COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CRIMINAL ACTION
22-00117

COMMONWEALTH

vs.

KAREN READ

On April 9, 2024, after notice to all parties and the United States Attorney's Office, the court heard oral argument on Motion of Boston Globe Media Partners, LLC to Terminate or Modify Impoundment Orders. At the conclusion of the hearing, I allowed the motion, in part, and vacated my prior orders of impoundment as to motion papers numbers 199, 200, 228 and 232, subject to appropriate redaction by the Commonwealth. Today, in response to that same order of April 9, 2024, the Commonwealth has submitted to the court redacted versions of the motion papers #199, #228 and #232 which are subject to that order. Given the time restraints and in the interest of immediacy, the court releases these redacted documents, marked as Exhibit A in connection with Boston Globe Media Partners, LLC's motion. The documents in Exhibit A are no longer impounded and shall be available for public inspection. My ruling in this regard is without prejudice to Boston Globe Media Partners, LLC's right to challenge and/or seek modification to the redactions made by the Commonwealth.

So Ordered

Date: April 10, 2024

Beverly J. Cannone
Justice of the Superior Court

EXHIBIT A

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS. **SUPERIOR COURT DEPARTMENT**
NO. 2282-CR-00117

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff

V.

KAREN READ,
Defendant

DEFENDANT'S MOTION TO DISMISS INDICTMENTS AND MEMORANDUM IN SUPPORT THEREOF

Now comes the Defendant Karen Read ("Ms. Read") and respectfully requests that this Honorable Court dismiss the indictments in the above-captioned matter, pursuant to Commonwealth v. O'Dell, 392 Mass. 445 (1984). In support of this motion, the defendant states that "the integrity of the grand jury proceeding was impaired by an unfair and misleading presentation to the grand jury," which requires dismissal of the indictments. See id. at 447. A copy of the grand jury minutes and exhibits are filed herewith under order of impoundment.

I. STATEMENT OF FACTS

On June 9, 2022, Ms. Read was indicted for murder in the second degree in violation of G.L. c. 26, § 1; manslaughter while operating under the influence of alcohol in violation of G.L. c. 265, § 13 1/2, and leaving the scene of personal injury and death in violation of G.L. 90, § 24(2)(a½)(2). The instant charges stem from the death of Boston Police Officer John O'Keefe, who was found unresponsive at approximately 6:00 a.m. on January 29, 2022, in the front yard of the home of another Boston Police Officer, Brian Albert.

Over the course of fourteen days, the Commonwealth presented the testimony of 41 witnesses to the grand jury. The Commonwealth called law enforcement officers from the Canton Police Department, who responded to the crime scene just after 6:00 a.m. on January 29, 2022: Officer Steven Saraf, Sergeant Sean Goode, Officer Stephen Mullaney, and Detective Sergeant Michael Lank; responding EMTs, paramedics, and members of the Canton Fire Department, including Anthony Flematti, Timothy Nuttal, Katie McLaughlin, Matthew Kelly, Francis Walsh, Jason Becker, Daniel Whitley and Greg Woodbury; Massachusetts State Police ("MSP") Troopers Michael Proctor, Kathleen Prince, and Yuriy Bukhenik, and David Diciccio; the individuals who testified they were present with Ms. Read and Mr. O'Keefe at the Waterfall Bar and Grill on the evening of January 28, 2022, including Chris Albert, Julie Albert, Karina Kolokithas, and Nicholas Kolokithas, Nicole Albert, Brian Albert, Brian Higgins, Jennifer McCabe, and Matthew McCabe; a percipient witness who observed Ms. Read drop O'Keefe off at the Albert residence just after midnight on January 29, 2022, Ryan Nagel; friends and family members of the decedent, Erin O'Keefe, Paul O'Keefe, Katherine Camerano, Michael Camerano, Laura Sullivan, Marietta Sullivan, Christopher Curran, and Kerri Curran (none of whom witnessed any of the events that transpired on January 28 or January 29, 2022); MSP Lieutenant O'Hara and MSP Detective Lieutenant Brian Tully, who testified that his team recovered a sneaker and several pieces of clear and red glass consistent with pieces of taillight from 34 Fairview Road at 6:00 p.m. on January 29, 2022; Forensic Pathologist Irini Scordi-Bello, who testified regarding O'Keefe's injuries; Curt Roberts and Kerry Roberts, who were informed just before 5:00 a.m. on January 29, 2022, that O'Keefe was missing; Nicholas Roberts, a Forensic Scientist with the Massachusetts State Police Crime Lab; and MSP Trooper Joseph Paul with the Collision Analysis and Reconstruction Section.

A majority of the witnesses who testified before the grand jury were not percipient witnesses to any of the events in question and were instead called for the purpose of testifying to remote and irrelevant "bad character" and propensity evidence prejudicing the jury against Ms. Read, misleading the grand jury, confusing the issues, and wasting time. To be clear, not a single witness testified that they observed Ms. Read strike O'Keefe with her vehicle, injure him in any way, or otherwise drive erratically on the night in question. The Commonwealth's presentation of the case was predicated entirely on flimsy speculation and presumption, underpinned by a questionable and biased investigation, and highly dubious "physical evidence." Absent the abject fraud perpetrated on the jury by the Commonwealth and its agents, Sergeant Lank and Trooper Michael Proctor, and the repeated reckless admission of inadmissible, highly prejudicial, and irrelevant information, the grand jury never would have indicted Ms. Read in this case. A brief summary of the evidence presented to the grand jury is set forth herein. Given the sheer volume of the grand jury transcripts in this case, the facts underpinning the respective arguments are set forth in more detail in the respective Argument sections below.

The evidence presented at the grand jury established that on the evening of January 28, 2022, the decedent John O'Keefe ("O'Keefe") and his girlfriend, Karen Read, met and enjoyed drinks with a group of individuals at the Waterfall Bar in Canton: Brian and Nicole Albert, Jennifer and Matt McCabe, Chris and Julie Albert, Brian Higgins (close friend of Brian Albert and special agent with the Massachusetts Bureau of Alcohol, Tobacco, Firearms, and Explosives, with an office inside the Canton Police Department), and Karina and Nicholas Kolokithas.[1] All

[1] Brian Albert, Nicole Albert, Jennifer McCabe, Matthew McCabe, Chris Albert, and Julie Albert are all members of the same family. Jennifer McCabe and Nicole Albert are sisters. Chris Albert and Brian Albert are brothers.

of the witnesses who testified before the grand jury indicated that Ms. Read and Mr. O'Keefe appeared happy at the bar and were in good spirits.

As the bar was set to close around midnight, the parties discussed going to Brian and Nicole Albert's residence located at 34 Fairview Road ("the Albert residence") to celebrate their son, Brian Albert Jr.'s, birthday. Shortly after midnight, Brian and Nicole Albert, Jennifer and Matthew McCabe, and Brian Higgins left the bar in their respective cars and drove to the Albert residence. Brian Albert Jr., was already at the house with two of his friends, Julie Nagel and an unidentified female. According to Brian and Nicole Albert's testimony before the grand jury, their nephew Colin Albert was also present for at least part of the party. Video surveillance footage and witness statements confirm Ms. Read and Mr. O'Keefe left the Waterfall around midnight and departed together toward the Albert residence in Ms. Read's black Lexus SUV.

Text messages and call detail records from Ms. McCabe and Mr. O'Keefe conclusively establish the following timeline:

1. At 12:14 a.m. Ms. McCabe texts Mr. O'Keefe "where to?"
2. At 12:14 a.m. Ms. McCabe calls Mr. O'Keefe and they discuss directions to the residence.
3. At 12:18 a.m. Mr. O'Keefe calls Ms. McCabe back
4. At 12:27 a.m. Ms. McCabe texts Mr. O'Keefe "Here?!"
5. At 12:29 a.m. Mr. O'Keefe answers a call from Ms. McCabe
6. At 12:31 a.m. Ms. McCabe texts Mr. O'Keefe "pull behind me"
7. At 12:40 a.m. Ms. McCabe texts Mr. O'Keefe "Hello"
8. At 12:42 a.m. Mr. McCabe texts Mr. O'Keefe "Where are u"
9. At 12:45 a.m. Ms. McCabe texts Mr. O'Keefe "hello"[2]

[2] Excerpts from Jennifer McCabe's and John O'Keefe's cell phone extractions are attached hereto as Exhibit 6.

Multiple witnesses testified that they saw a black SUV pull up to the Albert residence at 34 Fairview Road at approximately 12:15 a.m. At around 12:30 a.m. Ms. McCabe claims to have observed a black SUV pull up outside the Fairview Residence with the passenger-side of the vehicle facing the house. According to Ms. McCabe, although the vehicle sat outside the residence for approximately 15 minutes, no person ever came inside. Mr. McCabe testified that he observed "tire tracks" in a "V-shape" consistent with a three-point turn in the area where the dark SUV was previously parked outside the house.

Ryan Nagel testified that he arrived at the Albert residence around 12:15 a.m.—at approximately the same time as Ms. Read and O'Keefe. Ryan Nagel testified before the grand jury that he received a text from his sister, Julie Nagel, around 12:00 a.m., requesting that he pick her up at Brian Albert Jr.'s house (a longtime friend of 15 years). According to Mr. Nagel, he and his friend and girlfriend arrived approximately 15 minutes later to pick up his sister, Julie. As they drove from Dedham down Cedarcrest to take a left onto Fairview Road, he observed a dark SUV coming towards them from the opposite direction preparing to take a right onto Fairview Road. They followed the dark SUV toward the Fairview Residence. Once there, Mr. Nagel and his friends parked their Ford F-150 directly in front of the driveway such that the passenger-side of their vehicle was adjacent to the entrance. Mr. Nagel testified that the dark SUV was parked in front of their vehicle facing the same direction. Mr. Nagel texted his sister to let her know they had arrived. Sometime thereafter, Julie Nagel came outside to greet them. She said that she wanted to stay a while longer and would most likely spend the night at 34 Fairview. As Mr. Nagel continued to try to convince his sister to get in the car, he noticed that the dark SUV pulled up a car's length or two to the right side of the road so that it was about 20 to 25 feet ahead. After speaking with his sister for another five minutes or so, he again noticed the SUV

pull forward another car length or two in the same direction it was facing. Mr. Nagel testified that the SUV was never in park because he specifically recalls that the brake lights were activated the entire time. Eventually, unable to convince his sister to get in the car and leave the party, he and his friends left. As they pulled up past the SUV, Mr. Nagel, who was seated in the front passenger seat of his friend's Ford F-150, observed a woman matching Ms. Read's description seated in the driver's seat of the vehicle with the interior lights of her car on and her hands at "10 and 2." Mr. Nagel testified that he did not see a passenger inside the vehicle or anywhere else in the surrounding area of the vehicle. He further testified that he did *not* observe any damage to the vehicle and testified that the car's taillights were intact and undamaged.

At least six individuals claim to have left the Albert residence in the early morning of January 29, 2022, after Ms. Read had left the Fairview Residence and returned home: Jennifer McCabe and Matthew McCabe testified that they drove Julie Nagel and an unnamed female home at 1:30 a.m.; Brian Higgins testified that he went to complete "administrative work" at the Canton Police Department around 1:30 a.m.; and Colin Albert returned to his parents' home (Chris and Julie Albert's residence) at approximately 12:30 a.m. None of these individuals testified that they saw Mr. O'Keefe's body sprawled in the front yard, mere feet from the very roadway all of them would have driven on.

Phone records admitted to the grand jury from the night in question establish that Ms. Read made numerous calls to Mr. O'Keefe in the early morning of January 29, 2022, which were never answered. Third-party witnesses testified it would have been completely out of character for Mr. O'Keefe to leave his two adopted children home alone unattended overnight. Jennifer McCabe (Brian Albert's sister-in-law) and Kerry Roberts testified that they received early morning calls from Ms. Read asking if they could help her locate O'Keefe because he never

came home. Ms. Read subsequently drove to pick up Ms. McCabe across town to go look for O'Keefe. Ms. McCabe then drove Ms. Read's car to Mr. O'Keefe's residence, where they met Kerry Roberts. After the women conducted a final check to ensure that he had not returned home, they drove together in Ms. Roberts' car back to the Albert residence to see if O'Keefe might be there.

As they pulled up to Brian Albert's house at 6:04 a.m., Ms. Read spotted an unconscious Mr. O'Keefe lying face-up on his back in the front yard of the Albert residence. While Ms. Read and Ms. Roberts attempted to render aid, Ms. McCabe called 9-1-1. Law enforcement officers from the Canton Police Department responded to the scene. Mr. O'Keefe was subsequently transported by EMTs to Good Samaritan Hospital, where tragically he was pronounced dead at 7:59 a.m.

The recovery of evidence from the crime scene was presented to the grand jury as follows. Sergeant Michael Lank testified that the Canton Police Department recovered the following evidence from the crime scene on the morning of January 29, 2022: (1) a clear broken drinking glass; and (2) six frozen blood drops, which they placed in red Solo plastic cups that were provided by a neighbor. Members of the Massachusetts State Police Special Emergency Response Team ("SERT Team") conducted a subsequent search of the Albert residence on January 29, 2022, at approximately 6:00 p.m., this time, recovering three pieces of red and clear plastic consistent with Ms. Read's taillight. Additionally, according to Detective Sergeant Michael Lank's testimony before the grand jury, one week later, on February 4, 2022, Chief Berkowitz of the Canton Police Department purportedly drove by the Albert residence on a whim and saw, from his moving vehicle, an additional piece of red plastic that was consistent with the taillight of Ms. Read's vehicle. When an incredulous grand juror specifically inquired as

to why the chief of police had responded to the Albert residence and how he discovered the evidence, Detective Lank explained "nobody called the chief." When pressed further by the juror as to why he "just wandered over there," Detective Sergeant Lank recounted through hearsay, "He was driving down Fairview Road and he saw it, the evidence."

II.
ARGUMENT

The grand jury serves a vital purpose in our system of criminal justice by standing between the government and the individual as to any charge that is punishable by imprisonment in state prison. There are two circumstances where judicial inquiry into the quality of evidence heard by the grand jury is warranted: "(1) when it is unclear that sufficient evidence was presented to the grand jury to support a finding of probable cause; and (2) when the defendant contends that the integrity of the grand jury proceedings . . . has been impaired." Commonwealth v. Freeman, 407 Mass. 297, 282 (1990) (citing Commonwealth v. Mayfield, 398 Mass. 615, 619-620 (1986)).

As long held by the Supreme Judicial Court in Commonwealth v. O'Dell, 392 Mass. 445 (1984) (hereafter "O'Dell"), when the integrity of the grand jury proceedings is "impaired by an unfair and misleading presentation" by the Commonwealth, the indictment must not be allowed to stand. Id. at 446-47. Indeed, an indictment must be dismissed based on impairment of the grand jury when the following three elements are met: (1) law enforcement "knowingly or recklessly presented false or deceptive evidence to the grand jury; (2) the evidence was presented for the purpose of obtaining an indictment; and (3) the evidence probably influenced the grand jury's decision to indict." Commonwealth v. Carr, 464 Mass. 855 (2014), abrogated on other grounds by Commonwealth v. Crayton, 470 Mass. 228 (2014).

For example, in the seminal case of O'Dell, a police detective testified before the grand jury in support of an indictment against a defendant for armed robbery. O'Dell, supra, 392 Mass. at 445-46. During the course of the detective's testimony, the detective relayed to the grand jury a *portion* of the statement made to him by the defendant admitting that he was in the van with his co-defendant just prior to the armed robbery and that he waited in the van for his co-defendant on a side street outside the store where the armed robbery took place. Id. at 446-448. Significantly, however, the detective failed to testify regarding an exculpatory portion of the defendant's statement in which the defendant claimed he had no knowledge that his co-defendant was going to commit an armed robbery when he entered the store. Id. at 448-449. The court held that the "presentation of the defendant's edited statement tended to distort the meaning of that portion of the defendant's statement, which was repeated to the grand jury, and strongly suggested, incorrectly, an admission of guilt by silence." Id. at 449. On that basis, the Supreme Judicial Court held that the integrity of the grand jury proceedings was impaired and dismissed the indictment against the defendant for armed robbery. Id. at 449-450. Thus, in O'Dell, the Supreme Judicial Court held that where the withholding of exculpatory evidence from the grand jury impairs the integrity of the grand jury proceeding, the indictment must be dismissed. Id.

In keeping with that precept, courts have similarly found that law enforcement "may not withhold known exculpatory information which could undermine the credibility of an important witness in the eyes of a grand jury and, consequently, affect their decision to indict." Commonwealth v. Petras, 26 Mass. App. Ct. 483, 487 (1988); see Commonwealth v. Mayfield, 398 Mass. 615 (1986), citing Commonwealth v. Connor, 392 Mass. 838, 854 (1984).

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A. THE COMMONWEALTH AND ITS AGENTS KNOWINGLY AND RECKLESSLY PRESENTED FALSE AND DECEPTIVE EVIDENCE TO THE GRAND JURY AND WITHHELD KNOWN EXCULPATORY INFORMATION FOR THE PURPOSE OF OBTAINING AN INDICTMENT

As set forth herein, throughout the Commonwealth's presentation of evidence to the grand jury, the Commonwealth repeatedly elicited false and deceptive evidence and withheld exculpatory information, which was known to the Commonwealth and its agents at the time of the grand jury proceedings, and distorted the facts presented to the grand jury for the purpose of obtaining an indictment. As the Supreme Judicial Court has made clear: "There can be no doubt that the knowing use by the Commonwealth or one of its agents of false testimony to procure an indictment is a ground for dismissing the indictment." See Commonwealth v. Salman, 387 Mass. 160, 166 (1982) (citing Commonwealth v. St. Pierre, 377 Mass. 650, 655 (1979)).

1. THE COMMONWEALTH INTENTIONALLY ADMITTED FALSE AND DECEPTIVE STATEMENTS TO THE GRAND JURY REGARDING PURPORTED ADMISSIONS MADE BY MS. READ AT THE CRIME SCENE

Detective Sergeant Michael Lank testified at the grand jury that he oversees the Canton Police Department's Detective Bureau and was one of the first investigating officers to arrive at the crime scene located at 34 Fairview Road (Brian and Nicole Albert's residence) just after 6:00 a.m. on the morning of January 29, 2022. (April 14, 2022, GJ Minutes at 60-62.)

Here, like in O'Dell, the Commonwealth intentionally elicited testimony from Detective Sergeant Lank regarding an incomplete and misleading statement he attributed to Ms. Read *based not on his own personal knowledge or observations,* but instead based on purported conversations he had with unidentified officers that arrived on scene before him. (See id. at 67.) Specifically, Sergeant Lank testified before the grand jury as follows:

> So officers that were there prior to my arrival had attempted to speak with Karen Read. But from what I had gathered from them, she was too hysterical and was

> unable to really assist us in any way. **<u>The only information they were able to retrieve from her is that she could not recall whether or not she had been there [to 34 Fairview Road]</u>.**

<u>Id</u>. (emphasis added). Here, like in <u>O'Dell</u>, this portion of Ms. Read's purported statement, taken out of context, seems incredibly inculpatory because evidence presented to the grand jury unequivocally established that Ms. Read dropped O'Keefe off at the Albert residence just after midnight on January 29, 2022. However, Sergeant Lank's recitation of this rank, inadmissible, and unreliable double hearsay is incomplete, inaccurate, and intentionally deceptive.

According to the January 29, 2022, Canton Police Department Incident Report, Ms. Read spoke to three responding officers at 34 Fairview Road on January 29, 2022, all of whom arrived on scene before Sergeant Lank: (1) Officer Saraf, (2) Officer Mullaney, and (3) Sergeant Goode. (<u>Exhibit A</u>, Canton Police Department Incident Report.) The Commonwealth and Sergeant Lank have been in possession of this report since the case's inception. According to Officer Saraf's portion of the report memorializing his conversations with Ms. Read on January 29, 2022, Ms. Read was severely distraught and unable to tell him what happened, and kept screaming, "Is he dead." (<u>Id.</u> at COM_001002.) Officer Mullaney similarly reported that Ms. Read was "hysterical and distraught" and repeatedly screamed, "Is he dead" and "that's my boyfriend." (<u>Id.</u> at COM_001003.) **<u>Notably, Officers Saraf and Mullaney never attributed any incriminating statements or admissions to Ms. Read, as Sergeant Lank falsely recounted to the grand jury.</u>** (<u>Id.</u> at 001002-001003.) Instead, Detective Sergeant Lank appears to have adopted and regurgitated an incomplete (and deceptively inculpatory) version of Sergeant Goode's purported conversation with Ms. Read at the crime scene to the grand jury. According to Sergeant Goode's report memorializing his conversation with Ms. Read on January 29, 2022, Ms. Read was hysterical and was repeatedly yelling, "Is he dead"; when Sergeant

Goode asked Karen how O'Keefe ended up there (i.e. on the lawn), she replied, "I don't know." (Id. at COM_001001.) Sergeant Goode then asked her if she drove to the Albert residence the night prior, to which she responded, "I think so"; he noted that Ms. Read appeared visibly "upset and . . . unable to keep her train of thought" and told him she couldn't remember, at which point Sergeant Goode stopped asking her questions. (Id.) Thus, Sergeant Lank's testimony to the grand jury that the **only** information the responding officers were able to obtain from Ms. Read was an admission that she couldn't remember whether she had been to 34 Fairview Road is false, incomplete, and deceptive. See Commonwealth v. Mayfield, 398 Mass. 615, 620 (1986) ("We have recognized possible impairment if a prosecutor were to deceive grand jurors by presenting remote hearsay in the guise of direct testimony.")

Indeed, here, like in O'Dell, Sergeant Lank's testimony to the grand jury distorted Ms. Read's statements to responding officers, and strongly suggested, incorrectly, an admission of guilt (i.e. that she couldn't remember driving to 34 Fairview Road). In actuality, however, reports in the possession of the Commonwealth suggested that Ms. Read told law enforcement that she thought she drove O'Keefe to the Albert's residence *and* indicated that she appeared visibly distracted and unable to keep her train of thought when the responding officer asked her additional questions, including when she made the statement to the effect of I don't remember. (Exhibit A, COM_001001.) Thus, rather than ensure the rest of Ms. Read's statement was admitted into evidence, the Commonwealth allowed Detective Sergeant Lank's false and misleading recitation of Ms. Read's statement to responding officers remain, unimpeached for the purpose of unfairly implicating Ms. Read and ensuring an indictment.

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2. DETECTIVE SERGEANT LANK'S INTENTIONAL DECEPTION REGARDING HIS LONGSTANDING RELATIONSHIP WITH THE ALBERT FAMILY AND HIS HISTORY OF "DEPUTIZING" HIMSELF TO INVESTIGATE CRIMES INVOLVING THE ALBERTS

Additionally, Detective Sergeant Lank (i.e. an agent of the Commonwealth) utterly failed to disclose to the grand jury exculpatory information, which undermines his credibility in this case as well as public confidence in the fairness and impartiality of this murder investigation. Indeed, publicly available federal court documents confirm that (1) Sergeant Lank is a longtime childhood friend and drinking buddy of the percipient witnesses in this case; and (2) Sergeant Lank has a documented history of deputizing himself to "investigate" crimes perpetrated by his longtime childhood friends, the Alberts, to shield them from criminal liability. For example, on August 2, 2007, Sergeant Michael Lank was sued in Massachusetts District Court by Plaintiffs Marc Lopilato and Alfredo Lopilato ("the Lopilatos") for civil rights violations pursuant to 42 U.S.C. § 1983 (Mass. District Court Case No. 05-10012-NG), in a case involving percipient witness Chris Albert and Tim Albert (brothers of homeowner Brian Albert). (Exhibit B, Mass. D. Case No. 05-10012-NG, Amended Complaint.) The facts set forth in the Lopilatos' Amended Complaint are strikingly similar to the facts in this case and allege as follows. On August 31, 2002, Marc was sitting in a friend's car in a parking lot outside the Golden China restaurant in Canton, Massachusetts at approximately 12:45 a.m. (Id. at 2.) Earlier that evening, Marc had been in a verbal dispute with several individuals, including a man named Tim Albert (brother of Brian and Chris Albert, both of whom are percipient witnesses who testified before the grand jury in connection with this case). (Id.) As Marc was sitting in the parking lot, he noticed a group of several men, including Tim Albert and Chris Albert, leave the Centerfields Bar in Canton and approach his vehicle. (Id. at 3.) When Marc exited his vehicle, he was attacked and beaten by Chris Albert. (Id.) After the beating, Marc called his brother Alfredo to let him know what had

happened. (Id.) Shortly after Alfredo arrived at the parking lot to check on his brother, Chris Albert's childhood friend, Detective Sergeant Lank, emerged from the Centerfields Bar "swaying" and began yelling that he was a police officer. (Id.) When two other Canton Police Officers arrived on scene, Detective Sergeant Lank instructed them to handcuff Marc's brother and place him in the police cruiser. (Id.) According to Marc Lopilato, as the responding officers handcuffed Alfredo and placed him in the vehicle, Detective Sergeant Lank pushed Marc backwards, punched him with a closed fist in the face, took him to the ground and continued striking him, and then bit him on the arm so hard that he broke the skin. (Id. at 3-4.) Ultimately, Officer Lane, one of the responding officers, had to pull Detective Sergeant Lank off of Marc to stop the beating. (Id.) After doing so, Officer Lane did not ask Lopilato for any identifying information, and simply told him to leave unless he wanted to be arrested. (Id.) Detective Sergeant Lank then walked over to the police car where Alfredo was being held, and spit in his face. Immediately thereafter, Officer Lane released Alfredo from his handcuffs and told him to "get in [his] car and leave." (Id.) On August 31, 2002, Alfredo went to the Canton police station to file a complaint with internal affairs regarding the incident. (Id.) Alfredo was sent away and told he needed to come back on September 3, 2002, if he wanted to make a complaint. On September 3, 2002, Marc Lopilato went to the Canton Police Station to make a complaint and described Sergeant Lank's conduct on the night in question. (Id.) Shortly thereafter, Marc and Alfredo received a summons in the mail to appear in court on September 25, 2022, for charges related to Assault and Battery on a Police Officer, namely Detective Sergeant Lank. (Id.) According to discovery produced in that case, no police reports were drafted or filed in connection with the incident until September 2, 2002, after Alfredo attempted to initiate a complaint against Detective Sergeant Lank. (Id.)

