by four fellow officers as one of the off-duty officers present at Nathan Bill's Bar before the assault. R.A. 256, Madden Aff. Victim-witnesses identified him as being present at the bar and later at the assault itself – including one victim who described him as being among the officers that initiated the violence. *Id.* Four hours after the assault, Officer Cicero called to relieve himself from duty with a broken toe. *Id.* When asked about the incident, he invoked his Fifth Amendment rights against self-incrimination. *Id.*
- Officer Daniel Billingsley is identified as the individual who grew angry when he thought a Black man had whistled at his girlfriend, and who then escalated the incident. R.A. 256, Madden Aff. He was repeatedly picked out of photo line-ups as being present both at the bar, and at the attack itself. *Id.* Billingsley called out sick the day after the incident with “severe migraines.” *Id.* When questioned, he also invoked his rights against self-incrimination. *Id.*
- A victim-witness also picked Officer Igor Basovskiy out of a photo-line up as being present at bar and subsequent assault. R.A. 256, Madden Aff.

Without once disclosing these reports to defense counsel, the HCDAO continued to bring cases that relied upon the testimony of Officers Cicero and Billingsley right up to the time of their criminal indictments. R.A. 256, Madden Aff.; *see* R.A. 36-37, Nolen Aff.; R.A. 173, Druzinsky Aff.

IV. Petitioners

Petitioner Chris Graham is a resident of Springfield. Based on false reporting and false allegations by the SPD, he wrongfully served 18 months in the Hampden County House of Correction. The HCDAO contributed significantly to this harm by failing to investigate and disclose exculpatory evidence, including a 911 call stating that the person who actually possessed the gun was, unlike Mr. Graham, a white man. R.A. 31-32, Graham Aff.; R.A. 39, Nolen Aff.; R.A. 33-35, Miles Aff. Mr. Graham has experienced police misconduct consistent with the patterns and practices identified in the DOJ Report, as well as additional harassment. R.A. 30-32, Graham Aff. After serving his 18-month sentence and a month of probation, winning a motion for new trial on the gun charges in December 2019, and being told that the HCDAO would still retry him on the gun charges, the HCDAO finally filed a *nolle prosequi* in his case on or about March 25, 2021. R.A. 35, Miles Aff.; R.A. 39, Nolen Aff. But the charges have not been dismissed with prejudice, and Mr. Graham faces the risk of prosecution on those charges or others that the SPD might improperly cause to be brought against him. R.A. 39, Nolen Aff.; *see also Commonwealth v. Hinterleitner*, 391 Mass. 679, 682 (1984); *Commonwealth v. Massod*, 350 Mass. 745, 749-750 (1966).

Petitioner Jorge Lopez is an individual with criminal charges pending in Hampden Superior Court. All officers listed in the police report in Mr. Lopez's case belong to the SPD's Narcotics Unit. R.A. 312, Murdock Aff. Mr. Lopez asserts that he is being deprived of exculpatory evidence regarding the officers involved, and he has asked for an investigation of the SPD's misconduct. R.A. 312-3127; R.A. 318-319, Lopez Aff. The HCDAO has opposed these discovery requests on the Commonwealth's behalf and has filed a petition, under G. L. c. 211, § 3, asking this Court to relieve it of a discovery order by the Superior Court. *See Commonwealth v. Lopez*, SJ-2021-0122 (filed Mar. 31, 2021).

Petitioner Meredith Ryan is a bar advocate with Hampden County Lawyers for Justice and represents defendants who qualify for an appointed attorney in Springfield District and Hampden County Superior Courts. The issues raised in this Petition require substantial expenditures of her time and resources and significantly interfere with her advocacy for her clients. R.A. 270, 273, Ryan Aff.

Petitioner Kelly Auer is an attorney who has been accepting Bar Advocate appointments since August 2014, including by representing clients in Hampden County Superior and District Courts. The SPD's misconduct and the HCDAO's discovery practices directly affect her ability to advocate for and effectively advise her clients on every aspect of their cases, including plea agreements and trial strategies. R.A. 265, 269, Auer Aff.

