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Rule 13. PRETRIAL MOTIONS

1. (Applicable to cases initiated on or after September 7, 2004)

(a) In General.

(1) Requirement of Writing and Signature; Waiver. A pretrial motion shall be in writing and signed by the party making the motion or the attorney for that party. Pretrial motions shall be filed within the time allowed by subdivision (d) of this rule.

(2) Grounds and Affidavit. A pretrial motion shall state the grounds on which it is based and shall include in separately numbered paragraphs all reasons, defenses, or objections then available, which shall be set forth with particularity. If there are multiple charges, a motion filed pursuant to this rule shall specify the particular charge to which it applies. Grounds not stated which reasonably could have been known at the time a motion is filed shall be deemed to have been waived, but a judge for cause shown may grant relief from such waiver. In addition, an affidavit detailing all facts relied upon in support of the motion and signed by a person with personal knowledge of the factual basis of the motion shall be attached.

(3) Service and Notice. A copy of any pretrial motion and supporting affidavits shall be served on all parties or their attorneys pursuant to Rule 32 at the time the originals are filed. Opposing affidavits shall be served not later than one day before the hearing. For cause shown the requirements of this subdivision (3) may be waived by the court.

(4) Memoranda of Law. The judge or special magistrate may require the filing of a memorandum of law, in such form and within such time as he or she may direct, as a condition precedent to a hearing on a motion or interlocutory matter. No motion to suppress evidence, other than evidence seized during a warrantless search, and no motion to dismiss may be filed unless accompanied by a memorandum of law, except when otherwise ordered by the judge or special magistrate.

(5) Renewal. Upon a showing that substantial justice requires, the judge or special magistrate may permit a pretrial motion which has been heard and denied to be renewed.

(b) Bill of Particulars.

(1) Motion. Within the time provided for the filing of pretrial motions by this rule or within such other time as the judge may allow, a defendant may request or the court upon its own motion may order that the prosecution file a statement of such particulars as may be necessary to give both the defendant and the court reasonable notice of the crime charged, including time, place, manner, or means.

(2) Amendment. If at trial there exists a material variance between the evidence and bill of particulars, the judge may order the bill of particulars amended or may grant such other relief as justice requires.

(c) Motion to Dismiss or to Grant Appropriate Relief.

(1) All defenses available to a defendant by plea, other than not guilty, shall only be raised by a motion to dismiss or by a motion to grant appropriate relief.

(2) A defense or objection which is capable of determination without trial of the general issue

shall be raised before trial by motion.

(d) Filing. Only pretrial motions the subject matter of which could not be agreed upon at the pretrial conference shall be filed with the court.

(1) Discovery Motions. Any discovery motions shall be filed prior to the conclusion of the pretrial hearing, or thereafter for good cause shown. A discovery motion filed after the conclusion of the pretrial hearing shall be heard and considered only if (A) the discovery sought could not reasonably have been requested or obtained prior to the conclusion of the pretrial hearing, (B) the discovery is sought by the Commonwealth, and the Commonwealth could not reasonably provide all discovery due to the defense prior to the conclusion of the pretrial hearing, or (C) other good cause exists to warrant consideration of the motion.

(2) Non-discovery Pretrial Motions. A pretrial motion which does not seek discovery shall be filed before the assignment of a trial date pursuant to Rule 11(b) or (c) or within 21 days thereafter, unless the court permits later filing for good cause shown.

(e) Hearing on Motions. The parties shall have a right to a hearing on a pretrial motion. The opposing party shall be afforded an adequate opportunity to prepare and submit a memorandum of law prior to the hearing.

(1) Discovery Motions. All pending discovery motions shall be heard and decided prior to the defendant's election of a jury or jury-waived trial. Any discovery matters pending at the time of the pretrial hearing or the compliance hearing shall be heard at that hearing. Discovery motions filed pursuant to subdivision (d)(1) after the defendant's election shall be heard and decided expeditiously.

(2) Non-Discovery Pretrial Motions. A non-discovery motion filed prior to the pretrial hearing may be heard at the pretrial hearing, at a hearing scheduled to address the motion, or at the trial session. A non-discovery motion filed at or after the pretrial hearing shall be heard at the next scheduled court date unless otherwise ordered.

(3) Within seven days after the filing of a motion, or if the motion is transmitted to the trial session within seven days after the transmittal, the clerk or the judge shall assign a date for hearing the motion, but the judge or special magistrate for cause shown may entertain such motion at any time before trial. If the parties have agreed to a mutually convenient time for the hearing of a pretrial motion, and the moving party so notifies the clerk in writing at the time of the filing of the motion, the clerk shall mark up the motion for hearing at that time subject to the approval of the court. The clerk shall notify the parties of the time set for hearing the motion.

Rule 14. PRETRIAL DISCOVERY

(Applicable to cases initiated on or after September 7, 2004)

(a) Procedures for Discovery.

(1) Automatic Discovery.

(A) Mandatory Discovery for the Defendant. The prosecution shall disclose to the defense, and permit the defense to discover, inspect and copy, each of the following items and information at or prior to the pretrial conference, provided it is relevant to the case and is in the possession,

custody or control of the prosecutor, persons under the prosecutor's direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in the case:

(i) Any written or recorded statements, and the substance of any oral statements, made by the defendant or a co-defendant.

(ii) The grand jury minutes, and the written or recorded statements of a person who has testified before a grand jury.

(iii) Any facts of an exculpatory nature.

(iv) The names, addresses, and dates of birth of the Commonwealth's prospective witnesses other than law enforcement witnesses. The Commonwealth shall also provide this information to the Probation Department.

(v) The names and business addresses of prospective law enforcement witnesses.

(vi) Intended expert opinion evidence, other than evidence that pertains to the defendant's criminal responsibility and is subject to subdivision (b)(2). Such discovery shall include the identity, current curriculum vitae, and list of publications of each intended expert witness, and all reports prepared by the expert that pertain to the case.

(vii) Material and relevant police reports, photographs, tangible objects, all intended exhibits, reports of physical examinations of any person or of scientific tests or experiments, and statements of persons the Commonwealth intends to call as witnesses.

(viii) A summary of identification procedures, and all statements made in the presence of or by an identifying witness that are relevant to the issue of identity or to the fairness or accuracy of the identification procedures.

(ix) Disclosure of all promises, rewards or inducements made to witnesses the Commonwealth intends to present at trial.

(B) Reciprocal Discovery for the Prosecution. Following the Commonwealth's delivery of all discovery required pursuant to subdivision (a)(1)(A) or court order, and on or before a date agreed to between the parties, or in the absence of such agreement a date ordered by the court, the defendant shall disclose to the prosecution and permit the Commonwealth to discover, inspect, and copy any material and relevant evidence discoverable under subdivision (a)(1)(A)(vi), (vii), and (ix) which the defendant intends to use at trial, including the names, addresses, dates of birth, and statements of those persons whom the defendant intends to use as witnesses at trial.

(C) Stay of Automatic Discovery; Sanctions. Subdivisions (a)(1)(A) and (a)(1)(B) shall have the force and effect of a court order, and failure to provide discovery pursuant to them may result in application of any sanctions permitted for non-compliance with a court order under subdivision 14(c). However, if in the judgment of either party good cause exists for declining to make any of the disclosures set forth above, it may move for a protective order pursuant to subdivision (a)(6) and production of the item shall be stayed pending a ruling by the court.

(D) Record of Convictions of the Defendant, Codefendants, and Prosecution Witnesses. At

arraignment the court shall order the Probation Department to deliver to the parties the record of prior complaints, indictments and dispositions of all defendants and of all witnesses identified pursuant to subdivisions (a)(1)(A)(iv) and (v) within 5 days of the Commonwealth's notification to the Department of the names and addresses of its witnesses.

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

(2) Motions for Discovery. The defendant may move, and following its filing of the Certificate of Compliance the Commonwealth may move, for discovery of other material and relevant evidence not required by subdivision (a)(1) within the time allowed by Rule 13(d)(1).

(3) Certificate of Compliance. When a party has provided all discovery required by this rule or by court order, it shall file with the court a Certificate of Compliance. The certificate shall state that, to the best of its knowledge and after reasonable inquiry, the party has disclosed and made available all items subject to discovery other than reports of experts, and shall identify each item provided. If further discovery is subsequently provided, a supplemental certificate shall be filed with the court identifying the additional items provided.

(4) Continuing Duty. If either the defense or the prosecution subsequently learns of additional material which it would have been under a duty to disclose or produce pursuant to any provisions of this rule at the time of a previous discovery order, it shall promptly notify the other party of its acquisition of such additional material and shall disclose the material in the same manner as required for initial discovery under this rule.

(5) Work Product. This rule does not authorize discovery by a party of those portions of records, reports, correspondence, memoranda, or internal documents of the adverse party which are only the legal research, opinions, theories, or conclusions of the adverse party or its attorney and legal staff, or of statements of a defendant, signed or unsigned, made to the attorney for the defendant or the attorney's legal staff.

(6) Protective Orders. Upon a sufficient showing, the judge may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. The judge may alter the time requirements of this rule. The judge may, for cause shown, grant discovery to a defendant on the condition that the material to be discovered be available only to counsel for the defendant. This provision does not alter the allocation of the burden of proof with regard to the matter at issue, including privilege.

(7) Amendment of Discovery Orders. Upon motion of either party made subsequent to an order of the judge pursuant to this rule, the judge may alter or amend the previous order or orders as the interests of justice may require. The judge may, for cause shown, affirm a prior order

granting discovery to a defendant upon the additional condition that the material to be discovered be available only to counsel for the defendant.

(8) A party may waive the right to discovery of an item, or to discovery of the item within the time provided in this Rule. The parties may agree to reduce or enlarge the items subject to discovery pursuant to subsections (a)(1)(A) and (a)(1)(B). Any such waiver or agreement shall be in writing and signed by the waiving party or the parties to the agreement, shall identify the specific items included, and shall be served upon all the parties.

(b) Special Procedures.

(1) Notice of Alibi.

(A) Notice by Defendant. The judge may, upon written motion of the Commonwealth filed pursuant to subdivision (a)(2) of this rule, stating the time, date, and place at which the alleged offense was committed, order that the defendant serve upon the prosecutor a written notice, signed by the defendant, of his or her intention to offer a defense of alibi. The notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defense intends to rely to establish the alibi.

(B) Disclosure of Information and Witness. Within seven days of service of the defendant's notice of alibi, the Commonwealth shall serve upon the defendant a written notice stating the names and addresses of witnesses upon whom the prosecutor intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.

(C) Continuing Duty to Disclose. If prior to or during trial a party learns of an additional witness whose identity, if known, should have been included in the information furnished under subdivision (b)(1)(A) or (B), that party shall promptly notify the adverse party or its attorney of the existence and identity of the additional witness.

(D) Failure to Comply. Upon the failure of either party to comply with the requirements of this rule, the judge may exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from or presence at the scene of the alleged offense. This rule shall not limit the right of the defendant to testify.

(E) Exceptions. For cause shown, the judge may grant an exception to any of the requirements of subdivisions (b)(1)(A) through (D) of this rule.

(F) Inadmissibility of Withdrawn Alibi. Evidence of an intention to rely upon an alibi defense, later withdrawn, or of statements made in connection with that intention, is not admissible in any civil or criminal proceeding against the person who gave notice of that intention.

(2) Defense of Lack of Criminal Responsibility Because of Mental Disease or Defect.

(A) Notice. If a defendant intends to rely upon the defense of lack of criminal responsibility because of mental disease or defect at the time of the alleged crime, the defendant shall, within the time provided for the filing of pretrial motions by Rule 13(d)(2) or at such later time as the judge may allow, notify the prosecutor in writing of such intention. The notice shall state:

(i) whether the defendant intends to offer testimony of expert witnesses on the issue of lack of criminal responsibility because of mental disease or defect;

(ii) the names and addresses of expert witnesses whom the defendant expects to call; and

(iii) whether those expert witnesses intend to rely in whole or in part on statements of the defendant as to his or her mental condition at the time of the alleged crime or criminal responsibility for the alleged crime.

The defendant shall file a copy of the notice with the clerk. The judge may for cause shown allow late filing of the notice, grant additional time to the parties to prepare for trial, or make such other order as may be appropriate.

(B) Examination. If the notice of the defendant or subsequent inquiry by the judge or developments in the case indicate that statements of the defendant as to his or her mental condition at the time of, or criminal responsibility for, the alleged crime will be relied upon by expert witnesses of the defendant, the court, upon its own motion or upon motion of the prosecutor, may order the defendant to submit to a psychiatric examination consistent with the provisions of the General Laws and subject to the following terms and conditions:

(i) The examination shall include such physical and psychological examinations and physiological and psychiatric tests as the examiner deems necessary to form an opinion as to the mental condition of the defendant at the time the alleged offense was committed. No examination based on statements of the defendant may be conducted unless the court has found that (a) the defendant then intends to offer at trial psychiatric evidence based on his or her own statements or (b) there is a reasonable likelihood that the defendant will offer that evidence.

(ii) No statement, confession, or admission, or other evidence of or obtained from the defendant during the course of the examination, except evidence derived solely from physical or physiological observations or tests, may be revealed to the prosecution or anyone acting on its behalf unless so ordered by the judge.

(iii) The examiner shall file with the court a written psychiatric report which shall contain his or her findings, including specific statements of the basis thereof, as to the mental condition of the defendant at the time the alleged offense was committed. The report shall be sealed and shall not be made available to the parties unless (a) the judge determines that the report contains no matter, information, or evidence which is based upon statements of the defendant as to his or her mental condition at the time of, or criminal responsibility for, the alleged crime, or which is otherwise within the scope of the privilege against self-incrimination; or (b) the defendant files a motion requesting that the report be made available to the parties; or (c) during trial the defendant raises the defense of lack of criminal responsibility and the judge is satisfied that (1) the defendant intends to testify or (2) the defendant intends to offer expert testimony based in whole or in part upon statements of the defendant as to his or her mental condition at the time of, or criminal responsibility for, the alleged crime.>

If a psychiatric report contains both privileged and nonprivileged matter, the court may, if feasible at such time as it deems appropriate, make available to the parties the nonprivileged portions.

(iv) If a defendant refuses to submit to an examination ordered pursuant to and subject to the terms and conditions of this rule, the court may prescribe such remedies as it deems warranted

by the circumstances, which may include exclusion of the testimony of any expert witness offered by the defense on the issue of the defendant's mental condition or the admission of evidence of the refusal of the defendant to submit to examination.

(3) Notice of Other Defenses. If a defendant intends to rely upon a defense based upon a license, claim of authority or ownership, or exemption, the defendant shall, within the time provided for the filing of pretrial motions by Rule 13(d)(2) or at such later time as the judge may direct, notify the prosecutor in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, a license, claim of authority or ownership, or exemption may not be relied upon as a defense. The judge may for cause shown allow a late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(c) Sanctions for Noncompliance.