According to the Amended Complaint, months later, on February 6, 2003, Marc and Alfredo Lopilato were inside a Mobile gas station in Canton, when Detective Sergeant Lank entered the store and asked Marc how he was doing. (Id.) He told Detective Sergeant Lank that he wasn't doing well because he was being forced to appear in court even though it was Lank who had attacked him. (Id.) Seconds later, several police cruisers appeared in the parking lot. Detective Sergeant Lank placed Marc under arrest for "Threatening, Disorderly Conduct, and Intimidation." (Id.) Lopilato was booked and held at the police station until 3:00 a.m. the next morning. (Id.) On October 23, 2003, after a three-day jury trial, Marc and Alfredo Lopilato were found not guilty of all charges arising out of the August 31, 2022, incident. (Id.) The ADA who handled the witness intimidation charges arising out of the February 6, 2003, incident, thereafter, dismissed the charges after admittedly realizing Sergeant Lank was a liar. (Id.) The Lopalitos' civil case against Detective Sergeant Lank ultimately settled out of court. (Exhibit C, Mass. D. Case No. 05-10012-NG, Docket Dismissing Case Pursuant to Out-of-Court Settlement.)

Significantly, however, during the course of that litigation, Detective Sergeant Lank made several admissions in federal court documents, which directly bear on his credibility in this case: (1) he admitted he consumed approximately 4-5 beers at Centerfields Bar before "deputizing" himself to investigate a crime involving his longtime friend, Chris Albert; (2) he admitted that his friend Chris Albert approached him with his wife Julie Albert on the night in question, and indicated that he had just gotten into a fight with Marc Lopilato; (3) he admitted that he observed Chris Albert's hand to be swollen; and (4) he admitted that he is a longtime *childhood friend* of Chris Albert. (Exhibit D, Mass. D. Case No. 05-10012-NG, Pretrial Memorandum; Exhibit E, Mass. D. Case No. 05-10012-NG, Defendant's Answer, at ¶12.)

Notwithstanding his close relationship with the witnesses in this case and the fact that he was personally sued for using his position of power to cover up crimes involving the Alberts, Detective Sergeant Lank testified in this case as if he was a completely independent neutral investigator with no relation to the Alberts—the very family he was supposed to be investigating. (See April 14, 2022, GJ Minutes at 60-86). Detective Sergeant Lank's decision to withhold this exculpatory information unequivocally distorted the grand jury proceedings in this case. The Commonwealth's failure to disclose this exculpatory information and present the following deceptive facts to the grand jury impaired the integrity of the grand jury proceedings, requiring reversal:

1. **The Commonwealth never elicited any testimony from Detective Sergeant Lank informing the grand jury that the Canton Police Department was conflicted off of this case.** Detective Sergeant Lank testified that he notified a separate investigative agency, the Massachusetts State Police CPAC Unit, *for some unspecified reason*, to respond to the crime scene to investigate the case, and that Trooper Michael Proctor returned his call. (April 14, 2022, GJ Minutes at 66-67.) When a member of the grand jury specifically asked what the CPAC Unit is and why they were called, Sergeant Lank responded, "CPAC Unit is the State Police unit that investigates homicides or deaths, anything suspicious they would respond." (Id. at 68.) Thus, Detective Sergeant Lank falsely implied to the grand jury that the Canton Police Department "lost jurisdiction" because the State Police *always* respond to investigate homicides and withheld the fact that the agency he works for, the Canton Police Department, was conflicted off of the case. In reality, as admitted by Norfolk County District Attorney Morrissey when the

statement served him—the Canton Police Department "recognized early on they ha[d] a potential conflict" and "asked State Police to take over the Read investigation as *soon as they realized O'Keefe's body* had *been found at the home of [Brian] Albert*, whose brother, Kevin, works for the Canton Police Department."[3] **In spite of the Commonwealth's admitted knowledge of this fact, the prosecution never disclosed to the grand jury that the reason the Canton Police Department lost jurisdiction in the case was because their agency was conflicted**. If Detective Sergeant Lank and Trooper Michael Proctor (see Part II.A.3., *infra*) had been honest about their longstanding relationship with the Alberts, the grand jury would have been extraordinarily skeptical of this entire investigation, particularly given the fact that Detective Sergeant Lank and the Canton Police Department remained involved in the case *in the hours and days discovering the agency was conflicted.*

2. Canton Police Department Detective Sergeant Lank further testified before the grand jury that he was not scheduled to work on January 29, 2022, but responded to Brian Albert's residence anyway to investigate the death of a Boston Police Officer who was found severely injured at his residence. (Id. at 60-61.) Thus, just like in the case involving Chris Albert, off-duty Sergeant Lank deputized himself to investigate a crime in which his longtime friend was a witness. The Commonwealth further attempted to distort the facts relating to Detective Sergeant Lank's decision to involve himself in this case even after Sergeant Lank

[3] This statement was attributed to Norfolk County District Attorney Michael Morrissey in a November 21, 2023, article entitled *Canton police chief says department review over handling of Karen Read case 'will end wild speculation'*, which was published in the Boston Globe.

admitted he was not working by stating, "[B]ut, in essence, you're always working; is that fair to say?" (Id. at 61.) To which, Sergeant Lank responded, "Yes, sir." (Id.)

3. **In spite of Detective Sergeant Lank's clear conflict in this case, he personally took it upon himself to conduct the initial interviews of homeowners, Brian and Nicole Albert, and personally memorialized the reports regarding their statements**. (Id. at 36.) One of the members of the grand jury, perplexed by Brian and Nicole Albert's decision to hide inside their residence on the morning of January 29, 2022, specifically asked, "[d]id the owners/occupants of the home ever appear on the scene and interact with any of the officers" (Id. at 58.) Officer Mullaney responded that only Sergeant Lank and Sergeant Goode entered the residence to speak with them. The juror again said, "But they never came out to interact while you were there?" to which Officer Mullaney replied, "Not that I recall, no." (Id. at 58.) Another member of the grand jury, at the close of Sergeant Lank's testimony asked, "So how close to the house to where the body was laying, and with the fire department coming down and the lights going, no one from the house heard the noise and came to say what's going on?" (Id. at 79.) Quite obviously, the grand jury was disturbed and confused as to why the homeowners sequestered themselves in their residence and hid themselves from the police. Had they known that the person who took and memorialized their initial statement was a longtime family friend, this information would have seriously undermined the credibility of Brian and Nicole Albert and raised further questions for the grand jury about their involvement in O'Keefe's death.

4. Detective Sergeant Lank also testified before the grand jury that he returned to the Albert Residence at 9:00 a.m. after being contacted by Brian Albert's sister-in-law, Jennifer McCabe, because she supposedly had "more information that she wanted to share with [him]" and told him she forgot to tell responding officers that "while [she and Karen] were driving around looking for the victim, that Ms. Read had made the statement, 'I hope I didn't hit him.' And . . . that [Karen] made the statement again at the scene after they had discovered the victim." Id. at 72-73. Significantly, the Commonwealth failed to elicit the fact that Sergeant Lank is a personal friend of the Albert family (which includes Jennifer McCabe) and that Detective Sergeant Lank and the Canton Police Department were *already* supposed to have been conflicted off the case, making it completely inappropriate for Sergeant Lank to conduct any further interviews with his longtime family friends.

Thus, the Commonwealth and Detective Sergeant Lank intentionally withheld known exculpatory information, namely (1) that the Canton Police Department was conflicted off the case because numerous individuals at the top of the department were close friends and/or family members of the percipient witnesses and potential suspects in this case; (2) that Detective Sergeant Lank is a childhood friend of the Alberts; and (3) that Detective Sergeant Lank has a documented history of deputizing himself to "investigate" crimes perpetrated by his longtime childhood friends, the Alberts, to shield them from criminal liability. Clearly, this information would have caused the grand jury to question the independence and neutrality of the instant investigation, and would have undermined the credibility of Detective Sergeant Lank, Brian Albert, and Nicole Albert, all of whom testified before the grand jury. The reason the

Commonwealth withheld this exculpatory information is simple: this impeachment evidence undermines the prosecution's investigation, is an embarrassment to the Commonwealth and law enforcement, and weakens the case against Ms. Read. Thus, Commonwealth and its agents intentionally withheld this exculpatory information from the grand jury to prevent them from asking any additional questions about the nature of the conflict and relationships between the parties, and instead ensuring that they indicted Ms. Read.

3. TROOPER PROCTOR'S NUMEROUS FALSE AND DECEPTIVE STATEMENTS TO THE GRAND JURY MADE FOR THE PURPOSE OF SECURING AN INDICTMENT

Furthermore, the Commonwealth and its agents knowingly withheld from the grand jury the fact that Trooper Proctor—the Massachusetts State Police Detective called in by Detective Sergeant Lank to "cure" the conflict and take over the investigation in this case—is *also* close family friends with the Alberts. This fact unquestionably undermines the neutrality and fairness of the investigation itself, Trooper Proctor's credibility, and the credibility of the other percipient witnesses that testified before the grand jury in this case. Attached hereto as Exhibit F, are numerous (yet non-exhaustive) examples of Trooper Proctor's longstanding close familial relationship with the Alberts: (1) from left to right, a photograph of Trooper Proctor's mother Karen Barsamian Proctor (white shirt); third party witness Colin Albert (white t-shirt); Trooper Proctor's sister, Courtney Proctor Elburg (cardigan); implicated witness Chris Albert (blue polo) at a birthday party dated July 15, 2016; (2) a photographs showing Chris Albert's son, Colin Albert in *Trooper Proctor's sister's wedding party*, dated April 21, 2012; (3) a photograph of Trooper Proctor dancing with implicated witness Colin Albert at his sister's wedding dated April 21, 2012; (4) a photograph of Trooper Proctor seated at the same table as implicated witness Colin Albert, implicated witness Chris Albert, and implicated witness Julie Albert at his sister's

wedding dated April 12, 2012; and (5) a Facebook post by Trooper Proctor's mother, Karen Barsamian Proctor, in which she refers to Chris, Julie, and Colin Albert as her "second family." (Exhibit F.) In spite of the overwhelming evidence of Trooper Proctor's longstanding close familial relationship with the percipient witnesses in this case (which obviously predates his testimony before the grand jury), Trooper Proctor intentionally deceived the grand jury by pretending to be a neutral detective tasked with investigating a homicide.

As the lead investigator assigned to this case, Trooper Proctor testified extensively before the grand jury regarding his interviews with witnesses, the seizure of evidence, and observations relating to the case. Yet, not once in Trooper Proctor's hundreds of pages of testimony before the grand jury did Trooper Proctor ever disclose his longstanding relationship with the *very same witnesses* he personally interviewed in connection with this case before he took the stand. (April 21, 2022, GJ Minutes at 98-152; May 25, 2022, GJ Minutes at 3-34; May 31, 2022, GJ Minutes at 3-54; June 7, 2022, GJ Minutes at 35-116.) Instead, the Commonwealth and its agents intentionally misled the jury by having Trooper Bukhenik read his report memorializing Trooper Proctor's interview of Chris and Julie Albert on February 10, 2022, stating, "**Following formal introductions**, Julie Albert ... provided her cell-phone number ... [and] Chris Albert stated his cell phone number." (May 18, 2022, GJ Minutes at 30, 33.) Thus, Trooper Bukhenik falsely suggested to the grand jury that he and Trooper Proctor *formally introduced* themselves to Chris and Julie Albert—individuals that Trooper Proctor has known for at least a decade and that he *literally sat next to at his sister's wedding.* As evidenced in the attached photographs above, that suggestion was a lie.

Unsurprisingly, because of Trooper Proctor's personal bias and longstanding relationship with the Alberts, Trooper Proctor consistently testified before the grand jury in a manner that

distorted the facts to the grand jury in what can only be described as a concerted effort to shield his longtime friends from criminal liability and ensure the grand jury indicted Ms. Read. For example, at the grand jury, Trooper Proctor testified extensively regarding Ring video surveillance obtained in connection with this case. (June 7, 2022, GJ Minutes at 39-54.) Trooper Proctor testified that he was able to personally access the Ring application on O'Keefe's cell phone, which stored motion-activated video surveillance footage capturing O'Keefe's driveway on January 29, 2022. (Id. at 39-40.) The Commonwealth has been in possession of this video surveillance footage since January 29, 2022, and has had ample opportunity to review the footage. (Id.) Ring video surveillance from January 29, 2022, at 5:07 a.m., captured Ms. Read leaving O'Keefe's residence in her vehicle to look for O'Keefe. (Id. at 46-47; GJ Exhibit 44.)

During the grand jury proceedings, the Commonwealth asked Trooper Proctor to testify regarding his observations of the 5:07 a.m. video, to which he replied: "You'll see Karen Read reversing out of the garage in her black Lexus SUV, and as she pulls forward, I'll play it and then rewind it, but you'll notice the right taillight is broken. As you can see right here (indicating), the left taillight is all, all red, and the right one here is a clear piece showing, it appeared to be gap in the [sic] all red lighting on the right side there." (Id. at 46.) However, what the Commonwealth and Trooper Proctor intentionally failed to inform the grand jury is that a close review of the same video surveillance footage—mere seconds earlier—shows that as Ms. Read backs her Lexus SUV out of the driveway in the snow, **her passenger rear taillight strikes O'Keefe's parked Chevy Traverse with enough force to cause the wheel-bed of the Traverse to jostle**. (GJ Exhibit 44, 5:07 a.m. Ring Video Footage.) Thus, the Commonwealth intentionally mischaracterized and obfuscated the extraordinarily exculpatory portion of the video, which provides an alternate explanation for her broken taillight (i.e. that she broke her

taillight when she backed into O'Keefe's Chevy Traverse, not O'Keefe). Later on in Trooper Proctor's testimony, when the video surveillance was no longer on display to the grand jury, ADA Lally asked an intentionally confusing leading question to further perpetuate the false and deceptive narrative that Ms. Read never actually hit O'Keefe's Chevy Traverse: "Q: How would you describe sort of how close Ms. Read's vehicle gets to Mr. O'Keefe's Traverse during the course of backing out of the garage? A: Watching the video it is extremely close to – close to Mr. O'Keefe's SUV." (June 7, 2022, GJ Minutes at 53-54.) In doing so, the Commonwealth and its agents purposefully misled the grand jury into believing that Ms. Read's vehicle only came "close" to striking the Chevy Traverse, and that therefore she must have broken her taillight by striking O'Keefe.

Later, in yet another reckless attempt to deceive the jury, Assistant District Attorney Lally asked Trooper Proctor to testify regarding the cause of death listed on the decedent, John O'Keefe's, death certificate. (Id. at 35-36.) At the Commonwealth's direction, Trooper Proctor read into the record, "blunt impact injuries of head and hypothermia", suggesting that the cause of death was generally consistent with the Commonwealth's theory of the case. (Id. at 36.) Yet, in spite of the fact that the Commonwealth knew full well that O'Keefe's death certificate *also* states that the *manner* of death "**COULD NOT BE DETERMINED**", Trooper Proctor was never asked to testify regarding that portion of the death certificate. (See GJ Exhibit 41.) Here, like in O'Dell, the reason the Commonwealth wanted Trooper Proctor to read only a *portion* of the death certificate, is because the medical examiner's inability to determine the *manner of death* is clearly exculpatory and would have undermined the Commonwealth's ability to secure an indictment in this case.

Thus, the Commonwealth intentionally perpetrated a fraud on the grand jury for the purpose of securing an indictment by repeatedly eliciting *only* inculpatory information from Trooper Proctor, while at the same time excluding and withholding information from the grand jury that would have been exculpatory on the very same subject requiring a dismissal of the Indictments.

4. THE COMMONWEALTH INTENTIONALLY FAILED TO ELICIT CHRIS ALBERT'S INCONSISTENT STATEMENT REGARDING WHETHER HE WENT TO HIS BROTHER'S HOUSE AT 34 FAIRVIEW ROAD ON THE NIGHT IN QUESTION

During the course of the grand jury proceedings, the Commonwealth allowed Chris Albert to testify that he left the Waterfall on January 29, 2022, walked home, and never went to his brother's house located at 34 Fairview Road for the after-party. (April 28, 2022, GJ Minutes, at 24-26.) His wife, Julie Albert, similarly denied going to her brother-in-law's house after the Waterfall and testified that she went home to go to sleep. (Id. at 43.) However, according to Sergeant Yuriy Bukhenik's interview of Julie and Chris Albert on February 10, 2022, Julie and Chris Albert both indicated they "were present at the Waterfall Bar and Grill the night of January 28, 2022, **and then followed to Brian Albert's home in the early morning hours of January 29, 2022.**" (Exhibit G, February 21, 2022, Report Regarding Interviews with Chris and Julie Albert. (emphasis added).) The Commonwealth knowingly and recklessly failed to elicit the inconsistent statements made by Chris and Julie Albert during their interview with Sergeant Bukhenik on February 10, 2022, and instead allowed them to testify, unimpeached, that they never went to the crime scene on the night in question. In case there was any question as to what information ADA Lally did not want the grand jury to hear, during the course of the grand jury proceedings, ADA Lally explicitly instructed Sergeant Bukhenik to read the entirety of his report memorializing his February 10, 2022, conversation with Julie and Chris Albert "starting with

paragraph 2". (May 18, 2022, GJ Minutes, at 30.) At ADA Lally's direction, Trooper Bukhenik then proceeded to read the entirety of his three-page report memorializing his conversation with Chris and Julie Albert, which included numerous inadmissible prior consistent statements regarding their observations on January 28 and 29, 2022, in spite of the fact that both witnesses had already testified. (Id. at 30-31.) Shockingly, the portion of the report ADA Lally instructed Sergeant Bukhenik **not** to read, was the first paragraph of his report, which unequivocally states: "**Both Julie and Chris were present at the Waterfall Bar and Grill the night of January 28, 2022[,] and then followed to Brian Albert's home in the early morning of January 29, 2022**." (Exhibit G.) Thus, the Commonwealth intentionally prevented the grand jury from hearing evidence establishing Chris and Julie Albert lied about going to Brian Albert's house on the night in question. Like in O'Dell, this is yet *another* example of the Commonwealth intentionally misleading the grand jury by eliciting incomplete and misleading statements from witnesses for the purpose of obtaining an indictment against Ms. Read, requiring reversal.

5. THE COMMONWEALTH INTENTIONALLY FAILED TO IMPEACH JULIE ALBERT WITH AN EXPRESS ADMISSION TO LAW ENFORCEMENT THAT SHE KNEW O'KEEFE WAS DEAD BEFORE HIS BODY WAS SUPPOSEDLY "FOUND" BY HER SISTER-IN-LAW, JENNIFER MCCABE

The Commonwealth also allowed Julie Albert to perjure herself before the grand jury, by failing to impeach her false testimony with an express admission to law enforcement that she knew John O'Keefe was dead before his body was supposedly "found" by Ms. Read and her sister-in-law, Jennifer McCabe at 6:00 a.m. on January 29, 2022. On April 28, 2022, the Commonwealth called Julie Albert to testify extensively before the grand jury regarding her relationship with Ms. Read and O'Keefe, her interactions with the parties at the Waterfall bar on January 28, 2022, and her recollection of the events that transpired on January 29, 2022. (April

28, 2022, GJ Minutes at 28-48). Significantly, Julie Albert's testimony before the grand jury regarding the *timing* of when she first learned about O'Keefe's death differed markedly from her prior statements to law enforcement, which were incredibly exculpatory for Ms. Read and implicated Julie Albert and Jennifer McCabe in O'Keefe's death. Julie Albert testified before the grand jury regarding her recollection of what transpired on the morning of January 29, 2022, as follows:

> A: I just woke up and the first thing I do in the morning is, like we all probably do, is check our phones. And I woke up to a missed call from [my sister-in-law, Jennifer McCabe]...I think it was about 5:50. And I immediately looked and I kinda, it was weird because my phone is always on. The ringer is always on. But the text is always shut off at night. So my kids know, if you need me, call my phone, don't text my phone. And I kind of looked. She called. ***I thought it was just whatever. I didn't think obviously anything bad.*** I just thought maybe she did a butt – rolled over on her phone or, you know, something happened....So I got up. That day was my nephew's birthday...headed over to Brian and Nicole Albert's house....And my brother-in-law opened the door ... And that's when they said that, you know, there's been an accident of some sort.

(Id. at 45-47 (emphasis added).) However, according to Trooper Bukhenik's report memorializing his February 10, 2022, interview with Julie Albert, she told law enforcement "that she was asleep at 4:55 a.m. on January 29, 2022, when her phone woke her up and it was Jen's missed call, ***and that is how she found out about John dying.***" (Exhibit G, at 3.) Thus, Julie Albert admitted to law enforcement that *she knew John was dead an hour before anyone found his body or had reason to suspect John was injured.* Julie Albert's prior admission to law enforcement is incredibly exculpatory for Ms. Read and suggests that Jennifer McCabe and Julie Albert knew O'Keefe was dead before his body was supposedly "discovered" by Jennifer McCabe later that morning. Thus, this evidence inculpates Julie Albert, and exculpates Ms. Read. The Commonwealth was well aware that Julie Albert's testimony to the grand jury was completely inconsistent with her statements to Trooper Bukhenik on February 10, 2022; yet, the

Commonwealth allowed her perjured testimony to remain unimpeached before the grand jury. Indeed, it wasn't until May 18, 2022, a month after Julie Albert testified, that the Commonwealth finally attempted to sneak in Julie Albert's prior inconsistent statement, by asking Trooper Bukhenik to read three pages of his report memorializing his February 10, 2022, interview with Julie Albert. At the Commonwealth's instruction, Trooper Bukhenik read his report into the record verbatim (the vast majority of which clearly constitutes inadmissible hearsay). As set forth in the grand jury minutes, Trooper Bukhenik's recitation of his February 10, 2022, interview with Julie Albert spans 90 lines of the transcript, with Julie Albert's extremely exculpatory inconsistent statement appearing on lines 67 through 70. (May 18, 2022, GJ Minutes at 30-34). Thus, the Commonwealth intentionally hid Julie Albert's extremely exculpatory prior inconsistent statement from the grand jury for the purpose of securing an indictment against Ms. Read.

B. THE COMMONWEALTH IMPAIRED THE INTEGRITY OF THE GRAND JURY BY DELIBERATELY ADMITTING INADMISSIBLE EVIDENCE FOR THE PURPOSE OF PREJUDICING THE GRAND JURY, CONFUSING THE ISSUES, AND CONSUMING TIME UNNECESSARILY IN ORDER TO SECURE AN INDICTMENT AGAINST MS. READ

The Commonwealth's deliberate decision to repeatedly elicit inadmissible, prejudicial, and irrelevant prior bad act and character evidence, further impaired the integrity of the grand jury proceedings and requires dismissal of the indictments. Indeed, Massachusetts courts have long held that dismissal of the indictments is warranted "if the integrity of the grand jury was impaired by a prosecutor's improper conduct in the introduction of certain evidence." Commonwealth v. Brown, 490 Mass. 171, 181 (2022), citing Commonwealth v. Mayfield, 398 Mass. 615, 621 (1986) (hereafter "Mayfield). Much like in the seminal O'Dell case, discussed above, to demonstrate impairment to the integrity of the grand jury proceedings based on the

admission of certain evidence, a defendant must make a sufficient factual showing establishing the three elements articulated in Mayfield: (1) inadmissible evidence was presented knowingly or with reckless disregard for its lack of probative value and prejudicial effect; (2) the evidence was presented for the purpose of obtaining an indictment; and (3) the improper evidence probably influenced the grand jury's decision to indict. Id. at 181-182.

In determining whether those three elements have been met, the Supreme Judicial Court's decision in Commonwealth v. Brown, 490 Mass. 171 (2022) (hereafter "Brown") is instructive. In Brown, the defendant appealed his conviction for first-degree murder on the basis that, *inter alia*, the lower court improperly denied his motion to dismiss the indictments on the ground that the grand jury proceedings were impaired by the prosecutor's introduction of prejudicial Department of Correction ("DOC") records containing disciplinary reports of the defendant's disruptive behavior in custody. Id. at 172. The Supreme Judicial Court upheld the lower court's decision finding the defendant satisfied the first two elements required for a dismissal of the indictment under Mayfield, explaining that the DOC disciplinary records, which included descriptions of violent assaults on other inmates, manufacture of weapons, and threats against staff while incarcerated, were admitted by the prosecutor "'in reckless disregard of their lack of probative value, compounded by their potential prejudicial effect, and that the records were presented with the intention of obtaining indictments.'" Id. at 182. In finding "the prosecutor was reckless in introducing such improper, unfairly prejudicial and irrelevant evidence to the grand jury in order to obtain an indictment against the defendant" for first-degree murder, the Court explained that the prosecutor made no "'responsible effort to weigh the fairness of offering ... a set of highly inflammatory records demonstrating prior bad acts, proclivity to violence, and other general bad character of'" the defendant. Id. at 184. As to the third element, however, the

Supreme Judicial Court held that the improper evidence did not sufficiently influence the grand jury's decision to indict because, in addition to the strength of the other evidence presented in that case, the prosecutor gave a curative instruction explaining that grand jury should "'not use the fact that [the defendant and his codefendant] have been arrested before ... in deliberations when [the jurors] determine whether or not they committed this crime.'" Id. at 186. Thus, the Court held that because "the instructions were given sufficiently promptly after the evidence was introduced, and sufficiently conveyed that the grand jurors should not use the prior bad acts to support a finding of probable cause . . . the prior bad act evidence did not sufficiently influence the grand jury's decision to indict to require dismissal of the indictments." Id.

