

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT

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NO. DAR -

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COMMONWEALTH OF MASSACHUSETTS,  
Appellant

V.

RICHARD DILWORTH,  
Defendant-Appellee

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COMMONWEALTH'S RECORD APPENDIX

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SUFFOLK COUNTY

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NOVEMBER 2023

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Judge Ullman's Amended Memorandum and Order on  
Defendant's Motion to Dismiss..... C.A. 195-201




# 1884CR00453 Commonwealth vs. Dilworth, Jr., Richard OKA Dilworth, Richard





- Case Type:
- Indictment
- Case Status:
- Open
- File Date
- 06/12/2018
- DCM Track:
- A - Standard
- Initiating Action:
- FIREARM, CARRY WITHOUT LICENSE c269 §10(a)
- Status Date:
- 06/12/2018
- Case Judge:
- 
- Next Event:

All Information Party Charge Event Tickler Docket Disposition







## Docket Information

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
06/12/2018	Indictment(s) returned	1	
06/12/2018	Commonwealth Caitlin Fitzgerald, Esq.'s Motion for an arrest warrant	2	
06/12/2018	Endorsement on Motion for an arrest warrant , (#2.0): ALLOWED Judge: Cannone, Hon. Beverly J		 
06/12/2018	Issued: Straight Warrant issued on 06/12/2018 for Dilworth, Jr., Richard		
06/25/2018	Recalled: Straight Warrant cancelled on 06/25/2018 for Dilworth, Jr., Richard		
06/25/2018	Attorney appearance On this date Joshua Raisler Cohn, Esq. added as Appointed - Indigent Defendant for Defendant Richard Dilworth, Jr. Appointment made for the purpose of Case in Chief by Judge Edward J Curley.		
06/25/2018	Event Result: Deft brought into Court Continued to 7-18-18 for PTC in Rm 705 Continued to 9-26-18 for PTH in Rm 817 at 2pm Continued to 11-28-18 for FPTC in RM 817 at 2pm Cotnined to 12-3-18 for JT in Rm 817 at 9am: Arraignment scheduled on: 06/25/2018 09:00 AM Has been: Held as Scheduled Edward J Curley, Presiding Appeared: FTR Prosecutor Caitlin Fitzgerald, Esq., Defendant Richard Dilworth, Jr. Joshua Raisler Cohn, Esq., Appointed - Indigent Defendant Staff: Al Fiore, Assistant Clerk Magistrate Judge: Curley, Edward J		
06/25/2018	Defendant arraigned before Court. Judge: Curley, Edward J		
06/25/2018	Defendant waives reading of indictment Judge: Curley, Edward J		
06/25/2018	Plea of not guilty entered on all charges.		


<u>Docket</u> <u>Date</u>	<u>Docket Text</u>	<u>File</u> <u>Ref</u> <u>Nbr.</u>	<u>Image</u> <u>Avail.</u>
	Judge: Curley, Edward J		
06/25/2018	Court inquires of Commonwealth if abuse, as defined by G.L. c. 209A, § 1, is alleged to have occurred immediately prior to or in connection with the charged offense(s). Judge: Curley, Edward J  Judge: Curley, Edward J		
06/25/2018	Court finds NO abuse is alleged in connection with the charged offense. G.L. c. 276, § 56A. Judge: Curley, Edward J		
06/25/2018	Bail set at \$50,000.00 Surety, \$5,000.00 Cash. Without Prejudice. GPS Prior to Release Bail Warning Read. Mittimus Issued. COR: GPS Prior to release. 2. Home Confinement.  Judge: Curley, Edward J		
06/25/2018	ORDER: Findings and Order regarding bail filed  Judge: Curley, Edward J	3	 <a href="#">Image</a>
06/25/2018	Commonwealth 's Notice of Appearance of ADA C. Fitzgerald filed  Judge: Curley, Edward J	4	 <a href="#">Image</a>
06/25/2018	Commonwealth 's Statement of the case filed  Judge: Curley, Edward J	5	 <a href="#">Image</a>
06/25/2018	Issued on this date:  Mittimus in Lieu of Bail Sent On: 06/25/2018 11:52:57		
06/25/2018	Case assigned to: DCM Track A - Standard was added on 06/25/2018		
07/18/2018	Event Result:: Deft brought into Court Continued to 7-24-18 for PTC in Rm 705 Pre-Trial Conference scheduled on: 07/18/2018 09:30 AM Has been: Held as Scheduled Michelle Fentress, Presiding Appeared: FTR Prosecutor Caitlin Fitzgerald, Esq., Defendant Richard Dilworth, Jr. Joshua Raisler Cohn, Esq., Appointed - Indigent Defendant  Staff: Al Fiore, Assistant Clerk Magistrate Carol Mullen-Maguire, Assistant Clerk Magistrate Michelle Pierce, Assistant Clerk  Judge: Fentress, Michelle		
07/24/2018	Bail warnings read		
07/24/2018	Bail set at \$25,000.00 Surety, \$2,500.00 Cash. Without prejudice Prior bail ordered revoked. Said bail having been met, posted and verified ordered transferred from Roxbury District court 1802CR00095. Same conditions of bail, 1. Defendant must participate in "More than words programs" and ROCA.  Judge: Curley, Edward J		
07/24/2018	Event Result:: Pre-Trial Conference scheduled on: Defendant brought into court, Continued by agreement to 8/15/2018 hearing re: filing of motions (magistrate session)  E. Curley MAG C. Fitzgerald ADA J. Raisler-Cohn Atty FTR  Judge: Curley, Edward J		
07/24/2018	Pre-trial conference report filed	5.1	
08/15/2018	Event Result: Deft comes into Court : Motion Hearing scheduled on: 08/15/2018 09:30 AM		

<u>Docket</u> <u>Date</u>	<u>Docket Text</u>	<u>File</u> <u>Ref</u> <u>Nbr.</u>	<u>Image</u> <u>Avail.</u>
	<p>Has been: Held as Scheduled Edward J Curley, Presiding Appeared: FTR Prosecutor Caitlin Fitzgerald, Esq., Defendant Richard Dilworth, Jr. Joshua Raisler Cohn, Esq., Appointed - Indigent Defendant</p> <p>Staff: Al Fiore, Assistant Clerk Magistrate Carol Mullen-Maguire, Assistant Clerk Magistrate Michelle Pierce, Assistant Clerk</p> <p>Judge: Curley, Edward J</p>		
08/15/2018	<p>Defendant 's Motion for Rule 17 Summons for BPD training and protocol related to Social media investigation with Affidavit filed</p> <p>Judge: Curley, Edward J Applies To: Dilworth, Jr., Richard (Defendant); Suffolk County Jail (Holding Institution); Raisler Cohn, Esq., Joshua (Attorney) on behalf of Dilworth, Jr., Richard (Defendant); Fitzgerald, Esq., Caitlin (Attorney) on behalf of Suffolk County District Attorney (Prosecutor)</p>	6	 <a href="#">Image</a>
08/15/2018	<p>Defendant 's Motion for Rule 17 Summons for BPD internal affairs documents with Affidavit filed</p> <p>Judge: Curley, Edward J Applies To: Dilworth, Jr., Richard (Defendant); Suffolk County Jail (Holding Institution); Raisler Cohn, Esq., Joshua (Attorney) on behalf of Dilworth, Jr., Richard (Defendant); Fitzgerald, Esq., Caitlin (Attorney) on behalf of Suffolk County District Attorney (Prosecutor)</p>	7	 <a href="#">Image</a>
08/15/2018	<p>Defendant 's Motion for Discovery I filed</p> <p>Judge: Curley, Edward J Applies To: Dilworth, Jr., Richard (Defendant); Suffolk County Jail (Holding Institution); Raisler Cohn, Esq., Joshua (Attorney) on behalf of Dilworth, Jr., Richard (Defendant); Fitzgerald, Esq., Caitlin (Attorney) on behalf of Suffolk County District Attorney (Prosecutor)</p>	8	 <a href="#">Image</a>
08/15/2018	<p>Conditions of release on bail: Other Special Condition Deft allowed to attend a meeting on 8-17-18 between 1-4PM at More Than Words Program</p> <p>Judge: Curley, Edward J</p>		
09/06/2018	<p>Defendant not in court Defendant oral motion to modify conditions of release allowed Home confinement is vacated for today only from 1:00pm to 5:00PM to attend the More than Words Program ***NOTE: Letter shown to the Magistrate from More Than Words Fentress, MAG B. Tower for C. Fitzgerald, ADA J. Raisler-Cohn, Attorney FTR</p> <p>Judge: Fentress, Michelle</p> <p>Judge: Fentress, Michelle</p>		
09/11/2018	<p>Matter taken under advisement: Motion Hearing scheduled on: Defendant comes into court, Hearing re: P#18 discovery motions, after hearing taken under advisement Added conditions of bail: 1. May attend church every sunday from 11:00am-4:00pm</p> <p>Sullivan, J C. Fitzgerald ADA J. Raisler Cohn Atty FTR</p> <p>Judge: Sullivan, Hon. William F</p>		
09/11/2018	<p>Commonwealth 's Motion in Opposition to Deft's Motion for Snapchat account user name filed</p>	8.1	 <a href="#">Image</a>
09/26/2018	<p>Defendant comes to court. PTH held before Miller, J. Amended conditions of release: home confinement amended for the following hours: 9/27/18: 12pm-4pm 9/28/18: 8am-4pm 10/1/18: 3pm-9pm 10/2/18: 8am-4pm defendant to provide schedule after these dates.</p>		 <a href="#">Image</a>



<u>Docket</u> <u>Date</u>	<u>Docket Text</u>	<u>File</u> <u>Ref</u> <u>Nbr.</u>	<u>Image</u> <u>Avail.</u>
	Case continued by agreement to 10/10/18 at 2pm for hearing re: rule 17. ADA Fitzgerald Atty Raisler-Cohn N King c/r  Judge: Miller, Hon. Rosalind H		
09/26/2018	Commonwealth 's Certificate of Compliance  Judge: Miller, Hon. Rosalind H	9	
09/28/2018	ORDER: Court Order regarding Snapchat Account  Applies To: Raisler Cohn, Esq., Joshua (Attorney) on behalf of Dilworth, Jr., Richard (Defendant); Fitzgerald, Esq., Caitlin (Attorney) on behalf of Suffolk County District Attorney (Prosecutor)	10	 <a href="#">Image</a>
10/10/2018	Defendant comes to court. Motion filing held before Ullman, J. Paper # 7 allowed without prejudice. Summons to issue. Case continued by agreement to 10/31/18 at 2pm for motion filing in 817.  ADA Fitzgerald Atty Raisler Cohn FTR 817  Judge: Ullmann, Hon. Robert L		
10/11/2018	Notice and Summons (Dwyer) issued to Keeper of Records, Attention : Legal Department to produce privileged records by 10/24/2018 to the Clerk of the Superior Court. See attached order  Judge: Ullmann, Hon. Robert L	11	
10/31/2018	Event Result:: Filing of Motions scheduled on: 10/31/2018 02:00 PM Has been: Held as Scheduled Defendant comes into court, event held before Ullmann, J. Continued to 11/14/2018 at 2:00pm for further hearing re: Rule 14 and Rule 17 motions in (Ctrm. 817, non-custody) NOTE: Commonwealth's response to defendant's discovery due: 11/09/2018 out of court. Hon. Robert L Ullmann, Presiding * J. Mgee for C. Fitzgerald, ADA - J. Raisler, Attorney - N. Beaudion, BPD, Attorney - FTR(817) Appeared: Staff: Dave Sheehan, Assistant Clerk Magistrate  Judge: Ullmann, Hon. Robert L		
10/31/2018	Defendant 's Motion for discovery: selective prosecution with an affidavit in support of, filed.	12	
10/31/2018	Other 's Response to defendant's motion for training materials and protocols relating to social media investigations-The Boston Police Departments response, filed.	13	 <a href="#">Image</a>
10/31/2018	Opposition to paper #7.0 defendant's motion for internal affairs documents filed by BOSTON POLICE DEPARTMENT	14	 <a href="#">Image</a>
11/14/2018	Event Result:: Motion Hearing scheduled on: 11/14/2018 02:00 PM Has been: Held as Scheduled P# 14 Taken under advisement  Continued by agr to 12/3/18 at 10 am on P#12 in courtroom 817 at 1000 am (defs selective prosecution motion) and trial assignment  Cancel FPTC 11/18/18 Cancel TRIAL 12/3/18 Hon. Robert L Ullmann, Presiding- J Mgee for C Fitzgerald - N Beaudoin for PBD - J Raisler Cohn for Deft Atty - J Russo FTR Appeared: Staff: Lisa Medeiros erk Magistrate  Judge: Ullmann, Hon. Robert L		
11/16/2018	Event Result:: Jury Trial scheduled on: 12/03/2018 09:00 AM Has been: Canceled For the following reason: Joint request of parties Hon. Robert L Ullmann, Presiding Appeared:		








<u>Docket</u> <u>Date</u>	<u>Docket Text</u>	<u>File</u> <u>Ref</u> <u>Nbr.</u>	<u>Image</u> <u>Avail.</u>
	Staff: Anne Kaczmarek, Assistant Clerk Magistrate		
11/26/2018	Conditions of release on bail: Other Special Condition GPS Prior to release Home Confinement except for work at More Than Words *Employer to provide schedule to probation Church on Sunday from 11:00am to 4:00pm  Judge: Medeiros, Lisa B		
11/26/2018	Defendant 's Motion Conditions of Bail (Filed)  Judge: Medeiros, Lisa B	15	 <a href="#">Image</a>
11/26/2018	Defendant discharged  No warrants - Defendant instructed to report to probation before leaving on this day		
11/26/2018	Defendant brought into court on Elmo Warrant Conference to Review Status, Held Discharge Issued  L.Medeiros, MAG C.Fitzgerald, ADA J.Raisler Cohn, Atty FTR		
11/26/2018	Defendant 's Motion for rule 17 summons for discovery selective prosecution	16	 <a href="#">Image</a>
12/03/2018	Opposition to paper #16.0 the Boston Police Department's opposition to defendant's motion for Rule 17 summons motion for discovery selective prosecution filed by	17	 <a href="#">Image</a>
12/03/2018	Def comes into Court. Hearing held on P#'s 16 and 12. Continued to 1-9-19 at 2pm for Status/Trial Assignment at 2pm 817. Matter taken under advisement: Motion Hearing scheduled on: 12/03/2018 10:00 AM Has been: Held - Under advisement Hon. Robert L Ullmann, Presiding Appeared: D. Fredette, BPD - N. Beaudoin, BPD Prosecutor Caitlin Fitzgerald, Esq., Defendant Joshua Raisler Cohn, Esq., Appointed - Indigent Defendant  Staff: Lisa Mederios, Assistant Clerk Magistrate  Judge: Ullmann, Hon. Robert L		
12/12/2018	Defendant 's Motion for Limited Relief from home confinement (Filed)	18	 <a href="#">Image</a>
12/12/2018	Endorsement on Motion for limited Relief from home confinement,, (#18.0): ALLOWED "As long as advanced notice to Probation Department within 48 hours"		 <a href="#">Image</a>
12/12/2018	Defendant not in court, Motion Hearing, Held Motion Filed  R.Miller,J C.Fitzgerald,ADA J.Raisler Cohn,Atty FTR		
12/21/2018	ORDER: of Procedure (Copy to ADA C Fitzgerald and Atty RaislerCohn)	19	 <a href="#">Image</a>
12/21/2018	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: Joshua Raisler Cohn, Esq. Attorney: Caitlin Fitzgerald, Esq.		<a href="#">Image</a>
01/03/2019	Event Result:: Conference to Review Status scheduled on: 01/03/2019 02:00 PM Has been: Held as Scheduled  deft not in court		

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	Hon. Robert L Ullmann, Presiding - C Fitzgerald ADA - J RaislerCohn, Atty - FTR 2 pm Appeared: Staff: Lisa Mederios, Assistant Clerk Magistrate		
01/04/2019	Defendant 's Reply to "Proposed Stipulated Facts"	20	
01/09/2019	Event Result:: Conference to Review Status scheduled on: 01/09/2019 02:00 PM Has been: Rescheduled For the following reason: By Court prior to date Hon. Robert L Ullmann, Presiding Appeared: Staff: Rebeca Figueroa, Assistant Clerk Magistrate Michelle Pierce, Assistant Clerk		
01/18/2019	MEMORANDUM & ORDER:  Memorandum of Decision and Order on Defendant's Motions for Discovery on Alleged Selective Prosecution (P#16 and P#15):  For the above reason's, Dilworth's motions pursuant to Mass. R. Crim. P. 17 (Filing #16 in Case 1884-CR-00453 and Filing #19 in Case No. 1884- CR- 00469) are ALLOWED, as modified herein, and his motions pursuant to Mass. R. Crim. P. 14 (Filing #12 in Case No. 1884-CR-00453 and Filing #15 in Case No. 1884-CR-00469) are DENIED. A summons will issue directing the Boston Police Department to submit to the Clerk of the Court within 45 days of this Order all Form 26 reports prepared by any officer or other employee of the Boston Police Department between August 1, 2017 and July 31, 2018 that reference the use of Snapchat as an investigative tool in any case in which the subject of Snapchat monitoring has been charged with any offense related to that monitoring. Documents related to human trafficking investigations, sexual assault investigations and murder investigations will not be covered by this summons. Ullman, J.  Judge: Ullmann, Hon. Robert L  (Notice with Copy of Memorandum of Decision and Order sent to ADA C. Fitzgerald and Attorney J. Raisler-Cohn via First Class Mail)	21	
01/18/2019	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: Joshua Raisler Cohn, Esq. Attorney: Caitlin Fitzgerald, Esq.		
01/18/2019	Endorsement on Motion for Rule 17 Summons for Boston Police Department Internal Affairs Documents, (#7.0): DENIED After opposition and hearing, DENIED without prejudice to further consideration if Officer Crossen is identified by the Commonwealth as a trial witness. See Comm. v. Cruz, SJC-12463 (12/27/2018); Comm. v. Wunis, 426 Mass. 639, 644-645 (1998). Ullman, J.  (Notice with copies to ADA C. Fitzgerald and Atty. J. Raisler Cohn via First Class Mail)		
01/18/2019	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: Joshua Raisler Cohn, Esq. Attorney: Caitlin Fitzgerald, Esq.		
01/22/2019	Notice and Summons (Dwyer) issued to Keeper of Records BOSTON POLICE DEPARTMENT of to produce records by 01/22/2019 to the Clerk of the Superior Court.  Judge: Ullmann, Hon. Robert L	22	
01/23/2019	Defendant comes into Court.  Hearing Re: Status held before Locke, J.  Continued by Agreement to 3-18-19 for Hearing Re: Status of Motion to Suppress at 2:00PM in Courtroom 817.  By Order of the Court, Defendant is to provide notice of shift to the Probation Department in advance of taking evening shift at More than Words. Additionally, Defendant has one (1) hour to travel home from work.  Hon. Jeffrey A Locke, Presiding Appeared: C. Fitzgerald, ADA - J. Raisler Cohn, Atty. - FTR Staff: Michelle Fentress, Assistant Clerk Magistrate Michelle Pierce, Assistant Clerk		

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
01/23/2019	Defendant 's Motion to Modify Release Conditions: Shifting House Arrest to Curfew - Filed	23	
01/23/2019	Endorsement on Motion to Modify Release Conditions: Shifting House Arrest to Curfew, (#23.0): ALLOWED After hearing and by agreement, home confinement order vacated; curfew imposed 8pm - 6am except when assigned to scheduled night shifts at More than Words in which case curfew shall commence one hour after end of shift. Locke, J.		 <a href="#">Image</a>
02/21/2019	Defendant comes into court, Conference to Review Status, Held Case brought forward by probation Elmo Warrant No Action Taken Case has next date by agreement on 03/18/2019 RE: Conference to Review Status in CTRM 817 at 2:00pm  M. Fentress, MAG C. Fitzgerald, ADA J. Raisler Cohn, Atty FTR		
03/14/2019	Commonwealth 's Motion to to Accept its Notice of Appeal as Timely Filed pursuant to Mass. R. Crim. P. 4(C) - Filed  (Copy to Ullman, J.)	25	 <a href="#">Image</a>
03/14/2019	Commonwealth 's Notice of Appeal - Filed  (Copy to Ullman, J.)	24	 <a href="#">Image</a>
03/14/2019	Commonwealth 's Motion to Stay Production of Discovery - Filed  (Copy to Ullman, J.)	26	 <a href="#">Image</a>
03/18/2019	Defendant comes into Court.  Hearing Re: Status held before Locke, J.  Continued by Agreement to 3/25/19 for Hearing Re: Status at 2:00PM in Courtroom 817. - Defendant's presence waived for next date with no objection by the Commonwealth.  By Order of the Court Commonwealth's Motion to Reconsider is to file on or before 3/20/19. Locke, J.  Hon. Jeffrey A Locke, Presiding Appeared: C. Fitzgerald, ADA - J. Raisler Cohn, Atty. - FTR Staff: Rebeca Figueroa, Assistant Clerk Magistrate Michelle Pierce, Assistant Clerk		
03/18/2019	Defendant 's Motion for Discovery (Fourth): Facial Surveillance Technology with Affidavit of Counsel - Filed	27	 <a href="#">Image</a>
03/20/2019	Commonwealth 's Motion for Stay and Reconsideration of Ruling Granting Defense Motion for Evidence, and Boston Police Department's - Filed	28	 <a href="#">Image</a>
03/22/2019	The following form was generated:		
03/22/2019	The following form was generated:  Clerk's Notice Sent On: 03/22/2019 12:53:48		
03/25/2019	Event Result:: Defendant not in Court (Presence waived).  Continued to 4-29-19 for Status at 2pm in Rm 817 (Defendant's presence waived)  Conference to Review Status scheduled on:  03/25/2019 02:00 PM  Has been: Held as Scheduled  Hon. Jeffrey A Locke, Presiding  Appeared: 2:50pm FTR		



<u>Docket</u> <u>Date</u>	<i>Docket Text</i>	<u>File</u> <u>Ref</u> <u>Nbr.</u>	<i>Image</i> <i>Avail.</i>
	<p>Prosecutor Caitlin Fitzgerald, Esq.,</p> <p>Defendant Joshua Raisler Cohn, Esq., Appointed - Indigent Defendant</p> <p>Staff: Rebeca Figueroa, Assistant Clerk Magistrate Michelle Pierce, Assistant Clerk</p>		
03/25/2019	Endorsement on Motion for Stay and Reconsideration of Ruling Granting Defense Motion for Evidence, (#28.0): Other action taken Motion to Reconsider DENIED, including the request of the Commonwealth and BPD for an in camera hearing or review. Motion to Stay deferred to the Session Judge. Ullman, J.		 <a href="#">Image</a>
03/26/2019	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: Joshua Raisler Cohn, Esq. Attorney: Caitlin Fitzgerald, Esq.		
03/28/2019	Commonwealth 's Notice of Appeal - Filed	29	 <a href="#">Image</a>
04/29/2019	Defendant comes into Court Event Result:: Conference to Review Status scheduled on: 04/29/2019 02:00 PM Has been: Held as Scheduled Case continued by agreement to 5-29-19 by agreement Re: Status Hon. Robert N Tochka, Presiding, C. Fitzgerald, ADA J.Raisler Cohn, Atty, FTR Staff: Rebeca Figueroa, Assistant Clerk Magistrate		 <a href="#">Image</a>
04/29/2019	Matter taken under advisement: Conference to Review Status scheduled on: 05/29/2019 02:00 PM Has been: Held - Under advisement Hon. Robert N Tochka, Presiding Staff: Rebeca Figueroa, Assistant Clerk Magistrate Michelle Pierce, Assistant Clerk		
05/29/2019	Defendant not in Court. Defendant's presence previously waived.  Conference to Review Status not held due to parties not being present.  Continued by Order of the Court to 6/5/19 for Conference to Review Status (Commonwealth's Appeal) at 2:00PM in Courtroom 817. - Defendant's presence waived.  Hon. Robert N Tochka, Presiding Appeared: P. Mulligan, ADA for C. Fitzgerald, ADA - xxx - FTR Staff: Rebeca Figueroa, Assistant Clerk Magistrate		
06/05/2019	Defendant not in Court. Defendant's presence previously waived.  Conference to Review Status held before Tochka, J.  Continued by Agreement as follows:  8/1/19 Filing of Motions, Magistrate Session at 9:30AM.  9/11/19 Final Pre-Trial Conference at 2:00PM, Courtroom 817  9/16/19 Jury Trial at 9:00AM, Courtroom 817  Hon. Robert N Tochka, Presiding Appeared: B. Tower, ADA for C. Fitzgerald, ADA - J. Rasiler-Cohn, Atty. - FTR Staff: Rebeca Figueroa, Assistant Clerk Magistrate		
06/24/2019	Defendant not in court. Case brought forward, probation administrative conference held. After hearing, defendant had a dead GPS battery. Defendant contacted via phone, currently being monitored. Commonwealth not asking for increase in bail or change in conditions.  Medeiros, MAG - C. Fitzgerald, ADA - FTR		
06/24/2019	Notice of docket entry received from Supreme Judicial Court on June 21, the following was entered: JUDGMENT: as on file. "This is not a matter for the exercise of this	30	 <a href="#">Image</a>





<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	Court's extraordinary power. Accordingly, and upon consideration, it is ORDERED that the petition be, and the same hereby is, denied without hearing."		
07/01/2019	Court received Notice from Supreme Judicial Court regarding Fees with Notice of Appeal and Notice of Assembly of the Record on Appeal attached related to appeal (Filed)		 <a href="#">Image</a>
08/01/2019	Defendant 's Motion for relief for curfew for work filed and allowed with Commonwealth's assent - curfew may be adjusted to allow defendant to work with prior notice to probation a scheduled *Curfew can be adjusted when defendant is working All other terms and conditions of release remain	31	 <a href="#">Image</a>
08/01/2019	Defendant comes into court. Filing of motions held as scheduled. Case has next date of 9/11/19 RE: Final Pre-Trial Conference at 2:00 PM in Criminal 5 (CtRm 817)  Medeiros, MAG - C. Fitzgerald, ADA - J. Raisler-Cohn, Atty - 9:32 AM FTR		
08/28/2019	Event Result:: Final Pre-Trial Conference scheduled on: 09/11/2019 02:00 PM Has been: Rescheduled For the following reason: By Court prior to date Note: Counsel indicate that this matter currently on appeal, with a pending petition by the Commonwealth to the full bench.  Hon. Anthony M. Campo, Presiding Staff: Rebeca Figueroa, Assistant Clerk Magistrate		
08/28/2019	Event Result:: Jury Trial scheduled on: 09/16/2019 09:00 AM Has been: Rescheduled For the following reason: By Court prior to date Note: Counsel indicate that this matter currently on appeal, with a pending petition by the Commonwealth to the full bench.  Hon. Anthony M. Campo, Presiding Staff: Rebeca Figueroa, Assistant Clerk Magistrate		
10/17/2019	Event Result:: Defendant comes into Court. ELMO warrant.  Commonwealth Requests no action taken.  Case has next date of 12-2-19 for FPTC at 2pm in Rm 815 (Non Custody)  Conference to Review Status scheduled on:  10/17/2019 09:30 AM  Has been: Held as Scheduled  Michelle Fentress, Presiding  Staff: FTR 12:57pm - G. Ogus, ADA - K. Christianson, PO  Stacey Pichardo, Assistant Clerk Magistrate		
12/02/2019	Event Result:: Defendant comes into Court. Case brought forward by probation due to ELMO warrant having been issued.  Commonwealth requests no action be taken.  Case is on later today, 12-2-19 in Rm 817 at 2pm.  Curley, MAG - S. Pichardo, AC - G. Ogus for C. Fitzgerald, ADA - J. Fitzgerald, PO - FTR 11:27am		
12/02/2019	Event Result:: Jury Trial scheduled on: 12/09/2019 09:00 AM Has been: Canceled For the following reason: Joint request of parties Hon. Helene Kazanjian, Presiding Staff: Rebeca Figueroa, Assistant Clerk Magistrate Michelle Pierce, Assistant Clerk David Sheehan, Assistant Clerk Magistrate		
12/02/2019	Defendant comes into Court, Final Pre-Trial Conference Not Held, Joint request of parties, - Continued by agreement to 02/19/2020, Status Conference RE: Appeal at 2:00 PM (Criminal Session 5, CtRm 817)		



<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	Kazanjian, J - R. Figueroa, ACM - A. Boulanger for C. Fitzgerald, ADA - J. Raisler-Cohn, Atty - FTR		
02/19/2020	Attorney appearance On this date Joshua Raisler Cohn, Esq. dismissed/withdrawn as Appointed - Indigent Defendant for Defendant Richard Dilworth, Jr.		
02/19/2020	Attorney appearance On this date Connor M Barusch, Esq. added as Appointed - Indigent Defendant for Defendant Richard Dilworth, Jr. Appointment made for the purpose of Case in Chief by Judge Hon. Jeffrey A Locke.		
02/19/2020	Legal Counsel Fee Waived. Judge: Locke, Hon. Jeffrey A		
02/19/2020	Defendant comes into Court, Status Conference RE: Appeal held as scheduled before Locke, J. - Continued by agreement to 04/27/2020 for further Status Conference RE: Appeal at 2:00 PM (Criminal Session 5, CtRm 817)  Locke, J - R. Figueroa, ACM - G. Galizio for C. Fitzgerald, ADA - C. Barusch, Atty - FTR (2:31 PM)		
05/04/2020	Event Result:: Conference to Review Status scheduled on: 04/27/2020 02:00 PM Has been: Canceled For the following reason: By Court due to Covid-19 Staff: Rebeca Figueroa, Assistant Clerk Magistrate Michelle Pierce, Assistant Clerk		
06/22/2020	Defendant's presence waived with no objection.  Conference to Review Status held before Ricciuti, J.  Per Order of the Court: 1. Boston Police Department must produce outstanding discovery on or before July 6, 2020. 2. Further filings by the Defendant are due on or before August 3, 2020. 3. Commonwealth's Response is due on or before August 17, 2020.  Continued by Agreement to September 8, 2020 at 9:30AM for Hearing Re: Discovery Motions at 9:30AM in Courtroom 817.  Hon. Michael D Ricciuti, Presiding Appeared: C. Fitzgerald, ADA (via Zoom) - C. Barush, Atty. (via Zoom) - FTR (10:15AM) Staff: Rebeca Figueroa, Assistant Clerk Magistrate		
07/07/2020	Defendant 's Notice of Issues Related to Scheduling - Furloughs - Filed	32	
07/30/2020	Rescript received from Supreme Judicial Court; judgment AFFIRMED . (Faxed to probation)	32.1	 <u>Image</u>
08/03/2020	Attorney appearance On this date Joshua Raisler Cohn, Esq. added for Defendant Richard Dilworth, Jr.		
08/03/2020	Defendant 's Notice of Appearance for Attorney Joshua Raisler Cohn - Filed	33	
08/11/2020	Defendant 's Motion to Vacate Unlawful GPS Monitoring and Curfew Conditions of Pre-Trial Release and Accompanying Memorandum of Law with Affidavit of Counsel in Support - Filed	34	 <u>Image</u>
08/11/2020	Defendant 's EX PARTE Motion for Funds for Expenses with Affidavit of Counsel in Support - Filed	35	 <u>Image</u>
08/13/2020	Event Result:: Conference to Review Status scheduled on: 08/13/2020 10:30 AM Has been: Rescheduled For the following reason: Not reached by Court Hon. Mary K Ames, Presiding Staff: Rebeca Figueroa, Assistant Clerk Magistrate		
08/24/2020	Defendant is present in court via Zoom Videoconferencing.  Conference to Review Status held before Ames, J.  Continued by Agreement to October 28, 2020 for Conference to Review Status of Lora Motion at 11:00AM in Courtroom 817.  Per Order of the Court: Commonwealth must provide outstanding discovery to Defense		




<u>Docket</u> <u>Date</u>	<u>Docket Text</u>	<u>File</u> <u>Ref</u> <u>Nbr.</u>	<u>Image</u> <u>Avail.</u>
	Counsel on or before September 11, 2020.  Hon. Mary K Ames, Presiding Appeared: C. Fitzgerald, ADA (via Zoom) - J. Raisler Cohn, Atty. - FTR (11:10 AM) Staff: Rebeca Figueroa, Assistant Clerk Magistrate		
08/24/2020	Event Result:: Motion Hearing scheduled on: 09/08/2020 09:30 AM Has been: Rescheduled For the following reason: By Court prior to date Hon. Mary K Ames, Presiding Staff: Rebeca Figueroa, Assistant Clerk Magistrate		
08/24/2020	Endorsement on Motion to Vacate Unlawful GPS Monitoring and Curfew Conditions of Pre-Trial Release and Accompanying Memorandum of Law, (#34.0): DENIED See Paper #38 (1884CR00469). Ames, J. 8/24/2020		 <a href="#">Image</a>
08/24/2020	Rule 36 waived re:  Per Order of the Court and By Agreement until October 28, 2020.  Judge: Ames, Hon. Mary K		
08/24/2020	Endorsement on Motion for Funds, Ex Parte, (#35.0): ALLOWED		 <a href="#">Image</a>
09/22/2020	Commonwealth 's Motion for a Protective Order Regarding Discovery Ordered Under Rule Mass. R. Crim. P. 17, Affidavit in Support and Proposed Protective Order - Filed	36	 <a href="#">Image</a>
10/07/2020	Opposition to paper #36.0 Commonwealth 's Motion for a Protective Order Regarding Discovery Ordered Under Rule Mass. R. Crim. P. 17 filed by Richard Dilworth, Jr.	37	 <a href="#">Image</a>
10/08/2020	Defendant is present in court via Zoom Videoconferencing.  Hearing Re: Commonwealth's Motion for a Protective Order Regarding Discovery Ordered Under Rule Mass. R. Crim. P. 17 (P#36) held before Ames, J.  Continued to the previously scheduled date of October 28, 2020 for Conference to Review Status of Discovery at 11:00 AM in Courtroom 817.  Hon. Mary K Ames, Presiding Appeared: C. Fitzgerald, ADA (via Zoom) - C. Barusch, Atty. (via Zoom) - J. Raisler Cohn, Atty. (via Zoom) - FTR (12:15 PM) Staff: Rebeca Figueroa, Assistant Clerk Magistrate		 <a href="#">Image</a>
10/08/2020	Endorsement on Motion for a Protective Order Regarding Discovery Ordered Under Rule Mass. R. Crim. P. 17, (#36.0): ALLOWED After hearing, ALLOWED for the good and valid reasons cited herein and for the reasons stated on the record. M.K. Ames, J. 10.8.2020		 <a href="#">Image</a>
10/08/2020	Commonwealth 's Submission of Proposed Protective Order	38	
10/08/2020	Endorsement on Submission of Proposed Protective Order, (#38.0): ALLOWED SO ORDERED. M.K. Ames, J.		 <a href="#">Image</a>
10/26/2020	Defendant 's Motion to Continue with Affidavit of Counsel - Filed	39	 <a href="#">Image</a>
10/26/2020	Endorsement on Motion to Continue, (#39.0): ALLOWED		 <a href="#">Image</a>
10/27/2020	Event Result:: Conference to Review Status scheduled on: 10/28/2020 11:00 AM Has been: Rescheduled For the following reason: Request of Defendant Hon. Mary K Ames, Presiding Staff: Rebeca Figueroa, Assistant Clerk Magistrate		 <a href="#">Image</a>
11/30/2020	Event Result:: Conference to Review Status scheduled on: 12/01/2020 11:00 AM Has been: Rescheduled For the following reason: By Court due to Covid-19 Hon. Mary K Ames, Presiding Staff: Rebeca Figueroa, Assistant Clerk Magistrate		
01/13/2021	Defendant 's Motion for Equal Protection Discovery or in the alternative for a Rule 17 Summons, Affidavit of Counsel in Support with Attachments - Filed	40	 <a href="#">Image</a>

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
01/13/2021	Defendant 's Submission of Rule 14(a)(2) Motion for Boston Police Department Internal Affairs Documents or in the alternative for a Rule 17 Summons - Internal Affairs Files with Affidavit of Counsel in Support - Filed	41	 <a href="#">Image</a>
01/14/2021	Defendant is present in court via Zoom videoconferencing.  Conference to Review Status held before Krupp, J.  Continued by agreement to January 28, 2021 at 11:00 AM for Hearing Re: Discovery Motions in Courtroom 817.  Hon. Peter B Krupp, Presiding Appeared: C. Fitzgerald, ADA (via Zoom) - J. Raisler-Cohn, Atty. (via Zoom) - FTR (9:20 AM) Staff: Rebeca Figueroa, Assistant Clerk Magistrate		
01/27/2021	Commonwealth 's Motion to Continue Discovery Motion - Filed	42	 <a href="#">Image</a>
01/27/2021	Event Result:: Hearing RE: Discovery Motion(s) scheduled on: 01/28/2021 11:00 AM Has been: Rescheduled For the following reason: Request of Commonwealth Hon. Peter B Krupp, Presiding Staff: Rebeca Figueroa, Assistant Clerk Magistrate		 <a href="#">Image</a>
01/27/2021	Endorsement on Motion to Continue Discovery Motion, (#42.0): ALLOWED 1/27/21 ALLOWED. Date is converted to a status conference. Krupp, J. Attest: R. Figueroa, ACM		 <a href="#">Image</a>
01/28/2021	Defendant is present in court via Zoom videoconferencing.  Conference to Review Status held before Krupp, J.  Continued by agreement to March 9, 2021 at 10:30 AM for Hearing Re: Discovery Motions in Courtroom 817.  Per Order of the Court: 1. Commonwealth motions shall be filed on or before February 16, 2021; 2. Defendant's response shall be filed on or before March 2, 2021.  Hon. Peter B Krupp, Presiding Appeared: C. Fitzgerald, ADA (via Zoom) - J. Raisler-Cohn, Atty. (via Zoom) - FTR (10:58 AM) Staff: Rebeca Figueroa, Assistant Clerk Magistrate		
01/28/2021	Endorsement on Motion for Equal Protection Discovery or in the Alternative for a Rule 17 Summons, Defendant's, (#40.0): Other action taken 1/28/21 Categories 2, 3, 5 and 6 are ALLOWED by agreement. The Court will hear further argument on categories 1 and 4 on 3/9/21 at 10:30 AM. Krupp, J.		 <a href="#">Image</a>
01/28/2021	Endorsement on Motion for Boston Police Department Internal Affairs Documents or in the Alternative for a Rule 17 Summons - Internal Affairs Files, Rule 14(a)(2), (#41.0): ALLOWED 1/28/2021 ALLOWED by agreement. Krupp, J.		 <a href="#">Image</a>
02/17/2021	Commonwealth 's Motion in opposition to the Defendant's Motion for equal protection Discovery filed	43	 <a href="#">Image</a>
03/03/2021	Defendant 's Motion : Mr. Dilworth is Entitled to Relevant Discovery on the Issue of Whether the Investigatory Scheme Used by Law Enforcement Improperly Targeted Him in Violation of Equal Protection - Filed	44	  <a href="#">Image</a>
03/09/2021	Defendant is present in court via Zoom videoconferencing.  Hearing Re: Discovery Motions held before Krupp, J.  Continued by Agreement to March 11, 2021 at 12:30 PM for Hearing Re: Discovery Motions (P#40, 41, 43, 44) in Courtroom 817.  Hon. Peter B Krupp, Presiding Appeared: C. Fitzgerald, ADA (via Zoom) - J. Megee, Atty. BPD Legal (via Zoom) - J. Raisler Cohn, Atty. (via Zoom) - FTR (10:30 AM) Staff: Rebeca Figueroa, Assistant Clerk Magistrate		
03/11/2021	Event Result:: Hearing RE: Discovery Motion(s) scheduled on: 03/11/2021 12:30 PM Has been: Rescheduled For the following reason: Court Order Hon. Peter B Krupp, Presiding		