(1) Relief for Nondisclosure. For failure to comply with any discovery order issued or imposed pursuant to this rule, the court may make a further order for discovery, grant a continuance, or enter such other order as it deems just under the circumstances.

(2) Exclusion of Evidence. The court may in its discretion exclude evidence for noncompliance with a discovery order issued or imposed pursuant to this rule. Testimony of the defendant and evidence concerning the defense of lack of criminal responsibility which is otherwise admissible cannot be excluded except as provided by subdivision (b)(2) of this rule.

(d) Definition. The term "statement", as used in this rule, means:

(1) a writing made by a person having percipient knowledge of relevant facts and which contains such facts, other than drafts or notes that have been incorporated into a subsequent draft or final report; or

(2) a written, stenographic, mechanical, electrical, or other recording, or transcription thereof, which is a substantially verbatim recital of an oral declaration and which is recorded contemporaneously with the making of the oral declaration, except that a computer assisted real time translation, or its functional equivalent, made to assist a deaf or hearing impaired person, that is not transcribed or permanently saved in electronic form, shall not be considered a statement.

Rule 17. SUMMONSES FOR WITNESSES

2. (Applicable to District Court and Superior Court)

(a) Summons.

(1) For Attendance of Witness; Form; Issuance. A summons shall be issued by the clerk or any person so authorized by the General Laws. It shall state the name of the court and the title, if any, of the proceeding and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein.

(2) For Production of Documentary Evidence and of Objects. A summons may also command the person to whom it is directed to produce the books, papers, documents, or other objects designated therein. The court on motion may quash or modify the summons if compliance would

be unreasonable or oppressive or if the summons is being used to subvert the provisions of rule 14. The court may direct that books, papers, documents, or objects designated in the summons be produced before the court within a reasonable time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents, objects, or portions thereof to be inspected and copied by the parties and their attorneys if authorized by law.

(b) Defendants Unable to Pay. At any time upon the written ex parte application of a defendant which shows that the presence of a named witness is necessary to an adequate defense and that the defendant is unable to pay the fees of that witness, the court shall order the issuance of an indigent's summons. The witness so summoned shall be paid in accordance with the provisions of subdivision (c) of this rule. If the court so orders, the costs incurred shall be assessed to the defendant in accordance with the General Laws or the provisions of these rules.

(c) Payment of Witnesses. Expenses incurred by a witness summoned on behalf of a defendant determined to be indigent under this rule as well as expenses incurred by a witness summoned on behalf of the Commonwealth, as such expenses are determined in accordance with the General Laws, shall be paid after the witness certifies in a writing filed with the court the amount of his travel and attendance.

(d) Service.

(1) By Whom; Manner. A summons may be served by any person authorized to serve a summons in a civil action or to serve criminal process. A summons shall be served upon a witness by delivering a copy to him personally, by leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by mailing it to the witness' last known address.

(2) Place of Service.

(A) Within the Commonwealth. A summons requiring the attendance of a witness at a hearing or a trial may be served at any place within the Commonwealth.

(B) Outside the Commonwealth or Abroad. A summons directed to a witness outside the Commonwealth or abroad shall issue and be served in a manner consistent with the General Laws.

(3) Return. The person serving a summons pursuant to this rule shall make a return of service to the court.

(e) Failure to Appear. If a person served with a summons pursuant to this rule fails to appear at the time and place specified therein and the court determines that such person did receive actual notice to appear, a warrant may issue to bring that person before the court

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Rule 23. STATEMENTS AND REPORTS OF WITNESSES FOR IMPEACHMENT

1.(Applicable to District Court and Superior Court)

(a) Definition. The term "statement" as used in this rule in relation to any witness means:

(1) a writing made by a witness or another and signed or otherwise adopted or approved by such witness;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral declaration made by a witness and which is recorded contemporaneously with the making of the oral declaration;

(3) a declaration, however taken or recorded, or a transcription thereof, made by a witness to a grand jury; or

(4) those portions of a written report which consist of the verbatim declarations of a witness in matters relating to the case on trial.

(b) Statements of Witnesses. Upon motion for inspection by either party, the judge shall at trial order the production of the statements of a witness of the adverse party that are in the possession, custody, or control of the adverse party when the requested information is relevant, provided that prior to the time of motion for inspection the witness shall have testified on direct examination in the trial of the case. The judge shall provide whenever it is requested that a reasonable time be afforded to the moving party to facilitate his use of the statements in the trial.

(c) In Camera Inspection. If either party claims that any statement requested pursuant to subdivision (b) of this rule contains matter which does not relate to the subject matter of the testimony of the witness, the judge shall order that the statement be delivered for the inspection of the judge in camera, whereupon the judge shall excise that part of the statement which does not relate to the subject matter of the testimony of the witness. The judge shall then order delivery of the statement as excised to the moving party for his use. In the event that any portion of a statement is withheld subject to an objection, the entire text of the statement shall be preserved to be made available to the appellate court in the event of an appeal for the purpose of determining the correctness of the ruling of the trial judge.

(d) Protective Orders. Upon a showing of cause, the judge may at any time order that inspection be denied or restricted or may make such other order as is appropriate.

(e) Production Prior to Direct Examination. Notwithstanding the provisions of subdivisions (b) and (c) of this rule, the judge may, prior to the examination of a prospective witness, require either party to provide the statements of the witness to the adverse party so as to facilitate the orderly conduct of the trial proceeding.

(f) Sanctions for Noncompliance. If either party elects not to comply with an order of the judge to deliver any statement or part thereof under subdivisions (b) and (c) of this rule, the judge may order stricken from the record the testimony of the witness and the trial shall proceed, unless the judge in his discretion shall determine that the interests of justice require that a mistrial be declared

Excerpts from Relevant cases

Kyles v. Whitley (93-7927), 514 U.S. 419 (1995).

Thus, the prosecutor, who alone can know what is undisclosed, must be assigned the responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. Moreover, that responsibility remains regardless of any failure by the police to bring favorable evidence to the prosecutor's attention. To hold otherwise would amount to a serious change of course from the Brady line of cases

We have never held that the Constitution demands an open file policy (however such a policy might work out in practice), and the rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate. See ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3–3.11(a) (3d ed. 1993) ("A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused"); ABA Model Rule of Professional Conduct 3.8(d) (1984) ("The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense").

While the definition of *Bagley* materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a degree of discretion, it must also be understood as imposing a corresponding burden. On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith, see *Brady*, 373 U. S., at 87), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.

The State of Louisiana would prefer an even more lenient rule. It pleads that some of the favorable evidence in issue here was not disclosed even to the prosecutor until after trial, Brief for Respondent 25, 27, 30, 31, and it suggested below that it should not be held accountable under *Bagley* and *Brady* for evidence known only to police investigators and not to the prosecutor.[1] To accommodate the State in this manner would, however, amount to a serious change of course from the *Brady* line of cases. In the State's favor it may be said that no one doubts that police investigators sometimes fail to inform a prosecutor of all they know. But neither is there any serious doubt that "procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it." *Giglio* v. *United States*, 405 U. S. 150, 154 (1972). Since, then, the prosecutor has the means to discharge the government's *Brady* responsibility if he will, any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials.

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11. The State's counsel retreated from this suggestion at oral argument, conceding that the State is "held to a disclosure standard based on what all State officers at the time knew."

United States v Owens 933 F Supp 76, 86-89 (D.MA 1996) aff'd 98 F.3d 1333, (1st Cir. Mass. 1996)

The government has to [search for] all evidence in whatever form it takes –[...] When I say they have to [search for] documents of [all sorts], I mean they have to [search for] notes, if notes exist, they have to [search for] such internal government documents [as may exist] by whatever government agency. I think the government should be viewed as a unitary whole

All documents which tend to show the bias, prejudice, personal interest of any government witness to testify in favor of the government or against any defendant, and any documents which tend to show a special relationship of the witness or hostility of the witness either to any other government witness or to any of the defendants in a trial. That means, it seems to me, that within the scope of the statute of limitations all prior bad acts must be disclosed and if we're dealing with a witness who has received either immunity or any sort of promise, inducement, or reward,

the government must produce any data that it has with respect to the testimonial faculties of any witness. That witness' ability to observe, remember, or relate coming to this case. That means the government must produce any psychiatric data that it has which bears on the witness' ability to observe the conduct about which the witness is going to testify, or the witness' ability to remember or relate such conduct at the time when the witness comes on to testify

they are obliged to produce any evidence, extrinsic evidence, that tends to contradict any government witness about anything the government reasonably expects the witness will be inquired [**33] of on direct examination

the government must reveal any self-contradiction of the witness by any prior inconsistent statement or act prior to trial. And again, the self-contradiction, taking the narrowest formulation first, is self-contradiction with respect to anything that . . . is expected to be elicited from the government witness on direct examination.

The government is required to reveal any evidence that it has of prior bad acts which go to the reputation of the witness for truth or veracity or any specific acts which point to the witness having lied on other occasions

The government has to reveal all promises, rewards, and inducements to include the *quid* for the *quo.* And if that quid pro quo involves other sovereigns, of course that must be revealed

If you have a situation where there is a deal at any stage in the history of the witness, then a prior conviction which figured in that deal, . . . that has to be revealed

I think with respect to -- we'll take alcoholism, psychosis, drug addiction, other things which

impair the faculties and your ability either to know what's going on around you or accurately to giver testimony about it. Those types of impairments, if they existed during the time that the testimony is sought to be elicited concerning, or if they exist now, are discoverable

There is the risk here that the government may try to make an end run around its disclosure obligations by dragging its feet in witness selection. Such obfuscation is not to be tolerated and will receive short shrift in this session. By seeking an indictment, the government represents in good faith that it can make out a *prima facie* case as to each crime charged. This means that **at that time** it has witnesses and exhibits in hand. Consequently, the government must make its disclosures as part of the automatic disclosure process required by the local Rules

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Commonwealth v. Beal, 429 Mass. 530, 531-532 (Mass. 1999)

A prosecutor's duty of disclosure only applies to information in the possession of the prosecutor and information in the possession of persons "sufficiently subject to the prosecutor's control." Commonwealth v. Martin, 427 Mass. 816, 824, 696 N.E.2d 904 (1998). See [***4] Commonwealth v. Tucceri, 412 Mass. 401, 407, 589 N.E.2d 1216 (1992); Commonwealth v. Neal, 392 Mass. 1, 8, 464 N.E.2d 1356 (1984). Persons considered "subject to the prosecutor's control," and, therefore, subject to the prosecutor's duty of disclosure, are those individuals acting, in some capacity, as agents of the government in the investigation and prosecution of the case. See Kyles v. Whitley, 514 U.S. 419, 437, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995) ("individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police"). See also Commonwealth v. Martin, supra, and cases cited ("A prosecutor's obligations extend to information in possession of [*532] a person who has participated in the investigation or evaluation of the case and has reported to the prosecutor's office [**416] concerning the case"); Commonwealth v. Tucceri, supra ("A prosecutor's duty, however, extends only to exculpatory evidence in the prosecutor's possession or in the possession of the police who participated in the investigation and presentation of the case"); [***5] Commonwealth v. St. Germain, 381 Mass. 256, 261-262 n.8, 408 N.E.2d 1358 (1980). Compare Commonwealth v. Daye, supra at 734 (prosecution could not have "suppressed" police department reports because the reports were not in its possession nor generated as part of any joint investigation), with Commonwealth v. Martin, 427 Mass. at 823-824 (prosecution should have secured and turned over test results obtained by State police laboratory on prosecution's behalf).

HN3The prosecutor's duty does not extend beyond information held by agents of the prosecution team. "[A] prosecutor has no duty to investigate every possible source of exculpatory information on behalf of the defendant[] and . . . his obligation to disclose exculpatory information is limited to that in the possession of the prosecutor or police." Commonwealth v. Campbell, 378 Mass. 680, 702, 393 N.E.2d 820 (1979). n1 Information known to an independent witness, but unknown to the prosecution, is not within the possession and control of the prosecution unless that witness has acted, in some capacity, as an agent of the government in the investigation and prosecution of the crime. A complainant is not someone "who has participated in the investigation or evaluation of the [***6] case and has reported to the prosecutor's office

concerning the case." Commonwealth v. Martin, supra at 824. Consequently, they are not "sufficiently subject to the prosecutor's control that the duty to disclose applies to information in [their] possession." Id.

Commonwealth v. Caillot, 454 Mass. 245, 261-262 (Mass. 2009)

Brady v. Maryland, supra at 87, the Supreme Court held that HN8"suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the [***33] prosecution." See Commonwealth v. Ellison, 376 Mass. 1, 21, 379 N.E.2d 560 (1978), and cases cited. To establish a Brady violation, a defendant must show that (1) material information was in the possession of the prosecutor or "those police who are participants in the investigation and presentation of the case," Commonwealth v. Daye, 411 Mass. 719, 734, 587 N.E.2d 194 (1992); (2) the [*262] information tended to exculpate him; and (3) the prosecutor failed to disclose the evidence. n11 See Commonwealth v. Healy, 438 Mass. 672, 679, 783 N.E.2d 428 (2003), and cases cited; Commonwealth v. Adrey, 376 Mass. 747, 753, 383 N.E.2d 1110 (1978). The so-called Brady obligation is one of disclosure; it imposes no obligation on the prosecution to gather evidence or conduct additional investigation. See Commonwealth v. Lapage, 435 Mass. 480, 488, 759 N.E.2d 300 (2001) ("While the prosecution remains obligated to disclose all exculpatory evidence in its possession, it is under no duty to gather evidence that may be potentially helpful to the defense"); Commonwealth v. Beal, 429 Mass. 530, 531-532, 709 N.E.2d 413 (1999) v. Beal, 429 Mass. 530, 531-532, 709 N.E.2d 413 (1999) (duty of [**17] disclosure does not require prosecution to solicit information from witness).

FOOTNOTES

n11 HN9Determining whether the nondisclosed evidence is material depends on whether the evidence had [***34] been generally or specifically requested. Commonwealth v. Gallarelli, 399 Mass. 17, 20, 502 N.E.2d 516 (1987). "Where the accused has made a request for evidence sufficiently specific to place the prosecution on notice as to what the defense desires, the evidence must be disclosed even if it provides only 'a substantial basis for claiming materiality exists.'" d., quoting Commonwealth v. Wilson, 381 Mass. 90, 108-109, 407 N.E.2d 1229 (1980). "By way of contrast, where there has been no defense request whatsoever or only a general request for 'all Brady' or 'all exculpatory' evidence," see Commonwealth v. Wilson, supra at 109, "the test is whether the undisclosed evidence creates a 'reasonable doubt that did not otherwise exist.'" Commonwealth v. Gallarelli, supra at 21, quoting Commonwealth v. Wilson, supra at 110. We assume, without deciding, that the defendants made a specific request for this material prior to trial.