1. THE COMMONWEALTH RECKLESSLY INTRODUCED INADMISSIBLE, IMPROPER, UNFAIRLY PREJUDICAL, AND IRRELEVANT PROPENSITY AND "BAD CHARACTER" EVIDENCE TO THE GRAND JURY FOR THE PURPOSE OF OBTAINING AN INDICTMENT

The Commonwealth recklessly introduced a significant amount of inadmissible, prejudicial, and irrelevant propensity and "bad character" evidence for the purpose of obtaining an indictment against Ms. Read based on her general "bad character." As the Commonwealth well knows, "It is a fundamental rule that the prosecution may not introduce evidence that a defendant previously has misbehaved, indictably or not, for the purpose of showing his bad character or propensity to commit the crime charged." Commonwealth v. Baker, 440 Mass. 519, 529 (2003). Although this type of evidence is sometimes admissible for other relevant purposes, such as to prove a "common scheme, pattern of operation, absence of accident or mistake, identity, intent or motive...these exceptions are not without limitation." Id. (citing Commonwealth v. Triplett, 398 Mass. 561, 562 (1986) and Commonwealth v. Helfant, 398 Mass. 214, 224 (1986)) (internal quotations omitted). Similarly, although evidence of a hostile

relationship between a defendant and his spouse may be admitted as relevant to a defendant's motive to kill the victim, "such evidence should not be admitted if it relates to events which occurred at a time too remote from the killing."[4] Commonwealth v. Gil, 393 Mass. 204, 215-216 (citing Commonwealth v. Abbott, 130 Mass. 472, 475 (1881) (animosity between husband and wife three years before murder too distant to be probative of husband's motive) and Commonwealth v. Burke, 339 Mass. 521, 533 (1959) (evidence of defendant's husband's adulterous relationship which terminated seven months before wife's death not probative of motive to murder)). Moreover, even when this type of evidence is relevant for some limited purpose, the evidence must be excluded if its probative value is outweighed by the risk of unfair prejudice to the defendant.[5] See Evid. G., § 404(b)(2); Commonwealth v. Oberle, 476 Mass. 539, 550 (2017) (citing Commonwealth v. Crayton, 470 Mass. 228, 249-250 & n. 27 (2014)). In deciding whether challenged evidence is more prejudicial than probative, courts should consider the following factors: (1) whether the Commonwealth thoughtfully weighed the risks of unfair

[4] "Temporal remoteness is not an exercise in line drawing; rather, a reviewing court focuses on the ""logical relationship"" between the prior bad act evidence and the crime charged." Commonwealth v. Peno, 485 Mass. 378, 386 (2020) (citing Commonwealth v. Facella, 478 Mass. 393, 405 (2017)).

[5] Section 404(b)(2) permits the court to exclude evidence of a crime, wrong, or other act that is offered for a proper purpose (e.g., to prove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident) if the risk of unfair prejudice simply outweighs the probative value of the evidence. This is a more exacting standard than the standard set forth in Section 403, Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons, which permits the court to exclude relevant evidence if the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence substantially outweighs the probative value. Compare Evid. Code, § 403, with Evid. Code, § 404(b)92). That is because bad act and propensity evidence is "inherently prejudicial" and the risk of improper use is enormous. Commonwealth v. Crayton, 470 Mass. 228, 249 & n.27 (2014); see Commonwealth v. Woollam, 478 Mass. 493, 500–501 (2017) (where offered to establish motive in prosecution for first-degree murder, "testimony regarding the changes in the defendant once he began using drugs," including the statement that defendant had become "a little more violent," was "more prejudicial than probative").

prejudice, (2) whether the Commonwealth mitigated the prejudicial effect through proper limiting instructions, (3) whether the challenged evidence was cumulative of other admissible evidence, thereby reducing the risk of any prejudicial effect; and (4) whether the challenged evidence was so similar to the charged offense as to increase the risk of propensity reasoning by the jury. Commonwealth v. Peno, 485 Mass. 378 (2020).

Here, the Commonwealth intentionally elicited an unconscionable amount of testimony regarding a completely irrelevant verbal argument between Ms. Read and a woman named Marietta Sullivan, which occurred in Aruba on December 31, 2021, for the sole purpose of trying to assassinate Ms. Read's character in the eyes of the grand jury. Although every single witness unequivocally testified that there was no history of violence whatsoever in Ms. Read and O'Keefe's relationship, the Commonwealth repeatedly elicited inadmissible testimony regarding an incident that occurred in Aruba one month prior, which had no logical relationship to the crime charged. A non-exhaustive recitation of the testimony regarding this irrelevant and inherently prejudicial event is as follows:

1. During the grand jury proceedings, the Commonwealth knowingly chose to put O'Keefe's brother, Paul O'Keefe, on the stand to testify about *stories* he'd heard from other people about an incident in Aruba on December 31, 2021, involving Ms. Read, O'Keefe, and a woman named Marietta Sullivan. (April 27, 2022, GJ Minutes at 43-46.) Notably, Massachusetts courts have long held that the admission of hearsay statements for the purpose of showing a hostile relationship between the defendant and the victim is not permissible because it would "entirely eviscerate the [rule's] important purpose of securing the correctness and completeness of testimony through cross-examination." Commonwealth v. Seabrooks, 425 Mass. 507, 511-512 (1997).

In spite of this bright line rule, Paul O'Keefe was permitted to testify to gossip he heard from three separate individuals, including his wife, Erin O'Keefe, Laura Sullivan, and Marietta Sullivan about the Aruba Incident: "I had heard of an incident [in Aruba] where Karen had got off the elevator and saw my brother hugging Laura Sullivan's younger sister Etta who is probably ten years younger than she is, who my brother has known for a long time. **And Karen perceived that as they were kissing or making out which was not accurate, because I've actually had conversations with both Laura and Etta after the fact and they said that wasn't the case at all.** And I guess Karen made a big scene, you know, yelled at both of them, and I guess it just wasn't a pretty scene, from what I understand. . . . I had originally heard it from my wife who would communicate with Karen often. And then after the fact, through Laura Sullivan and Etta Sullivan." (April 27, 2022, GJ Minutes at 45-46.) Thus, the Commonwealth invited Paul O'Keefe to testify to this rank hearsay and extremely prejudicial propensity evidence for the purpose of obtaining an indictment based on Ms. Read's general "bad character".

2. The Commonwealth also deliberately chose to call Laura Sullivan as a witness before the grand jury to testify about the same incident, which, like Paul O'Keefe, she did not personally observe or witness. (May 5, 2022, GJ Minutes at 4-34.) *Inter alia*, Laura Sullivan was permitted to testify about her completely irrelevant negative initial impressions of Karen during the planning of the Aruba trip (i.e. that Karen told her she needed her own bathroom and her own space), id. at 13; that her husband told her that he saw Karen and John at the pool in Aruba and Karen was "giving John an earful" because she wanted to "get him out of the pool to get ready to go out, and he

just wanted to watch the game" (which in addition to being irrelevant also constitutes unreliable and inadmissible hearsay), id. at 20-21; the Commonwealth then elicited additional inadmissible and prejudicial hearsay testimony from Laura, allowing her to testify that her sister, Marietta, told her a story about how Ms. Read was an "asshole" in Aruba because she ran into O'Keefe in the hotel lobby on New Year's eve, where "he kind of tripped and like fell, and [Marietta] caught him... And [Marietta] pushed him towards [his room]. And [Marietta] said at that point Karen turned around and said, 'Who the fuck is she?' And [O'Keefe] said 'That's Etta, Laura's Sister.' And [Karen] looks right at my sister and she goes 'Fuck you.' And my sister was like, 'Well, nice to meet you. Fuck you too.'" id. at 21-22; the Commonwealth then elicited inadmissible and prejudicial hearsay testimony from Laura that she spoke with John later that night and he told her that Karen is "crazy", id. at 23; the Commonwealth then elicited inadmissible hearsay testimony from Laura, stating that her sister, Marietta, denied ever kissing O'Keefe and that she would know if her sister was lying (improperly vouching for her sister), id. at 24-25; and finally, after all of that, the Commonwealth then asked Laura to describe whether anything stuck out regarding Karen and John's relationship, permitting Laura to go on a long, irrelevant, and speculative diatribe about her perception of their relationship, which included her opinion that "there was no compassion or affection or anything between the two of them" and that there was no "spark" and "no connection", id. at 30-31. Thus, the Commonwealth called Laura Sullivan for the wildly inappropriate purpose of spewing inadmissible hearsay and gossip about Ms. Read's "bad character" in the

hopes that it would prejudice the jury against her for the purpose of securing an indictment.

3. As if the admission of the above evidence wasn't prejudicial enough, the Commonwealth later instructed Trooper Proctor to read another law enforcement officer's report memorializing his February 8, 2022, interview with Laura Sullivan about the Aruba trip to the grand jury, which, in addition to being an inadmissible prior consistent statement, also contains at least four layers of inadmissible hearsay. (May 25, 2022, GJ Minutes, at 10-13.)

4. The Commonwealth then chose to have Marietta Sullivan testify before the grand jury regarding the Aruba Trip. (May 5, 2022, GJ Minutes at 34-50). Marietta Sullivan testified that she ran into John in the lobby of their hotel in Aruba on New Years' Eve in 2021 when he was super drunk and playfully pushed him towards his room. According to Marietta, Karen appeared, yelled his name loudly, and then told Marietta to go fuck herself. Id. at 42-44. *Inter alia*, the Commonwealth also intentionally elicited the following inadmissible prejudicial statements from Marietta: (a) ADA Lally asked Marietta to tell the grand jury what her "sister Laura relate[d] to [her] as far as what John had told her about why [Karen and John] were not at the cabanas, causing her to go on a whole diatribe accusing Ms. Read of being a liar, Id. at 47; (b) ADA Lally asked Marietta to explain to the grand jury what she and her sister discussed about Karen after the New Years Eve incident, to which Marietta explained that she told her sister that "Karen sucks" and she "wasn't a fan of her" and that Karen left a "bad taste in [her] mouth", Id. at 44; (c) ADA Lally asked Marietta to testify about Ms. Read's conversations with her sister after the Aruba incident,

which led her to testify that Ms. Read only apologized to her sister and never apologized to Marietta personally or paid for her room, id. at 48-49; (d) Marietta further testified that John told her that on January 31, 2022 Karen had apparently "been giving [him] a hard time" and they had been "keeping their distance" because John "wanted to [] watch the [football] game and apparently that was an issue", id. at 40. All of this testimony constitutes inadmissible propensity evidence and serves no purpose other than to put evidence of Ms. Read's "bad character" in front of the grand jury for the purpose of having her indicted on these charges.

5. What's more, the Commonwealth subsequently instructed Trooper Proctor to read Lieutenant John Fanning's report memorializing his February 8, 2022, interview with Marietta Sullivan to the grand jury, yet again reiterating her prejudicial and irrelevant statements (above) about the Aruba incident. (May 25, 2022, GJ Minutes, at 10-14.)
6. Finally, the Commonwealth also elicited testimony from Erin O'Keefe, stating she received a text from Karen on December 31, 2021, stating she caught John kissing Marietta Sullivan in the hotel lobby. (April 27, 2022, Grand Jury Minutes at 30.)

The Commonwealth's intentional admission of this unreliable and prejudicial gossip makes a mockery of the grand jury process. Here, like in Brown, the prosecutor was reckless in introducing this exceptionally cumulative, improper, unfairly prejudicial, and irrelevant "bad acts" and character evidence to the grand jury in order to obtain an indictment against Ms. Read. Aside from the fact that the vast majority of the evidence discussed above clearly constituted inadmissible hearsay, the Commonwealth produced no reliable evidence to suggest that the Aruba incident had *anything whatsoever* to do with O'Keefe's death a full month later on January 29, 2022, or that this remote and isolated incident was even a point of contention in Ms.

Read and O'Keefe's relationship after that trip. Indeed, ADA Lally made no responsible effort whatsoever to weigh the fairness of offering five witnesses (four of whom were not even personally present) to testify about this highly inflammatory incident, in which Ms. Read apparently got angry at another woman—not the decedent—because she purportedly mistakenly believed O'Keefe had kissed another girl. The Commonwealth intentionally admitted this prior bad acts and character evidence for no reason other than to sully Ms. Read's character in the hopes that the jury would indict her based on the fact that she was, in Marietta's words, an "asshole". Any marginal probative value that Ms. Read's *temporary* mistaken belief that O'Keefe kissed another girl might have in terms of evidencing a "hostile relationship" or intent to murder was far outweighed by the cumulative, prejudicial, and inflammatory effect of the evidence on the grand jury.

Similarly, in what can only be described as an act of desperation to salvage the weak evidence against Ms. Read in this case, the Commonwealth repeatedly asked witnesses to testify about whether they had *ever* observed *any* arguments between Ms. Read and O'Keefe, knowing full well that minor, run-of-the mill arguments **are not relevant to the proceedings because they are not suggestive of motive or intent to commit murder**. For example, during the course of John's sister-in-law, Erin O'Keefe's testimony, ADA Lally asked her to describe any arguments Ms. Read and O'Keefe might have had, "even if they were relatively minor." Eventually, Erin O'Keefe responded, "my mother-in-law ... sometimes he thought she spoiled the kids too much." (April 27, 2022, GJ Minutes at 14.) The Commonwealth further elicited testimony from Erin O'Keefe, that on the afternoon of January 28, 2022, Ms. Read texted her to say that O'Keefe had accused her of spoiling the kids because she took his daughter, Kayley, to Dunkin Donuts. Id. at 19. After admitting this irrelevant and prejudicial testimony from Erin

O'Keefe herself, ADA Lally then intentionally elicited the same cumulative testimony as hearsay from Paul O'Keefe:

> A: [John] didn't confide in me too much or talk about it too much. . . it's mostly stuff that I've heard through my wife because she had a relationship with Ms. Read.
> Q: What are some of the things that you've heard through your wife Erin?
> A: The typical complaining about, you know, what they would fight about when they did fight, mostly based around buying stuff for the kids, spending too much money on the kids, spoiling the kids. My brother was – wanted them to have more of a humble upbringing as opposed to, you know, having fancy expensive clothes or stuff to that effect.

Id. at 41. The Commonwealth then chose to call law enforcement officer David Diciccio to testify regarding Paul O'Keefe's statement that "there were verbal arguments between [Karen and John] when alcohol was involved" in spite of Paul previously admitting, on the stand, that he had never personally witnessed any arguments between them. Id. at 111. The Commonwealth similarly elicited irrelevant testimony from O'Keefe's friend, Michael Camerano, that O'Keefe mentioned being annoyed with Karen because she hadn't asked him to help her fix a plumbing issue at her house and because she sometimes spoiled his kids. Id. at 87. ADA Lally then had David Diciccio regurgitate to the grand jury the exact same problematic statements made by Michael Camerano, by having him read his report memorializing his prior interview with Michael Camerano into the record. Id. at 120. Finally, the Commonwealth admitted testimony from Jennifer McCabe, who stated that Karen told her on January 28, 2022, that she and John had gotten into a "disagreement" earlier because she had taken his daughter to Dunkin Donuts to get an iced coffee before school and John was upset about it. (April 26, 2022, GJ Minutes at 168.) The cumulative effect of this prejudicial evidence cannot be understated. The Commonwealth intentionally called numerous witnesses to repeat the same highly inflammatory stories over and over again until the jury had no choice but to indict based on their general

dislike of Ms. Read rather than based on the proper consideration of whether there is probable cause to believe she committed the crimes charged. Clearly, the admission of these minor, run-of-the-mill arguments have no bearing on motive or intent to *murder* someone and are not suggestive of a hostile relationship, but instead were elicited for the sole purpose of tarnishing Ms. Read's character. Thus, the Commonwealth recklessly admitted days' worth of inadmissible, highly prejudicial testimony with no probative value in an effort to secure an indictment against Ms. Read.

2. THE COMMONWEALTH RECKLESSLY INTRODUCED INADMISSIBLE, IMPROPER, AND UNFAIRLY PREJUDICIAL SPCULATION, LAY, AND EXPERT "OPINION" TESTIMONY TO THE GRAND JURY FOR THE PURPOSE OF OBTAINING AN INDICTMENT

As explained below, the Commonwealth recklessly introduced incriminating lay and expert "opinion" testimony and rank speculation to the grand jury for the purpose of obtaining an indictment.

a. Improper Lay Witness Testimony

Massachusetts Evidence Code section 701 governs the admission of lay witness testimony. Pursuant to Section 701, if the witness is not testifying as an expert, then the witness's testimony is limited to those opinions or inferences that are (1) rationally based on the perception of the witness; (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue; and (3) not based on scientific, technical, or other specialized knowledge within the scope of Section 702. "As a general rule, a witness is permitted to testify only to facts that the witness has observed and may not give an inference or opinion based upon those facts." Commonwealth v. Yetz, 37 Mass. App. Ct. 970, 971 (1995) (finding witness's testimony that he saw defendant and complainant on the couch together and it looked "suspicious" was improperly admitted). Moreover, it is improper to admit evidence that is

speculative. See Commonwealth v. Buckman, 461 Mass. 24, 31 (2011); Commonwealth v. Rivera, 52 Mass. App. Ct. 312, 323 (2001) ("It is within the judge's discretion to exclude evidence that is too remote in time or too speculative.")

The Commonwealth knowingly and intentionally elicited extremely prejudicial and improper lay opinion testimony from MSP Trooper Diciccio regarding a hearsay statement he obtained from Paul O'Keefe on January 30, 2022. (April 27, 2022, GJ Minutes at 112-113.) ADA Lally was unequivocally in possession of Trooper Diciccio's report, when he instructed Trooper Diciccio to read the following passage from his report to the grand jury: "**Paul said he went to the hospital to view John's body and it looked like John had been hit by a car**." (Id.) Aside from the fact that this statement is rank hearsay, Paul O'Keefe is not a forensic pathologist and has no education, knowledge, or experience to qualify as an expert in opining on *manner* of death. In point of fact, even the Commonwealth's own forensic medical examiner refused to go so far as to say that O'Keefe's injuries were consistent with being hit by a car. The determination that O'Keefe's injuries were consistent with being hit by a car is not an opinion that can be said to be based upon a lay witness's perceptions. Thus, the Commonwealth intentionally elicited this improper lay opinion testimony to fill gaps in the case that their qualified expert could not. Thus, the admission of this improper opinion evidence at ADA Lally's direction was improper and was admitted for the sole purpose of prejudicing the jury.

Similarly, the Commonwealth used speculative testimony by Jennifer and Matt McCabe to fill other gaping holes in the Commonwealth's case. For example, the Commonwealth improperly allowed Matt McCabe to speculate that the reason Ms. Read and O'Keefe never came into the Albert residence that night was because they got into an argument (a baseless assumption that was otherwise completely unsupported by the record): "[Karen's] car was out

there. We just thought it was weird, you know, in hindsight were they having a disagreement in the car...It wasn't as if they pulled up and I looked outside and the next thing you know they were gone. They definitely moved the car and for some reason just never came into the house." (April 26, 2022, GJ Minutes at 147). Additionally, the Commonwealth asked Jennifer McCabe to speculate as to why John's daughter, [redacted] might have described Ms. Read as acting "crazy" on the morning of January 29, 2022: "I think [redacted] is referring to the crazy as, when she first called me it was: Jen. John. So the crazy would be Karen telling me that they got into a fight. He didn't come home. He was at the Waterfall. Then her remembering the second story of, being at my sister's, oh, we got to get to Fairview to then [redacted] had told me she changed the story again and said to somebody else that he was dead and he got hit by a plow. **So those were the things that [redacted] was referring to when she was saying that [Karen] was acting crazy**." (April 26, 2022, GJ Minutes at 220.) Thus, the Commonwealth intentionally invited this incredibly inculpatory improper speculative testimony in clear violation of the dictates in Commonwealth v. Buckman, supra, 461 Mass. at 31 (speculative testimony is inadmissible) for the purpose of filling missing holes with speculation rather than facts for the purpose of ensuring Ms. Read was indicted.

b. Improper Expert Opinion Testimony

Pursuant to the Massachusetts Guide to Evidence Section 702, a witness who is qualified as an expert by knowledge, skill, experience, training, or education may only testify in the form of an opinion if the following four elements are met: (1) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (2) the testimony is based on sufficient facts or data; (3) the testimony is the product of reliable principles and methods; and (4) the expert has reliably applied the principles

and methods to the facts of the case. Mass. G. Evid, § 702. "Expert opinion testimony must rest on a proper basis, [or] else inadmissible evidence might enter under the guise of expert opinion." Commonwealth v. Wardsworth, 482 Mass. 454 (2019) (citing Commonwealth v. Barbosa, 477 Mass. 658, 667 (2017)).

Traditional rules governing opinion testimony prohibited a witness from giving an opinion on the ultimate issue in the case to "preclude a witness form giving an opinion as to the legal significance of the facts in issue in such a fashion as to invade the province of the jury." Commonwealth v. Lugo, 63 Mass.App.Ct. 204, 207-208. The rule has been relaxed in recent years to allow an expert's opinion to touch on ultimate issues as long as the expert does not offer an opinion as to the defendant's guilt or innocence. Id. (citing Commonwealth v. Zavala, 52 Mass. App. Ct. 770, 775). However, the Supreme Judicial Court has held that the expert's opinion may only touch on ultimate issues within his or her field of expertise if it will aid the jury in reaching a decision. Id. (citing Commonwealth v. Cruz, 413 Mass. 686, 689-691 (1992). Moreover, when opinion testimony on the ultimate issue is permitted, the jury must be instructed that the witness's interpretation is not dispositive of the matter. Id. (citing Commonwealth v. Henderson, 435 Mass. 155, 160, n.9 (2001).)

Here, the Commonwealth instructed Trooper Proctor to read into the record multiple reports written by MSP Computer Forensics Expert, Trooper Guarino, which included Trooper Guarino's repeated baseless opinion that O'Keefe was the victim of a motor vehicle homicide. Indeed, as borne out in the following exchange, ADA Lally explicitly instructed Trooper Proctor to admit the following inadmissible and prejudicial evidence:

> Q: What is it that Trooper Guarino does for the State Police Detective Unit at the Norfolk County District Attorney's Office?
> A: He's technology, a bit of an expert on cell phones, computers, and infotainment systems....

> Q: Did Trooper Guarino write a report in regard to the seizure and **<u>attempted examination</u>** of [the infotainment system]...If you could read from that report at this time.
> A: On Saturday, January 29, 2022, Trooper Michael Proctor and Sergeant Yuri Bukhenik of the Norfolk County District Attorney's Office responded to the unattended death of John O'Keefe...at 34 Fairview Road in Canton. **<u>Through my investigation it was found that O'Keefe was a victim of a motor vehicle homicide...</u>** At this time, we were unable to access the data and analyze it. Both systems are secured at the Norfolk County DA's Office for future analysis.

(June 7, 2022, GJ Minutes at 74-75.) Thus, ADA Lally knowingly elicited Trooper Guarino's completely baseless and unsubstantiated "expert" opinion that O'Keefe's was struck by a motor vehicle *in spite of the fact that the basis for his opinion was his inability to access or download that vehicle's infotainment system.* Then, ADA Lally did it again:

> Q: Now in addition to that, did Trooper Guarino write a report in regard to a cell phone extraction or forensic analysis of the cell phone belonging to Karen Read?
> A. Correct.
> Q: And if you could read from Trooper Guarino's report in regard to that at this time.
> A: **<u>Through my investigation, it was found that O'Keefe was a victim of a motor vehicle homicide</u>**...Trooper Proctor secured the cell phone belonging to Karen Read...who is a suspect in a homicide...**<u>At this time, we are unable to access the data on the phone and it's secured at the Norfolk DA's Office.</u>**

<u>Id.</u> at 77-78. Thus, again, ADA Lally intentionally elicited a hearsay statement with zero probative value (i.e. that Trooper Guarino was unable to analyze Karen Read's cell phone) for the sole purpose of admitting Trooper Guarino's incredibly prejudicial and improper "expert opinion" that Mr. O'Keefe was the victim of a vehicular homicide, falsely insinuating to the grand jury that he must have reviewed electronic evidence in this case suggesting O'Keefe was struck by a vehicle. This opinion was unquestionably meant to deceive the jury into believing the Commonwealth had already conclusively determined that O'Keefe was killed by a car—a proposition which is patently incorrect. Then, again, ADA Lally forced that baseless conclusion down the grand jury's throat a third time, by having Trooper Proctor read yet another prejudicial report authored by Trooper

Guarino into the record: "Through my investigation it was found that O'Keefe was the victim of a motor vehicle homicide. While on scene...Trooper Proctor secured O'Keefe's cell phone and brought it to the Norfolk DA's Office for forensic analysis...A copy of the cell phone extraction was placed on the server for future reference." Id. at 79-80. Thus, the grand jury was presented with a completely baseless assertion by Trooper Guarino under the guide of "expert opinion" testimony that his analysis of O'Keefe's cell phone established that O'Keefe was struck by a motor vehicle. Trooper Guarino's prejudicial and inculpatory expert opinion was not based on *any* facts or data and was not the product of reliable principles or methods as required by Mass. G. Evid, § 702. Rather, the Commonwealth intentionally elicited this information to fix a fatal flaw in the prosecution's case: i.e. that the *manner* of death was a vehicular homicide.

3. THE COMMONWEALTH INTENTIONALLY AND REPEATEDLY ADMITTED PRIOR CONSISTENT STATEMENTS OF THE COMMONWEALTH'S WITNESSES FOR THE PURPOSE OF STRENGTHENING THEIR OTHERWISE WEAK CASE AND HIDING SIGNIFICANT IMPEACHMENT EVIDENCE TO SECURE AN INDICTMENT IN THIS CASE

"The evidence before the grand jury must consist of reasonably trustworthy information sufficient to warrant a reasonable or prudent person in believing that the defendant has committed the offense." Commonwealth v. Roman, 414 Mass. 642, 643 (1993); *see* O'Dell, 392 Mass. at 450 (quoting Commonwealth v. Stevens, 362 Mass. 24, 26 (1972)); *see also* Commonwealth v. McCarthy, 385 Mass. 160, 163 (1982). As the Commonwealth well knows, prior consistent statements of a witness are not admissible. Commonwealth v. Lareau, 37 Mass. App. Ct. 679 (1994) (citing Commonwealth v. Brookins, 416 Mass. 97, 102 (1993)). The only exception to this general rule occurs "where a claim is made that the witness's [testimony] is of recent contrivance or is the product of particular inducements or bias" and the prior consistent statement was made before the witness became subject to the bias or pressure that is claimed to

have influenced his testimony. Id. (citing Commonwealth v. Healey, 27 Mass. App. Ct. 30, 34 (1989) and Commonwealth v. Brookins, supra, 416 Mass. at 103). Indeed, the use of prior consistent statements to rebut the appearance of contrivance should be allowed only with cautionary instructions so that the probative value for the proper purpose is clear, because of the ever present danger that the jury will, despite instructions, consider the prior consistent statement as evidence of the facts therein asserted. Id. (citing Commonwealth v. Darden, 5 Mass. App. Ct. 522, 528 (1977)). Throughout the months-long grand jury proceedings in this case, the Commonwealth recklessly dispensed with the rules of evidence and admitted all prior consistent statements of the prosecution's witnesses regardless of the statements' admissibility, which had the intended effect of (1) making it appear as if the evidence against Ms. Read was stronger than it actually is; and (2) deceptively concealing inconsistent statements by simply reading entire police reports into the record (such that the jury wouldn't be alerted to any inconsistencies), often weeks after that witness had already testified.

