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2024 SEP 24 AM 8:49  
NORFOLK, ss.  
CLERK OF THE COURT  
NORFOLK COUNTY  
COMMONWEALTH

SUPERIOR COURT DEPT.  
NO. 2382CR00091

v.

BRIAN WALSH

**MOTION FOR DISCOVERY OF DOCUMENTS  
RELATED TO THE DISTRICT ATTORNEY  
AND LAW ENFORCEMENT**

Now comes counsel for the defendant, Brian Walshe, and respectfully requests that the Commonwealth (1) inquire and disclose the following information and (2) if such information contains what is considered confidential or protected information, that it be produced pursuant to a protective order, and (3) if after proper inquiry to acknowledge such inquiry for any category listed below where it was determined that no such information existed:

1. A complete copy of all data referred to in the Commonwealth's notice dated September 6, 2024, described as "an extraction of Trooper Proctor's work cell phone" and "Trooper Proctor's work cloud account";
2. A complete copy of an estimated 3074 pages of materials and documents provided by the Department of Justice to the Norfolk County District Attorney's office regarding its investigation into the death of Officer John O'Keefe;
3. A complete copy of all correspondence between the DOJ and the Norfolk County District Attorney's office regarding its investigation into the death of Officer John O'Keefe;
4. A complete copy of any documents, correspondence received from the United States Attorney or any other federal agency concerning the Norfolk County District Attorney's office's investigation into the death of Sandra Birchmore;

5. A complete copy of any documents and materials regarding the policy, protocols or agreements, including any memorandum of understanding, between the Massachusetts State Police and the Norfolk County District Attorney's office related to the assignment of state police to that office;
6. Any and all notes, reports, memoranda or other documents related to the investigation of State Trooper Michael Proctor and his conduct in investigating the death of Officer John O'Keefe and the whereabouts of Ana Walshe, including but not limited to the following:
  - a. Notes, records, memoranda or other documents concerning Proctor's job performance;
  - b. Notes, records, memoranda or other documents concerning disciplinary actions, formal or informal, of Proctor;
  - c. Notes, records, memoranda or other documents concerning complaints or any similar communication from any party concerning the conduct of Proctor;
  - d. Notes, records, memoranda or other documents concerning the supervision of Proctor by the state police, the Commonwealth or any of its agents;
  - e. Notes, record, memoranda or other documents containing information of any person, including state police, local police, investigator or forensic consultant supervised by or required to report directly to Proctor.
7. Any and all internal affairs records, memoranda or other documents regarding Proctor.
8. Any and all policies, protocols, directives or memorandum of understanding regarding the supervision of state police assigned to the Norfolk County District Attorney's office;
9. Any and all notes of all state police and any member of the Cohasset Police Department involved in the investigation of this matter concerning the investigation of this matter;
10. Any and all notes, reports, memoranda or other documents containing information concerning the investigation of this matter that have not thus far been provided as of the filing of this motion;

11. Any and all notes, reports, memoranda or other documents concerning interviews or conversations with prospective grand jury witnesses regardless of whether the witness was in fact called to testify before the grand jury in this matter;
12. Any and all notes, reports, memoranda or other documents from any victim advocate concerning any information concerning the investigation of this case or the disappearance of Ana Walshe;
13. Any and all notes, reports, memoranda or other documents containing any reference to leads arising in the investigation of this matter of persons who are or were considered as "targets", "suspects" or "third-party culprits" regardless of the outcome of any investigation and regardless of whether such persons were ever investigated;
14. Any and all notes, reports, memoranda or other documents concerning communications of the state police, any member of the Cohasset Police Department, any person at a different police department, federal law enforcement, and any agent of the Commonwealth and the District Attorney for Norfolk County concerning the investigation of this case;
15. Any and all cellular telephone records in the possession of the Commonwealth or its agents of any state police and any member of the Cohasset Police Department involved in the investigation of this matter;
16. Any and all text messages in the possession of the Commonwealth or its agents of any state police and any member of the Cohasset Police Department involved in the investigation of this matter; and,
17. Any and all social media records in the possession of the Commonwealth or its agents of any state police and any member of the Cohasset Police Department involved in the investigation of this matter.
18. Finally, the defendant requests that if it is determined that no information in any of the above categories was deleted, destroyed or lost, the Commonwealth inform counsel of that conclusion including the time, place, manner and means and the circumstances of any deletion, destruction or loss of the information.

**As grounds therefore,** the defendant asserts that the request

for inquiry and disclosure as requested is necessary for the adequate preparation of the trial of this matter for the reasons set forth in the attached memorandum of law and fact. In summary here, these requests are based on the revelations of bias and a lack of proper supervision of the state police assigned to the Norfolk District Attorney's office, the biased statements of Trooper Michael Proctor, the DOJ investigation into the handling of the death investigation of Officer John O'Keefe, the production of 3072 pages of documents produced to certain parties regarding that death investigation, the fact that portions of correspondence between the DOJ and the Norfolk County District Attorney's office has been released, that the Commonwealth has received digital data regarding Trooper Michael Proctor, and the troubling emerging facts and circumstances regarding the Norfolk County District Attorney's investigation into the death of Sandra Birchmore.

The failure to produce this specific information requested herein results in a violation of the defendant's rights established by the 6<sup>th</sup> and 14<sup>th</sup> amendments to the Federal Constitution, art. 12 of the Massachusetts Declaration of Rights, establishing the defendant's rights to effective assistance of counsel, due process and a fair trial, Mass. R. Crim. P. 14, the rules of professional conduct concerning the duties and obligations of the prosecutor and the common law.

BRIAN WALSH

By his attorneys:

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DATED: September 24, 2024

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COMMONWEALTH OF MASSACHUSETTS

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v.

BRIAN WALSH

**AFFIDAVIT IN SUPPORT OF DEFENDANT'S  
MOTION FOR PRODUCTION OF INFORMATION CONCERNING  
DISTRICT ATTORNEY AND LAW ENFORCEMENT**

I, Larry Tipton, state the following to be true to the best of my knowledge and belief:

1. I, along with Attorney Kelli Porges, represent Mr. Brian Walshe in this matter charging him with murder.
2. Mr. Walshe's motion does not allege the Norfolk County District Attorney's office of any wrongdoing. The motion addresses what has been revealed as serious questions about the conduct, decisions and bias in its investigations, the bias and inadequate supervision of the state police assigned to the office and other police departments reporting to the office in its investigations, and is an effort to require production of any exculpatory evidence that raises questions about the investigation of Mr. Walshe.
3. The requests for the information set forth in the motion is based at least in part on the factual record now firmly established that the relationship between the state police and the District Attorney for Norfolk County ("DA") is flawed, problematic and results in a lack of integrity, bias in investigative decisions, conclusions and opinions.
4. It is clear that, based on the evolving factual record regarding Trooper Michael Proctor ("Proctor") that there exists a lack of supervision, that biased decisions, conclusions and opinions are allowed to flourish and that these biases infect the myriad of decisions made during the investigation and prosecutions handled by these law enforcement personnel and the DA.
5. This observation is not the single opinion of defense counsel but shared by others:

- a. The Department of Justice initiated an investigation of the DA in its handling of the prosecution in the matter of Commonwealth v. Read.
- b. There appears to be either a similar investigation or at the very least, concerns for the lack of sufficient investigation into the matter involving the death of Sandra Birchmore.
- c. Furthermore, there is factual record evidence that Proctor was not properly supervised by his state police supervisors and was permitted to espouse biased and prejudicial comments regarding at the least the defendant in the aforementioned case and there is nothing to support a belief that other law enforcement personnel purportedly supervised by state police and reporting to the DA received adequate supervision;
- d. My experience as defense counsel indicates that the Proctor's supervisor, Det. Lt. Tully, has either knowingly or mistakenly misrepresented facts in the recent case of Commonwealth v. Lopes, misrepresentations that were litigated by way of extensive pleadings and in those instances, Tully had to admit his mistakes made in reports and sworn testimony to the grand jury and at the first trial of the matter but only after confronted with defense pleadings demanding the truth. These instances include but are not limited to the following:
  - i. misrepresenting to the grand jury that certain critical messages were in fact "read" by the defendant that if not corrected were to be used to establish the defendant's mental state and motive;
  - ii. misrepresenting GPS location data that if not corrected would have been used to suggest the defendant's whereabouts at critical times immediately preceding the incident; and,
  - iii. Notes ordered produced by way of motion that revealed that Tully's investigation reports submitted in the case did not include important details of the observations of the defendant's mental states by a critical witness at critical times immediately preceding the incident.
- e. Another example is a report submitted by other state

police investigators in that same case that were intended to support an argument that the defendant mocked the police on social media were eventually shown to be unreliable and upon motion by the defendant were eventually not used by the Commonwealth.

6. At least one legal scholar has been quoted in the Boston Globe article regarding the emerging facts of the Birchmore investigation and the Proctor matter that "[t]he entire infrastructure is built so that prosecutors are able to protect officers, who are their star witnesses," said Nicole Gonzalez Van Cleve, a Brown University associate professor of sociology who coauthored a 2020 report on the relationship between police and prosecutors.
7. It is clear that in the Proctor debacle and based on experience of defense counsel, the biases and detrimental impact of such biases and flawed relationships appear historically to only be forthcoming when defense counsel, as was the case in Commonwealth v. Read and in Commonwealth v. Lopes, bring a court's attention to what is believed to be exculpatory evidence of the professional negligence that otherwise would have remained hidden from view.
8. This observation is further supported by evolving case law cited in the attached memorandum of law and fact.
9. It is for these reasons we seek on behalf of Mr. Walshe the Commonwealth be required to inquire and disclose and to do so consistent with the prevailing law of discovery.
10. These requests are grounded in the belief that only due diligence and a review of the materials by experienced defense counsel well-versed in the relevant allegations of this case and information derived from its own ongoing investigation can determine whether inherent bias, professional negligence or a casual disregard for justice has permeated the investigation of Mr. Walshe.
11. In my opinion, it would be ineffective assistance of counsel to not make the requests in this motion and to ignore the revelations summarily described above and to rely on what appears to be a failure of the DA's office to properly supervise its investigating agents and the failure for those very agents to properly supervise themselves.
12. What's more, Proctor, as "case officer" of the investigation of Mr. Walshe, as well as other state police assigned to the



DA's office, were in charge of and intricately involved in the investigation of Mr. Walshe resulting in the indictment charging him with murder.

13. In this case, until he was suspended, Proctor was considered the lead or primary investigator, was involved in interviewing critical witnesses, was present for a majority of the grand jury presentations, reviewed other investigator reports and forensic reports, presumably interviewed and prepared grand jury witnesses, reviewed and "supervised" other agents of the Commonwealth, helped in the drafting of reports, determined what lead(s) to follow and not follow, made a decision or was instrumental in making a decision to target Mr. Walshe, and in summary, shaped the scope of the investigation leading to the indictment.
14. Importantly, the investigation of Mr. Walshe was being conducted at or around the same time that Proctor, his supervisors and other agents of the Commonwealth, were investigating the aforementioned Read case and making biased and unprofessional remarks and decisions.
15. The Proctor debacle resulted in Proctor being first suspended and then terminated from the State Police, but only after defense counsel exposed the serious issues.
16. It is now clear that the Commonwealth has also determined not to call Proctor as a witness. This decision speaks volumes about the impact Proctor's conduct has had on his investigation and lends substantial support for production of the information sought in this motion.
17. The media reported that the parties in the Read case and the Commonwealth have been provided notice of its receipt of 3074 pages of records specific to the investigation of the death of Officer John O'Keefe.
18. Additionally, on September 6, 2024, the Commonwealth notified the parties of its receipt of digital data regarding Proctor, that it has initiated its own review of that data, and that it is considering having someone purportedly independent to review those records, presumably for exculpatory information.
19. A suggestion that someone independent of the DA's office is qualified to review documents in this manner under these attendant circumstances ignores the SJC's reasoning, logic and decision to change the framework for evaluating

statutorily privileged records in Commonwealth v. Dwyer as discussed in the accompanying memorandum, doing away with in camera review--establishing a review process whereby defense counsel, with protections in place to ensure there is no disclosure of privileged information, review the privileged materials.

20. It is not an overstatement to simply state that defense counsel, knowing the allegations, relevant facts, circumstances, possible defenses and information not in the possession of the Commonwealth based on the defense investigation, is in a better position to determine what is potentially exculpatory evidence buried in the information requested.
21. Importantly, the requested documents are not privileged by statute and even where there is heightened concern that sensitive information not be revealed, protective orders have long been used by the courts to guard against such disclosure.
22. The bias and resulting damage may be intentional. It appears to be in many instances in (1) the Proctor matter, (2) in failing to include relevant and exculpatory information in final reports as described above, and (3) in the DA's office presumably being unaware of the Proctor's negligence and bias and when made aware of the same, sought to diminish it and its impact on the prosecution in the Read matter. Apparently, that has now changed over time with Proctor being suspended and the Commonwealth belatedly determining they will not call him as a future witness.
23. And it is critical to consider implicit bias and the resulting need for these requests in this case. Bias does not have to be intentional to result in damage and a biased investigation.
24. The SJC has approved and recommended a preliminary and final instruction on "implicit bias." This court should not ignore the implications of implicit bias as it pertains to law enforcement decisions made in the investigation of Mr. Walshe and other cases.
25. For example, jurors are instructed in part to not rely on personal and "unsupported assumptions you may have" and to "do your best to resolve this case based upon the evidence and law, without sympathy, bias, or prejudice, to the best of your ability as human beings." While the same admonition

should be applied by the DA's office and its agents,  
apparently it does not in all occasions.