Commonwealth v. Clemente, 452 Mass. 295, 311 (Mass. 2008)

Due process requires that "the government disclose to a criminal defendant favorable evidence in its possession that could materially aid the defense against the pending charges." Commonwealth v. Daniels, 445 Mass. 392, 401, 837 N.E.2d 683 (2005), quoting Commonwealth v. Tucceri, 412 Mass. 401, 404-405, 589 N.E.2d 1216 (1992). This duty of disclosure extends, however, only to "information in the possession of the prosecutor and information in the possession of persons 'sufficiently subject to the prosecutor's control.'" Commonwealth v. Beal, 429 Mass. 530, 531, 709 N.E.2d 413 (1999) v. Beal, 429 Mass. 530, 531, 709 N.E.2d 413 (1999), quoting Commonwealth v. Martin, 427 Mass. 816, 824, 696 N.E.2d 904 (1998). [***29] Those subject to the prosecutor's control and whose work product is included within the prosecutor's duty of disclosure are those persons acting, in some capacity, as agents of the government in the investigation and prosecution of the case. Commonwealth v. Beal, supra. v. Beal, supra. Here, there was no showing, or even an allegation, that the agents of the State police or of the DEA who interviewed Sapochetti were involved in any respect in the investigation [**36] of the shootings. Contrast Commonwealth v. Thomas, 451 Mass. 451, 454-455, 886 N.E.2d 684 (2008); Commonwealth v. Lykus, 451 Mass. 310, 326-328, 885 N.E.2d 769 (2008). Thus, the material sought was not prepared by anyone within the control of the prosecution and there was no obligation on the part of the prosecutor to obtain or disclose the report

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Commonwealth v. Thomas, 451 Mass. 451, 453-454 (Mass. 2008)

Under rule 14 (a) (1) (A) (iii), the Commonwealth's obligation to furnish discovery of exculpatory material is limited to facts and information "relevant to the case and . . . in the possession, [*454] custody or control of the prosecutor, persons under the prosecutor's direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in the case." It is

clear that "[t]he prosecutor's duty does not extend beyond information held by agents of the prosecution team." Commonwealth v. Beal, 429 Mass. 530, 532, 709 N.E.2d 413 (1999).

The Commonwealth cannot be ordered to respond to discovery motions by the defendants to conduct statistical analysis of information that is not in its possession, custody, or control or to make legal evaluations about unspecified "other information" that may or may not be relevant.

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Commonwealth v. Lykus, 451 Mass. 310, 326-328 (Mass. 2008)

Nondisclosure of exculpatory evidence. The Commonwealth argues that the judge erred by

imputing to it the FBI's nondisclosure of the FBI voiceprint [**782] laboratory report. The Commonwealth does not dispute that the evidence was exculpatory, that it had been requested specifically, or that it had not been disclosed. Rather, the Commonwealth contends that the prosecutor's duty to disclose such evidence applies only to [***33] exculpatory evidence "in the possession of the prosecutor and information in the possession of persons 'sufficiently subject to [*327] the prosecutor's control,'" and it asserts that it cannot be held responsible for the failure of the FBI to disclose the report because the FBI was not under its control. Commonwealth v. Beal, 429 Mass. 530, 531, 709 N.E.2d 413 (1999), quoting Commonwealth v. Martin, 427 Mass. 816, 824, 696 N.E.2d 904 (1998). See Commonwealth v. Tucceri, 412 Mass. 401, 407, 589 N.E.2d 1216 (1992) ("A prosecutor's duty, however, extends only to exculpatory evidence in the prosecutor's possession or in the possession of the police who participated in the investigation and presentation of the case"). The Commonwealth acknowledges that HN4a "prosecutor has a duty to learn of any [exculpatory] evidence known to the others acting on the government's behalf in the case, including the police." Commonwealth v. Beal, supra, quoting Kyles v. Whitley, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). However, it asserts, it requested all FBI laboratory reports, as indicated by the record, but the FBI withheld the voiceprint report based on its own internal policies. For these reasons the Commonwealth urges that the actions of the FBI not be imputed to the Commonwealth.

This [***34] court has said that, HN5in dual sovereign situations, where a "motion [for specific exculpatory evidence] is allowed . . . cooperation between State and Federal prosecutors is and should be common enough so that the burden of securing Federal cooperation should be placed on the State prosecutor rather than on the defendant." Commonwealth v. Liebman, 379 Mass. 671, 675, 400 N.E.2d 842 (1980), S.C., 388 Mass. 483, 446 N.E.2d 714 (1983). In that case, the defendant appealed from his conviction of conspiracy to commit armed robbery of a bank while masked or disguised. He unsuccessfully had sought in Federal and State courts production of Federal grand jury minutes of the two principal witnesses against him in Massachusetts involving the same alleged incident that was the subject of a Federal grand jury investigation. The case was remanded with instructions that the prosecutor seek the grand jury minutes from the Federal court. The court added that if the Federal court did not order release of the grand jury minutes the indictment against the defendant was to be dismissed. However, if the grand jury minutes were obtained, the case was to "proceed as if State grand jury minutes were involved. If the minutes might create a [***35] reasonable doubt that did not otherwise exist, a new trial may be appropriate." Id. at 676.

[*328] We need not concern ourselves with the question whether the Commonwealth should be ordered to request the voiceprint laboratory report, because it did. See Commonwealth v. Donahue, 396 Mass. 590, 599, 487 N.E.2d 1351 (1986) (discussing factors to be applied in determining whether prosecutor obligated to seek requested exculpatory evidence from Federal authorities). The defendant, due to his own efforts, obtained the report. The question before us is whether the failure to produce the report in 1973 should be imputed to the Commonwealth. We think it should.

Without defining the scope of the issue, the circumstances of this case fall well within the core of the principle under which the actions of one sovereign may be imputed to another. This is not a case in [**783] which the FBI had little or no involvement. This was, at the very least, a joint investigation by Federal and State authorities.

Commonwealth v. Frith, 458 Mass. 434, 442 (Mass. 2010)

Under rule 14 (c), a judge can impose a variety of sanctions on the Commonwealth for failure to comply with pretrial discovery rules.n9 See, e.g., Commonwealth v. Lam Hue To, supra at 310 (grant of mistrial followed by new trial is typical relief where defendant is prejudiced by prosecutor's failure to properly disclose exculpatory evidence); Commonwealth v. Douzanis, 384 Mass. 434, 436, 425 N.E.2d 326 (1981) (dismissal of indictment may be proper remedy for Commonwealth's failure to comply with discovery order); Commonwealth v. Giontzis, 47 Mass. App. Ct. 450, 456-462, 713 N.E.2d 997 (1999) (judge properly limited scope of testimony from Commonwealth's rebuttal expert witness where Commonwealth failed to disclose appearance by such witness in violation of discovery order). As we have stated, sanctions pursuant to rule 14 (c) are designed to protect a defendant's right to a fair trial. See Commonwealth v. Mason, 453 Mass. 873, 878-879, 906 N.E.2d 329 (2009).

Commonwealth v. Morales, 453 Mass. 40, 49 (Mass. 2009)

Reciprocal discovery. Just before the beginning of the trial, defense counsel was ordered to make available to the Commonwealth, pursuant to a motion for reciprocal discovery, a tape recording of a telephone conversation between Ana Williams and Leo Lovejoy in which Lovejoy boasted that he fabricated his statements to police concerning this case in order to secure a cooperation agreement with the Commonwealth in an unrelated criminal prosecution he was facing, and for which he was incarcerated at the time. The defendant urges us to overrule Commonwealth v. Durham, 446 Mass. 212, 843 N.E.2d 1035 (2006), [***18] contending that the reciprocal discovery order violated his rights under the Fifth and Sixth Amendments to the United States Constitution because it deprived him of the element of surprise in his cross-examination of Leo Lovejoy, who the prosecutor decided not to call because of what she learned about him through reciprocal discovery. In addition, because the prosecutor did not call Leo Lovejoy, the defendant claims he was deprived of the opportunity to call him after learning from Lovejoy's attorney that the witness would invoke his Fifth Amendment privilege. Finally, the defendant contends that counsel was ineffective for failing to preserve this issue for appellate review.

Commonwealth v. Durham, 446 Mass. 212, 229 (Mass. 2006)

In summary, we acknowledge, as the defendant had emphasized, that cross-examination is important for determining credibility and assisting the trier of fact in arriving at a fair verdict. We acknowledge as well that some "imbalance" exists between the resources of the State and those of the defendant. The imbalance, however, has been considerably adjusted in modern criminal practice by requiring the State to assist the defense with full discovery, by the provision of considerable funds [***34] to hire an investigator and to retain experts to conduct evaluations and other tests (and then to testify), and by nonconstitutionally compelled prophylactic measures, such as permitting jury instruction on topics like the failure of the police to record a

confession, see Commonwealth v. DiGiambattista, 442 Mass. 423, 447-449, 813 N.E.2d 516 (2004), and mistaken identification, see Commonwealth v. Rodriguez, 378 Mass. 296, 310-311, 391 N.E.2d 889 (1979) (Appendix). The foregoing lists just a few measures. The role of cross-examination, and the existence of an imbalance, should not override the right of the people, and the victims of crimes, to have the evidence evaluated by a fully informed trier of fact. These considerations are responsibly achieved by the interpretation of the rule we reach. And, as we have pointed out, there is no constitutional infringement on the defendant's rights by our interpretation, notwithstanding his efforts to have created a constitutional chimera. Our interpretation recognizes that criminal trials are matters of justice and not sporting events in which the side that has the strongest advocate (employing advantages to which he or she is not entitled) [***35] gains the upper hand

Commonwealth v. Paszko, 391 Mass. 164, (Mass. 1984

The policy of our rules is that the availability of statements of nonparty witnesses gathered by an adversary serves a truth-enhancing function

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Wardius v. Oregon., 412 U.S. 470, 475-476 (U.S. 1973

we do hold that HN4in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street. The State may not insist that trials be run as a "search for truth" so far as defense witnesses are concerned, while maintaining "poker game" secrecy for its own witnesses. n9 [*476] It is fundamentally [**2213] unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State.

FOOTNOTES
n9 Indeed, the State's inherent information-gathering advantages suggest that if there is to be any imbalance in discovery rights, it should work in the defendant's favor

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Commonwealth v. Daniels, 445 Mass. 392, 401-402 (Mass. 2005)

Due process of law requires that the government disclose to a criminal defendant favorable evidence in its possession that could materially aid the defense against the pending charges." Commonwealth v. Tucceri, 412 Mass. 401, 404-405, 589 N.E.2d 1216 (1992), citing Brady v.

Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The public's faith in the integrity of our criminal justice system could not be sustained otherwise. "Favorable evidence" need not be dispositive evidence. Evidence [***21] may be favorable or exculpatory, and thus required to be disclosed, "although it is not absolutely destructive of the Commonwealth's case or highly demonstrative of the defendant's innocence." Commonwealth v. Ellison, 376 Mass. 1, 22, 379 N.E.2d 560 (1978). If evidence "provides some significant aid to the defendant's case, whether it furnishes corroboration of the defendant's story, calls into question a material, although [*402] not indispensable, element of the prosecution's version of the events, or challenges the credibility of a key prosecution witness," that evidence should reach the defendant's hands before trial, if at all possible. Id

At the pretrial stage, and where the requested discovery is specific, the requirements of due process mandate that a judge should not refuse to order discovery without either reviewing the specifically requested material or obtaining a representation from the Commonwealth that the specifically requested material contains no favorable evidence. See

Commonwealth v. Tucceri, supra at 407 ("Judges . . . should [***22] be sensitive to the allowance of motions for the disclosure of specific information claimed to be exculpatory"); *Commonwealth v. Campbell*, 378 Mass. 680, 700-701, 393 N.E.2d 820 (1979) ("The judge plainly had the responsibility to review and pass on the propriety of any editing of the record of [an interview with the key prosecution witness] rather than to delegate that job entirely to the prosecutor"). This is so because "[a] defendant's [**693] right to discover exculpatory evidence does not include the unsupervised authority to search through the Commonwealth's files"; rather, "it is the State that decides which information must be disclosed." *Pennsylvania v. Ritchie, 480 U.S. 39, 59, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987)*. If the State decides that information is to be disclosed, the State must review specifically requested information and determine whether it is favorable to the defendant.

Commonwealth v. Tucceri, 412 Mass. 401 (1992).

Due process of law requires that the government disclose to a criminal defendant [*405] favorable evidence in its possession that could materially aid the defense against the pending charges. The Supreme Court of the United States announced the prosecution's constitutional obligation to disclose material, exculpatory evidence in Brady v. Maryland, 373 U.S. 83, 87 (1963), where the defendant had requested specific evidence. In United States v. Agurs, 427 U.S. 97 (1976), the Court provided protections for defendants who only generally requested exculpatory evidence or made no request at all. The Agurs opinion distinguished between a specific request and a general request for exculpatory evidence in determining whether the prosecution's omission warranted a new trial. When the unsatisfied request was specific, a new trial would be required if the undisclosed evidence "might have affected the outcome of the trial." Id. at 104. If there was no request or if, as here, only a general request was made, a new trial would be required only [***9] if the undisclosed evidence "create[d] a reasonable doubt which did not otherwise exist." Id. at 112. In Commonwealth v. Ellison, 376 Mass. 1, 23-24 (1978), Justice Kaplan discussed some of the uncertainties the Agurs opinion created. n3

FOOTNOTES

n3 A third aspect involves situations in which the prosecution knew or should have known that perjurious testimony was offered and did not disclose that fact. There, a new trial is required "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v. Agurs, supra at 103.

In United States v. Bagley, 473 U.S. 667 (1985), the Supreme Court adopted a single standard of prejudice (what it calls materiality) for all prosecutorial nondisclosure cases. See id. at 682; id. at 685 (White, J., concurring in part in the judgment). [***10] That unitary standard, taken from Strickland v. Washington, 466 U.S. 668, 694 (1984), which in turn relied on the no request or no-specific request test of the Agurs case, states that "[t]he evidence is material [i.e. requires a new trial] only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence [*406] in the outcome." United States v. Bagley, supra at 682. n4 In Commonwealth v. Gallarelli, 399 Mass. 17 (1987), this court declined to adopt the Bagley "one size fits all" test as a matter of State law and adhered to the Agurs test for determining the consequences of a prosecution's failure to comply with a specific request for exculpatory evidence. Id. at 21 n.5. See Commonwealth v. Daye, 411 Mass. 719, 728-729 (1992).

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<u>Commonwealth v. Adjutant</u>, 443 Mass. 649, 650 (Mass. 2005)

evidence of a victim's prior violent conduct may be probative of whether the victim was the first aggressor where a claim of self-defense has been asserted and the identity of the first [***2] aggressor is in dispute. n1 Consequently, when such circumstances are present, we hold, as a matter of common-law principle, that trial judges have the discretion to admit in evidence specific incidents of violence that the victim is reasonably alleged to have initiated. While there is potential for confusion and prejudice inherent in the admission of this type of evidence, trial judges are well equipped to decide whether the probative value of the evidence proffered outweighs its prejudicial effect in the context of the facts and issues presented in specific cases.