The benefit to the Commonwealth of utilizing such witnesses—one who possesses no personal knowledge of facts tending to establish the defendant's guilt, and who merely testifies to hearsay suggested by the prosecutor produces "'evidence" which appears smooth, well integrated and consistent', making even weak cases appear strong." United States v. Brito, 907 F.2d 392, 395 (2d Cir. 1990); and second, such reliance also "prevents the defendant from utilizing grand jury testimony in cross-examining witnesses who will testify at trial." United States v. Arcuri, 282 F. Supp. 347, 349-50 (E.D.N.Y. 1968). Neither of these rationales advances the grand jury's traditional function as an effective protection 'against unfounded criminal prosecutions.'" Commonwealth v. McCarthy, 385 Mass. at 163 (quoting Lataille v. District Court of Eastern Hampden, 366 Mass. 525, 532 (1974)); *see* Estepa, 471 F.2d at 1135 (labeling

as "sinister" the government's use of surrogate witness in grand jury to prevent impeachment at trial of main witness). While the law of the Commonwealth is clear that an "indictment shall not be dismissed on the grounds that … hearsay evidence was presented before the grand jury," Mass. R. Crim. P. 4(c); O'Dell, 392 Mass. at 450, this court should not hesitate to dismiss an indictment when "the integrity of the grand jury proceeding was impaired by an unfair and misleading presentation to the grand jury." O'Dell, 392 Mass. at 447; see Commonwealth v. Mayfield, 398 Mass. 615, 620 (1986) ("We have recognized possible impairment if a prosecutor were to deceive grand jurors by presenting remote hearsay in the guise of direct testimony.").

Here, the Commonwealth repeatedly elicited prior consistent statements of witnesses, in an effort to make their case appear stronger by the quantity (rather than the quality) of the evidence. For example, in spite of the fact that Jennifer McCabe, Kerry Roberts, Matthew McCabe, Brian Albert, and Officer Saraf *all* testified before the grand jury, ADA Lally insisted on having Trooper Proctor read, verbatim, his reports memorializing the entirety of all of those witnesses prior statements to the grand jury. Thus, throughout the grand jury proceedings, the Commonwealth utterly failed to impeach a single witness or ask Trooper Proctor to testify—based on his own memory—what those witnesses told him about a particular issue in the past. Apparently, Trooper Proctor was afraid of perjuring himself and was not confident that the conversations actually happened as he described in his reports. This type of presentation was meant to leave the jurors with the false impression that certain claims were supported by multiple witnesses, when in fact these were merely regurgitations of the same fact through different individuals.

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C. THE CUMULATIVE EFFECT OF THE COMMONWEALTH'S FALSE AND DECEPTIVE PRESENTATION TO THE JURY, OMISSION OF EXCULPATORY EVIDENCE, AND REPEATED ADMISSION OF INADMISSIBLE, IRRELEVANT, AND PREJUDICIAL EVIDENCE INFLUENCED THE GRAND JURY'S DECISION TO INDICT

The cumulative effect of the Commonwealth's intentional decision to (1) distort the facts presented to the grand jury by omitting certain exculpatory portions of Ms. Read's statement to law enforcement on scene; (2) allow Canton Police Department Detective Sergeant Lank to deceive the jury about his longstanding relationship with the Albert family and history of "deputizing" himself to investigate their crimes; (3) misleading the grand jury regarding Trooper Proctor's longstanding relationship with the Albert family (who should have been considered suspects in this case); (4) present false and deceptive evidence regarding the physical evidence in this case, including the Ring Video footage obtained from O'Keefe's residence and O'Keefe's injuries; (5) exclude Chris and Julie Albert's prior inconsistent statements, which implicate them in O'Keefe's death and exculpate Ms. Read; (6) the reckless admission of inadmissible, prejudicial "bad act" and "bad character" propensity evidence; (7) the reckless introduction of inadmissible and prejudicial opinion testimony which, *inter alia*, deceptively signaled to the grand jury that O'Keefe was killed by a motor vehicle; and (8) the repeated and reckless admission of prior consistent statements of witnesses in an effort to bolster the credibility of those witnesses, unquestionably influenced the grand jury's decision to indict.

Here, like in O'Dell, Detective Sergeant Lank's testimony to the grand jury distorting Ms. Read's statements to responding officers, and falsely suggesting an admission of guilt (i.e. that she couldn't remember driving to 34 Fairview Road)—alone, requires reversal. Moreover, the deception perpetrated by Detective Sergeant Lank and Trooper Proctor, and their failure to disclose their personal, longstanding relationships with the very individuals they were tasked

with investigating completely undermines the objectivity and reliability of the Commonwealth's investigation and would have cast doubt on the Commonwealth's investigation as a whole. Had the Commonwealth presented these easily provable and known facts to the grand jury, i.e. that Trooper Proctor and Detective Sergeant Lank are *both* close friends with Chris and Julie Albert, and that Chris and Julie Albert lied to the grand jury about statements that inculpate them and exculpate Ms. Read—the jury would have had serious doubts as to the reliability of the *entirety* of the investigation conducted in this case.

As the Supreme Judicial Court explained in Commonwealth v. Brown, 490 Mass. 171 (2022), if the Commonwealth chooses to admit prior bad act or other propensity evidence, limiting instructions are needed to ensure the propensity evidence does not sufficiently influence the grand jury's decision to indict. Id. at 186. Here, the Commonwealth never gave a single limiting instruction regarding the limited and proper use of other bad act evidence as is required under the law. See, e.g., Commonwealth v. McCowen, 458 Mass. 461, 478 (2010) (noting the jury was instructed on limited use of bad act evidence both when admitted and during final charge, and quoting with favor judge's instruction to jury "that they were not permitted to use that information to infer that 'if somebody did something in the past, then they must have done the matter that we're now on trial for. **That's never allowed.**'") (emphasis added). The prosecutor's failure to give any limiting instruction regarding any of the extensive bad act and character evidence tacitly invited the grand jurors to use the bad act evidence for propensity purposes, the exact use of such evidence that the Supreme Judicial Court explicitly condemns.

Moreover, even if the Commonwealth had given a limiting instruction, that would not explain why the Commonwealth deliberately admitted the prejudicial evidence in the first place, instead of simply omitting it from the grand jury presentation. The answer is clear with or

without the limiting instructions: the Commonwealth needed the propensity value of the evidence in order to indict Ms. Read. Finally, the improper admission of this evidence cannot be saved, here, by the strength of the other evidence presented to the grand jury. Indeed, the evidence against Ms. Read was weak, based on deception, and was presented almost entirely through the use of inadmissible evidence. There is no question that the deliberate admission of the improper propensity and "opinion" evidence went a long way to filling gaps and curing deficiencies, all to the defendant's prejudice.

The combination of all of this—the false and deceptive testimony presented to the grand jury, the extensive propensity and "opinion" evidence given to the jury without limiting instructions, and the repeated admission of inadmissible and unreliable hearsay admitted for the sole purpose of bolstering the Commonwealth's otherwise weak case—could not help but influence the grand jurors, improperly, to indict. This impairment of the integrity of the grand jury was pervasive and serious and requires the dismissal of the indictments in this case.

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III.
CONCLUSION

For the foregoing reasons, the defendant requests that his motion be allowed, and that all the indictments in this matter be dismissed.

Respectfully Submitted,
For the Defendant,
Karen Read
By her attorney,

Alan J. Jackson, Esq., *Pro Hac Vice*
Elizabeth S. Little, Esq., *Pro Hac Vice*
Werksman Jackson & Quinn LLP
888 West Sixth Street, Fourth Floor
Los Angeles, CA 90017
T. (213) 688-0460
F. (213) 624-1942

David Yannetti

David R. Yannetti, Esq.
44 School St.
Suite 1000A
Boston, MA 02108
(617) 338-6006
BBO #555713
law@davidyannetti.com

January 5, 2024

CERTIFICATE OF SERVICE

I, Attorney Elizabeth Little, hereby certify that I served the "Defendant's Motion to Dismiss Indictments and Memorandum in Support Thereof" upon the Commonwealth by emailing a copy on January 5, 2023, to Norfolk County Assistant District Attorney Adam Lally at adam.lally@mass.gov.

January 5, 2023
Date

Elizabeth S. Little

EXHIBIT A

SUPPLEMENTAL NARRATIVE FOR PATROLMAN STEVEN A SARAF

Ref: 22-87-OF

1. On 01/29/22, I was dispatched to 34 Fairview Rd. for a report of a unresponsive party in the snow. When I arrived I saw three people on the ground over the victim (O'KEEFE) waving at me. They said he was not breathing. They were performing CPR on O'KEEFE. I noticed READ, Karen, the victim's girlfriend had blood on her face from doing mouth to mouth. O'KEEFE was bleeding from his face. I went over to the victim and felt his skin and it was cold to the touch. I asked if he was a drug user and they said no, he is a Boston Cop. I went to get the A.E.D. from my patrol vehicle and at the same moment the Canton Fire Department was arriving. CFD took over the care of Mr. O'KEEFE.

2. Following that, READ, Karen kept screaming is he dead, is he dead. She was severely distraught and was not able to tell me what happened. I tried to console her and keep her out of the inclement weather. I had her sit in one of the cars. Sgt Goode arrived and started speaking to the the parties that were there.

SUPPLEMENTAL NARRATIVE FOR STEPHEN MULLANEY

Ref: 22-87-OF

1. On Wednesday January 29, 2022 I, Officer Mullaney was assigned to patrol the East sector for the 11:45p-7:45a patrol shift. At approximately 6:05a Officer Saraf and I were dispatched to 34 Fairview Road for a report of an unresponsive party.

2. Upon my arrival, Canton FD was arriving on scene. Ofc. Saraf had already been on scene. When I exited my cruiser I observed a female party attempting CPR on the victim in the snow. As I approached the victim, Canton FD began CPR. I then assisted Canton FD with lifting the victim onto a stretcher. The victim was then taken by stretcher to the ambulance.

3. At this time, Ofc. Saraf asked me to assist in getting witnesses information. I then spoke with MCCABE, Jennifer. I asked MCCABE who the victim was and she identified the victim as O'KEEFE, John. MCCABE then explained to me that a group of people had gone out to Waterfall Grill and Bar in Canton Center earlier in the night. Jennifer stated that she and her husband left the bar at approximately 12a and went to her brother-in-law's house at 34 Fairview Road. MCCABE then told me that O'KEEFE and his girlfriend, READ, Karen were invited to 34 Fairview road but never arrived. I asked MCCABE if she possibly knew how long the victim had been where he was found and she told he was dropped off by READ sometime between 12a-1a. MCCABE then told me that she was called by READ at approximately 5:00a wondering if she knew where John was. At this time, Sgt. Goode arrived on scene and the victim was transported to Good Samartian shortly after.

4. While talking to MCCABE, READ was hysterical and distraught and repeatedly screamed, "is he dead," and "that's my boyfriend." Sgt. Goode then advised ROBERTS, Kerry to take READ home. After READ and ROBERTS left, Canton Control advised officers that READ was making suicidal statements to her father. ROBERTS then brought READ back to the scene where Sgt. Goode asked me to fill out Section 12 paperwork and she was transported to Good Samaritan Hospital.

5. I stayed on scene and assisted Sgt. Goode, Det. Sgt. Lank and Lt. Gallagher.

On 01/29/2022, at 608am, I was contacted at home by Sgt. Sean Goode. Sgt. Goode advised me that a male party had been found in the snow by the area of 34 Fairview Rd. Sgt. Goode stated that the party involved, who is a Boston Police officer, was in grave condition and Canton EMS was on scene. The conditions at this time were blizzard like, with heavy snow, wind, and freezing temperatures.

2. At approximately 624am, I arrived on scene at 34 Fairview Rd. Sgt. Goode, Officer Saraf, and Officer Mullaney had already spoken to multiple witnesses and the victim was being treated in the ambulance by Canton EMS. The ambulance left for Good Samaritain Hospital shortyly after I arrived. Sgt. Goode made me aware that the officers and EMT's told him that the victim was bleeding from the nose and mouth. They also stated that he appearecd to have swelling above one of his eyes.

3. The first person that I spoke to was MCCABE, Jennifer. She was able to provide us with a general timeline of events:

- Jennifer was at Waterfall bar and Grill in Canton with her husband,Matthew McCabe, Brian Albert (brother-in-law), and Niclole Albert (sister).

- Approximately 1100pm. They were accompanied at the bar by O'KEEFE, John, and his girlfriend, READ, Karen.

- Approximately 1200am. Jennifer, Matthew, Brian and Nicole left the bar and went back to ALBERT'S house at 34 Fairview Rd.

- Approximately 1214am. O'KEEFE texted Jennifer and asked where they were going. Jennifer responded that they were going to 34 Fairview Rd. Moments later a vehicle pulled up in front of the house, which Jennifer believed was O'KEEFE and his girlfriend, READ. She observed as the vehicle just sat out in front of the house for several minutes. The vehicle was facing uphill, with the passenger side facing the house. She thought that the vehicle sat outside for at least fifteen minutes. MCCABE stated that neither party ever came to the door and ultimately the vehicle drove away. She attempted to text O'KEEFE, but never got a response.

- Approximately 130am. MCCABE and her husband leave the house and give a ride home to Julie Nagel, who lives on Highland Street in Canton.

- Approximately 453am. MCCABE was contacted by READ and FURBUSH, Kayley (neice of O'Keefe). They were distraught because O'KEEFE never arrived home and was not answering his phone. MCCABE and READ attempted to call some of O'KEEFE's close friends, including ROBERTS, Kerry.

- Approximately 500am. ROBERTS picked up MCCABE and READ to go looking for O'KEEFE.

- Approximately 600am. ROBERTS, MCCABE, and READ locate O'KEEFE in the yard of 34 Fairview Rd. He was located on the left side of the yard about eight feet in from the street. He was found unconscious on the ground, laying on his back. ROBERTS began to perform

CPR.

- Approximately 604am. 911 call was placed to the Canton Police Station.

4. Officers on scene were able to secure the scene as best they could, as the weather conditions continued to be severe. State Police CPAC unit was contacted at 638am. Trooper Proctor called back within a few minutes and was made aware of the situation.

5. While on scene, all attempts to speak with READ were unsuccessful. She was hysterical and difficult to control. The only statement that she was able to relay to Canton officers while on scene, was that she did not remember ever being at 34 Fairview Rd. READ later made statements via telephone to her parents, threatening suicide. Canton EMS ultimately responded back to the scene and READ was taken to the hospital under a Section 12 order.

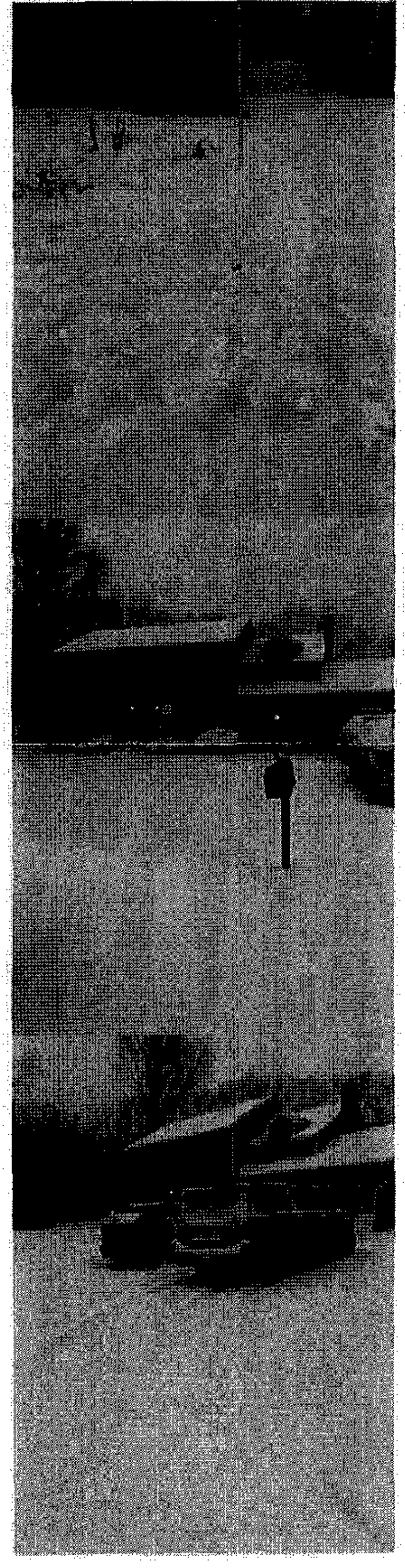
6. Next, I went into 34 Fairview Rd. and spoke with the home owners, ALBERT, Brian and ALBERT, Nicole. Both parties from this point forward will be referred to by their first names. Brian stated that they had seen the victim at Waterfall Bar and Grill and had spoken to him. He stated that he did not know the party well, but knew that he was a friend of MCCABE (sister-in-law). Brian and Nicole recalled that the victim had been welcomed to come to their house, but he never arrived. When asked about O'KEEFE's demeanor or if O'KEEFE had any altercations with anyone earlier at the bar, Brian said that he seemed to be fine at the bar and there were no issues whatsoever. MCCABE, Matthew (husband of Jennifer) also stated that he had observed the vehicle pull up out front of the house, but never saw either party get out of the vehicle. Matthew also reiterated what Brian said. O'KEEFE seemed to be fine at the bar and that there was really nobody else in the establishment other than their group. Next, I asked Brian and Nicole who else was at the house that night. Aside from the names already mentioned, the following people were present at some point during the time in question: Brian Albert Jr. (Brian and Nicole's son), Caitlin Albert (daughter), Julie Nagel (Brian Jr.'s friend), and Brian Higgins, who is a friend of Brian Albert Sr. They advised me that their daughter Caitlin left the house around 1215am, when she was picked up by her boyfriend, Tristin Morris.

7. While still on scene, Lt. Gallagher, Sgt. Goode and I attempted to retrieve as much evidence as possible given the weather conditions. Lt. Gallagher was able to use a leaf blower to blow away the top layers of snow. We were able to observe a broken drinking glass and multiple patches of red, which appeared to be frozen blood drops. Six samples of this substance was retrieved by using red Solo plastic cups. The broken glass was retrieved and bagged into evidence. Both items were returned to the Canton police station and logged into evidence.

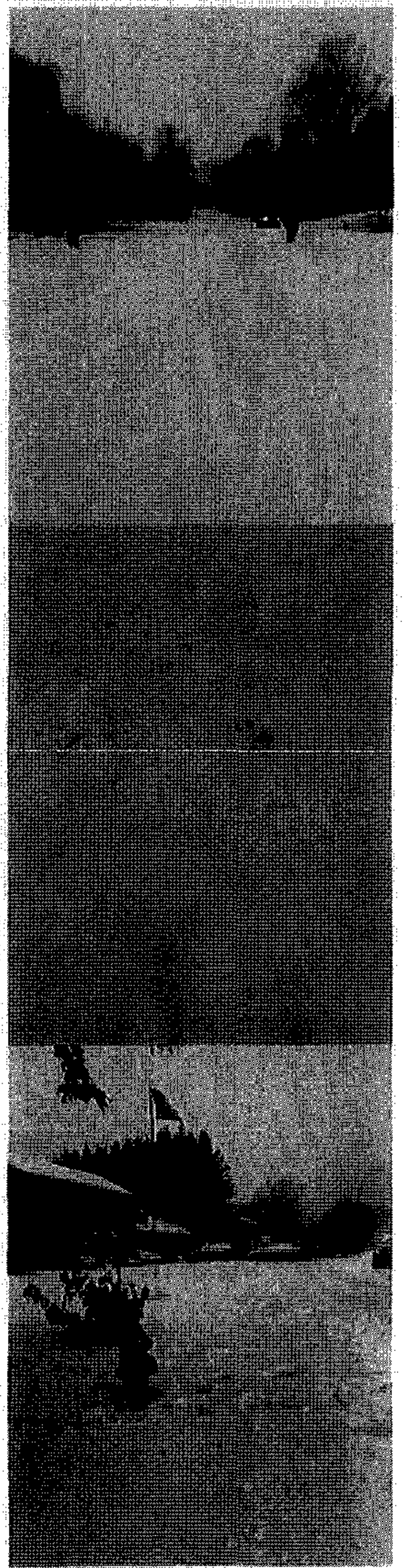
8. At approximately 900am, I was contacted at the police station by MCCABE, Jennifer.

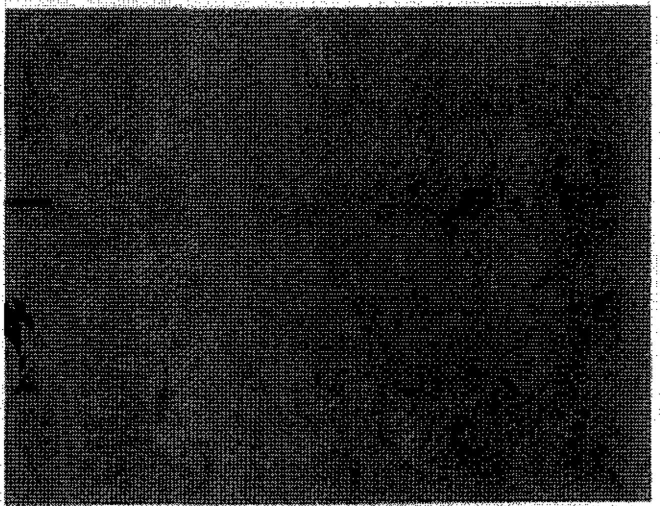
She asked if it was possible to come back to 34 Fairview Rd. and speak with her. Lt. Gallagher and I both left immediately and arrived back at 34 Fairview within a few moments. MCCABE told us that she recalled something that she was not sure if we were aware of. She said that when READ was driving around with her and ROBERTS looking for the victim, she said something to the effect of "I hope I didn't hit him". MCCABE told us that she made these statements again at the scene when the victim was discovered. She thought that READ may have made these statements in front of a police officer, but she was not sure.