26. There is literature to support the effects of implicit bias on professionals such as police officers and prosecutors.
27. In conclusion, the requested discovery should be ordered produced based in part or in whole on the established fact of Proctor's conduct leading to his suspension and now the Commonwealth's decision to not call him as a witness and the other reasons stated in the defendant's motion, including but not limited to the association between the DA's office and Proctor and the state police wherein state police officers are specifically assigned to and provide investigation services to the DA's office in the investigation of alleged crimes, the investigation of the DA's office by the Department of Justice and the Boston office of the U.S. Attorney and the emerging information regarding the flawed investigation of the death of Sandra Birchmore.

**Larry Tipton**

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Larry Tipton, BBO# 552557

DATED: September 24, 2024

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BRIAN WALSH

**MEMORANDUM IN SUPPORT OF  
MOTION FOR DISCOVERY OF DOCUMENTS  
RELATING TO THE DISTRICT ATTORNEY AND LAW ENFORCEMENT**

The defendant, Mr. Brian Walshe, has filed a motion seeking discovery of documents, digital data, records and materials concerning the Department of Justice ("DOJ") investigations involving the Norfolk County DA's office ("DA") and its handling of an investigation involving allegations of murder, documents and digital data regarding Proctor, a state police officer, and agents of the Commonwealth involved in the investigation of Mr. Walshe.

"In January of 2023 Trooper Michael Proctor was designated as the case officer in the missing person and murder investigation of Ana Walshe by the Massachusetts State Police." Commonwealth's Notice Regarding State Trooper Michael Proctor's Work Phone Data (September 6, 2024). The Commonwealth has announced it will not call Proctor at the trial of Mr. Walshe. The fact Proctor was "case officer" in Mr. Walshe's case and the disclosure that the DA's office has now chosen to not use him as a witness are two important factors reinforcing rather than distracting the need for production of the requests made in Mr.

Walshe's motion.<sup>1</sup>

The requests are made pursuant to Mass. R. Crim. P. 14, and Mr. Walshe's rights guaranteed by the state and federal constitution that require the DA's office to produce exculpatory information. The requests, set forth in the motion and not repeated herein, are necessary in part due to the need to ensure that the DA's office investigate and disclose exculpatory evidence as outlined below and importantly, the serious issues raised in various pleadings, trial testimony and media that raise substantial questions about the integrity of the DA's ability to properly investigate serious crimes and the state police and law enforcement in the investigation of criminal cases in Norfolk County, many of whom are assigned to the DA's office.<sup>2</sup>

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<sup>1</sup>The effects of Proctor's bias, his lack of supervision and the complacency of his supervisors on the investigation of Mr. Walshe do not disappear and become irrelevant because the Commonwealth chooses to strike Proctor from witness lists.

<sup>2</sup>The relationship between the state police unit assigned the DA's office raises serious questions requiring this motion. Media reports and legal scholars has commented on this issue:

But critics question why outside investigators weren't brought into the case from the onset, particularly after detectives determined Birchmore was pregnant and claiming Farwell was the father. Academic experts and local advocates argue that prosecutors and police officers have tight professional relationships that can taint the integrity of their investigations.

"The entire infrastructure is built so that prosecutors are able to protect officers, who are their star witnesses," said Nicole Gonzalez Van Cleve, a Brown University associate professor of sociology who

More specifically, Mr. Walshe requests are based on the factual record established that (1) Proctor demonstrated bias against a person accused of murder, (2) Proctor was not properly supervised, (3) the relationship between the DA's office and the state police creates a problematic relationship that prevents proper supervision of its investigators, (4) there is reason to believe the DOJ has concerns about the DA's office and how it handles investigations and (5) the revelations emerging concerning the Sandra Birchmore failed investigation at a minimum suggest a biased approach to investigating wrongdoing by law enforcement personnel.

Given the above, the basis for Mr. Walshe's requests can be equated to the three concerns outlined by the SJC in a recent case where the SJC specifically held the following:

First, the practice of the district attorney's office of disclosing adverse credibility findings made about the [Springfield Police] department's officer witnesses only on a discretionary basis violates the duty of the district attorney's office to disclose. Second, the practice of the district attorney's office of withholding instances of officer misconduct from disclosure where a particular bad act cannot be attributed clearly to a particular officer violates the duty of the district attorney's office to disclose. Third, by failing to gain access to all documents known

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coauthored a 2020 report on the relationship between police and prosecutors.

See

<https://www.bostonglobe.com/2024/09/13/metro/sandra-birchmore-death-independent-investigation-matthew-farwell/?event=event12> (last accessed 9/23/2024).

to have been reviewed by the DOJ, the district attorney's office failed in its duty to investigate.

Graham v. Dist. Att'y for Hampden Dist., 493 Mass. 348, 350 (2024).

The requests herein are an attempt to ensure the Norfolk DA does not ignore or simply misinterpret and possibly gloss over on a discretionary basis what is exculpatory information contained in the records sought. The defendant's motion requests certain categories of documents and information. One concern is that the DA's office, given the volume of materials, may choose not to review the contents of all such documents under the mistaken belief that a category of documents is not relevant, or is simply ill-equipped to determine what is truly exculpatory in this context. But those beliefs would result in a violation of Mr. Walshe's rights and would be contrary to the law. In any event, at a minimum the DA would still need to produce all documents in the requested categories to permit the counsel for Mr. Walshe to search for exculpatory information. See discussion in Graham, 493 Mass. at 372-73 (where it was not clear what the DOJ reviewed in the Graham case, the SJC held that "to the extent that these materials are not internal affairs records, . . . , the district attorney's office must obtain all documents falling into these categories from the department in order to fulfill the duty of the district attorney's office of investigation."). Furthermore, the obligation here extends to any additional or new exculpatory

information that arises in the exercise of fulfilling its obligations. See id.