Petitioner Committee for Public Counsel Services ("CPCS") was created by G. L. c. 211D, §§ 1 et. seq., "to plan, oversee, and coordinate the delivery of criminal . . . legal services by salaried public counsel, bar advocate and other assigned counsel programs and private attorneys serving on a per case basis." CPCS must provide representation to all indigent defendants in Hampden County and, as such, "has a compelling interest in advocating for uniform practices and solutions that will ensure consistent treatment for all of those defendants." *Bridgeman I*, 471 Mass. at 486. The SPD's misconduct and the HCDAO's discovery practices directly implicate CPCS's ability to provide representation for defendants in Hampden County. CPCS also has a strong interest in ensuring the integrity of the criminal justice system in order to safeguard the constitutional rights of its past, present, and future clients.

Petitioner Hampden County Lawyers for Justice ("HCLJ") is an organization that serves as the bar advocate program in Hampden County by providing private counsel to indigent defendants through a contract with CPCS. HCLJ has a strong interest in safeguarding the constitutional rights of the clients of its members. R.A. 320-322, Hoose Aff. When the Commonwealth fails adequately

to investigate and disclose exculpatory evidence, the rights of people represented by HCLJ's members suffer, and HCLJ's members must devote time and resources to tracking down evidence. *See, e.g.*, R.A. 265, Auer Aff.; R.A. 270, 273, Ryan Aff.

ARGUMENT

I. To protect the rights of defendants and ensure the proper administration of justice, the Court should hold that the Commonwealth must investigate the SPD's misconduct and impose interim remedies while an investigation proceeds.

As this Court recently emphasized, prosecutors have robust obligations to disclose police misconduct. *Matter of a Grand Jury Investigation*, 485 Mass. 641 (2020). But these obligations would lose their force if prosecutors could evade their duty to disclose police misconduct simply by declining to learn about it. That is why the duty to investigate egregious government misconduct, as articulated in cases like *Cotto* and *Ware*, must be applied to the policing context. That does not appear to be happening in Springfield. A thorough investigation by the Commonwealth into the scope and timing of SPD misconduct is necessary to determine which defendants' rights have been affected, to protect those rights, and to thereby ensure the proper functioning of the judiciary.

A. The Commonwealth must fully investigate evidence of egregious misconduct by a member of the prosecution team.

The Commonwealth has an ongoing legal and ethical duty to investigate misconduct perpetrated by a member of the prosecution team. *See, e.g.*, *Ware*, 471 Mass. at 95; *Brady*, 373 U.S. at 87; Mass. R. Prof. C. 3.8(d), (g), (i). When the Commonwealth fails to carry out that duty, particularly where the misconduct becomes systemic, the Court has acted to ensure that the Commonwealth thoroughly investigates the scope and timing of the misconduct. *Bridgeman v. Dist. Attorney for Suffolk Dist.*, 476 Mass. 298, 315 (2017). The Court does so “to remove the cloud that has been cast over the integrity of the work performed ..., which has serious implications for the entire criminal justice system.” *Cotto*, 471 Mass. at 115.

The duty to investigate is fundamental to due process, which “require[s] continued vigilance on the part of the Commonwealth for information the Commonwealth knows, or should know.” *Commonwealth v. Daniels* 445 Mass. 392, 403-04 (2005). Accordingly, prosecutors have a continuing duty to investigate when there is a reasonable basis to suspect that a member of the prosecution team has engaged in misconduct. *See Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (“the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police”); *United States v. Agurs*, 427 U.S. 97, 103 (1976) (“a prosecutor’s duty extends . . . to information that the prosecutor ‘should have known’”).