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	Staff: Rebeca Figueroa, Assistant Clerk Magistrate		
03/12/2021	Defendant is present in court via Zoom videoconferencing.  Hearing Re: Discovery Motions Hearing (P#40, 41, 43, 44) held before Krupp, J.  After hearing, the motions are held under advisement.  Continued by Agreement to April 5, 2021 at 10:00 AM for Status Conference in Courtroom 817.  Hon. Peter B Krupp, Presiding Appeared: C. Fitzgerald, ADA (via Zoom) - J. Raisler Cohn, Atty. (via Zoom) - FTR (8:50 AM) Staff: Rebeca Figueroa, Assistant Clerk Magistrate		
03/30/2021	MEMORANDUM & ORDER:  On Defendant's Motion for Equal Protection Discovery or For a Rule 17 Summons  (Notice and Copy to Counsel of Record via Electronic and First Class Mail)  Judge: Krupp, Hon. Peter B	45	 <a href="#">Image</a>
03/30/2021	Endorsement on Motion for Equal Protection Discovery or in the Alternative for a Rule 17 Summons, (#40.0): Other action taken 3/30/21 After hearing, ALLOWED IN PART and DENIED IN PART without prejudice. See Memorandum and Order of same date. Krupp, J.		 <a href="#">Image</a>
04/02/2021	The following form was generated: A Clerk's Notice was generated and sent to: Defendant, Attorney: Connor M Barusch, Esq. CPCS 10 Malcolm X Blvd, Roxbury, MA 02108 Prosecutor, Attorney: Caitlin Fitzgerald, Esq. 1 Bulfinch Place, Boston, MA 02114		
04/02/2021	Defendant 's Motion to Vacate Unlawful GPS Monitoring and Curfew Conditions of Pre-Trial Release and Accompanying Memorandum of Law with Affidavit of Counsel in Support - Filed	46	 <a href="#">Image</a>
04/05/2021	Defendant is present in court via Zoom videoconferencing.  Status Conference held before Krupp, J. After hearing, Defendant's Motion to Vacate GPS Monitoring and Curfew Conditions of Pre-Trial Release was allowed.  GPS Monitoring and Curfew conditions of release have been vacated.  Continued by Agreement to May 13, 2021 at 9:30 AM for Status Conference in Courtroom 817.  Hon. Peter B Krupp, Presiding Appeared: C. Fitzgerald, ADA (via Zoom) - J. Raisler Cohn, Atty. (via Zoom) - FTR (9:59 AM) Staff: Tiffany Castillo, Assistant Clerk Magistrate		
04/05/2021	Endorsement on Second Motion to Vacate Unlawful GPS Monitoring and Curfew Conditions of Pre-Trial Release and Accompanying Memorandum of Law, (#46.0): ALLOWED "After hearing, ALLOWED. The GPS and curfew conditions are lifted." J. Peter Krupp, 4/5/21.		 <a href="#">Image</a>
04/09/2021	Defendant 's EX PARTE Motion for expenses: implicit bias; filed and ALLOWED up to \$2,000.00 (Krupp, J)	47	 <a href="#">Image</a>
04/09/2021	Defendant 's EX PARTE Motion for expenses: race and policing; filed and ALLOWED up to \$3,000.00 (Krupp, J)	48	 <a href="#">Image</a>
05/11/2021	Defendant 's Motion for Additional Discovery: Snapchat User Icon /Bitmoji and User Name	49	 <a href="#">Image</a>
05/13/2021	Defendant is present in court via Zoom videoconferencing.  Conference to Review Status held before Krupp, J.  Continued by agreement to June 1, 2021 at 2:00 PM for Hearing Re: Discovery Motions (P#49) in Courtroom 817 (via Zoom).  Hon. Peter B Krupp, Presiding Appeared: C. Fitzgerald, ADA (via Zoom) - J. Raisler Cohn, Atty. (via Zoom) - FTR (9:38 AM) Staff: Rebeca Figueroa, Assistant Clerk Magistrate		<a href="#">Image</a>
06/01/2021	Opposition to paper #49.0 Defendant 's Motion for Additional Discovery: Snapchat User Icon /Bitmoji and User Name filed by Suffolk County District Attorney	50	

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
06/01/2021	Event Result:: Hearing RE: Discovery Motion(s) scheduled on: 06/01/2021 02:00 PM Has been: Not Held For the following reason: Transferred to another session Hon. Peter B Krupp, Presiding Staff: Rebeca Figueroa, Assistant Clerk Magistrate		
06/01/2021	Defendant comes into court by Zoom After hearing matter taken under advisement By agreement case continued to 6/24/2021 at 9:30am for status to be held by Zoom (Krupp, J) ACM Danielle Bisson ADA Caitlin Fitzgerald by Zoom ATTY Joshua Cohn and Connor Barusch by Zoom Held at the Moakley Courthouse in CTRM 9 on FTR and by Zoom at 3:15pm		
06/24/2021	Defendant 's Motion to Amend Protective Order - Filed	51	
06/24/2021	Defendant is present in court via Zoom videoconferencing.  Conference to Review Status held before Krupp, J.  Continued by agreement to September 24, 2021 at 10:00 AM for In-Person Non-Evidentiary Motion Hearing in Courtroom 817.  Per Order of the Court: 1. All defense motions shall be filed on or before August 13, 2021; 2. Commonwealth response shall be filed on or before September 10, 2021.  Hon. Peter B Krupp, Presiding Appeared: C. Fitzgerald, ADA (via Zoom) - J. Raisler Cohn, Atty. (via Zoom) - FTR (9:35 AM) Staff: Rebeca Figueroa, Assistant Clerk Magistrate		
06/24/2021	MEMORANDUM & ORDER:  ON DEFENDANT'S MOTION FOR DISCOVERY OF SNAPCHAT USER ICON/BITMOJI AND USER NAME  Judge: Krupp, Hon. Peter B  (Notice and Copy to Counsel of Record via Electronic and First Class Mail)	52	 <u>Image</u>
06/24/2021	Endorsement on Motion for Additional Discovery: Snapchat User Icon/Bitmoji and User Name, Defendant's, (#49.0): ALLOWED 6/24/21 After hearing, ALLOWED. See Memorandum and Order of same date. Krupp, J.		 <u>Image</u>
06/24/2021	Endorsement on Motion for Protective Order, Defendant's, (#51.0): ALLOWED 6/24/21 ALLOWED without opposition. Krupp, J.		 <u>Image</u>
09/24/2021	Defendant is present in court.  Conference to Review Status held before Ames, J.  Continued by agreement to October 19, 2021 at 2:00 PM for a Status Conference re: Discovery in Courtroom 817.  Hon. Mary K Ames, Presiding Appeared: C. Fitzgerald, ADA - J. Raisler Cohn, Atty. - FTR (10:13 AM) Staff: Tiffany Castillo, Assistant Clerk Magistrate		
10/19/2021	Event Result:: Conference to Review Status scheduled on: 10/19/2021 02:00 PM Has been: Not Held For the following reason: Request of Defendant Hon. Mary K Ames, Presiding Staff: Rourke Donnelly, Assistant Clerk Magistrate		
11/02/2021	Event Result:: Conference to Review Status scheduled on: 11/02/2021 02:00 PM Has been: Held as Scheduled Hon. Mary K Ames, Presiding Staff: Rourke Donnelly, Assistant Clerk Magistrate  Defendant comes into Court; matter continued by agreement to 11/30/21 for Status. Ames,J. - C.Fitzgerald, ADA - J.Raisler-Cohn, Attny - FTR		

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
11/30/2021	Event Result:: Conference to Review Status scheduled on: 11/30/2021 02:00 PM Has been: Held as Scheduled Hon. Mary K Ames, Presiding Staff: Rourke Donnelly, Assistant Clerk Magistrate  Defendant not in Court (waived); matter continued by agreement to 1/11/22 for Status. Ames.J. - C.Fitzgerald, ADA - J.Raisler-Cohn, Attny - FTR		
12/03/2021	Commonwealth 's Motion to Reconsider Court's Order to Compel Disclosure of Snapchat Usernames and Bitmojis w/affidavit, filed	53	 <a href="#">Image</a>
12/08/2021	Endorsement on Motion to Reconsider, (#53.0): DENIED 12/8/21 After review, the Commonwealth's Motion to Reconsider the Court's Order to Compel Disclosure of Snapchat Usernames and Bitmojis (Docket #53 in 1884CR453 and Docket #56 in 1884CR469) is DENIED. The Commonwealth has not cited any changed circumstances, newly discovered evidence or information, or any development in the relevant law. See Audubon Hill S. Condominium Ass'n v. Community Ass'n Underwriters of Am., Inc., 82 Mass. App. Ct. 461, 470 (2012). The additional affidavit contains no such information. The additional affidavit, which is unsigned and undated, could have been presented when the motion was being litigated, and is only now being submitted more than five months after the Court's decision without explanation for the delay. To the extent the Commonwealth's motion contends the Court erred in its original ruling, it generally rehashes arguments previously presented and that I rejected. See Memorandum and Order on Defendant's Motion for Discovery of Snapchat User Icon/Bitmoji and User Name (Docket #52). /s/ Peter B. Krupp  Notice to parties via email.		
12/13/2021	Commonwealth 's Motion to Stay Production of Discovery, filed	54	 <a href="#">Image</a>
12/13/2021	Notice of appeal filed.  Applies To: Suffolk County District Attorney (Prosecutor)	55	 <a href="#">Image</a>
01/11/2022	Endorsement on Motion to Stay Discovery, (#54.0): ALLOWED  Judge: Wall, Hon. Joshua		 <a href="#">Image</a>
01/11/2022	Event Result:: Conference to Review Status scheduled on: 01/11/2022 10:30 AM Has been: Held via Video/Teleconference Hon. Joshua Wall, Presiding Staff: Rourke Donnelly, Assistant Clerk Magistrate  Defendant's appearance waived; status conference held; matter continued to 2/15/22 for Status. Wall,J. - C.Fitzgerald, ADA - J.Raisler-Cohn, Attny - FTR		
02/15/2022	Event Result:: Conference to Review Status scheduled on: 02/15/2022 10:00 AM Has been: Not Held For the following reason: Joint request of parties Hon. Joshua Wall, Presiding Staff: Rourke Donnelly, Assistant Clerk Magistrate		
05/24/2022	Event Result:: Conference to Review Status scheduled on: 05/24/2022 02:00 PM Has been: Held as Scheduled Hon. Jackie Cowin, Presiding Staff: Rourke Donnelly, Assistant Clerk Magistrate		
05/24/2022	Defendant 's Motion to dismiss with Prejudice as Sanction for Commonwealth's Refusal to Produce Court Ordered Discovery for Mr.Dilworth's Equal Protection Claim, filed	56	 <a href="#">Image</a>
05/24/2022	Commonwealth 's Notice of Non Compliance w/affidavit of Detective Brian Ball, filed	57	 <a href="#">Image</a>
05/24/2022	Other 's Notice of Non Compliance - Boston Police Department, filed	58	 <a href="#">Image</a>
06/08/2022	Commonwealth 's Memorandum in Opposition to the Defendant's Motion to Dismiss, filed	59	 <a href="#">Image</a>
06/08/2022	Event Result:: Motion Hearing scheduled on: 06/08/2022 02:00 PM Has been: Held as Scheduled Hon. Jackie Cowin, Presiding Staff: Rourke Donnelly, Assistant Clerk Magistrate		<a href="#">Image</a>

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	Defendant comes into Court; motion hearing held; taken under advisement. Ullmann, J. - C.Fitzgerald, ADA - J.Raisler-Cohn - FTR		
06/27/2022	Event Result:: Conference to Review Status scheduled on: 07/12/2022 02:00 PM Has been: Canceled For the following reason: Case Disposed Hon. Robert L Ullmann, Presiding Staff: Rourke Donnelly, Assistant Clerk Magistrate		
06/27/2022	MEMORANDUM & ORDER:  ON DEFENDANT'S MOTION TO DISMISS.  Motion ALLOWED. This case is DISMISSED WITHOUT PREJUDICE.  Counsel notified via email on June 27, 2022.  Judge: Ullmann, Hon. Robert L  As of 7/22/22 THIS ORDER HAS BEEN SUPERSEDED BY PAPER #64 "AMENDED MEMORANDUM and ORDER ON DEFENDANT'S MOTIONS TO DISMISS"	60	 <u>Image</u>
06/27/2022	Offense Disposition:: Charge #1 FIREARM, CARRY WITHOUT LICENSE c269 §10(a) On: 06/27/2022 Judge: Hon. Robert L Ullmann By: Other Court Event Dismissed - Without Prejudice  Charge #2 AMMUNITION WITHOUT FID CARD, POSSESS c269 §10(h)(1) On: 06/27/2022 Judge: Hon. Robert L Ullmann By: Other Court Event Dismissed - Without Prejudice  Charge #3 FIREARM, CARRY WITHOUT LICENSE LOADED c269 s.10(n) On: 06/27/2022 Judge: Hon. Robert L Ullmann By: Other Court Event Dismissed - Without Prejudice  Charge #4 FIREARM, POSSESS LARGE CAPACITY c269 §10(m) On: 06/27/2022 Judge: Hon. Robert L Ullmann By: Other Court Event Dismissed - Without Prejudice		
06/27/2022	Docket Note: Chief Probation Officer Forbes notified via email that the case has been dismissed without prejudice.		
06/27/2022	Notice of appeal filed by Commonwealth regarding Court's order granting the defendant's motion to dismiss	61	 <u>Image</u>
06/28/2022	Notice to surety, T. Pocher Murphy bail available for return.		
07/05/2022	Defendant not in Court.  Surety Tyra Pocher-Murphy appears in Court.  Motion hearing held and after hearing, Allowed.  Event Result:: Motion Hearing scheduled on: 07/05/2022 02:00 PM Has been: Held as Scheduled Hon. Michael Doolin, Presiding Staff: Tiffany Castillo, Assistant Clerk Magistrate James Pardi, Assistant Clerk Magistrate FTR 2:47pm		
07/05/2022	Surety 's Motion for return of cash deposited with the Court as bail with Affidavit filed and after hearing, Allowed.  Judge: Doolin, Hon. Michael	62	 <u>Image</u>
07/05/2022	Financial Note:  RAB FORM		
07/07/2022	Defendant 's Motion to Correct Undisputed Facts in the Memorandum and Order to Dismiss filed (Copy of Motion, Notice, and Docket sent to Ullmann, RAJ.)	63	
07/19/2022	Non-Custody Defendant not in Court. Presence waived.  Conference to Review Status held as scheduled. After hearing, Defendant's Motion to be allowed - Court to issue Order.		

<u>Docket Date</u>	<i>Docket Text</i>	<u>File Ref Nbr.</u>	<i>Image Avail.</i>
	Hon. Robert L Ullmann, Presiding - T. Castillo, ACM - C. Fitzgerald, ADA - J. Raisler Cohn, Atty. - FTR 2:32PM		
07/22/2022	MEMORANDUM & ORDER:  of Decision on Defendant's Motion to Dismiss, AMENDED  This Memorandum of Order SUPERSEDES this Court's previous Order (Paper #60)  **Notice to parties via electronic mail**  Judge: Ullmann, Hon. Robert L	64	 <a href="#">Image</a>
01/13/2023	Attorney appearance On this date David D McGowan, Esq. added as Attorney for the Commonwealth for Prosecutor Suffolk County District Attorney		
01/13/2023	Appeal: Statement of the Case on Appeal (Cover Sheet).	65	 <a href="#">Image</a>
01/13/2023	Notice to Clerk J. Stanton of the Appeals Court of Assembly of Record		 <a href="#">Image</a>
01/13/2023	Notice of assembly of record sent to Counsel		 <a href="#">Image</a>
01/18/2023	Appeal entered in Appeals Court on 01/18/2023 docket number 2023-P-0041	66	 <a href="#">Image</a>




20  
**1884CR00469 Commonwealth vs. Dilworth, Jr., Richard OKA Dilworth, Richard**

- Case Type:
- Indictment
- Case Status:
- Open
- File Date
- 06/14/2018
- DCM Track:
- A - Standard
- Initiating Action:
- FIREARM, CARRY WITHOUT LICENSE c269 §10(a)
- Status Date:
- 11/30/2018
- Case Judge:
- Ullmann, Hon. Robert L
- Next Event:
- 




All Information	Party	Charge	Event	Tickler	Docket	Disposition
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**Docket Information**



<u>Docket Date</u>	<i>Docket Text</i>	<u>File Ref Nbr.</u>	<i>Image Avail.</i>
06/14/2018	Indictment(s) returned	1	
06/14/2018	Commonwealth Caitlin Fitzgerald, Esq.'s Motion for an arrest warrant Filed	2	<a href="#">Image</a>
06/14/2018	Endorsement on Commonwealth's Motion for an arrest warrant, (#2.0): ALLOWED Judge: Cannone, Hon. Beverly J		 <a href="#">Image</a>
06/14/2018	Issued: Straight Warrant issued on 06/14/2018 for Dilworth, Jr., Richard		
06/25/2018	Recalled: Straight Warrant cancelled on 06/25/2018 for Dilworth, Jr., Richard		
06/25/2018	Attorney appearance On this date Joshua Raisler Cohn, Esq. added as Appointed - Indigent Defendant for Defendant Richard Dilworth, Jr. Appointment made for the purpose of Case in Chief by Judge Edward J Curley.		
06/25/2018	Event Result:: Deft brought into Court Continued to 7-18-18 for PTC in Rm 705 Continued to 9-26-18 for PTH in Rm 817 at 2pm Continued to 11-28-18 for FPTC in Rm 817 at 2pm Continued to 12-3-18 for JT in Rm 817 at 9am Arraignment scheduled on: 06/25/2018 09:00 AM Has been: Held as Scheduled Edward J Curley, Presiding Appeared: FTR Prosecutor Caitlin Fitzgerald, Esq., Defendant Richard Dilworth, Jr. Joshua Raisler Cohn, Esq., Appointed - Indigent Defendant Staff: Al Fiore, Assistant Clerk Magistrate Judge: Curley, Edward J		
06/25/2018	Defendant arraigned before Court. Judge: Curley, Edward J		
06/25/2018	Defendant waives reading of indictment Judge: Curley, Edward J		





<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
06/25/2018	Plea of not guilty entered on all charges. Judge: Curley, Edward J		
06/25/2018	Court inquires of Commonwealth if abuse, as defined by G.L. c. 209A, § 1, is alleged to have occurred immediately prior to or in connection with the charged offense(s). Judge: Curley, Edward J  Judge: Curley, Edward J		
06/25/2018	Court finds NO abuse is alleged in connection with the charged offense. G.L. c. 276, § 56A. Judge: Curley, Edward J		
06/25/2018	Bail set at \$50,000.00 Surety, \$5,000.00 Cash. Without Prejudice. GPS Prior to release Bail Warning Read. Mittimus Issued. COR: 1. GPS Prior to Release. 2. Home Confinement.  Judge: Curley, Edward J		
06/25/2018	ORDER: Findings and Order Regarding Bail filed  Judge: Curley, Edward J	3	 <a href="#">Image</a>
06/25/2018	Commonwealth 's Notice of Appearance of ADA Caitlin Fitzgerald filed  Judge: Curley, Edward J	4	 <a href="#">Image</a>
06/25/2018	Commonwealth 's Statement of the case filed  Judge: Curley, Edward J	5	 <a href="#">Image</a>
06/25/2018	Issued on this date:  Mittimus in Lieu of Bail Sent On: 06/25/2018 11:39:14		
06/25/2018	Case assigned to: DCM Track A - Standard was added on 06/25/2018		
07/18/2018	Event Result:: Deft brought into Court Continued to 7-24-18 for PTC in Rm 705 Pre-Trial Conference scheduled on: 07/18/2018 09:30 AM Has been: Held as Scheduled Michelle Fentress, Presiding Appeared: FTR Prosecutor Caitlin Fitzgerald, Esq., Defendant Richard Dilworth, Jr. Joshua Raisler Cohn, Esq., Appointed - Indigent Defendant  Staff: Al Fiore, Assistant Clerk Magistrate Carol Mullen-Maguire, Assistant Clerk Magistrate Michelle Pierce, Assistant Clerk  Judge: Fentress, Michelle		
07/24/2018	Bail set at \$25,000.00 Surety, \$2,500.00 Cash. Without Prejudice. GPS PRIOR TO RELEASE Bail Warning Read. Mittimus Issued. COR: GPS Prior to Release. 2. Home Confinement unless allowed with permission from probation.  Judge: Curley, Edward J		
07/24/2018	Issued on this date:  Mittimus in Lieu of Bail Sent On: 07/24/2018 10:21:45	6	
07/24/2018	Event Result:: Deft brought into Court Continued to 8-15-18 for hearing Re: filing of mtoions in Rm 705 Pre-Trial Conference scheduled on: 07/24/2018 09:30 AM Has been: Held as Scheduled Edward J Curley, Presiding Appeared: FTR Prosecutor Caitlin Fitzgerald, Esq., Defendant Richard Dilworth, Jr. Joshua Raisler Cohn, Esq., Appointed - Indigent Defendant  Staff: Al Fiore, Assistant Clerk Magistrate Carol Mullen-Maguire, Assistant Clerk Magistrate		





<u>Docket</u> <u>Date</u>	<u>Docket Text</u>	<u>File</u> <u>Ref</u> <u>Nbr.</u>	<u>Image</u> <u>Avail.</u>
	Michelle Pierce, Assistant Clerk  Judge: Curley, Edward J		
07/24/2018	Pre-trial conference report filed  Judge: Curley, Edward J Applies To: Dilworth, Jr., Richard (Defendant); Raisler Cohn, Esq., Joshua (Attorney) on behalf of Dilworth, Jr., Richard (Defendant); Fitzgerald, Esq., Caitlin (Attorney) on behalf of Suffolk County District Attorney (Prosecutor)  Judge: Curley, Edward J	7	
07/24/2018	Bail set on 06/25/2018 revoked.  Judge: Curley, Edward J Applies To: Dilworth, Jr., Richard (Defendant); Raisler Cohn, Esq., Joshua (Attorney) on behalf of Dilworth, Jr., Richard (Defendant); Fitzgerald, Esq., Caitlin (Attorney) on behalf of Suffolk County District Attorney (Prosecutor)		
08/15/2018	Event Result:: Deft comes into Court Continued to 9-11-18 for Motion hearing in Rm 704 Filing of Motions scheduled on: 08/15/2018 09:30 AM Has been: Held as Scheduled Edward J Curley, Presiding Appeared: FTR Prosecutor Caitlin Fitzgerald, Esq., Defendant Richard Dilworth, Jr. Joshua Raisler Cohn, Esq., Appointed - Indigent Defendant  Staff: Al Fiore, Assistant Clerk Magistrate Carol Mullen-Maguire, Assistant Clerk Magistrate Michelle Pierce, Assistant Clerk  Judge: Curley, Edward J		
08/15/2018	Defendant 's Motion for Rule 17 Summons for BPD training and protocol related to social media investigation with Affidavit filed.  Judge: Curley, Edward J Applies To: Dilworth, Jr., Richard (Defendant); Raisler Cohn, Esq., Joshua (Attorney) on behalf of Dilworth, Jr., Richard (Defendant); Fitzgerald, Esq., Caitlin (Attorney) on behalf of Suffolk County District Attorney (Prosecutor)	9	 <a href="#">Image</a>
08/15/2018	Defendant 's Motion for Discovery I filed  Judge: Curley, Edward J Applies To: Dilworth, Jr., Richard (Defendant); Raisler Cohn, Esq., Joshua (Attorney) on behalf of Dilworth, Jr., Richard (Defendant); Fitzgerald, Esq., Caitlin (Attorney) on behalf of Suffolk County District Attorney (Prosecutor)	10	 <a href="#">Image</a>
08/15/2018	Conditions of release on bail: Other Special Condition After hearing, Defendant allowed to attend meeting on 8-17-18 from 1-4pm at More Than Words Program.  Judge: Curley, Edward J Applies To: Dilworth, Jr., Richard (Defendant); Raisler Cohn, Esq., Joshua (Attorney) on behalf of Dilworth, Jr., Richard (Defendant); Fitzgerald, Esq., Caitlin (Attorney) on behalf of Suffolk County District Attorney (Prosecutor)		
09/06/2018	Defendant not in Court (on home confinement) Defendant oral motion to modify conditions of release - Allowed  Home Confinement is vacated for today only from 1pm to 5pm to attend the More Than Words Program  R. Tower for C Fitzgerald, ADA J. Raisler, Attorney FTR  Judge: Fentress, Michelle		
09/11/2018	Event Result:: Motion Hearing scheduled on: Defendant comes into court, hearing re: P#10 discovery motion After hearing, taken under advisement Added conditions of bail: 1. May attend church every sunday from 11:00am-4:00pm  Sullivan, J		




<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	C. Fitzgerald ADA J. Raisler Cohn Atty FTR  Judge: Sullivan, Hon. William F  Judge: Sullivan, Hon. William F		
09/11/2018	Commonwealth 's Motion in Opposition to Deft's Motion for Snapchat account user name filed	10.1	
09/26/2018	Defendant comes to court. PTH held before Miller, J. Amended conditions of release: home confinement amended for the following hours: 9/27/18: 12pm-4pm 9/28/18: 8am-4pm 10/1/18: 3pm-9pm 10/2/18: 8am-4pm defendant to provide schedule after these dates.  Case continued by agreement to 10/10/18 at 2pm for hearing re: rule 17. ADA Fitzgerald Atty Raisler-Cohn N King c/r  Judge: Miller, Hon. Rosalind H		
09/26/2018	Commonwealth 's Certificate of Compliance  Judge: Miller, Hon. Rosalind H	11	
09/28/2018	ORDER: Court Order regarding Snapchat  Judge: Sullivan, Hon. William F	12	
10/10/2018	Defendant comes to court. Motion filing held before Ullman, J. Paper # 6 and 9 allowed without prejudice. Summons to issue. Case continued by agreement to 10/31/18 at 2pm for motion filing in 817.  ADA Fitzgerald Atty Raisler Cohn FTR 817  Judge: Ullmann, Hon. Robert L		
10/10/2018	Defendant 's Motion for Dental Visit allowed by Ullmann, J	13	
10/11/2018	Notice and Summons (Dwyer) issued to Keeper of Records, to produce privileged records by 10/24/2018 to the Clerk of the Superior Court.  Judge: Ullmann, Hon. Robert L	14	
10/31/2018	Defendant Comes Into Court 10/31/2018 02:00 PM Has been: Held as Scheduled Hon. Robert L Ullmann, Presiding Continued by Agreement to 11/14/18 at 200pm for Further Rule 14 and 17 Discovery Hearing (817,Non Custody) Ullman,J - J.Megee for C. Fitzgerald,ADA - N.Beaudoin,Atty for BPD - J.Raisler-Cohn,Atty - FTR		
10/31/2018	Defendant 's Motion for Discovery: Selective Prosecution Filed with Affidavit in Support thereof	15	
10/31/2018	Other 's Response to Defendants Motion for Training Materils and Protocols Relation to Social Media Investigations Filed by Attorney Nathaniel R. Beaudoin on Behalf of the Boston Police Department	16	 
10/31/2018	Opposition to paper #15.0 to Defendants Motion for Internal Affairs Documents filed by BOSTON POLICE DEPARTMENT Filed	17	
11/14/2018	Event Result:: Hearing RE: Discovery Motion(s) scheduled on: 11/14/2018 02:00 PM Has been: Held as Scheduled  Deft comes into court Hearing on P# 15 9Selective prosecution scheduled for 12/3/18 at 10 am in courtroom 817 and trial assignment cancel 11/28 fptc cancel trial 12/3		

<u>Docket</u> <u>Date</u>	<i>Docket Text</i>	<u>File</u> <u>Ref</u> <u>Nbr.</u>	<i>Image</i> <i>Avail.</i>
	<p>Comm to file opposition no later than 11/28 18</p> <p>Hon. Robert L Ullmann, Presiding - C Fitzgerald, ADA - N Beaudon, BPD - J Raisler Cohn, Atty FTR J Russo            Appeared:            Staff:                Anne Kaczmarek, Assistant Clerk Magistrate</p> <p>Judge: Ullmann, Hon. Robert L</p>		
11/16/2018	<p>Event Result:: Jury Trial scheduled on:            12/03/2018 09:00 AM            Has been: Canceled For the following reason: Joint request of parties            Hon. Robert L Ullmann, Presiding            Appeared:            Staff:                Anne Kaczmarek, Assistant Clerk Magistrate</p>		
11/23/2018	<p>Attorney appearance            On this date John Gordon MacLachlan, Esq. added as Appointed - Indigent Defendant for Defendant Richard Dilworth, Jr.            Appointment made for the purpose of Bail Only by Judge Edward J Curley.</p>		
11/23/2018	<p>Legal Counsel Fee Waived.            Judge: Curley, Edward J</p>		
11/23/2018	<p>Event Result:: Probation Administrative Conference scheduled on:            Defendant comes into court,            Case brought forward for Hre: GPS violation            Commonwealth request no action to be taken in regards to GPS violation            Case has next date</p> <p>E. Curley MAG            D. Goheen ADA            M. Hansen PO            J. MacLachlan Atty            FTR</p>		
11/23/2018	<p>Attorney appearance            On this date John Gordon MacLachlan, Esq. dismissed/withdrawn as Appointed - Indigent Defendant for Defendant Richard Dilworth, Jr.</p>		
11/26/2018	<p>Defendant 's Motion on Conditions of Bail            (Filed)</p>	18	
11/26/2018	<p>Defendant discharged</p> <p>Defendant instructed to report to probation before leaving on this day</p>		<u>Image</u>
11/26/2018	<p>Conditions of release on bail: Other Special Condition            Home Confinement except for work at More Than Words *Employer to provide schedule to probation            Church on Sunday from 11:00am to 4:00pm</p> <p>Judge: Medeiros, Lisa B</p>		
11/26/2018	<p>Defendant brought into court on Elmo Warrant            Conference to Review Status, Held            Discharge Issued</p> <p>L.Medeiros, MAG            C.Fitzgerald, ADA            J.Raisler Cohn, Atty            FTR</p>		
11/26/2018	<p>Defendant 's Motion for rule 17 summons for discovery selective prosecution</p>	19	
12/03/2018	<p>Opposition to paper #19.0 the boston police departments opposition to defendant's motion for Rule 17            summons for discovery: selective prosecution filed by</p>	20	
12/03/2018	<p>Deft comes into Court.            Hearing held on P#'s 19 and 15. Both Matters taken under advisement:            Motion Hearing scheduled on:            12/03/2018 10:00 AM            Has been: Held - Under advisement            Continued to 1-9-19 for Status/Trail Assignment in Rm 817 at 2pm            Hon. Robert L Ullmann, Presiding            Appeared: D. Fredette and N. Beaudoin, BPD            Prosecutor                Caitlin Fitzgerald, Esq.,</p>		

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	<p>Defendant  Joshua Raisler Cohn, Esq., Appointed - Indigent Defendant</p> <p>Staff:  Lisa Mederios, Assistant Clerk Magistrate</p> <p>Judge: Ullmann, Hon. Robert L</p>		
12/12/2018	Defendant 's Motion for Limited Relief from Home Confinement (Filed)	21	
12/12/2018	Endorsement on Motion for Limited Relief from home confinement, (#21.0): ALLOWED "As long as advanced notice to Probation Department within 48 hours"		
12/12/2018	Defendant not in court, Motion Hearing, Held Motion Filed		<u>Image</u>
	R.Miller,J C.Fitzgerald,ADA J.Raisler Cohn,Atty FTR		
12/21/2018	ORDER: of Procedure (Copy to ADA C Fitzgerald and Atty Raisler Cohn)	22	
	Judge: Ullmann, Hon. Robert L		
01/03/2019	Event Result:: Conference to Review Status scheduled on: 01/03/2019 02:00 PM Has been: Held as Scheduled		
	Deft not in court		
	Hon. Robert L Ullmann, Presiding - C Fitzgerald, ADA - J RasilerCohn, Atty - FTR 2 pm Appeared: Staff: Lisa Mederios, Assistant Clerk Magistrate		
01/04/2019	Defendant 's Reply to "Proposed Stipulated Facts"	23	
01/09/2019	Event Result:: Conference to Review Status scheduled on: 01/09/2019 02:00 PM Has been: Rescheduled For the following reason: By Court prior to date Hon. Robert L Ullmann, Presiding Appeared: Staff: Rebeca Figueroa, Assistant Clerk Magistrate Michelle Pierce, Assistant Clerk		<u>Image</u>
01/18/2019	Endorsement on Motion for Rule 17 Summons Motion for Discovery: Selective Prosecution, (#19.0): ALLOWED For the above reason's, Dilworth's motions pursuant to Mass. R. Crim. P. 17 (Filing #16 in Case 1884-CR-00453 and Filing #19 in Case No. 1884- CR- 00469) are ALLOWED, as modified herein, and his motions pursuant to Mass. R. Crim. P. 14 (Filing #12 in Case No. 1884-CR-00453 and Filing #15 in Case No. 1884-CR-00469) are DENIED. A summons will issue directing the Boston Police Department to submit to the Clerk of the Court within 45 days of this Order all Form 26 reports prepared by any officer or other employee of the Boston Police Department between August 1, 2017 and July 31, 2018 that reference the use of Snapchat as an investigative tool in any case in which the subject of Snapchat monitoring has been charged with any offense related to that monitoring. Documents related to human trafficking investigations, sexual assault investigations and murder investigations will not be covered by this summons. Ullman, J.		
	Judge: Ullmann, Hon. Robert L		
01/18/2019	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: Joshua Raisler Cohn, Esq. Attorney: Caitlin Fitzgerald, Esq.		
01/18/2019	Endorsement on Motion for Discovery: Selective Prosecution, (#15.0): DENIED After opposition and hearing, DENIED without prejudice to further consideration if Officer Crossen is identified by the Commonwealth as a trial witness. See Comm. v. Cruz, SJC-12463 (12/27/2018); Comm. v. Wunis, 426 Mass. 639, 644-645 (1998). Ullman, J. - See Endorsement on P#7 on Docket 1884CR00453.		
	(Notice and Copy sent to parties via First Class Mail)		
	Judge: Ullmann, Hon. Robert L		

<u>Docket</u> <u>Date</u>	<u>Docket Text</u>	<u>File</u> <u>Ref</u> <u>Nbr.</u>	<u>Image</u> <u>Avail.</u>
01/18/2019	MEMORANDUM & ORDER:  Memorandum of Decision and Order on Defendant's Motions for Discovery on Alleged Selective Prosecution:  For the above reason's, Dilworth's motions pursuant to Mass. R. Crim. P. 17 (Filing #16 in Case 1884-CR-00453 and Filing #19 in Case No. 1884- CR- 00469) are ALLOWED, as modified herein, and his motions pursuant to Mass. R. Crim. P. 14 (Filing #12 in Case No. 1884-CR-00453 and Filing #15 in Case No. 1884-CR-00469) are DENIED. A summons will issue directing the Boston Police Department to submit to the Clerk of the Court within 45 days of this Order all Form 26 reports prepared by any officer or other employee of the Boston Police Department between August 1, 2017 and July 31, 2018 that reference the use of Snapchat as an investigative tool in any case in which the subject of Snapchat monitoring has been charged with any offense related to that monitoring. Documents related to human trafficking investigations, sexual assault investigations and murder investigations will not be covered by this summons. Ullman, J.  (Notice and copy sent to parties via First Class Mail)  Judge: Ullmann, Hon. Robert L	24	 <a href="#">Image</a>
01/18/2019	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: Joshua Raisler Cohn, Esq. Attorney: Caitlin Fitzgerald, Esq.		
01/22/2019	Notice and Summons (Dwyer) issued to Keeper of Records BOSTON POLICE DEPARTMENT of to produce records by 01/22/2019 to the Clerk of the Superior Court.  Judge: Ullmann, Hon. Robert L	25	
01/23/2019	Defendant 's Motion to Modify Release Conditions: Shifting House Arrest to Curfew - Filed	26	
01/23/2019	Defendant comes into Court.  Hearing Re: Status held before Locke, J.  Continued by Agreement to 3-18-19 for Hearing Re: Status of Motion to Suppress at 2:00PM in Courtroom 817.  By Order of the Court, Defendant is to provide notice of shift to the Probation Department in advance of taking evening shift at More than Words. Additionally, Defendant has one (1) hour to travel home from work.  Hon. Jeffrey A Locke, Presiding Appeared: C. Fitzgerald, ADA - J. Raisler Cohn, Atty. - FTR Staff: Michelle Fentress, Assistant Clerk Magistrate Michelle Pierce, Assistant Clerk		
01/23/2019	Endorsement on Motion to Modify Release Conditions: Shifting House Arrest to Curfew, (#26.0): ALLOWED After hearing and by agreement, home confinement order vacated; curfew imposed 8pm - 6am except when assigned to scheduled night shifts at More than Words in which case curfew shall commence one hour after end of shift. Locke, J.		 <a href="#">Image</a>
02/21/2019	Defendant comes into court, Conference to Review Status, Held Case brought forward by probation Elmo Warrant No Action Taken Case has next date by agreement on 03/18/2019 RE: Conference to Review Status in CTRM 817 at 2:00pm  M. Fentress, MAG C. Fitzgerald, ADA J. Raisler Cohn, Atty FTR		
03/14/2019	Commonwealth 's Notice of Appeal - Filed  (Copy to Ullman, J.)	27	 <a href="#">Image</a>
03/14/2019	Commonwealth 's Motion to Accept its Notice of Appeal as Timely Filed pursuant to Mass. R. Crim. P. 4(C) - Filed  (Copy to Ullman, J.)	28	 <a href="#">Image</a>