### **Defense Counsel's Obligation**

The SJC in Graham addressed the importance attached to the production of exculpatory information, and "reemphasize[d] the importance of a prosecutor's dual duties – to disclose and to investigate – in upholding the integrity of our criminal justice system[,]” and stated “[i]t is the responsibility of prosecutors and defense attorneys alike to ensure that the due process rights of every criminal defendant . . . are vindicated and protected.” Graham, 493 Mass. at 350, citing Committee for Pub. Counsel Servs. v. Attorney Gen., 480 Mass. 700, 702-704 (2018).<sup>3</sup>

### **Exculpatory Evidence Requested Only Needs To Diminish Mr. Walshe's Culpability To Mandate Production**

It is well-established that “[t]he due process clauses of

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<sup>3</sup>The defendant herein relies in part to the SJC's logic and reasoning decision in Graham. We understand the underlying substantive issues in Graham, involving a pattern and practice of the Springfield Police Department in violating defendant's rights over a period of years and the Hampden DA's neglect in adhering to the law with regard to disclosing exculpatory information. But the SJC's discussion of the relevant law applicable to Mr. Walshe's requests changed nothing in that regard except one thing and clearly reinforced the critical need to ensure a DA's obligations are honored. The SJC made it clear that the prosecution's obligations at issue must be and will be enforced or there will be consequences in any failure to do so. While the relative law in this area was not altered in Graham, what was required to change was a DA's office choosing to ignore the rights of defendants that had gone on for years. This motion is one effort to ensure this does not happen in Norfolk County given the present circumstances and investigations underlying Mr. Walshe's motion.



the Federal Constitution and the Massachusetts Declaration of Rights require that the Commonwealth disclose to a defendant material, exculpatory evidence in its possession or control." Committee for Pub. Counsel Servs., 480 Mass. at 731. Exculpatory evidence in this context is not evidence of innocence. To be considered exculpatory in the context of production of discovery as requested in Mr. Walshe's motion, evidence need only "tend to diminish [a defendant's] culpability." Matter of a Grand Jury Investigation, 485 Mass. 641, 647-649 (2020).

Mr. Walshe is requesting production of documents and information that may eventually raise issues of admissibility. This may be a factor in seeking Rule 17, third-party records but not here. As was made clear in Graham, (see also Commonwealth v. McFarlane, 493 Mass. 385 (2024)), admissibility is not a determining factor in determining the scope of the DA's obligation to investigate and disclose under state and federal law. See also Brady v. Maryland, 373 U.S. 83, 87-88 (1963). Rather, it is the nature of the information, turning only on whether the information has a "tendency toward exculpating a defendant." See Matter of a Grand Jury Investigation, 485 Mass. at 653.

The DA's obligation in this context is not discretionary. Article 12 guarantees every criminal defendant "shall have a right to produce all proofs, that may be favorable to him[.]" A

prosecutor cannot, consistent with their obligation to disclose exculpatory information, withhold at their discretion exculpatory information. Graham, 493 Mass. 349, citing Matter of a Grand Jury Investigation, 485 Mass. at 649 (Massachusetts has a broader duty to disclose than Federal Brady requirements).<sup>4</sup> The obligation to disclose exculpatory material is "an obligation, not a decision" and the DA's office "must" disclose exculpatory information. See Graham, 493 Mass. at 364, quoting Matter of a Grand Jury Investigation, 485 Mass. at 646-647. In addition to Rule 14, rules of professional conduct, e.g., Mass. R. Prof. C. 3.8 (g), mandates that a prosecutor cannot avoid seeking evidence favorable to a defendant, and in where disclosure is required, a failure to do so is "akin to active concealment." See e.g., Milke v. Ryan, 711 F.3d 998, 1006 (9th Cir. 2013).

Mr. Walshe should in the ordinary course not have to press for disclosure of exculpatory information as he does in his motion. But the underlying concern here is that given the present

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<sup>4</sup>In 2020, the United States Department of Justice (DOJ) conducted an investigation of the Springfield police department (department) and found that the department's officers, particularly those within the narcotics bureau, routinely falsified police reports and engaged in a "pattern or practice of excessive force." These findings raised questions about the integrity of the evidence used by the office of the district attorney for the Hampden district (district attorney's office) to obtain convictions. We are called on to determine whether the district attorney's office failed to comply with his obligations to disclose and investigate evidence of the department's misconduct. See Graham, 493 Mass. 348, 349 (2024).

circumstances there is a serious question about the DA's ability to seek out exculpatory evidence in the information requested.

Under our rules of criminal procedure and the various rights established by both federal and state constitutions, a defendant ordinarily need not request exculpatory material to mandate disclosure and this information is subject to automatic disclosure. Commonwealth v. Bing Sial Liang, 434 Mass. 131, 135 (2001). As the SJC has stated, a system that permits exculpatory information "known to the prosecution team to go undisclosed would be to set up a system where a 'prosecutor may hide, [and a] defendant must seek," exculpatory information.'" Graham, 493 Mass. at 366-67, citing Commonwealth v. Baran, 74 Mass. App. Ct. 256, 299 (2009) and other cases, omitted here.

Mr. Walshe has made requests for information concerning both the DA and many of the law enforcement personnel involved in the investigation of Mr. Walshe. The SJC has repeatedly made clear that the DA's duty to disclose extends to all facts within the possession, custody, or control of a member of the prosecution team. Bing Sial Liang, 434 Mass. at 135; Commonwealth v. Beal, 429 Mass. 530, 531-532 (1999) (noting that the Commonwealth cannot ignore information held by its agents). At the very least, the DA's "obligations extend to information in possession of a person who has participated in the investigation or evaluation of the case and has reported to the prosecutor's office concerning the

case." Commonwealth v. Martin, 427 Mass. 816, 824 (1998); Commonwealth v. Woodward, 427 Mass. 659, 679 (1998); Matter of a Grand Jury Investigation, 485 Mass. at 658-659.

In fact, the DA's obligation "encompasses information that may not even be known to the prosecutor or housed within his or her files, so long as the information is related directly to the crimes at issue and is in the possession of some prosecution team member." Graham, 493 Mass. 348, 362 (citations omitted). And furthermore, this obligation extends in some instances beyond the specific case under investigation and is applicable to "any criminal case in which that officer prepared a report or may serve as a witness." Id. at 658. These cases have established that this information requested includes not just the law enforcement officers involved in the case but also includes the State police crime laboratory chemists, victim and witness advocates and medical examiners.

#### **Internal Affairs Records**

Mr. Walshe's requests do not raise an issue of conflicting procedural guardrails for disclosing exculpatory information. Mr. Walshe's requests are made with an understanding that the DA's obligations to disclose certain categories of information have different procedural requirements for disclosure. The defendant acknowledges that his obligations with regard to internal affairs records not in the possession of the Commonwealth or its agents

may be different and subject to the discovery procedures laid out in Commonwealth v. Wanis, 426 Mass. 639, 642-644 (1998), and Commonwealth v. Rodriguez, 426 Mass. 647, 650 (1998). Setting aside the different obligations applicable to disclosing information about civil cases, criminal investigation and internal affairs reports, this motion simply requests information in the possession and control of the DA's office and its agents. The underlying concerns for Mr. Walshe's requests are in part evident from the many failures that have been revealed in the Commonwealth v. Read prosecution and now the serious issues just emerging in the Sandra Birchmore investigation.