<u>Commonwealth v. Odgren</u>, 455 Mass. 171, 181-182 (Mass. 2009)

Where [***22] HN8rule 17 (a) (2) departs from earlier Massachusetts law is in authorizing the production of subpoenaed records "within a reasonable time prior to the trial or . . . when they are to be offered in evidence" (emphasis added), when the court so directs. The change was "not intended to permit the use of summonses to subvert the discovery rule, Mass. R. Crim. P. 14," as amended, 444 Mass. 1501 (2005), but "to permit the court to avoid delay where the production of many books, papers, documents, or other objects would delay the proceedings if not ordered until the [] commencement" of the trial or evidentiary hearing. Reporters' Notes to Mass. R. Crim. P. 17 (a) (2), supra at 1522. Accord Commonwealth v. Mitchell, supra at 791. See 2 C.A. Wright, Federal Practice and Procedure § 274, at 241-242 & n.15 (3d ed. 2000) (although most of Federal rule 17 [c] "was a restatement of prior law," its allowance of either side to inspect

subpoenaed records "prior to the trial" was "an innovation," meant to expedite trial by providing time and place before trial for inspection of subpoenaed materials).

Unlike rule 14, which governs discovery between the parties, rule 17 allows for pretrial access to records [***23] from third parties. See Commonwealth v. Dwyer, 448 Mass. 122, 140 n.22, 859 N.E.2d 400 (2006); Lampron, 441 Mass. at 268. That access is potentially available to both prosecutors and defendants. See Martin v. Commonwealth, 451 Mass. 113, 123 n.20, 884 N.E.2d 442 (2008); Commonwealth v. Draheim, 447 Mass. 113, 118 n.12, 849 N.E.2d 823 (2006); [*182] Commonwealth v. Mitchell, 444 Mass. at 798 n.17; Lampron, supra at 268-270. See also 2 C.A. Wright, Federal Practice and Procedure, supra at § 274, at 240 (government as well as defendant may use Federal rule 17 [c]); 5 W.R. LaFave, J.H. Israel, N.J. King, & O.S. Kerr, Criminal Procedure § 20.2(d), at 371 (3d ed. 2007) (referring to use of Federal rule 17 [c] by both prosecutors and defendants for pretrial production of records).

In Lampron, we concluded that HN9a party seeking pretrial production of third-party records must file a motion seeking prior judicial approval. See Lampron, 441 Mass. at 270 (only judge has authority, on filing of motion, to issue subpoena for records prior to trial). n21 [**224] Once a subpoena has issued, it may be challenged by a motion to quash or for modification. See id. at 267-268. Accord Commonwealth v. Mitchell, 444 Mass. at 798-799.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS SUFFOLK SUPERIOR COURT

	) **No. SUCR 2010-**
COMMONWEALTH OF MASSACHUSETTS	)
	)
	)
v.	)
	)
	)
Defendant.	)
	)

MOTION FOR DISCOVERY

COMES NOW DEFENDANT, by and through his attorney of record, and hereby moves this Honorable Court, consistent with the statutory requirements of Rule 14 of the Rules of Criminal Procedure and defendant's Constitutional rights under the United States Constitution and the Massachusetts Declaration of Rights to due process and a fair trial, to disclose to the defense and produce and/or allow the inspection, examination or copying of the below set forth items, documentation or information no later than 30 days following any order hereon.

Defendants must be allowed access to all witnesses. M.G.L. c. 258 §3(m) requires that victims be informed of their right to submit to an interview by defense. The SJC noted in Commonwealth v. Beal, 429 Mass 530, 533 (1999) that : "a prosecutor can not actively stand in the way of a defendant questioning witnesses. Nor should a prosecutor discourage witnesses from speaking with the defense." (*Citation omitted).*

2. The criminal records of all non law enforcement witnesses.

3. Copies of any police or other law enforcement reports, state, federal or local, concerning the alleged incident or matters related to this alleged incident. These reports also

include but are not limited to inter office or department memorandums, department "intelligence" reports, and all interview and "incident" reports. If the reports are claimed to be privileged for whatever reason please submit the reports for an in camera review by the court for a determination of whether they contain any facts relevant to the crimes in issue or contain exculpatory information such as the identification of other suspects.

Specifically this request includes all reports (form 26 and otherwise), of all officers that were present at the scene of the alleged offense as required to be compiled by Boston Police policy.

"A defendant has constitutional rights with respect to the statements of persons who were witnesses to an alleged crime which are in the government's possession." See Brady v. Maryland, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963); Commonwealth v. Tucceri, 412 Mass. 401, 404-407, 589 N.E.2d 1216 (1992).

The SJC in Commonwealth v. Durham, 446 Mass. 212 (2006) expressed the basis for more liberal discovery rules.

"The rules of our criminal justice system, including our discovery rules, serve to ensure that defendants are treated fairly. In recognition of the State's power and resources, and the advantage such a position gives the prosecution over the defense in a criminal case, n6 a variety of constitutional, statutory, rule-based and common-law rights are afforded the accused in part to even the playing field. See Wardius v. Oregon, 412 U.S. 470, 480, 93 S. Ct. 2208, 37 L. Ed. 2d 82 (1973) (Douglas, J., concurring in result). As the United States Supreme Court has acknowledged, discovery regimes should similarly be responsive to this imbalance of power. See id. at 475-476 n.9 ("State's inherent information-gathering advantages suggest that . . . any imbalance in discovery . . . should work in the defendant's favor"). See also Commonwealth v. Perez, 698 A.2d 640, 643-644 (Pa. Super. Ct. 1997) ("the more liberal the discovery rules become, the greater the advantage the Commonwealth has in prosecuting its case"). It is therefore unsurprising that "prosecutorial discovery was strongly condemned in early American jurisprudence." Scott v. State, 519 P.2d 774, 778 (Alaska 1974) and cases and treatises cited therein.

4. Any and all witness statements in the possession of any governmental agency involved in the within prosecution, including but not limited to handwritten notes, grand jury testimony, trial transcripts or tape recordings of any relevant interview or hearing. If said statements were not reduced to writing, the substance of any oral statement made by the witness.

5. All written, recorded or transcribed statements of any kind by the defendants concerning the incident. If such has not been reduced to writing, the substance of all oral statements by the defendants which the Commonwealth intends to introduce at trial or a hearing, and identities of person(s) who heard the oral statements.

6. Any and all handwritten notes compiled by the Commonwealth or other law enforcement agents, or any witness, exclusive of attorney work product [unless said asserted work product is the only compilation of the witness statement] relative to the instant investigation. If said notes have been destroyed by any person after compilation of any police or other report please indicate in a written statement that the name of the officer or agents that has destroyed their notes along with the date of said destruction.

7. Copies of all reports, notes or other memoranda of any identification procedure concerning this alleged offense, including all photographs exhibited or names or other identifying information of individuals exhibited in a corporal lineup, whether or not the person charged herein was within said photographic or physical "line-up." If said identification procedure was not reduced to writing, then a written statement of the substance of said procedure.

8. Copies of, or opportunity to inspect any and all documentary and physical evidence, from whatever source, which concerns the subject matter of this investigation, whether or not

the Commonwealth intends to introduce such evidence at trial. Such would include, but is not limited to, clothing, personal property, knives, guns, photographs, ledgers, charts, and diagrams.

______9. All logs of items seized during any search including who conducted such search and who was present during any such search, together with any photographs or videotapes during the conduct of such search.

10. Any and all items of exculpatory information known or available to the prosecution within the meaning of the United States Supreme Court's holding in Kyles v. Whitley, 514 U.S.____, 131 L. Ed. 2d 490, 115 S.Ct. ___ (1995), [exculpatory evidence has been defined in United States v. Owens, 933 F.Supp. 76 (D. Mass. 1996) and the Discovery Rules for the District of Massachusetts, LR 116.1 as any and all information or material that would:

a. Cast doubt on defendant's guilt as to any essential element;

b. Cast doubt on the admissibility of evidence;

c. Cast doubt on the credibility or accuracy of any evidence the government anticipates offering; or

d. Diminishes the degree of culpability of defendant's alleged acts; Such information or materials would include but is not be limited to: witnesses statements, psychiatric reports, criminal history records, pending charges, promises, rewards or inducements by any governmental agent, military discharge papers, court marshals, or other documents that could be utilized for cross examination.

> **Rule 14 (a) (1) of the Massachusetts Rules of Criminal Procedure, requires, among other things, that, on motion, the prosecution must disclose "any facts of an exculpatory nature within the possession, custody, or control of the prosecutor." The rule reaches police officers who are participants in the investigation and presentation of the case and police officers who regularly report to the prosecutor or did so in reference to a given case. See Commonwealth v. Daye, 411 Mass. 719, 734, 587 N.E.2d 194 (1992); Commonwealth v. St. Germain, 381 Mass. 256, 261-262 n.8, 408 N.E.2d 1358 (1980);**

Commonwealth v. Campbell, 378 Mass. 680, 702, 393 N.E.2d 820 (1979)
Commonwealth v. Wanis, 426 Mass. 639, 690 N.E.2d 407 (1998)

11. Evidence of any promises, rewards, compensation or grants of immunity by any governmental agency to any witness that is identified as being involved with this investigation.

12. Please provide the names, address and telephone number of any expert witness the Commonwealth intends to call at trial.

13. Please provide the substance of any opinion evidence to be offered by any expert, including but not limited to, a description of the materials examined, tests performed and a resume of the experts' credentials.

14. Copies of all scientific evidence reports, including copies of all handwritten, type written or tape recorded notes and datum, not previously provided, such as fingerprint comparisons and drug lab back up datum,

15. Copies of all photographs and videotapes taken at or acquired from any locations which are the subject matter of this investigation, including all locations searched, whether or not the Commonwealth intends to introduce said photographs in evidence.

Rule 14 of the Rules of Criminal Procedure, as amended, sets forth a broad range of discovery requirements for both the prosecution and the defense. In Commonwealth v. Durham, 446 Mass. 212 (2006) the SJC recently elaborated on the discovery obligations of the parties:

In view of the text of our rule, and its provisions permitting the discovery of witness lists,

> **together with the fact that our work product doctrine "favors liberal discovery," Commonwealth v. Paszko, [391 Mass 164 (1984)], we decline to invalidate the order [requiring reciprocal discovery] on the basis of non controlling and conflicting authority predicated on quite different discovery practices and principles. Our conclusion comports with the "significant liberalization of criminal discovery," and the notion that "the proper guide to discovery practices should [be] the degree to which discovery will enhance the reliability of factfinding." Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report, supra at 2-3, 8.**

In making discovery requests, a defendant is entitled to relief if he/she establishes a "reasonable possibility based on concrete evidence . . . that access to the [evidence] would have produced evidence favorable to the cause." Commonwealth v. Olszewski, 401 Mass. 749, 753-54 (1988). Even if statements are not reduced to writing, there is often an obligation to do so. See Commonwealth v. Lewinski, 367 Mass. 903 (1975); Commonwealth v. Borans, 379 Mass 117, 153 (1979); Commonwealth v. Gilbert 377 Mass. 887, 893 (1979); Commonwealth v. St. Germain, 381 Mass. 256, 261 n. 5 (1980).

Without question, in the case at bar, the requested items have a reasonable possibility of aiding the defense. Defendant merely seeks reasonable information which the Commonwealth has in its possession or is reasonably ascertainable by them. The evidence sought here would not only directly assist in potential cross-examination of the witnesses but further the search for the truth of the charge.

An order to require the production of handwritten notes, even that of the prosecutor, is well within the discretion of the court. At a minimum doubtful questions concerning any privilege should be resolved by an *in camera* inspection. See e.g.,District Att'y v. Flatley 419 Mass. 507, 512 (1995). While the SJC has, under certain circumstances, rejected a claim of prejudice from the destruction of handwritten notes,

Commonwealth v. Hunter, 426 Mass. 715,719 (1998) that finding was made only because another officer's "notes from the very same interview were in evidence, and the defendant cross-examined both officers about the interview." See also Commonwealth v. Olszewski, 416 Mass. 707, 717, (1993). Of additional note, is that Local Rule 116.9 of the United States District Court for the District of Massachusetts specifically requires the preservation of handwritten notes because of the due process concerns over destruction thereof.

"A rule that encourages prosecutors to make pretrial disclosures of obviously or even arguably exculpatory material would not only promote fair trials but would also help to avoid post-trial judicial review. Judges, therefore, should be sensitive to the allowance of motions for the disclosure of specific information claimed to be exculpatory." Commonwealth v. Tucceri, 412 Mass. 401, 406 (1992); see also Commonwealth v. Smiledge, 419 Mass. 156, 158 (1994).

AFFIDAVIT OF MICHAEL C. BOURBEAU

I, MICHAEL C. BOURBEAU, on oath declare, depose and say that:

I am an attorney licensed to practice law in the states of California and Massachusetts and in each of the federal courts therein as well as the United States Supreme Court.

I have been retained to represent . Pursuant to that representation I have met with the Assistant District Attorney assigned to this matter, conducted an ongoing investigation, and reviewed the documentation that has been provided by the Commonwealth including police reports.

Each of the requested items will assist in the preparation and presentation of the defense in this matter.

I declare under penalty of perjury that the foregoing is true and correct.

Date:

Respectfully submitted,

BOURBEAU & BONILLA, LLP

MICHAEL C. BOURBEAU BBO #545908
Attorney for Defendant

15 Broad Street, Suite 210
Boston, MA 02109
(617) 350-6565

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **SUPERIOR COURT**
NO.

COMMONWEALTH

V.

MOTION FOR INFORMANT INFORMATION

Now comes the defendant in the above-numbered indictment and respectfully moves that this Honorable Court, pursuant to Mass.R.Crim.P. 14(a)(1)(C) and the Fourth, Fifth and Fourteenth Amendments to the Federal Constitution and Article XII of the Massachusetts Declaration of Rights, order the Commonwealth to provide the defendant with the following discovery:

1. **The identity, address and date of birth of the informant. See Commonwealth v. Healis, 31 Mass.App.Ct. 527, 530-531 (1991) (disclosure ordered where the defendant asserted that he was "set-up" by the informant, in part because the informant was the only nongovernment witness and he arranged the circumstances at which the defendant's arrest occurred;) Commonwealth v. Ennis, 1 Mass.App.Ct. 499, 503 (1973) (disclosure ordered in part because the informant arranged the meeting at which the alleged drug sale occurred;) Commonwealth v. Swenson, 386 Mass. 268 (1975); Roviaro v. United States, supra. (The informant's identity is required where it is relevant and helpful to the defense of the accused.)**

2. **Disclosure of all statements made by the informant relevant to this case, the name of the police officer to whom the statements were made, the names of any others present at the time the statement was made and when the statements were made. See Roviaro v. United States, 353 U.S. 53, 60 (1957) (The contents of an informer's communication is not privileged if disclosure will not reveal the informant's identity.)**

2. **Any and all notes, reports, or other documentation regarding any prior or subsequent attempts by the Boston Police, State Police or Federal authorities, including but not limited to informants or other agents, to engage the defendant in the sale of illicit drugs. Further, that if such attempts occurred without any documentation generated, that such attempts be memorialized and turned over to**

the defense. See Commonwealth v. Liang, 434 Mass. 131 (2001); Commonwealth v. Gilbert, 377 Mass. 887 (1979).