Applying these principles, this Court stepped in to correct the Commonwealth’s failure to investigate the initial revelations of misconduct by former state chemist Sonja Farak because, in contrast to the “broad formal investigation” into Annie Dookhan’s misconduct at the Hinton lab, “the Commonwealth’s investigation into the timing and scope of Farak’s misconduct ha[d] been cursory at best.” *Cotto*, 471 Mass. at 111. That failure to investigate egregious misconduct, the Court explained, was impermissible. The Court held that “the Commonwealth ha[s] a duty to conduct a thorough investigation to determine the nature and extent of [Farak’s] misconduct, and its effect on both pending cases and on cases in which defendants already had been convicted of crimes involving controlled substances that Farak had analyzed.” *Ware*, 471 Mass. at 95.

The Court therefore did two things. First, it gave the Commonwealth a deadline: one month to “notify the [Superior Court] whether it intend[ed] to undertake . . . an investigation” that would thoroughly ascertain the timing and scope of Farak’s misconduct. *Cotto*, 471 Mass. at 115. Second, it announced interim measures—such as “entertain[ing] discovery motions to retest randomly selected drug samples” and “affording a defendant an opportunity to conduct postconviction discovery”—that trial judges could implement while the investigation unfolded. *Id.* at 111-15; *Ware*, 471 Mass. at 96. In response, the Attorney General undertook an investigation resulting in the “Cotto Report,”

and the number of cases associated with Farak’s misconduct ultimately grew from “at least eight,” *Cotto*, 471 Mass. at 110, to more than 16,000. *See* Report of the Special Master at 4, *Committee for Public Counsel Services v. Attorney General*, No. SJ-2017-0347 (filed Sept. 23, 2019).¹²

B. The existing evidence of SPD misconduct is sufficient to trigger the Commonwealth’s duty to investigate.

The lesson of *Cotto* and *Ware* is that the Commonwealth cannot avoid finding exculpatory evidence that, if known, it would be required to disclose. Yet egregious SPD misconduct appears to have triggered no meaningful investigation by the Commonwealth—no sanctions, no substantial remedial action, and no disclosure by the HCDAO. In short, evidence of SPD misconduct is often met by incuriosity. *See, e.g.*, R.A. 268, Auer Aff.; R.A. 317, Murdock Aff.; R.A. 305-09, Puryear Aff.; R.A. 271, Ryan Aff. This problem implicates defendants’ due process rights, not only because evidence provided in *an individual defendant’s case* might be false, but also because falsification and excessive force *in any case* constitute exculpatory evidence that must be disclosed to defendants. Police officers, no less than chemists, are “part of the prosecution.” *Commonwealth v. St. Germain*, 381 Mass. 256, 262 (1980); *see Matter of a Grand Jury Investigation*, 485 Mass. at 658 (information that a police officer lied to conceal excessive force must be disclosed to the defense counsel in any criminal case where the officer is a potential witness or prepared a report).

The recent correspondence between the City and the HCDAO highlights the substantial gap between the Commonwealth’s investigative duties and its actual practices. Nowhere does this correspondence reflect an effort to do more than, at most, identify incidents highlighted by the DOJ. But even with respect to that known misconduct, there is no shared understanding that all relevant documents will be turned over to prosecutors so that they, in turn, can disclose it to criminal defendants. To the contrary, the correspondence appears to reflect a view that documents

¹² https://www.aclum.org/sites/default/files/20190923_report_of_special_master.pdf

actually or potentially reflecting police misconduct are not being turned over—*because there are just so many of them*. R.A. 212-14, Letter from Springfield City Solicitor Edward Pikula to Hampden District Attorney Gulluni (Dec. 10, 2020); R.A. 216, Letter from Hampden District Attorney Gulluni to Springfield City Solicitor Edward Pikula (Mar. 11, 2021).

It is therefore imperative that the Commonwealth thoroughly investigate the timing and scope of SPD misconduct. The Commonwealth cannot disclaim this duty by relying on an outside agency like the DOJ, particularly because the DOJ Report does not purport to be comprehensive. It expressly raises “substantial concern” that there “are other uses of unreasonable force that are falsely reported,” but have yet to be uncovered. R.A. 19. Moreover, because the DOJ investigation was undertaken for the purpose of determining the existence of a pattern and practice within the SPD Narcotics Bureau *generally*—it cannot fulfill the Commonwealth’s obligation to investigate and disclose exculpatory evidence about the *specific* officers participating in a defendant’s case. *See Bridgeman*, 476 Mass. at 315. Nor can the Commonwealth foist its investigative duties onto defendants. Merely sending the DOJ Report to defense counsel cannot fulfill the Commonwealth’s duty “to conduct a thorough investigation.” *Cotto*, 471 Mass. at 112.