It is important to point out here that there is a difference from a "duty to inquire" about internal affairs reports and having knowledge of or be in possession of such reports. The SJC has determined in Wanis that police department internal affairs records fall outside a prosecutor's automatic discovery obligations pursuant to Mass. R. Crim. P. 14. See id. at 643. This court deemed internal affairs divisions to be outside of the scope of the prosecution team and therefore "reject[ed] any suggestion" that internal affairs records, even if relevant and material, must be produced by the prosecution. Id. This reasoning was grounded in (1) the importance of maintaining the integrity of internal affairs investigations and the morale of police officer, (2) confidentiality and the potential to chill

"cooperation with investigation efforts." See id. at 645 and discussion in Graham, 493 Mass. at 373-74.

And while Mr. Walshe acknowledges the differing obligations, it is clear that Proctor as well as other state police involved in the investigation of Mr. Walshe, are part of the internal state police unit assigned to the DA's office. It would seem a contradiction in logic and reasoning to simply say the DA's office in these circumstances can turn a blind eye to what it knows about its own investigators. Any argument that disclosure of what is known and what the DA or its agents possess requires the Wanis/Rodriguez procedural framework to be applied contravenes applicable law. This is made clear in the discussion of these reports in Graham.

Even while shielding internal affairs records from automatic disclosure, this court provided criminal defendants with avenues to access any salient information contained within internal affairs files. Under Wanis, 426 Mass. at 644 [], if a prosecutor actually possesses police department internal affairs records, the prosecutor must review that material in response to a rule 14 motion. If a prosecutor does not possess such records, a defendant may obtain the statements of percipient witnesses contained within an internal affairs file via a motion under Mass. R. Crim P. 17, as appearing in 378 Mass. 885 (1979). See id. If a defendant desires additional information, a summons for production must be sought and, if opposed, the defendant must make a specific, good faith showing of relevancy to a judge.

Graham, 493 Mass. at 374 citing Wanis, 426 Mass. at 644-645 (emphasis added).

While Wanis and Rodriguez "place an explicit limitation on a

prosecutor's duty of inquiry" with regards to these reports, "[t]his limitation does 'nothing to relieve the Commonwealth of its ongoing duty to disclose exculpatory information — including any material, exculpatory information related to past discipline or internal investigation of the officer in question — to the extent such information is in the possession, custody, or control of the prosecution team.'" Graham, 493 Mass. 348, 374, quoting Commonwealth v. Cruz, 481 Mass. 1021, 1022 (2018).

**Defense Counsel Must Be Able to Review the Information in the First Instance**

Long ago, almost two decades ago, the SJC determined that a procedure by which statutorily privileged and confidential information was first reviewed *in camera* by the trial court judge was flawed. Commonwealth v. Dwyer, 448 Mass. 122 (2006).

Experience has also confirmed that trial judges cannot effectively assume the role of advocate when examining records. Requiring judges to take on the perspective of an advocate is contrary to the judge's proper role as a neutral arbiter. . . . Despite their best intentions and dedication, trial judges examining records before a trial lack complete information about the facts of a case or a defense to an indictment, and are all too often unable to recognize the significance, or insignificance, of a particular document to a defense. The absence of an advocate's eye may have resulted in overproduction, as well as underproduction, of privileged records, and has repeatedly contributed to trial delays and appeals, jeopardizing the rights of defendants, complainants, and the public.

Dwyer, 448 Mass. at 144-45. This reasoning doesn't imply a judge would be biased but rather simply ill-equipped to carry out the function of defense counsel. See also Commonwealth v.

Stockhammer, 409 Mass. 867, 882 (1991), quoting Dennis v. United States, 384 U.S. 855, 875 (1966) ("In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate"). The same logic and reasoning should apply here with even greater force and logic as it concerns the DA's review of the information requested in Mr. Walshe's motion: It is only the advocate, counsel for Mr. Walshe, who can properly and effectively determine what is exculpatory in the information requested in light of the inherent bias and prosecutorial role the DA obviously has in this case, coupled with the present circumstances repeatedly referenced herein.

And where Dwyer was decided a mere twenty years ago, over 450 years ago, a phrase was first uttered applicable to the need for defense counsel to review the documents and not leave it to the DA's office or some other entity, amounting to the "fox guarding the hen house." Either possibility is woefully inadequate.<sup>5</sup>

Procedural rules were promulgated in Dwyer whereby defense counsel reviewed (and "only defense counsel" may initially

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<sup>5</sup>The phrase reportedly originated in the 1580's and is used often over 450 years later. See *"The Contre-League and Answere to Certain Letters Sent to the Maisters of Renes, by One of the League who Termeth Himselfe Lord of the Valley of Mayne, and Gentleman of the Late Duke of Guizes Trainee"* (1589) ("...he is a wolfe to keep the sheep, and a foxe to looke to the hennes.").



review, see Dwyer at 145), the privileged and confidential information under the strict adherence with a protective order.

Importantly, the interests underlying the wholesale changes made in Dwyer to then-existing law are in reality the same interests underlying Mr. Walshe's requests. See Dwyer, 448 Mass. at 143, citing Commonwealth v. Two Juveniles, 397 Mass. 261, 266 (1986) (defendant's interests at stake in disclosure of statutorily privileged records are "well-established due process rights of an accused, protected by the Constitutions of the United States and of the Commonwealth ... to gain access to evidence 'shown to be relevant and likely to be significant' or material to his defense, and to use that evidence to confront witnesses and to challenge the validity of the Commonwealth's case").

#### **Ambiguity or Confusion**

Defense counsel is in the best position to evaluate the requested information and to determine its exculpatory significance and ultimately, whether to assert its admissibility at trial following a hearing. Ambiguity and confusion on behalf of the DA's office is no excuse to not disclose the information requested. The applicable law and the SJC has made it clear that even where there might be some confusion about what a particular agent of the Commonwealth did or did not do, if there is a question that certain statements or conduct constitute

exculpatory evidence, for instance, raise the issue of bias on the part of an agent, the team or the DA's office in the investigation of Mr. Walshe, any such confusion cannot prevent disclosure.<sup>6</sup> And importantly, the SJC has stated that "prosecutors must 'err on the side of caution' when deciding whether to disclose." Graham, 493 Mass. at 362 (citation omitted). If there exists ambiguity in the information, the DA's office "cannot shirk its disclosure obligations, but rather must disclose" the exculpatory information involving any of the involving agents, at the very least, any agents involved in the investigation of Mr. Walshe and the allegations. See e.g., discussion pertinent to criminal conduct in Graham, 493 Mass. at 365.