4. **Any and all information available to the Commonwealth, or that by the exercise of due diligence can be ascertained by the Commonwealth, of promises, inducements, or rewards of any kind or nature made directly or indirectly to any Commonwealth witness, including but not limited to the informant, whether or not the Commonwealth intends to call that witness at trial. See Giglio v. United States, 405 U.S. 150 (1972); Commonwealth v. Gilday, 382 Mass. 166, 177 (1980); Commonwealth v. St. Germain, 381 Mass. 256, 261-2 n.8 (1980); Commonwealth v. Connor, 392 Mass. 838, 850-2 (1984).**

RELEVANT FACTS

It is alleged that the defendant sold cocaine to undercover Drug Enforcement Agent Rentas on two separate occasions. The defendant, through counsel, asserts that he was entrapped by the informant in this case, a Hispanic male, acting as an agent of the police. (See affidavits of defendant and counsel.) Specifically, that the informant, knowing that defendant's family was facing financial hardship, introduced him both to a distributor of drugs and a buyer identified as Joe, the undercover officer in this case. The Hispanic male contacted the defendant numerous times subsequently and each time defendant said he was not interested in selling drugs. During this time, the informant aggressively and persistently tried to persuade the defendant to sell drugs. Furthermore, after the two alleged sales in this case, the undercover officer contacted the defendant several times in order to get him to sell drugs. The defendant said no on each occasion.[2]

ARGUMENT

1. Defense seeks the identity of the informant.

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[2] This is corroborated by the date of the application for the complaint in this case, some two months after the last alleged transaction.

The privilege ruling government informants is not absolute. "Where the disclosure of an informant's identity, or of the contents of his communication, is relevant and helpful to the defense of the accused, or is essential to a fair determination of the cause, the privilege must give way." Commonwealth v. Ennis, 1 Mass.App.Ct. 499, 501 (172) (citing Roviaro v. United States, 353 U.S. 53 (1957)). The exception to the privilege is well-established and rooted in the due process requirements of the state and federal constitutions. Id.

In Commonwealth v. Healis, 31 Mass.App.Ct. 527 (1991), the defense moved pretrial for the Commonwealth to be ordered to divulge the name, address and record of the informant. Id. at 529. The defendant relied on the fact that he possessed only a limited amount of drugs for personal use, and that he had been "set-up" such that the informant planted more cocaine in his car than he had actually purchased. Id. The Court found that the informant had arranged the meeting at which the defendant was arrested and that the informant had acted under the direction of the police. Id. at 530. Under these circumstances the Court held that the disclosure of the informant's identity was required. Id. at 531. Similarly, the defendant asserts that he was "set-up" (in this case, entrapped) by an informant who was acting as an agent of the police.

Entrapment by an agent acting on behalf of the government, such as an informant, is a well established defense. See Commonwealth v. Tracey, 416 Mass. 528 (1993). To raise such a defense the threshold for the defendant is low. Id. at 536. Such evidence includes "aggressive persuasion, coercive encouragement, lengthy negotiations, pleading or arguing with the defendant, repeated or persistent solicitation, persuasion, importuning, and playing on sympathy or other emotion." Id. The evidence may be based solely on the

defendant's assertion. Id. Entrapment may be attributed to the government where there is evidence of inducement by one acting at the direction of a government agent. Id. at 537.

Here, the defendant has, by way of affidavit, set forth evidence of entrapment by a man acting at the direction of the government.[3] The defendant was approached by a Hispanic male who, knowing his financial difficulties, introduced him to both the buyer and seller of drugs. The buyer was undercover Agent Rentas. The Hispanic male afterward engaged in persistent and aggressive tactics in order to persuade defendant to sell drugs, including numerous contacts and plays on the defendant's sympathy for his children's welfare. Agent Rentas subsequently engaged in persistent efforts to persuade the defendant to sell drugs.

Under Roviaro, supra at 62, the court must employ a balancing test weighing the public interest in protecting the identity of the informant against the right of the defendant to prepare his defense. Factors relevant to the balancing test include the crime charged, the possible defense and the significance of the privileged information sought. Id. See also Commonwealth v. Lugo, 406 Mass. 565, 570-571 (1990). The defendant need not make a specific showing as to exactly what the evidence will prove, especially when there is no way for him to know what it would be. Id. at 572. Where the informant is an active participant in the alleged crime or the only nongovernment witness, disclosure has usually been ordered. See Commonwealth v. Healis, supra at 531.

Applying the balancing test to the case at bar, the identity of the defendant must be divulged. The information sought is "relevant and helpful to the defense of the accused." Roviaro, supra. Specifically, defense asserts that the identity of the informant is needed in

[3] Defense counsel has also asserted her intent to raise the defense of entrapment.

order to investigate his defense of entrapment, challenge the credibility of this witness and potentially the police officers involved, and raises constitutional issues of confrontation. Furthermore, the informant was the only witness present at the time of defendant's entrapment and the informant and actively participated in his entrapment. Under these circumstances, the privilege must give way.

2. Defense seeks all nonprivileged communications between the informant and the police.

"The scope of the [informant] privilege is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of the informer, the contents are not privileged." U.S. v. Roviaro, supra.

As to those communications that would not disclose the identity of the informant (as described under #2 above) defense seeks all that are within the possession or control of the government under the relevancy standard set forth in Mass.R.Crim.P. 14.

Similarly, defense seeks any and all statements, whether written or oral, of any and all attempts to engage the defendant in the sale of illicit drugs, both prior to and subsequent to alleged sales in this case (as described under #3 above).

Under Rule 14, prosecutors must disclose material and relevant written statements within their possession, custody or control upon request of the defense. Commonwealth v. Liang, 434 Mass. 131 (2001). Relevant evidence is any evidence that has a "rational tendency to prove an issue" in the case. Commonwealth v. Drayton, 386 Mass. 39, 48 (1982). Furthermore, such statements, if exculpatory, must be provided to defense whether or not the statements are in writing. See e.g., Commonwealth v. Gilbert, 377 Mass. 887 (1979) ("But it [is], after all, a matter of choice on the [assistant district] attorney's part whether he would reduce to writing the statement made to him, and in the circumstances

we think the question of the attorney's duty should not be made to turn on his own election." Id. at 893.); Commonwealth v.Lewinski, 367 Mass. 889 (1975); Commonwealth v. Stewart, 365 Mass. 99 (1974); Commonwealth v. Lapka, 13 Mass. App. Ct. 24 (1982). Exculpatory evidence includes all evidence, "which provides some significant aid to the defendant's case, whether it furnishes corroboration of the defendant's version of the facts, call into question a material, although not indispensable, element of the prosecution's version of the events, or challenges the credibility of a key Commonwealth witness." Commonwealth v. Ellison, 376 Mass. 1, 22 n. 9. Furthermore, all statements made by the defendant must be provided whether or not such statements are in writing. (A prosecutor should make disclosure of o

ral statements of the defendant when they deliver the written statements of witnesses. Lapka, supra at 31.) See also revised rule Mass.R.Crim.P. 14.

In the case at bar, the unprivileged communications sought are relevant to the defendant's position that he was entrapped by the informant. Specifically, the communications sought are relevant to the agency relationship between Agent Rentas and the informant; the amount of pressure put on the defendant by both the informant and Agent Rentas to sell drugs; any allegation that the defendant was predisposed prior to his alleged involvement in this case; the defendant's resolve not to sell drugs; and other factors likewise relevant to his entrapment defense. The statements are exculpatory to the extent that they either aid his defense of entrapment or challenge the credibility of the Commonwealth's witnesses, and as such should be provided whether or not they are in writing. Finally, all statements of the defendant, whether or not recorded, made to either the officer or the informant must be provided to defense.

3. Defense seeks all promises, inducements or rewards made to the informant or any witness for the prosecution, whether or not the Commonwealth seeks to introduce their testimony at trial.

Evidence of bias in favor of the Commonwealth invokes the defendant's right of confrontation and is exculpatory. See Giglio v. United States, 405 U.S. 150 (1972); Commonwealth v. Gilday, 382 Mass. 166, 177 (1980); Commonwealth v. St. Germain, 381 Mass. 256, 261-2 n.8 (1980); Commonwealth v. Connor, 392 Mass. 838, 850-2 (1984). Any such evidence must therefore be provided to the defense.

Respectfully Submitted,

Victoria Kelleher
Joe Perillo
15 Church Street
Salem MA 01970
(978) 744-4126

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, ss.SUFFOLK SUPERIOR COURT NO. SUCR2004-

COMMONWEALTH

v.

MOTION TO DISCLOSE EVIDENCE OF SPECIFIC ACTS OF VIOLENCE OF SPECIFIC PERSONS

Now comes the defendant who moves that the Court order the Commonwealth, the Boston Police Department and any other agent of the Commonwealth to notify the defendant, pursuant to Commonwealth v. Adjutant, 443 Mass. 649, 664 (2004), of any specific acts of violence of two persons, the deceased X and his brother, XXX.

The defendant specifically requests any and all police reports, investigation reports, or other documents where the facts and circumstances in such documents make reference to any assaultive behavior by the above-named persons or where the above-named persons have alleged an assault of any type was committed upon them by some other person.

As grounds therefore, the defendant states that

1. He is charged with the killing of X;

2. That statements purportedly made to police by the defendant indicate it was in self defense;

3. That the defendant reportedly told the police that he had been assaulted by gunfire and physical threats by X and XXX the day prior to the alleged killing;

4. That at the scene of the alleged killing it was reported that X had a hammer and at one time may have raised it above his head or otherwise attempted to pull it out of his jacket to use it against the defendant;

5. That currently it is alleged that XXX committed a killing on March 18, 2005, by shooting another person. That case is pending in this court. See SUCR2005-10265.

6. The issue of who was the initial aggressor will be a live issue at trial.

7. Much of this information is in the custody and control of the assistant district attorney and its agents.

8. The burden on the Commonwealth to obtain this information is minimal.

9. It would be extremely unfair to deny the defendant access to this potentially exculpatory information.

To deny the defendant access of this information, when requested, would prevent himfrom effectively investigating and preparing his defense. See Commonwealth v. Adjutant, 443 Mass. 649, 664 (2004); Commonwealth v. Baker, 440 Mass. 519 (2003)(defense counsel was ineffective for not conducting full investigation and requesting funds for proper presentation of the defense). Failure to provide this potentially exculpatory, relevant and material information would violate the defendant's rights guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article XII of the Declaration of Rights to the Massachusetts Constitution.

By his attorney,
Larry Tipton, BBO # 552557
Law Office of Larry Tipton
60 State Street Suite 700
Boston, MA 02109
(617) 878-2078

AFFIDAVIT OF COUNSEL

In support of this motion, I, Larry Tipton, state the following to be true to the best of my knowledge and belief under the pains and penalties of perjury:

10. The Committee for Public Counsel Services has assigned counsel to represent the defendant on this matter. The defendant is currently being held on this matter.

11. The defendant is charged with murder.

12. The discovery requested is necessary for the adequate preparation of the defense.

13. Discovery documents produced contain references to at least one uncharged armed assault allegation against the defendant. The defendant is known to the alleged victim and his relatives. It is probable that instances of bad acts will be attempted to be introduced at trial.

14. The defendant purportedly gave statements to the police wherein he described his actions as self-defense, that he had been shot at and attached the day before, that he believed that a person who is believed to be XXX was present the day before and may had fired a gun at the defendant.

15. XXX reportedly stated to police that he was involved in an altercation with the defendant, wherein a knife was reportedly brandished and Hodge reported that his jacket was cut.

16. XXX is currently awaiting trial on a charge of murder for shooting a person coming off an MBTA bus, on or around March 18, 2005.

Larry Tipton, BBO # 552557
Law Office of Larry Tipton
60 State Street Suite 700
Boston, MA 02109 (617) 878-2078

Dated: September 27, 2005

COMMONWEALTH OF MASSACHUSETTS
EAST BOSTON DISTRICT COURT

SUFFOLK SS:

COMMONWEALTH OF MASSACHUSETTS,	)
	) No. 06CR
Plaintiff,	)
	)
v.	)
	)
XXX	)
Defendant.	)
	)

MOTION FOR DISCOVERY ...”GANG” INFORMATION

COMES NOW DEFENDANT XXX, by and through his attorney of record, and hereby moves this Honorable Court, consistent with the statutory requirements of Rule 14 of the Rules of Criminal Procedure and defendant's Constitutional rights under the United States Constitution and the Massachusetts Declaration of Rights to due process and a fair trial, to disclose to the defense and produce and/or allow the inspection, examination or copying of the below set forth items, documentation or information.

The Boston Police Incident Report makes reference to MS-13's and 18th Street and infers that there is animosity within the groups. The Commonwealth has represented in open court that it intends to introduce gang evidence. With regards to MS-13's and 18th Street evidence, the defendant respectfully requests that the following information be provided:

1. FIO’s (BPD Form 2487), Boston Police Booking Forms and Boston Police 1.1 of MS-13's and 18th Street generated by the Boston

Police Department within 1 year prior to the alleged incident which reference the following individuals:

A. XXX

B. X

C. XYX

D. ZXZ

2. FIO's, incident reports, memorandums, compilations of M-13's and 18th Street which specifically make reference to their locality, grafitti markings, and activities considered to be gang related. See, Commonwealth v. Swafford, 441 Mass. 329 (2004) (the Commonwealth was allowed to present gang evidence such as the gang's locality, its graffiti marking (an insignia containing the letters "TSP"), and its membership. The Commonwealth presented this evidence in order to establish the defendants' motive: retribution for the beating of a fellow gang member.)

3. The name of the individual which the Commonwealth will use at trial to present the so called gang evidence.

4. The basis of the opinion of the individual used to introduce the gang evidence.

5. Evidence of any promises, rewards, compensation or grants of immunity by any governmental agency to any witness that is identified as being involved with this investigation.

6. Please provide the names, address and telephone number of any expert witness the Commonwealth intends to call at trial.

AFFIDAVIT OF Victoria M. Bonilla-Argudo

I, Victoria M. Bonilla, on oath declare, depose and say that:

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I am an attorney licensed to practice law in the state of Massachusetts and in each of the federal courts therein.