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
03/14/2019	Commonwealth 's Motion to Stay Production of Discovery - Filed (Copy to Ullman, J.)	29	 <a href="#">Image</a>
03/18/2019	Defendant comes into Court.  Hearing Re: Status held before Locke, J.  Continued by Agreement to 3/25/19 for Hearing Re: Status at 2:00PM in Courtroom 817. - Defendant's presence waived for next date with no objection by the Commonwealth.  By Order of the Court Commonwealth's Motion to Reconsider is to file on or before 3/20/19. Locke, J.  Hon. Jeffrey A Locke, Presiding Appeared: C. Fitzgerald, ADA - J. Raisler Cohn, Atty. - FTR Staff: Rebeca Figueroa, Assistant Clerk Magistrate Michelle Pierce, Assistant Clerk		
03/18/2019	Defendant 's Motion for Discovery (Fourth): Facial Surveillance Technology and Affidavit of Counsel - Filed	30	 <a href="#">Image</a>
03/20/2019	Commonwealth 's Motion for Stay and Reconsideration of Ruling Granting Defense Motion for Evidence, and Boston Police Department's - Filed (Copy to Ullman, J.)	31	 <a href="#">Image</a>
03/22/2019	The following form was generated:		
03/22/2019	The following form was generated:  Clerk's Notice Sent On: 03/22/2019 12:43:28		
03/25/2019	Event Result:: Defendant not in Court (Presence waived for today).  Continued to 4-29-19 for Status in Rm 817 at 2pm (Non Custody, presence waived for this date)  Conference to Review Status scheduled on:  03/25/2019 02:00 PM  Has been: Held as Scheduled  Hon. Jeffrey A Locke, Presiding  Appeared: FTR 2:50pm  Prosecutor Caitlin Fitzgerald, Esq., Defendant Joshua Raisler Cohn, Esq., Appointed - Indigent Defendant  Staff: Rebeca Figueroa, Assistant Clerk Magistrate Michelle Pierce, Assistant Clerk		
03/25/2019	Endorsement on Motion for Stay and Reconsideration of Ruling Granting Defense Motion for Evidence, (#31.0): Other action taken Motion to Reconsider DENIED, including the request of the Commonwealth and BPD for an in camera hearing or review. Motion to Stay deferred to the session judge. Ullman, J.  Judge: Ullmann, Hon. Robert L		
03/26/2019	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: Joshua Raisler Cohn, Esq. Attorney: Caitlin Fitzgerald, Esq.		
03/28/2019	Commonwealth 's Notice of Appeal - Filed	32	 <a href="#">Image</a>
04/29/2019	Defendant comes into Court Event Result:: Conference to Review Status scheduled on: 04/29/2019 02:00 PM Has been: Held as Scheduled Case continued by agreement to 5-29-19 by agreement Re: Status Hon. Robert N Tochka, Presiding, C. Fitzgerald, ADA J. Raisler Cohn, Atty, FTR		









<u>Docket</u> <u>Date</u>	<i>Docket Text</i>	<u>File</u> <u>Ref</u> <u>Nbr.</u>	<i>Image</i> <i>Avail.</i>
	Staff: Rebeca Figueroa, Assistant Clerk Magistrate		
05/29/2019	Defendant not in Court. Defendant's presence previously waived.  Conference to Review Status not held due to parties not being present.  Continued by Order of the Court to 6/5/19 for Conference to Review Status (Commonwealth's Appeal) at 2:00PM in Courtroom 817. - Defendant's presence waived.  Hon. Robert N Tochka, Presiding Appeared: P. Mulligan, ADA for C. Fitzgerald, ADA - xxx - FTR Staff: Rebeca Figueroa, Assistant Clerk Magistrate		
06/05/2019	Defendant not in Court. Defendant's presence previously waived.  Conference to Review Status held before Tochka, J.  Continued by Agreement as follows:  8/1/19 Filing of Motions, Magistrate Session at 9:30AM.  9/11/19 Final Pre-Trial Conference at 2:00PM, Courtroom 817  9/16/19 Jury Trial at 9:00AM, Courtroom 817  Hon. Robert N Tochka, Presiding Appeared: B. Tower, ADA for C. Fitzgerald, ADA - J. Rasiler-Cohn, Atty. - FTR Staff: Rebeca Figueroa, Assistant Clerk Magistrate		
06/24/2019	Defendant not in court. Case brought forward, probation administrative conference held. After hearing, defendant had a dead GPS battery. Defendant contacted via phone, currently being monitored. Commonwealth not asking for increase in bail or change in conditions.  Medeiros, MAG - C. Fitzgerald, ADA - FTR		
06/24/2019	Notice of docket entry received from Supreme Judicial Court on June 21, the following was entered: JUDGMENT: as on file. "This is not a matter for the exercise of this Court's extraordinary power. Accordingly, and upon consideration, it is ORDERED that the petition be, and the same hereby is, denied without hearing."	33	 <a href="#">Image</a>
07/01/2019	Court received Notice from Supreme Judicial Court regarding Fees with Notice of Appeal and Notice of Assembly of the Record on Appeal attached related to appeal (Filed)	34	 <a href="#">Image</a>
08/01/2019	Defendant 's Motion for relief for curfew for work filed and allowed with Commonwealth's assent - curfew may be adjusted to allow defendant to work with prior notice to probation as scheduled *Curfew can be adjusted when defendant is working All other terms and conditions of release remain in effect	35	 <a href="#">Image</a>
08/01/2019	Defendant comes into court. Filing of motions held as scheduled. Case has next date of 9/11/19 RE: Final Pre-Trial Conference at 2:00 PM in Criminal 5 (CtRm 817)  Medeiros, MAG - C. Fitzgerald, ADA - J. Raisler-Cohn, Atty - 9:32 AM FTR		
08/28/2019	Event Result:: Final Pre-Trial Conference scheduled on: 09/11/2019 02:00 PM Has been: Rescheduled For the following reason: By Court prior to date Note: Counsel indicate that this matter currently on appeal, with a pending petition by the Commonwealth to the full bench.  Hon. Anthony M. Campo, Presiding Staff: Rebeca Figueroa, Assistant Clerk Magistrate		
08/28/2019	Event Result:: Jury Trial scheduled on: 09/16/2019 09:00 AM Has been: Rescheduled For the following reason: By Court prior to date Note: Counsel indicate that this matter currently on appeal, with a pending petition by the Commonwealth to the full bench.  Hon. Anthony M. Campo, Presiding		

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	Staff: Rebeca Figueroa, Assistant Clerk Magistrate		
10/17/2019	Event Result:: Defendant comes into Court. ELMO warrant.  Commonwealth Request no action taken.  Case has next date of 12-2-19 for FPTC in Rm 815 at 2pm  Conference to Review Status scheduled on:  10/17/2019 09:30 AM  Has been: Held as Scheduled  Michelle Fentress, Presiding  Staff: G. Ogus, ADA - K. Christianson, PO - FTR 12:57pm  Stacey Pichardo, Assistant Clerk Magistrate		
12/02/2019	Event Result:: Defendant comes into Court. Case brought forward by probation due to ELMO warrant having been issued.  Commonwealth requests no action be taken.  Case is on later today, 12-2-19 in Rm 817 at 2pm.  Curley, MAG - S. Pichardo, AC - G. Ogus for C. Fitzgerald, ADA - J. Fitzgerlad, PO - FTR 11:27am		
12/02/2019	Event Result:: Jury Trial scheduled on: 12/09/2019 09:00 AM Has been: Canceled For the following reason: Joint request of parties Hon. Helene Kazanjian, Presiding Staff: Rebeca Figueroa, Assistant Clerk Magistrate Michelle Pierce, Assistant Clerk David Sheehan, Assistant Clerk Magistrate		
12/02/2019	Defendant comes into Court, Final Pre-Trial Conference Not Held, Joint request of parties, - Continued by agreement to 02/19/2020, Status Conference RE: Appeal at 2:00 PM (Criminal Session 5, CtRm 817)  Kazanjian, J - R. Figueroa, ACM - A. Boulanger for C. Fitzgerald, ADA - J. Raisler-Cohn, Atty - FTR		
02/19/2020	Attorney appearance On this date Joshua Raisler Cohn, Esq. dismissed/withdrawn as Appointed - Indigent Defendant for Defendant Richard Dilworth, Jr.		
02/19/2020	Attorney appearance On this date Connor M Barusch, Esq. added as Appointed - Indigent Defendant for Defendant Richard Dilworth, Jr. Appointment made for the purpose of Case in Chief by Judge Hon. Jeffrey A Locke.		
02/19/2020	Legal Counsel Fee Waived. Judge: Locke, Hon. Jeffrey A		
02/19/2020	Defendant comes into Court, Status Conference RE: Appeal held as scheduled before Locke, J. - Continued by agreement to 04/27/2020 for further Status Conference RE: Appeal at 2:00 PM (Criminal Session 5, CtRm 817)  Locke, J - R. Figueroa, ACM - G. Galizio for C. Fitzgerald, ADA - C. Barusch, Atty - FTR (2:31 PM)		
05/04/2020	Event Result:: Conference to Review Status scheduled on: 04/27/2020 02:00 PM Has been: Canceled For the following reason: By Court due to Covid-19 Staff: Rebeca Figueroa, Assistant Clerk Magistrate Michelle Pierce, Assistant Clerk		
06/22/2020	Defendant's presence waived with no objection.  Conference to Review Status held before Ricciuti, J.  Per Order of the Court: 1. Boston Police Department must produce outstanding discovery on or before July 6, 2020.		





<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	<p>2. Further filings by the Defendant are due on or before August 3, 2020. 3. Commonwealth's Response is due on or before August 17, 2020.</p> <p>Continued by Agreement to September 8, 2020 at 9:30AM for Hearing Re: Discovery Motions at 9:30AM in Courtroom 817.</p> <p>Hon. Michael D Ricciuti, Presiding Appeared: C. Fitzgerald, ADA (via Zoom) - C. Barush, Atty. (via Zoom) - FTR (10:15AM) Staff: Rebeca Figueroa, Assistant Clerk Magistrate</p>		
07/07/2020	Defendant 's Notice of Issues Related to Scheduling - Furloughs - Filed	36	
07/30/2020	Rescript received from Supreme Judicial Court; judgment AFFIRMED . (Faxed to probation)	36.1	 
08/03/2020	Attorney appearance On this date Joshua Raisler Cohn, Esq. added for Defendant Richard Dilworth, Jr.		
08/03/2020	Defendant 's Notice of Appearance for Attorney Joshua Raisler Cohn - Filed	37	
08/11/2020	Defendant 's Motion to Vacate Unlawful GPS Monitoring and Curfew Conditions of Pre-Trial Release and Accompanying Memorandum of Law with Affidavit of Counsel in Support - Filed	38	 
08/11/2020	Defendant 's EX PARTE Motion for Expenses with Affidavit of Counsel in Support - Filed	39	 
08/13/2020	Event Result:: Conference to Review Status scheduled on: 08/13/2020 10:30 AM Has been: Rescheduled For the following reason: Not reached by Court Hon. Mary K Ames, Presiding Staff: Rebeca Figueroa, Assistant Clerk Magistrate		
08/24/2020	Defendant is present in court via Zoom Videoconferencing.  Conference to Review Status held before Ames, J.  Continued by Agreement to October 28, 2020 for Conference to Review Status of Lora Motion at 11:00AM in Courtroom 817.  Per Order of the Court: Commonwealth must provide outstanding discovery to Defense Counsel on or before September 11, 2020.  Hon. Mary K Ames, Presiding Appeared: C. Fitzgerald, ADA (via Zoom) - J. Raisler Cohn, Atty. - FTR (11:10 AM) Staff: Rebeca Figueroa, Assistant Clerk Magistrate		
08/24/2020	Event Result:: Motion Hearing scheduled on: 09/08/2020 09:30 AM Has been: Rescheduled For the following reason: By Court prior to date Hon. Mary K Ames, Presiding Staff: Rebeca Figueroa, Assistant Clerk Magistrate		
08/24/2020	Endorsement on Motion to Vacate Unlawful GPS Monitoring and Curfew Conditions of Pre-Trial Release and Accompanying Memorandum of Law, (#38.0): DENIED DENIED after hearing. Reasons for the Court's decision are made on the record at hearing. M.K. Ames, J. 8/24/2020		 
08/24/2020	Rule 36 waived re:  Order of the Court and By Agreement until October 28, 2020.  Judge: Ames, Hon. Mary K		
09/22/2020	Commonwealth 's Motion for a Protective Order Regarding Discovery Ordered Under Rule Mass. R. Crim. P. 17, Affidavit in Support and Proposed Protective Order - Filed	40	 
10/07/2020	Opposition to paper #40.0 Commonwealth 's Motion for a Protective Order Regarding Discovery Ordered Under Rule Mass. R. Crim. P. 17 filed by Richard Dilworth, Jr.	41	 
10/08/2020	Defendant is present in court via Zoom Videoconferencing.  Hearing Re: Commonwealth's Motion for a Protective Order Regarding Discovery Ordered Under Rule Mass. R. Crim. P. 17 (P#36) held before Ames, J.		







<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	Continued to the previously scheduled date of October 28, 2020 for Conference to Review Status of Discovery at 11:00 AM in Courtroom 817.  Hon. Mary K Ames, Presiding Appeared: C. Fitzgerald, ADA (via Zoom) - C. Barusch, Atty. (via Zoom) - J. Raisler Cohn, Atty. (via Zoom) - FTR (12:15 PM) Staff: Rebeca Figueroa, Assistant Clerk Magistrate		
10/08/2020	Endorsement on Motion for Protective Order Regarding Discovery Ordered Under Rule Mass. R. Crim. P. 17, (#40.0): ALLOWED After hearing, ALLOWED for the good and valid reasons cited herein and for the reasons stated on the record. M.K. Ames, J. 10.8.2020		 <a href="#">Image</a>
10/08/2020	Commonwealth 's Submission of Proposed Protective Order	42	
10/08/2020	Endorsement on Submission of Proposed Protective Order, (#42.0): ALLOWED SO ORDERED. M.K. Ames, J.		 <a href="#">Image</a>
10/26/2020	Defendant 's Motion to Continue with Affidavit of Counsel - Filed	43	 <a href="#">Image</a>
10/26/2020	Endorsement on Motion to Continue, (#43.0): ALLOWED		 <a href="#">Image</a>
10/26/2020	Event Result:: Conference to Review Status scheduled on: 10/28/2020 11:00 AM Has been: Rescheduled For the following reason: Request of Defendant Hon. Mary K Ames, Presiding Staff: Rebeca Figueroa, Assistant Clerk Magistrate		 <a href="#">Image</a>
11/30/2020	Event Result:: Conference to Review Status scheduled on: 12/01/2020 11:00 AM Has been: Rescheduled For the following reason: By Court due to Covid-19 Hon. Mary K Ames, Presiding Staff: Rebeca Figueroa, Assistant Clerk Magistrate		
01/13/2021	Defendant 's Motion for Equal Protection Discovery or in the alternative for a Rule 17 Summons, Affidavit of Counsel in Support with Attachments - Filed	44	 <a href="#">Image</a>
01/14/2021	Defendant is present in court via Zoom videoconferencing.  Conference to Review Status held before Krupp, J.  Continued by agreement to January 28, 2021 at 11:00 AM for Hearing Re: Discovery Motions in Courtroom 817.  Hon. Peter B Krupp, Presiding Appeared: C. Fitzgerald, ADA (via Zoom) - J. Raisler-Cohn, Atty. (via Zoom) - FTR (9:20 AM) Staff: Rebeca Figueroa, Assistant Clerk Magistrate		
01/19/2021	Defendant 's Submission of Rule 14(a)(2) Motion for Boston Police Department Internal Affairs Documents or in the alternative for a Rule 17 Summons- Internal Affairs Files with Affidavit of Counsel in Support - Filed	45	 <a href="#">Image</a>
01/27/2021	Commonwealth 's Motion to Continue Discovery Motion - Filed	46	 <a href="#">Image</a>
01/27/2021	Event Result:: Hearing RE: Discovery Motion(s) scheduled on: 01/28/2021 11:00 AM Has been: Rescheduled For the following reason: Request of Commonwealth Hon. Peter B Krupp, Presiding Staff: Rebeca Figueroa, Assistant Clerk Magistrate		 <a href="#">Image</a>
01/27/2021	Endorsement on Motion to Continue Discovery Motion, (#46.0): ALLOWED 1/27/21 ALLOWED. Date is converted to a status conference. Krupp, J. Attest: R. Figueroa, ACM		 <a href="#">Image</a>
01/28/2021	Defendant is present in court via Zoom videoconferencing.  Conference to Review Status held before Krupp, J.  Continued by agreement to March 9, 2021 at 10:30 AM for Hearing Re: Discovery Motions in Courtroom 817.  Per Order of the Court: 1. Commonwealth motions shall be filed on or before February 16, 2021; 2. Defendant's response shall be filed on or before March 2, 2021.		

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	Hon. Peter B Krupp, Presiding Appeared: C. Fitzgerald, ADA (via Zoom) - J. Raisler-Cohn, Atty. (via Zoom) - FTR (10:58 AM) Staff: Rebeca Figueroa, Assistant Clerk Magistrate		
02/17/2021	Commonwealth 's Motion in opposition to the Defendant's Motion for equal protection Discovery filed	47	
03/03/2021	Defendant 's Motion : Mr. Dilworth is Entitled to Relevant Discovery on the Issue of Whether the Investigatory Scheme Used by Law Enforcement Improperly Targeted Him in Violation of Equal Protection - Filed	48	 <u>Image</u>  <u>Image</u>
03/09/2021	Defendant is present in court via Zoom videoconferencing.  Hearing Re: Discovery Motions held before Krupp, J.  Continued by Agreement to March 11, 2021 at 12:30 PM for Hearing Re: Discovery Motions (P#44, 45, 47, 48) in Courtroom 817.  Hon. Peter B Krupp, Presiding Appeared: C. Fitzgerald, ADA (via Zoom) - J. Megee, Atty. BPD Legal (via Zoom) - J. Raisler Cohn, Atty. (via Zoom) - FTR (10:30 AM) Staff: Rebeca Figueroa, Assistant Clerk Magistrate		
03/11/2021	Event Result:: Hearing RE: Discovery Motion(s) scheduled on: 03/11/2021 12:30 PM Has been: Rescheduled For the following reason: Court Order Hon. Peter B Krupp, Presiding Staff: Rebeca Figueroa, Assistant Clerk Magistrate		
03/12/2021	Defendant is present in court via Zoom videoconferencing.  Hearing Re: Discovery Motions Hearing (P#44, 45, 47, 48) held before Krupp, J.  After hearing, the motions are held under advisement.  Continued by Agreement to April 5, 2021 at 10:00 AM for Status Conference in Courtroom 817.  Hon. Peter B Krupp, Presiding Appeared: C. Fitzgerald, ADA (via Zoom) - J. Raisler Cohn, Atty. (via Zoom) - FTR (8:50 AM) Staff: Rebeca Figueroa, Assistant Clerk Magistrate		
03/30/2021	MEMORANDUM & ORDER:  On Defendant's Motion for Equal Protection Discovery or For a Rule 17 Summons  (Notice and Copy to Counsel of Record via Electronic and First Class Mail)  Judge: Krupp, Hon. Peter B	49	 <u>Image</u>
04/02/2021	The following form was generated: A Clerk's Notice was generated and sent to: Defendant, Attorney: Connor M Barusch, Esq. CPCS 10 Malcolm X Blvd, Roxbury, MA 02108 Prosecutor, Attorney: Caitlin Fitzgerald, Esq. 1 Bulfinch Place, Boston, MA 02114		
04/02/2021	Defendant 's Motion to Vacate Unlawful GPS Monitoring and Curfew Conditions of Pre-Trial Release and Accompanying Memorandum of Law with Affidavit of Counsel in Support - Filed	50	 <u>Image</u>
04/05/2021	Defendant is present in court via Zoom videoconferencing.  Status Conference held before Krupp, J. After hearing, Defendant's Motion to Vacate GPS Monitoring and Curfew Conditions of Pre-Trial Release was allowed.  GPS Monitoring and Curfew conditions of release have been vacated.  Continued by Agreement to May 13, 2021 at 9:30 AM for Status Conference in Courtroom 817.  Hon. Peter B Krupp, Presiding Appeared: C. Fitzgerald, ADA (via Zoom) - J. Raisler Cohn, Atty. (via Zoom) - FTR (9:59 AM) Staff: Tiffany Castillo, Assistant Clerk Magistrate		

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
04/05/2021	Endorsement on Defendant's Second Motion to Vacate Unlawful GPS Monitoring and Curfew Conditions of Pre-Trial Release and Accompanying Memorandum of Law, (#50.0): ALLOWED "After hearing, ALLOWED. The GPS and curfew conditions are lifted." J. Peter Krupp, 4/5/21.		 <a href="#">Image</a>
05/11/2021	Defendant 's Motion for Additional Discovery: Snapchat User Icon/Bitmoji and User Name	51	 <a href="#">Image</a>
05/13/2021	Defendant is present in court via Zoom videoconferencing.  Conference to Review Status held before Krupp, J.  Continued by agreement to June 1, 2021 at 2:00 PM for Hearing Re: Discovery Motions (P#51) in Courtroom 817 (via Zoom).  Hon. Peter B Krupp, Presiding Appeared: C. Fitzgerald, ADA (via Zoom) - J. Raisler Cohn, Atty. (via Zoom) - FTR (9:38 AM) Staff: Rebeca Figueroa, Assistant Clerk Magistrate		 <a href="#">Image</a>
06/01/2021	Opposition to paper #51.0 Defendant 's Motion for Additional Discovery: Snapchat User Icon/Bitmoji and User Name filed by Suffolk County District Attorney	52	
06/01/2021	Event Result:: Hearing RE: Discovery Motion(s) scheduled on: 06/01/2021 02:00 PM Has been: Not Held For the following reason: Transferred to another session Hon. Peter B Krupp, Presiding Staff: Rebeca Figueroa, Assistant Clerk Magistrate		
06/01/2021	Defendant comes into court by Zoom After hearing matter taken under advisement By agreement case continued to 6/24/2021 at 9:30am for status to be held by Zoom (Krupp, J) ACM Danielle Bisson ADA Caitlin Fitzgerald by Zoom ATTY Joshua Cohn and Connor Barusch by Zoom Held at the Moakley Courthouse in CTRM 9 on FTR and by Zoom at 3:15pm		
06/24/2021	Defendant 's Motion to Amend Protective Order - Filed	53	 <a href="#">Image</a>
06/24/2021	Defendant is present in court via Zoom videoconferencing.  Conference to Review Status held before Krupp, J.  Continued by agreement to September 24, 2021 at 10:00 AM for In-Person Non-Evidentiary Motion Hearing in Courtroom 817.  Per Order of the Court: 1. All defense motions shall be filed on or before August 13, 2021; 2. Commonwealth response shall be filed on or before September 10, 2021.  Hon. Peter B Krupp, Presiding Appeared: C. Fitzgerald, ADA (via Zoom) - J. Raisler Cohn, Atty. (via Zoom) - FTR (9:35 AM) Staff: Rebeca Figueroa, Assistant Clerk Magistrate		 <a href="#">Image</a>
06/24/2021	MEMORANDUM & ORDER:  ON DEFENDANT'S MOTION FOR DISCOVERY OF SNAPCHAT USEER ICON/BITMOJI AND USER NAME  (Notice and Copy to Counsel of Record via electronic and first class mail)  Judge: Krupp, Hon. Peter B	54	 <a href="#">Image</a>
06/24/2021	The following form was generated: A Clerk's Notice was generated and sent to: Defendant, Attorney: Joshua Raisler Cohn, Esq. Committee for Public Counsel Services Roxbury Defenders Unit 10 Malcolm X Blvd, Roxbury, MA 02119 Prosecutor, Attorney: Caitlin Fitzgerald, Esq. 1 Bulfinch Place, Boston, MA 02114		
06/24/2021	Endorsement on Motion for Additional Discovery: Snapchat User Icon/Bitmoji and User Name, Defendant's, (#51.0): ALLOWED 6/24/21 After hearing, ALLOWED. See Memorandum and Order of same date. Krupp, J.		 <a href="#">Image</a>
06/24/2021	Endorsement on Motion to Amend Protective Order, Defendant's, (#53.0): ALLOWED 6/24/21 ALLOWED without opposition. Krupp, J.		 <a href="#">Image</a>

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
09/14/2021	Commonwealth 's Motion to convert motion date to status regarding discovery compliance date filed.	55	
09/24/2021	Defendant is present in court.  Conference to Review Status held before Ames, J.  Continued by agreement to October 19, 2021 at 2:00 PM for a Status Conference re: Discovery in Courtroom 817.  Hon. Mary K Ames, Presiding Appeared: C. Fitzgerald, ADA - J. Raisler Cohn, Atty. - FTR (10:13 AM) Staff: Tiffany Castillo, Assistant Clerk Magistrate		
10/19/2021	Event Result:: Conference to Review Status scheduled on: 10/19/2021 02:00 PM Has been: Not Held For the following reason: Request of Defendant Hon. Mary K Ames, Presiding Staff: Rourke Donnelly, Assistant Clerk Magistrate		
11/02/2021	Event Result:: Conference to Review Status scheduled on: 11/02/2021 02:00 PM Has been: Held as Scheduled Hon. Mary K Ames, Presiding Staff: Rourke Donnelly, Assistant Clerk Magistrate  Defendant comes into Court; matter continued by agreement to 11/30/21 @ 2pm. Ames,J. - C.Fitzgerald, ADA - J.Raisler-Cohn, Attny - FTR		
11/30/2021	Event Result:: Conference to Review Status scheduled on: 11/30/2021 02:00 PM Has been: Held as Scheduled Hon. Mary K Ames, Presiding Staff: Rourke Donnelly, Assistant Clerk Magistrate  Defendant not in Court (waived); matter continued by agreement to 1/11/22 for Status. Ames,J. - C.Fitzgerald, ADA - J.Raisler-Cohn,Attny -FTR		
12/03/2021	Commonwealth 's Motion to Reconsider the Court's Order to Compel Disclosure of Snapchat Usernames and Bitmojis w/affidavit, filed	56	
12/08/2021	Endorsement on Motion to Reconsider, (#56.0): DENIED 12/8/21 After review, the Commonwealth's Motion to Reconsider the Court's Order to Compel Disclosure of Snapchat Usernames and Bitmojis (Docket #53 in 1884CR453 and Docket #56 in 1884CR469) is DENIED. The Commonwealth has not cited any changed circumstances, newly discovered evidence or information, or any development in the relevant law. See Audubon Hill S. Condominium Ass'n v. Community Ass'n Underwriters of Am., Inc., 82 Mass. App. Ct. 461, 470 (2012). The additional affidavit contains no such information. The additional affidavit, which is unsigned and undated, could have been presented when the motion was being litigated, and is only now being submitted more than five months after the Court's decision without explanation for the delay. To the extent the Commonwealth's motion contends the Court erred in its original ruling, it generally rehashes arguments previously presented and that I rejected. See Memorandum and Order on Defendant's Motion for Discovery of Snapchat User Icon/Bitmoji and User Name (Docket #52). /s/ Peter B. Krupp  Notice to parties via email.		
12/13/2021	Notice of appeal filed.  Applies To: Suffolk County District Attorney (Prosecutor)	57	 
12/13/2021	Commonwealth 's Motion to Stay Production of Discovery, filed	58	
01/11/2022	Event Result:: Conference to Review Status scheduled on: 01/11/2022 10:30 AM Has been: Held via Video/Teleconference Hon. Joshua Wall, Presiding Staff: Rourke Donnelly, Assistant Clerk Magistrate  Defendant's presence excused; matter continued by agreement to 2/15/22 for Status. Wall,J. - G.Galizio for C.Fitzgerald, ADA - J.Raisler-Cohn, Attny - FTR		
01/11/2022	Endorsement on Motion to Stay Production of Discovery, (#58.0): ALLOWED  Judge: Wall, Hon. Joshua		 

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
02/15/2022	Event Result:: Conference to Review Status scheduled on: 02/15/2022 10:00 AM Has been: Not Held For the following reason: Joint request of parties Hon. Joshua Wall, Presiding Staff: Rourke Donnelly, Assistant Clerk Magistrate		
05/24/2022	Event Result:: Conference to Review Status scheduled on: 05/24/2022 02:00 PM Has been: Held as Scheduled Hon. Jackie Cowin, Presiding Staff: Rourke Donnelly, Assistant Clerk Magistrate  Defendant comes into Court; status conference held; parties to report a new date. Cowin, J. - C.Fitzgerald, ADA - J.Raisler-Cohn, Attny -FTR		
05/24/2022	Defendant 's Motion to dismiss with Prejudice as Sanction for Commonwealth's Refusal to Produce Court ordered Discovery for Mr.Dilworth's Equal Protection Claim, filed	59	 <a href="#">Image</a>
05/24/2022	Commonwealth 's Notice of Non Compliance w/affidavit of Detective Brian Ball, filed	60	 <a href="#">Image</a>
05/24/2022	Other 's Notice of Non Compliance, filed  Applies To: BOSTON POLICE DEPARTMENT (Keeper of Record)	61	 <a href="#">Image</a>
06/08/2022	Commonwealth 's Memorandum in Opposition to Defendant's Motion to Dismiss, filed	62	 <a href="#">Image</a>
06/08/2022	Event Result:: Motion Hearing scheduled on: 06/08/2022 02:00 PM Has been: Held as Scheduled Hon. Robert L Ullmann, Presiding Staff: Rourke Donnelly, Assistant Clerk Magistrate  Defendant comes into Court; motion to dismiss hearing held; taken under advisement. Ullmann,J. - C.Fitzgerald, ADA - J.Raisler-Cohn, Attny -FTR		<a href="#">Image</a>
06/27/2022	MEMORANDUM & ORDER:  ON DEFENDANT'S MOTION TO DISMISS.  Motion ALLOWED. This case is DISMISSED WITHOUT PREJUDICE.  Counsel notified via email on June 27, 2022.  Judge: Ullmann, Hon. Robert L	63	 <a href="#">Image</a>
06/27/2022	Event Result:: Conference to Review Status scheduled on: 07/12/2022 02:00 PM Has been: Canceled For the following reason: Case Disposed Hon. Robert L Ullmann, Presiding Staff: Rourke Donnelly, Assistant Clerk Magistrate		
06/27/2022	Offense Disposition:: Charge #1 FIREARM, CARRY WITHOUT LICENSE c269 §10(a) On: 06/27/2022 Judge: Hon. Robert L Ullmann By: Other Court Event Dismissed - Without Prejudice  Charge #2 AMMUNITION WITHOUT FID CARD, POSSESS c269 §10(h)(1) On: 06/27/2022 Judge: Hon. Robert L Ullmann By: Other Court Event Dismissed - Without Prejudice  Charge #3 FIREARM, CARRY WITHOUT LICENSE LOADED c269 s.10(n) On: 06/27/2022 Judge: Hon. Robert L Ullmann By: Other Court Event Dismissed - Without Prejudice  Charge #4 FIREARM, POSSESS LARGE CAPACITY c269 §10(m) On: 06/27/2022 Judge: Hon. Robert L Ullmann By: Other Court Event Dismissed - Without Prejudice  Charge #5 FIREARM W/DEFACED NO., RECEIVE c269 §11C On: 06/27/2022 Judge: Hon. Robert L Ullmann By: Other Court Event Dismissed - Without Prejudice		
06/27/2022	Docket Note: Chief Probation Officer Forbes notified via email that the case has been dismissed without prejudice.		

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
06/27/2022	Notice of appeal filed by Commonwealth regarding Court's order granting the defendant's motion to dismiss  Applies To: Suffolk County District Attorney (Prosecutor)	64	 <a href="#">Image</a>
06/28/2022	Notice to surety, T. Porcher- Murphy bail available for return.		
07/05/2022	Financial Note:  RAB form		
07/07/2022	Defendant 's Motion to Correct Undisputed Facts in the Memorandum and Order to Dismiss filed (Copy of Motion, Notice, and Docket sent to Ullmann, RAJ.)	65	 <a href="#">Image</a>
07/13/2022	General correspondence regarding Return of service of a notice to pick up bail. UNSERVED. (filed)		
07/19/2022	Non-Custody Defendant not in Court. Presence waived.  Conference to Review Status held as scheduled. After hearing, Defendant's Motion to be allowed - Court to issue Order.  Hon. Robert L Ullmann, Presiding - T. Castillo, ACM - C. Fitzgerald, ADA - J. Raisler Cohn, Atty. - FTR 2:32PM		
07/22/2022	MEMORANDUM & ORDER:  of Decision on Defendant's Motions to Dismiss, AMENDED  This Memorandum of Order SUPERSEDES this Court's previous Order (Paper #63)  **Notice to parties via electronic mail**  Judge: Ullmann, Hon. Robert L	66	 <a href="#">Image</a>
01/13/2023	Attorney appearance On this date David D McGowan, Esq. added as Attorney for the Commonwealth for Prosecutor Suffolk County District Attorney		
01/13/2023	Appeal: Statement of the Case on Appeal (Cover Sheet).	67	 <a href="#">Image</a>
01/13/2023	Notice to Clerk J. Stanton of the Appeals Court of Assembly of Record		 <a href="#">Image</a>
01/13/2023	Notice of assembly of record sent to Counsel		 <a href="#">Image</a>
01/19/2023	Appeal entered in Appeals Court on 01/18/2023 docket number 2023-P-0042	68	 <a href="#">Image</a>

8

COMMONWEALTH OF MASSACHUSETTS  
 SUFFOLK, ss. SUFFOLK SUPERIOR DEPT  
 1884 CR 453  
 1884 CR 469

COMMONWEALTH

v.

RICHARD DILWORTH

DEFENDANT'S FIRST MOTION FOR DISCOVERY

Now comes Mr. Dilworth in the above entitled matter and moves this Court to order the Commonwealth to produce the following discovery to the defendant:

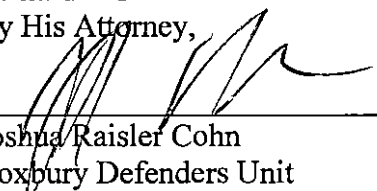
1. All written notes which document the investigation into Mr. Dilworth and the charges in his two indictments.
2. Any emails, memos or other communication between investigating officers related to the investigation of either of these cases.
3. The snapchat account, user name, photo, and chat history of the "false" snapchat account used to gather evidence against Mr. Dilworth
4. All snapchat recordings that were made of Mr. Dilworth, including the recordings that did not show any indication of criminal activity.
5. Notice of the number of unrecorded snapchat observations officers made of Mr. Dilworth, and to the best of the officer's ability, the content of those 'snaps'.

The defendant states that this requested discovery is all mandatory under Mass. R. Crim. Pro. 14, and is necessary in order to ensure the defendant's rights to effective assistance of counsel, the right to present a defense, confrontation, due process and a fair trial, as guaranteed by the 5<sup>th</sup>, 6<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution, as well as Article XII of the Massachusetts Declaration of Rights. The Defendant must be provided with all police reports relevant to his case. Com. v. Fossa, 40 Mass. App. Ct. 563, 567 (1996)

(Commonwealth's failure to turn over relevant police reports was "glaring procedural foul.")

Additionally, said evidence may affect the credibility of a Commonwealth witness and is, therefore, exculpatory. Com. v. St. Germain, 381 Mass. 256, 261, n.6-10 (1980)

Richard Dilworth  
By His Attorney,



---

Joshua Raisler Cohn  
Roxbury Defenders Unit  
Committee for Public Counsel Services  
7 Palmer Street, Suite 302  
Roxbury MA 02119  
617-445-7581

DATED:

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

SUFFOLK SUPERIOR COURT  
NO. 1884CR000453  
1884CR469

COMMONWEALTH

v.

RICHARD DILWORTH

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COMMONWEALTH'S OPPOSITION TO THE DEFENDANT'S MOTION FOR SNAPCHAT  
ACCOUNT USER NAME

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Now comes the Commonwealth and respectfully requests this Honorable court deny the Defendant's Motion for the Snapchat Account information used by the officer in this case. As grounds therefore the Commonwealth asserts that the information sought by the defendant is not mandatory discovery under Mass. R. Crim. P. 14, is privileged information, is not material and relevant to the defendant's defense at trial, and as such, should not be disclosed.

Facts

On January 11, 2018, officers viewed an individual believed to be Richard Dilworth holding a firearm on Snapchat. Officers learned of his location and responded to that area, where they observed a parked motor vehicle. Officers approached the defendant while he was seated in the passenger seat of an SUV parked behind his house. Officers asked Dilworth to exit the vehicle to which he did not comply. Officers were forced to remove Dilworth from the vehicle and he violently resisted. Once Dilworth was detained, officers recovered a black Smith and Wesson firearm loaded with 26 rounds of .40 caliber ammunition including one in the chamber in a large capacity metal feeding device.

9/11/18  
filed

On May 11, 2018 Boston Police Officers observed Richard Dilworth flash a firearm on snapchat at approximately 2:45pm. In the video he was in front of the New Family Supermarket located at 205 Humbolt Ave. Officers were familiar with Mr. Dilworth from a firearm arrest in January. Officers were aware that he was on a GPS and lived at 18 Hollander Street. Based on this information, officers called ELMO and learned that Mr. Dilworth was at home by the time they viewed the video. They conducted surveillance for several hours and observed the suspect enter and exit the back of the house several times, wearing the same clothing depicted in the snapchat video. At approximately 8:50pm, officers observed the suspect leave the area of his home. ELMO informed officers that he had gone to the area of 2030 Columbia Road. Officers went to that area and saw the suspect sitting on a bicycle near the entrance to the building. The suspect appeared nervous and said he was just waiting for his mother to let him into the building. He then placed both hands towards his waist area and began to turn away from officers. At that time officers conducted a pat frisk of the suspect and located a Ruger 9MM with an obliterated serial number which was loaded with one round in the chamber and eight rounds in the magazine, but capable of holding over ten rounds.

The videos from Snapchat that are relative to this incident and within the Commonwealth's care, custody, and control have been provided to counsel for the defendant along with Boston Police Reports documenting the officer's observations.

On August 15, 2018 the Defendant filed his motion seeking The snapchat account, username, photo, and chat history of the "false" snapchat account used to gather evidence against Mr. Dilworth.

### Brief Overview of Snapchat

Snapchat is a social media application that is available for individual download using an IOS or Android operating platforms. *See* Snapchat, <https://support.snapchat.com/en-US/article/account-setup> (last visited December 28, 2017). Snapchat allows a user to send video or pictures messages to other Snapchat users using the camera technology on a user's cell phone. *Id.* An individual user is identified through a unique user name that cannot be changed after the user account is created. *Id.* at <https://support.snapchat.com/en-US/article/account-setup> (last accessed 12/28/2017). "My Story is a select collection of your Snaps that play in the order you took them. My Story lasts 24 hours, so your friends can see your day unfold." *Id.* at <https://support.snapchat.com/en-US/article/my-story> (last visited December 28, 2017).

### Argument

This Court should deny the Defendant's motion because the information sought is not the subject of Massachusetts Rules of Criminal Procedure Rule 14, the information sought is privileged, as it is akin to the Commonwealth's Surveillance Location Privilege and Informer's Privilege, and the defendant has not met his obligation to show that the information is material and relevant to his defense at trial.

a. THE INFORMATION REQUESTED BY THE DEFENDANT IS NOT MANDATORY DISCOVERY UNDER RULE 14.