#### **Protective Orders and Procedure**

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<sup>6</sup>The SJC stated in relevant part that "even if the extent of an officer's participation in criminal misconduct is unclear, an officer's known presence at the [scene], coupled with reports of physical force by [other law enforcement] . . . is potentially exculpatory and enough to mandate disclosure." Graham, 493 Mass. at 365-66, citing Matter of a Grand Jury Investigation, 485 Mass. at 650 (evidence that would tend to exculpate defendant, including by impeaching credibility of key prosecution witness, must be disclosed). "In other words, the extent of an officer's involvement need not be clearly proven for the incident to be disclosed; instead, if evidence known to the prosecution team 'would tend to exculpate the defendant or tend to diminish his or her culpability,' it must be disclosed." Graham, 493 Mass. at 366. Disclosure of information that may not be as clear as one would hope it to be at the least permits defense counsel to investigate the contents of the disclosure and "probe more deeply" based on defense counsel's knowledge of the case in determining what may in fact be exculpatory evidence. See Matter of a Grand Jury Investigation, 485 Mass. at 653.

Concerns expressed by the DA's office in its notice entitled Commonwealth's Notice Regarding State Trooper Michael Proctor's Work Phone Data, dated September 6, 2024, disclosing its possession of Proctor data cites its concerns for the need to maintain the confidentiality of some of the information in its possession. The notice also cites, in footnote 1, a plethora of statutes and case law suggesting the DA's office is bound by such statutes and case law to not disclose at least some of the information. And finally, the DA's notice references its intent to explore whether to send the information out to an independent entity to review the information for exculpatory information.<sup>7</sup>

First, the obvious question is why a so-called "independent" review by as yet an unknown entity preserves confidentiality and adheres to the statutes cited any better than disclosing the information to Mr. Walshe's counsel under a protective order? Simply put, it does not. In Graham, the SJC in simple language stated that "[a]ll records will be disclosed subject to a protective order", citing to Mass. R. Crim. P. 14 (a) (6) ("The

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<sup>7</sup>The Dwyer protocols, referenced above, additionally require that before there can be any disclosure of information produced for review by defense counsel, defense counsel must first get approval from the court by way of a sealed pleading explaining the rationale and basis for disclosure at trial. There is nothing in Mr. Walshe's requests that prevents a protective order from being fashioned that preserves the confidential nature of investigative materials and prevents disclosure without prior court approval preceded by an opportunity to be heard by the prosecution.

judge may, for cause shown, grant discovery to a defendant on the condition that the material to be discovered be available only to counsel for the defendant"), and Committee for Pub. Counsel Servs., 480 Mass. at 733 ("Absent a protective order, no prosecutor, whether in the office of the Attorney General or in the office of a district attorney, has the authority to decline to disclose exculpatory information"). Graham, 493 Mass. 348, 379.

A protective order is the simple solution, not bringing in another entity to do what that entity is incapable of doing. That is, it is defense counsel, with our obligations to Mr. Walshe, to ensure his rights are protected and honored in the face of bias, ongoing DOJ investigations and emerging information about flawed investigations. Defense counsel, who are aware of the facts and circumstances of the allegations made against Mr. Walshe, aware of what constitutes exculpatory evidence in the context of the case allegations and counsels' knowledge of facts and details that may not be known by the DA's office or its many agents, are in the best position to review and determine what is or is not exculpatory.

#### **Experience Requires Production of the Requested Information**

There is another reason to order production of the information to enable defense counsel to review the data. Counsel's experience includes instances of the state police

assigned to the DA's office choosing to omit or distort and whether intentionally or not, in essence try to conceal exculpatory evidence, may be evidence of blatant bias as is the case with Proctor or implicit bias, discussed below.

For example, Det. Lt. Tully was reportedly the supervisor of Proctor. In a recent case,<sup>8</sup> it was demonstrated that Tully distorted and misrepresented facts. These misrepresentations were only revealed when brought to the attention of the trial court in extensive pleadings. As a result of the defense filing various trial motions in an attempt to challenge Tully's omissions and distortions, the DA's office and Tully had to admit his mistakes made in reports and sworn testimony to the grand jury. These instances include but are not limited to the following: (1) misrepresenting to the grand jury that certain critical messages were in fact "read" by the defendant that if not corrected were to be used to establish the defendant's mental state and motive; (2) misrepresenting GPS location data that if not corrected would have been used to suggest the defendant's whereabouts at critical times immediately preceding the incident; and, (3) notes ordered produced by way of motion that revealed that Tully's investigation reports submitted in the case did not include important details of the observations of the defendant's mental states by a critical witness at critical times immediately

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<sup>8</sup>See Commonwealth v. Lopes, 1882CR00309.

preceding the incident. Another example is a report submitted by other state police investigators in that same case that were intended to support an argument that the defendant mocked the police on social media that were eventually shown to be unreliable if not fabricated. The Commonwealth eventually decided not to attempt to even use the flawed evidence after the defendant in that case filed his pleading challenging the evidence.

### **Implicit Bias**

Finally, Proctor was designated the "case officer" in Mr. Walshe's case. The Proctor debacle clearly demonstrated his bias towards persons accused of serious crime. His supervisors at worst ignored the signs of such bias but in the least glossed over Proctor's biases and obviously did not recognize and acknowledge the taint that an investigator's bias inflicts on the integrity of the investigation. But apart and aside from an investigator's clear bias, there is another reason for Mr. Walshe making these requests and that is implicit bias. The duty imposed on defense counsel to request the information in this motion on behalf of Mr. Walshe is at least in part grounded in the understanding expressed in relevant literature that bias affects opinions and conclusions. And this bias can and does affect the DA's office, its agents, and any "independent" entity suggested by the September letter that may be brought into the review

process. In short, bias in any form would impact any determination of what is exculpatory in thousands of pages of documents.<sup>9</sup>

With regard to the acknowledged and possibly adverse effects of implicit bias, jurors are now instructed on implicit bias at the beginning of a case and before they deliberate. Implicit bias in the investigation and prosecution of cases results in different assessments, opinions and decisions about the scope of a DA's office to investigate and disclose, making it difficult and at times impossible to if obligations have in fact been honored, as it was in Graham matter and as evidenced by the

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<sup>9</sup>There is no reason not to acknowledge the importance of recognizing implicit bias as it concerns the investigation of Mr. Walshe and the conclusions and opinions resulting in the indictment. This is made very clear where the SJC instruction includes citation to relevant research including but not limited to the following, applicable not only to a juror but equally so to any DA and any investigating agent: "Combatting [sic] implicit bias requires us to focus carefully on the relevant information to come to a conclusion, rather than working backward from a presupposed conclusion and filtering the data through that conclusion. Dror, Cognitive and Human Factors in Expert Decision Making: Six Fallacies and the Eight Sources of Bias, 92 Analytical Chemistry 7998, 8003 (2020) ("[A]s a general principle to combat bias, we need to take actions that will cause us to focus solely on the relevant data and not work backward."). See also Greenwald & Krieger, Implicit Bias: Scientific Foundations, 94 Cal. L. Rev. 945, 946 (2006) ("[T]he science of implicit cognition suggests that actors do not always have conscious, intentional control over the processes of social perception, impression formation, and judgment that motivate their actions.") See <https://www.mass.gov/doc/sjc-model-jury-instructions-on-implicit-bias-preliminary-charge-pdf-sept-29-2021/download>(last accessed 9/17/2024).

relevant jurisprudence. See e.g., Brady, supra, and its progeny.