I have been appointed to represent defendant, XXX, by this Honorable Court. Pursuant to that representation I have met with the Assistant District Attorney assigned to this matter, conducted an ongoing investigation, and reviewed the documentation that has been provided by the Commonwealth including police reports. Given such a situation defendant's right to a fair trial may depend on accurate and timely reports of what witnesses saw or didn't see, or what was said by the defendant, consistent or inconsistent with subsequent statements or testimony. Each of the requested items will assist in the preparation and presentation of the defense in this matter.

I declare under penalty of perjury that the foregoing is true and correct.

Date: September 8, 2006

Respectfully submitted,

BOURBEAU & BONILLA

Victoria M. Bonilla-Argudo BBO #558750
Attorney for Defendant

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(617) 350-6868

COMMONWEALTH OF MASSACHUSETTS

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Hampden, ss. Superior Court Department of the Trial Court.

COMMONWEALTH OF MASSACHUSETTS)
)
vs.) Indictment No. 06
)
XXX,)
Defendant.)

DEFENDANT'S OPPOSITION TO PROSECUTION'S MOTION FOR PROTECTIVE ORDER

INTRODUCTION

The Commonwealth invokes Rule 14(a)(6) of the Rules of Criminal Procedure as authority for the entry of a protective order which it seeks to justify on the basis of evidence which it proposes to share only with the Court. Defendant XXX opposes the motion on the grounds [1] although it depends on establishing facts to justify the relief it requests, it is not supported by an affidavit as required by Rule 13(a)(2); [2] that the predicates required by Rule 14(a)(6) have not been established; [3] that the proposed order is vague and overly broad; and [4] that the proposed order would violated his right to effective assistance of counsel and his right to participate in the preparation and conduct of his own defense.

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The Commonwealth wants the protective order to impose the following restrictions on the defendant, personally:

> [1] No discovery material can be shown to the defendant or any other person who is not employed or retained to assist in the defense of this case unless the identifying information of an individual who was named in the affidavit as the source of information submitted in support of the application for a warrant to search the premises at 50 Putnam Circle has been redacted from the discovery material before it is shown to that person.
> [2] The same prohibition applied to unredacted discovery previously furnished in this case or in "any underlying District Court case."
> [3] The same prohibition applied to any person to whom unredacted discovery materials are disclosed.
> [4] "This order shall also apply to any Personal Information contained within criminal record (CORI) information obtained from the Board of Probation or Probation Department or any other derivative source."[4]

Without conceding that a protective order should be issued, Defendant Rosario would like to point out that this proposed order is duplicative; the categories of information covered overlap; and the essential terms are vague and do not clearly designate the information to which they apply. Should the Court issue such an order it will be very difficult to determine whether it has been violated, should that issue later arise.

Rule 14(a)(6) provides:

> "Upon a sufficient showing, the judge may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. The judge may alter the time requirements of this rule. The judge may, for cause shown, grant discovery to a defendant on the condition that the material to be discovered be available only to counsel for the defendant."

Defendant Rosario submits that this rule cannot be fairly and evenhandedly applied

[4] "For purposes of this order, 'Personal Information' includes the following information relating to any person (except the defendant) that is contained within discovery material provided in this case: "Date of Birth, Social Security Number, Driver's License Number, Motor vehicle information Maiden name, Mother's name, Father's name, Home Phone, Cell Phone, Home Address, Business Address, or School Name or Address."

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because it is so vague as to be standardless, and it authorizes the Court to issue orders which would violate the defendant's right to due process, right to defend himself and right to counsel. Defendant XXX further submits that whatever showing is required by this provision must be made with respect to each aspect of the prosecution's request.

The factual basis of the prosecution's motion appears to be that, when State Police Daniel Soto prepared his August 17, 2006 application and affidavit requesting a warrant to search Mr. XXX's apartment in Springfield, in the affidavit he named an individual who was the source of much of his probable cause evidence. On September 25, 2006 Holyoke police executed a search warrant at 39 Girard Way, Apt. E, in Holyoke and found a few flyers bearing the photograph of Trooper Soto's August 17, 2006 source of information and designating that source as an informant. The flyer states [with respect to whom is not clear] that his "papers are coming soon." The prosecution opines that the "papers" which "are coming soon" are the Soto August 17, 2006 affidavit and that Mr. XXX intends to disseminate this affidavit to others when he obtains a copy of it. This scenario makes "redaction of the materials warranted and necessary."

The Commonwealth omits to inform the Court that it has already undertaken to grant itself the remedy it seeks here; this motion is actually a request that the Court rubber stamp what the prosecution has already done unilaterally. The Commonwealth here has proceeded as if it has the authority in the first instance to take whatever steps it deems appropriate and then, when convenience or objection by the defense dictates, induce the Court to ratify its usurpatious conduct.

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The discovery compliance date in Mr. XXX's case was November 10, 2006 but nothing was produced on that date. See Defendant's Exhibit A, November 16, 2006 letter of Linda J. Thompson, Esq., attached hereto. The defendant does not request that this document be sealed. On November 14, 2006 the District Attorney's office issued an order directing the Sheriff to bring Mr. XXX to the courthouse despite the fact that no motion was pending and nothing had been scheduled in his case. Mr. XXX got only as far as the lockup; he was not taken into the courtroom on that occasion. Attorney Thompson was not notified of this action, which appears to have been taken to facilitate a "judge-shopping" effort by the prosecution. Exhibit A.

In her November 16 letter, Attorney Thompson informed Assistant District Attorney Dolan that her investigation had disclosed that there was no record of a district court search warrant having been issued to authorize the August 17, 2006 search of Mr. XXX's apartment, and there was no record of an order impounding search warrant documents which might have been filed in the district court regarding this search. Exhibit A. On November 17, 2006 ADA Dolan faxed to Attorney Thompson an extensively redacted copy of Tpr. Soto's application and affidavit, the search warrant and the return, each dated August 17, 2006. In addition, he faxed a copy of an August 23, 2006 Motion To Seal And Impound granted that date by a justice of the Springfield District Court. In the same transmission, Attorney Thompson received a copy of an October 24, 2006 Motion To Disclose, granted by the same District Court justice, authorizing ADA Dolan to disclose the warrant, application and return "in accordance

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with its discovery obligations in a pending criminal prosecution (commonwealth v. XXX, Superior Court Indictment No. 06-1188." Nothing in the District Court motion requested permission to redact the search warrant materials and nothing in the District Court's order authorized any redaction. The copy of Tpr. Soto's affidavit furnished to Attorney Thompson was significantly redacted. In paragraph 8 the affidavit states that in an August 17, 2006 interview with Tpr. Soto and Holyoke Det. Barkyoumb, the "redacted" individual "stated he would cooperate, adding that he was also willing to be named in this affidavit and would testify in court if needed." In addition, a police report of the execution of the warrant to search Mr. XXX's home states that a copy of the warrant which the prosecution now wants to secrete with a protective order was left with Mr. XXX at the time it was executed. This assertion is not true but it does belie the now-asserted need to impound the search warrant.

Thus for the past month the prosecution has had written permission from the judge who impounded them to provide copies of the affidavit, warrant and return to Defendant XXX but failed to do so within the required time. It unilaterally redacted the affidavit rather than asking either the District Court judge or a justice of the Superior Court to make that judgment. This redaction is inconsistent with Judge Beatty's order authorizing release of the affidavit to comply with the prosecution's discovery obligations and it violates Rule 14, which does not permit redaction absent a protective order. The prosecution has taken these unilateral actions outside the judicial process to protect an individual who from the outset has agreed to be identified in the affidavit and to testify if needed. This usurpation of the judicial function should be penalized through discovery sanctions.

With this motion, the prosecution seeks to "protect the privacy and safety of victims and witnesses." It cites no authority on which the Court might issue a protective order to protect someone's privacy. No victim is identified in these papers. The only witness specified in them has volunteered to let his role be made public. In sum, the

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motion does not present an appropriate occasion for the Court's exercise of its Rule 14(a)(6) powers and so should be denied.

I. The Motion Should Be Denied Because It Does Not Comply With The Requirements Of Rule 13.

Rule 13(a)(2) requires that all pretrial motions be supported by an affidavit asserting facts based on the personal knowledge of the affiant, even if the affiant is a party's counsel. Commonwealth v. Lampron, 441 Mass 265, 270-271 (2004); Commonwealth v. Trigones, 397 Mass 633, 641 n. 4 (1986)[prosecutor's affidavit must meet same standard as defense affidavit]; Commonwealth v. Santosuosso, 23 Mass App Ct 310, 314-315 (1986). A motion which does not meet this standard need not be heard. Commonwealth v. Benjamin, 358 Mass 672, 676 n. 5 (1971) ["The requirement of really adequate affidavits should be strictly enforced as a matter of good judicial administration."].

Although it makes serious factual claims, the prosecution's motion is unsupported by any affidavit or other offer of proof. The record demonstrates that the prosecution team has in this case engaged in surreptitious, irregular conduct regarding these search warrant documents which casts doubt on the integrity of its presentation. The sole documentary support offered with its motion has not been served upon the defense, despite the fact that no order impounding it or otherwise excusing it from complying with the service requirements of Rules 13(a)(2) and (3) ["A copy of any pretrial motion and supporting affidavits shall be served on all parties or their attorneys pursuant to Rule 32

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at the time the originals are filed"] and Rule 32(a).

II. Objection To Request That Exhibit #1 Be Sealed And Motion To Strike Or For Disclosure Of Evidence.

The prosecution does not enjoy carte blanche to file documents, unilaterally withhold them from the defense, and obtain a ruling on evidence kept secret from the defendant. No reason has been given for this method of proceeding and no statute, case law or other authority has been offered to justify it.

As a matter of due process, Defendant XXX is entitled to notice and the right to be heard on the question of whether this protective order should be issued. The right to see and contest the evidence being considered by the Court is fundamental to due process. The defendant moves to strike Exhibit #1, or, if it is to be considered, for disclosure to him with an opportunity to investigate it and to present countervailing evidence.

The use of secret evidence to support or determine a motion of this importance is inimical to Mr. XXX's due process rights. No showing of necessity has been attempted, not even a conclusory assertion that disclosure of the flyer would endanger an individual or jeopardize an investigation. The implication of the materials submitted is that this flyer has already been circulated, so no evident purpose would be served by impounding it, other than hamstringing Mr. XXX's ability to respond effectively to the prosecution's allegations. The request to impound this document, and the grounds and authority supporting the request must, like other pretrial motions, be made in writing, and the failure to comply with this rule precludes consideration of the motion. Rule 13(a)(1); Commonwealth v. Pope, 392 Mass 493, 498 n. 8 (1984). The prosecution's single sentence presentation of this request ["The Commonwealth also requests that Exhibit # 1

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be sealed.”] does not meet the Rule 13 requirements that each ground for relief be stated in a separate paragraph, the grounds on which it is based shall be stated separately, and “all reasons...then available...shall be set forth with particularity.” No affidavit supports this request either. One purpose of these requirements is to inform the opposing party of the issues to be litigated, another is to inform the Court of the issues and to assist it in determining whether an evidentiary hearing is called for. Lampron, supra. The Court should require the prosecution to provide a copy of Exhibit #1 to the defense forthwith.

If granted, the protective order sought by the prosecution here will drastically curtail Mr. XXX’s ability to participate in his own defense and will impair his rights to due process and to effective assistance of counsel. In Re Taylor, 567 F2d 1183, 1187 (2nd Cir. 1977). In Taylor, the Second Circuit held that, even when the document is related to grand jury proceedings, the government must establish a “compelling interest” in secrecy to justify depriving the defendant of “the root requirements of due process, i.e., notice setting forth the alleged misconduct with particularlity and an opportunity for a hearing....” Id., at 1188. The prosecution here has established no compelling interest in keeping Exhibit #1 secret. It does not allege that disclosure of this document will never be appropriate, nor that the document contains singular information affecting the safety of the informant whom Tpr. Soto has already “outed.” Mr. XXX’s right to effectively defend himself and his right to effective assistance of counsel far outweigh the prosecution’s scantly asserted interest in secrecy.

The factual basis for this motion is dubious and is vigorously contested.

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Defendant XXX will request an evidentiary hearing in the event the prosecution files an affidavit which establishes the need for one. Given the significant legal issues at stake, the purposes of Rule 13(a)(2)'s affidavit requirement make it imperative that this requirement be "strictly enforced." Exhibit #1 should be stricken or disclosed before any further proceeding on this motion.

III. The Requested Protective Order Violates Defendant XXX's Right To Prepare And Present His Defense And To Effective Assistance Of Counsel And Should Be Denied.

A. Consultation With The Defendant Is Indispensable To The Provision Of Effective Assistance Of Counsel.

The defendant cannot constitutionally be excluded from the process of reviewing and evaluating pretrial discovery materials. This proposition follows unavoidably from the role of the defendant in the defense of the charges against him or her. Further, the fact that the defendant has obtained or been provided the assistance of counsel cannot be used to eliminate his or her role in the investigation and preparation of the defense.

The right to counsel is the right to assistance of counsel, while the right to defend is personal to the defendant. Faretta v. California, 422 U.S. 806, 834 (1975). Counsel cannot be forced on a defendant, who is entitled to be the captain of his or her own defense even when represented by counsel. See, Article 12: "every subject shall have a right...to be fully heard in his defense by himself, or his counsel, at his election." And when the defendant is represented by counsel, he or she is entitled to effective assistance

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of counsel. Lavallee v. Justices In The Hampden Superior Court, 442 Mass 228, 235 (2004). Supervising the pretrial fact investigation is a crucial function of defense counsel, and there is usually no way for counsel to meet this constitutional responsibility without consulting closely with the defendant while doing so.

In its seminal opinion defining the right to effective assistance of counsel, the Supreme Court described the constitutionally necessary level of interaction between the defendant and effective counsel regarding pretrial defense investigation:

> "These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. As the Court of Appeals concluded, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.
>
> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into **counsel's conversations with the defendant** may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions."

Strickland v. Washington, 466 U.S. 668, 690-691 (1984)[emphasis added]. The Supreme Court's description of defendant-defense attorney interaction during trial is also an apt description of that interaction during pretrial investigation:

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> "It is common practice during [overnight] recesses for an accused and counsel to discuss the events of the day's trial. Such recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. The lawyer may need to obtain from his client information made relevant by the day's testimony, or he may need to pursue inquiry along lines not explored earlier."