Under Massachusetts Rules of Criminal Procedure 14 ("Rule 14"), the Commonwealth is required to provide certain mandatory discovery. *See* Mass. R. Crim. P. 14. Evidence that is within the Commonwealth's care, custody, or control that is relevant or exculpatory is specifically enumerated within Rule 14 as mandatory discovery to be provided by the Commonwealth to the defendant. *Id.*

In this motion for Snapchat account information, the defendant seeks information that is not mandatory discovery under Rule 14 because the information is not relevant or exculpatory. Boston police have provided recordings of the videos that they observed and a supplemental report detailing their observations. The additional information sought by the defendant is not relevant or exculpatory to the case at bar. In this case the officers made observations of the social media pages, recorded the videos they observed, and reduced their observations to writing in an internal Boston Police Report. That discovery has been provided to the defendant. Despite this, the defendant seeks further information relating to the means and methods that officers used to access the videos. The defendant has made no showing that the additional information sought is relevant or exculpatory. It is neither. Rather, these further information requests relating to the means and methods used by officers to access these videos are merely a fishing expedition into the investigative tools utilized by the Boston Police, the disclosure of which will severely hamper ongoing and future investigations.

b. THE SOCIAL MEDIA INFORMATION SOUGHT BY THE DEFENDANT IS PRIVILEGED AS IT IS AKIN TO THE SURVEILLANCE LOCATION PRIVILEGE.

The Court has long recognized the Commonwealth's privilege to withhold information as it relates to a specific surveillance location. *See Commonwealth v. Grace*, 43 Mass. App. Ct. 905 (1997). "Under certain circumstances, however, the Commonwealth possesses a 'surveillance location privilege,' which protects the precise location of the secret surveillance post from disclosure." *Id.* Such a location must be disclosed if it is "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause." *Id. citing Roviario v. United States*, 353 U.S. 53, 60-61 (1957). While a defendant is not required to make a specific showing of how

he would be prejudiced, he must do more than claim he needs to know the surveillance location. Grace at 906. “Rather, he is under an affirmative ‘obligation to show an exception to the privilege.’” Id. at 906 *citing* Commonwealth v. Swenson, 368 Mass. 268 (1975).

In the case at bar, the information sought by the defendant is analogous to the disclosure of a surveillance location. By seeking this information the defendant seeks to identify the virtual surveillance location used by officers to gather information. While the disclosure of any surveillance location is significant, disclosure of a virtual location has far greater ramifications, stretching beyond a single investigation or single vantage point.

In this case, the defendant has failed to meet his obligation to show that he is an exception to the Commonwealth’s surveillance location privilege. In Grace, the Court considered whether the defendant’s rights had been violated when he was precluded from conducting a cross examination into the specific surveillance post from which the officers alleged to have observed a drug transaction. Grace at 905. The officer testified regarding his observations, the distance, any obstructions, and his use of binoculars. Id. On cross examination the defendant sought to elicit the exact location from which the officer made these observations. Id. When the Commonwealth’s objection was sustained, the defendant objected, citing he was precluded from conducting a full cross-examination. Id. The Court held that the defendant had not met his burden of showing he was an exception to the privilege and found no error in precluding the disclosure of the surveillance location. Id. at 906. The Court conversely decided in Lugo that withholding a secret surveillance location was improper when the officer testified, with some discrepancies within his testimony, that he viewed drug transactions from a secret location. Commonwealth v. Lugo, 406 Mass. 565, 566 (1990). At a hearing, the officer testified to his location, his view, and observations of the defendant. Id. at 569. However, a number of

discrepancies regarding the officer's observations surfaced during cross examination. Id. Despite the discrepancies, the trial court found that the defendant had not been prejudiced by withholding the surveillance location. On appeal the Court held that withholding the surveillance location was an error, citing that the Commonwealth's case rested entirely on the credibility of the officer and the defendant had made a strong showing that he might have needed the location based on the inconsistencies in the officer's testimony. Id. at 574. Significantly, unlike the situation here, in both those cases the information was sought at trial as within the scope the defendant's right to confront and cross-examine witnesses and not as part of pre-trial discovery. See Commonwealth v. Lugo, 406 Mass. 565, 571 (1990) ("Cases which have considered the subject have maintained the distinction between a demand for disclosure at a pretrial hearing, where the issue is probable cause for arrest or a search, and a demand for disclosure at trial, where the issue is the defendant's ultimate guilt or innocence.")

Moreover, much like the Grace defendant, the defendant in the case at bar has failed to meet his obligation of showing that he is an exception to the Commonwealth's privilege. The defendant has made no showing that the information that he seeks is material or relevant. Further, unlike the Lugo case, there are no discrepancies in the observations made by the officers on the social media platform. The observations made by the officers were memorialized in a Boston Police report, video recorded, and provided to the defendant in discovery.

As the social media information requested by the defendant is akin to type of information protected by the Commonwealth's surveillance location privilege and the defendant has failed to meet his obligation of showing that he is an exception to the privilege, the Court should deny his request.

c. THE SOCIAL MEDIA INFORMATION SOUGHT BY THE DEFENDANT IS PRIVILEGED AS IT IS AKIN TO THE CONFIDENTIAL INFORMANT PRIVILEGE.

“The government’s privilege not to disclose the identity of an informant has long been recognized in this Commonwealth.” Commonwealth v. Dias, 451 Mass. 463, 468 (2008) *citing* Commonwealth v. Madigan, 449 Mass. 705, 705-706 (2007), Worthington v. Scribner, 109 Mass. 487, 488 (1872). The Commonwealth’s informant privilege is based on the compelling public interest in supporting police in securing evidence of criminal activity and pursuing effective law enforcement. Id. Nonetheless, this privilege is not absolute and must be weighed against the defendant’s right to information material to his defense. Id. at 718. “The issue of disclosure ‘calls for balancing the public interest in protecting the flow of information against the individual’s right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the [privileged] testimony, and other relevant factors.’” Id. citing Roviario v. United States, 353 U.S. 53,62 (1957).

To overcome the Commonwealth’s confidential informant privilege, the defendant bears some obligation of demonstrating that the disclosure of the confidential informant would provide material evidence needed by the defendant to present a fair case at trial. Id. at 719. “A defendant must ‘make some offering so that the trial judge may assess the materiality and relevancy of the disclosure to the defense, if that relevancy is not apparent from the nature of the case and the defense offered thereto.’”

In the instant case, disclosure of the information sought by the defendant is tantamount to the disclosure of a confidential informant. By using publically available means to access third party social media pages, law enforcement has been able to gather information, secure evidence

of criminal activity, effectuate lawful arrests, and remove numerous unlawful firearms from the community, as they did in this case. However, disclosure of their means and methods with which these observations were made will inevitably compromise pending investigations utilizing these techniques and jeopardize law enforcement's ability to conduct further investigations in this manner. In a case involving confidential informants, disclosure of the identity of a confidential informant would undoubtedly compromise the use of that informant in the future because their anonymity would be lost and they would be labeled as law enforcement. Similarly, disclosure of the means and methods used by Boston Police to investigate cases would jeopardize these channels of communication used by officers, not only in this case but in many others.

As disclosure of the information sought by the defendant is privileged, as it is akin to the disclosure of a confidential informant, the defendant's request for discovery should be denied because the defendant has not demonstrated that the requested information is relevant or material to a defense at trial. As discussed in Dias, the defendant has the obligation to make some offering that the discovery sought is relevant and material to a defense at trial. In the instant case, the defendant has made no offering that the information requested is material or relevant to his defense at trial. In this case the defendant is charged with possessing a firearm after a firearm was recovered from his person. The relevance of the means and methods by which Boston Police observed the social media accounts is not readily apparent from the nature of the case or crime charged. The reason, the Commonwealth asserts, is because the information sought is not relevant or material to a defense at trial, or even to whether the defendant or codefendant has a reasonable expectation of privacy in the information obtained on Snapchat and Facebook by using publicly available means to access third party social media pages. *See Commonwealth v.*

D'Onofrio, 396 Mass. 711, 714 (1986) (to establish a search in the constitutional sense, the defendant has the burden of demonstrating a reasonable expectation of privacy).

Even if the Court were to find the information sought to be of some minimal value, the privilege should still not give way when viewed in light of the applicable balancing test. When considering whether the Commonwealth's privilege against disclosing a confidential informant should give way, the Court may consider the circumstances of the specific case, nature of the offense, the significance of the privileged testimony, and other relevant factors that the court deems necessary. Frequently, the determination takes into account concerns regarding the reliability of the informant. In this case, consideration of each of these factors weighs against disclosure of the social media discovery. The observations made by Boston Police on the social media account was documented, recorded, and provided to the defendant in discovery. Not only has the defendant been provided with a report detailing the officers' observations surrounding the use social media, but he has also received video recordings of what the officers viewed on social media. Any further information sought is merely a fishing expedition into the investigative techniques of law enforcements with the obvious effect, whether intended or not, or rendering those techniques ineffectual in future investigations.

As the defendant has failed to demonstrate that the information requested is material or relevant to his defense at trial, this Court should deny the defendant's request for privileged information.

#### Conclusion

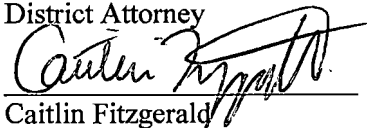
As the information sought by the defendant is not mandatory discovery under Rule 14, is privileged information, and is not material and relevant to the defendant's defense at trial, the privileged information should not be disclosed. If this Court is nevertheless inclined to allow the defendant's motion, the Commonwealth respectfully requests this Honorable Court

conduct an ex-parte, in-camera review of the information sought by the defendant prior to entering such a ruling.

Respectfully Submitted  
For the Commonwealth,

Daniel F. Conley  
District Attorney

by:

  
Caitlin Fitzgerald  
Assistant District Attorney  
Suffolk County District Attorney  
One Bulfinch Place  
Boston, MA 02114

Dated: August 16, 2018

COMMONWEALTH OF MASSACHUSETTS  
 SUFFOLK, ss. SUFFOLK SUPERIOR DEPT  
 1884 CR 453 ✓  
 1884 CR 469

COMMONWEALTH

v.

RICHARD DILWORTH

**DEFENDANT'S MOTION FOR DISCOVERY: SELECTIVE PROSECUTION**

Now comes the Defendant, Mr. Dilworth, and respectfully moves this court to order that the defendant be given access to discovery that will provide evidence of selective prosecution and enforcement in the use of "Snapchat" as an investigatory tool. The request is made pursuant to the Mass R. Crim. P. 14, the Massachusetts Declaration of Rights, articles I, V, XII, Commonwealth v. Lora, 451 Mass. 425 (2006), Commonwealth v. Washington W., 457 Mass 140 (2010), Commonwealth v. Buckley 478 Mass 861, 871 (2018), Brady v. Maryland, 373 U.S. 83 (1963) and the Fifth and Fourteenth amendments to the United States Constitution.

**The defendant seeks the production of:**

- 1) All police/incident reports or Form 26 reports generated by the Boston Police Department from June 1<sup>st</sup>, 2016 to October 1, 2018 for investigations that involve the use of "Snapchat" social media monitoring.**

The defendant agrees to exclude from his request reports for investigations where the police have not yet arrested and charged the suspect. The defendant further agrees at this time to protective order that would preclude him from sharing any information or details from these reports except the statistical data about the race of the people targeted, investigated and prosecuted as a result of these "Snapchat" investigations.

**OCT 31 2018**

In support of his request, the defendant states that in a preliminary survey of defense counsel in Suffolk County, counsel has not learned of any cases where the target of a “Snapchat” investigation was White, and in that survey an overwhelming majority of the people targeted were Black, like Mr. Dilworth. Of the approximately 20 cases that defense counsel is aware of involving Snapchat investigations, about 82% of the targets were identified as Black, and the remainder were Hispanic. The Commonwealth has provided information that there are no training materials, and not policies, procedures or protocols, written or otherwise, related to social media investigation by the Boston Police Department. Where unbridled discretion is given to the investigating officers to investigate who they want, how they want, with no guidance establishing race neutral reasons to target individuals with a specific investigatory regime, the risk of implicit or explicit bias based on race to be a motivation for targeting is very high. This risk is bolstered by the preliminary data showing that the entire population of people known to defense counsel to be targeted with this technology are Black and Brown.

Mr. Dilworth requires the above requested discovery in order to document, with specificity, the racial disparities in selecting people of color as targets for this investigatory regime. The discovery should be ordered as “judicial scrutiny is necessary to protect individuals from prosecution based on arbitrary and otherwise impermissible classification”. Commonwealth v. Bernardo B., 453 Mass 158, 168 (2009).

In order to make a detailed record of race discrimination in the criminal context, Mr. Dilworth requires the requested data. The Courts of the Commonwealth have repeatedly held that general statistically evidence does not create a sufficient record, and that a successful defendant

will provide more complete data in litigating an equal protection claim. See Commonwealth Laltaprasad 475 Mass. 692, (2016), Commonwealth v. Lora, 451 Mass. 425.

The defendant here is able to “present evidence which raises at least a reasonable inference of impermissible discrimination”. Washington W., at 143. See Commonwealth v. Lora, 451 Mass. 425, 436 (2008) (held that statistical evidence can be used to meet a defendant's initial burden of "producing sufficient evidence to raise a reasonable inference of impermissible discrimination."); cf. Lipchitz v. Raytheon, Co., 434 Mass. 493, 508-09 (2001) (statistical evidence may support inference that employment decision was tainted by unlawful bias). Commonwealth v. Betances, 451 Mass. 457 (2008) (holding that defendant must make a preliminary showing with affidavits and facts that can demonstrate a reasonable basis to infer the potential for profiling exists); see also Lora, 451 Mass. at 443; Commonwealth v. Thomas, 451 Mass. 451, 455 (2008) (noting that "valid statistical evidence" showing disparate enforcement of laws based on race is "relevant and material to demonstrate" that impermissible enforcement occurred in particular case).

In Washington W., similar discovery was ordered on a less substantial preliminary showing by the defendant that is present here. Washington W. presented information that sexual activity among teenagers is frequent in Massachusetts, minimal prosecutions show the DA's office does not have a police of prosecuting such underage activity, and he belonged to a protected class that was historically discriminated against. He did not present, in support of his discovery motion, any evidence that the district attorney's office has a history of prosecuting underage same sex activity. Mr. Dilworth, on the other-hand, is able to present this court with preliminary data that documents the explicit targeting of Black and Brown people for investigation and prosecution using a specific surveillance technology. The Supreme Judicial Court encouraged defense counsel to seek out this type of data when evidence of race based selective prosecution existed.


Commonwealth v. Buckley 478 Mass 861, 871 (2018) (“encouraging” defendants to seek, develop, and present to the Court statistical evidence of racial discrimination in criminal proceedings). It is certainly within this court’s discretion to order the available discovery.

Richard Dilworth is a black man of African descent. He is therefore a member of a protected class for purposes of equal protection analysis. See Commonwealth v. Sanchez, 79 Mass. App. Ct. 189, 193 (2011) (noting that Hispanics and African-Americans "are members of a racial or ethnic group protected under art. 1 of the Declaration of Rights"); Commonwealth v. Fryar, 414 Mass. 732, 736-741 (1993) (holding that removal of sole Black juror violated equal protection). Moreover, there exists sufficient preliminary data to make a “reasonable inference of impermissible discrimination” where preliminary data demonstrates that only Black and Brown people are the targets of this entire class of investigation.

In this case, we should not partake in a criminal process that continues and gives credence to the racial disparities in our justice system. Mr. Dilworth has presented a reasonable inference that there is impermissible race based discrimination in his prosecution, and in his being targeted. The requested discovery will provide further evidence of his claims, and provide additional support for his prayers for relief.

Respectfully Submitted;  
RICHARD DILWORTH

By ~~his~~ attorney:

  
Joshua Raisler Cohn  
BBO #679791

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COMMONWEALTH OF MASSACHUSETTS  
SUFFOLK, ss. SUFFOLK SUPERIOR DEPT  
1884 CR 453  
1884 CR 469

COMMONWEALTH

v.

RICHARD DILWORTH

**AFFIDVIT IN SUPPORT OF MOTION FOR DISCOVERY**

I, Joshua Raisler Cohn, state the following to be true and accurate to the best of my knowledge and belief

1. I represent the defendant, Richard Dilworth, in the above number complaint.
2. Mr. Dilworth, as a Black man, is a member of a protected class which has been the target of abhorrent, persistent, and ongoing discrimination for longer than the existence of the constitutional rights upon which he relies.
3. Mr. Dilworth was indicted for two separate incidents of carrying a loaded firearm without an FID card, one in January 2018 and the other in May of 2018.
4. In both cases, the Boston Police Department apparently accessed Mr. Dilworth's Snapchat account by utilizing a "fake" Snapchat account created by officers, requesting to become 'friends' with the defendant, then monitoring the messages and information he shares with his friends.
5. Counsel conducted an informal survey of some defense lawyers in Suffolk County. The preliminary questions were sent to all the staff attorneys with CPCS, requesting basic information about if lawyers had 'Snapchat' cases, what the race of the defendant was, and whether the defendant was the person being targeted by the investigation. Counsel

then also reached out to several Bar Advocates, though not the entire Bar Advocate list, to request the same information

6. The responses that counsel received identified 20 such cases. Approximately 82% of the defendants were Black, and 18% were Hispanic. There were no white defendants in the information that counsel received.
7. Counsel expects that not everyone who has these cases responded to the request for information, and that his request likely reached the lawyers who cover about 25% of the criminal cases in Suffolk County.
8. The information received does appear to be significant even though not every case is documented in this list.
9. Counsel has limited his discovery request narrowly, to assist in the focused and streamlines collection of the relevant data, and is offering to be subject to a protective order.
10. Upon amassing the data, counsel will work with a statistician to conduct analysis on the data to present this court with a clear record about the disparate impact of this investigatory regime on people of color, and will incorporate that information into a motion to dismiss or a motion to suppress.
11. The requested information is in the care custody and control of the Commonwealth, is material and relevant and therefor required under Mass. Rule Crim. Pro. Rule 14, and is exculpatory evidence.

Signed under the pains and penalties of perjury



Joshua Raisler Cohn

Table 2: Racial and Ethnic Population Distribution of Residents by Location

<b>Boston</b>				<b>Brookline</b>			
	<b>Non-Hispanic</b>	<b>Hispanic</b>	<b>Total</b>		<b>Non-Hispanic</b>	<b>Hispanic</b>	<b>Total</b>
<b>White</b>	289893 (46.97%)	42707 (6.92%)	332600 (53.89%)	<b>White</b>	43040 (73.28%)	1981 (3.37%)	45021 (76.65%)
<b>Black</b>	138071 (22.37%)	12364 (2.00%)	150435 (24.38%)	<b>Black</b>	1828 (3.11%)	149 (0.25%)	1977 (3.37%)
<b>Other</b>	81266 (13.17%)	52829 (8.56)	150435 (21.73%)	<b>Other</b>	10900 (18.56%)	834 (1.42%)	11734 (19.98%)
<b>Total</b>	509230 (82.52%)	107900 (17.48%)	617130 (100%)	<b>Total</b>	55768 (94.95%)	2964 (5.05%)	58732 (100%)

<b>Dorchester</b>				<b>Roxbury</b>			
	<b>Non-Hispanic</b>	<b>Hispanic</b>	<b>Total</b>		<b>Non-Hispanic</b>	<b>Hispanic</b>	<b>Total</b>
<b>White</b>	25308 (22.15%)	4959 (4.34%)	30267 (26.50%)	<b>White</b>	5431 (11.21%)	3523 (7.27%)	8954 (18.48%)
<b>Black</b>	49144 (43.02%)	3760 (3.29%)	52904 (46.31%)	<b>Black</b>	25100 (51.80%)	2515 (5.19%)	27615 (56.99%)
<b>Other</b>	20376 (17.84%)	10688 (9.36%)	31064 (27.19%)	<b>Other</b>	4607 (9.51%)	7278 (15.02%)	11885 (24.53%)
<b>Total</b>	94828 (83.01%)	19407 (16.99%)	114235 (100%)	<b>Total</b>	35138 (72.52%)	13316 (27.48%)	48454 (100%)

<b>South Boston</b>				<b>West Roxbury</b>			
	<b>Non-Hispanic</b>	<b>Hispanic</b>	<b>Total</b>		<b>Non-Hispanic</b>	<b>Hispanic</b>	<b>Total</b>
<b>White</b>	25264 (75.84%)	1602 (4.81%)	26866 (80.65%)	<b>White</b>	22303 (73.25%)	1199 (3.94%)	23502 (77.19%)
<b>Black</b>	2247 (6.75%)	416 (1.25%)	2663 (7.99%)	<b>Black</b>	2959 (9.72%)	280 (0.92%)	3239 (10.64%)
<b>Other</b>	2094 (6.29%)	1688 (5.07%)	3782 (11.35%)	<b>Other</b>	2611 (8.58%)	1094 (3.59%)	3705 (12.17%)
<b>Total</b>	29605 (88.87%)	3706 (11.13%)	33311 (100%)	<b>Total</b>	27873 (91.55%)	27873 (8.45%)	30446 (100%)

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

Suffolk Division of the  
Superior Court Department  
Docket Nos. 1884CR0453,  
1884CR0469

\_\_\_\_\_  
COMMONWEALTH )  
v. )  
RICHARD DILWORTH )  
\_\_\_\_\_ )


**THE BOSTON POLICE DEPARTMENT'S  
RESPONSE TO DEFENDANT'S MOTION FOR  
TRAINING MATERIALS AND PROTOCOLS  
RELATING TO SOCIAL MEDIA INVESTIGATIONS**

The Boston Police Department (hereinafter the "Department") is responding to the defendant's motion, pursuant to Mass. R. Crim. P. 17, seeking training materials and protocols used by the Department in social media investigations.

At this time, the Department has no training materials relating to conducting investigations on social media platforms. Likewise, the Department has no policies, protocols, or procedures in place, written or otherwise, relating to the use of social media platforms in criminal investigations.

Respectfully submitted,  
Eugene O'Flaherty  
Corporation Counsel,

The Boston Police Department,  
By its attorney,

  
\_\_\_\_\_  
Nathaniel R. Beaudoin, BBO #689518  
Assistant Corporation Counsel  
Office of the Legal Advisor  
Boston Police Department  
One Schroeder Plaza  
Boston, MA 02120  
(617) 343-4550


Date: October 24, 2018

CERTIFICATE OF SERVICE

I, Nathaniel R. Beaudoin, Assistant Corporation Counsel for the Boston Police Department, hereby certify that a true copy of the above document was served electronically to the below listed attorneys on the 24<sup>th</sup> day of October, 2018.

Caitlin Fitzgerald, Esq.  
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caitlin.fitzgerald@state.ma.us

Joshua Raisler Cohn, Esq.  
Roxbury Defenders Unit  
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\_\_\_\_\_  
Nathaniel R. Beaudoin  
Assistant Corporation Counsel

## COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
CRIMINAL ACTION  
NO. 1884-CR-00453 ✓  
1884-CR-00469

COMMONWEALTH

vs.

RICHARD DILWORTH

**MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S  
MOTIONS FOR DISCOVERY ON ALLEGED SELECTIVE PROSECUTION**

Reducing gun violence in Boston is a law enforcement priority and an important matter of public safety and health.<sup>1</sup> In this endeavor, social media can serve as a valuable law enforcement tool.<sup>2</sup> However, the U.S. Constitution and the Massachusetts Declaration of Rights require that race play no part in any decision by police to investigate or prosecute crime.<sup>3</sup>

The defendant, Richard Dilworth (“Dilworth”), a black male, has made an initial, limited statistical showing suggesting that the Boston Police Department (“BPD”) uses Snapchat as an investigative tool almost exclusively against black males. Dilworth seeks

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<sup>1</sup> See, e.g., City of Boston, “Regional Gun Buyback Program Part of Regional Gun Safety Collaboration,” Dec. 15, 2017, <https://www.boston.gov/news/regional-gun-buyback-program-part-regional-gun-safety-collaboration> (last visited Jan. 2, 2019); Boston Children’s Hospital, “Gun Violence and Children: Why it’s a public health issue,” Thriving, <https://thriving.childrenshospital.org/gun-violence-children-issue> (last visited Jan. 2, 2019).

<sup>2</sup> See, e.g., Heather Kelly, “Police Embrace Social Media as Crime-fighting Tool,” CNN Business, August 30, 2012, <https://www.cnn.com/2012/08/30/tech/social-media/fighting-crime-social-media/index.html> (last visited 12/27/18).

<sup>3</sup> See *infra* at Section A.

additional discovery that he believes may support a claim of racial discrimination in police use of Snapchat.<sup>4</sup>

This Court held hearings on December 3, 2018 and January 3, 2019. For the below reasons, the Court finds that Dilworth has met the requirements for issuance of a summons under Rule 17 of the Massachusetts Rules of Criminal Procedure (“Mass. R. Crim. P. 17” or “Rule 17”), requiring BPD to produce additional information about its use of Snapchat as an investigative tool. However, the Court will limit the scope and time frame of Dilworth’s request to exclude documents related to ongoing investigations and reduce the burden on BPD of identifying and producing the requested information.

#### **RELEVANT FACTS**<sup>5</sup>

Snapchat is a social media app that enables users to share video and other content. Snapchat users create personal accounts. An existing Snapchat account can be accessed only by permission from the account holder. The account holder grants access to someone who wants to “follow” the account by “friending” the requestor. “Friends” generally have access to the account holder’s postings.

In or around October 2017, a BPD officer submitted a request through the Snapchat app to “follow” a Snapchat account with the username “youngrick44.” The officer did not identify himself as a police officer, and he did not use either the name or photo of anyone known to Dilworth. Dilworth as “youngrick44” accepted the request and became “friends” with BPD officers, who were acting in an undercover capacity. While “following” the “youngrick44” account, officers viewed eight separate Snapchat

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<sup>4</sup> Dilworth's motion seeks information, not a finding of discrimination or other wrongdoing by BPD, and this Court makes no such finding.

<sup>5</sup> For purposes of this motion only, the parties stipulate to the facts set forth herein.

videos of Dilworth, holding what appeared to be a firearm. There is no evidence that BPD gained access to the “youngrick44” account by hacking into the account or using any means other than “friending” Dilworth while acting in an undercover capacity.

On January 11, 2018, BPD officers arrested Dilworth and recovered a loaded Smith & Wesson revolver from Dilworth’s waistband. The District Attorney’s office charged Dilworth with multiple offenses arising out of seizure of the revolver. Docket No. 1884-CR-00453. After being released on bail, Dilworth was again seen on Snapchat by BPD officers holding what appeared to be a firearm. He was again arrested by Boston police, on May 11, 2018, in the possession of a firearm, this time a loaded Ruger pistol. The District Attorney’s office charged Dilworth with multiple offenses arising out of seizure of the pistol. Docket No. 1884-CR-00469.

In August 2018, in each of his two cases, Dilworth filed a request under Mass. R. Crim. P. 17 seeking training materials and protocols used by BPD in social media investigations. On October 24, 2018, BPD responded to the motion, stating that “the Department has no training materials relating to conducting investigations on social media platforms. Likewise, the Department has no policies, protocols, or procedures in place, written or otherwise, relating to the use of social media platforms in criminal investigations.”

On October 31, 2018, in each of his two cases, Dilworth filed Defendant’s Motion for Discovery: Selective Prosecution pursuant to Mass. R. Crim. P. 14 (Filing # 12 in Docket No. 1884-CR-00453; Filing # 15 in Docket No. 1884-CR-00469). On November 26, 2018, in each of his two cases, Dilworth filed a motion seeking the same material pursuant to Mass. R. Crim. P. 17 (Filing # 16 in Docket No. 1884-CR-00453; Filing # 19

in Docket No. 1884-CR-00469). The motions seek “all police/incident reports or Form 26 reports generated by the Boston Police Department from June 1, 2016 to October 1, 2018 for investigations that involve the use of ‘Snapchat’ social media monitoring.” The motions excluded “reports for investigations where the police have not yet arrested and charged the suspect.” Dilworth subsequently modified his requests to exclude documents related to human trafficking investigations and sexual assault investigations.

In support of the motions, Dilworth submitted affidavits of his attorney, stating that counsel had conducted an “informal survey,” sending questions to all Committee for Public Counsel Services (“CPCS”) Public Defender Division staff attorneys in Suffolk County and some attorneys who serve as bar advocates in Suffolk County for indigent criminal defendants. Dilworth’s attorney estimated that these attorneys collectively are responsible for roughly 25% of the criminal cases that are prosecuted in Suffolk County. The questions included “if lawyers had ‘Snapchat’ cases, what the race of the defendant was, and whether the defendant was the person being targeted by the investigation.” The affidavits further state that counsel received responses identifying defendants in 20 such cases. Of those cases, 17 of the defendants (85%) were black, and three (15%) were Hispanic. There were no non-Hispanic white defendants.

“Incident reports” or “police reports,” also known as “1-1’s,” usually memorialize an initial investigation and arrest and are readily searchable within an electronic database. However, it is the practice of the BPD not to identify Snapchat in incident reports as the investigatory tool that was used, so a search of incident reports will not easily identify “Snapchat cases.”

BPD's use of Snapchat and other social media as an investigative tool has typically been memorialized in separate reports, known as Form 26 reports. These reports are prepared on a computer, and the officer who has used the social media submits the reports in paper form or electronically to that officer's supervisor. Apparently, Form 26 reports cannot be electronically searched.

### DISCUSSION

#### **A. Despite the Absence of a Constitutional "Search," Dilworth Has a Viable Basis for His Discovery Request, Under Principles of Equal Protection**

As an initial matter, this Court rejects the Commonwealth's and BPD's argument that the law on selective enforcement is not applicable here because the police use of Snapchat in this case was not a "search or seizure" for purposes of the Fourth Amendment of the U.S. Constitution and article 14 of the Massachusetts Declaration of Rights. See Comm. Br. at 4; BPD Br. at 5.<sup>6</sup> The equal protection principles of the Fourteenth Amendment of the U.S. Constitution and articles 1 and 10 of the Massachusetts Declaration of Rights provide protections that are independent of the Fourth Amendment of the U.S. Constitution and article 14 of the Massachusetts Declaration of Rights. See Commonwealth v. Lora, 451 Mass. 425, 436-437 (2008), citing Whren v. United States, 517 U.S. 806, 813 (1996). Therefore, a claim of discriminatory enforcement does not require the existence of conduct that constitutes a search or seizure for constitutional purposes. In United States v. Avery, 137 F.3d 343, 353 (6th Cir. 1997), the court considered it "established in this circuit that the Fourteenth Amendment protects citizens from police action, including the decision to interview an

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<sup>6</sup> "Comm. Br." refers to the Commonwealth's opposition brief, and "BPD Br." refers to BPD's opposition brief.

airport patron, based solely on impermissible racial considerations.” In the view of that court, it was irrelevant for equal protection purposes that the police do not need probable cause or reasonable suspicion to interview travelers at an airport. By way of analogy, the Massachusetts Department of Revenue does not need probable cause or reasonable suspicion to audit a taxpayer, but it cannot devote its resources to pursuing one particular race, religion or ethnic group. Police use of an investigative tool based on a suspect’s membership in a protected class violates the equal protection principles of the Fourteenth Amendment and arts. 1 and 10 of the Massachusetts Declaration of Rights.

**B. The Appropriate Rule for Dilworth’s Request Is Mass. R. Crim. P. 17**

The Defendant brings the present motions under Massachusetts Rules of Criminal Procedure 14 and 17. While Mass. R. Crim. P. 14(a)(2) allows a defendant to obtain evidence “within the possession, custody, or control of the prosecutor or persons under his direction or control, it is Mass. R. Crim. P. 17(a)(2) . . . that allows the defendant to summons books, papers, documents, or other objects from third parties.” Commonwealth v. Thomas, 451 Mass. 451, 456 (2008) (internal quotations and additional citation omitted).

The Commonwealth and BPD each argue that the respective rule under which it would be required to provide discovery (Rule 14 for the Commonwealth; Rule 17 for BPD) is not applicable to Dilworth’s request. See Comm. Br. at 8-11; BPD Br. at 3-5. Although some of the documents sought by Dilworth may well be in the possession, custody or control of the prosecutor assigned to this case and those under her direction or control, the request is directed to BPD as a department, not to any team of prosecutors and agents. As such, Rule 17(a)(2), allowing a party to summons documents from third

parties, is the appropriate vehicle for requesting the documents that Dilworth seeks. See Commonwealth v. Dwyer, 448 Mass. 122, 140 n.22 (2006) (“Pretrial access to the records of third parties can be obtained *only* on a judicial order authorizing the issuance of a rule 17(a)(2) summons.”) (emphasis in original); Thomas, 451 Mass. at 454-455 (where defendant was pulled over by State Trooper, materials in the possession of the colonel of State police were not discoverable under Rule 14(a)(1) because the colonel was not “part of the prosecution of the defendants’ cases”). The issue for this Court is whether Dilworth has made a sufficient showing under Mass. R. Crim. P. 17(a)(2) to support issuance of a summons for the records that he has requested.

**C. Dilworth Has Met the Standard for Issuance of a Summons to BPD for the Requested Information, but the Requested Scope and Time Frame Shall be Narrowed to Exclude Documents Related to Ongoing Investigations and Reduce the Burden on the Department**

To obtain documents under Mass. R. Crim. P. 17(a)(2), the party seeking the documents must make a threshold showing that the evidence sought is material and relevant. Thomas, 451 Mass. at 456. Consistent with federal case law under the analogous federal rule of criminal procedure, the Supreme Judicial Court has adopted a four-part test, which requires the defendant to show “(1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general ‘fishing expedition.’”

Commonwealth v. Lampron, 441 Mass. 265, 269 (2004), quoting United States v. Nixon, 418 U.S. 683, 699-700 (1974) (internal quotation marks omitted). If these four

requirements are met, the Court must consider and balance the burden on the Commonwealth of responding to the request. See Commonwealth v. Bernardo B., 453 Mass. 158, 174 (2009) (request “may not impose undue burdens on the Commonwealth”).

To meet the threshold showing, which is also the first part of the four-part test under Lampron, Dilworth must present reliable information, in affidavit form, demonstrating a reasonable basis to infer that racial profiling *may* have been the basis for his having been targeted by police for investigation via Snapchat. See Commonwealth v. Betances, 451 Mass. 457, 461-462 (2008) (required preliminary showing “must contain reliable information in affidavit form demonstrating a reasonable basis to infer that profiling, and not a traffic violation alone, may have been the basis for the vehicle stop.”). At this stage, Dilworth need not present evidence that would raise an inference that he was, in fact, selectively targeted for investigation. As the Supreme Judicial Court noted in Bernardo B., *supra*, such a requirement would put defendants in a Catch-22 situation. 453 Mass. at 169 (party not required to present evidence raising “‘reasonable inference, based on credible evidence,’ that the defendant himself was selectively prosecuted,” because such a standard “would place criminal defendants in the untenable position of having to produce evidence of selective enforcement in order to obtain evidence of selective enforcement.”).

Dilworth has presented, in affidavit form, the results of an informal survey of criminal defense attorneys in Suffolk County as to the race of their clients in cases in which BPD used Shapchat as an investigative tool. The threshold issue for this Court is whether this statistical showing is sufficient to create an inference that Dilworth’s race

may possibly have been a factor in initially targeting him for use of Snapchat as an investigative tool.<sup>7</sup> This is *not* a case in which the defendant has shown that a person of a different race similarly situated to him was treated more favorably by law enforcement than he was treated. Contrast Bernardo B., 453 Mass. at 161, 173 (minor male defendant prosecuted for sex crimes resulting from consensual acts with minor females, who were not prosecuted). Therefore, at this juncture, a statistical showing is Dilworth's only vehicle to obtain information about alleged discriminatory use of Snapchat.

The survey of Suffolk County criminal defense lawyers conducted by Dilworth's counsel has identified 20 instances in which BPD used Snapchat as an investigative tool. Of these 20 instances, 17 of the defendants (85%) are black, three defendants (15%) are Latino/Hispanic, and none are white. One's reaction to whether this statistical showing suggests the possibility of selective enforcement based on race might depend in part on one's overall trust or distrust of the criminal justice system. However, this Court cannot rule based on conjecture, positive or negative, about the motivation for police conduct.

The Court recognizes the presumption of regularity and good faith that attaches to prosecutor and police conduct under our laws. See Lora, 451 Mass. at 437. However, “[n]otwithstanding the presumption of regularity that attaches to prosecutorial decisions, judicial scrutiny is necessary to protect individuals from prosecution based on arbitrary or otherwise impermissible classification.” Bernardo B., 453 Mass. at 168. The racial composition of the defendants in the 20 cases identified by Dilworth differs dramatically

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<sup>7</sup> Dilworth was charged in case No. 1884-CR-000469 after he was released on bail in case No. 1884-CR-00453, and police officers apparently viewed him again on Snapchat brandishing a firearm. The Court questions whether any statistical showing could defeat the inference that Dilworth was targeted after his first indictment not because of his race, but because he had recently been indicted for unlawful possession of a loaded firearm.

from the racial composition of Boston's population as a whole. Whereas non-Hispanic whites, blacks and African Americans, and Latinos/Hispanics are respectively 44.9%, 25.3% and 19.4% of the Boston population according to recent U.S. Census estimates, non-Hispanic whites, blacks and African Americans, and Latinos/Hispanics are respectively 0%, 85% and 15% of the cases identified by Dilworth's counsel.<sup>8</sup>

The Supreme Judicial Court has encouraged lawyers to make statistical showings under the so-called Lora framework where selective enforcement is suspected. See Commonwealth v. Buckley, 478 Mass. 861, 871 (2018) ("We take this opportunity to encourage lawyers to use the Lora framework in cases where there is reason to believe a traffic stop was the result of racial profiling."). Buckley involved a traffic stop, in which Fourth Amendment and article 14 protections apply. However, for the above-stated reasons, this Court concludes that equal protection principles are equally applicable in the context of police investigations that do not require showings of probable cause or reasonable suspicion. See *supra* at Section A. As a logical corollary to this conclusion, this Court reads Buckley to encourage use of the Lora framework beyond traffic stops to include challenges to police activity in the context presented here, i.e., use of social media as an investigative tool.

On the record before this Court, the defendant has made an initial statistical showing of racial disparity and the Commonwealth has not offered any explanation as to why Dilworth was initially targeted for Snapchat monitoring. Because BPD has no

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<sup>8</sup> See United States Census Bureau, QuickFacts: Boston city, Massachusetts, [www.census.gov/quickfacts/bostoncitymassachusetts](http://www.census.gov/quickfacts/bostoncitymassachusetts) (last visited Jan. 8, 2019).

policies, procedures or protocols for its use of social media as an investigative tool,<sup>9</sup> the explanation cannot be that BPD was complying with a written policy.<sup>10</sup> In the absence of a BPD policy or procedure and a representation of compliance with that policy or procedure, or some other explanation as to why BPD initially targeted the defendant, Dilworth, the public and this Court can only speculate as to why police initially selected Dilworth as a suspect to be “friended” on Snapchat.<sup>11</sup>

In its opposition memorandum, the Commonwealth relies on two cases in which the Supreme Judicial Court vacated trial court orders for production of documents pertaining to alleged discriminatory enforcement, Betances, *supra*, and Thomas, *supra*.<sup>12</sup> However, both cases are readily distinguishable from this case. In Betances, the defendant sought information about a trooper’s prior motor vehicle stops as *mandatory* discovery, and the Supreme Judicial Court concluded that the information sought was not “subject to a[n] order to furnish automatic and mandatory discovery under rule 14(a)(1)(A).” Betances, 451 Mass. at 459-461. Were it otherwise, the Court reasoned, “an arresting officer’s motor vehicle citations, or traffic stop reports, would routinely be demanded in every case involving the traffic stop of a minority driver.” Id. at 461. Here, Dilworth makes no argument that the documents he seeks should have been provided mandatorily. Additionally, the Court in Betances concluded that the defendant had not

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<sup>9</sup> Police department use of social media to investigate crime is not a new phenomenon, having been utilized by police for at least 10 years. See Kelly, *supra* note 2.