In Proctor's example, regardless of the type of bias present, such bias is evident from Proctor's willingness to disparage the accused while purporting to be objective. History demonstrates that such bias can result in countless defendants' rights being violated for years, for example, in the failings of the Hampden DA's office at issue in Graham. And it appears as it does in this case that the relationship between the Springfield Police Department and the Hampden DA's office was at least in part due to years of a failure to properly investigate and disclose exculpatory information.

What's more, it Proctor was "supervised" by his superiors, who in turn simply turned a blind's eye to his bias and casual disregard for his obligations as a state police officer, demonstrating their own bias and lack of interest in supervising its agents. And the DOJ investigation of the Norfolk DA speaks volumes about what can be characterized as the DA's own biases. And this is reinforced by the emerging revelations of the possible lack of integrity in the investigation of the Birchmore death. Neither the Proctor debacle, the questionable handling of the tragic death of Sandra Birchmore nor the violations of defendants' rights in Graham would have come to light but for the efforts of defense counsel in those cases.



### Conclusion

Accordingly, for the reasons set forth above, Mr. Walshe's requests for production of the information including the requests to permit defense counsel to review all of the requested documents, digital information and 3074 pages of DOJ reports should be allowed pursuant to an appropriate protective order.

BRIAN WALSH

By his attorneys:

**Larry Tipton**

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DATED: September 24, 2024

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

SUPERIOR COURT  
Docket No. 2382CR00091

COMMONWEALTH

V.

BRIAN WALSH

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COMMONWEALTH'S RESPONSE TO DEFENDANT'S "MOTION FOR DISCOVERY  
OF DOCUMENTS RELATED TO THE DISTRICT ATTORNEY AND LAW  
ENFORCEMENT"

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Now comes the Commonwealth in response to the defendant's September 24, 2024 request for material pursuant to Massachusetts Rule of Criminal Procedure 14. The Commonwealth addresses each request as follows:

1. A complete copy of all data referred to in the Commonwealth's notice dated September 6, 2024, described as "an extraction of Trooper Proctor's work cell phone" and "Trooper Proctor's work cloud account".

The Commonwealth objects as beyond the scope of Mass. R. Crim. P. 14. The Commonwealth alerted the Court and the defendant that there is privileged information within Trooper Proctor's work phone. The Commonwealth has sought the assistance of an independent examiner to review the contents of the phone and cloud information. In the meantime, the Commonwealth is reviewing the extraction reports for all exculpatory evidence that pertains to this investigation, including any allegations of misconduct that bear upon truthfulness or could be read as suggesting bias, as well as any material that would question one's credibility or ability to be impartial. See Matter of a Grand Jury Investigation, 485 Mass. 641, 649 (2020); in Commonwealth v. McFarlane, 493 Mass. 385 (2024); Graham v. District Attorney for the Hampden Dist., 493 Mass. 348 (2024).

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CLERK OF THE COURT

2. **A complete copy of an estimated 3074 pages of materials and documents provided by the Department of Justice to the Norfolk County District Attorney's office regarding its investigation into the death of Officer John O'Keefe.**

The Commonwealth objects. The majority of material is subject to a judicially signed federal court order that restricts the recipients from disclosing or disseminating these materials and documents and as such the materials and documents are not within the control of the Norfolk District Attorney's Office. The Commonwealth has recently received, outside of that court order, certain text messages referenced at trial and will produce those text messages to defense counsel, subject to our request in Norfolk Superior Court for a protective order. Requests for other information should be made to the United States Attorney's Office pursuant to 28 CFR 16.00, et. seq. See Mass. R. Crim. P. 14(a)(1)(E).<sup>1</sup>

3. **A complete copy of all correspondence between the DOJ and the Norfolk County District Attorney's office regarding its investigation into the death of Officer John O'Keefe.**

The Commonwealth objects as beyond the scope of Mass. R. Crim. P. 14 as there is not showing of relevance or materiality. The Commonwealth will provide eight letters between the Norfolk District Attorney's Office and the United States Attorney Office/Department of Justice. All other correspondence would be considered work product, see Mass. R. Crim. P. 14(a)(5), be subject to the investigatory exemption, and/or are communications subject to the federal protective order, see Mass. R. Crim. P. 14(a)(6), as stated supra.

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<sup>1</sup> "Notice and Preservation of Evidence. (i) Upon receipt of information that any item described in subparagraph (a)(1)(A)(i)-(viii) exists, except that it is not within the possession, custody or control of the prosecution, persons under its direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in the case, the prosecution shall notify the defendant of the existence of the items and all information known to the prosecutor concerning the item's location and the identity of any person possessing it. (ii) At any time, a party may move for an order to any individual, agency or other entity in possession, custody or control of items pertaining to the case, requiring that such items be preserved for a specified period of time. The court shall hear and rule upon the motion expeditiously. The court may modify or vacate such an order upon a showing that preservation of particular evidence will create significant hardship, on condition that the probative value of said evidence is preserved by a specified alternative means."

- 4. A complete copy of any documents, correspondence received from the United States Attorney or any other federal agency concerning the Norfolk County District Attorney's office's investigation into the death of Sandra Birchmore.**

The Commonwealth objects as beyond the scope of Mass. R. Crim. P 14. Should counsel be seeking reports and videos related to the death of Sandra Birchmore that were previously made public, the Commonwealth will produce those materials pursuant to G.L. c. 66, § 10, the public records law. Correspondence with the United States Attorney's Office and/or other federal agency would be exempt under G. L. c. 4, § 7(26)(f) (investigatory exemption) as there is a pending federal prosecution.

- 5. A complete copy of any documents and materials regarding the policy, protocols or agreements, including any memorandum of understanding, between the Massachusetts State Police and the Norfolk County District Attorney's office related to the assignment of state police to that office.**

There is no memorandum of understanding generated by the Norfolk District Attorney's Office or the Massachusetts State Police. In response to your request, the Legal Department for the Massachusetts State Police has provided the Massachusetts State Police general investigations policy, which includes supervisor responsibilities.