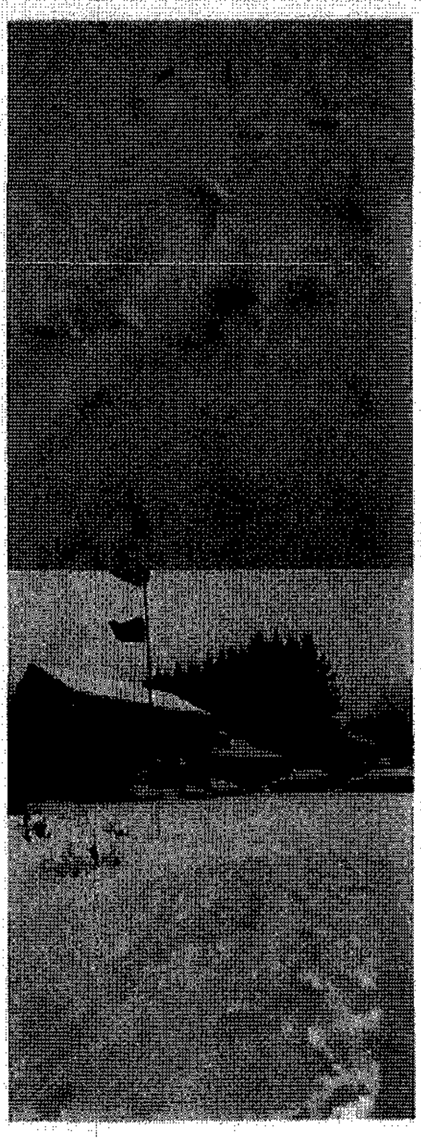
Canton Police Department
Images Associated with 22-87-OF



Canton Police Department
Images Associated with 22-87-OF







Canton Police Department
Images Associated with 22-87-OF

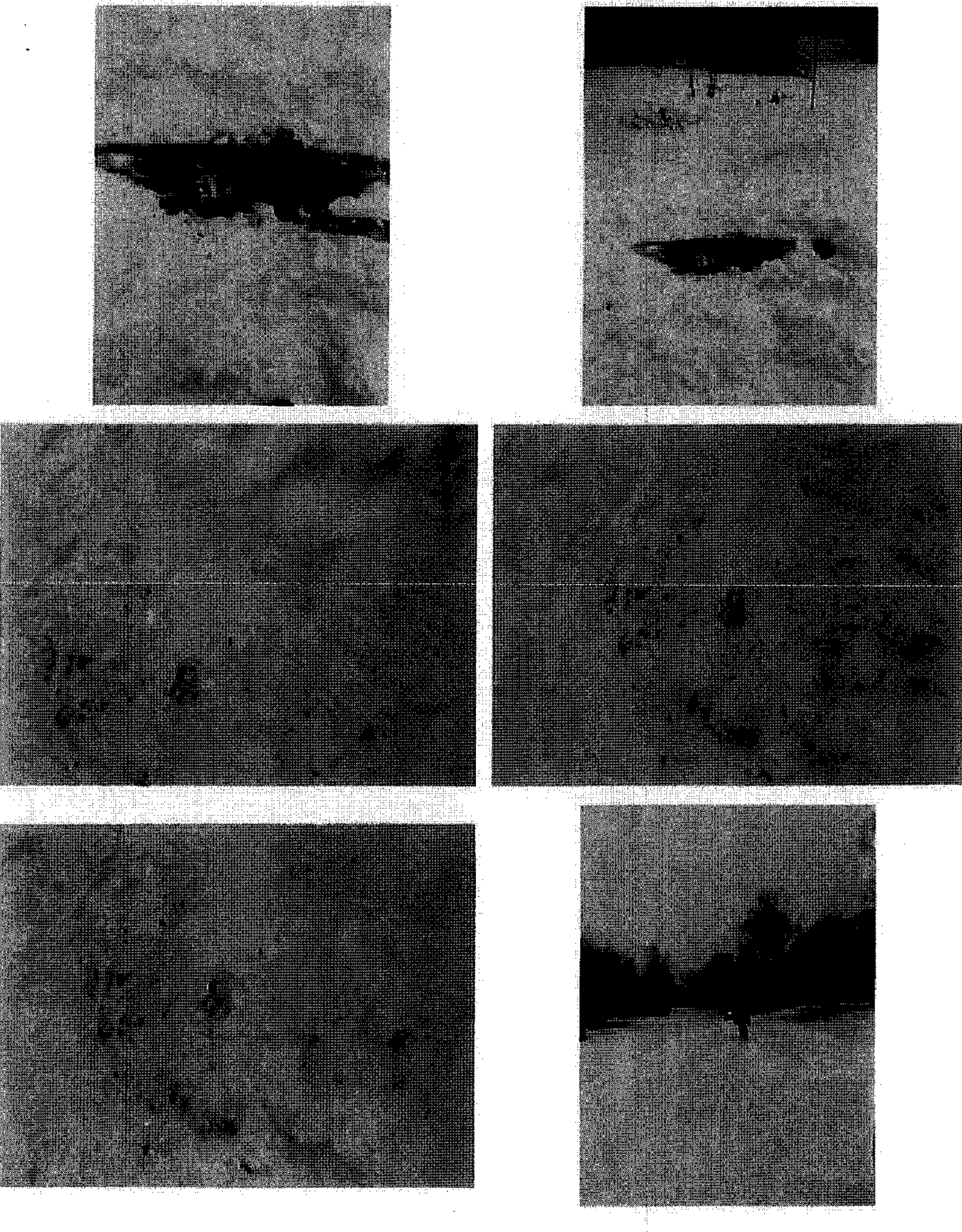


EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MARC LOPILATO and ALFREDO LOPILATO, Plaintiffs,	)	C.A. No. 05-10012-NG
v.	)	**AMENDED COMPLAINT**
OFFICER MICHAEL LANK, OFFICER GLENN NIX, OFFICER ERROL LANE, CANTON POLICE CHIEF PETER BRIGHT, and THE TOWN OF CANTON, Defendants.	)	

INTRODUCTION

1. This is an action for money damages on behalf of Plaintiffs Marc Lopilato and Alfredo Lopilato, arising out of the violation of their constitutional rights by Officer Michael Lank, Officer Glenn Nix, Officer Errol Lane, and Chief Peter Bright of the Canton Police Department. Plaintiffs also allege that the Town of Canton had a custom and policy of deliberate indifference to the rights of its citizens that resulted in the violation of Plaintiffs' constitutional rights. This action is brought pursuant to 42 U.S.C. §1983 and M.G.L. c. 12 §11(I).

JURISDICTION

2. Jurisdiction is based upon 28 U.S.C. §§1331 and 1343, and on the pendent jurisdiction of this court to entertain related claims arising under state law.

PARTIES

3. Plaintiff Marc Lopilato is a resident of Norfolk County, Massachusetts.
4. Plaintiff Alfredo Lopilato is a resident of Norfolk County, Massachusetts.

5. Defendant Town of Canton is a municipality duly organized under the laws of the Commonwealth of Massachusetts.

6. Defendant Chief of Police, Peter Bright, was at all times relevant to this complaint Chief of the Canton Police Department, acting under color of law, and is sued as an individual and in his supervisory capacity as Police Chief. At all times material hereto, it was the responsibility of Defendant Bright to properly train, supervise, and discipline police officers at the Canton Police Department and to implement established law, policies, and regulations at the Canton Police Department.

7. Defendant Michael Lank was at all times relative to this complaint an employee of the Town of Canton Police Department and is sued in his individual capacity.

8. Defendant Errol Lane was at all times relative to the complaint an employee of the Town of Canton Police Department and is sued in his individual capacity.

9. Defendant Glenn Nix was at all times relative to the complaint an employee of the Town of Canton Police Department and is sued in his individual capacity.

FACTS

10. On August 31, 2002, at approximately 12:45 a.m., Marc Lopilato was sitting in a friend's car in a parking lot outside the Golden China restaurant in Canton, Massachusetts.

11. Earlier that evening Marc Lopilato had been in a verbal dispute with several individuals including an individual by the name of Tim Albert.

12. Tim Albert's older brother, Chris Albert, is a childhood friend of Defendant Lank. Chris and Tim Albert had been drinking that evening at Centerfields Bar in Canton. Defendant Lank was drinking at Centerfields that evening as well.

13. While sitting in the car, Marc Lopilato noticed a group of several men leave Centerfields Bar and approach the car. At this time, Marc Lopilato exited the car.

14. He was then attacked by several of the men in the group, including Chris Albert.

15. After this attack, Marc Lopilato called his brother Alfredo Lopilato and informed him that he had been physically assaulted by a group of men.

16. Plaintiff Alfredo Lopilato left his girlfriend's house, where he had been sleeping, and came to the parking lot out of concern for his brother's well-being.

17. When Alfredo Lopilato arrived, he noticed Chris Albert, Tim Albert's brother. Alfredo knew Chris Albert, and thus approached him to inquire about the earlier dispute.

18. At this time, Defendant Lank came from the area in front of Centerfields Bar. He was swaying as he walked. At trial following this incident, Lank would admit that he drank "about four" beers in the two hours he was in Centerfields.

19. Defendant Lank approached the Plaintiffs as they approached Chris Albert. He began yelling that he was a police officer. His breath smelled strongly of alcohol. At the trial following the incident, Lank would testify that he activated himself as a police officer at this time.

20. Two other Canton Police Officers, Defendant Lane and Defendant Nix, arrived at the scene. Defendant Lank instructed them to handcuff Plaintiff Alfredo Lopilato. Defendant Nix handcuffed Alfredo Lopilato and placed him in the back of a police cruiser.

21. While the other officers were placing Alfredo Lopilato in the police cruiser, Defendant Lank approached Marc Lopilato, pushed him backwards, and then punched him, with a closed fist, on the side of his face.

22. Plaintiff Marc Lopilato fell to the ground. Defendant Lank landed on top of him.
23. Defendant Lank continued to hit Marc Lopilato.
24. Defendant Lank then bit Plaintiff Marc Lopilato on the arm, breaking the skin.
25. Defendant Lane pulled Defendant Lank off of Marc Lopilato. He did not ask Lopilato for any identifying information. He simply told him to leave.
26. While Alfredo Lopilato was sitting, handcuffed, in the back of the cruiser Defendant Lank approached him and spit directly in his face. Defendant Lank then asked Alfredo who "the other kid" was. He then said, "whoever he is, I am going to make his life miserable." Defendant Lank's speech was slurred and his breath smelled of alcohol.
27. After Defendant Lank spit in Alfredo Lopilato's face, Defendant Lane released him from the handcuffs. Lopilato asked, "did you see him spit in my face?" Defendant Lane responded, "just get in your car and leave."
28. Defendant Lank drove away after the incident, despite his obvious intoxication.
29. The next morning, Saturday, August 31, 2002, Alfredo Lopilato went to the Canton police station to make a complaint with internal affairs on behalf of his brother and himself. He was sent away, and told that he would have to come back on the following Tuesday, September 3, 2002, if he wanted to make a complaint. Alfredo asked Marc if he would go to the police station on that date, as Alfredo would be working.
30. Police reports regarding the incident were not drafted or filed until September 2; this was only *after* Alfredo Lopilato went to the station on August 31 to complain about the conduct of the Defendant officers.
31. On the following Tuesday, September 3, 2002, Marc Lopilato went to the Canton Police Station to make a complaint on behalf of himself and his brother. He spoke with a

Sergeant and described the officers' conduct during the incident. The Sergeant told him he would "get back to him" regarding his complaint. That evening, someone from the department called Alfredo and stated that she would look into the complaint. To this day, neither Marc nor Alfredo Lopilato has heard anything further from anyone in the Canton Police Department regarding the outcome of any investigation into their complaint.

32. Soon thereafter, both Marc and Alfredo Lopilato received a summons in the mail to appear in court on September 25, 2002. They had each had been charged with Assault and Battery on a Police Officer.

33. On the evening of February 6, 2003, Marc and Alfredo Lopilato went inside a Mobile gas station in Canton. Their other brother, Chris Lopilato, and several other individuals were waiting for them in a vehicle outside. Defendant Lank entered the store and asked Marc Lopilato how he was doing. He replied, "not so good…you attacked me, and now I am the one who has to go to court."

34. Marc and Alfredo Lopilato went outside to get in the vehicle. Suddenly several cruisers appeared. Defendant Lank then ordered Marc Lopilato to get into his cruiser. While in the cruiser, Defendant Lank asked, "can we talk about this now?" When Marc Lopilato did not reply, Defendant Lank placed him under arrest and instructed another officer to take him to the police station.

35. Lopilato was booked and held at the police station. He was released at 3:00 a.m., and arraigned the next morning on the following charges: Threatening, Disorderly Conduct, and Intimidation.

36. On October 23, 2003, after a three-day jury trial, Marc and Alfredo Lopilato were found not guilty of all charges arising out of the August 31, 2002 incident.

37. All of the charges arising out of the February 6, 2003 incident were dismissed at the arraignment that same morning. The Assistant District Attorney who handled the matters apologized to Marc Lopilato and stated that after the October trial he realized that Defendant Lank "was a liar."

38. As a result of the Defendants' conduct, Marc Lopilato suffered physical injuries, humiliation, embarrassment, and emotional distress. Alfredo Lopilato suffered humiliation, embarrassment, emotional distress, and economic losses.

COUNT ONE
VIOLATION OF 42 U.S.C. §1983
BY DEFENDANTS LANK, NIX AND LANE

39. The Plaintiffs restate and re-allege Paragraphs 1 through 38 and incorporate said Paragraphs herein as Paragraph 39.

40. By the actions described in Paragraphs 1 through 38 herein, Defendants Lank, Nix and Lane, acting under color of law, violated Plaintiffs' rights:

    a. To free speech and to petition the government for a redress of grievances, in violation of 42 U.S.C. §1983 and their rights under the First and Fourteenth Amendments;

    b. To be free from excessive force and unlawful seizures, in violation of 42 U.S.C. §1983 and the Fourth and Fourteenth Amendments to the United States Constitution.

COUNT TWO
VIOLATION OF 42 U.S.C. §1983
BY DEFENDANT BRIGHT

41. The Plaintiffs restate and re-allege Paragraphs 1 through 40 and incorporate said Paragraphs herein as Paragraph 41.

42. By the actions described in Paragraphs 1 through 40 herein, Defendant Bright has, through his acts and omissions, shown a deliberate indifference to the Plaintiffs' constitutional rights and deprived the Plaintiffs of their constitutional right to free speech, to petition, and to be free from excessive force and unlawful seizures by:

    a. Failing to take advantage of easily available measures to ensure his officers did not engage in constitutional violations;

    b. Failing to adequately train his officers on the right to free speech, the right to petition, the use of force and on the guidelines for proper seizures;

    c. Failing to adequately train, supervise, discipline officers whom he knew were prone to violate the right to free speech, violate the right to petition, use excessive force and make illegal seizures;

    d. Tolerating a custom and practice in which officers violate the right to free speech, violate the right to petition, use excessive force and make improper seizures; and

    e. Failing to adequately investigate incidents where he knew officers violated the right to free speech, violated the right to petition, used excessive force and made improper seizures.

COUNT THREE
VIOLATION OF 42 U.S.C. §1983
BY DEFENDANT TOWN OF CANTON

43. The Plaintiffs restate and re-allege Paragraphs 1 through 42 and incorporate said Paragraphs herein as Paragraph 43.

44. By the actions described in Paragraphs 1 through 42 herein, the Defendant Town of Canton has demonstrated a custom and policy of deliberate indifference to the rights of its citizens by:

a. Failing to adequately train its officers on the right to free speech, the right to petition, the use of force and the guidelines for proper seizures;

b. Failing to adequately supervise and discipline officers who are prone to violate the right to free speech, violate the right to petition, use excessive force and make illegal seizures;

c. Tolerating a custom and practice in which officers violate the right to free speech, violate the right to petition, use excessive force and make improper seizures;

d. Failing to adequately investigate incidents where officers violate the right to free speech, violate the right to petition, use excessive force and make improper seizures.

COUNT FOUR
VIOLATION OF MASSACHUSETTS CIVIL RIGHTS ACT, M.G.L. c. 12, §11I
BY ALL INDIVIDUAL DEFENDANTS

45. The Plaintiffs restate and re-allege Paragraphs 1 through 44 and incorporate said Paragraphs herein as Paragraph 45.

46. By the actions described in Paragraphs 1 through 44 herein, the Defendants violated the Plaintiffs' civil rights through threats, intimidation and coercion, in violation of M.G.L. c. 12, §11I.

WHEREFORE, Plaintiffs request that this Honorable Court:

(1) Award compensatory damages against the Defendants jointly and severally;

(2) Award punitive damages against Defendant police officers;

(3) Award the costs of this action, including reasonable attorneys' fees; and,

(4) Award such other and further relief as this Court deems necessary.

JURY TRIAL DEMAND

A jury trial is hereby demanded for all claims.

Respectfully submitted,
Plaintiffs Marc Lopilato & Alfredo Lopilato,
By their attorneys,

DATED: August 2, 2007

//s// Jessica D. Hedges

Stephen B Hrones (BBO No. 242860)
Jessica D Hedges (BBO No. 645847)
Hrones, Garrity & Hedges, LLP
Lewis Wharf-Bay 232
Boston, MA 02110-3927
T)617/227-4019

CERTIFICATE OF SERVICE

I, Jessica D. Hedges, hereby certify that, on this the 2nd day of August, 2007, I served a copy of this document, where unable to do so electronically, by first-class, postage prepaid, to all attorneys of record.

//s// Jessica D. Hedges
Jessica D. Hedges

EXHIBIT C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
No: 05cv10012-WGY

Marc Lopilato

Plaintiff

v.

Officer Michael Lank et al
Defendant

SETTLEMENT ORDER OF DISMISSAL

YOUNG, D.J.

The Court having been advised on November 21, 2007 that the above-entitled action has been settled:

IT IS ORDERED that this action is hereby dismissed without cost and without prejudice to the right of any party, upon good cause shown, to reopen the action within thirty (30) days if settlement is not consummated.

By the Court,

/s/Matthew A. Paine

Deputy Clerk

November 21, 2007

To: All Counsel

EXHIBIT D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MARC LOPILATO and ALFREDO, LOPILATO, Plaintiffs

v.

Officer MICHAEL LANK, Officer GLENN NIX, Officer ERROL LANE, Canton Police Chief PETER BRIGHT, and the TOWN OF CANTON, Defendants,

C.A. NO. 05-10012 NG

JOINT PRE-TRIAL MEMORANDUM

The parties respectfully submit the following Pretrial Memorandum.

I. Statement of the Evidence Parties Will Offer at Trial

A. Plaintiffs

In the early morning hours of August 31, 2002, Marc Lopilato was beaten and bitten by defendant Michael Lank. Just before the assault, defendant Lank had been drinking in a local bar. After activating himself as a police officer he intervened in a conversation between plaintiffs and several of his childhood friends. He stated was a police officer and physically inserted himself between the parties. When Marc Lopilto, told him to get out of the way, defendant Lank "sucker punched" plaintiff Marc Lopilato, wrestled him to the ground and bit him on the arm, leaving severe bruising. Defendant officers Lane and Nix were present. Defendant Nix handcuffed Alfredo Lopilato at defendant Lank's request, and placed him in the back of a police cruiser.

Defendants Nix and Lane pulled defendant Lank away from Marc Lopilato. When Marc Lopilato asked defendant officer Lane if he saw what just happened,

defendant Lane stated, "Get the fuck out of here before I arrest you." Following the officer's orders, Marc Lopilato left. He had sustained a black eye and bruising. His arm was wounded with a deep bite mark.

Defendant Lank then approached the police cruiser where Alfredo Lopilato was being held and asked, "Whose your buddy?" Then Lank stated, "I am going to make your life miserable," and spit in Alfredo Lopilato's face. After approximately 45 minutes, Alfredo Lopilato was released.

The next day Alfiredo Lopilato went to the police station to make a complaint against the involved officers. He asked to speak with the lieutenant or captain, and was told to come back on Monday. He left his phone number. On the following Monday, Marc Lopilato went to the station to make a complaint. He spoke with a Sergeant, showed him his bite mark, and described the officers' conduct during the incident. The Sergeant told him he would "get back to him" regarding his complaint.

On the following Tuesday, Alfredo called the department and made another verbal complaint, and stated he wanted to come in and speak with someone. The officer with whom he spoke stated that she would look into it and get back to him. That evening, someone from the department called Alfredo and stated that she would look into the complaint. To this day, neither Marc nor Alfredo Lopilato has heard anything further from anyone in the Canton Police Department regarding an investigation into their complaints.

Instead, several days after making the complaint both Marc and Alfredo received a summons to appear in Stoughton District Court on charges of Assault and Battery on a Police Officer.

On the evening of February 6, 2003, while the charges arising out of the August 31, 2002 incident were pending, Marc and Alfredo Lopilato went inside a Mobile gas station in Canton. Their other brother, Chris Lopilato, and several other individuals were waiting for them in a vehicle outside. Defendant Lank entered the store and asked Marc Lopilato how he was doing. He replied, "not so good…you attacked me, and now I am the one who has to go to court." Marc and Alfredo Lopilato went outside to get in the vehicle. Defendant Lank then ordered Marc Lopilato to get into his cruiser. While in the cruiser, Defendant Lank asked, "can we talk about this now?" When Marc Lopilato did not reply, Defendant Lank placed him under arrest and instructed another officer to take him to the police station. Lopilato was booked and held at the police station. He was released at 3:00 a.m., and arraigned the next morning on charges of threatening, disorderly conduct, and intimidation.

On October 23, 2003, after a three-day jury trial, Marc and Alfredo Lopilato were found not guilty of all charges arising out of the August 31, 2002 incident. All of the charges arising out of the February 6, 2003 incident were dismissed. Since the incident the Lopilatos have been pulled over repeatedly for motor vehicle citations in Canton.

B. Defendants

The defendants expect the evidence to show that on August 31, 2002, the defendant, Lank worked a 12-8 shift on August 30, then worked a detail from 8-4 p.m. He went home, slept for a period of time and then went to a friend's house to attend a wake. He left the friend's house and went to Centerfields. He arrived there at approximately 10:30-11:00 p.m. He stayed there until closing time consuming 4-5 beers. While leaving the restaurant, he was asked by the owner, Jim Maranthas to drive another

patron home. He got into his truck and was about to leave when Chris Albert approached him. Mr. Albert was with his wife (Julie) and indicated that he had just got into a fight with Marc Lopilato and Marc had made threats against him. Officer Lank observed Mr. Albert's hand to be swollen.

While speaking with them, Officer Lank noticed a group of men coming down the street. Mr. Albert backed away and said it was Marc and his brother coming down the street. Officer Lank exited his truck and walked towards the Lopilatos. He identified himself as a police officer and told them that there would be no more fighting. The plaintiffs said they did not care if he was a police officer. Officer Lank held up his hands and got in between both groups. Marc and Alfredo began to slap at his hands. Marc then grabbed him and tried to push him. Officer Lank held on to Marc until they separated. Marc then punched Officer Lank striking him in the left ear. Officer Lank returned a blow and they began to wrestle and trade blows. He felt someone hitting him on the back of head and turned to see Alfredo Lopilato behind him.

At some point, the defendants, Nix and Lane arrived and the groups were separated. A decision was made to summons in Marc Lopilato as well as his brother, Alfredo Lopilato. Officer Lank contacted his supervisor that night who informed him that he could write his report when he returned to duty. (two days later) Officer Lank later completed his report and had the plaintiffs summonsed into court for assault and battery charges. A clerk's hearing was held and a complaint was issued.

During the pendency of the criminal charges, Officer Lank was on duty and went to the local Mobil mart for a drink. While in the store, the plaintiffs came in and began to make statements to him. ("you are a pussy", "you wanted no part of me that night", we

will get you") Officer Lank, initially, brushed their comments off and left the store. While in the parking lot, Marc Lopilato threatened him further. Officer Lank called for back up and placed Marc under arrest and charged him with disorderly conduct and intimidation of a witness. Marc was transported to the station by another officer.

Mr. Maranthas was the owner of Centerfields. He testified during the criminal trial that earlier in the evening (9:00), there was an altercation between the plaintiff, Marc Lopilato and Tim Albert. He called the police because Marc refused to leave the premises. The police arrived and the dispute was cleared up. He then testified that around 12:30 a.m he was outside his establishment talking with Officer Lank. He requested that Officer Lank drive another patron home because the patron had too much to drink. He testified that Lank did not appear intoxicated. At that point, he observed Tim Albert walk towards them and indicate that he was just in a fight with Marc Lopilato and that Marc had threatened to kill him. Maranthas testified that Lank told Albert to go to police station to file a complaint. He then observed a group of individuals walking towards them. Officer Lank exited his truck and walked towards the oncoming group. He identified himself as a police officer and said there would be no more fighting. Maranthas indicated that the plaintiff (Marc) said that they did not care if he was cop and a fight ensued. He called 911 from his cell phone. He did observe Marc Lopilato fighting with Lank. Officers arrived and the fight was broken up.

II. Stipulations of fact

None.

III. Contested issues of fact

At this time all facts are contested.

IV. Jurisdictional Issues

None

V. Questions Raised by Pending Motions

Defendants intend to file a motion to bifurcate. Plaintiffs intend to oppose this motion. Defendants also intend to file a motion in limine to exclude evidence of unrelated, unsubstantiated misconduct on the part of the officers. Plaintiffs intend to oppose this motion. Plaintiffs intend to file a motion to amend the complaint, adding an additional theory of recovery under §1983, namely that the Defendants violated the Plaintiffs First Amendment rights.

VI. Issues of Law Including Evidentiary Questions

None

VII. Requested Amendment to the Pleadings

None at this time.

VIII. Additional Matters to Aid the Disposition of this Action

None

IX. Probable Length of Trial by Jury

One week (of half days)

X. Plaintiffs Expected Trial Witnesses

a. The parties to this action

a. Mark Hanley

b. Steve Alessi

c. Anthony DiVito

d. Jim Dagget

e. Tim Albert

f. Brendan Albert

g. James Young

h. Chris Albert

i. Peter Besani

j. Chris Dipitro

k. Officer Callery

l. Christopher Lopilato

m. Officer Paul Digiampitro

n. Officer Ted Lehan

o. Sergeant Kenneth Drinan

p. Julie Daniels

q. James Marathis

r. Sergeant Mark Ronayne

s. Gillian Daniels

t. Brian Dolan

u. Raymondo Brandao

v. Omar Sylvester

w. Sonia Cambria

x. Kimberly Ricci

y. Lt. Helena Findlen

z. Bob Nut, licsw

aa. Chief Kenneth Berkowitz

bb. Officer Saraf

cc. Officer O'Brien

dd. Officer Eric Wade

Defendants:

In addition to the witnesses listed above, the defendants intend to call Ron Holman, Brockton, MA.

XII. Expert Witnesses

None

XIII. Proposed Exhibits

Plaintiff

a. Photographs of Scene

b. Photographs of Injuries to Marc Lopilato

c. Incident Reports from 8/31/02 incident

d. Incident Reports from 2/6/03 incident

e. Booking sheets

f. Investigation reports and notes

g. Mental Health records for Marc Lopilato

h. Documents regarding fee paid to criminal defense attorney Timothy O'Connell

i. Documents regarding housing expenses incurred as a result of plaintiffs move from Canton

j. Criminal Dockets (03-0250 & 02-1813)

Defendants

a. Dental records for Officer Michael Lank

Respectfully Submitted
Counsel for plaintiffs,

//s// Jessica D. Hedges
Jessica D. Hedges
BBO No. 645847
Hrones, Garrity & Hedges, LLP
Lewis Wharf–Bay 232
Boston, MA 02110
T) 617/227-4019

Counsel for Defendants:

/S/ James W. Simpson, Jr.
James W. Simpson, Jr. BBO#634344
Merrick, Louison & Costello, LLP.
67 Batterymarch Street
Boston, MA 02110
(617) 439-0305

EXHIBIT E

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MARC LOPILATO and ALFRED LOPILATO, Plaintiffs, v. OFFICER MICHAEL LANK, OFFICER GLENN NIX, OFFICER ERROL LANE, CANTON POLICE CHIEF PETER BRIGHT, and THE TOWN OF CANTON, Defendants.	CIVIL ACTION NO. 05-10012-NG

DEFENDANTS' ANSWER TO AMENDED COMPLAINT WITH AFFIRMATIVE DEFENSES AND JURY CLAIM

Now come the Defendants, Officers Michael Lank, Glenn Nix, and Errol Lane, Canton Police Chief Peter Bright, and the Town of Canton, and answer the Plaintiffs' Amended Complaint as follows:

1. The Defendants do not respond to Paragraph 1 because the Plaintiffs do not allege material facts, but instead describe their intentions with respect to their purported causes of action and state conclusions of law to which no response is required. To the extent that a further response is required, the Defendants deny that they violated the Plaintiffs' constitutional rights, deny that the Town of Canton had a "custom and police of deliberate indifference to the rights of its citizens that resulted in the violation of Plaintiffs' constitutional rights," and otherwise leave the Plaintiffs to their proof.

2. The Defendants do not respond to Paragraph 2 because it states a conclusion of law to which no response is required. To the extent that a further response is required, the Defendants leave the Plaintiffs to their proof.