The DOJ has joined others in saying that there is something important under a rock in Springfield. It is the Commonwealth’s job to turn over the rock, and to disclose what it finds to wronged defendants.

C. The Court should ensure that the Commonwealth discharges its duty to investigate systemic SPD misconduct.

As in *Cotto* and *Ware*, the Commonwealth’s failure to investigate SPD misconduct has impaired the rights of an unknown number of defendants. And as in *Cotto* and *Ware*, this Court can address that situation using its superintendence powers. *See Ware*, 471 Mass. at 93 (“the potential implications of such behavior on defendants . . . present exceptional circumstances warranting this court’s immediate attention”); *Commonwealth v. Charles*, 466 Mass. 63, 88 (2013) (exercise of

superintendence authority is appropriate where there has been a “violation of the party’s substantive rights” and it is not possible to obtain “adequate relief through the ordinary appellate process”).

To start, the Court should hold that the Commonwealth’s duty to thoroughly investigate SPD misconduct has been triggered, and set a deadline for the Commonwealth to say whether anyone on its behalf will undertake that investigation. *See Cotto*, 471 Mass. at 115. Any such investigation should “begin promptly and . . . be completed in an expeditious manner.” *Id.* The Commonwealth 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, and review all cases where the HCDAO filed a *nolle prosequi* after learning of possible SPD misconduct. *See, e.g.*, R.A. 268, Auer Aff. The Commonwealth should be required to provide periodic public reports of its findings, which would allow for the scope of the investigation to be tailored to emerging recommendations from the single justice, and to create a list of cases affected by any misconduct in order to ensure that impacted defendants will be notified.

Moreover, to mitigate the risk of ongoing violations of rights, the Court should impose interim evidentiary relief. *Id.* at 111-15; *Ware*, 471 Mass. at 96. SPD officers, unlike Annie Dookhan and Sonja Farak, continue to provide evidence in criminal matters upon which the HCDAO relies to secure warrants, charges, and convictions; failing to redress their misconduct causes ongoing harm. Interim remedies are therefore consistent with the Court’s “authority to regulate the presentation of evidence in court proceedings.” *Commonwealth v. DiGiambattista*, 442 Mass. 423, 444-45 (2004). Such relief could include the creation and monitoring of a thorough *Brady* list of officers with misconduct issues; ensuring that defendants receive evidence as it becomes available; a judicial presumption in favor of the admissibility of the DOJ Report, 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. This relief will ensure that defendants in ongoing and future cases based on evidence proffered by SPD officers are afforded fair and constitutional proceedings.

II. To guarantee the proper administration of justice, the Court should ensure that the HCDAO is fulfilling its obligations to disclose SPD misconduct.

Beyond ensuring that the Commonwealth is properly investigating egregious misconduct by SPD officers, this Court should ensure that the HCDAO's discovery practices properly disclose that misconduct. Evidence of SPD misconduct has been publicly available for years, yet almost nothing is known about whether and how the HCDAO discloses that misconduct. Indeed, there is reason to believe that even when the HCDAO suspects SPD misconduct, as reflected in the HCDAO's decision to file a *nolle prosequi*, it does not disclose that misconduct going forward. There is, therefore, significant uncertainty as to which defendants convicted based on evidence or testimony from SPD officers have had constitutionally fair trials or knowing and voluntary pleas.

A. District attorneys must adequately disclose evidence of officer misconduct in every case and must notify defendants when new misconduct is discovered.