- 6. Any and all notes, reports, memoranda or other documents related to the investigation of State Trooper Michael Proctor and his conduct in investigating the death of Officer John O'Keefe and the whereabouts of Ana Walshe, including but not limited to the following:**
  - a. Notes, records, memoranda or other documents concerning Proctor's job performance;**
  - b. Notes, records, memoranda or other documents concerning disciplinary actions, formal or informal, of Proctor;**
  - c. Notes, records, memoranda or other documents concerning complaints or any similar communication from any party concerning the conduct of Proctor;**
  - d. Notes, records, memoranda or other documents concerning the supervision of Proctor by the state police, the Commonwealth or any of its agents;**
  - e. Notes, record, memoranda or other documents containing information of any person, including state police, local police, investigator or forensic consultant supervised by or required to report directly to Proctor.**

The Commonwealth will produce all law enforcement notes related to the disappearance and murder of Ana Walshe. The Commonwealth had notified counsel of a pending internal affairs

investigation and that Trooper Proctor is as of this date suspended without pay. The Commonwealth is producing the Massachusetts State Police Office of Professional Integrity documents pertaining to Trooper Proctor and Sergeant Yuriy Bukhenik that are currently within the custody and control of the Norfolk District Attorney's Office. See Graham v. District Attorney for the Hampden Dist., 493 Mass. 348 (2024). The Commonwealth will also produce the official transcripts of Trooper Michael Proctor's testimony in Commonwealth v. Karen Reed, No. 2282CR000117.

Other materials, not within the possession, custody, or control of the NDAO would be in the custody of the Massachusetts State Police Office of Professional Integrity and subject to a Mass. Rule. Crim. P. 17(a) (2) motion.

**7. Any and all internal affairs records, memoranda or other documents regarding Proctor.**

See response 6. The Commonwealth will continue to produce to the extent records come within its control and custody pursuant to Mass. R. Crim. P. Rule 14. See Graham v. District Attorney for the Hampden District, 439 Mass. 348, 373-374 (2024). Other materials, not within the possession, custody, or control of the Norfolk District Attorney's Office would be in the custody of the Massachusetts State Police Office of Professional Integrity and subject to a Mass. Rule. Crim. P. 17(a) (2) motion.

**8. Any and all policies, protocols, directives or memorandum of understanding regarding the supervision of state police assigned to the Norfolk County District Attorney's office.**

See response 5.

**9. Any and all notes of all state police and any member of the Cohasset Police Department involved in the investigation of this matter concerning the investigation of this matter.**

No objection to notes of statements of witnesses. The Commonwealth has previously provided all notes Sergeant Harrison Schmidt, see Notice of Discovery II item 229, and the notes from personnel at the Massachusetts State Police Crime Lab, contained within the documents on

Notice of Discovery III. The Commonwealth recognizes its ongoing discovery obligations and will inquire and produce any remaining notes. The Commonwealth will inquire of all law enforcement witnesses as to the existence of notes.

- 10. Any and all notes, reports, memoranda or other documents containing information concerning the investigation of this matter that have not thus far been provided as of the filing of this motion.**

No objection. The Commonwealth will continue to provide notes of statements of witnesses and all material the defendant is entitled to under Mass. R. Crim. P. 14.

- 11. Any and all notes, reports, memoranda or other documents concerning interviews or conversations with prospective grand jury witnesses regardless of whether the witness was in fact called to testify before the grand jury in this matter.**

No objection. See response 9.

- 12. Any and all notes, reports, memoranda or other documents from any victim advocate concerning any information concerning the investigation of this case or the disappearance of Ana Walshe.**

The Commonwealth objects. The victim witness advocate has no statements of witnesses. The notes concern contact with the family of the murder victim, Ana Walshe. See Commonwealth v. Bing Sial Liang, 434 Mass. 131, 137 (2001). The Commonwealth recognizes it has a duty to inquire.

- 13. Any and all notes, reports, memoranda or other documents containing any reference to leads arising in the investigation of this matter of persons who are or were considered as "targets", "suspects" or "third-party culprits" regardless of the outcome of any investigation and regardless of whether such persons were ever investigated.**

The Commonwealth has previously provided all notes and reports containing information regarding targets, suspects or third parties known to the Commonwealth. To the extent that the defendant's request involves individuals associated with the defendant's own federal prosecution, the Commonwealth does not possess that information or material and a request should be made to the United States Attorney's Office pursuant to 28 CFR 16.00, et. seq. See

Mass. R. Crim. P. 14(a)(1)(E). It will continue to provide notes of the law enforcement witnesses and will continue to inquire.

**14. Any and all notes, reports, memoranda or other documents concerning communications of the state police, any member of the Cohasset Police Department, any person at a different police department, federal law enforcement, and any agent of the Commonwealth and the District Attorney for Norfolk County concerning the investigation of this case.**

The request is overly broad. The Commonwealth has provided all statements of witnesses under Mass. R. Crim. P. 14. The Commonwealth objects to the requests for work product, which are not subject to Rule 14.

**15. Any and all cellular telephone records in the possession of the Commonwealth or its agents of any state police and any member of the Cohasset Police Department involved in the investigation of this matter.**

The request is overly broad. The Commonwealth has produced all statements of witnesses. To the extent that the defendant seeks phone records, the proper motion is pursuant to Mass. Rule. Crim. P. 17(a)(2).

**16. Any and all text messages in the possession of the Commonwealth or its agents of any state police and any member of the Cohasset Police Department involved in the investigation of this matter.**

The request is overly broad. The Commonwealth has produced all statements of witnesses. To the extent that the defendant seeks phone records, the proper motion is pursuant to Mass. Rule. Crim. P. 17(a)(2).

**17. Any and all social media records in the possession of the Commonwealth or its agents of any state police and any member of the Cohasset Police Department involved in the investigation of this matter.**

The request is overly broad. The Commonwealth has produced all statements of witnesses. To the extent that the defendant seeks social media records, the proper motion is pursuant to Mass. Rule. Crim. P. 17(a)(2).

**18. Finally, the defendant requests that if it is determined that no information in any of the above categories was deleted, destroyed or lost, the Commonwealth inform counsel of that conclusion including the time, place, manner and means and the circumstances of any deletion, destruction or loss of the information.**

The request is overly broad and outside the scope of Mass. R. Crim. P. 14. At this time, the Commonwealth is unaware that any discoverable material regarding this investigation has been altered, deleted, lost or destroyed.

Respectfully submitted

For the Commonwealth,

Greg Connor  
Assistant District Attorney

Anne Yas  
Assistant District Attorney

Tracey Cusick  
Assistant District Attorney

*/s/ Laura A. McLaughlin*  
Laura A. McLaughlin  
Assistant District Attorney

Dated: October 2, 2024



### **CERTIFICATE OF SERVICE**

I, Greg Connor, do hereby certify that a copy of Commonwealth's Response to Defendant's "Motion for Discovery of documents related to the district attorney and law enforcement" with appropriate attachments by hand to counsel of record, Larry Tipton and Kelli Porges, on this date October 2, 2024.

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Greg Connor  
Assistant District Attorney