<sup>10</sup> In at least one other context, that of inventory searches, compliance with a written policy provides a legitimate basis for police activity that would otherwise not be constitutional. See Commonwealth v. Ellerbe, 430 Mass. 769, 773 n.8 (2000); Commonwealth v. Allen, 76 Mass. App. Ct. 21, 24 (2009).

<sup>11</sup> The Court recognizes that it has no authority to compel BPD to create any policy, procedure or protocol.

<sup>12</sup> See Comm. Br. at 6, 10. BPD also relies on Betances in its opposition brief. See BPD Br. at 5.

made the preliminary showing that would be required for the type of discovery he sought, as the defendant's showing was limited to two police reports in which the trooper had pulled over one black motorist and one Cuban-born motorist in the area where the defendant was pulled over. *Id.* at 461-462. Here, survey data covering 20 matters provides a more extensive showing.

In *Thomas*, as in *Betances*, the defendants sought materials on alleged selective enforcement as mandatory discovery. *Thomas*, 451 Mass. at 453. Moreover, in *Thomas* the defendants sought, with regard to the trooper who pulled them over, the trooper's "citation books, audit sheets, and 'any other information' concerning whether [the trooper] had engaged in 'profiling, stereotypical thinking and hunches, or [had] used dubious investigative techniques'" over an approximate six-year time period. *Id.* In reversing the trial court's discovery order, the Supreme Judicial Court concluded that some of the requested materials were not in the possession of the prosecution team, and also concluded that the "vague and overbroad" request impermissibly ordered the Commonwealth to conduct statistical analyses and make legal evaluations about unspecified "other information" that may or may not have been relevant. *Id.* at 454-455. Here, by contrast, the Defendant has requested a well-defined set of documents for a specified purpose, such that the request can reasonably be carried out by BPD.<sup>13</sup>

Having found that the requested documents are material and relevant to Dilworth's defense, the Court further finds that Dilworth has satisfied the other three requirements for issuance of a summons under *Lampron*. As to the first other

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<sup>13</sup> The Court further notes that the request in *Thomas* targeted the long-term history of a particular trooper, whereas the defendant in this case seeks information covering a shorter time frame about the broader practices of BPD.

requirement, the requested documents “are not otherwise procurable reasonably in advance of trial by exercise of due diligence.” Lampron, 441 Mass. at 269. Dilworth cannot obtain the requested documents without a summons. His counsel already made an attempt to do so with only partial success, through the informal survey described herein. Only BPD has access to all of the documents that will be covered by the subpoena.

As to the second other requirement, Dilworth may have a constitutional challenge to the charges against him, and may waive his right to assert the challenge if he does not litigate the issue before trial. Therefore, he “cannot properly prepare for trial without such production and inspection in advance of trial.” Id.

As to the third additional requirement, the Court has found that the requested information is relevant to Dilworth’s claim that BPD may be using Snapchat in a discriminatory way. See *supra* at 10-12. In this context, the fact that Dilworth does not know what the requested records will reveal does not render the request a “fishing expedition” because, as noted above, requiring a more detailed showing would put Dilworth in the “untenable position of having to produce evidence of selective enforcement in order to obtain evidence of selective enforcement.” Bernardo, B., 453 Mass. at 169. Therefore, the Court finds that “the application is made in good faith and is not intended as a general ‘fishing expedition.’” Lampron, 441 Mass. at 269.

This Court has fully considered Supreme Judicial Court holdings that “rule 17(a)(2) is not a discovery tool... Rather, it is intended to expedite trial proceedings . . . .” Commonwealth v. Jones, 478 Mass. 65, 68 (2017) (internal quotations and additional citations omitted), and cases cited therein. However, an overly restrictive reading of Rule 17(a)(2) in this context would undermine the Supreme Judicial Court’s encouragement to

defendants that they employ the Lora framework to ferret out whether or not discrimination has played any role in law enforcement decisions about whom to investigate or prosecute. See Buckley, 478 Mass. at 871.

Because Dilworth has satisfied the four-part test for issuance of a summons pursuant to Mass. R. Civ. P. 17, the Court must consider the burden that would be imposed on BPD in collecting the Forms 26 covered by the summons. Because Forms 26 apparently are not stored electronically, BPD cannot comply with a summons by performing an electronic word search. Most likely, BPD will need to canvas the supervisory officers in the Department to whom Forms 26 are submitted.

To avoid the production of documents related to ongoing investigations and any undue burden on BPD in complying with this request, and recognizing the possibility of additional requests, the Court will limit both the scope and the time frame of the documents that BPD must produce.

As to scope, BPD will be required to produce Forms 26 only in those cases where the defendant has been charged. In all such cases, any Form 26 that references the use of Snapchat (indeed, all relevant Forms 26) should already have been produced to the defendants in those cases as part of the automatic discovery in those cases. Further, Dilworth voluntarily narrowed his initial request to exclude human trafficking investigations and sexual assault investigations. This Court will also exclude murder investigations, which raise similar issues to human trafficking and sexual assault investigations and often involve voluminous paperwork.

As to time frame, instead of producing Forms 26 for a more than two-year period, as requested by Dilworth, BPD will be required to produce such forms created during the

one-year period from August 1, 2017 to July 31, 2018. This time frame begins roughly two months before police “friended” Dilworth on Snapchat and ends roughly two months after his second arrest.

The one-year set of BPD reports that this Court will summons may reveal a less dramatic discrepancy by race in police use of Snapchat than the 20 cases presented to the Court. Moreover, even if the racial composition of this broader set mirrors the racial composition of the 20 cases presented to this Court, a race-neutral explanation for this discrepancy may well defeat Dilworth’s equal protection claim. See Castaneda v. Partida, 430 U.S. 482, 493 (1977) (“an official act is not unconstitutional solely because it has a racially disproportionate impact.”).<sup>14</sup> However, the documents covered by the summons are material and relevant, and they will assist the Court in resolving Dilworth’s claim.

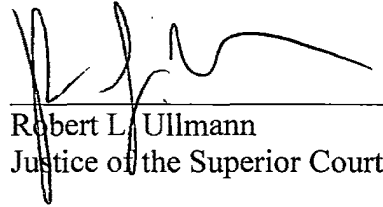
### **CONCLUSION AND ORDER**

For the above reasons, Dilworth’s motions pursuant to Mass. R. Crim. P. 17 (Filing # 16 in Case No. 1884-CR-00453 and Filing # 19 in Case No. 1884-CR-00469) are **ALLOWED**, as modified herein, and his motions pursuant to Mass. R. Crim. P. 14 (Filing # 12 in Case No. 1884-CR-00453 and Filing # 15 in Case No. 1884-CR-00469) are **DENIED**. A summons will issue directing the Boston Police Department to submit to the Clerk of the Court within 45 days of this Order all Form 26 reports prepared by any officer or other employee of the Boston Police Department between August 1, 2017 and

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<sup>14</sup> While the Supreme Judicial Court has said that its analysis of racial discrimination in jury selection “is the same under the Federal Constitution and the Declaration of Rights,” Commonwealth v. Long, 419 Mass. 798, 806 (1995), the parties do not cite and this Court has not found any case in which the Supreme Judicial Court has articulated this principle in the context of alleged selective enforcement by police.

July 31, 2018 that reference the use of Snapchat as an investigative tool in any case in which the subject of Snapchat monitoring has been charged with any offense related to that monitoring. Documents related to human trafficking investigations, sexual assault investigations and murder investigations will not be covered by the summons.



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Robert L. Ullmann  
Justice of the Superior Court

Dated: January 18, 2019

COMMONWEALTH OF MASSACHUSETTS  
 SUFFOLK, ss. SUFFOLK SUPERIOR DEPT  
 1884 CR 453  
 1884 CR 649

2021 JAN 13 PM 12:58

COMMONWEALTH

v.

RICHARD DILWORTH

**DEFENDANT'S MOTION FOR EQUAL PROTECTION DISCOVERY  
 OR IN THE ALTERNATIVE FOR A RULE 17 SUMMONS**

Now comes Mr. Dilworth and respectfully moves this Court to order the below requested materials. The requested information is necessary to enable the Mr. Dilworth to properly raise an equal protection challenge to the racial profiling on social media that resulted in his arrests under Commonwealth v. Long, 485 Mass. 711 (2020), Mass R. Crim Pro. 14, the 5<sup>th</sup>, 6<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution, and Article 12 of the Massachusetts Declaration of Rights. In the alternative, Mr. Dilworth brings this motion under Mass R. Crim. Pro 17 and Commonwealth v. Lampron, 441 Mass. 265, 270 (2004). Mr. Dilworth asks this court to order the following be produced:

1. Booking sheets, color booking photos and police incident reports for the arrests associated with each of the twenty-one "Form 26" reports that have been provided in discovery.<sup>1</sup>
2. Implicit Bias or Anti Bias training:
  - a. Notice as to whether the Boston Police Department currently has, or ever had in the past, implicit bias or anti-bias or similar training for police officers or command staff.
  - b. The name of this training
  - c. Whether Officers Zachary Crossen (131216) James O'Loughlin

<sup>1</sup> Counsel is bound by a protective order designed to protect the privacy of civilian information on these reports, but will provide a list of names to the Commonwealth separate from this motion.

(131212), Brian Johnson (#103611), Joseph Connolly (#99771), Matthew M. Conley (#102955), Thomas Bernier (#83788), Thomas Noto (#75653), or Lieutenant James Miller attended such implicit bias or anti-bias training.

- d. If so, please provide dates of the training that each officer attended, the name(s) of the instructor(s) for the trainings attended, any materials which were distributed or presented as part of the training, and evaluations done by or about the listed officers as part of the training or follow up.
- e. If the officer(s) did not attend such a training, please provide whether there was an implicit bias or anti-bias training that was offered which the officer did not participate in.

3. Training materials and protocols related to social media investigations

- a. The Defendant renews his motion that was previously filed (paper number 6) and allowed and then answered in October of 2018 (paper number 13). The defendant is seeking an update and current response that that previously allowed request.

4. Social Media Investigations

- a. Notice of any documentation that exists, in addition to the previously provided 'Form 26' reports and the associated video recordings, that would document the individuals who were being monitored by any member of the Youth Violence Strike Force on Snapchat between August 1<sup>st</sup> 2017 and July 31, 2018. (ie: a spreadsheet or list of people being monitored, officer notes, screenshots, etc)
- b. Notice of the total number of people being monitored on Snapchat by the Youth Violence Strike Force between August 1<sup>st</sup> 2017 and July 31, 2018.
- c. Any recording or image that is part of discovery that has been turned over to any defendant that shows all or part of the "friends list" being used on snapchat or, in the alternative, the recordings from all of the cases in the forms 26.
- d. Documentation of any other arrests, or search warrant executions that occurred between August 1<sup>st</sup> 2017 and July 31, 2018 that were based on Snapchat monitoring by member of the Youth Violence Strike Force or other members of the Boston Police Department (noting the exceptions in the original discovery order excluding murder, human trafficking or sexual assault investigations)

5. Notice of whether the Commonwealth intends to use presence in the Gang Database (maintained by the Boston Police, BRIC or other law enforcement agencies) as a justification for social media monitoring of the subjects of this investigatory scheme at a motion to suppress or similar motion litigating an equal protection claim.
6. The Suffolk County District Attorney's Office to provide any exculpatory information to Mr. Dilworth related to the officers involved producing relevant reports in this matter, specifically targeting or arresting Mr. Dilworth, and their supervisor.

In support thereof, Mr. Dilworth states that he was illegally targeted along with numerous other young people of color by the Boston Police Department for social media surveillance. Mr. Dilworth is seeking 'relevant' material to litigate his equal protection claim. Commonwealth v. Long, 485 Mass. 711 (2020). Mr. Dilworth has been provided with some court ordered discovery, and this request seeks additional material to document and explain the material that he has been provided with, as well and to prepare for the Commonwealth's anticipated defenses in an evidentiary hearing on these issues.

**1. Booking sheets and police incident reports for the arrests associated with each of the twenty-one "Form 26" reports that have been provided in discovery.**

In January of 2019 the court ordered the production of one year of "Form 26" reports related to snapchat investigations conducted by the Boston Police. As grounds for that motion, the defendant presented an affidavit documenting that the defense was aware of 20 Snapchat cases in the Suffolk County courts, and of those cases 17 defendants were Black and 3 were Latinx. After

protracted litigation, the Supreme Judicial Court affirmed the discovery order in May 2020, and the “Form 26” reports were provided in October of 2020. A total of 21 “Form 26” reports were provided, barely more than the original 20 cases the defense had cited as a basis for the discovery motion.

The provided reports do not contain race or demographic information related to the people being monitored, and those reports often do not contain details about the arrest. In order to generate meaningful statistics about the race of people being targeted for social media investigations by the Boston Police, the defense needs access to that race information. The booking sheet and police report would contain the relevant information. “A defendant has a right to reasonable discovery of evidence concerning the totality of the circumstances” Commonwealth v. Long, 485 Mass. at 740 (2020). In order to meet the burden for the production of discovery, the material sought needs only to be relevant to the totality of the circumstances. Id. See Commonwealth v. Buckley 478 Mass 861, 871 (2018)), (“encouraging” defendants to seek, develop, and present to the Court statistical evidence of racial discrimination in criminal proceedings) see also Commonwealth v. Laltaprasad 475 Mass. 692, (2016) n. 20 (general statistically evidence of “troubling” negative racially disparate impact of mandatory minimum drug sentences on people of color did not create a sufficient record, and that a successful equal protection challenge will provide more complete data in litigating the claim).

## **2. Implicit Bias or Anti Bias training:**

Mr. Dilworth, a Black man, is seeking information about whether the officers involved in the investigator scheme that ensnared him took implicit bias or anti-bias training and details about that training. The records would allow the Defendant to determine whether the officers were training on implicit bias and whether the training, or lack thereof, may have influenced their decisions in deciding who to target for social media investigations.

Information on whether the officers in this case took racial bias training would help Mr. Dilworth determine if he has enough evidence for a reasonable inference of racial profiling to file a motion to suppress under Long. In Long, the SJC held that the defendant wishing to raise an equal protection claim bears the burden of establishing a reasonable inference that the targeting was motivated by race. 485 Mass. at 714. The reasonable inference is based on a totality of the circumstances of facts; and the inference does not need to be based solely on statistics. Further, the Court endorsed that when litigating an equal protection racial profiling claim, the showing of bias by the police officers may be bias that is explicit or implicit. Long, 485 Mass. at 739.

Officer Crossen, the first officer to document monitoring Mr. Dilworth on social media and to stop, search and arrest him, was the subject of a sustained internal affairs complaint for failing to follow the "Bias Free Policing Policy". This incident occurred a month after Mr. Dilworth was first arrested in 2018. Officer Crossen further was the subject of another "Bias Free Policing Policy" complaint in 2015, though this complaint was not sustained. Officer O'Loughlin was the second officer to document monitoring Mr. Dilworth on social media. The other officers listed in this request are the authors of the other "Form 26" reports that were produced in discovery, and the Lieutenant is the person who supervises the unit. All the officers involved in these cases are members of

the Youth Violence Strike Force, which is a specialized unit within the Boston Police Department that often targets communities of color and people of color.

When Mr. Dilworth presents statistical evidence of the racial profiling that occurs in this investigatory scheme, he will be relying on reports for the officers listed. The discretionary decisions of these officers resulted in the targeting and enforcement that was done, and any training they participated in related to implicit bias is relevant to evaluating those decisions.

### **3. Training materials and protocols related to social media investigations**

The Defendant renews his motion that was previously filed (paper number 6) and allowed and then answered in October of 2018 (paper number 13). The defendant is seeking an update and current response that that previously allowed request. This motion was allowed by agreement in 2018. As grounds, the defendant states that as of October 2018 the Boston Police reported having not training materials, or policies procedures or protocols in place related to social media investigations. Mr. Dilworth is seeking current information related to this request. The existence and non-existence, or the creation of a policy, may be relevant to a fact finder in determining the role of explicit or implicit bias in decision making.

### **4. Social Media Investigations**

Connected with his equal protection challenge, Mr. Dilworth is seeking additional documentation from the Youth Violence Strike force that would document the totality of the population being surveilled on Snapchat. He is seeking:

- a. Notice of any documentation that exists, in addition to the previously provided 'Form 26' reports and the associated video recordings, that would document the individuals who were being monitored by any member of the Youth Violence Strike Force on Snapchat between August 1<sup>st</sup> 2017 and July 31, 2018. (ie: a spreadsheet or list of people being monitored, officer notes, screenshots, etc)
- b. Notice of the total number of people being monitored on Snapchat by the Youth Violence Strike Force between August 1<sup>st</sup> 2017 and July 31, 2018.
- c. Any recording or image that is part of discovery that has been turned over to any defendant that shows all or part of the "friends list" being used on snapchat or, in the alternative, the recordings from all of the cases in the forms 26.
- d. Documentation of any other arrests, or search warrant executions that occurred between August 1<sup>st</sup> 2017 and July 31, 2018 that were based on Snapchat monitoring by member of the Youth Violence Strike Force or other members of the Boston Police Department (noting the exceptions in the original discovery order excluding murder, human trafficking or sexual assault investigations)
- e. Notice of whether the Snapshot monitoring being done by officers Zachary Crossen (131216) James O'Loughlin (131212), Brian Johnson (#103611), Joseph Connolly (#99771), Matthew M. Conley (#102955), Thomas Bernier (#83788), Thomas Noto (#75653) was conducted on department issued cell phones.

These requests meet the threshold for relevance outlined in Long for discovery production. While statistical evidence is not required to raise a reasonable inference of racial motivation, such evidence remains probative of the question under the new equal protection regime established by the Court this year. Long, 485 Mass.739-740. The requested material will permit to defendant to explore the demographics of the population target by social media monitoring. In prior hearings Boston Police officers have testified that they monitor hundreds or possibly thousands of people on Snapchat. The

Commonwealth has provided documentation 21 people who were charged related to Snapchat monitoring. The demographics of the remaining people who were selected for monitoring, but who were not charged, will illuminate whether there is a reasonable inference that target selection for Snapchat investigations are, at least in part racially, motivated. See Long at 760, n. 17 (Budd, J., concurring) (even in the absence of officer specific data, department wide patterns of racial profiling could be a sufficient statistical showing to raise a reasonable inference that the police action was based on race). With regard to the Department issued cell phone request, public records requests document that most of the officers engaged in the Snapchat monitoring currently have department issued cell phones. The publicly available list does not establish whether the officers had a department issued cell phone in 2018. This is relevant to potential future discovery requests related to the mechanics of how the social media monitoring was conducted and how it was monitored.

5. **Notice of whether the Commonwealth intends to use presence in the Gang Database (maintained by the Boston Police, BRIC or other law enforcement agencies) as a justification for social media monitoring of the subjects of this investigatory scheme at a motion to suppress or similar motion litigating an equal protection claim.**

The Commonwealth has signaled that it has some documents or evidence it could present to the court in an effort to document that this investigatory practice was race neutral. Counsel for Mr. Dilworth is seeking notice, in

advance of the hearing, as to whether the Commonwealth intends to rely on the Gang Database or other similar lists maintained by the police department in an attempt to counter the inference of race motivation in this case. As grounds, the defendant states that such evidence would require additional discovery litigation, and like the concerns raised in Mass. R. Crim. Pro 17, that additional litigation would stall and significantly delay an evidentiary hearing in this matter if the issue was raised for the first time during the hearing.

Gang policing is built on a foundation of untruths and unfair stereotypes. More than seventy-five percent of the names in Boston's gang database belong to Black men or teens. The police monitor what young Black and Latinx people wear, where they go, and who they know. Based on this surveillance, they assign people points according to criteria of police invention, which become the basis for entry into the gang database. In fact, just *two percent* of the more than 5,300 unique names in the Boston Regional Intelligence Center Gang Database represent white people.<sup>2</sup> A staggering 97.7% of names in the gang database belong to non-white people.<sup>3</sup> See Long, 485 Mass. at 750 (Budd, J.,

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<sup>2</sup> See, e.g., Gal Tziperman Lotan, *Data show Boston police stop Black people most often*, Bos. Globe (June 15, 2020), <https://www.bostonglobe.com/2020/06/15/metro/data-show-boston-police-stop-black-people-most-often/>; Jan Ransom, *Blacks remain focus of Boston police investigations, searches*, Bos. Globe (Aug. 28, 2017), <https://www.bostonglobe.com/metro/2017/08/28/blacks-remain-focus-boston-police-investigations-searches/PDbFr2QZexCEi3zJTO9mOJ/story.html>; Evan Allen & Travis Andersen, *Evans defends Boston police after ACLU report on racial bias*, Bos. Globe (Oct. 9, 2014), <https://www.bostonglobe.com/metro/2014/10/08/aclu-charges-boston-police-engaged-rationally-biased-tactics-police-call-report-inaccurate/Zev3p7jvRVQ2loKSWncu2H/story.html>.

<sup>3</sup> See, e.g., Shannon Dooling, *Here's What We Know About Boston Police's Gang Database*, WBUR (June 26, 2019), <https://www.wbur.org/news/2019/07/26/boston-police-gang-database-immigration> ("Boston police provided redacted documents showing how gang members and associates are tracked. An

concurring) (“[T]he officer’s recognition of the vehicle or an occupant from a prior interaction or observation, conversations with other officers, or information in a gang database . . . are the same factors currently used by police to racially profile people of color.”).

If the Gang Database, or some similar list will be used as evidence by the Commonwealth to counter the inference of racial motivation, Mr. Dilworth requires adequate time to seek discovery related to that rebuttal.

**6. The Suffolk County District Attorney’s Office to provide any exculpatory information to Mr. Dilworth related to the officers involved producing relevant reports in this matter, specifically targeting or arresting Mr. Dilworth, and their supervisor.**

Pursuant to Mass. R. Crim. P. 14(a)(1)(iii) and In the Matter of a Grand Jury Investigation, 485 Mass. 641 (2020), Mr. Dilworth moves this Honorable Court order the Commonwealth to discover and disclose any and all exculpatory material regarding any police witness who is a potential witness or authored a report relevant this case, including but not limited too Officers Zachary Crossen (131216) James O’Loughlin (131212), Brian Johnson (#103611), Joseph Connolly (#99771), Matthew M. Conley (#102955), Thomas Bernier (#83788), Thomas Noto (#75653), or Lieutenant James Miller.

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individual’s name and photo, aliases and nicknames, and gang affiliations are listed. In one example, a man is documented as an ‘INACTIVE’ gang associate who was born in 1996. . . . The report states that the man was wearing a brand of hat that’s known to be worn by gang members (four points). The type of hat was redacted by Boston Police. He was also seen in East Boston ‘alongside 3 other males, all of which are now verified [redacted] gang members’ (two points.”) (also noting that 2.3% of the gang database names with known races are white people).

The Commonwealth has a constitutional duty to disclose all exculpatory information to the defendant. Brady v. Maryland, 373 U.S. 83 (1963). This duty encompasses information that “furnishes corroboration of the defendant’s story, calls into question a material, although not indispensable, element of the prosecution’s version of the events, or challenges the credibility of a key prosecution witness.” Commonwealth v. Ellison, 376 Mass. 1, 22 (1978). “Exculpatory’ in this context is not a narrow term,” Commonwealth v. St. Germain, 381 Mass. 256, 261 n.6 (1980); indeed, even “[e]vidence tending to impeach the credibility of a key prosecution witness is clearly exculpatory.” Commonwealth v. Collins, 386 Mass. 1, 8 (1982).

The Supreme Judicial Court has also indicated that the following information must also be sought and disclosed because of its exculpatory nature:

any finding of misconduct that reflects upon the truthfulness or possible bias of the employee, including a finding of lack of candor during a criminal, civil, or administrative inquiry or proceeding; ii) any past or pending criminal charge brought against the employee; iii) any allegation of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation; iv) prior findings by a judge that an agency employee has testified untruthfully, made a knowing false statement in writing, engaged in an unlawful search or seizure, illegally obtained a confession, or engaged in other misconduct; v) any misconduct finding or pending misconduct allegation that either casts a substantial doubt upon the accuracy of any evidence -- including witness testimony -- that the prosecutor intends to rely on to prove an element of any crime charged, or that might have a significant bearing on the admissibility of prosecution evidence . . . .

In the Matter of a Grand Jury Investigation, 485 Mass. at 659-660,

Once the Commonwealth obtains exculpatory information, it must turn it over to the defendant. See Brady, *supra*. A prosecutor must do so “without regard to its impact on the case.” CPCS v. Attorney Gen., 480 Mass. 700, 730 (2018). In other words, “once the information is determined to be exculpatory, it should be disclosed -- period.” In the Matter of a Grand Jury Investigation, 485 Mass. at 641.

Beyond simple disclosure, the Commonwealth has a “duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case[.]” Kyles v. Whitley, 514 U.S. 419, 437 (1995) (emphasis added). See Commonwealth v. Ware, 471 Mass. 85, 95 (2015) (“It is well established that the Commonwealth has a duty to learn of and disclose to a defendant any exculpatory evidence that is held by agents of the prosecution team” [internal quotes omitted]). Prosecutors are thus required to make inquiries of all government agents that could be in possession of such information, including, among other sources, police and victim witness advocates. See Commonwealth v. Liang, 434 Mass. 131, 135 (2001).

The Commonwealth has a more extensive duty to disclose arising from Mass. R. Crim. P. 14(a)(1)(A)(iii), which requires prosecutors to disclose “any facts of an exculpatory nature.” Although it does not delineate what material must be turned over, the rule “envisions a broad disclosure requirement for exculpatory facts[.]” CPCS, 480 Mass. at 732. See *id.* at 733 (“No checklist can

exhaust all potential sources of exculpatory evidence”). “Absent a protective order, no prosecutor, whether in the office of the Attorney General or in the office of a district attorney, has the authority to decline to disclose exculpatory information.” Id.

The Commonwealth has a specific Brady disclosure obligation with respect to police witnesses: “where a prosecutor determines from information in his or her possession that a police officer lied to conceal the unlawful use of excessive force . . . or lied about a defendant’s conduct and thereby allowed a false or inflated criminal charge to be prosecuted, the prosecutor’s obligation to disclose exculpatory information requires that the information be disclosed to defense counsel in any criminal case where the officer is a potential witness or prepared a report in the criminal investigation.” In the Matter of a Grand Jury Investigation, 485 Mass. at 658.

This request is pursuant to Mass R. Crim. P 14(a)(1) and (2). Over the last several years the Court has recognized the difficulty in obtaining discovery and litigating equal protection claims in the criminal court. (See Buckley, Long, *supra*). As the Court has repeatedly acknowledged, the policing experienced by Black people differs categorically from the policing experienced by white people.<sup>4</sup> This is part of a historical continuum. As such,

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<sup>4</sup> *See, e.g., Commonwealth v. Long*, 485 Mass. 711, 717–18 (2020) (“This court has identified the discriminatory enforcement of traffic laws as particularly toxic. . . . The discriminatory enforcement of traffic laws is not a minor annoyance to those who are racially profiled. To the contrary, these discriminatory practices cause great harm.”); *Commonwealth v. Evelyn*, 485 Mass. 691, 708 (2020) (“[T]his pattern of racial profiling has been confirmed by more recent FIO reports.”); *Commonwealth v. Williams*, 481 Mass. 443, 451 n.6 (2019) (collecting studies showing “ample empirical evidence” to support a conclusion that “African-American males receive disparate treatment in the criminal justice system”);

the court eased the discovery burden on defendants raising equal protection challenges, and clarified that records traditionally sought for equal protection statistical challenges under Rule 17 (ie: registry of motor vehicle records for traffic citations) fall under Rule 14. Long at 740-741. The requested records are in held by the prosecuting police department or the District Attorney's office, which work hand in hand to conduct the prosecutions for this investigatory regime.

In the alternative, this request is in-compliance with the required procedure pursuant to Mass. R. Crim. P. 17(a)(2), as explained fully in Commonwealth v. Lampron and Commonwealth v. Dwyer. In Lampron, the Supreme Judicial Court adopted the federal standards for the issuance of a subpoena for the production of documentary evidence. Id. at 270. To justify such a summons, the moving party must demonstrate, "(1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection

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*Commonwealth v. Buckley*, 478 Mass. 861, 876-77 (2018) (Budd, J., concurring) ("Years of data bear out what many have long known from experience: police stop drivers of color disproportionately more often than Caucasian drivers for insignificant violations (or provide no reason at all)."); *Commonwealth v. Warren*, 475 Mass. 530, 539-40 (2016) ("[B]lack men in the city of Boston were more likely to be targeted for police-civilian encounters such as stops, frisks, searches, observations, and interrogations. Black men were also disproportionately targeted for repeat police encounters."); *Commonwealth v. Lora*, 451 Mass. 425 (2008); *Commonwealth v. Feyenord*, 445 Mass. 72, 88 (2005), *cert. denied*, 546 U.S. 1187 (2006) (Greaney, J., concurring) (discussing "humiliating, painful, and unlawful" nature of some police encounters targeting African-American and Hispanic individuals); *Commonwealth v. Gonsalves*, 429 Mass. 658, 670 (1999) (Ireland, J., concurring) (collecting studies on disparate policing of Black and Hispanic people in traffic stops); *Commonwealth v. Phillips*, 413 Mass. 50, 53 (1992) (describing informal Boston Police "search on sight" policy which enacted "martial law" for young Black people in Roxbury).

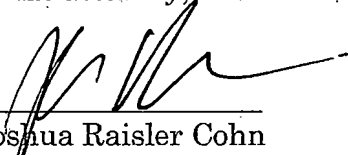
may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general 'fishing expedition'." *Id.* at 269 (citing United States v. Nixon, 418 U.S. 683, 699-700 (1974)).

The defendant asserts that the attached affidavit clearly sets out that the requested documents have a "rational tendency to prove [or disprove] an issue in the case." Commonwealth v. Lampron, 441 Mass. 265, 269-270 (2004) citing Commonwealth v. Fayerweather, 406 Mass. 78, 83 (1989), quoting Commonwealth v. Chretien, 383 Mass. 123, 136 (1981). See Commonwealth v. Pelosi, 441 Mass. 257 (2004). The requirements of Lampron and Dwyer have been met in this case.

"When a party cannot know for certain the contents of a requested document, it is appropriate for a court to order the issuance of a summons pursuant to rule 17(a)(2) on a showing of the relevance of what the document is likely to contain." Commonwealth v. Reed, 444 Mass. 803, 808 (2005).

Counsel further submits that the records sought in this motion are essential to the defendant's right to compulsory process to secure favorable evidence, to the effective assistance of counsel, to obtain exculpatory information, and to present a defense, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article Twelve of the Massachusetts Declaration of Rights. For these reasons, the Defendant moves this Court for the issuance of the requested subpoenas.

Richard Dilworth  
By his attorney,



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Joshua Raisler Cohn  
BBO 679791  
Roxbury Defenders Unit  
Committee for Public Counsel Services  
7 Palmer Street  
Roxbury, MA 02119

Dated: January 10<sup>th</sup>, 2021

COMMONWEALTH OF MASSACHUSETTS  
 SUFFOLK, ss. SUFFOLK SUPERIOR  
 DEPT  
 1884 CR 453  
 1884 CR 649

COMMONWEALTH  
 v.

RICHARD DILWORTH

**AFFIDAVIT OF COUNSEL IN SUPPORT OF MOTION FOR  
 BPD INTERNAL AFFAIRS DOCUMENTS**

I, Joshua Raisler Cohn, do hereby depose and say that the following is true to the best of my knowledge, understanding and belief:

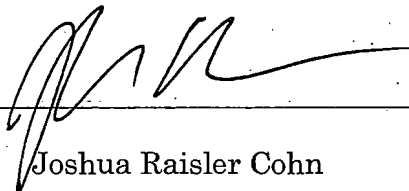
1. I am an attorney employed by the Committee for Public Counsel Services, and have been assigned to represent the defendant in the above-captioned matter. He has been determined to be indigent.
2. Mr. Dilworth is a young Black man.
3. The defendant is charged possession of a firearm, possession of a high capacity magazine, and other related charges.
4. The charges in this case allege Mr. Dilworth was in a car parked in a private parking lot behind his home, and was approached by several police officers including Zachary Crossen. Those officers ordered him out of the car, based on information they gained from an "ongoing investigation" because they believed he was in possession of a firearm. A struggle ensued, and officers recovered a firearm allegedly from Mr. Dilworth's waistband.
5. Officer Crossen testified to the grand jury about the facts and circumstances of this case. Defense counsel anticipates calling Officer Crossen at the motion to suppress and trial in this matter.
6. In February of 2018, a video tape was released showing Officer Crossen stopping, detaining and questioning a young black man in the Roxbury neighborhood. This video shows officer Crossen apparently mis-identifying the man he stopped, accusing the man of being a 'contributor' (implying that he is a problem in his community) and questioning the man about his phone and his employment.

7. New articles in the Boston Globe, Boston Herald, and other commercial news sources quote Boston Police Department spokespeople stating that they are “reviewing” the incident, or “investigating” the incident.
8. In those same new articles both the young man stopped, and news outlets, raised the concern that he was targeted because of his race, a protected class.
9. A review in December 2020 of publicly available Boston Police records shows three internal affairs complains against Officer Crossen. Those records reflect that within a month of the Dorchester incident, March 6, 2018, a complaint was filed against Officer Crossen alleging the policy violations “Bias Free Policing Policy”, “Respectful Treatment” and “Abuse of Process”. The public records indicate all three allegations were sustained.
10. In more than a decade of being a public defender in Boston, counsel has rarely seen a sustained IAD complaint against a Boston police officer.
11. In 2014 the ACLU and the Boston Police Department released analysis of all the FIO’s in the city from 2007 to 2010 which documented that even when controlling for crime rated in individual neighborhoods, the Boston Police stopped, detained and questioned black and brown people at significantly disproportionate rates when compared to the rates at which white people were stopped.
12. The credibility of Officer Crossen, and any implication that he was targeting the defendant due to his race, will be relevant at the motion to suppress and the trial in this matter.
13. Officer Conley wrote 15 of the 21 “Form 26” reports that were disclosed in discovery, all on the same day about a month after Judge Ullman ordered the reports be produced.
14. Officers, Crossen, Noto, Bernier, O’Loughlin, Connolly and Johnson each authored one report disclosed in discovery based on monitoring they had conducted on Snapchat.
15. Pursuant to Commonwealth v. Lampron, the requested documents are not otherwise procurable reasonably in advance of trial by exercise of due diligence because the the Boston Police Department will not provide these records to counsel absent either a judicial order. The demographic

information requested will illuminate the pattern of targeting Black and Brown people with this investigatory scheme.

16. Pursuant to Commonwealth v. Lampron, the defendant cannot properly prepare for trial without the production and inspection of the records. Waiting to inspect them on the day of trial would unreasonably delay the trial.
17. Pursuant to Commonwealth v. Lampron, the request for the documents has been made in good faith and is not a "fishing expedition." The Commonwealth has never disputed the initial showing made by counsel that the entire group of people being prosecuted for Snapchat cases are Black or Brown, nor have they suggested that the demographics of the population of people being monitored on Snapchat is any different than the people charged. The requested materials are all relevant to investigating any bias, implicit or explicit, that may have been a factor in the decisions being made about who to monitor for this type of investigation.
18. "The documentary evidence sought has a rational tendency to prove [or disprove] an issue in the case." Commonwealth v. Fayerweather, 406 Mass. 78, 83 (1989). Specifically, Crossen and the other officers are percipient witnesses in the case, and produced either sworn affidavits or written declarations that was the basis of the police acquiring evidence against the defendant. They are part of a unit that focuses on Black and Brown young people. These materials will document whether or not there is a reasonable inference that the investigatory decisions in these Snapchat cases are motivated by race, at least in part.
19. Under Article 12, the defendant has a constitutional right to produce all favorable proofs.

Sworn to under the pains and penalties of perjury this 9<sup>th</sup> day of January, 2021



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Joshua Raisler Cohn

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

SUFFOLK SUPERIOR COURT  
NO. 1884CR000453  
1884CR00469

COMMONWEALTH

v.

RICHARD DILWORTH

2021 FEB 17 PM 1:20

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COMMONWEALTH'S OPPOSITION TO THE DEFENDANT'S MOTION FOR EQUAL PROTECTION DISCOVERY

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Now comes the Commonwealth and respectfully requests this Honorable court deny the Defendant's Motion for Discovery filed on January 19, 2021, specifically as it relates to items 1 and 4 (a-e). As reasons therefore, the Commonwealth states that that the defendant has failed to raise a valid equal protection claim and has failed to show a reasonable basis that profiling was involved in these cases. As such, the discovery is not relevant in the circumstances of the case before the Court, this discovery is not mandatory under M.R.C.P. 14.

Facts

On January 11, 2018, officers viewed an individual believed to be Richard Dilworth holding a firearm on Snapchat. Several months prior to this date, Boston Police Officer Zachary Crossen friend requested Mr. Dilworth on Snapchat using an undercover account and Mr. Dilworth accepted the friend request. During those several months, Officers observed seven videos which depicted Mr. Dilworth holding a firearm. On January 11, 2018, after seeing the eighth snapchat video, Officers learned of his location and responded to that area, where they observed a parked motor vehicle. Officers approached the defendant while he was seated in the

passenger seat of an SUV parked behind his house. Officers asked Dilworth to exit the vehicle to which he did not comply. Officers were forced to remove Dilworth from the vehicle and he violently resisted. Once Dilworth was detained, officers recovered a black Smith and Wesson firearm loaded with 26 rounds of .40 caliber ammunition including one in the chamber in a large capacity metal feeding device. The defendant was arraigned in the Roxbury Division of the Boston Municipal Court on January 12, 2018 and his bail was set at \$2,500 with the condition that he be fitted with a GPS if released on bail. Mr. Dilworth posted the bail and was fitted with the GPS.

On May 11, 2018 Boston Police Officers observed Richard Dilworth flash a firearm on snapchat at approximately 2:45pm. In the video he was in front of the New Family Supermarket located at 205 Humbolt Ave. Officers were familiar with Mr. Dilworth from the firearm arrest in January. Officers were aware that he was on a GPS and lived at 18 Hollander Street. Based on this information, officers called ELMO and learned that Mr. Dilworth was at home by the time they viewed the video. They conducted surveillance for several hours and observed the suspect enter and exit the back of the house several times, wearing the same clothing depicted in the snapchat video. At approximately 8:50pm, officers observed the suspect leave the area of his home. ELMO informed officers that he had gone to the area of 2030 Columbia Road. Officers went to that area and saw the suspect sitting on a bicycle near the entrance to the building. The suspect appeared nervous and said he was just waiting for his mother to let him into the building. He then placed both hands towards his waist area and began to turn away from officers. At that time officers conducted a pat frisk of the suspect and located a Ruger 9MM with an obliterated serial number which was loaded with one round in the chamber and eight rounds in the magazine, but capable of holding over ten rounds.