Defendants have the right to receive evidence tending to negate their guilt, impeach a government witness's credibility, or corroborate their story. *Matter of a Grand Jury Investigation*, 485 Mass. at 646-647; Mass. R. Crim. P. 14(a)(1)(A)(iii), as amended, 444 Mass. 1501 (2005); Mass. R. Prof. C. 3.8(d), as appearing in 473 Mass. 1301 (2016). In furtherance of that right, the Commonwealth has an automatic and ongoing duty "to learn of and disclose to a defendant any such evidence that is 'held by agents of the prosecution team;'" this includes evidence known to staff in the district attorney's office and police officers who participated in the case. *Ware*, 471 Mass. at 95 (citing *Beal*, 429 Mass. at 532). Accordingly, evidence of officer misconduct must be disclosed in every case involving that officer after the misconduct took place, *see Matter of a Grand Jury Investigation*, 485 Mass. at 658; *Giglio*, 405 U.S. at 154, because a prosecutor is considered to have knowledge of

officer misconduct simply by virtue of it having occurred. *See Arnold v. McNeil*, 622 F. Supp. 2d 1294, 1315 (M.D. Fla. 2009), *aff'd. on op. below* 595 F.3d 1324 (11th Cir. 2010) (officer's knowledge of his own misconduct sufficient to impute knowledge to prosecutor under *Brady*); *Scott*, 467 Mass. at 349 (chemist's knowledge of her own misconduct triggered duty to disclose).

Applying these principles, the Court recently upheld an order allowing the Commonwealth to disclose evidence of officer misconduct to “all defendants of cases not yet tried and cases now disposed that were tried after the date of the [misconduct], for which the identified officer either prepared a report or is expected to be a witness at trial.” *Matter of a Grand Jury Investigation*, 485 Mass. at 645-46. The Court also required the Commonwealth to make disclosures to other defendants about officers who “lied to conceal the unlawful use of excessive force,” or “lied about a defendant's conduct and thereby allowed a false or inflated criminal charge to be prosecuted.” *Id.* at 658. Thus, officer misconduct in one case may have to be disclosed in other cases.

This Court's cases also make clear that the Commonwealth must identify open and closed cases affected by egregious government misconduct, and take reasonable steps to “timely and effectively notify” each affected defendant. *Bridgeman II*, 476 Mass. at 315. In the drug lab context, the Court established robust systems to ensure that defendants whose cases may have been impacted by egregious lab misconduct were both identified and notified. Defendants potentially affected by egregious police misconduct deserve nothing less.

B. The HCDAO does not appear to be fulfilling its disclosure obligations.

It is implausible that the HCDAO has properly discharged its duty to obtain and disclose all exculpatory evidence concerning the SPD. Upon an incomplete DOJ review of documents, in which the DOJ's ability to “identify untruthful [SPD] reporting” was often limited to situations in which “photographic and/or video evidence happened to be available,” the DOJ nevertheless identified “substantial evidence” of false, vague, and misleading police reports—evidence that jeopardizes the

due process rights of defendants but nevertheless was not previously disclosed by the HCDAO to defense counsel. *See* R.A. 16, 18. Thus, while “it is apparent that the Commonwealth clearly had information suggesting that [the SPD] ha[s] engaged in misconduct” for years, the magnitude and implications of the problem on defendants’ right to a fair trial are unknown. *See Ware*, 471 Mass. at 96. It is unclear how, or why, the HCDAO has no record of findings similar to the DOJ’s when it regularly relies on SPD reports to pursue criminal convictions.

Beyond failing to disclose excessive force and misleading reports identified by the DOJ, the HCDAO seems generally to fail to disclose exculpatory evidence to which defendants are entitled, with disclosures sometimes occurring only after a news story or other event reveals the misconduct to the public. R.A. 265-69, *Auer Aff.*; R.A. 270-71, *Ryan Aff.*; R.A. 324, *Nicoletti Aff.* It is unacceptable that MassLive.com, or a Google search, does a better job tracking police misconduct than the district attorney. *See* R.A. 38-39, *Nolen Aff.* Even now, cases seemingly flagged in the DOJ Report as evidence of SPD misconduct are continuing without *Brady* disclosures by the HCDAO. *See* R.A. 234-35, *O’Connor Aff.*