Geders v. United States, 425 U.S. 80, 88 (1976). In Geders the Court held that the interests served by the practice of sequestering witnesses had to yield to the defendant's Sixth Amendment right to counsel. Id., at 91. Concurring, Justices Marshall and Brennan characterized the Geders holding this way:

> "Thus, as the Court holds, a defendant who claims that an order prohibiting communication with his lawyer impinges upon his Sixth Amendment right to counsel need not make a preliminary showing of prejudice. Such an order is inherently suspect, and requires initial justification by the Government.
>
> The only justification expressly considered by the Court in its opinion is the desire to avoid the risk of unethical counseling by an attorney. The Court holds that the fear of unethical conduct is not a sufficient ground for an order barring overnight communication between a defendant and his attorney, and **the same would hold true absent the most unusual circumstances, I take it, for an order barring consultation between a defendant and his attorney at any time before or during the trial**"

Id., at 92-93 [emphasis added]. Granting the order requested by the Commonwealth will clearly violate this principle and may well constitute reversible constitutional error at this point in the proceedings.

B. Consultation And Investigation Must Begin Promptly.

The Supreme Judicial Court's discussion of the importance of prompt appointment of counsel likewise indirectly acknowledges the indispensable part played by consultation between defendant and counsel about investigation of the facts. It also emphasizes the importance of prompt investigation and the prejudicial consequences of delaying the defense investigation:

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> "There are myriad responsibilities that counsel may be required to undertake that must be completed long before trial if the defendant is to benefit meaningfully from his right to counsel under art. 12. (Citation omitted). **These duties include interviewing the defendant and witnesses while events are fresh in their memories, preserving physical evidence that may be important to the defense, and locating potential defense witnesses.** The effects of the passage of time on memory or the preservation of physical evidence are so familiar that the importance of prompt pretrial preparation cannot be overstated.
>
> The right to counsel also includes **assistance in making decisions about specific defenses and trial strategies**, which may rise to the level of 'critical stage' of the process. * * * *
>
> Our Rules of Criminal Procedure acknowledge the importance of prompt pretrial preparation to the fairness of criminal proceedings. * * * *
>
> In view of the importance of prompt pretrial investigation and preparation, and the serious likelihood that without the assistance of counsel decisions that are themselves critical stages are not being made, the petitioners currently are being deprived of counsel to an extent that raises concerns about whether they will ultimately receive the effective assistance of trail counsel. **This is particularly true for petitioners held in lieu of bail or under an order of preventive detention, who are virtually powerless to obtain a lawyer on their own or to begin working on their own defense. The harm from inaction over a period of time is cumulative.** It is precisely for these reasons that [Rule 7(b), ©)] requires an appearance of counsel to be filed at the arraignment, with certain exceptions."

Lavallee, 442 Mass at 235-236 [emphasis added].

The proposed protective order will wreck havoc on the defendant's right to prepare his defense by prompt investigation of the facts while the witnesses are likely still to be in this geographical area and the events in question – which may well turn on fairly fine points of timing, given the fact that the events described in Tpr. Soto's affidavit all occurred within a two-hour period – are still fresh in the witness's minds. His right to present all proofs in his favor, protected by Art. 12 and the Sixth Amendment, depends upon this immediate access to the evidence.

The prosecution here seeks to hobble the defense from behind a screen of secrecy erected in large part by ignoring its legal obligations and by usurping judicial authority.

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Its failure to comply with Rule 13's requirements reflects the shoddy quality of its reasons for asking this Court to ratify its ultra vires activities and should be rejected.

C. No Cause Has Been Shown For The Requested Protective Order.

Rule 14(a)(6) requires a "sufficient showing" or "cause shown" to justify the request for a protective order. Because the materials at issue are automatic discovery within the scope of Rule 14(a)(1)(vii) the prosecution bears the burden of production and proof on this motion, if for no other reason than that it has kept the facts on which it is proceeding from the defendant.

Defendant XXX is at the distinct disadvantage of having to argue the merits of facts not known to him. It is fair to note that the prosecutor's motion does not assert that the flyer [Exhibit #1] urges any violent activity toward the person supposedly pictured in it, and does not allege that, although the person's photograph may have been circulated in Holyoke, any threats have been made to him. This individual agreed to be identified in the search warrant affidavit and to testify in court, thus publicly presenting himself as an informant. Further, the unredacted details of Tpr. Soto's affidavit present the redacted informant as a male who picked up Mr. XXX at the State Street Bar at about 5:30 p.m. on August 17, 2006, drove him to his home and waited while Mr. XXX went inside and came back out to the car with 50 grams of crack for the redacted informant, who then took him back to the State Street Bar. Exhibit F. The idea that this person's identity can be kept secret is not credible and the request that Mr. XXX be barred from communicating with his lawyer about this person's identity is especially pernicious and

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subversive of his right to counsel. The motion is based on other counter-intuitive assumptions. There is no reason to think that many of the flyers referred to have not already been circulated.

But nothing in the prosecution's presentation links these flyers to Mr. XXX or his case. It is not alleged that the unredacted informant has assisted only in Mr. XXX's case. The flyers must have been created some time before September 25, 2006. Mr. XXX was indicted September 26, 2006. The prosecution has not alleged that there was any basis on which Mr. XXX might have expected that papers were about to be disclosed in his case which would identify the redacted informant. In short, the "Commonwealth's opinion" that the "papers (that) are coming soon" is Tpr. Soto's search warrant affidavit is sheer speculation. "Protective orders are designed for the unusual case in which the granting of discovery will work to the injury of the person whose material is to be discovered or to the injury of some third person." Reporters Notes to Rule 14(a)(6). The prosecution has utterly failed to establish a factual basis for either its unilateral redactions or for the drastic interference in Mr. XXX's attorney-client relationship which it requests.

D. An Evidentiary Hearing Should Be Held Into The Prosecution's Irregular Conduct.

Although no basis has been presented for granting the prosecution's requested protective order, the information before the Court demonstrates that the prosecution team has engaged in a course of conduct which appears to be highly irregular and to have encroached on judicial prerogatives. The August 17, 2006 warrant was executed that day

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but the officers did not serve a copy on Mr. XXX, who was present. A return was made the same day, but defense counsel's inquiries as recently as November 16, 2006 disclosed that the staff for the Clerk of the District Court could not locate any record that this warrant had been issued or executed and had no file on it. Exhibit A. The August 23, 2006 Motion To Seal And Impound, endorsed by District Court Justice Beatty, is captioned "Commonwealth v. Jane/John Doe" and bears no docket number. Exhibit C. The prosecutor's October 24, 2006 Motion To Disclose, endorsed on that date by Judge Beatty, has a Superior Court heading, no docket number, and is captioned "In Re A Warrant Issued By This Court Under MGL Chapter 272 Section 99." Exhibit D. Judge Beatty's separate order dated October 24, 2006, explicitly authorizing disclosure of "a certified copy of the documents submitted in support of a warrant issued pursuant to MGL Chapter 276 Section 1, authorizing the search of 50 Putnam Circle in the City of Springfield on August 17, 2006" has an incomplete District Court heading, no docket number, and is captioned "ORDER." That order concludes: "The Order to seal remains in effect for all other purposes." Exhibit #. The order to seal is in the form of an endorsement, "allowed," with no elaboration. The motion states that the purpose is to protect "a continuing investigation and prosecution." As relief, it requests "an order that any supporting documents regarding this action be sealed and impounded until such time as the investigation has been completed and the matter has been presented for complaint or indictment." Although Defendant XXX has been indicted, he is unable to determine whether the limiting terms of the order have been met, and the fact that the order remains

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in effect for all other purposes leaves him and his counsel with no way to determine whether or to what extent it limits their right to make use of the materials that have been disclosed to them. For this reason, none of these documents has been appended to this Opposition; the defendant will submit them to the Court at the time of hearing.

The course of these doings raises questions whether the Clerk of the District Court has made appropriate records or maintained custody of the records of the August 17, 2006 search warrant proceedings and subsequent impoundment and release motions and orders. This Court should schedule an evidentiary hearing at which these irregularities can be clarified, rectified if need be.

Respectfully submitted,
XXX

By_________________________

_

Linda J. Thompson
BBO # 496840
Thompson & Thompson,
P.C.
1331 Main Street, Suite

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COMMONWEALTH OF MASSACHUSETTS
SUFFOLK SUPERIOR COURT

SUFFOLK SS:

COMMONWEALTH OF MASSACHUSETTS,	)	No. SUCR2010-
Plaintiff,	)	
v.	)	
XXX	)	
Defendant.	)	

DEFENDANT XXX's OPPOSITION TO COMMONWEALTH's

MOTION FOR PROTECTIVE ORDER

COMES NOW DEFENDANT, XXX, by and through his attorney of record, who hereby submits the following memorandum in opposition to the Commonwealth's Motion for Protective Order:

Citing Mass. Rule of Crim. P. 14(a)(6) which allows for judicial limitations on discovery disclosure "[u]pon a sufficient showing," the Commonwealth seeks to prohibit the disclosure of not only the addresses of civilian witnesses, but also *the names of the witnesses* to the client "in writing" or "in any other form until after a date set by this Court." The Commonwealth makes said request without any affidavit as required by M.R. Cr. P. Rule 13(a)(2) or specific reference to specific witnesses who may be concerned for their safety. Paragraph O, page 6 of the motion simply makes unsupported

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general accusations that "witnesses" have indicated safety concerns.

In making such bold assertions, the Commonwealth fails to disclose to the Court that many of the witnesses have lengthy criminal records for firearms and other violent offenses with no reason to fear Mr. XXX or anyone else. See attached redacted BOP record of one of the Commonwealth's main witnesses. Not only does that witness (and other witnesses) have a substantial motive to fabricate the allegations, there is absolutely no basis for the witness to claim he is in "danger" if his identity is disclosed to Mr. XXX as Mr. XXX has been made aware of his name and accusations he has made for several years. In fact, several of the "civilian" witnesses in this case were previously disclosed by the Commonwealth to Mr. XXX in 2007 when he was tried, **and acquitted**, of another alleged homicide that occurred near the time of the instant offense. Strangely, the Commonwealth now raises allegations of "safety" concerns for the very same witnesses that they previously disclosed including one who previously testified against Mr. XXX.

Quite frankly, the Commonwealth's allegations of "safety concerns for the witnesses if their names were to be disclosed is disingenuous at best. See attached affidavit of below signed counsel. Prior to filing the motion for protective order the Commonwealth had *agreed* with undersigned counsel that the names of the witnesses could be disclosed to the clients as long as the names and addresses were "blacked out" on the written discovery provided to the client. Because co-counsel would not agree to the proposed limitation the Commonwealth sought a more restrictive order that limits the

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ability of counsel to properly investigate the case and provide effective representation.

A defendant in a criminal case is entitled to the effective assistance of counsel pursuant to the Sixth Amendment to the United States Constitution and Article Twelve of the Massachusetts Declaration of Rights. See Mickens v. Taylor, 535 U.S. 162 (2002); Commonwealth v. Britto, 433 Mass. 596 (2001).[5]

Effective assistance of counsel begins with proper investigation of the government's case. In Wiggins v. Smith, 539 U.S. 510 (2003), defense counsel's failure to conduct investigation as to defendant's social history in a death penalty case violated the defendant's Sixth Amendment Right to Counsel. The Court held that counsel may make a tactical decision in a death penalty sentencing hearing not to present defendant's history, but only after an adequate investigation has taken place so that a reasoned decision may be made. "Strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgments support the limitations on investigation". Id. at 528.) In determining a standard for reasonable professional judgment, the Court referred to ABA standards for effective assistance of counsel.

The American Bar Association, the National Legal Aid and Defense Association

[5] As the Supreme Judicial Court stated in Commonwealth v. Hodge, 386 Mass. 165, 169 (1982), in discussing the differences between the Sixth Amendment and the Massachusetts Declaration of Rights, the "Declaration of Rights can … provide greater safeguards than the Bill of Rights of the United States Constitution."

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and the Committee for Public Counsel Services have all provided standards for investigation. The ABA describes in Standard 4.4.1 counsel's duty to investigate as follows:

> (a) Defense counsel should conduct a prompt investigation of the circumstances of the case and *explore all avenues* leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. (Emphasis added).

See also Strickland v. Washington, 466 U.S. 668 (1984); Williams v. Taylor, 529 U.S. 362 (2000); House v. Balkcom, 725 F.2d 608, 618 (C.A. Ga. 1984) (Defendant denied effective assistance of counsel in counsel's total failure to prepare and investigate, including the failure to interview or attempt to interview prosecution witnesses. " While we do not require that a lawyer be a private investigator in order to discern every possible avenue which may hurt or help the client, we do require that the lawyer make an effort to investigate the obvious. Pretrial investigation, principally because it provides a basis upon which most of the defense case must rest, is, perhaps, the most critical stage of a lawyer's preparation.")

Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures provides the following standard concerning investigation:

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> 4.1 Investigation
>
> Counsel should promptly investigate the circumstances of the case and explore all avenues leading to facts relevant both to the merits and to the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities ***as well as from witnesses identified by the client or by others.***
> (Emphasis added).

See also, Powell v. Alabama, 287 U.S. 45, 71 (1932) (" It is not enough to assume that counsel thus precipitated into the case thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thorough-going investigation might disclose as to the facts. No attempt was made to investigate. No opportunity to do so was given…Under the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense." Commonwealth v. Alvarez, 433 Mass. 93, (2000) (Defense counsel failure to obtain, review and provide defendant's medical records to his psychiatric expert was ineffective assistance of counsel requiring reversal) ; Commonwealth v. Hill, 432 Mass. 704 (2000). (Defense counsel's failure to interview a witness who testified in co-defendant's trial with, the excuse that witness was hostile and a crack head did not excuse his failure to investigate and required reversal for ineffective assistance of counsel); Commonwealth v. Berrios, 64 Mass. App. Ct. 541, 550 (2005) (Defendant's guilty plea vacated and motion for new trial allowed where trial counsel did not investigate the testimony of a key witness in co-defendant's case who changed his testimony of Defendant's role). When counsel is hampered in his investigation and

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preparation for trial, the defendant is denied his Sixth Amendment right. United States v. Cronic, 466 U.S. 648, 659 (1984). See, "too Little, Too Late: Ineffective Assistance of Counsel, The Duty to Investigate, and Pretrial Discovery in Criminal Cases", Roberts, J. 31 Fordham Urban Law Journal 1097, 1105 (May, 2004):

> The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.Such fact development cannot take place without investigation. In turn, adversarial balance cannot take place without investigation by both the prosecution and the defense. Thus, defense counsel's duty to investigate rests on the recognition of pretrial investigation as perhaps the most critical stage of a lawyer's preparation.

In the case at bar the Commonwealth seeks to prevent

Mr. XXX from being able to assist in his defense by discussing with his counsel what he knows about the witnesses against him, including any motive they may have for testifying falsely. In that several of the witnesses have been previously disclosed to him by the Commonwealth, there is simply no good cause for the type of protective order sought here. On the other hand, counsel would agree to the limitations previously agreed to; the limitations on addresses and written materials.