JURISDICTION

3. The Defendants lack sufficient knowledge and information upon which to form a belief as to the truth of the allegation in Paragraph 3, and therefore leave the Plaintiffs to their proof.

4. The Defendants lack sufficient knowledge and information upon which to form a belief as to the truth of the allegation in Paragraph 4, and therefore leave the Plaintiffs to their proof.

5. The Defendants admit the allegation contained in Paragraph 5.

6. As to the allegations in Paragraph 6, the Defendants admit only that the Town of Canton employed Peter Bright as Chief of the Police Department at the time of the events alleged in the Complaint. The Defendants do not respond to the remainder in Paragraph 6 because it does not allege a material fact, but rather states conclusions of law to which no response is required. To the extent that a response may be required, the Defendants leave the Plaintiffs to their proof.

7. As to the allegations in Paragraph 7, the Defendants admit only that, at all times relevant to the Complaint, the Town of Canton employed Michael Lank as a Police Officer. The Defendants do not respond to the remainder in Paragraph 7 because it does not allege a material fact, but rather describes the Plaintiffs' intention with respect to the capacity in which the Plaintiffs have sued this Defendant.

8. As to the allegations in Paragraph 8, the Defendants admit only that, at all times relevant to the Complaint, the Town of Canton employed Errol Lane as a Police Officer. The Defendants do not respond to the remainder in Paragraph 8 because it does not allege a material fact, but rather describes the Plaintiffs' intention with respect to the capacity in which the Plaintiffs have sued this Defendant.

9. As to the allegations in Paragraph 9, the Defendants admit only that, at all times relevant to the Complaint, the Town of Canton employed Glenn Nix as a Police Officer. The Defendants do not respond to the remainder in Paragraph 9 because it does not allege a material fact, but rather describes the Plaintiffs' intention with respect to the capacity in which the Plaintiffs have sued this Defendants.

FACTS

10. The Defendants lack sufficient knowledge and information upon which to form a belief as to the truth of the allegations in Paragraph 10, and therefore leave the Plaintiffs to their proof.

11. The Defendants lack sufficient knowledge and information upon which to form a belief as to the truth of the allegations in Paragraph 11, and therefore leave the Plaintiffs to their proof.

12. Denied in the express terms alleged. As to the allegations in Paragraph 12, the Defendants admit only that Chris Albert was a childhood friend of Michael Lank and further admit that Michael Lank was a patron at Centerfields on or around August 31, 2002. The Defendants lack sufficient knowledge and information upon which to form a belief as to the truth of the remaining allegations in Paragraph 12, and therefore leave the Plaintiffs to their proof.

13. The Defendants lack sufficient knowledge and information upon which to form a belief as to the truth of the allegations in Paragraph 13, and therefore leave the Plaintiffs to their proof.

14. The Defendants lack sufficient knowledge and information upon which to form a belief as to the truth of the allegations in Paragraph 14, and therefore leave the Plaintiffs to their proof.

15. The Defendants lack sufficient knowledge and information upon which to form a belief as to the truth of the allegations in Paragraph 15, and therefore leave the Plaintiffs to their proof.

16. The Defendants lack sufficient knowledge and information upon which to form a belief as to the truth of the allegations in Paragraph 16, and therefore leave the Plaintiffs to their proof.

17. The Defendants lack sufficient knowledge and information upon which to form a belief as to the truth of the allegations in Paragraph 17, and therefore leave the Plaintiffs to their proof.

18. As to the allegations in Paragraph 18, the Defendants admit only that Michael Lank was in the area in front of Centerfields. The Defendants deny that Michael Lank was swaying as he walked. The Defendants lack sufficient knowledge and information upon which to form a belief as to the truth of the remaining allegations in Paragraph 18, and therefore leave the Plaintiffs to their proof.

19. Denied in the express terms alleged. As to the allegations in Paragraph 19, the Defendants admit only that Michael Lank approached the Plaintiffs and identified himself as a police officer. Defendants deny that portion in Paragraph 19 that

alleges that Michael Lank's "breath smelled strongly of alcohol." The Defendants lack sufficient knowledge and information upon which to form a belief as to the truth of the remaining allegations in Paragraph 19, and therefore leave the Plaintiffs to their proof.

20. As to the allegations in Paragraph 20, the Defendants admit only that Errol Lane and Glenn Nix arrived at the scene of the incident and that Plaintiff Alfredo Lopilato was handcuffed and placed in a police cruiser. The Defendants deny the remaining allegations in Paragraph 20.

21. The Defendants deny the allegations in Paragraph 21.

22. The Defendants deny the allegations in Paragraph 22.

23. The Defendants deny the allegations in Paragraph 23.

24. The Defendants deny the allegations in Paragraph 24.

25. The Defendants deny the allegations in Paragraph 25.

26. The Defendants deny the allegations in Paragraph 26.

27. The Defendants deny the allegations in Paragraph 27.

28. As to the allegations in Paragraph 28, the Defendants admit only that Michael Lank later drove away. The Defendants deny the remaining allegations in Paragraph 28.

29. The Defendants lack sufficient knowledge and information upon which to form a belief as to the truth of the allegations in Paragraph 29, and therefore leave the Plaintiffs to their proof.

30. The Defendants deny the allegations contained in Paragraph 30.

31. As to the allegations contained in Paragraph 31, the Defendants admit only that a Canton Police Sergeant spoke with Plaintiff Marc Lopilato at the Canton Police Station on or about September 3, 2002. The Defendants lack sufficient knowledge and information upon which to form a belief as to the truth of the remaining allegations in Paragraph 31, and therefore leave the Plaintiffs to their proof.

32. The Defendants lack sufficient knowledge and information upon which to form a belief as to the truth of the allegations in Paragraph 32, and therefore leave the Plaintiffs to their proof.

33. The Defendants deny the allegations in Paragraph 33.

34. Denied in the express terms alleged. As to the allegations contained in Paragraph 34, the Defendants admit only that the Plaintiffs went outside, that additional police cruisers arrived on the scene, and that Marc Lopilato was placed under arrest. The Defendants deny the remaining allegations contained in Paragraph 34.

35. As to the allegations in Paragraph 35, the Defendants admit only that Marc Lopilato was booked and held at the Canton Police Station. The Defendants deny the portion in Paragraph 35 that alleges that Marc Lopilato was released at 3:00 a.m. Defendants lack sufficient knowledge and information upon which to form a belief as to the truth of the remaining allegations in Paragraph 35, and therefore leave the Plaintiffs to their proof.

36. Defendants lack sufficient knowledge and information upon which to form a belief as to the truth of the remaining allegations in Paragraph 36, and therefore leave the Plaintiffs to their proof.

37. The Defendants lack sufficient knowledge and information upon which to form a belief as to the truth of the allegations in Paragraph 37, and therefore leave the Plaintiffs to their proof.

38. Defendants lack sufficient knowledge and information upon which to form a belief as to the truth of the remaining allegations in Paragraph 38, and therefore leave the Plaintiffs to their proof.

COUNT ONE:
VIOLATION OF 42 U.S.C. § 1983
BY DEFENDANTS LANK, NIX, AND LANE

39. The Defendants hereby incorporate and make their responses to Paragraphs 1-38 their response to Paragraph 39 as if fully set forth herein.

40. The Defendants deny the allegations contained in Paragraph 40.

WHEREFORE, the Defendants respectfully move the Court to dismiss the Plaintiffs' Complaint, to enter Judgment in favor of the Defendants, to afford the Plaintiffs no relief, and to award the Defendants their recoverable costs, expenses, and attorneys' fees.

COUNT TWO:
VIOLATION OF 42 U.S.C. § 1983
BY DEFENDANT BRIGHT

41. The Defendants hereby incorporate and make their responses to Paragraphs 1-40 their response to Paragraph 41 as if fully set forth herein.

42. The Defendants deny the allegations contained in Paragraph 42.

WHEREFORE, the Defendants respectfully move the Court to dismiss the Plaintiffs' Complaint, to enter Judgment in favor of the Defendants, to afford the

Plaintiffs no relief, and to award the Defendants their recoverable costs, expenses, and attorneys' fees.

COUNT THREE:
VIOLATION OF 42 U.S.C. § 1983
BY DEFENDANT TOWN OF CANTON

43. The Defendants hereby incorporate and make their responses to Paragraphs 1-42 their response to Paragraph 43 as if fully set forth herein.

44. The Defendants deny the allegations contained in Paragraph 44.

WHEREFORE, the Defendants respectfully move the Court to dismiss the Plaintiffs' Complaint, to enter Judgment in favor of the Defendants, to afford the Plaintiffs no relief, and to award the Defendants their recoverable costs, expenses, and attorneys' fees.

COUNT FOUR:
VIOLATION OF MASSACHUSETTS CIVIL RIGHTS ACT, M.G.L. c. 12, § 11I,
BY ALL INDIVIDUAL DEFENDANTS

45. The Defendants hereby incorporate and make their responses to Paragraphs 1-44 their response to Paragraphs 45 as if fully set forth herein.

46. The Defendants deny the allegations contained in Paragraph 46.

WHEREFORE, the Defendants respectfully move the Court to dismiss the Plaintiffs' Complaint, to enter Judgment in favor of the Defendants, to afford the Plaintiffs no relief, and to award the Defendants their recoverable costs, expenses, and attorneys' fees.

AFFIRMATIVE DEFENSES

FIRST DEFENSE

The Complaint does not state a claim against Michael Lank, Glen Nix, Errol Lane, Peter Bright, or the Town of Canton upon which relief can be granted.

SECOND DEFENSE

The Complaint does not state a claim upon which relief can be granted because Michael Lank, Glen Nix, Errol Lane, Peter Bright, and Town of Canton are not liable to Plaintiffs for any amount of damages alleged.

THIRD DEFENSE

Defendants Michael Lank, Glenn Nix, Errol Lane, and Peter Bright are entitled to qualified immunity.

FOURTH DEFENSE

Defendants Michael Lank, Glenn Nix, and Errol Lane were privileged in their use of force, and, therefore, the Plaintiffs are barred from recovering damages.

FIFTH DEFENSE

The Defendants state that they were justified in their conduct and acts and, therefore, are not liable to the Plaintiffs as alleged in the Complaint.

SIXTH DEFENSE

Defendants Michael Lank, Glenn Nix, and Errol Lane state that they defended themselves and/or others with reasonable and necessary force, and, therefore, the Plaintiffs are barred from recovering damages.

SEVENTH DEFENSE

The Defendants' conduct was consistent with and protected by law and/or legal process, and, therefore, the Plaintiffs are barred from recovering damages.

EIGHTH DEFENSE

At the time of the incidents alleged, the Plaintiffs were acting in violation of applicable law, and, therefore, their claims are barred.

NINTH DEFENSE

The Plaintiffs are estopped from recovering damages by their own wrongful conduct, which was a substantial factor in causing their alleged incident and injuries.

TENTH DEFENSE

The Plaintiffs failed to reasonably mitigate their alleged damages.

ELEVENTH DEFENSE

The Plaintiffs failed to file their complaint within the time allowed by the statute of limitations.

JURY DEMAND

The Defendants hereby demand a trial by jury on all triable issues.

The defendants, OFFICERS MICHAEL LANK, GLEN NIX, and ERROL LANE, POLICE CHIEF PETER BRIGHT, and THE TOWN OF CANTON,
By their attorneys,

/s/ Douglas I. Louison
Douglas I. Louison BBO# 545191
Stephen C. Pfaff BBO# 553057
Valerie A. McCormack BBO# 661460
Merrick, Louison & Costello, L.L.P.
67 Batterymarch Street
Boston, MA 02110
(617) 439-0305

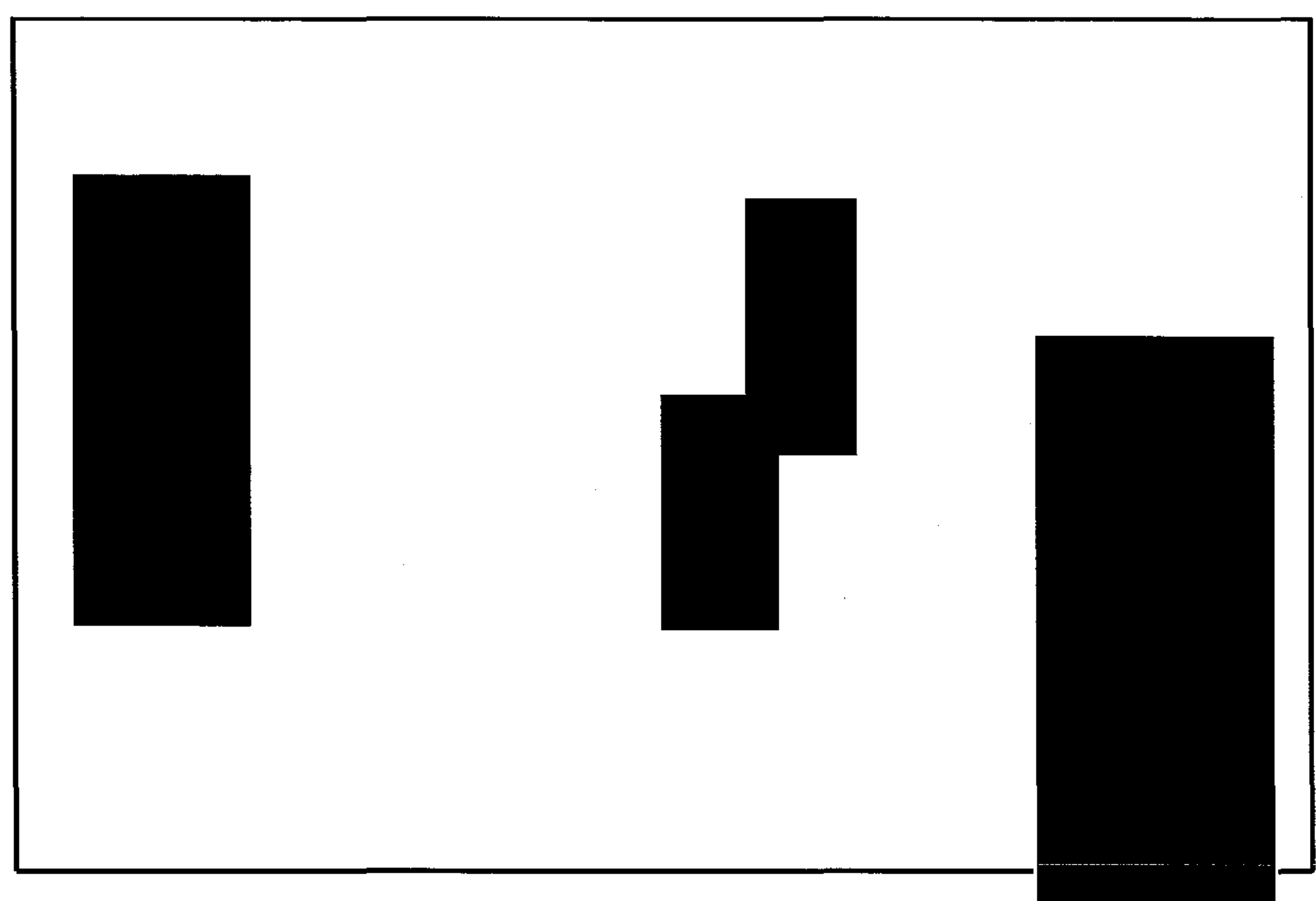
CERTIFICATE OF SERVICE

I hereby certify that, on this 16th day of August 2007, I caused the foregoing **Defendants' Answer to the Amended Complaint** to be served via electronic filing to the attorneys of record:

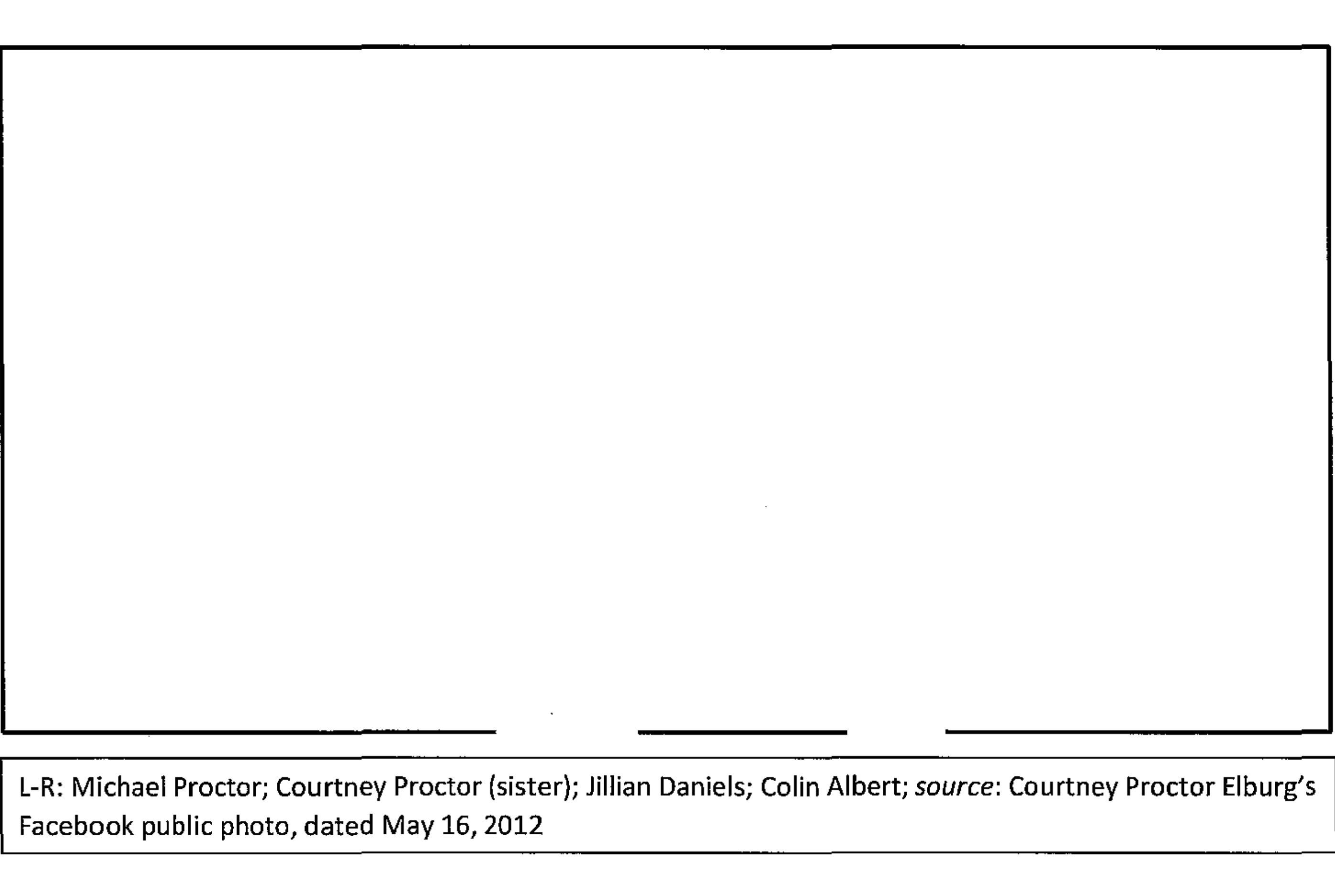
Stephen B. Hrones
Jessica D. Hedges
Michael L. Tumposky
Hrones, Garrity & Hedges, L.L.P.
Lewis Wharf – Bay 232
Boston, MA 02110-3927

/s/ Douglas I. Louison
Douglas I. Louison

EXHIBIT F



L-R: David Proctor (Michael Proctor's father); Karen Proctor (mother); Colin Albert; Courtney Proctor (sister); Chris Albert; *source*: Courtney Proctor Elburg's Facebook public photo, dated Jul. 15, 2016



L-R: Michael Proctor; Courtney Proctor (sister); Jillian Daniels; Colin Albert; *source*: Courtney Proctor Elburg's Facebook public photo, dated May 16, 2012

L-R: Jillian Daniels; Michael Proctor; Colin Albert (far left); Courtney Proctor; *source*: Courtney Proctor Elburg's wedding video, Visions Forever, dated Apr. 21, 2012

At table: Colin Albert; Chris Albert; Julie Albert; Michael Proctor (in black vest); *source*: Courtney Proctor Elburg's wedding video, Visions Forever, dated Apr. 21, 2012

L-R: Colin Albert; Chris Albert; Jillian Daniels; Julie Albert; *source*: Chris Albert's Facebook public photo, dated Oct. 12, 2019

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

SUPERIOR COURT DEPARTMENT
NO. 2282-CR-00117

COMMONWEALTH OF MASSACHUSETTS,	)
Plaintiff	)
V.	)
KAREN READ, Defendant	)

SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS INDICTMENTS

Defendant Karen Read ("Ms. Read") hereby files the instant Supplemental Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss Indictments pursuant to Commonwealth v. O'Dell, 392 Mass. 445 (1984). On February 28, 2024, the Court granted the Commonwealth's Motion to Impound the Confidential Federal Documents, and the entirety of the Confidential Federal Documents were lodged with the Court.[1] "the integrity of the [state] grand jury proceeding was impaired by an unfair and

[1] The Confidential Federal Documents, which were filed under order of impoundment with the Court are incorporated herein by reference.

misleading presentation to the grand jury," requiring dismissal of the indictments in this case. See id. at 447.

I.
SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES

The grand jury serves a vital purpose in our system of criminal justice by standing between the government and the individual as to any charge that is punishable by imprisonment in state prison. There are two circumstances where judicial inquiry into the quality of evidence heard by the grand jury is warranted: "(1) when it is unclear that sufficient evidence was presented to the grand jury to support a finding of probable cause; and (2) when the defendant contends that the integrity of the grand jury proceedings . . . has been impaired." Commonwealth v. Freeman, 407 Mass. 297, 282 (1990) (citing Commonwealth v. Mayfield, 398 Mass. 615, 619-620 (1986)).

A. THE COMMONWEALTH AND ITS AGENTS IMPAIRED THE INTEGRITY OF THE GRAND JURY PROCEEDINGS BY PRESENTING FALSE AND DECEPTIVE EVIDENCE AND WITHHOLDING KNOWN EXCULPATORY INFORMATION

As set forth in Defendant's Motion to Dismiss the Indictments and herein, throughout the Commonwealth's presentation of evidence to the grand jury, the Commonwealth repeatedly elicited false and deceptive evidence and withheld exculpatory information, which was known to the Commonwealth or its agents at the time of the grand jury proceedings, and distorted the facts presented to the grand jury for the purpose of obtaining an indictment. As long held by the Supreme Judicial Court in Commonwealth v. O'Dell, 392 Mass. 445 (1984) (hereafter "O'Dell"), when the integrity of the grand jury proceedings is "impaired by an unfair and misleading presentation" by the Commonwealth, the indictment must not be allowed to stand. Id. at 446-47. Indeed, an indictment must be dismissed based on impairment of the grand jury when

the following three elements are met: (1) the Commonwealth or one of its agents "knowingly or recklessly presented false or deceptive evidence to the grand jury; (2) the evidence was presented for the purpose of obtaining an indictment; and (3) the evidence probably influenced the grand jury's decision to indict." Commonwealth v. Carr, 464 Mass. 855 (2014), abrogated on other grounds by Commonwealth v. Crayton, 470 Mass. 228 (2014). In keeping with that precept, courts have similarly found that law enforcement "may not withhold known exculpatory information which could undermine the credibility of an important witness in the eyes of a grand jury and, consequently, affect their decision to indict." Commonwealth v. Petras, 26 Mass. App. Ct. 483, 487 (1988); see Commonwealth v. Mayfield, 398 Mass. 615 (1986), citing Commonwealth v. Connor, 392 Mass. 838, 854 (1984). Further, pursuant to O'Dell, **"[I]f the Commonwealth or one of its agents knowingly uses false testimony to procure an indictment, the indictment should be dismissed, and a prosecutor who learns of the use of knowingly false, material evidence has a duty to come forward**." Commonwealth v. Mayfield, 3988 Mass. 615, 620 (1986) (emphasis added), citing Commonwealth v. Salman, 387 Mass. 160, 166-167 (1982).