Instead, the HCDAO has repeatedly asserted that it need not obtain evidence from the SPD related to officer misconduct. *See, e.g.,* R.A. 267, *Auer Aff.*; R.A. 33-35, *Miles Aff.*; R.A. 315-16, *Murdock Aff.*; R.A. 270-73, *Ryan Aff.* In Petitioner Lopez’s case, the prosecutor strongly implied that the duty to disclose SPD records is triggered only when the SPD inadvertently submits exculpatory documents to prosecutors “through inadvertence.” R.A. 316, *Murdock Aff.*; R.A. 341, Hearing Transcript, *Commonwealth v. Lopez*, C.A. No. 1979R0143 (Springfield Dist. Ct. Feb. 10, 2021). But even where the HCDAO physically possesses the records, it does not always make disclosures. *See* R.A. 37, *Nolen Aff.*; R.A. 174-75, *Druzinsky Aff.* And even where there is evidence of officer misconduct in a specific case, the HCDAO does not investigate it or disclose it to other defendants. *See, e.g.,* R.A. 305-07, *Puryear Aff.*; R.A. 259-60, *Fleischner Aff.*; R.A. 173-74, *Druzinsky Aff.*

That blinkered view of the Commonwealth’s disclosure obligations is unsupportable. Just as the Commonwealth could not avoid its discovery obligations by claiming that egregious government misconduct was known only to chemists working for the Department of Public Health, the Commonwealth cannot avoid those obligations by claiming that egregious government misconduct is known only to the police. *See Matter of a Grand Jury Investigation*, 485 Mass. at 645-46; *Bridgeman II*, 476 Mass. at 315; *see also* Mass. R. Prof. C. 3.8(g) (“The prosecutor in a criminal case shall . . . not avoid pursuit of evidence because the prosecutor believes it will damage the prosecution’s case or aid the accused”); *State v. Coleman*, 907 N.W.2d 124, 139 (Iowa 2018) (“prosecutorial misconduct involves . . . the prosecutor’s reckless disregard of a duty to comply with the applicable legal standard or obligation”); *Gov’t of Virgin Islands v. Fabie*, 419 F.3d 249, 256 (3d Cir. 2005) (“[a] pattern of constitutional violations may . . . be used to show recklessness on the part of a prosecutor”).

C. The Court should exercise its superintendence powers to assure the HCDAO’s compliance with its disclosure obligations.

When confronted with an apparent affront to the judicial system’s integrity, the Court has the authority to inquire. “The power, authority, and jurisdiction of this court to make the inquiry and to hold hearings rest on at least the following grounds, among others: (a) the inherent common law and constitutional powers of this court, as the highest constitutional court of the Commonwealth, to protect and preserve the integrity of the judicial system and to supervise the administration of justice; (b) the supervisory powers confirmed to this court by G. L. c. 211, § 3, as amended; (c) the power of this court to maintain and impose discipline with respect to the conduct of all members of the bar, either as lawyers engaged in practice or as judicial officers; and (d) the power of this court to establish and enforce rules of court for the orderly conduct (1) of officers and judges of the courts and (2) of judicial business and administration.” *In re DeSaulnier*, 360 Mass. 757, 758–59 (1971). Or, as Justice Brandeis put it, “[t]he court protects itself.” *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). The Court’s exercise of its supervisory powers is “not limited to

correcting error, but may be guided by whatever is needed to ensure that cases are tried fairly and expeditiously.” *Commonwealth v. O’Brien*, 432 Mass. 578, 584 (2000).