The Reporter's Notes to M.R.Cr.P. Rule 14 make clear that protective orders are "for the **unusual** case in which the granting of discovery will work to the injury of the person whose material is to discovered or some third person." There has been no such showing by the Commonwealth. In 2008, the SJC in Commonwealth v. Holliday, 450

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Mass. 794, 799 -807 (2008) weighed in on protective orders in rival “gang” cases where the SJC found witness safety “inherent in the situation.” Of note is that there is **no such allegation** in the case at bar. In Holliday, id. at 802, the SJC made clear that “it is beyond debate that a defendant has the right to gain access to relevant evidence that bears on the question of guilt or innocence or that will otherwise help his defense, and to use that evidence to confront witnesses through cross-examination” yet found that the trial judge there did not abuse its discretion in granting the limited order. In making that finding the SJC took specific note that the protective order there, although restrictive, “**did not prevent defense counsel from telling who the witnesses were...nor did it prevent counsel from reviewing the witness statements with them**, emphasis added. The SJC then when on to say that “we need not decide whether [the order providing redacted copies of names and addresses to a defendant] might ever unconstitutionally impinge a defendant’s right to a fair trial” because the agreed upon method of redaction and oral disclosure was consistent with the purpose of the order. Id. at 805.

WHEREFORE, the Commonwealth has failed to identify any basis for the allegation that **all** civilian witnesses have “safety” concerns and must be kept secret from Mr. XXX. Preventing counsel from discussing the identity of witnesses with Mr. XXX would violate his rights to effective representation of counsel and a fair trial because such would prevent Mr. XXX from assisting in his own defense inclusive of his right to confrontation and cross examination of the witnesses against him. The Commonwealth’s motion, as drafted, must be denied in the interest of justice.

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Date: July 27, 2010

Respectfully submitted,

BOURBEAU & BONILLA, LLP

MICHAEL C. BOURBEAU, BBO #545908
77 Central Street
Boston, MA 02109
(617) 350-6565

Attorney for Defendant

AFFIDAVIT OF MICHAEL C. BOURBEAU

I Michael C. Bourbeau declare depose and say that:

I am attorney licensed to practice law in the States of Massachusetts and California and each federal court therein as well as the United States Supreme court. I have been appointed by this Honorable Court through the Committee for Public counsel Services to represent Mr. XXX herein.

Pursuant to that representation I met with, and have had several discussions with, ADA X concerning limitations on discovery disclosure. On June 24, 2010 counsel discussed and agreed on a protective order, subject to the approval of co-counsel, that would limit written materials disclosed to each defendant (blacking out names and addresses) but would allow disclosure and discussion of the names of the witnesses with the client. On said day co-counsel would not agree to the proposed order and sought a hearing with the court. Thereafter, ADA X filed a motion for protective order seeking not only redaction of written materials but also disclosure of the civilian witnesses "in any other form." The inability to discuss witnesses with my client would prevent me

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from providing a proper investigation and providing effective representation.

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Commonwealth of Massachusetts

Suffolk, ss Suffolk Superior Court

No.:

Commonwealth

v. XXX

Motion for Court-Ordered Summons for House of Correction Records

The defendant moves, under Mass. R. Crim. P. 17(a)(2), for the issuance of summonses for the production of records to the clerk's office for defense counsel inspection as permitted by Commonwealth v. Dwyer, 448 Mass. 122, 146 (2006). Specifically, the defendant moves for production of all records, including disciplinary reports, classification reports, stay away orders, and any other records relating to discipline or gang information concerning Aaron Brown, date of birth: 115/1990, from:

South Bay House of Correction 20 Bradston St Boston, MA 02118-2705.

In support of this motion, the defendant states as follows:

1. Background.

1. On June 14, 2010, XX was arraigned on two indictments charging Assault with a Dangerous Weapon and Accessory after the Fact to Assault and Battery witha Dangerous Weapon. Mr. Draughn pleaded not guilty.

2. The indictments are based on a fight that broke out on August 29,

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2009, at the Dorchester YMCA and that the government alleges resulted in Mr. 's co-defendant shooting Aaron Brown. Mr. Brown died that night.

1. Mr. Brown had been in custody at the South Bay House of Correction, and had only been released a couple of weeks before he was shot.

2. Houses of Correction keep records that include documentation of fights, orders that inmates have no contact, gang databases, as well as assessment issues, such as classification report.

3. Because Mr. Brown was released from South Bay weeks before he was shot, records documenting any fights or problems that Mr. Brown had with other people are likely to be relevant and admissible at trial as evidence that a third party committed the offense. See Commonwealth v. Conkey, 443 Mass. 60, 66 (2004); Commonwealth v. Silva-Santiago, 453 Mass. 782, 801 (2009).

II. Procedure for Inspection of Third-Party Records under Commonwealth v. Dwyer.

6. In Commonwealth v. Dwyer, 448 Mass. at 123-124, the Supreme Judicial Court established new protocols governing access to records in the hands of third parties. Dwyer requires the defendant to file a motion for a pretrial summons under Mass. R. Crim. P.

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17(a)(2). Id. at 147. The motion must be accompanied by an affidavit establishing (a) that the records "are relevant and have evidentiary value," (b) that the records "are not otherwise procurable reasonably in advance of trial by exercise of due diligence," (c) that the defendant "cannot properly prepare for trial" without having an opportunity to inspect the records before trial, and (d) "that the motion is made in good faith and is not intended as a general 'fishing expedition.'" Id. at 142 (citations and internal quotation marks omitted). The "affidavit may contain hearsay statements so long as the affidavit identifies the source of the hearsay, the hearsay is reliable, and the affidavit establishes with specificity the relevance of the requested documents." Id. at 141 n. 24 (citations and internal quotation marks omitted).

The Supreme Judicial Court has defined relevance as a "rational tendency to prove [or disprove] an issue in the case." Commonwealth v. Lampron, 441 Mass. 265, 269-70 (2004) (brackets in original). The defendant's burden is to show that the requested documents "are likely to be admissible" at trial. Id. "By definition, such requests for production of documents deal in likelihoods, i.e., a sufficient likelihood that the requested documents or objects will contain some information that is material and relevant." Commonwealth v. Olivejra, 438 Mass. 325, 339-40 (2002). "It is not necessary that the evidence in question bear directly on the issue or be conclusive of it. So long as it has a tendency to prove a proposition, it is admissible simply because it helps a little." Commonwealth v. Emence, 47 Mass. App. Ct. 299, 302 (1999). Once a hearing is scheduled, the Commonwealth must

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forward copies of the pleadings to the holder of the records and the subject of the records and must give them notice of when a hearing on the Rule 17(a)(2) motion will be held. Id. at 147-148. After the hearing, the judge must determine whether the defendant has met the four requirements described above and whether the records sought are "presumptively privileged." Id. at 148. Ifthe defendant has met the requirements, the court will issue a summons directing the record holder to deliver the records to the office of the clerk of court. Id. The judge's determination that records are "presumptively privileged" has no effect on whether the summons will be issued, but it does mean that "the summons and notice shall inform ... the record holder [of the designation], and shall order the record holder to produce [the] records to the clerk of court in a sealed envelope or box marked 'PRIVILEGED,' with the name of the record holder, the case name and docket number, and the return date specified on the summons." Id. at 149.

. Once the records have been delivered to the clerk's office, the clerk "shall permit only defense counsel who obtained the summons to inspect the records, and only on counsel's signing and filing a protective order in a form approved by [the Supreme Judicial Courd." Id. Ifafter inspecting the records, defense counsel thinks that copying or disclosing the records to some other person "is necessary to prepare the case for trial, counsel shall file a motion to modify the protective order to permit copying or disclosure to specifically named individuals of particular records." Id. at 150. Before introducing the records at trial, defense counsel must file a motion in limine. Id.

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III. The Attached Afidavit of Counsel Meets the Requirements for a Court-Ordered Summons under Dwyer.

10. The attached affidavit of counsel demonstrates that the four requirements for issuance of a court-ordered summons under R. Crim. P. 17(a)(2), relevance, admissibility, necessity and specificity, have been met.

IV. Conclusion

For the above stated reasons, the defendant requests that this Court order a hearing to be held, at which time the record-holder may appear as permitted by Commonwealth v. Dwyer.

By his attorney,

Margaret Fox, Salsberg & Schneider 232 Lewis Wharf Boston, MA 02110 617-227-778

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Commonwealth ofMassachusetts

Suffolk, ss. Superior Court No.

Commonwealth

v.

Afidavit of Counsel in Support of Defendant's Motion for House of Correction Records

Defendant has moved, under Mass. R. Crim. P. 17, for records from the South Bay House of Correction pursuant to Commonwealth v. Dwyer, 448 Mass. 122, 146 (2006). In support of that motion, counsel for the defendant states the following:

1 I was appointed to represent on the above-captioned indictments charging Mr. Draughn with assault with a dangerous weapon and accessory after assault and battery dangerous weapon. He was arraigned on June 14, 2010. See docket entry 5. He has no criminal record.

2 I have reviewed all the discovery provided to me by the Commonwealth, including the grand jury minutes, police reports, surveillance video, and recorded witness statements.

Draughn is charged with assault with a dangerous weapon for pulling out a gun at a dance at the Dorchester YMCA on August 29, 2010, and with accessory after for driving away from the dance t allegedly shot Aaron Brown.

Houses of Correction keep records that include documentation of fights, orders that inmates have no contact, gang databases, as well as assessment issues, such as classification report.

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Because Mr. Brown was released from South Bay weeks before he was shot, records documenting any fights or problems that Mr. Brown had with other people are likely to be relevant and admissible at trial.

There is "wide latitude to the admission of relevant evidence that a person other than the defendant may have committed the crime" as long as the evidence (1) has a "rational tendency to prove the issue the defense raises, and the evidence cannot be too remote or speculative"

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*also admitted in California

Victoria M. Bonilla-Argudo
Telephone (617) 350-6868

November

MA Criminal Training Counsel

Records Office

Re: Commonwealth v. Xx

0205CR001301

Dear M :

Please be advised that this office represents Mr. Lemus in East Boston District Court for charges of operating under the influence. Kindly provide me with the following information:

1. Police Academy training attendance and graduation dates for:

   a. Officer Martin Velez BPD 11746

   b. Officer Michael Matthews BPD 10725

2. Copies of training manuals for OUI and field sobriety testing in effect at the time the officers were trained.

Website: www.lawgenie.com **E-mail**: mike@lawgenie.com; vicky@lawgenie.com

3. Please note that I have a copy of Manual HS 178R2/2000. If either of these officers was trained under this manual, simply advise and no copy need be provided for that officer.

If there is a fee for this service, kindly advice so that prompt payment is emitted.

Thank you for your anticipated cooperation with this regard.

Sincerely,

Victoria M. Bonilla

Police Academy Name	Address	Phone
Barnstable County Police Academy	PO Box 746Barnstable, MA 2630	508-771-5391
Boston Police Academy	85 Williams AveHyde Park, MA 2136	617-635-8000
Boylston Regional Police Academy	221 Main StreetBoylston, MA 01505	781-437-0322
MBTA Transit Police Academy	240 Southampton StreetBoston, MA 2118	617-222-1170
Massachusetts Criminal Justice Training Council	41 Terrace Hall AveBurlington, MA 1803	617-727-7827
Mass State Police Academy	340 West Brookfield RoadNew Braintree, MA 1531	508-867-1000
New Bedford Regional Police Academy	1204 Purchase StreetNew Bedford, MA 2740	508-992-7014
Plymouth Regional Police Academy	24 Long Pond RoadPlymouth, MA 2360	781-437-0330
Randolph Regional Police Academy	6 Adams StreetRandolph, MA 2368	781-437-0321
Reading Regional Police Academy	P.O. Box 522Reading, MA 1867	781-437-0340
Western Mass Regional Police Academy	1 Armory SquareSpringfield, MA 1102	413-755-5721

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK SUPERIOR COURT

SUFFOLK SS:

	)	No. SUCR2010-
COMMONWEALTH OF MASSACHUSETTS,	)	
	)	
	)	
Plaintiff,	)	
	)	
v.	)	
XXX	)	
	)	
Defendant.	)	

MOTION FOR DISCLOSURE OF MATERIAL THIRD-PARTY CULPRIT INFORMATION

COMES NOW DEFENDANT, XXX, by and through his attorney of record and hereby moves this Honorable Court for an order directing the Commonwealth to disclose the name, and identifying information of a "source" who stated to the police that:

> **James Coakely (Morse associate) stated on AIM in recent days that they believe the Cedar Street members provided the firearm that resulted in death of Aaron Brown. The source stated that Coakely is a known shooter for this group. This source further stated that Damian Oliver "Day Day" stated to a friend that Maki Suliman (CSB/OP) was going to "get his". This source believes this statement was made as Morse/Norfolk Street associates are seeking retaliation for Brown's death**

Said source has relevant and material evidence as to who may be responsible for Aaron Brown's death. For example, he indicates that Coakley

is a “known shooter” for Morse Street. It is therefore important to learn how he knows Coakley is a known shooter, and what information he has concerning who was involved in the Brown shooting.

The simple fact that he asserts that he received some of his information from others does not remove the “source” from being a potential witness as to a third party’s responsibility for the Brown shooting. He clearly did not disclose all the information he had concerning Coakly, and most likely not all the information he had concerning the Brown shooting.

A defendant is entitled under the 6th and 14th Amendments to the Federal Constitution and article 12 of the Massachusetts Declaration of Rights to present a defense. Holmes v.

South Carolina, 547 U.S. 319 (2006)(constitutional error to preclude introduction third-party culprit evidence even where the third party denies any wrongdoing). The right to present a

defense is “abridged by [state] evidence rules that ‘infring[e] upon a weighty interest of the accused’ and are ‘arbitrary’ or ‘disproportionate to the purposes they are designed to serve.’”

547 U.S. at 325 (citations omitted). A defendant is entitled

to challenge the government’s evidence and to offer evidence that someone else did the crime and it is reversible error to preclude such evidence, where the defendant’s “‘proffered evidence

is of substantial probative value, and will not tend to prejudice or confuse, all doubt should be resolved in favor of admissibility.’"

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Commonwealth v. Keizer, 377 Mass. 264 (1979), quoting Holt v. United States, 342 F.2d 163, 166 (5th Cir. 1965). See also Commonwealth v. Murphy, 282 Mass. 593 (1933)(reversible error to preclude evidence that someone else committed the larceny at issue).

Whether couched in terms of "third party culprit" defense, or that someone else did it, all the defendant needs to demonstrate at the outset is that the other person had the opportunity, manner and means of committing the crime. There is no need for any showing of similarities in a case such as this, where the issue isn't simply a clear case of mistaken identification but rather a case of lies, deceit and motive on the part of the government's key witness.

WHEREFORE, Mr., respectfully moves this Honorable Court to order the disclosure of this "source" even if the disclosure is subject to a strict protective order.

Date: Respectfully Submitted

MICHAEL C. BOURBEAU BBO #545908
Attorney for Defendant
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