1. TROOPER PROCTOR AND SERGEANT BUKHENIK'S NUMEROUS FALSE AND DECEPTIVE STATEMENTS TO THE GRAND JURY WERE MADE FOR THE PURPOSE OF SECURING AN INDICTMENT AND IMPAIRED THE INTEGRITY OF THE GRAND JURY

As set forth in Defendant's Motion to Dismiss the Indictment, Trooper Proctor knowingly presented false and deceptive evidence to the grand jury for the purpose of obtaining an indictment against Ms. Read. In the Motion to Dismiss, Ms. Read submitted significant evidence in support of her claim that Trooper Proctor intentionally withheld the fact that he has a longstanding personal relationship with numerous witnesses in this case for the purpose of making his "investigation" into O'Keefe's death appear unbiased. As the lead investigator

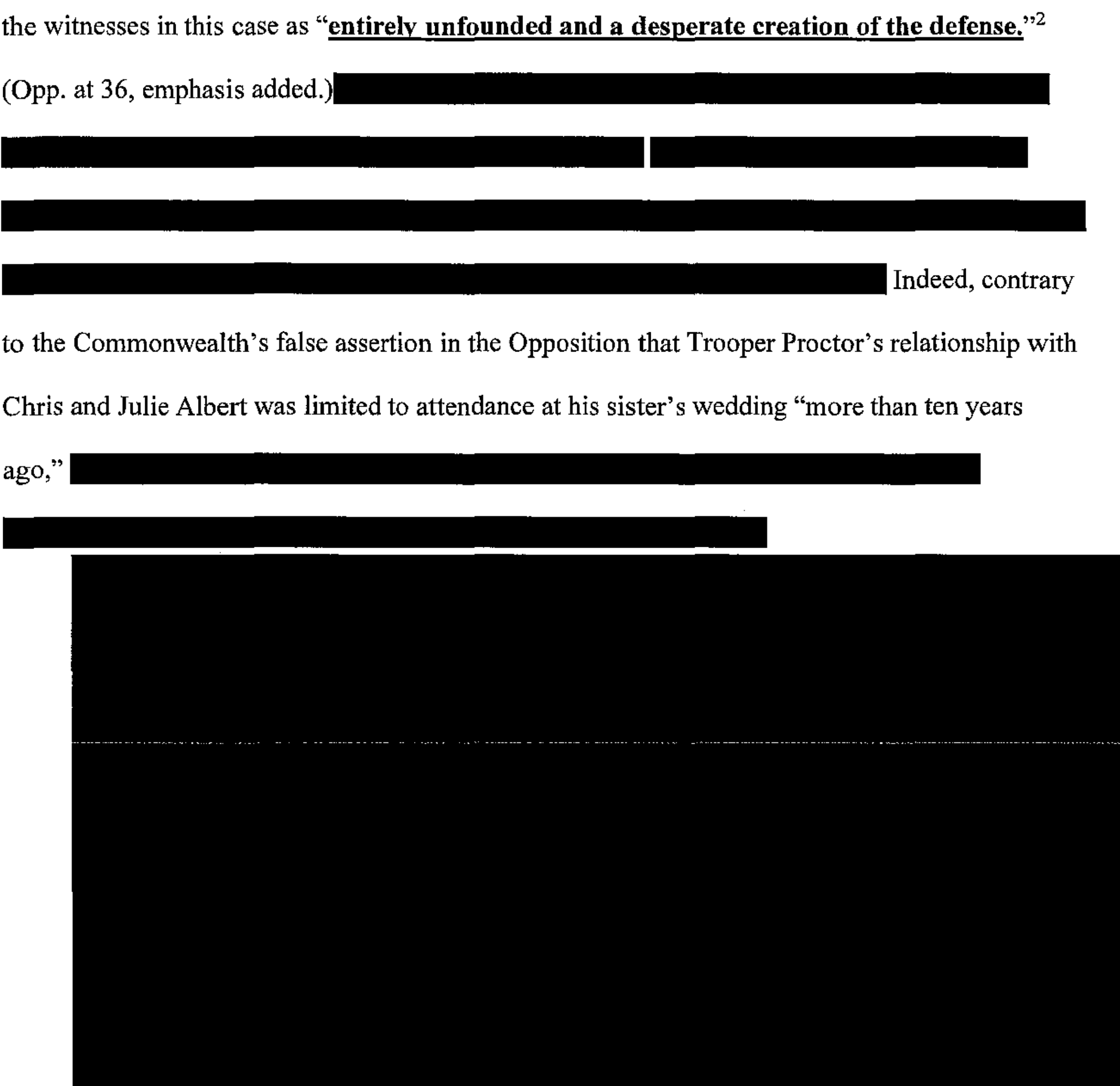
assigned to this case, Trooper Proctor testified extensively regarding his interviews with witnesses, the seizure of evidence, and his observations relating to the case. (See April 21, 2022, GJ Minutes at 98-152; May 25, 2022, GJ Minutes at 3-34; May 31, 2022, GJ Minutes at 3-54; June 7, 2022, GJ Minutes at 35-116.) Trooper Proctor intentionally mispresented himself to the grand jury as an unbiased investigator who had no personal relationship with any of the witnesses in this case.

a.

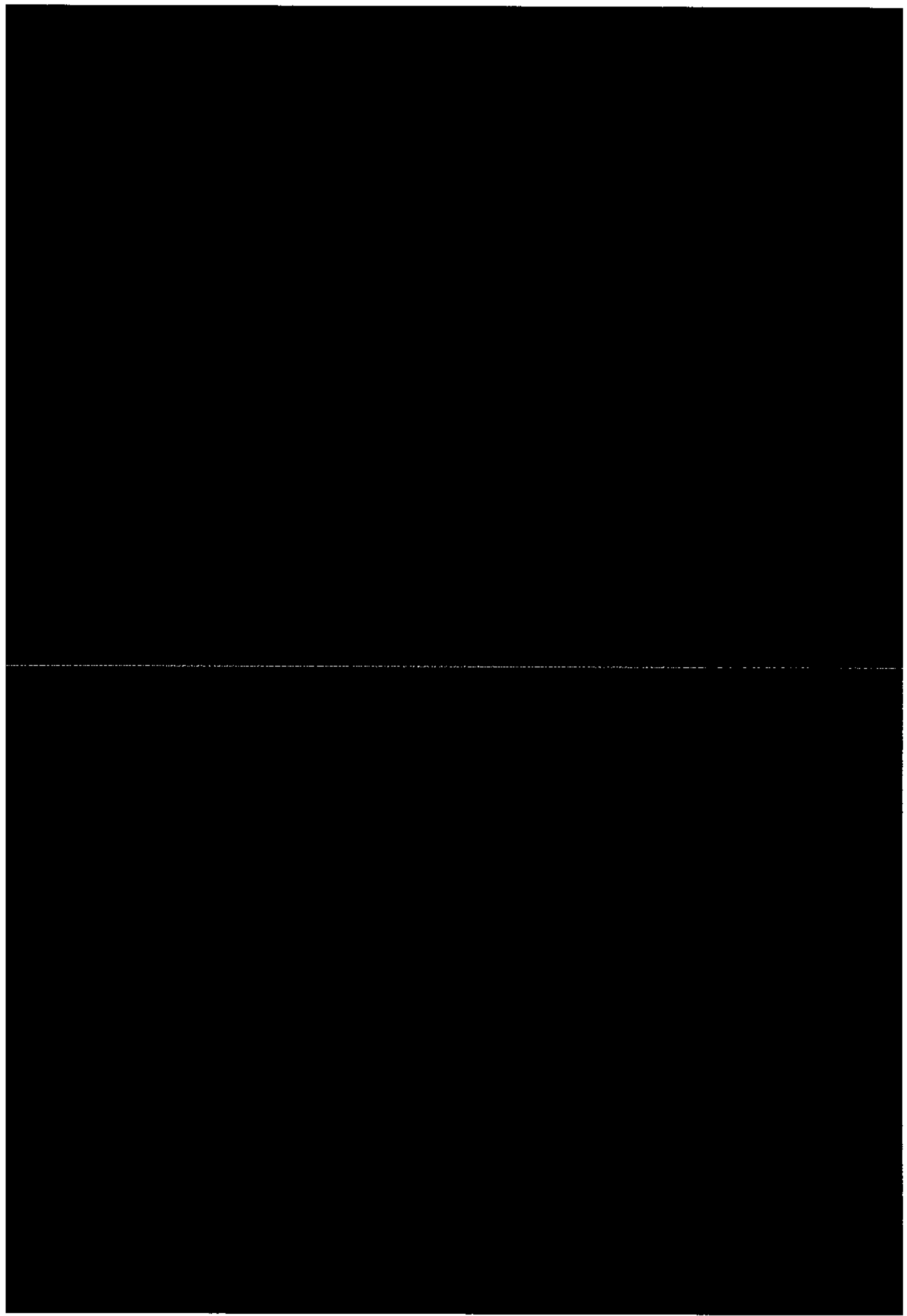
First, as set forth in Defendant's Motion to Dismiss the Indictments, Trooper Proctor intentionally and deceptively withheld significant information establishing his longstanding relationships with the Alberts in his testimony before the grand jury.

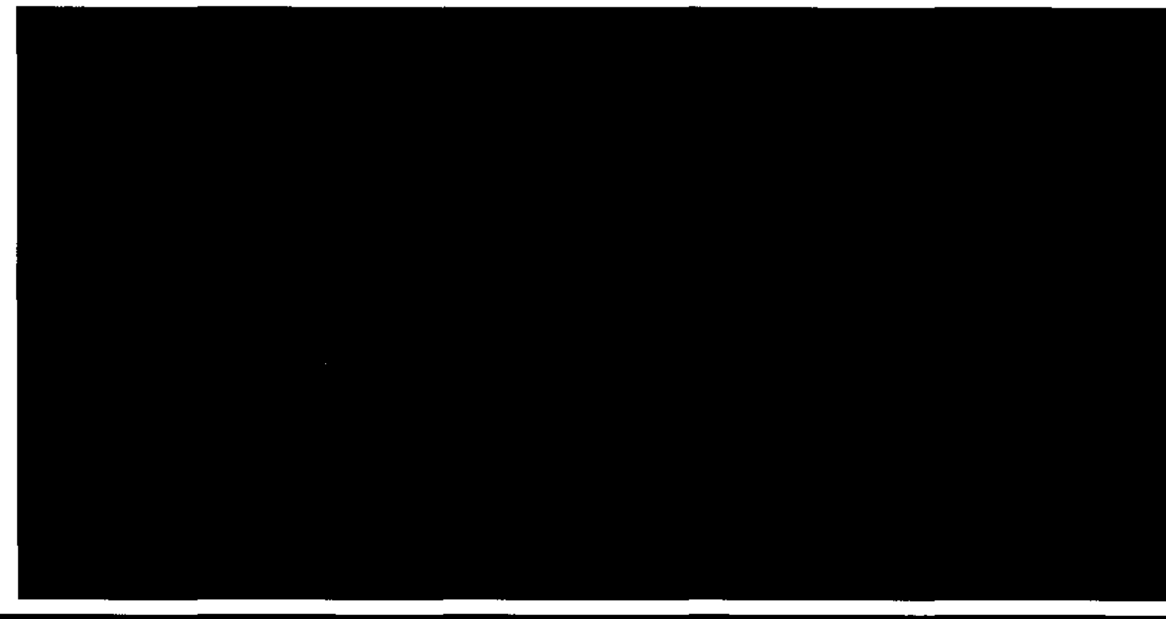
In the Commonwealth's Opposition, Assistant District Attorney McLaughlin characterizes Trooper Proctor's "supposed close and personal relationships" with

the witnesses in this case as "**entirely unfounded and a desperate creation of the defense.**"[2] (Opp. at 36, emphasis added.) Indeed, contrary to the Commonwealth's false assertion in the Opposition that Trooper Proctor's relationship with Chris and Julie Albert was limited to attendance at his sister's wedding "more than ten years ago,"



[2] In the Commonwealth's Opposition, ADA McLaughlin intentionally minimizes and misrepresents the nature of Trooper Proctor's relationship with Chris Albert and Julie Albert, both of whom are witnesses in this case, by stating that the "scant evidence" of Trooper Proctor's relationship with Chris and Julie Albert is limited to photographs from Trooper Proctor's sister's wedding from more than ten years ago. (Opp. at 36.) To be clear, the defense submitted numerous photographs spanning many years, which establish Trooper Proctor's longstanding familial relationship with the Alberts. In one of those photographs, Trooper Proctor is depicted sitting at the same table as Chris and Julie Albert—*at his sister's wedding.* The Commonwealth's deliberate ignorance regarding the nature of Trooper Proctor's relationship with Julie Albert and Chris Albert defies logic.





the Commonwealth has repeatedly and intentionally misrepresented the nature of Trooper Proctor's relationship with the witnesses in this case to the Court and the general public by going so far as issuing a press release categorically denying that Trooper Proctor had a compromising relationship with witnesses in this case.

Commonwealth and its agents intentionally misled the jury by allowing Trooper Bukhenik to falsely insinuate to the grand jury that he and Trooper Proctor had never met Chris and Julie Albert before interviewing them on February 10, 2022, by testifying: "**<u>Following formal introductions</u>**, Julie Albert … provided her cell-phone number … [and] Chris Albert stated his

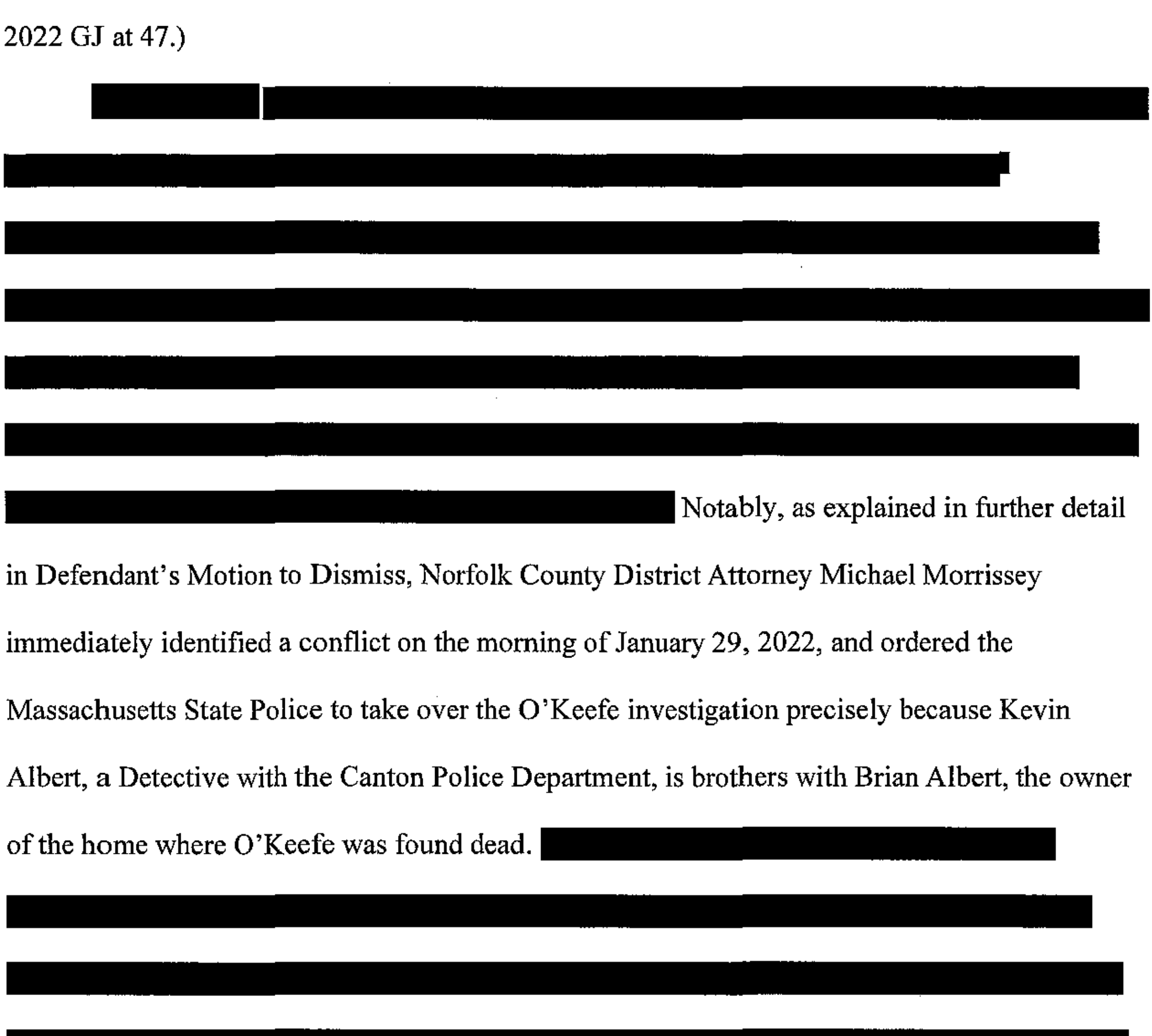
cell phone number." (May 18, 2022, GJ Minutes at 30, 33.)

Regardless, Trooper Bukhenik falsely suggested to the grand jury that he and Trooper Proctor *formally introduced* themselves to Chris and Julie Albert—in spite of the fact that Trooper Proctor has known Chris and Julie Albert for more than a decade

This information was intentionally withheld from the state grand jury. Instead, Trooper Bukhenik was permitted to testify at length before the grand jury regarding his interview with Brian Higgins on February 3, 2022, which included the fact that Higgins took it upon himself to selectively print out text message between himself, Karen Read, and John O'Keefe,

May 18, 2022 GJ at 44-48.) Rather than elicit testimony that would have established the *reason* Sergeant Bukhenik took the unprecedented step of failing to properly secure a critical piece of evidence Sergeant Bukhenik was impermissibly allowed to vouch for Brian Higgins' credibility and state: "Brian understood

the magnitude of his actions and assured me that all the data is complete and accurate." (May 18, 2022 GJ at 47.)



Notably, as explained in further detail in Defendant's Motion to Dismiss, Norfolk County District Attorney Michael Morrissey immediately identified a conflict on the morning of January 29, 2022, and ordered the Massachusetts State Police to take over the O'Keefe investigation precisely because Kevin Albert, a Detective with the Canton Police Department, is brothers with Brian Albert, the owner of the home where O'Keefe was found dead.

[3] As set forth in Defendant's Motion to Dismiss, Brian Albert is the homeowner of 34 Fairview Road. On January 29, 2022, the decedent was found unresponsive on Brian Albert's front lawn. At the grand jury, Detective Sergeant Lank testified that he notified a separate investigative agency, the Massachusetts State Police CPAC Unit to respond to the crime scene to investigate the case, and that Trooper Proctor returned his call. (April 14, 2022, GJ Minutes at 66-67.)

Because of Trooper Proctor's personal bias and longstanding relationship with the Alberts, Trooper Proctor consistently testified before the grand jury in a manner that distorted the facts to the grand jury in what can only be described as a concerted effort to shield his longtime friends from criminal liability and ensure the grand jury indicted Ms. Read. For example, at the grand jury, Trooper Proctor testified extensively regarding Ring video surveillance obtained in connection with this case, and falsely suggested that Ms. Read may have deleted video footage showing her arrival home in the early morning hours of January 29, 2022. (June 7, 2022, GJ Minutes at 39-54.) If Trooper Proctor had testified truthfully regarding his compromising relationships with nearly all of the Commonwealth's witnesses in this case, the grand jury would have reached the more reasonable conclusion regarding the missing Ring video footage—namely, that Trooper Proctor, the compromised law enforcement officer who admittedly had access to O'Keefe's Ring account deleted the footage because it would have showed Ms. Read's taillight intact.

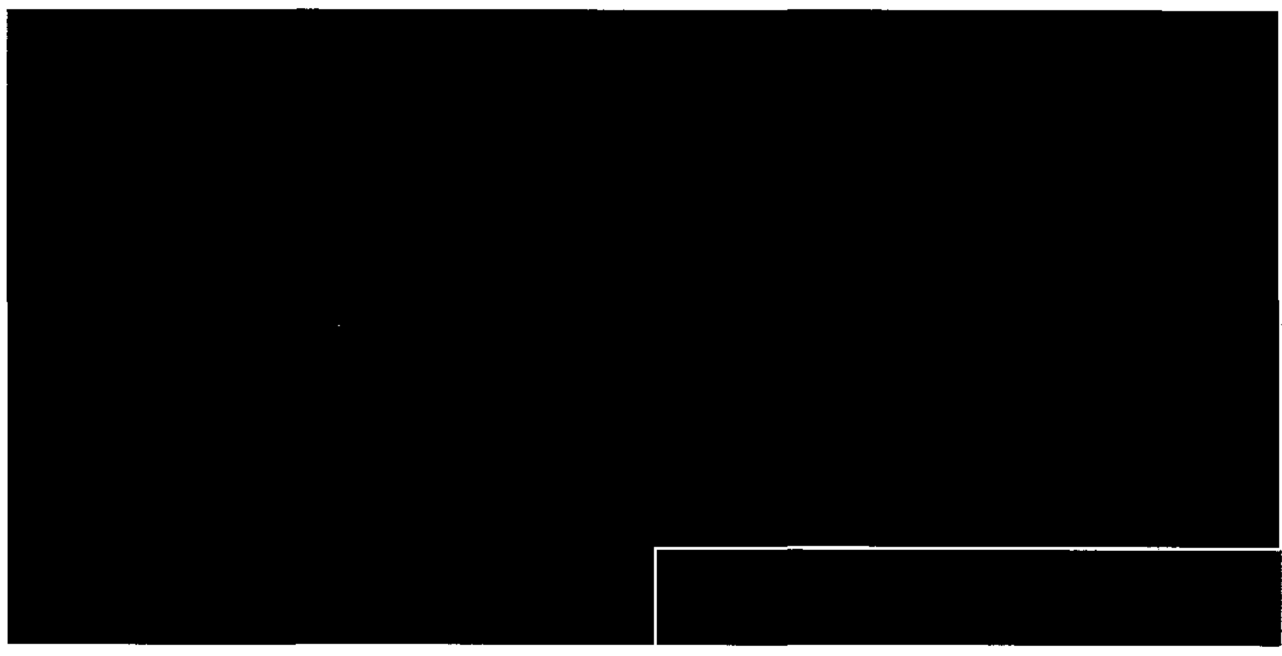
b.

Additionally, as explained more fully in the Motion to Dismiss, Assistant District Attorney Lally elicited misleading testimony from Trooper Proctor regarding the *manner* of O'Keefe's death. At the Commonwealth's direction, Trooper Proctor was instructed to read the cause of death determination from O'Keefe's death certificate into the record, namely "blunt impact injuries of head and hypothermia," suggesting that the cause of death was generally consistent with the Commonwealth's theory of the case. (June 7, 2022, GJ Minutes at 36.) Intentionally withheld from the grand jury, however, is the fact that O'Keefe's death certificate

also states that the *manner* of death "**COULD NOT BE DETERMINED.**" (See GJ Exhibit 41.) Here, like in O'Dell, the reason the Commonwealth wanted Trooper Proctor to read only a *portion* of the death certificate into the record, is because the medical examiner's inability to determine the *manner of death* is clearly exculpatory and would have undermined the Commonwealth's ability to secure an indictment in this case.

In the Commonwealth's Opposition, ADA McLaughlin cites Commonwealth v. Ellis, 373 Mass. 1, 8 (1977) for the proposition that the word "homicide" should be excluded from a death certificate in a criminal trial because such a finding would prejudice a defendant in a case where the defense to the murder is that the killing was accidental.[4] (Opp. at 38-39, citing Commonwealth v. Ellis, 373 Mass. 1, 8 (1977) ["The better and safer course is to exclude from a death certificate the words "homicide", "suicide", or "accident" in a criminal trial."].) Notably missing from the list of words on a death certificate that need to be excluded from a criminal trial is a finding that the manner of death "could not be determined." See id. That is what happened here. As explained in the Motion to Dismiss, the Medical Examiner found that the manner of death *could not be determined* (i.e. that there was insufficient information to assign a manner of death or to distinguish between two or more possible manners of death). This finding was exculpatory, and yet was intentionally withheld from the grand jury.

[4] Ironically, in spite of correctly noting that it would be completely improper for the Commonwealth to elicit testimony conclusively suggesting that the instant offense was a "homicide" in front of the grand jury, the Commonwealth repeatedly elicited Trooper Proctor's improper expert opinion testimony that O'Keefe was the victim of a motor vehicle homicide in spite of the fact that this opinion was actually contradicted by the Medical Examiner. (June 7, 2022, GJ Minutes at 74-78.) Indeed, the Commonwealth intentionally elicited this improper testimony from Trooper Proctor in order to fix a fatal flaw in the prosecution's case: i.e. that the *manner* of death could not be determined.



to deem O'Keefe's death a homicide, the Commonwealth and Trooper Proctor intentionally misled the grand jury by eliciting inadmissible and improper expert testimony from Trooper Proctor and allowing him to *repeatedly* testify to Trooper Guarino's baseless "determination" that O'Keefe's death was a vehicular homicide. (See June 7, 2022, GJ Minutes at 74-78.)

2. THE COMMONWEALTH AND ITS AGENTS INTENTIONALLY AND RECKLESSLY DECEIVED THE GRAND JURY BY WITHHOLDING EVIDENCE THAT JENNIFER MCCABE GOOGLED "HO[W] LONG TO DIE IN COLD" AT OR BEFORE 2:27 A.M. ON JANUARY 29, 2022

At the grand jury, the Commonwealth intentionally and recklessly deceived the grand jury by presenting an incomplete extraction of Jennifer McCabe's cell phone as an exhibit before the grand jury. (See Opp. at 37.) Noticeably missing from the Commonwealth's Cellebrite "Full File System Extraction" of Jennifer McCabe's iPhone 11, was the fact that **Jennifer McCabe googled "hos long to die in cold" at or before 2:27 a.m. on January 29, 2022**—three hours before O'Keefe's hypothermic and unresponsive body was found on her brother-in-law, Brian Albert's front lawn. (GJ Exhibit 49.)

The Commonwealth presented significant self-serving testimony by Ms. McCabe, inculpating Ms. Read. Yet, the Commonwealth intentionally withheld evidence that *two hours after* O'Keefe arrived at her brother-in-law's residence, *three hours* before she inserted herself into Ms. Read's search for O'Keefe, and *three hours* before her "discovery" of his lifeless body in the cold snow of her brother-in-law's front lawn, Ms. McCabe googled *how long does it take to die in the cold.* The Commonwealth's failure to present this exceptionally exculpatory evidence—which clearly suggests third party culpability—to the grand jury was intentionally deceptive and impaired the grand jury necessitating dismissal of the indictments in this case.

3. THE COMMONWEALTH INTENTIONALLY WITHHELD BETWEEN JENNIFER MCCABE AND KERRY ROBERTS

The Commonwealth also intentionally failed to elicit testimony from Jennifer McCabe and Kerry Roberts,

[5]

Thus, the grand jury was improperly misled to believe that Kerry Roberts and Jennifer McCabe both independently testified that (1) only Ms. Read was able to see O'Keefe's body on Brian Albert's front lawn when they drove past the house on the morning of January 29, 2022; (2) that Ms. Read told them that she didn't remember anything from the night before; and (3) that they observed that Ms. Read's taillight was missing pieces. (April 26, 2022 GJ at 55-56, 61-62, 77.)

The Commonwealth's intentional exclusion of this material evidence, which undermines the credibility of a key prosecution witness impaired the integrity of the grand jury proceedings and requires dismissal of the indictments. See Commonwealth v. Mayfield, 398 Mass. 615, 620-21 (1986).

II.
CONCLUSION

In addition to the grounds set forth in Defendant's Motion to Dismiss, the cumulative effect of—Trooper Proctor and Sergeant Bukhenik's false and deceptive testimony, the Commonwealth's intentional omission of evidence establishing third party culpability, and the intentional omission of evidence which would have undermined the credibility of key witnesses in this case—could not help but influence the grand jurors, improperly, to indict. This

impairment of the integrity of the grand jury was pervasive and serious and requires the dismissal of the indictments in this case.