On October 31, 2018 the defendant filed a motion requesting discovery relative to a claim of selective prosecution pursuant to both Mass.R.Crim .P. 14 and 17. The Superior Court Justice denied the defendant's motion under Rule 14 and allowed his motion (with modifications) under Rule 17. The Commonwealth appealed the matter under M.G.L. ch. 211 sec. 3. The Single Justice denied the petition without a hearing, citing that the matter didn't warrant the exercise of the Court's extraordinary powers pursuant to ch. 211 sec. 3. The Commonwealth appealed the Single Justice's decision to the Superme Judicial Court, citing that he had abused his discretion by denying the petition. The SJC found that the Single Justice had not abused his discretion. In making this ruling, the SJC specifically noted in a FN 5:

“In ruling as we do that the single justice did not abuse her discretion by declining to intervene at the discovery stage, we express no view on the merits of the Commonwealth's claim, on the motion judge's statement that a claim of selective prosecution might lie even if there has been no infringement of the defendant's constitutional rights, or on the judge's assessment that Dilworth has made the necessary threshold showing for obtaining discovery under rule 17.”

Throughout the pendency of the appeal, production of the discovery was stayed. After the SJC's decision, the Commonwealth collected and provided to the defendant all Form 26 reports relating to individuals arrested with firearms as the result of Snapchat investigations between August 1, 2017 and July 31, 2018. After this discovery was provided, the defendant filed an additional discovery motion, “The Defendant's Motions for Equal Protection Discovery or in the Alternative Rule 17 Summons”.

#### Overview of Snapchat

Snapchat is a social media application that is available for individual download using an IOS or Android operating platforms. See Snapchat, <https://support.snapchat.com/en-US/article/account-setup> (last visited December 28, 2017). Snapchat allows a user to send video

or pictures messages to other Snapchat users using the camera technology on a user's cell phone. Id. An individual user is identified through a unique user name that cannot be changed after the user account is created. Id. at <https://support.snapchat.com/en-US/article/account-setup> (last accessed 12/28/2017). "My Story is a select collection of your Snaps that play in the order you took them. My Story lasts 24 hours, so your friends can see your day unfold." Id. at <https://support.snapchat.com/en-US/article/my-story> (last visited December 28, 2017).

The Snapchat website describes the application as such: "Snapchat is a mobile application made by Snap Inc. and available through the iPhone App Store and Google Play. The application provides a way to share moments with photos, videos, and text". Users can post content to their Snapchat Story for their "friends" to view. Snapchat servers are designed to automatically delete Snaps added to a Snapchat Story after 24 hours. Snapchat photos and videos observed on an account are given a time it was recorded and posted. This timestamp is displayed in the upper left corner of the photo and/or video and reflects how long ago it was recorded and posted – e.g. "2h ago", "9h ago", "30min ago", etc. If a photo or video is posted to an account that was not recorded live but taken at a prior date or time, it will be noted as being sent from the phone's Camera Roll or Memories – e.g. "2h ago from Camera Roll", "9h ago from Camera Roll", "30 min ago from Camera Roll", "6 months ago from Memories", etc. In other words, all photos and videos posted are sent live unless they have the "Camera Roll" or "Memories" designation. Snapchat, in the experience of this Affiant, is operated exclusively on cellular devices, most commonly iPhone and Android devices.

### Argument

#### **I. The Defendant has Failed to Raise a Valid Equal Protection Claim**

The defendant has not met his burden in making a preliminary showing required for the Court to order this discovery under Rule 14. For evidence to support a claim that a defendant was stopped for discriminatory motives it must be material and relevant. *Commonwealth v. Lora*, 451 Mass. 425, 442 (2008); *Commonwealth v. Long*, 485 Mass. 711, 725 (2020). In *Lora*, the Court found that “evidence of racial profiling is relevant in determining whether a traffic stop is the product of selective enforcement violative of the equal protection guarantee of the Massachusetts Declaration of Rights; and the evidence seized in the course of a stop violative of equal protection should, ordinarily, be excluded at trial.” *Lora*, at 426. In *Long*, the Court established a revised test to ensure that drivers who are subjected to racially motivated traffic stops have a viable means by which to vindicate their rights to the equal protection of the laws. *Long*, at 713.

Here, the defendant’s reliance on *Lora and Long* in this case is misplaced. In *Bentances*, a case decided the same day as *Lora* that contemplated the burden for equal protection discovery, the Court found that if the defendant can make a preliminary showing, by way of an affidavit containing reliable information, demonstrating a reasonable basis to infer that profiling, and not another reason alone, may have been the basis for the stop, then the Commonwealth must turn over the relevant discovery. *Commonwealth v. Bentances*, 451 Mass. 457, 461 (2008). In *Long*, the Court found that in the context of traffic stops, at the discovery phase the question is whether the defendant has made a threshold showing of relevance. *Long*, at 725. The purpose of this discovery order would be to allow the defendant to rebut the presumption, at a motion to suppress on Equal Protection grounds (*Lora or Long* motion), that a law enforcement officer made a stop in good faith. *Bentances*, at 461. Here, there is no stop in question to be evaluated in a *Lora/Long* motion. No stop in the constitutional sense occurs until after the officers have

observed the defendant on Snapchat eight times with a firearm, which is in fact the reason for the stop(s) in these cases.

Here, the defendant's motion and affidavit do not challenge a stop in the constitutional sense, they challenge an investigation technique. The Court should deny the defendant's motion simply because the requested evidence would not be relevant to a pretrial motion to suppress or at trial, and therefore is not appropriate. *Commonwealth v. Stewart*, 411 Mass. 345, 354 (1991) ("Whether evidence is relevant depends on its logical tendency to prove some issue in the case on trial"). For information to be relevant in a criminal case, it must have a "logical predicate or nexus" to admissible evidence. *Commonwealth v. Quegan*, 35 Mass. App. Ct. 129, 133 (1993). The defendant may argue that a stop in the constitutional sense occurred when the officer friend requested the defendant on Snapchat, however the Court has consistently ruled that no seizure occurs when an Officer friend requests a defendant, and at this stage the defendant has the burden of showing relevance. (Please see decisions of the Honorable Diane Freniere and the Honorable Robert Ullman attached to the Commonwealth's first discovery motion opposition).

## II. General Selective Prosecution Analysis

Even if this Court were to analyze this case under the selective prosecution framework, the motion should still be denied as the defendant has failed to meet his burden. Although the Court in *Lora* ruled that evidence supporting a claim that a defendant was stopped for discriminatory motives might be material and relevant, the Court noted in *Commonwealth v. Betances*, "[a] categorical, and unsupported, request for all of an arresting officer's police reports, even for a reasonable period of time . . . cannot be sufficient by itself, in this area of law, to justify an automatic production order under rule 14 (a)(1)(A)." *Betances, supra* at 461. If

such a request was sufficient, every officer's reports would routinely be demanded in every case involving the stop of a minority defendant. *Id.* The Supreme Judicial Court has declined to approve the use of the discovery rules to impose such an onerous burden on the Commonwealth, in the absence of a preliminary showing by the defendant that a reasonable basis exists to require the information sought. *Id.* In *Long*, the Court did not change the law regarding general selective prosecution analysis, rather it created a revised test for drivers who are subjected to racially motivated traffic stops. *Long*, at 713 and 722. Here, the defendant does not challenge a traffic stop, and therefore, the analysis remains that established by the Court in *Bentances*.

Criminal prosecutions are presumed to be undertaken in good faith and without intent to discriminate, and as such the defendant bears the initial burden of presenting evidence which raises at least a reasonable inference of impermissible discrimination. *Commonwealth v. Franklin*, 376 Mass. 885, 894 (1978). "In order to meet this burden, the defendant must first 'present evidence which raises at least a reasonable inference of impermissible discrimination,' including evidence that 'a broader class of persons than those prosecuted has violated the law . . . that failure to prosecute was either consistent or deliberate . . . and that the decision not to prosecute was based on an impermissible classification such as race, religion, or sex' (citations omitted)." *Lora, supra* at 437 (quoting *Commonwealth v. Franklin*, 376 Mass. 885, 894 (1978)). Put more simply, "the initial burden rests on the defendant to produce evidence that similarly situated persons were treated differently because of their race." *Id.* at 445. Here, were the defendant allowed the discovery of which he seeks, over the Commonwealth's objection, it should only be reports of individuals, who like himself, were seen on snapchat with a firearm, but unlike himself, were not stopped by police. Or to be more specific, individuals who are

similarly situated to the defendant would be those who were seen with firearms on snapchat eight or more times and not stopped by police.

In order for the this type of discovery to be ordered under Rule 14, the defendant must make a preliminary showing, by way of an affidavit containing reliable information, demonstrating a reasonable basis to infer that profiling, and not another reason alone, may have been the basis for the stop. *Id.* at 462. It is not sufficient to aver speculation that profiling may be occurring on the part of the arresting officer or his department. *Id.* The Court in *Lora* notes,

“Of necessity, the important responsibility of eliminating racial considerations in the day-to-day enforcement of our laws lies principally with the executive branch of government, and no evidence was presented in this case to suggest that this is a responsibility that is being ignored. While the judicial branch shares the responsibility of ensuring that the protections of the Constitution are afforded to all residents, it can only exercise that responsibility when proper and sufficient evidence has been presented to it.”

*Lora*, at 446-447

Here, the only affidavit submitted was authored by counsel for the defendant. This affidavit contains no reasonable basis to believe that the officers involved in this case stopped the defendant based on racial profiling. The survey fails to address the central issue in *Lora* - whether “a broader class of persons than those prosecuted has violated the law . . . that failure to prosecute was either consistent or deliberate . . . and that the decision not to prosecute was based on an impermissible classification such as race, religion, or sex’ (citations omitted).”

*Commonwealth v. Lora*, 451 Mass. 425, 437 (2008). The class of people similarly situated to the defendant would be individuals seen by officers posting firearms on snapchat and the question would be whether or not people in this class were treated differently based on their race (i.e - were white individuals seen on Snapchat with firearms and not stopped). The affidavit clearly

ignores the fact that Mr. Dilworth himself was observed by officers with a firearm on Snapchat seven times previously without being stopped.

An unwavering line of cases holds that a violation of the Equal Protection Clause requires state action motivated by discriminatory intent; the disproportionate effects of state action are not sufficient to establish such a violation. *Hernandez v. New York*, 500 U.S. 352, 372-374 (1991). In *Washington v. Davis*, 426 U.S. 229, 239 (1976), the Court explained that "our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact." "[A] defendant who alleges an equal protection violation has the burden of proving 'the existence of purposeful discrimination.'" *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987). See also *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-265, (1977); *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 198 (1973); *Wright v. Rockefeller*, 376 U.S. 52, 56-57(1964). Courts have recognized the discriminatory intent requirement explicitly in the context of jury selection. *Hernandez, supra*, at 44. Thus, "[a] purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurors of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination." *Akins v. Texas*, 325 U.S. 398, 403-404 (1945). See also *Alexander v. Louisiana*, 405 U.S. 625, 628-629 (1972); *Whitus v. Georgia*, 385 U.S. 545, 549-550 (1967); *Norris v. Alabama*, 294 U.S. 587, 589 (1935); *Neal v. Delaware*, 103 U.S. 370, 394 (1881). The point was made clearly in *Batson* itself: "As in any equal protection case, the 'burden is, of course,' on the defendant who alleges discriminatory selection . . . 'to prove the existence of purposeful discrimination.'" 476 U.S. at 93, quoting *Whitus, supra*, at 550.

In *Washington v. Davis, supra*, the Court outlined the dangers of a rule that would allow an equal protection violation on a finding of mere disproportionate effect. Such a rule would give rise to an unending stream of constitutional challenges:

“A rule that [state action] designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.”

*Henandez, supra* at 45-46, quoting *Davis, supra*, at 248.

### III. *Commonwealth v. Long* analysis

The defendant’s reliance on *Commonwealth v. Long* is misplaced, not only because he fails to raise a valid Equal Protection violation, but because the revised equal protection analysis created by the Court in *Long* is specific to challenges to traffic stops. *Long*, at 713 and 722.

“Under general selective prosecution analysis, a defendant’s initial showing must include evidence “that a broader class of persons than those prosecuted violated the law,... that failure to prosecute was either consistent or deliberate,... and that the decision not to prosecute was based on an impermissible classification such as race, religion, or sex.””

*Long* at 722 quoting *Lora*, 451 Mass. at 437

“In the context of racially biased motor vehicle stops, purportedly to enforce traffic laws, however, these first two requirements are unnecessary. As stated, because of the ubiquity of traffic violations, only a tiny percentage of these violations ultimately result in motor vehicle stops, warnings, or citations. Thus, it virtually always will be the case “that a broader class of persons” violated the law than those against whom the law was enforced.”

*Long* at 722.

The Court went on to conclude that in the context of motor vehicle stops, the first two requirements of the general selective prosecution analysis are not required and announced the totality of the circumstances test, requiring only the evidence necessary to support a reasonable

inference that the stop was based on membership in a protected class. *Id.* In creating this test that deviates from the general selective prosecution analysis, the Court considered the lack of sufficient records regarding traffic stops. *Id.* at 720 and 722.

If the Court were to analyze the defendant's motion under the *Long* standard, the question would be relevance. *Long*, at 725. The discovery requested is not relevant, as the defendant has failed to make a valid equal protection claim, as argued above. If the Court were to find that a valid equal protection claim has been made and that the *Long* analysis is to be applied the scope of the discovery requested should be limited. The defendant in his motion requests arrest reports, search warrant affidavits, and video recordings. Much of the information contained within these materials, which are all unrelated investigations, would be irrelevant even to an equal protection challenge by the defendant. If the Court were to allow portions of the defendant's motion, the Commonwealth would ask that the members of the Commonwealth be ordered to direct members of the Boston Police Youth Violence Strike Force to review any reports, booking sheets, videos, still shots, or other existing documentation that would show who they were following on snapchat from August 1, 2017 through July 1, 2018 and to disclose, in writing, the perceived race, gender, and estimated age of each individual, and that the Commonwealth be ordered to provide that information to the defendant.

#### **IV. Outstanding Item Requested Not in the Care, Custody, and Control of the Commonwealth**

The defendant, in item 3(e) requests notice of whether the Snapchat monitoring being done by numerous officers was conducted on their department issued cell phones. This information is not within the care and custody of the Commonwealth and should not be ordered under M.R.C.P. 14. Also, the discovery requested is not relevant as the defendant has failed to raise a valid equal

protection challenge, even if he had raised a valid challenge, he has failed to meet his burden for discovery under the general selective prosecution analysis, and even if the Court analyzed this request under *Commonwealth v. Long*, the requested discovery is not of the nature contemplated in the revised analysis. *Long*, at 725.

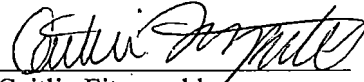
Conclusion

As the defendant has failed to raise a valid claim and further failed to demonstrate a reasonable basis to infer that profiling and not other reasons were the basis for the stop, the Commonwealth respectfully requests that this Court deny the motion for discovery.

Respectfully Submitted  
For the Commonwealth,

RACHAEL ROLLINS  
DISTRICT ATTORNEY

by:

  
Caitlin Fitzgerald  
Assistant District Attorney

Dated: 2/10/21

## COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
Criminal No. 18-453 ✓  
Criminal No. 18-469

COMMONWEALTH

vs.

RICHARD DILWORTH

**MEMORANDUM AND ORDER ON  
DEFENDANT'S MOTION FOR EQUAL PROTECTION  
DISCOVERY OR FOR A RULE 17 SUMMONS**

In January and again in May 2018, defendant Richard Dilworth was arrested after a Boston Police officer viewed Snapchat videos of him holding what appeared to be a firearm. In these two dockets, defendant faces multiple firearm charges. Defendant, who is a Black male, contends that Boston Police officers used Snapchat as an investigative tool exclusively against young males of color. He argues the police targeted his Snapchat account for surveillance at least in part because of his race in violation of his right to equal protection of the laws. The case is before me on defendant's motion for discovery or for a Rule 17 summons. For the following reasons, the motion is allowed in part and denied in part without prejudice.

**BACKGROUND**

In late 2018, defendant filed discovery motions seeking "all police/incident reports or Form 26 reports"<sup>1</sup> by the Boston Police reflecting the use of Snapchat from June 1, 2016 to October 1, 2018, but excluding investigations that did not yield an arrest or charge, or that related to human trafficking or sexual assault investigations. In support of the motions, defense

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<sup>1</sup> The Boston Police Department uses Form 26 reports to document its use of Snapchat and other social media applications as an investigative tool.

counsel asserted that he had been able to identify 20 cases built upon Boston Police review of Snapchat postings, all of which involved people of color and 17 of whom were Black.

In January 2019, the Court (Ullmann, J.) issued a Memorandum of Decision and Order on Defendant's Motions for Discovery on Alleged Selective Prosecution ("January 2019 Order"), which allowed defendant's discovery requests under Mass. R. Crim. P. 17. See Commonwealth v. Dilworth, 35 Mass. L. Rptr. 365, 2019 WL 469356 (Jan. 18, 2019). Judge Ullmann rejected the Commonwealth's argument that defendant did not have a viable basis for his request because the alleged discriminatory practice did not result in a search or seizure. He ruled the discriminatory use of an investigatory tool by law enforcement could violate equal protection under the Fourteenth Amendment of the United States Constitution and arts. 1 and 10 of the Massachusetts Declaration of Rights. Dilworth, 2019 WL 469356 at \*2. Judge Ullmann then found defendant had made a threshold showing that the requested documents were material and relevant to his defense by "demonstrating a reasonable basis to infer that racial profiling *may* have been the basis for [defendant] having been targeted by police for investigation via Snapchat." Id. at \*\*3-4 (italics in original). While allowing defendant's motion, Judge Ullmann limited the scope and time frame of the discoverable materials to "all Form 26 reports prepared by an officer or other employee of the Boston Police Department between August 1, 2017 and July 31, 2018 that reference the use of Snapchat as an investigative tool in any case in which the subject of Snapchat monitoring has been charged with any offense related to that monitoring[, excluding d]ocuments related to human trafficking investigations, sexual assault investigations and murder investigations." Id. at \*7.

The Commonwealth sought relief from Judge Ullmann's January 2019 Order under G.L. c. 211, § 3. A Single Justice denied the petition for interlocutory review without a hearing. The

Commonwealth then sought review by the full court. On June 16, 2020, the Supreme Judicial Court rejected the Commonwealth's further appeal and upheld the Single Justice's ruling.

Commonwealth v. Dilworth, 485 Mass. 1001, 1003 (2020) (rescript).

In October 2020, pursuant to the January 2019 Order, the Boston Police produced to defendant 21 responsive Form 26 reports. The Form 26 reports did not contain race or demographic information about the people monitored on Snapchat.

Defendant then filed the instant discovery motion for six additional categories of material in support of his equal protection claim. The Commonwealth assented to producing documents responsive to four categories, but objected to producing the materials sought in Requests 1 and 4. Request 1 seeks "booking sheets, color booking photos and police incident reports for the arrests associated with each of the twenty-one 'Form 26' reports that have been provided in discovery." Request 4, labeled "Social Media Investigations," seeks:

- a. Notice of any documentation that exists, in addition to the previously provided "Form 26" reports and the associated video recordings, that would document the individuals who were being monitored by any member of the Youth Violence Strike Force on Snapchat between August 1, 2017 and July 31, 2018 (i.e., a spreadsheet or list of people being monitored, officer notes, screenshots, etc.).
- b. Notice of the total number of people being monitored on Snapchat by the Youth Violence Strike Force between August 1, 2017 and July 31, 2018.
- c. Any recording or image that is part of discovery that has been turned over to any defendant that shows all or part of the 'friends list' being used on Snapchat or, in the alternative, the recordings from all the cases in the Form 26 reports.
- d. Documentation of any other arrests, or search warrant executions that occurred between August 1, 2017 and July 31, 2018 that were based on Snapchat monitoring by members of the Youth Violence Strike Force or other members of the Boston Police Department (noting the exceptions in the original discovery order excluding murder, human trafficking or sexual assault investigations).

- e. Notice of whether the Snapchat monitoring being done [by seven officers who are identified in defendant's motion] was conducted on department issued cell phones.

The Commonwealth objects to this discovery on grounds similar to those advanced before Judge Ullmann in connection with his January 2019 Order. The Commonwealth concedes that certain of these requests are relevant and discoverable under the rationale of the January 2019 Order, but seeks an alternative to producing some of the considerable data that would not be relevant but that would be contained in some of the documents requested.

### **DISCUSSION**

To obtain materials under Rules 14 and 17 of the Massachusetts Rules of Criminal Procedure, the party seeking the materials must make a threshold showing that the evidence sought is material and relevant. See Commonwealth v. Thomas, 451 Mass. 451, 456 (2008). The Commonwealth argues defendant has failed to establish the materiality or relevance of the discovery he seeks in Requests 1 and 4 because police investigatory methods are not subject to challenge under equal protection principles absent a constitutional seizure, and even if they were, defendant has not made a preliminary showing that he was unlawfully targeted by police. These arguments were addressed and rejected in the January 2019 Order, which constitutes the law of the case. Although the law of the case doctrine does not bar a different ruling before entry of judgment "to reach a just result," see Goulet v. Whitin Machine Works, Inc., 399 Mass. 547, 554 (1987), I am not persuaded that a just result requires a different ruling here.

The Commonwealth also argues the materials in Requests 1 and 4(a)-(d) are not relevant to an equal protection claim insofar as they seek information about *all* individuals targeted for Snapchat surveillance as opposed to just information about individuals similarly situated to defendant who were not stopped by police. In support, the Commonwealth contends the equal

protection framework discussed in Commonwealth v. Lora, 451 Mass. 425 (2008) (inference of impermissible discrimination may be raised with statistical evidence), and Commonwealth v. Long, 485 Mass. 711 (2020) (inference of impermissible discrimination may be raised based on totality of circumstances), only applies if a defendant is seeking to suppress the fruits of a discriminatory motor vehicle stop. Because there was no motor vehicle stop here, the Commonwealth contends defendant may only raise a reasonable inference of impermissible discrimination by satisfying the tripartite burden established in Commonwealth v. Franklin, 376 Mass. 885, 894 (1978) (showing requires evidence that broader class of persons violated the law and was treated differently based on impermissible classification). I am not persuaded by the Commonwealth's arguments.

The crux of defendant's equal protection argument is that Boston Police officers chose only to monitor the Snapchat accounts of young men of color. Assuming, *arguendo*, that this is true, it must also be true that the Boston Police are not monitoring the Snapchat accounts of young white males, which would in turn preclude defendant from identifying any similarly situated white males. To the extent the tripartite burden presumes underlying circumstances in which law enforcement has treated similarly situated persons more favorably, it is ill-suited to assess the merits of defendant's claim. In view of similar concerns, in the January 2019 Order Judge Ullmann determined that the Lora equal protection framework could be used "beyond traffic stops to include challenges to police activity in the context presented here, i.e., use of social media as an investigative tool." Dilworth, 2019 WL 469356 at \*4. I decline to revisit this ruling, or determine at this stage whether defendant may also raise an inference of impermissible discrimination under the equal protection framework established in Long. Defendant's ability to

substantiate his equal protection claim is likely to turn on the substance of the information he gathers in discovery.

I am satisfied that the information defendant seeks in Requests 1 and 4 is relevant and material to his defense. Defendant contends that the materials responsive to Request 1 will provide race and demographic information that did not appear in the Form 26 reports he received in response to his Rule 17 request, and that such information is necessary to generate meaningful statistical evidence. I agree and the Commonwealth does not meaningfully contest this.<sup>2</sup>

Defendant also argues Requests 4(a)-4(d) will yield information that will allow him to compile statistical evidence and explore the demographic composition of the total population the Boston Police targeted for Snapchat surveillance during the relevant time period; and the information sought in Request 4(e) is relevant to future discovery requests concerning the mechanics and oversight of the Boston Police Department's use of Snapchat in investigations.

The relevance and materiality of the statistical evidence defendant seeks to compile is briefly discussed above and was addressed more extensively in the January 2019 Order. It is worth noting, however, that regardless of any disparities the demographic information of the individuals documented in the Form 26 reports ultimately reveals, statistical evidence based on the racial composition of just 21 people may not be sufficient to support an inference of impermissible discrimination by itself. The information sought by way of Requests 4(a)-4(d), which goes beyond defendant's previous request by seeking information about people who were

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<sup>2</sup> At argument, the Commonwealth conceded it should turn over the information responsive to Request 1 if the Court does not disturb Judge Ullmann's conclusion that an equal protection challenge may lie in this context. As I have said, I see no reason to second-guess that conclusion.

monitored, but never charged, will provide statistical evidence based on a greater number of data points that may support or dispel the requisite inference.

Nonetheless, many of the materials responsive to Requests 4(c) and 4(d) are likely to contain information that is not relevant to defendant's equal protection claim. As a result, the Commonwealth has asked the Court to allow it to direct members of the Boston Police Department's Youth Violence Strike Force to review any reports, booking sheets, videos, screen shots, or other documentation of all those people they were monitoring on Snapchat between August 1, 2017 and July 1, 2018 and disclose in writing each individual's perceived race, gender and age. The Commonwealth's request is reasonable and will be adopted without prejudice, subject to the conditions described in the order below.

### **ORDER**

The discovery sought in Requests 1, 4(a), 4(b), and 4(e) of defendant's Motion for Equal Protection Discovery, or in the Alternative for a Rule 17 Summons ("the Motion") (Docket #40 in Docket #18-543), is discoverable under Rule 14 or 17 of the Massachusetts Rules of Criminal Procedure.<sup>3</sup> As to those Requests, the motion is **ALLOWED**. The Motion is further **ALLOWED** with respect to Requests 4(c) and 4(d) insofar as the Commonwealth is hereby **ORDERED** as follows:

- (i) To direct the Boston Police officers who conducted Snapchat surveillance between August 1, 2017 and July 31, 2018 to review any documentation, photos, videos, or data accessible through the Snapchat application regarding dates the officers used undercover accounts to "friend" particular individuals, in order to determine who they were monitoring on Snapchat between August 1, 2017 and July 31, 2018;

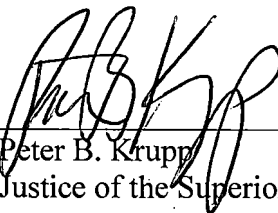
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<sup>3</sup> If a dispute emerges that the parties cannot resolve about whether Rule 14 or Rule 17 provides the operative vehicle here, the Court will resolve it at the next hearing scheduled for April 5, 2021.

- (ii) To direct each officer to disclose in writing the initials (e.g. “William Smith” would be listed as “W.S.”), perceived race, gender, and age of each individual they monitored during the relevant time period, and identify with reasonable specificity the sources of information from which they derived their conclusions for each individual; and
- (iii) To produce all information collected in response to (i) and (ii) to defendant by May 5, 2021.

The Motion is otherwise **DENIED** without prejudice.

Dated: March 30, 2021

  
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Peter B. Krupp  
Justice of the Superior Court

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## COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUFFOLK SUPERIOR DEPT

1884 CR 453

1884 CR 469

2021 MAY 11 PM 12:52

COMMONWEALTH

v.

RICHARD DILWORTH

DEFENDANT'S MOTION FOR ADDITIONAL DISCOVERY: SNAPCHAT  
USER ICON/BITMOJI AND USER NAME

Now comes Mr. Dilworth in the above-entitled matter and moves this Court to order the Commonwealth to produce the following discovery to the defendant:

1. Color copies of the user icons or bitmojis, and the user names, for the fake Snapchat accounts used by officers of the Youth Violence Strike Force between August 1<sup>st</sup> 2017 and July 31, 2018, including but not limited too the account(s) used to monitor Mr. Dilworth.

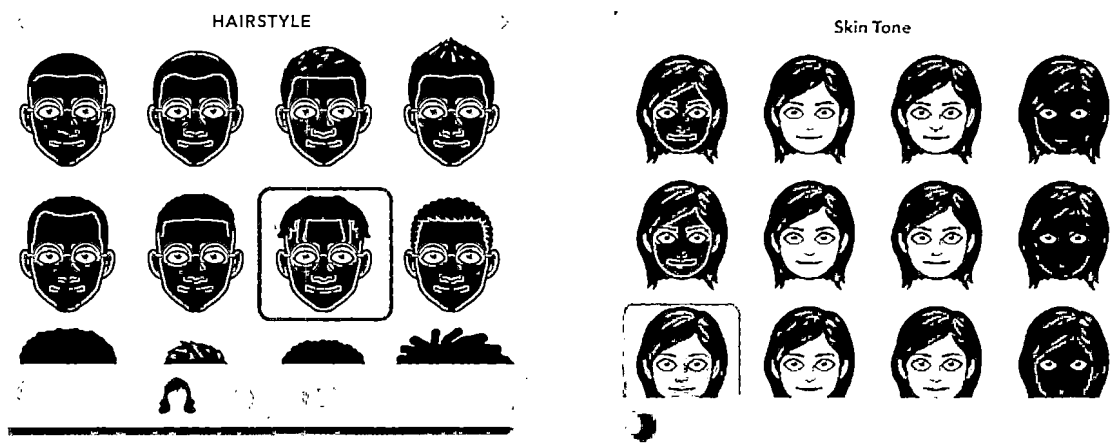
The requested information is necessary to enable the Mr. Dilworth to properly raise an equal protection challenge to the racial profiling on social media that resulted in his arrests under Commonwealth v. Long, 485 Mass. 711 (2020), Mass R. Crim Pro. 14, the 5<sup>th</sup>, 6<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution, and Article 12 of the Massachusetts Declaration of Rights. In the alternative, Mr. Dilworth brings this motion under Mass R. Crim. Pro 17 and Commonwealth v. Lampron, 441 Mass. 265, 270 (2004).

Mr. Dilworth requested the above listed discovery, along with other items, August 15<sup>th</sup>, 2018. (Paper # 8).<sup>1</sup> The Commonwealth opposed this motion, and relied on the 'informant privilege', describing the fake Snapchat accounts as akin to

<sup>1</sup> "The snapchat account, user name, photo, and chat history of the "false" snapchat account used to gather evidence against Mr. Dilworth".

confidential informants or secret surveillance locations, and noting that if this information was turned over, the accounts would become useless. (Paper #8.1). The Commonwealth further argued that the material sought was not relevant or exculpatory. The Commonwealth did agree to provide some information, and reported that 1) the police only watched Mr. Dilworth, and did not use the false accounts to communicate or engage in conversations with the people they were monitoring and 2) the user image or bitmoji and the user name was not a person who would be known to the defendant.

Through the course of this litigation the parties have learned that the user images on Snapchat are commonly bitmojis or icons, not photos of actual people.<sup>2</sup> This is consistent with the disclosure from the Commonwealth referenced above. When selecting the bitmojis for these fake accounts, officers had many options, including skin tone, eye color, hair color and hair style. Ie:



<sup>2</sup> In 2017 Snapchat changed their user policies and ended the practice of people using real photos as their icons and switched to bitmojis. <https://www.theverge.com/2017/5/25/15692968/snapchat-snapcode-pictures-bitmoji-update-ghost-complaints>

Mr. Dilworth is challenging the investigative technique used by the Youth Violence Strike Force of the Boston Police to specifically target young people (mostly men) of color in Boston for surveillance. (See Paper #44). The race and skin tone and hair color and style that the officers chose to use as their ‘undercover’ for the fake Snapchat accounts they set up will demonstrate the demographics of the groups they are trying to infiltrate. See Commonwealth v. Long, 485 Mass. at 724 (“When examining the totality of the circumstances, judges should consider factors such as: (1) patterns in enforcement actions by the particular police officer...”). The Equal Protection challenge here deals with the patterns of decisions police made from the outset of an investigatory scheme, and how those patterns of decisions reflect a choice to target people based on race. The user images, and the names of those accounts, are relevant and necessary pieces of evidence in this litigation, and the selection of these user images by officers is one of the first exercises of selectivity that the police made with this investigatory scheme that documented the race of the people they are going to target.

The privilege to withhold the identity of a confidential informant, or a surveillance location is not a barrier to disclosure in this case. See Commonwealth v. Dias, 451 Mass. 463, 469, (2008) “A defendant must ‘make some offering so that the trial judge may assess the materiality and relevancy of the disclosure to the defense, if that relevancy is not apparent from the nature of the case and the defense offered thereto”. Where disclosure is “relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.” Id., Roviaro v. United States, 353 U.S. 53, 60-61 (1957). Similarly, the


surveillance location privilege must give way if the location is “relevant and helpful to the defense of than accused, or is essential a fair determination of a cause’.

Commonwealth v. Grace 43 Mass App. Ct. 905 (1997). To access surveillance location information, a defendant must make “a preliminary showing that disclosure [of the information] would provide material evidence needed” to present his case to the jury. Id., citing Commonwealth v. Hernandez, 421 Mass. 272, 276 (1995). In weighing the circumstances of the case, the age of the case, the fact that the ‘informant’ here is not a real person but an old online identity, and the relevance of the material requested to Mr. Dilworth’s defense, the balancing supports disclosure.

In determining that the Commonwealth's privilege should give way, the court needs to consider the distinction between “the need for disclosure at a pretrial suppression hearing and at the trial proper.” Commonwealth v. D.M., 480 Mass. 1004, 1006 (2018) and cases cited. In historical litigation on this issue in Massachusetts, the courts have addressed whether the informant privilege protects against disclosure in litigation related to probable cause and the justifications for search and seizures, or the issuance of warrants. Id., see cases cited. The purpose of the information sought in this case is different. Rather than arguing the information is necessary to evaluate the credibility of the information sourced to a confidential informant as it relates to probable cause or proof beyond a reasonable doubt, the request here is relevant of Mr. Dilworth’s Equal Protection claim. “We have already concluded that the privilege must give way when information is material to the fair presentation of a defense” Commonwealth. v. Shaughessy, 455

Mass. 346, 355(2009). The defense being raised here directly implicates selectivity decisions made by the police officers related to this investigation. Choosing an informant based on race, or in this case choosing a bitmoji or user icon and name based on the race it portrays, is relevant to the 'totality of the circumstances' of this investigatory scheme, and is 'material to the fair presentation of [the] defense. Id., see also Long at 731.

Richard Dilworth  
By His Attorney,



Joshua Raisler Cohn  
Roxbury Defenders Unit  
Committee for Public Counsel Services  
7 Palmer Street, Suite 302  
Roxbury MA 02119  
617-445-7581

DATED:

5-7-21

COMMONWEALTH OF MASSACHUSETTS  
SUFFOLK, ss. SUFFOLK SUPERIOR DEPT  
1884 CR 453  
1884 CR 469

COMMONWEALTH

v.

RICHARD DILWORTH

AFFIDAVIT OF COUNSEL

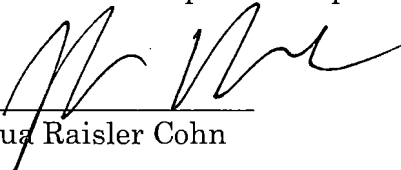
I, Joshua Raisler Cohn, state the following to be true and accurate to the best of my knowledge and belief:

1. I am an attorney for the Roxbury Defenders Unit of the Committee for Public Counsel Services. I have been appointed by the court to represent Richard Dilworth
2. Mr. Dilworth is a young Black man.
3. The defendant is charged with possession of a firearm, possession of a high capacity magazine, and other related charges.
4. Mr. Dilworth is raising a selective investigatory scheme challenge to the social media monitoring of the Youth Violence Strike Force. Part of his burden of proof requires making a showing of a reasonable inference that the police actions were motivated, at least in part, by race.
5. Here, the decision to select the race, skin tone, hair style and other features of the user image icon that the police used for their fake Snapchat accounts reflects deliberate choices made early in this investigation about the demographics of who the police were targeting.
6. Pursuant to Commonwealth v. Lampron, the requested documents are not otherwise procurable reasonably in advance of trial by exercise of due diligence because the the Boston Police Department will not provide these records to counsel absent either a judicial order, and Mr. Dilworth has previously and unsuccessfully requested these documents. . The information requested will illuminate the pattern of targeting Black and Brown people with this investigatory scheme.
7. Pursuant to Commonwealth v. Lampron, the defendant cannot properly prepare for trial without the production and inspection of the records.

Waiting to inspect them on the day of trial would unreasonably delay the trial.

8. Pursuant to Commonwealth v. Lampron, the request for the documents has been made in good faith and is not a “fishing expedition.” The Commonwealth has never disputed the initial showing made by counsel that the entire group of people being prosecuted for Snapchat cases are Black or Brown, nor have they suggested that the demographics of the population of people being monitored on Snapchat is any different than the people charged. The requested materials are all relevant to investigating any bias, implicit or explicit, that may have been a factor in the decisions being made about who to monitor for this type of investigation.
9. “The documentary evidence sought has a rational tendency to prove [or disprove] an issue in the case.” Commonwealth v. Fayerweather, 406 Mass. 78, 83 (1989). Specifically, these materials will document whether or not there is a reasonable inference that the investigatory decisions in these Snapchat cases are motivated by race, at least in part.
10. The requested discovery is material and relevant to the case, and is necessary to the defense in order to prepare for motions and trial in this matter.

Signed under the pains and penalties of perjury.

  
\_\_\_\_\_  
Joshua Raisler Cohn

## COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
Criminal No. 18-453 ✓  
Criminal No. 18-469

COMMONWEALTH

vs.

RICHARD DILWORTH

**MEMORANDUM AND ORDER ON  
DEFENDANT'S MOTION FOR DISCOVERY OF  
SNAPCHAT USER ICON/BITMOJI AND USER NAME**

Defendant Richard Dilworth seeks to pursue a motion challenging the Boston Police Department's infiltration of Snapchat accounts to investigate young males of color, and, to this end, has filed a series of discovery motions. Before me is his most recent motion, which seeks discovery of "the user icons or bitmojis, and the user names" used by officers of the Boston Police Department's Youth Violence Strike Force to infiltrate and monitor Snapchat accounts during the one-year period from August 1, 2017 through July 31, 2018, including the accounts used to monitor Mr. Dilworth.

In ruling on this discovery motion, I presume familiarity with Judge Ullmann's Memorandum of Decision and Order on Defendant's Motions for Discovery on Alleged Selective Prosecution, which allowed certain of defendant's discovery requests under Mass. R. Crim. P. 17, see Commonwealth v. Dilworth, 35 Mass. L. Rptr. 365, 2019 WL 469356 (Jan. 18, 2019) ("the January 2019 Order",<sup>1</sup> and my Memorandum and Order on Defendant's Motion for

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<sup>1</sup> A Single Justice denied interlocutory review of Judge Ullmann's decision. The Single Justice's denial was upheld by the full court. See Commonwealth v. Dilworth, 485 Mass. 1001 (2020) (rescript).

Equal Protection Discovery or for a Rule 17 Summons (Mar. 30, 2021) (Docket #45). As I did in my March 30, 2021 Order, I decline to revisit Judge Ullman's January 2019 Order, or to determine at this stage whether defendant may also raise an inference of impermissible discrimination under the equal protection framework established in Commonwealth v. Long, 485 Mass. 711 (2020). There is no question here that discovery of the user icons or bitmojis, and the user names, used by the police to infiltrate Snapchat accounts will persuasively and visually allow defendant to demonstrate or at least draw an inference about the ethnic and/or racial demographic the Boston Police chose to target for Snapchat monitoring.