Here, the HCDAO’s duty to obtain and disclose exculpatory evidence is fundamental to the courts’ ability to fairly administer justice. This duty is meant to help mitigate the “grave danger that the courts themselves may become the instrumentality through which government agents may effectuate threats to defendants.” *Id.* This danger has been evidenced by cases in which the HCDAO, based on the false reporting of the SPD, has pursued prosecutions for assault and battery on a police officer, resisting arrest, or disorderly conduct only to have the press reveal that SPD officers were the aggressors. As our state has seen, if even a single member of the prosecution team engages in egregious misconduct, the effect can be systemic. In Springfield, the evidence of egregious misconduct goes well beyond one individual, and has occurred within a department where “officers have no clear rules governing their conduct.” R.A. 344, Police Executive Research Forum, *Assessment of the Springfield, Massachusetts Police Department: Executive Summary* (2019); R.A. 2.

Where, as here, there is substantial evidence that a prosecuting agency’s practices contribute to constitutional violations and impair the proper functioning of the judiciary, the Court must protect itself from the taint of misconduct, including by assessing the agency’s disclosure practices. *See Fabie*, 419 F.3d at 256 (“a prosecutor who sustains an erroneous view of her *Brady* obligations over time will be inadequately motivated to conform her understanding to the law”). That should happen here. Consistent with its “constitutional and...statutory... obligation to oversee the administration of justice in our courts,” *Commonwealth v. Bastarache*, 382 Mass. 86, 102 (1980), this Court should assess the HCDAO’s discovery practices for compliance with the constitution, this Court’s case law, and the rules that govern disclosure. Given the gap between the substantial revelations of police misconduct in Springfield, on the one hand, and the insubstantial disclosures of

that misconduct to defendants, on the other, guidance from this Court is needed regarding what prosecutors must do when confronted with evidence of egregious police misconduct.

CONCLUSION

This Court or the full Court, upon reservation and report, should exercise its authority under G. L. c. 211, § 3, and c. 231A, § 1, and provide comprehensive remedies to mitigate ongoing violations of defendants' rights in Hampden County.

1. With respect to the Commonwealth's duty to investigate SPD misconduct, the Court should:
 - a. declare that the Commonwealth's duty to thoroughly investigate the timing and scope of SPD misconduct has been triggered;
 - b. require the Commonwealth to notify the Court whether it intends to undertake such an investigation and, if so, whether it has identified an impartial entity to do so, *see Cotto*, 471 Mass. at 115; and
 - c. provide criminal defendants the interim evidentiary relief necessary to ensure the integrity of the criminal proceedings.
2. With respect to the Commonwealth's duty to disclose SPD misconduct, the Court should:
 - a. assess the HCDAO's discovery practices for compliance with the constitution, this Court's case law, and the rules governing disclosure; and
 - b. provide guidance to the HCDAO and all district attorneys concerning their obligations when confronted with evidence of egregious police misconduct.
3. With respect to further proceedings, the Court should retain jurisdiction over this case in order to consider and impose any further remedies that may be warranted following the Commonwealth's investigation, or lack thereof.

Dated: April 6, 2021

Respectfully submitted,

Martin M. Fantozzi (BBO #554651)
Matthew P. Horvitz (BBO #664136)
Abigail Fletes (BBO #707177)
GOULSTON & STORRS PC
400 Atlantic Avenue
Boston, MA 02110
(617) 482-1776
mhorvitz@goulstonstorrs.com

Somil Trivedi*
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION, INC.
915 15th St., NW
Washington, DC 20005
(202) 715-0802
strivedi@aclu.org

Ezekiel Edwards*
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION, INC.
125 Broad Street, 18th Fl.
New York, NY 10004-2400
(212) 549-2610
eedwards@aclu.org

** pro hac vice application pending*

Matthew R. Segal (BBO #654489)
Jessica J. Lewis (BBO #704229)
Daniel L. McFadden (BBO #676612)
William C. Newman (BBO #370760)
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF MASSACHUSETTS, INC.
211 Congress Street
Boston, MA 02110
(617) 482-3170
msegal@aclum.org

Rebecca Jacobstein (BBO #651048)
Mitchell Kosht (BBO #706334)
COMMITTEE FOR PUBLIC COUNSEL SERVICES
100 Cambridge St., 14th Floor
Boston, MA 02110
(617) 910-5726
rjacobstein@publiccounsel.net

Counsel for the Committee for Public Counsel Services