Respectfully Submitted,
For the Defendant,
Karen Read
By her attorney,

Alan J. Jackson, Esq., *Pro Hac Vice*
Elizabeth S. Little, Esq., *Pro Hac Vice*
Werksman Jackson & Quinn LLP
888 West Sixth Street, Fourth Floor
Los Angeles, CA 90017
T. (213) 688-0460
F. (213) 624-1942

David Yannetti

David R. Yannetti, Esq.
44 School St.
Suite 1000A
Boston, MA 02108
(617) 338-6006
BBO #555713
law@davidyannetti.com

March 6, 2024

CERTIFICATE OF SERVICE

I, Attorney Elizabeth Little, hereby certify that I served the "Supplemental Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss Indictments" upon the Commonwealth by emailing a copy on March 6, 2024, to Norfolk County Assistant District Attorney Adam Lally at adam.lally@mass.gov.

3/6/24
Date

Elizabeth S. Little

NORFOLK SUPERIOR COURT
DOCKET NO. 2282CR0117

COMMONWEALTH

v.

KAREN READ

COMMONWEALTH'S SUPPLEMENTAL OPPOSITION TO DEFENDANT'S MOTION TO DISMISS INDICTMENTS AND DEFENDANT'S MOTION FOR SANCTIONS AND DISQUALIFICATION OF THE NORFOLK DISTRICT ATTORNEY'S OFFICE

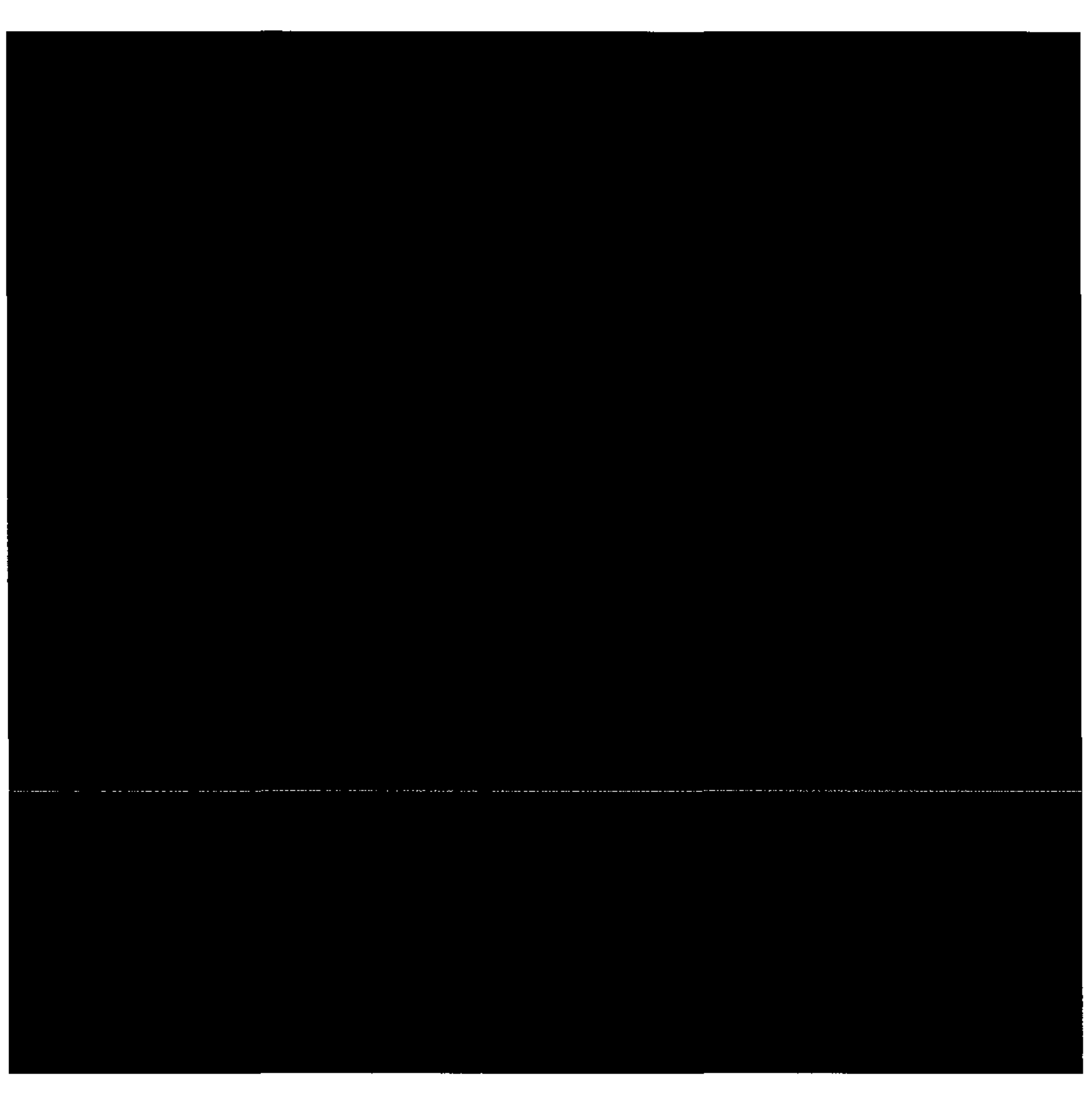
Now Comes the Commonwealth in the above-captioned matter and supplements,

[REDACTED]

[REDACTED] the following memorandum in opposition to the "defendant's motion to dismiss indictments" based on claims that the presentation of evidence to the grand jury was unfair and misleading in violation of Commonwealth v. O'Dell, 392 Mass. 445 (1984) and the "defendant's motion for sanctions and for disqualification of the Norfolk County District Attorney." [REDACTED] do not alter the legal analysis put forth in the Commonwealth's February 15, 2024 and February 21, 2024 oppositions and for those arguments incorporated hereinto both motions should be denied.

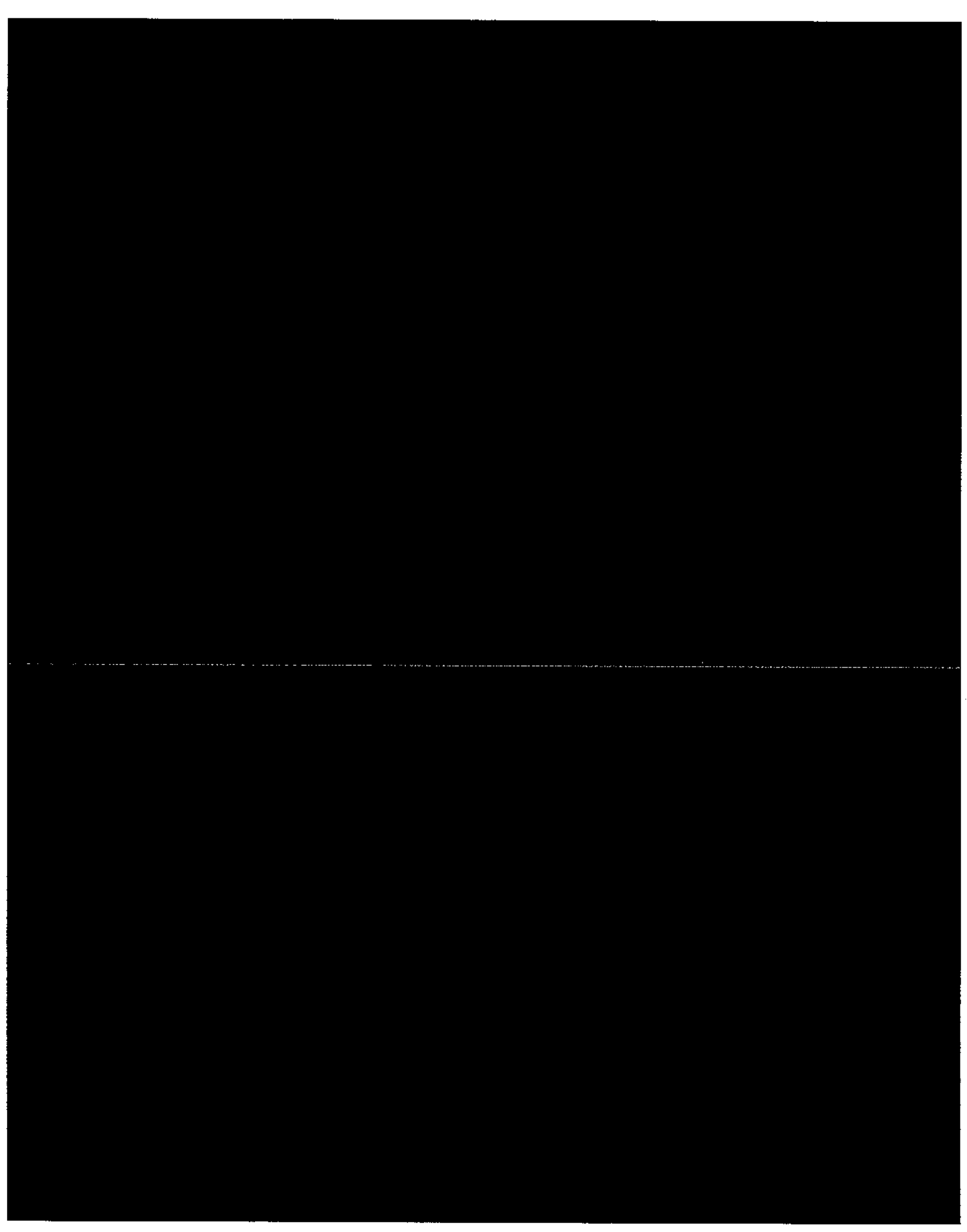
[REDACTED]

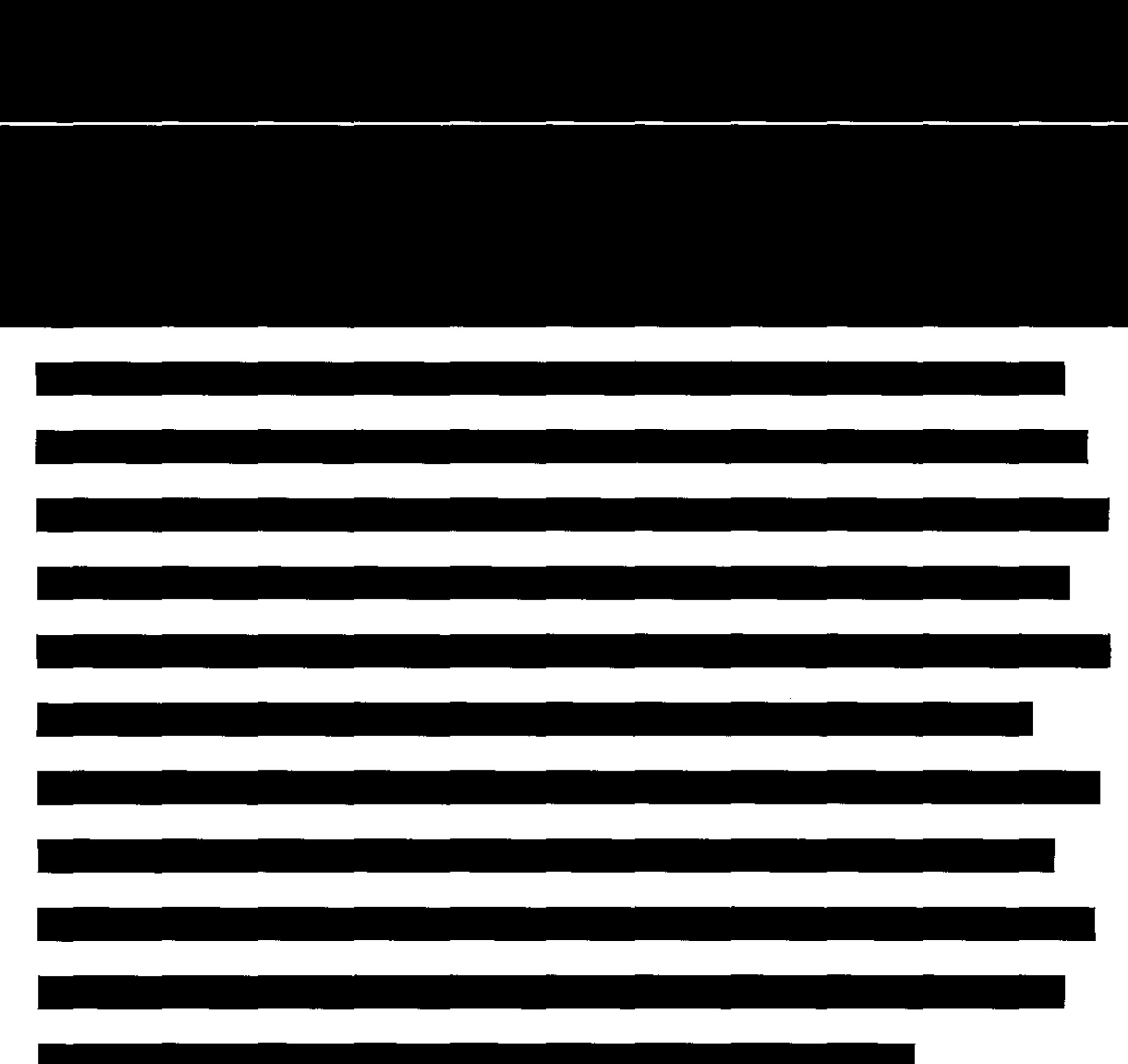
Notably, the Commonwealth had repeatedly requested the U.S. Attorney's Office produce any and all exculpatory evidence relative to this case since May 2023. On February 26, 2024, this Honorable Court granted the defendant and Commonwealth additional time to supplement their motions, in light of the federal materials.



A. **Commonwealth's Supplemental Opposition to Defendant's Motion to Dismiss**

A court may dismiss indictments when the integrity of the grand jury proceeding was impaired by an unfair and misleading presentation. O'Dell, 392 Mass. at 447. It is the defendant's burden to show impairment of the grand jury proceeding, and that burden is a heavy one. Commonwealth v. LaVelle, 414 Mass. 146, 150 (1993). In reviewing the evidence presented to the grand jury, this court views it in the light most favorable to the Commonwealth. Commonwealth v. Catalina, 407 Mass. 779, 781 (1990).



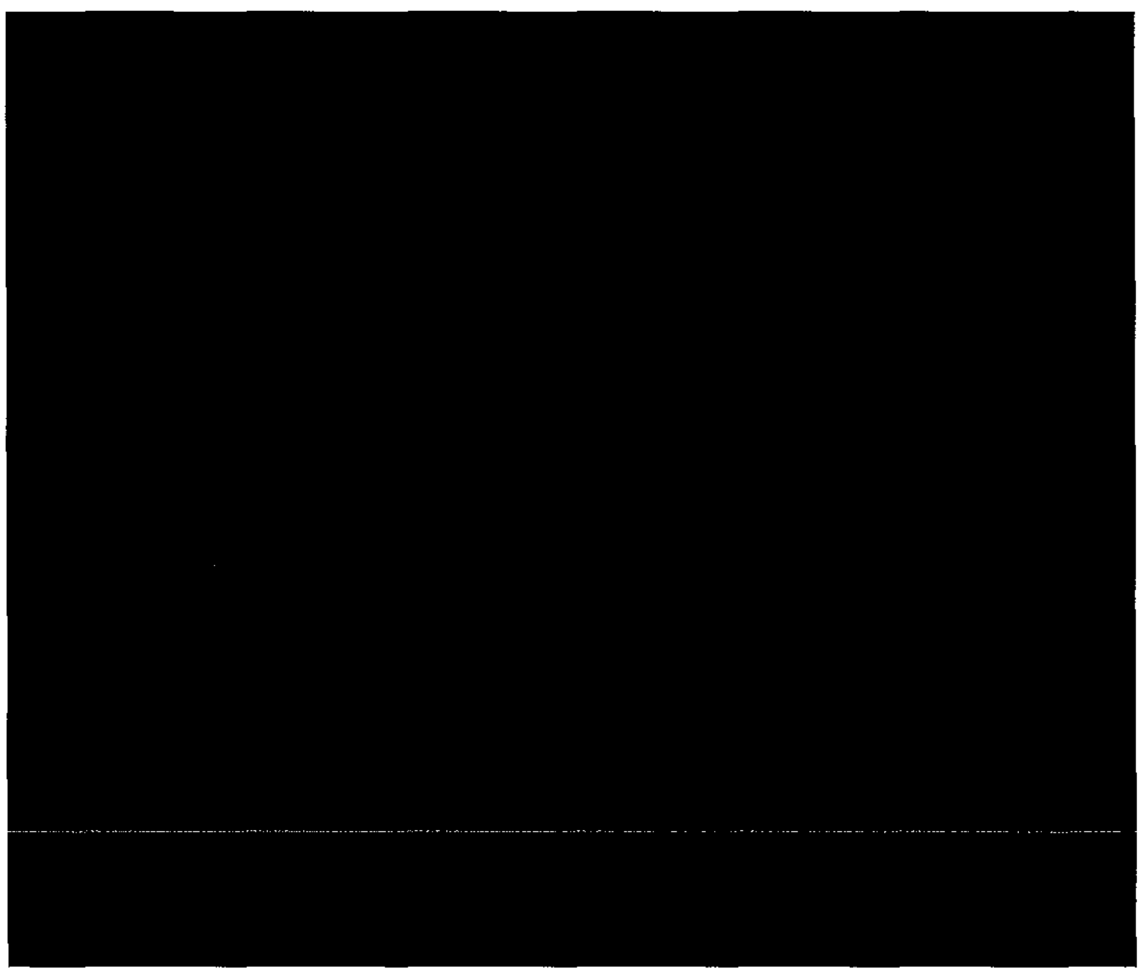


The Commonwealth recognizes its broad constitutional duty to investigate and inquire into information that may be exculpatory and will continue to fulfill its prosecutorial obligations to seek and produce all exculpatory material. See In Matter of a Grand Jury Investigation, 485 Mass. 641, 649 (2020) (prosecutors have an affirmative obligation to "disclose exculpatory information but also the broad obligation under our rules to disclose any facts that would tend to exculpate the defendant or tend to diminish his or her culpability"); Graham v. Dist. Attorney for Hampden Dist., 493 Mass. 348, 369

(2024) (duty of inquiry and duty to disclose all exculpatory evidence held by members of prosecution team).

Notably, most of these witnesses are lifelong residents of the relatively small community of Canton, MA.

In the light most favorable to the Commonwealth, the grand jury was not impaired or mislead nor would knowledge about Trooper Proctor's sister's relationship with Julie and Chris Albert, individuals not present at 34 Fairview Road, have altered the grand jury's decision to indict based on the totality of evidence presented. See generally Commonwealth v. Biasiucci, 60 Mass. App. Ct. 734, 748 (2004) (withheld evidence would not have altered grand jury's decision to indict).



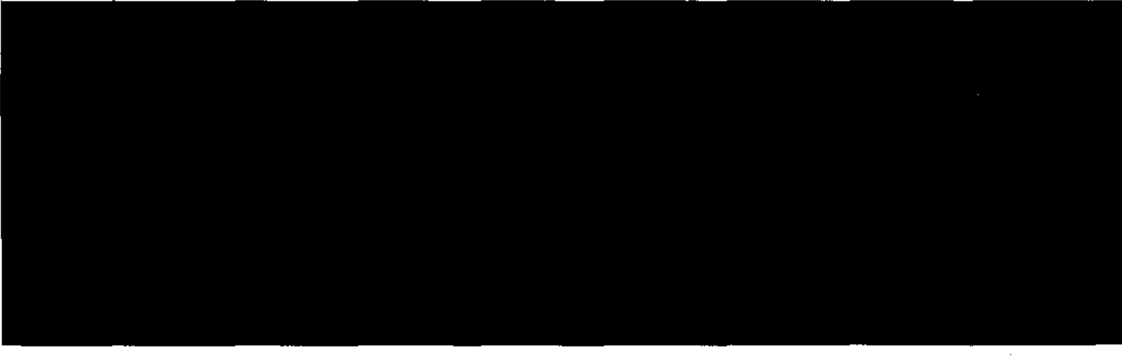
Further, the Commonwealth did not withhold exculpatory evidence pertaining to Jennifer McCabe's google searches from the grand jury. The purported "incriminating" google search did not appear in the initial download given the version of Cellebrite software that existed at that time.

The defendant's contrary opinion is a disputed matter of fact that will be resolved by the trial jury. See Commonwealth v. Kendall, 9 Mass. App. Ct. 152, 159 (1980) (when differing expert opinions, weight of evidence and credibility of witnesses is for jury to decide).

Any claims by the defendant to the contrary or suggestion that one witness influenced another is an issue resolved at trial, should the defendant attempt to impeach a witness' testimony.

B. Commonwealth's Supplemental Opposition to Defendant's Motion to Disqualify and Sanction the Norfolk District Attorney's Office

The Commonwealth also offers the following supplement to their February 14, 2024, opposition and the defendant's claim that she was prejudiced by the purported delay in disclosing the Commonwealth's efforts to obtain the federal materials.



"Dismissal of criminal charges with prejudice is the most severe sanction that the court can impose in a criminal case to remedy misconduct on the part of the Commonwealth." Commonwealth v. Mason, 453 Mass. 873, 877 (2009). Courts have never dismissed criminal charges in the absence of the defendant showing a substantial threat of prejudice. Id. at 878 (police engaged in intentional, deliberate, and egregious misconduct that violated defendant's constitutional rights, however dismissal not warranted where there was no prejudice, no risk to fair trial, and available alternative remedies); Commonwealth v. King, 400 Mass. 283, 292 (1987) ("It may be that, in the absence of prejudice or substantial threat of prejudice, an indictment should never be dismissed.") "Absent egregious misconduct or at least a serious threat of prejudice, the remedy of dismissal infringes too severely on the public interest in bringing guilty persons to justice." Id. quoting from Commonwealth v. Cinelli, 389 Mass. 197, 210 (1983); Commonwealth v. Cronk, 396 Mass. 194 (1985) (dismissal is a remedy of last resort because it precludes a public trial).

Furthermore, "[p]recluding trial of the accused based on some unauthorized or unconstitutional conduct on the part of wayward prosecutors, police, or other officers within the law enforcement or judicial system deprives the public of its ability to protect itself by punishing an offender. Other less drastic sanctions ordinarily are available." Commonwealth v. Viverito, 422 Mass. 228, 230 (1996) (police and bail commissioner's intentional or deliberate indifference to hold defendant in custody without a bail hearing did not warrant dismissal). The degree of prejudice to warrant dismissal focuses on the defendant's right to a fair trial and any threat of interference with those procedural rights. Mason, 453 Mass. at 878. Judicial responses should be limited to "truly remedial, and not punitive, measures." Id., quoting Commonwealth v. Hine, 393 Mass. 564, 573 (1984) ("courts should not adopt prophylactic remedies for police misconduct which needlessly frustrate law enforcement and the public interests in that sphere."); King, 400 Mass. at 292 ("Nothing in the record suggests, nor is there good reason to suppose, that, unless this court provides a prophylactic remedy, police officers are likely to repeat the type of conduct that occurred in this case. In the absence of a demonstrated need for deterrence, a prophylactic remedy is inappropriate.")

Despite the defendant's narrow focus into Trooper Proctor, he is not an essential witness for the Commonwealth. All of his investigative work occurred in the company of or under the supervision of other law enforcement officers.

This court may take steps to ensure that the Commonwealth does not benefit from any wrongdoing, "such as allowing counsel for the defendant to establish, if called as a prosecution witness, the possible bias of any officers who engaged in the misconduct". Mason, 453 Mass. at 879 (police engaged in egregious misconduct by withholding bail information to prevent defendant's release to punish the defendant for remarks made during his arrest; Court held did not pose substantial threat of prejudice as lesser sanctions were available). The Commonwealth does not dispute that as an alternative remedy, the defendant has a constitutional right to cross-examine a prosecution witness to show bias and challenge the witness' credibility. Commonwealth v. Hall, 50 Mass. App. Ct. 208, 212 (2002), citing Commonwealth v. Bui, 419 Mass. 392. The Supreme Judicial Court has held, upon a plausible showing of bias, "[i]f on the facts, there is a possibility of bias, even a remote one, the judge has no discretion to bar all inquiry into the subject." Bui, 419 Mass. at 401. However, determining whether the evidence demonstrates bias, falls within the sound discretion of the trial judge and the trial judge has discretion to limit cross-examination if the questioning becomes redundant, too speculative, would involve only collateral maters, or used simply as a means to prove bad character. See Commonwealth v. Avalos, 454 Mass. 1, 7 (2009); Commonwealth. v. LaVelle, 414 Mass. 146, 153–154 (1993); Commonwealth v. Kindell, 84 Mass. App. Ct. 183, 188 (2013).

Trooper Proctor was aware the defendant's rule 17 motion for his communications with Jennifer McCabe was allowed by this court, without his objection. These records show the last communication occurred in August and the communications pertained to the harassment Jennifer McCabe endured as a witness in this case.

In conclusion, dismissal is not appropriate on either O'Dell grounds or a broader claim of governmental misconduct, as the defendant has failed to demonstrate any prejudice, let alone a substantial risk to her right to a fair trial. The defendant has now received a vast amount of discovery that far exceeds the bounds of what is permitted by the Massachusetts Rules of Criminal Procedure. As in any criminal trial, the defendant may be permitted to challenge the credibility and testimony of any witness and the jury will assess the weight of the evidence to decide the ultimate issue of guilt.

As demonstrated by the "federal letters" previously produced in this case, the Commonwealth has diligently sought for all exculpatory evidence within the possession of the U.S. Attorney's Office since May 2023. The Commonwealth is actively taking additional steps to continue to inquire and investigate the existence of any additional exculpatory evidence.

For the foregoing reasons, and all the arguments set forth in the Commonwealth's February 15, 2024 and February 21, 2024 oppositions the defendant's motions should be DENIED.

Respectfully Submitted
For the Commonwealth,

MICHAEL W. MORRISSEY
DISTRICT ATTORNEY

By: ______________________

Date: March 11, 2024

Adam C. Lally
Assistant District Attorney

Laura A. McLaughlin
Assistant District Attorney