In arguing against the requested discovery, the Commonwealth analogizes to the informant privilege and the surveillance location privilege. The Commonwealth contends that disclosure would end the police use of these investigative electronic tools and would impair the ability of the police to surreptitiously watch Snapchat accounts for suspicious activity.

Neither the informant privilege nor the surveillance location privilege are directly apt. The informant privilege is designed to protect sources of law enforcement information against threats of harm and to continue the flow of information to law enforcement. Commonwealth v. Barry, 481 Mass. 388, 410 (2019); Commonwealth v. Bonnett, 472 Mass. 827, 847 (2015). Similarly, the surveillance location privilege protects against the unnecessary disclosure of physical location information that will prevent the continued effective use of that physical location to conduct surveillance. Commonwealth v. Hernandez, 421 Mass. 272, 274-276 (1995); Commonwealth v. Lugo, 23 Mass. App. Ct. 494, 497-498 (1987), cited with approval in Commonwealth v. Lugo, 406 Mass. 565, 570 (1990).

The informant and surveillance location privileges are not directly applicable to electronic surveillance of the type apparently employed to watch Snapchat postings. First, the

argument against disclosing the user icon, bitmoji, or user name is “weakened” because disclosure does not raise a concern with the physical safety of an informant or of police officers. Hernandez, 421 Mass. at 276, quoting Commonwealth v. Rios, 412 Mass. 208, 213 n.7 (1992). Second, although the disclosure may impede the police from using the disclosed fictional electronic identities as effectively, it will not prevent the police from inventing new ones to continue their collection of information from the Snapchat platform. In effect, the police technique of secretly infiltrating Snapchat accounts is an infinitely renewable resource; spoiling one electronic “surveillance location” – or a series of fictional identities used three to four years ago – does not prevent the police from creating any number of others.

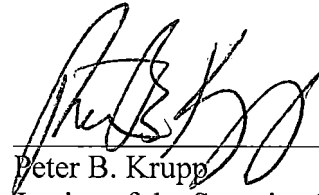
More importantly, both the informant and surveillance location privileges will yield when, as here, the information sought is relevant and material to the defense. See Commonwealth v. Dias, 451 Mass. 463, 468-469 (2008) (informant privilege); Commonwealth v. Grace, 43 Mass. App. Ct. 905, 906 (1997) (surveillance location privilege). In this case, the defense believes, and has introduced considerable anecdotal information to support the reasonableness of its belief, that the police targeted predominantly young men of color to monitor their Snapchat accounts for illegal activity. Discovery of the monitoring police officer’s fictional Snapchat user identities is reasonably expected to offer relevant, material, and persuasive graphic evidence of the racial and ethnic demographic targeted by the Boston police for secret monitoring.

**ORDER**

Defendant's Motion for Additional Discovery: Snapchat User Icon/Bitmoji and User

Name is **ALLOWED**.

Dated: June 24, 2021

  
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Peter B. Krupp  
Justice of the Superior Court

## COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

SUFFOLK SUPERIOR COURT  
NO. 1884CR000453  
1884CR00469

COMMONWEALTH

v.

RICHARD DILWORTH

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**COMMONWEALTH'S MOTION TO RECONSIDER THE COURT'S ORDER TO COMPEL  
DISCLOSURE OF SNAPCHAT USERNAMES AND BITMOJIS**

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Now comes the Commonwealth and respectfully requests this Honorable court reconsider its prior order compelling the Commonwealth to disclose the usernames and Bitmojis of Boston Police undercover snapchat accounts and asks that the Court re-open the hearing on this matter. In support of this motion the Commonwealth asks the Court to consider the attached affidavit of Boston Police Detective Brian Ball, explaining why disclosure of this information would cause irreparable damage to the Commonwealth's substantive right and privilege to prevent disclosure of its confidential informants and surveillance locations used in criminal investigations. The Commonwealth is also asking the Court to re-consider the scope of the order.

Brief Facts

On January 11, 2018, officers viewed an individual believed to be Richard Dilworth holding a firearm on Snapchat. Several months prior to this date, Boston Police Officer Zachary Crossen friend requested Mr. Dilworth on Snapchat using an undercover account and Mr. Dilworth accepted the friend request. During those several months, Officers observed seven

videos which depicted Mr. Dilworth holding a firearm. On January 11, 2018, Officers learned of his location and responded to that area, where they observed a parked motor vehicle, asked Mr. Dilworth the exit and located a loaded firearm. The defendant was arraigned in the Roxbury Division of the Boston Municipal Court on January 12, 2018 and his bail was set at \$2,500 with the condition that he be fitted with a GPS if released on bail. Mr. Dilworth posted the bail and was fitted with the GPS.

On May 11, 2018 Boston Police Officers observed Richard Dilworth flash a firearm on snapchat at approximately 2:45pm. Officers were aware that he was on a GPS and lived at 18 Hollander Street. Based on this information, officers called ELMO and learned that Mr. Dilworth was at home by the time they viewed the video. Officers set up surveillance and at approximately 8:50pm, observed the suspect leave the area of his home. Based on additional observations and the knowledge of the snapchat video officers conducted a pat frisk of the suspect and located a loaded firearm. (please see the Commonwealth's original opposition for more specific facts and an overview of Snapchat).

#### Procedural History of Equal Protection Litigation

On August 15, 2018 the defendant filed a motion for discovery of the Officer's snapchat usernames and account information including the photograph. The Commonwealth objected to this motion and the motion was denied on September 28, 2018 by Judge Sullivan. On October 31, 2018 the defendant filed a motion requesting discovery relative to a claim of selective prosecution pursuant to both Mass.R.Crim .P. 14 and 17, this discovery request did not include a request for account usernames or photos. The Superior Court Justice denied the defendant's motion under Rule 14 and allowed his motion (with modifications) under Rule 17. The

Commonwealth appealed the matter under M.G.L. ch. 211 sec. 3. The Single Justice denied the petition without a hearing, citing that the matter didn't warrant the exercise of the Court's extraordinary powers pursuant to ch. 211 sec. 3. The Commonwealth appealed the Single Justice's decision to the Supreme Judicial Court, citing that he had abused his discretion by denying the petition. On July 28, 2020, the SJC found that the Single Justice had not abused his discretion. In making this ruling, the SJC specifically noted in a FN 5:

“In ruling as we do that the single justice did not abuse her discretion by declining to intervene at the discovery stage, we express no view on the merits of the Commonwealth's claim, on the motion judge's statement that a claim of selective prosecution might lie even if there has been no infringement of the defendant's constitutional rights, or on the judge's assessment that Dilworth has made the necessary threshold showing for obtaining discovery under rule 17.”

Throughout the pendency of the appeal, production of the discovery was stayed. After the SJC's decision, the Commonwealth collected and provided to the defendant all Form 26 reports relating to individuals arrested with firearms as the result of Snapchat investigations between August 1, 2017 and July 31, 2018. After this discovery was provided, the defendant filed an additional discovery motion on January 13, 2021, “The Defendant's Motions for Equal Protection Discovery or in the Alternative Rule 17 Summons”. This discovery request did not include account photos. The Commonwealth objected on the same basis, that the defendant did not meet his burden for equal protection discovery, and on March 30, 2021 the Court ordered parts of the discovery, largely citing to the Court's prior findings. Parts of that discovery request were ordered and were in the process of being provided when on May 7, 2021 the defendant filed another discovery motion, asking for the account photos (emojis), a request that had previously been denied based on the surveillance privilege. The Commonwealth again

objecting citing that the defendant had failed to raise a viable equal protection claim, the defendant had failed to meet his burden for equal protection discovery, and that the information was protected by both the surveillance and informant privilege. On June 24, 2021 the Court allowed the defendant's motion, finding no confidential informant or surveillance privilege. On September 13, 2021 the Commonwealth was finally able to complete compilation of the discovery ordered on June 24, 2021, including the initials and perceived age, race and gender of every person the YVSF followed on snapchat during the relevant time period. In the findings of fact and law, the Court specifically found that disclosure of this information "does not raise a concern with the physical safety of an informat or police officers", and that "the police technique of secretly infiltrating Snapchat accounts is an infinitely renewable resource". On November 29, 2021 the Commonwealth received an affidavit from Detective Brian Ball explaining why disclosure of the additional information in the March 30<sup>th</sup> order, specifically the usernames and bitmojis, would in fact jeopardize the safety of both confidential informants and police officers, and why these undercover snapchat accounts are not infinitely renewable surveillance locations.

#### Argument

The defendant argued the Snapchat usernames and emojis should be produced to aid him in making an Equal Protection claim in accordance with *Commonwealth v. Long*, 485 Mass. 711 (2020). The defendant's argument lacks merit for multiple reasons. First, *Long* is expressly limited to motor vehicle stops based on selective enforcement of the traffic laws and is therefore wholly inapplicable to this case where there was no motor vehicle stop for a violation of a traffic law. *Long*, 485 Mass. at 713 and 722. Second, the defendant has not provided sufficient

justification to vitiate either of the two privileges asserted by the Commonwealth; the privilege against disclosing confidential informants or the surveillance location privilege.

I. Confidential Informant Privilege

“The government’s privilege not to disclose the identity of an informant has long been recognized in this Commonwealth.” *Commonwealth v. Madigan*, 449 Mass. 702, 705-06 (2007) (citing *Worthington v. Schribner*, 109 Mass. 487, 488 (1872)). “That privilege serves a substantial, worthwhile purpose in assisting the police in obtaining evidence of criminal activity and therefore should be respected as far as reasonably possible consistent with fairness to a defendant.” *Commonwealth v. Elias*, 463 Mass. 1015, 1016 (2012). The privilege is not absolute, but rather “disclosure is only required in the limited circumstances where it will provide material evidence needed by the defendant for a fair presentation of his case to the jury.” *Id.* (internal quotation marks omitted).

There is a specific two-stage process for determining whether an asserted privilege not to disclose this information holds or should be vitiated. *Commonwealth v. D.M.*, 480 Mass. 1004, 1005 (2018). The first stage is determining if the Commonwealth validly asserted the privilege. *Id.* The privilege may be asserted where disclosure would endanger the informant or where disclosure would otherwise impede law enforcement efforts. *Id.* If the privilege was properly asserted, then the motion judge evaluates the defendant’s need for the information. *Id.* at 1006. The evaluation must be made in the context of whether the information is sought for use in a preliminary hearing or for use in the trial itself. *Id.* The privilege not only protects the release of the name of an informant, but also forbids the disclosure of details that would in effect identify the informant. *Commonwealth v. John*, 36 Mass. App.Ct. 702 (1994).

Here, the Commonwealth has appropriately asserted a privilege. As explained in the attached affidavit, disclosure of the Snapchat usernames and emojis are tantamount to the disclosure of multiple confidential informants and a surveillance locations. Moreover, the attached affidavit explains, the emojis and usernames (informant's identities and surveillance locations) have been used in numerous other criminal investigations both past and ongoing. In a case involving confidential informants, disclosure of the identity of a confidential informant would undoubtedly compromise the use of that informant in the future because its anonymity would be lost and disclosed as a law enforcement source. Similarly, disclosure of the means and methods used by Boston Police to investigate, here the usernames and emojis associated with all of the undercover Snapchat accounts, would jeopardize not only this case but many others, and unnecessarily so where the user name and emoji are not "percipient witnesses" to the criminality with which defendant is charged (unlawful possession), but merely equivalent to the tip that led police to discover the defendant in such unlawful possession. By using publicly available means to access third party social media pages, law enforcement has been able to gather information, secure evidence of criminal activity, effectuate lawful arrests, and remove numerous unlawful firearms from the community, as they did in this case. The use of this resource has also reduced the number of random street encounters. However, disclosure of the means and methods by which these observations were made will inevitably compromise pending investigations utilizing these techniques and jeopardize law enforcement's ability to conduct further investigations utilizing any of the existing usernames and emojis.

Here, the affidavit has established how use of the usernames and emojis have been, and are, ongoing, and how disclosure would effectively destroy the use of this law enforcement effort, thereby establishing the legitimacy of the privilege to not disclose. *D.M.*, 480 Mass. at 1005.

Should the Court want to hear from a witness on this issue, the Commonwealth would be welcome to an evidentiary hearing.

Since the privilege was properly asserted, the Court must evaluate the defendant's need for the information. *Id.* at 1006. The evaluation must be made in the context of whether the information is sought for use in a preliminary hearing or for use in the trial itself. *Id.* "The issue of disclosure 'calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the [privileged] testimony, and other relevant factors.'" *Worthington v. Scribner*, 109 Mass. 487, 488 (1872), citing *Roviaro v. United States*, 353 U.S. 53,62 (1957).

To overcome the Commonwealth's confidential informant privilege, the defendant bears some obligation of demonstrating that the disclosure of the confidential informant would provide material evidence needed by the defendant to present a fair case at trial. *Id.* at 719. "A defendant must 'make some offering so that the trial judge may assess the materiality and relevancy of the disclosure to the defense, if that relevancy is not apparent from the nature of the case and the defense offered thereto.'"

Here, the defendant has failed to show that the discovery in question is relevant. As argued in the Commonwealth's opposition and as mentioned above, the defendant's reliance on the discovery standard in *Long* is misplaced for two reasons. First, it is unclear in both the Commonwealth and the First Circuit if any equal protection motion lies when there is no constitutional seizure. The issue of whether or not there is any seizure in the constitutional sense when an officer sends a friend request using an undercover account is currently before the

Supreme Judicial Court. *Commonwealth v. Carrasquillo*, NO. SJC-13122. Second, even if an equal protection claim may lie where there is no constitutional seizure, the burden at the discovery phase is that articulated in *Betances*, not *Long*, as this is not a case involving a minor motor vehicle infraction. *Long*, at 22. As such, to even make a showing of relevancy the burden would be on the defendant to make a preliminary showing, by way of an affidavit containing reliable information, demonstrating a reasonable basis to infer that profiling, and not another reason alone, may have been the basis for the stop. *Commonwealth v. Betances*, 451 Mass. 457, 461 (2008). Here, the defendant has clearly failed to make that showing. As such, the defendant has failed to show that the discovery in question would be material or relevant to the litigation of the case, and therefore has failed to meet his burden to pierce the veil of the Commonwealth's privilege.

Further, in balancing the defendant's need for this information against the Commonwealth's privilege the Court should consider that the Commonwealth has already offered a race neutral reason regarding why officers frequently request the individuals that they do. The purpose of this discovery order would be to allow the defendant to rebut the presumption, at a motion to suppress on Equal Protection grounds that a law enforcement officer acted in good faith. *Betances* at 461. The Court in *Lora* found that when a stop is the product of selective enforcement, and therefore in violation of the equal protection guarantee of the Massachusetts Declaration of Rights, evidence of that stop should be suppressed. *Commonwealth v. Lora*, 451 Mass. 425, 426 (2008). In such a motion, the burden lies on the defendant.

"In order to meet this burden, the defendant must first 'present evidence which raises at least a reasonable inference of impermissible discrimination,' including evidence that 'a broader class of persons than those prosecuted has violated the law . . . that failure to prosecute was either consistent or deliberate . . . and that the decision not to prosecute was based on an impermissible classification such as race, religion, or sex' (citations omitted)."

*Lora*, supra at 437 (quoting *Commonwealth v. Franklin*, 376 Mass. 885, 894 (1978)).

Put more simply, “the initial burden rests on the defendant to produce evidence that similarly situated persons were treated differently because of their race.” *Id.* at 445. If the defendant is able to make such a showing, the burden then shifts to the Commonwealth to provide a race neutral reason for the stop in question. *Id.*

Here, the Commonwealth has already provided a race neutral reason through the affidavit and could also offer this information through testimony at an evidentiary hearing.

## II. Surveillance Privilege

The surveillance location privilege empowers the Commonwealth to withhold disclosure of the precise location of a specific surveillance location. *Commonwealth v. Grace*, 43 Mass. App. Ct. 905, 906 (1997). In order to vitiate the privilege a defendant must do more than merely claim he needs to know the surveillance location. *Id.* The defendant must show an exception to the privilege. See *Commonwealth v. Hernandez*, 421 Mass. 272, 275 (1995) (surveillance location privilege vitiated by defendant’s showing of need to know exact location in order to cross examine about obstructions in the line of sight between that location and where the defendant was seen standing); see also *Commonwealth v. Lugo*, 406 Mass. 565, 566 (1990) (surveillance location privilege vitiated by discrepancies in officer’s testimony).

The information sought by the defendant here is analogous to disclosure of both a confidential informant’s identity and a surveillance location. The defendant seeks to identify user names and emojis used by all officers to gather information, thereby making known the identities and locations of police in virtual spaces. While the disclosure of any surveillance location is significant, disclosure of a virtual locations have greater ramifications, beyond that of

a single investigation or single vantage point. Virtual surveillance locations such as Snapchat have likely resulted in more seizures of illegal firearms than any physical surveillance location.

The defendant failed to establish an exception that would vitiate the Commonwealth's surveillance location privilege. In *Grace*, the officer testified regarding his observations, the distance, lack of obstructions, and his use of binoculars. *Grace*, 43 Mass. App. Ct. at 905. On cross examination the defendant sought to elicit the exact location from which the officer made these observations. *Id.* When the Commonwealth's objection was sustained, the defendant objected, citing he was precluded from conducting a full cross-examination. *Id.* The Court held that the defendant had not met his burden of showing an exception to the privilege. *Id.* at 906. Here, as in *Grace*, the defendant failed to meet his burden of establishing an exception to the Commonwealth's privilege. As discussed *supra*, the defendant's basis for seeking the information, to raise a *Long* claim, is not relevant to the facts of this case. As such the Commonwealth is asking the Court to reconsider his order to compel production of the Snapchat usernames and emojis associated with all accounts.

### III. Scope

Even if *Long* applied, which it does not, the defendant's request exceeds the scope of *Long*. Under *Long*, only the stops conducted by the specific officer at issue are potentially subject to disclosure. *Long* does not extend to other officers in same unit, barracks, or police department as a whole. The order here, to produce the user names and emojis being used by other officers (not involved in this case) is well beyond the scope of *Long*. *Long*, at 724-726.

### Conclusion

As the defendant has failed to raise a valid equal protection claim, failed to demonstrate a reasonable basis to infer that profiling and not other reasons were the basis for the stop, failed to


peirce the veil of either the informatnt or surveillance privilege, and the Commonwealth has offered a race neutral explanation for the investigative tactic at issue, the Commonwealth respectfully requests that this Court reconsider its order compelling the Commonwealth to produce the usernames and bitmojis of all undercover snapchat accounts used by the YVSF and

to re-open the hearing on this matter.

Respectfully Submitted  
For the Commonwealth,

RACHAEL ROLLINS  
DISTRICT ATTORNEY

by:

  
Caitlin Fitzgerald  
Assistant District Attorney

Dated: December 3, 2021

## COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT DEPARTMENT  
NO.

COMMONWEALTH

v.

RICHARD DILWORTH

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**AFFIDAVIT OF DETECTIVE BRIAN BALL REGARDING THE USE OF SNAPCHAT  
AS AN INVESTIGATIVE TOOL**

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1. I am a Boston Police Detective, currently assigned to the Youth Violence Strike Force. I have been a Boston Police Officer since 2003, when I graduated from the Boston Police Academy. I was promoted to Detective in June of 2015. I have completed a 4-week (160 hours) Detective Training Course which was held at the Boston Police Academy. The focus of the Detective training included search warrant training, crime scene collection training, interview and interrogation, and crime scene evidence procedures, which included photographs, fingerprinting and fuming. Upon being rated Detective I was assigned to District B2, which covers the Roxbury and Dorchester sections of Boston. In May of 2016, I was reassigned to the Youth Violence Strike Force.
2. Prior to being promoted to Detective, I was assigned to the Boston Police Youth Violence Strike Force from 2008 to 2015. The YVSF is a city wide unit that is primarily responsible for responding to and dealing with firearm and gang related activity in the City of Boston. Prior to being assigned to the YVSF I was assigned to District B3, which covers the Mattapan and Dorchester sections of Boston. As a District Detective assigned to B2, my responsibilities included responding to and processing crime scenes, collecting and analyzing evidence, interviewing victims, suspects and witnesses and using search warrants and subpoenas to further investigate criminal cases.
3. I have also participated in numerous state and federal investigations that have resulted in the seizure of firearms and drugs. During my career, I have worked in conjunction with special agents from the Bureau of Alcohol, Tobacco and Firearms (ATF), the Drug Enforcement Agency (DEA), the Federal Bureau of Investigations (FBI), the United States Marshal Service (USMS) and the Immigration and Naturalization Services (INS). These investigations have required the use of confidential informants, electronic monitoring equipment,

surveillance and search warrants. During the course of these investigations I have testified in both state and federal court, and as a result these investigations and subsequent testimony have led to numerous convictions in both state and federal court for individuals charged with various firearm and drug related offenses. I am federally deputized as a United States Marshal and am a Task Force Officer with the United States Marshal Service.

4. The vast majority of my career as a Police Officer has been focused on gang related investigations. My initial assignment at District B3, apart from my basic patrol duties, was an introduction into Boston street gangs. I became aware of gang conflicts, primarily in the Dorchester and Mattapan neighborhoods. I learned the basics of gang structures, territories, conflicts and rituals as they pertain to gangs in those neighborhoods. This work led me into daily contact with gang members and also led to an understanding of relationships within the group, their allies and their perceived rivals. My assignment to the Youth Violence Strike Force, commonly referred to as the "Gang Unit", allowed me to participate in longer term firearm and drug gang investigations throughout the City of Boston and Commonwealth of Massachusetts. While assigned to the YVSF as a Patrolman, I participated in short term and long-term gang and firearm-based investigations. I handled confidential informants and conducted numerous interviews of gang members throughout these investigations. My assignment as a patrolman in the YVSF gave me further insight as to how individual gangs are structured, the basis for their alliances and conflicts and their methods of making money collectively.
5. My initial assignment after my promotion to Detective was to District B2 in the Roxbury neighborhood of Boston. Though I took part in general investigations, I was often assigned gang investigations related to shootings, robberies and homicides. These investigations, from the initial call, through the subsequent investigation and to the eventual grand jury and court proceedings gave further insight into gang dynamics. Specifically, it often allowed me unique insight from the perspective of the victim and witness of these gang related incidents. This experience offered a different viewpoint into gangs than I was previously exposed to in the more enforcement focused role in the YVSF.
6. This cumulative experience has aided me in my current role as a Detective in the YVSF. My primary duty is to initiate and coordinate gang-based firearm and illegal drug investigations within the Boston Police Department and partner State and Federal Agencies. These investigations are almost always initiated as a response to violent acts committed by gang associates. Many of these investigations have involved me utilizing electronic recording equipment, Confidential Witnesses and Cooperators and Undercover Police Officers. These resources have allowed me to monitor "real-time" gang activity, often from within the gang itself and take directed action as a result.

### *Gang Experience*

7. It has been my experience that Boston street gangs have evolved in structure, identifiers, hierarchies and methods of making money throughout the last 16 years. For instance, my initial gang encounters were with individuals who routinely stayed in a constant area as a means of protecting their "turf". Oftentimes they would regularly wear distinctive clothing that signified their membership in a particular gang. Gang members would often self-admit their membership in a particular gang and would openly disparage their rivals, often times to police officers in casual encounters. These outward indicators have been far less common throughout the last 10 years. Recognizing that gang intelligence gathered by police and prosecutors has often led to enhancements in criminal cases has made gang members more wary of showing their allegiances and associations to gangs. Gang members are far less likely to self-admit to police officers that they are members of a gang as they would years earlier.
  
8. This relatively new-found reluctance has not been true with social media. It is my experience that gangs use social media to promote their gangs, disparage their rivals and brag about criminal acts they have taken part in. Initially social media was used to connect with other individuals associated with the gang and their allies and members would post individual and group photos, often in gang attire and in their respective gang "turf". This has evolved into social media being used to initiate acts of violence, often with a gang member taunting a rival by posting videos and images of themselves in rival gang areas, often with firearms. The common display of firearms is essential in that it shows their allies that they are willing to commit acts of violence on behalf of themselves and the group and warns enemies that they are armed and should be considered a threat. This is often done to give the individual "street cred" and re-affirms their allegiance to their respective gang. I have been involved in many investigations where a gang member informed rivals that he was planning to shoot them or their associates. This has given us the opportunity to interrupt this intended act of violence and, in many cases, arrest the offender for firearm related offenses. It is similarly common to see gang associates brag on social media about past acts of violence committed by the gang. This has been true in fatal and non-fatal shootings. In some cases, groups of gang associated individuals have re-enacted specific acts of violence. Often details of these incidents are not commonly known, lending credibility to the belief that the group's statement that they were responsible for the respective act of violence is true. This has been helpful on gathering intelligence on gang related feuds and has aided investigations and subsequent court proceedings. The reluctance to display gang attire or self-admit to gang membership is also not shared on social media. It is common to see gang members either submit written and video posts where they re-affirm their gang membership and appear in hats, shirts and homicide memorial pins that are associated with a particular group. It has been common for Gang Unit Officers to view a social media posting where a member outwardly displays his allegiance

and membership to a gang, through spoken and typed words and clothing attire, and then deny it in an encounter with police. In my experience in gang investigations, through observations of and/or interviews with gang associates, that while the fear of being labeled a gang member by police is a concern, the need to display certain behaviors to maintain or further their role within the group is greater.

9. Though my experience has been primarily on investigating Boston based gangs, I have taken part in numerous State and Federal gang investigations. I have seen that gangs differ between project-based gangs, neighborhood-based gangs, street-based gangs and, more recently, social-media based gangs. These groups differ individually in structure and hierarchy. They do not all share the same method of making money or their ability to successfully elude law enforcement intervention. Some street gangs will only recruit new members that are from a particular housing project or specific set of streets in an effort to stymie attempts from rival gangs and/or law enforcement to gather intelligence on the group. This is often successful in that regard but restricts the group's ability to recruit new members. Other street gangs are less likely to place such restrictive requirements on admission to the group in an effort to add to the numbers of the group and develop a larger hierarchy within the group. This allows the gang to add younger, more easily influenced individuals that can carry out the established member's orders and insulate them from exposure. The negative component to this strategy is that it makes it easier to be compromised by law enforcement efforts and rival gangs that routinely plant lower level individuals in and around the gang. Recently there has been an increase in gangs that are extremely active on social media. These gangs conduct a large amount of their gang and drug activity on social media platforms but have proven to be as violent as "traditional" gangs. Many shootings have been committed as a result of a social media posting where a rival is insulted or ridiculed. Because these posts are often public, there is often a violent response to these posts. It has become common for these acts to be broadcast, sometimes live, on social media. It is imperative in gang culture that public insults be retaliated against and the detection of Law Enforcement is outweighed by the perceived need to be seen as not having been "punked" by a rival.

#### ***Social Media Based Investigations***

10. The use of social media information has evolved substantially over the last 10 years. In the past, social media was primarily used to corroborate group affiliations and gang identifiers such as hats and clothing indicating allegiance to a particular gang. The intelligence gained was considered corroborative in nature rather than actionable intelligence. This has shifted exponentially throughout the years to the point where gang members routinely communicate their intentions to carry out acts of violence through social media platforms, most commonly Facebook and Snap Chat.

11. The role of social media in facilitating acts of firearm and gang related violence became more apparent in the follow up investigations of these incidents. It became clear to Investigators that many of these acts of violence were often imitated by social media activity. This was commonly done through direct threats posted to social media pages. These threats were routinely followed up by a retaliatory act of violence. It became obvious that social media had become the new method of posting derogatory digital graffiti in a rival gang's turf.
12. It has also become common for gang members to carry out acts of violence and then take credit on social media after the act had been committed. This is done in an attempt to let other gang members, both foes and allies, know that the particular gang is active and committed to acts of gang violence. Boasts about being up on the "scoreboard" after a rival is shot or killed are now frequently observed by Investigators.
13. Based upon this change in gang activity, Investigators began to proactively monitor social media accounts of individuals believed to be active in firearm activity and gang related violence. This adjustment has proven essential in preventing many acts of violence before they are committed. This is done either through directly intercepting an armed individual, often in a rival gang area, or the use of saturation patrols in a particular area with the intention of deterring the intended act of violence.
14. This method of proactive policing has also allowed Investigators the ability to direct firearm related investigations toward individuals known to be actively carrying firearms. This has led to the recovery of hundreds of firearms from individuals known to carry out acts of violence. In addition to the benefit of reducing acts of violence by gang members, it has allowed Investigators to focus their efforts on the violent members of a particular gang rather than lesser involved individuals.
15. This Affiant has interviewed hundreds of active Boston gang members during the course of conducting these investigations. The assertion that social media activity is the driving factor in gang violence in the City of Boston has been corroborated by the individuals directly involved in these incidents. It has been stated in numerous, recent interviews that it is increasingly common for a shooting to be predicated by a social media post, often where a gang member will explicitly taunt a rival. Often times, individuals in rival gangs will pre-plan an act of violence with rivals. Meet spots and times will be arranged and a "shoot on sight" rule will be set. Often times these individuals are aware that law enforcement will be monitoring this public interaction but the common sentiment is that fear of detection by Law Enforcement is dwarfed by the need to be perceived as unafraid of their rivals and the willingness to be publicly supportive of their respective gang. Publicly backing down from a rival, referred to as "taking a short", results in ridicule and shame from friend and foe alike.

16. This directed policing has greatly minimized negative encounters with the public because the police are acting with a greater level of tangible intelligence and not just on a "hunch" that an individual is of unlawful design. This has resulted in a marked decrease in situations where an individual may be stopped by the police and feels a level of harassment in the encounter. The fact the police were acting in good faith is often of little consolation to an individual who feels they were unjustly stopped by police. Intelligence based policing, often aided with information gained through social media, has guided the police in investigative stops and minimized encounters with citizens who have no connection to gang activity or violence.

### *Use of Social Media Accounts*

17. Often times the intelligence gained from these investigations is gathered through use of an "undercover" social media account. This is commonly done through activating a social media account using a fake, often generic, name. The name chosen has no connection to any real people and is often times a descriptive title with no actual name attached. A generic photo is sometimes used but it is more common currently to use a cartoon "bit-emoji" image with no relation to any particular person. These steps are taken to prevent an individual from associating the account with anyone known to them and ensure they are not tricked into interacting with a social media account with a friend, associate or family member.
18. Once the social media account is set up, the Investigator will commonly send friend requests to specific individuals. These requests are based upon the Investigators knowledge of an individual's connection to criminal activity, most commonly gang and firearm related violence. The Investigators do not interact with or communicate with these individuals with the exception of cases of exigent circumstances. Directed, long term investigations may involve some level of communication with a particular target. This is extremely uncommon and is not the practice of Investigators conducting routine firearm and gang investigations. It is this Affiant's understanding that Investigators involved in human trafficking investigations will interact with suspected pimps as it is necessary to set up an encounter with a Victim of human trafficking. This is done with the intention of removing the Victim, often times a juvenile, from a situation where she is being abused and exploited. It has also proven useful in identifying victims of these crimes and has aided in locating them and preventing exploitation and sexual assaults.
19. As stated, this Affiant has had extensive experience in firearm and gang investigations where social media was the nexus for the criminal acts. In these investigations, no messages are sent to targets and all messages from targets are ignored. Essentially, the Investigator acts as an observer, viewing posts that the target posts to his or her page. These posts are sent to the targets friend's group

and are seen by the undercover account along with the other hundreds and thousands of other individuals the target chooses to share his or her postings with.

20. The targets of these investigations are chosen based upon the Investigator's prior knowledge of the Suspect or his/her associates. This is almost always based upon the target's connection to criminal activity. In most cases, the law enforcement account will send a friendship request to the account of the individual suspected of criminal activity. As stated earlier, the law enforcement account does not have any connection to or resemblance to any known individual. No interaction, other than the act of requesting a user's friendship, takes place. In many cases, the law enforcement account will receive invitations from the friends of the target once the connection between the two accounts is made.
21. It should be noted that Snapchat gives user accounts a number based upon the accounts activity. This activity includes social media postings, messages to and from accounts and number of friends, resulting in a higher activity number. A high activity number is often considered to be a status symbol for Snapchat users. It should also be noted that Snapchat account names are very rarely a user's actual "real life" name and is often a slang style name with no connection to the user's actual name. This often results in Snapchat users sending and receiving friend requests from individuals that are unknown to them. This is in contrast to social media platforms such as Facebook, where account names contain the actual name of the account user. It is believed that this is one reason why Snapchat is the preferred social media platform to conduct gang activity and drug distribution as there is a higher level of anonymity and helps in avoiding detection by Law Enforcement.
22. It is increasingly common to use information gained from a human confidential informant or undercover officer and corroborate that information from intelligence gleaned from social media postings. This has the benefit of corroborating the human source's information as accurate and truthful. Often the targets of gang and firearm investigations are violent individuals. It has been this Affiant's experience that gang members will actively seek out and assault and/or kill individuals that they perceive to be cooperating with law enforcement. The use of social media intelligence, combined with human source intelligence, allows Investigators the ability to minimize interactions between the target and the human source. This combined use method is often disclosed in court hearings. As is the case in the majority of court proceedings, the identity of the human source is not disclosed for fear of grave harm befalling the confidential source. The disclosure of the social media account in these hearings would allow the target of the investigation the ability to narrow down the inevitable list of individuals believed to have cooperated with law enforcement. The disclosure of the account details, such as the user name and description of the account's profile picture, would instantly jeopardize other investigations conducted with similar tactics.

23. The disclosure of an account name or specific account details would undoubtedly render that account useless in future investigations. It has become commonplace for suspected Law Enforcement undercover accounts to be publicly exposed when discovered. In many cases, individuals that will post screen shots of the undercover account and will urge his or her followers to share the image. In one case, a YVSF Detective's picture and name was attached to the warning. This posting was widely shared and resulted in the Detective receiving a number of death threats. The exposure of undercover accounts will also cause potential harm to undercover officers and confidential informants as many investigations use a combination of social media accounts and human intelligence. These investigations are extremely complex and dangerous; revealing the "identity" of an undercover account would prove to be as harmful to undercover officers and informants and would necessitate the termination of any ongoing investigation connected to that account.
24. Snapchat in particular has become an essential investigative tool for a number of reasons. Snapchat postings allow the viewer to identify with a greater level of certainty when a specific incident took place. The images and videos are given a "camera roll" designation, indicating the posting was a previously saved video or image and the time it was recorded cannot be determined with absolute certainty. Other images or videos are given a specific timestamp, such as "just now", "10min", "2hrs" etc. This timestamp gives the Investigator specific information as to when an individual may have been armed or when they plan to carry out an intended attack. It has also proven useful in cases where individuals post videos of acts of gang related violence in that corroborative video can be recovered from an independent camera or identify witnesses. This has proven useful in numerous acts of violence, including homicide investigations. This evidence has also been increasingly beneficial in court proceedings. The Court now regularly has the benefit of viewing evidence on motive (threatening rivals with violence) and means of attack (display of a firearm) in cases where individuals are charged in violent incidents.
25. Often times these individuals will display illegal firearms or post images or videos depicting acts of gang violence or threats to a rival. When these observations are made, the Investigator will preserve the video or image using a second phone. This is done by using the video function of the second phone to record the video or image being played on the first phone. The recording is also time stamped by the Investigator.
26. If the Investigator observes a criminal act, such as a person unlawfully possessing a firearm or an individual with intention to commit an immediate act of violence, attempts are made to act on that information. If an individual is criminally charged as a result of this investigation, the social media observations are

documented and this documentation, along with the corresponding video evidence, is brought before the respective court as evidence.

27. It is increasingly common for gangs to commit an act of violence and then brag about it immediately on social media. This information is crucial to law enforcement in their efforts to hold the offenders responsible for these acts and prevent future acts of violence. It also aids police supervisors in deploying Officers in specific areas as a preventive measure based upon information gleaned from social media investigations. Police are obligated to take preventive measures when they receive information from the community or confidential informants regarding future acts of violence. Not collecting this intelligence and taking appropriate action would amount to an act of negligence in this digital age.
28. Taking police action with a greater level of intelligence, gained by merely viewing a video that is often available to hundreds or thousands of other individuals, has proven effective in focusing law enforcement efforts on specific individuals or groups rather than uninvolved, innocent parties. This has reduced the perception that law enforcement is casting a "wide net" and basing police action on uninformed and baseless intelligence. Often this intelligence is gained from one single friend request and making observations of a known individual's activity. This method has proven to be the safest method and far less intrusive than the use of a confidential informant, electronic surveillance such as pole cams or wire intercepts or undercover officers. This has framed intelligence based policing, allowing Law Enforcement the ability to focus only on the individuals suspected of committing violent crimes and has greatly minimized unnecessary encounters with community members that have no connection to criminal activity.

Respectfully submitted,

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## COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT DEPARTMENT  
DOCKET NO. 1884CR00453  
1884CR00469COMMONWEALTH OF MASSACHUSETTS,  
Petitioner,

v.

RICHARD DILWORTH,  
Defendant & Respondent

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**COMMONWEALTH'S MOTION TO STAY PRODUCTION OF DISCOVERY**

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The Commonwealth respectfully requests that this Honorable Court stay his order to produce discovery issued on June 24, 2021 (which was the subject of a motion to reconsider denied on December 8, 2021). As reasons therefore, the Commonwealth would state that it has filed a notice of appeal. If the discovery is turned over prior to filing, argument, and decision on the appeal, the appeal will become moot.

Respectfully submitted  
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For The Suffolk District  
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BBO # 684902

Dated: December 13, 2021

**CERTIFICATE OF SERVICE**

I hereby certify under the pains and penalties of perjury that on this day I caused a copy of this motion to stay in the case of Commonwealth v. Richard Dilworth to be served on opposing counsel, Joshua Raisler Cohn, via email as follows:

Joshua Raisler Cohn, Esq.  
jraislercohn@publiccounsel.net

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(617) 619-4129

Dated: December 13, 2021

**COMMONWEALTH OF MASSACHUSETTS****SUFFOLK, SS****SUFFOLK SUPERIOR COURT  
CRIMINAL DIVISION  
DOCKET NO. 1884CR00453  
1884CR00469****COMMONWEALTH****v.****RICHARD DILWORTH**

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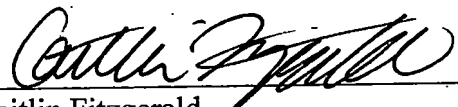
**COMMONWEALTH'S NOTICE OF APPEAL**

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The Commonwealth, pursuant to Mass. R. Crim. P. 15 and G.L. c. 278, § 28E, hereby gives notice of its intent to appeal the ruling of the Court, Justice Peter Krupp, dated December 8, 2021, allowing the Defendant's Motion for Additional Discovery: Snapchat User Icon/Bitmoji and Username and denying the Commonwealth's Motion to Reconsider.

Respectfully submitted  
For the Commonwealth,

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For the Suffolk District



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Dated: December 13, 2021

## COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

SUFFOLK SUPERIOR COURT  
NO. 1884CR00453  
1884CR00469

COMMONWEALTH

v.

RICHARD DILWORTH

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**MOTION TO DISMISS WITH PREJUDICE AS SANCTION FOR  
COMMONWEALTH'S REFUSAL TO PRODUCE COURT ORDERED  
DISCOVERY FOR MR. DILWORTH'S EQUAL PROTECTION CLAIM**

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Mr. Dilworth's indictments must be dismissed as a sanction for the Commonwealth's and Boston Police Department's "egregious prosecutorial misconduct" in *refusing* to produce Equal Protection related discovery that was ordered by the trial court, reaffirmed on a motion to reconsider, and upheld by a Single Justice of the Supreme Judicial Court. Commonwealth v. Washington W., 462 Mass. 204, 216 (2012) (dismissal with prejudice within the discretion of the trial judge when Commonwealth willfully defies a discovery order and in doing so denies the opportunity to develop a factual basis in support of an equal protection claim). There is no lawful basis to withhold the discovery, and this prosecution must not be allowed to continue.

Richard Dilworth, the 25-year-old Black man indicted in these cases, was targeted for social media surveillance, along with numerous other young people of color, by the Youth Violence Strike Force ("Gang Unit") of the Boston Police

Department. Since 2018, Mr. Dilworth has been litigating discovery issues related to his claim that his rights to Equal Protection under the law were violated by the police when he was targeted in an investigatory scheme that selects people for surveillance on Snapchat in a manner that “was motivated at least in part by race”. Commonwealth v. Long, 485 Mass. 711, 726 (2020); Commonwealth v. Lora, 451 Mass. 425, 445 (2008); see also arts. 1 and 10 of the Massachusetts Declaration of Rights; Matter of a Grand Jury Investigation, 485 Mass. 641 (2020); Brady v. Maryland, 373 U.S. 83 (1963).

On June 24<sup>th</sup>, 2021, the Commonwealth was ordered to produce the bitmoji images and user names of the false snapchat accounts created and used by the Gang Unit, which would “offer relevant, material and persuasive graphic evidence of the racial and ethnic demographics targeted by the Boston Police for secret monitoring”. (Paper # 52) Throughout the motions to reconsider and application for interlocutory review since this order was entered, it appears the Boston Police Department and Commonwealth never intended to comply with this discovery order. Choosing not to seek relief from the most recent Single Justice order upholding Mr. Dilworth’s access to discovery, the Commonwealth is engaged in litigation gamesmanship and is now refusing to comply with the discovery order. They are apparently hoping that either there will be no consequence for their egregious misconduct, or if a dismissal is allowed, that they will exercise their right of appeal under Mass R. Crim Pro. 15(a)(1) in an attempt to re-litigate their repeatedly rejected objections to the ordered discovery, and, ultimately, to prematurely appeal Mr. Dilworth’s underlying Equal

Protection claim before he has had the opportunity to present it to a trial court on a full factual record.

### Statement of Facts

“[A]s members of the legal community, we need to reexamine why, too often, our criminal justice system fails to treat African-Americans the same as white Americans, and recommit ourselves to the systemic change needed to make equality under the law an enduring reality for all. This must be a time not just of reflection but of action.” Letter from the Seven Justices of the Supreme Judicial Court to Members of the Judiciary and the Bar (June 3, 2020).<sup>1</sup> Four years prior to this call to action, in his State of the Judiciary speech in 2016, late Chief Justice Ralph Gants announced the creation of an independent team to investigate the vast racially disproportionate impacts in the state criminal court system:

“We need to explore the reasons behind the great disparity in the rates of imprisonment among Whites, African-Americans, and Hispanics in this Commonwealth. According to data collected by the Sentencing Commission, as a nation, in 2014, the rate of imprisonment for African-Americans was 5.8 times greater than for Whites; in Massachusetts, it was nearly 8 times greater. As a nation, in 2014, the rate of imprisonment for Hispanics was 1.3 times greater than for Whites; in Massachusetts, it was nearly 4.9 times greater. We need to find out why.”

Gants, Ralph D., State of the Judiciary (Oct 20, 2016).<sup>2</sup>

Around this time the Youth Violence Strike Force (YVSF) of the Boston Police Department began a social media surveillance investigation scheme using the

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<sup>1</sup> <https://www.mass.gov/news/letter-from-the-seven-justices-of-the-supreme-judicial-court-to-members-of-the-judiciary-and-the-bar-june-3-2020>

<sup>2</sup> <https://www.mass.gov/doc/2016-state-of-the-judiciary-address-by-sjc-chief-justice-ralph-d-gants-oct-20-2016/download>.

application Snapchat. This program involved creating fake accounts<sup>3</sup>, using bitmoji characters (cartoon-like images made to look like people) as icons for the accounts, pretending not to be police officers, and infiltrating friend groups and online meet-ups or parties within the messaging app. Officers in the YVSF created accounts using names and images that they believed would allow them to infiltrate groups of young people of color. By default, posts made on Snapchat can only be viewed by people who have been electronically accepted as ‘friends’ by the user.<sup>4</sup> Officers in this program made selections about who to secretly monitor, and requested to be ‘friends’ with hundreds of young people of color within the city. They monitored these accounts from their cell phones, watching online communications and online gatherings. Sometimes they even watched these accounts while off duty.

Patterns of racial profiling have been well documented within investigatory and enforcement approaches by the Boston Police Department.<sup>5, 6</sup> Of course, the issue

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<sup>3</sup> The creation of fake accounts violates the terms of service for Snapchat accounts.

<https://snap.com/en-US/community-guidelines>, <https://snap.com/en-US/terms>

<sup>4</sup> <https://support.snapchat.com/en-US/a/privacy-settings2>. See *Commonwealth v. Carrasquillo*, 489 Mass. 107, 109-110 (2022).

<sup>5</sup> Am. Civil Liberties Union of Mass., Stop and Frisk Report Summary (Oct. 2014),

<https://www.aclum.org/sites/default/files/wp-content/uploads/2015/06/reports-black-brown-and-targeted-summary.pdf>

(“63% of Boston police-civilian encounters from 2007-2010 targeted Blacks, even though Blacks made up less than 25% of the city’s population. Even after controlling for crime, Boston police officers were more likely to initiate police encounters in Black neighborhoods and to initiate encounters with Black people. Boston police essentially gave no justification for 75% of these encounters, simply listing ‘investigate person’ as the reason.”). *Id.* at 1 (“Blacks were more likely than whites to be subjected to repeat police civilian encounters and to be frisked or searched, even after controlling for civilians’ alleged gang involvement and history of prior arrest.”). *Id.* at 2 (describing how the BPD especially targets “young men of color”). See also *Commonwealth v. Phillips*, 413 Mass. 50, 52-53 (1992).

<sup>6</sup> A 2020 review of 2019 data documented that Black people made up 70% of field interrogations or observations (FIOs) in Boston. Thompson, *Black People Made Up 70 Percent Of Boston Police Stops, Department Data Show*, WGBH (June 12, 2020), <https://www.wgbh.org/news/local-news/2020/06/12/black-people-made-up-70-percent-of-boston-police-stops-department-data-show>. This February, a report commissioned by the Executive Office of Public Safety and Security (EOPSS) found that in 2020, Black drivers received 44.6% of the traffic tickets in Boston, while making up only 22% of the population of the city. <https://www.mass.gov/news/executive-office-of-public-safety-and-security-releases-baseline-analysis-of-police-traffic-stop-data>.

is not limited to the Boston Police.<sup>7</sup> “[W]e should confront squarely the fact that the phenomenon of racial profiling is a product of more than one-off cases of individual bias or animus -- it is a systemic problem that has flourished under the rules that this court has set.” Long, 485 Mass. at 756 (Budd, J., concurring). Within the Snapchat investigatory scheme, it appears everyone arrested as a result of Snapchat monitoring is a young person of color. Mr. Dilworth filed an affidavit with his initial discovery motions documenting that, based on a survey of the defense bar, everyone arrested based on this investigatory scheme was a person of color, 85% were Black, and 15% were Latinx. None were white. Commonwealth v. Dilworth, 35 Mass. L. Rptr. 2019, WL 469356 (Jan. 18, 2019). The Boston Police have asserted that there was neither training nor training materials on this technique, nor were there any protocols for conducting this type of investigation. Paper # 13. This means the process of deciding who to target for monitoring was left entirely to the discretion of the officers involved. It remains uncontested that this investigatory scheme overwhelmingly targeted young people of color.

The monitoring of Mr. Dilworth started in the fall/winter of 2017. Officer Zach Crossen, a member of the Youth Violence Strike Force, made a ‘friend request’ of Mr. Dilworth using a Snapchat account purporting to be someone other than a police officer. Over several months, Officer Crossen observed eight videos that appear to show Mr. Dilworth holding a gun. On January 11<sup>th</sup>, 2018, Officer Crossen and other

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<sup>7</sup> Reviewing over 100 million traffic stops across the United States, the Stanford Open Policing Project has found that Black drivers are pulled over more often, based on less suspicion, than white drivers. <https://www.nbcnews.com/news/us-news/inside-100-million-police-traffic-stops-new-evidence-racial-bias-n980556>

members of the Youth Violence Strike Force arrested Mr. Dilworth in a parked car behind his home, and recovered a firearm. In February of 2018 Officer Crossen was the subject of an investigation within the police department after a video surfaced of him detaining a young Black man in Roxbury. During that incident the officer appears to detain the young man for no reason, refers to him as a contributor to the problems in the neighborhood, and provides his name but an incorrect badge number when he is asked to identify himself.<sup>8</sup> It appears that Officer Crossen may have mistaken the young man for someone else. An internal affairs complaint was filed as a result of this incident alleging that Crossen violated the Bias Free Policing Policy, and the standards for Respectful Treatment and Abuse of Process. All three charges were recommended to be sustained against him, though ultimately the Superintendent-in-Chief recommended that only two of the three charges be sustained against the officer. In May 2018, Mr. Dilworth was again observed on Snapchat with what appeared to be a gun. He was arrested a second time on May 11<sup>th</sup>, 2018, and was charged again with having a gun.<sup>9</sup>

Mr. Dilworth filed a discovery motion for the police-created false Snapchat account usernames and account information including the user photographs in August 2018.<sup>10</sup> Paper # 8. The Commonwealth opposed this motion, and relied on the

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<sup>8</sup> Durkin Richer, *Activists decry video of Boston police stop of black man*, Boston.com (Feb. 28, 2018), <https://www.boston.com/news/local-news/2018/02/28/activists-decry-video-of-boston-police-stop-of-black-man>.

<sup>9</sup> Officers watched Mr. Dilworth at his home for a substantial period of time (where unlawfully possessing a firearm would be a misdemeanor with no mandatory sentence) and waited until he left his home and was more than a mile away before approaching him, searching him and arresting him (where unlawfully possessing a firearm not at home is a felony with a mandatory minimum sentence—a charge which has been documented to be disproportionately brought against Black men).

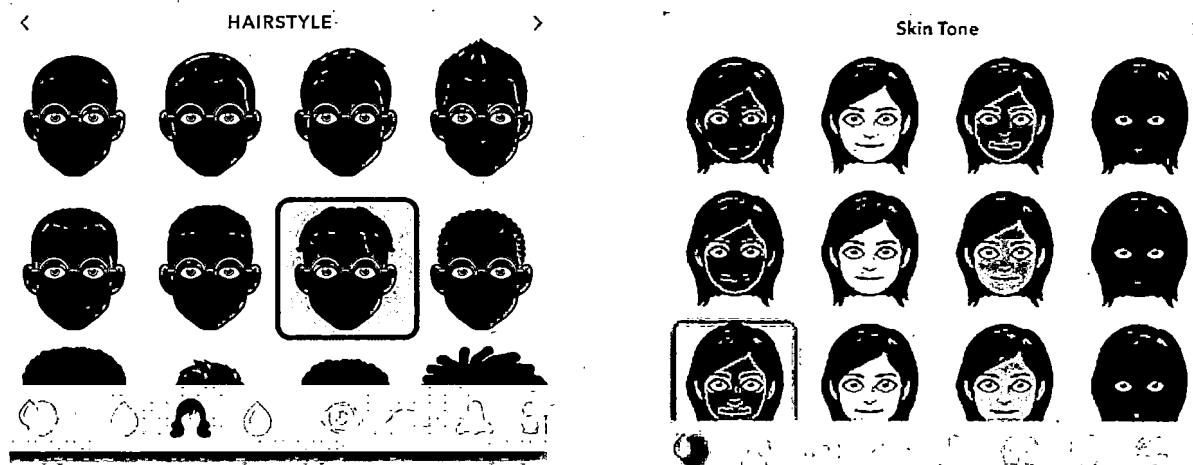
<sup>10</sup> At the time, the defense was not aware that user images created during that time could only be cartoon style bitmojis, and not photographs.

'informant privilege', describing the fake Snapchat accounts as akin to confidential informants or secret surveillance locations. Paper #8.1. The Commonwealth further argued that the materials sought were not relevant or exculpatory. The Commonwealth did agree to provide some information, and reported that 1) the police only watched Mr. Dilworth, and did not use the false accounts to communicate or engage in conversations with the people they were monitoring and 2) the user image or bitmoji and the username was not a person who would be known to the defendant.

In October of 2018 Mr. Dilworth filed an Equal Protection based discovery motion pursuant to both Mass.R.Crim.P 14 and 17 seeking more detailed reports related to the people who were criminally prosecuted based on surveillance from this investigatory scheme. After several hearings, Judge Ullman allowed the defendant's motion with modifications, pursuant to Mass.R.Crim.P 17. See Commonwealth v. Dilworth, 35 Mass. L. Rptr. 2019, WL 469356 (Jan. 18, 2019). The Commonwealth moved for reconsideration, which was denied. The Commonwealth then appealed under G.L. c. 211, § 3. The Single Justice denied the petition without a hearing, allowing Judge Ullman's discovery order to stand. SJ-2019-0171. The Commonwealth then appealed to the Supreme Judicial Court, which ruled without oral argument that the Single Justice had not abused her discretion in denying the Commonwealth's petition for extraordinary review and therefore allowed the Equal Protection discovery motion to remain intact. Commonwealth v. Dilworth, 485 Mass. 1001 (2020). In October 2020, prior to producing the ordered discovery, the Commonwealth obtained Court approval for a protective order on the materials to be provided. After

the discovery was produced, Mr. Dilworth filed for additional Equal Protection discovery to identify the total population of people who were monitored in this investigatory scheme, not just those arrested. Paper # 40. After additional briefing, Judge Krupp ordered the bulk of the requested discovery to be produced related to Mr. Dilworth's equal protection claim (Paper # 45). The parties agreed that the previous protective order would remain in effect for this additional related discovery.

On May 11, 2021, Mr. Dilworth filed the discovery motion at issue here, seeking the bitmojis and usernames of the false accounts created by and used by the police. In creating these accounts, officers select the skin color, skin tone, hair color, and hair style while creating a user image (a bitmoji, or cartoonlike image) for their account profile. The below images are screenshots of what this process looks like within the mobile application:



Mr. Dilworth is raising a defense that directly implicates selectivity decisions made by officers in this investigatory scheme. The equal protection selective enforcement and/or selective prosecution claim being developed will require that the

defense present data or other evidence to establish an inference of purposeful discrimination. The intentional choices officers made related to creating a bitmoji and account name based on the race that account portrayed is relevant to the ‘totality of the circumstances’ of this investigatory scheme, and is material to the fair presentation of the defense .

After briefing and argument, Judge Krupp allowed Mr. Dilworth’s motion for bitmoji and username discovery on June 24, 2021. Paper # 52. The Judge engaged in the appropriate two-part test: he found that the asserted informant and surveillance location privileges did not directly apply to a false online identity used by the YVSF, but even assuming either applied, he conducted the required balancing to find that any privilege which existed by analogy must yield to Mr. Dilworth’s showing that the bitmoji and username would “offer relevant, material and persuasive graphic evidence of the racial and ethnic demographics targeted by the Boston Police for secret monitoring”. Id.

Nearly six months later, on December 2, 2021, the Commonwealth filed a motion to reconsider with an unsigned and undated affidavit.<sup>11, 12</sup> On December 8, 2021, Judge Krupp in his discretion denied the motion to reconsider, finding:

“The Commonwealth has not cited any changed circumstances, newly discovered evidence or information, or any development in the relevant law...The additional affidavit contains no such information. The additional affidavit, which is unsigned and undated, could have been presented when the motion was being litigated, and is only now being submitted more than five months after the Court’s decision without explanation for the delay. To the extent the Commonwealth’s motion

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<sup>11</sup> No explanation was provided to the court for the delay.

<sup>12</sup> This unsigned affidavit made no assertion that the accounts at issue in this discovery order are still in use.

contends the Court erred in its original ruling, it generally rehashes arguments previously presented and that I rejected.”

(Written endorsement on Paper #53).<sup>13</sup>

During the three years of litigation related to accessing discovery for Mr. Dilworth’s Equal Protection claims, our courts have grappled with the issue of racial profiling in policing, recognizing both that race-based selectivity is a widespread issue, and that historically used legal approaches to address these issues have been inadequate. “All too frequently, however, the prohibition against facially discriminatory laws has been inadequate to address the role played by racism and other invidious classifications in the way facially neutral laws actually are enforced.” Long, 485 Mass. at 716.

The discovery provided so far lends weight to Mr. Dilworth’s claim that he was targeted for monitoring by an investigatory scheme focused on Black and brown people. Officer Crossen, the officer who initiated the monitoring of Mr. Dilworth, during this time was monitoring about 125 people on Snapchat using a false account, according to discovery. Of those 125 people, 102 were listed as Black, around 9 were listed as Black Hispanic, Cape Verdean, Haitian or Somali, four were listed Hispanic, three were white Hispanic, and only one person (0.8%) was listed as white. In an unsigned affidavit, Det. Ball claims that the gang unit is following known individuals: “The investigator will commonly send friend requests to specific individuals. The

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<sup>13</sup> See Commonwealth v. Conkey, 443 Mass. 60, 75-78 (no error in denying motion to reconsider without hearing when no there are no new facts or changes in the law), Commonwealth v. Charles, 466 Mass. 63, 84 (2013) (party filing for reconsideration should specify 1) changed circumstances such as newly discovery evidence or information, 2) development of relevant law or 3) a particular or demonstrable error in the original ruling or decision).

requests are based upon the investigator's knowledge of an individual's connection to criminal activity, most commonly gang and firearm related violence." (Paper # 53) However, in the materials provided documenting the people being followed by all the officers in the YVSF on Snapchat<sup>14</sup>, officers report not knowing the name, age, race or gender of 486 of the 2700 people being followed (18%) and don't know the names of 1864 of the 2700 people being followed (69%). It cannot be true both that officers are targeting people for monitoring due to suspected or known criminal activity and that the same officers have no idea who 70% of the people they are monitoring are. Of people being monitored by YVSF officers on Snapchat whose race is reported, about 1914 of 2214 are Black (86.4%).

Since his arrests, Mr. Dilworth himself has completed an intensive job training and mentorship program through More Than Words and received substantial support from another youth development organization. He has obtained and lost more than 4 jobs since completing that program, each time doing well at work but still being let go due to HR policies implicated by the fact of his pending open cases. He has continued to pursue his interests in music, his strong relationship with his family and community, and his efforts to start a small fashion business where he would be self-employed (and not subjected to the CORI related concerns of an employer).

### ARGUMENT

Rule 14 of the Massachusetts Rules of Criminal Procedure requires that the Commonwealth produce to a defendant, at or before the pretrial conference,

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<sup>14</sup> It appears that at least nine YVSF officers are engaged in Snapchat monitoring.

a number of relevant items over which the Commonwealth has possession, custody, or control. Further, a judge may make discovery orders under the rules of criminal procedure, and “on failure of the Commonwealth to comply with a lawful discovery order, the judge may impose appropriate sanctions, which may include dismissal of the criminal charge” pursuant to Mass. R. Crim. P. 14 (c)(1). See Commonwealth v. Douzanis, 384 Mass. 434, 436 (1981), Commonwealth v. Cronk, 396 Mass. 194, 198–99, (1985). A judge enjoys wide discretion in fashioning the appropriate remedy, and “more severe discovery violations may warrant more severe remedial sanctions...” Commonwealth v. Carney, 458 Mass. 418, 429 (2010). “In the context of discovery violations, bad faith exists when a violation was ‘willful and motivated by a desire to obtain a tactical advantage.’” Commonwealth v. Reynolds, 429 Mass. 388, 398, (1999) (internal citations omitted). Dismissal with prejudice is appropriate “where there is egregious prosecutorial or police misconduct and prejudice to the defendant’s right to a fair trial, and where the dismissal is necessary to cure the prejudice.” Washington W., 462 Mass. at 215.

**A. The Commonwealth’s Egregious, Willful Refusal to Produce the Ordered Discovery Will Severely Prejudice Mr. Dilworth and Irremediably Harm His Opportunity to Obtain a Fair Trial, and Dismissal is the Appropriate Remedy.**

Dismissal is appropriate where such egregious prosecutorial misconduct prejudices the defendant’s right to a fair trial. Washington W., 462 Mass. at 215. The contested discovery here concerns material that goes directly to the center

of Mr. Dilworth's judicially recognized, cognizable equal protection claim. See Memorandum and Order on Commonwealth's Motion to Reconsider Allowance of Motion to Compel Discovery and Reopen Evidence, June 24, 2021 (Krupp, J.).

The SJC confronted a strikingly similar issue in Commonwealth v. Washington W., 462 Mass. 204 (2012). There, the Commonwealth was ordered to provide statistical data concerning the district attorney's prosecution of juvenile sexual assault charges to prepare, assess, and establish a potential selective prosecution claim. Id. at 206-208. The Commonwealth filed a motion to reconsider and an application under G.L. c. 211, § 3, which were both denied. The motion judge granted the defendant's motion to dismiss the charges against him with prejudice. Id. The SJC upheld the dismissal, finding that the judge did not abuse her discretion in allowing the motion. Id. at 217. To wit, the SJC found that the judge did not err in finding that the Commonwealth had deliberately, willfully and repeatedly failed to comply with the discovery order where it refused in court to provide the data. Id. at 213-214. Importantly, the court found that this willful failure prejudiced the juvenile's right to a fair trial because "[t]he juvenile's right to a fair trial, therefore, included the right to develop the factual basis necessary to support his claim of selective prosecution, and the prosecutor's refusal to comply with the judge's discovery order essentially denied him the opportunity to evaluate and present this claim." Id. at 216.

1. Mr. Dilworth is severely prejudiced by the Commonwealth's refusal to produce court ordered discovery.

Mr. Dilworth requires the ordered discovery to develop a factual basis to support his equal protection claim based on a selective police investigatory scheme. See Washington W., supra. This court has already ruled that he is entitled to the bitmojis and user names, and a Single Justice of the Supreme Judicial Court has affirmed that the discovery order was not an abuse of discretion. Commonwealth v. Dilworth, SJ-2-22-0049 (March 31, 2022); see also Commonwealth v. Varela et al., SJ-2021-0441 (April 15, 2022) (affirming an identical trial court order for bitmoji and username discovery in a different Snapchat case).

Generally, an Equal Protection claim may be established through inferences or direct evidence. Inferences may be established through either statistical evidence that gives rise to an inference of racial profiling, or through an assessment of the totality of the circumstances. See Long, 485 Mass. at 724-725. The discovery that has been provided by the Commonwealth to date all appears to be material to establishing the race-based nature of this investigatory scheme inferentially; ie: the demographics of the people being followed on snapchat. The bitmoji and username evidence is categorically different and therefore not cumulative or redundant—it will “offer relevant, material and persuasive graphic evidence of the racial and ethnic demographics targeted by the Boston Police for secret monitoring”. (Order, Paper #52). Creating an account on Snapchat is step one

of this investigative scheme, and will provide direct evidence documenting choices made by officers about who they intended to target. The nature of the evidence belies the Commonwealth's argument that discovery ordered here and affirmed on interlocutory appeal is not needed for Mr. Dilworth to litigate his claim.

The Commonwealth also argues that Mr. Dilworth will suffer no prejudice due to their refusal to comply with court orders because has no viable equal protection argument—a claim that is premature on this motion, as the Supreme Judicial Court already confirmed in Dilworth two years ago. See Dilworth, 485 Mass at 1003, 1003 n.5. The Commonwealth also gratuitously reargues its assertion that Mr. Dilworth is not entitled to the discovery because the information is analogous to surveillance location/informant privilege, and Mr. Dilworth has established no applicable exception. This Court has rejected all of these arguments. See Paper # 52, 53. A Single Justice of the Supreme Judicial Court also found no merit to these arguments and confirmed that this Court did not abuse its discretion in ordering discovery that the Commonwealth now refuses to produce. The Commonwealth's arguments are misplaced, and it is obligated to comply with the order despite its own conclusions and continuing disagreements. "Unless and until a discovery order is vacated, it remains an order of the court. And a party that, as here, willfully violates the order is subject to sanctions under [R]ule 14(c)(1)." Washington W., 462 Mass. at 214 ("[N]o party is entitled to disregard a court order based on its contention that the order is no longer necessary, especially where, as here, the judge rejected the contention."). The Commonwealth cannot have it both

ways; the Commonwealth knows that the typical response to refusal to disclose the name of a confidential informant is a nol pros, or in rare cases where they refuse to comply with discovery orders but are attempting to continue litigation on the issues, dismissal by the court. Even on the Commonwealth's own twice-rejected legal theory, dismissal is still the proper remedy.

2. Dismissal with Prejudice is the Appropriate Sanction in this Case for Egregious Prosecutorial Misconduct in Refusing to Comply with a Discovery Order.

Having exhausted its interlocutory appeals of a discovery order that it does not want to honor or obey, the Commonwealth is now simply refusing to comply wholesale. This kind of litigation gamesmanship to prevent Mr. Dilworth from accessing the information he needs to develop and present an equal protection claim is willful and egregious prosecutorial misconduct warranting dismissal with prejudice.

In Washington W., beyond the clear prejudice to the juvenile's trial rights, the Supreme Judicial Court reasoned that dismissal was also an appropriate remedy because of the nature of the claim the defendant was pursuing: "the juvenile was denied the opportunity to develop a factual basis in support of his claim that he was a victim of selective prosecution...If the evidence were to support that claim, the juvenile may have been entitled to a dismissal with prejudice." Washington W., 462 Mass. at 216. Here, given the early stage of this litigation, it is not yet clear whether Mr. Dilworth's equal protection claim would be raised in a motion to dismiss or a motion to suppress. In Commonwealth v. Dilworth, the Supreme Judicial Court has

previously described the equal protection claim as a selective prosecution claim, and has suggested that either a motion to dismiss or a motion to suppress may be the appropriate vehicle to raise such a claim: “Here the motion judge did not rule on the substantive merits of Dilworth’s *selective prosecution* claim... Should Dilworth, at some later point, present a selective prosecution defense that leads to a successful *motion to suppress* or a *motion to dismiss*, the Commonwealth will be free to appeal from any such ruling.” Dilworth, 485 Mass. at 1003 (emphasis added).

Given that Mr. Dilworth’s claim concerns an allegation that the police’s investigatory targets and tactics were motivated at least in part by race, and not the racially discriminatory selective filing of criminal charges by the prosecution, the claim may more properly be considered a selective *enforcement* claim. In the context of racially motivated traffic stops, the Supreme Judicial Court has held that suppression—and not dismissal—is the proper remedy for a successful claim of selective enforcement. Compare Commonwealth v. Lora, 451 Mass. 425, 440 (2008) (“[I]f a defendant can establish that a traffic stop is the product of selective enforcement predicated on race, evidence seized in the course of the stop should be suppressed . . .”) (emphasis added); Commonwealth v. Long, 485 Mass. 711, 719-720 (2020) (“As with any other selective enforcement claim, if a defendant raises a reasonable inference that a stop was motivated by race, the burden shifts to the Commonwealth to rebut the inference. Unlike other types of selective prosecution cases, however, if the Commonwealth fails to rebut that inference in the context of a traffic stop, the remedy is *not dismissal*. Because the discriminatory enforcement of

traffic laws is more closely tied to the evidence obtained as a result of the stop, rather than the decision to bring criminal charges based on that evidence, we concluded that suppression was the correct remedy for a traffic stop that violated the guarantees of equal protection in arts. 1 and 10.” (emphasis added and citations omitted), with Commonwealth v. King, 374 Mass. 5, 19 (“We conclude that a female charged with prostitution or night walking would be entitled to a *dismissal* of the charges with prejudice on an appropriate showing that the police department or the prosecutor's office followed an unjustifiable policy of *selective enforcement* against female prostitutes and not male prostitutes.”). Regardless of whether the claim is construed as a selective prosecution or selective enforcement claim, however, dismissal is the proper remedy on *this motion* and *at this stage* because this motion is a response to the Commonwealth’s willful obstruction and refusal to comply with ordered discovery on any potential cognizable equal protection claim.

The equal protection claim at issue here, that the police are targeting individuals including Mr. Dilworth for surveillance based on their race, implicates constitutional protections pursuant to the Fourteenth Amendment to the U.S. Constitution and articles 1 and 10 of the Massachusetts Declaration of Rights. See King, 374 Mass. at 20 (“While some selectivity is permissible in criminal law enforcement, the Federal and Massachusetts Constitution’s guarantee that the government will not proceed against an individual based on ‘an unjustifiable standard such as race, religion, or other arbitrary classification.’”); Lora, 451 Mass. at 436-440 (“[T]he constitutional basis for objecting to intentionally discriminatory

application of laws is the Equal Protection Clause, not the Fourth Amendment.”). As the Supreme Judicial Court painstakingly explained in Lora and reaffirmed in Long, the proper remedy for a successful claim of unconstitutional selective *enforcement* is suppression of the ill-gotten evidence to deter the police from continuing to engage in unconstitutional conduct. See generally Lora, 451 Mass. at 438-439; see also Long, 485 Mass. at 719-720.

In the same way that suppression has a deterrent effect on the police, dismissal has a deterrent effect on the prosecution. Therefore, the proper remedy for a selective *prosecution* claim is dismissal. Long, 485 Mass. at 717 (“Consistent with Federal equal protection law, we have held that a prosecution brought based on an impermissible classification must be dismissed.”), citing King, 374 Mass. at 22. Thus, the willful obstruction of an equal protection discovery order—a prosecutorial decision—must also result in dismissal.

In Washington W., the SJC found the remedy of dismissal with prejudice was warranted because “the only way to cure the denial of [the lost opportunity to pursue the equal protection claim] was to grant the juvenile the relief he potentially could have obtained had he received the ordered discovery and demonstrated that he was a victim of selective prosecution.” Washington W., 462 Mass at 217. In these parallel circumstances, the court is well within its broad discretion to dismiss the charges against Mr. Dilworth with prejudice. Where Mr. Dilworth’s motion to dismiss is based on the prosecutor’s egregious discovery misconduct (refusal to turn over ordered evidence that may show a pattern of

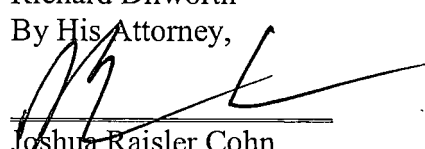
government discrimination on the basis of a constitutionally protected class), dismissal is the proper remedy.

The Commonwealth has blatantly proclaimed that it refuses to comply with the Court's order, an order which implicates Mr. Dilworth's right to equal protection under the law and will irremediably harm his opportunity to obtain a fair trial. These circumstances justify dismissal pursuant to Rule 14(c).

### Conclusion

"[I]t is the unanimous view of [the Supreme Judicial Court] that the prohibition against racial profiling must be given teeth...." Long, Mass. at 736 (Gants, C.J. , concurring). The first step to give the prohibition on racial profiling teeth must be granting access to information to understand the nature and scope of the challenged racial profiling. Dismissal with prejudice is the appropriate sanction for the government's refusal to comply with court orders.

Respectfully Submitted,  
Richard Dilworth  
By His Attorney,

  
\_\_\_\_\_  
Joshua Raisler Cohn  
BBO # 679791

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5-24-22

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

SUFFOLK SUPERIOR COURT  
NO. 1884CR00453  
1884CR00469

COMMONWEALTH

v.

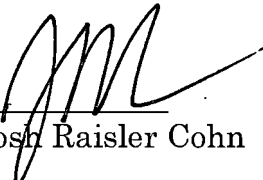
RICHARD DILWORTH

AFFIDAVIT OF COUNSEL

I Joshua Raisler Cohn, do hereby affirm under pains and penalties of perjury”

1. I am a staff attorney at the Committee for Public Counsel Services.
2. I was assigned by the court to represent Mr. Dilworth on the above listed indictments.
3. I have reviewed the provided discovery and incorporated that discovery into the attached motion to dismiss.
4. The evidence being withheld by the Commonwealth is central to Mr. Dilworth’s defense, and not bring provided with that evidence undermines his legal claims.
5. There is no other mechanism for Mr. Dilworth to access the court ordered discovery, expect for the Commonwealth to provide it.

Signed under pains and penalties of perjury

  
Josh Raisler Cohn

## COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

SUFFOLK SUPERIOR COURT  
NO. 1884CR000453  
1884CR00469

COMMONWEALTH

v.

RICHARD DILWORTH

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**Boston Police Department's Notice of Non-compliance**

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Now comes the Boston Police Department in the above-captioned matter and respectfully notifies the Court that it is unable to comply with this Court's June 24, 2021 order to disclose the usernames and so-called "bitmojis" associated with Department undercover Snapchat accounts.

Compliance with the Court's order to disclose all bitmoji and usernames of Boston Police Department undercover SnapChat accounts would bring about the end of the use of one of the most effective investigative techniques the Department has in combating firearm's violence. Since the Boston Police Department started utilizing undercover accounts to view publically posted content on the social media applications, more than 200 illegally possessed firearms have been taken off of the street using this investigative technique. As noted in the Affidavit of Detective Brian Ball, if the username and bitmojis associated with undercover BPD accounts were to be disclosed the accounts would be rendered useless. See Com. v. Lugo, 406 Mass. 565, 570 (1990) ("policy reasons comparable to those which favor the nondisclosure of an informer support the privilege to keep

a surveillance location secret”). These accounts, which took significant time and effort to develop, are not a renewable resource.

What is more, the disclosure of the usernames and bitmojis could jeopardize the safety of both officers and confidential informants. Indeed, as referenced in the affidavit of Detective Ball, information obtained from confidential informants is utilized in developing or corroborating leads in snapchat investigations. If the account information was known to the targets of these investigations, they could use it to find common connections between themselves, the undercover officer and suspected confidential informants. This would in turn bring about the substantial risk of physical harm to those believed to be confidential informants.

Lastly, the disclosure of the ordered information is not going to assist the Defendant in making his fanciful equal protection claim. In fact, the Defendant has failed to even facially allege a cognizable claim of selective prosecution under the 14<sup>th</sup> Amendment’s Equal Protection Clause of the Massachusetts Declaration of Rights. The Defendant made the unfortunate decision to twice display a firearm on open source social media for the world to see. Because he cannot claim a constitutional incursion or injury in the viewing of these videos, the Defendant asks this Court to waive the long-standing requirement of a showing of “injury in fact” in the equal protection context. See Commonwealth v. Lewis, 185 N.E.3d 952 (Mass. App. Ct. 2022)(finding the defendant lacked a reasonable expectation of privacy in “snap story” which was viewed by police officer with an undercover account); Lujan v. Defs. of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136 (1992)(“ our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized.”). It is clear that the defendant

cannot sustain a selective prosecution claim through showing that an investigative technique that does not implicate the Fourth Amendment or Article 14 was utilized in a racially disparate manner. The discovery to make such a showing is not relevant and should not have been ordered.

In sum, compliance with this Court's June 24, 2021 order would result in more illegal firearms on our streets, making Boston a less safe place. Withholding the ordered discovery does not prevent the defendant from vindicating any actual claims regarding the constitutionality of his arrest and prosecution. The Department is unable to comply with the order.

Respectfully submitted,  
Adam Cederbaum  
Corporation Counsel,

The Boston Police Department,  
By its attorney,

/s/ James Megee  
James Megee, BBO #691911  
Assistant Corporation Counsel  
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Boston Police Department  
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Boston, MA 02120  
(617) 343-4550

Date: 5/24/2022

## COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

SUFFOLK SUPERIOR COURT  
NO. 1884CR000453  
1884CR00469

COMMONWEALTH

v.

RICHARD DILWORTH

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COMMONWEALTH'S NOTICE OF NON-COMPLIANCE

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The Commonwealth, in the above-captioned matter, respectfully, responds to this Court's order to produce the "bitmojis" and usernames of the undercover snapchat accounts used by the Boston Police Department, providing notice of its inability to comply.

Procedural History of Equal Protection Discovery Litigation

On August 15, 2018 the defendant filed a motion for discovery of the Officer's snapchat usernames and account information including the photograph. The Commonwealth objected to this motion and the motion was denied on September 28, 2018 by Judge Sullivan. On October 31, 2018 the defendant filed a motion for discovery re: selective prosecution, requesting discovery relative to a claim of selective prosecution pursuant to both Mass.R.Crim .P. 14 and 17, this discovery request did not include a request for account usernames or photos. The Superior Court Justice denied the defendant's motion under Rule 14 and allowed his motion (with modifications) under Rule 17. Specifically the Court ordered that the Boston Police Department provide all Form 26 reports prepared by any officer or other employee of the Boston Police Department between August 1, 2017 and July 31, 2018 that reference the use of Snapchat as an investigative tool in any case in which the subject of Snapchat monitoring has been charged with any offense related to that

monitoring. The Commonwealth appealed the matter under M.G.L. ch. 211 sec. 3. The Single Justice denied the petition without a hearing, citing that the matter didn't warrant the exercise of the Court's extraordinary powers pursuant to ch. 211 sec. 3. The Commonwealth appealed the Single Justice's decision to the Supreme Judicial Court, citing that he had abused his discretion by denying the petition. On July 28, 2020, the SJC found that the Single Justice had not abused his discretion. In making this ruling, the SJC specifically noted in a FN 5:

“In ruling as we do that the single justice did not abuse her discretion by declining to intervene at the discovery stage, we express no view on the merits of the Commonwealth's claim, on the motion judge's statement that a claim of selective prosecution might lie even if there has been no infringement of the defendant's constitutional rights, or on the judge's assessment that Dilworth has made the necessary threshold showing for obtaining discovery under rule 17.”

Throughout the pendency of the appeal, production of the discovery was stayed. After the SJC's decision, the Commonwealth collected and provided to the defendant all Form 26 reports relating to individuals arrested with firearms as the result of Snapchat investigations between August 1, 2017 and July 31, 2018. After this was provided, the defendant filed an additional discovery motion on January 13, 2021, “The Defendant's Motions for Equal Protection Discovery or in the Alternative Rule 17 Summons”. This discovery request did not include account photos. The Commonwealth objected on the same basis, that the defendant did not meet his burden for equal protection discovery, and on March 30, 2021 the Court ordered parts of the discovery, largely citing to the Court's prior findings. The additional discovery ordered included Booking sheets, color booking photos and police incident reports for the arrests associated with each of the twenty-one “Form 26” reports that have been provided in discovery; Notice of any documentation that exists, in addition to the previously provided “Form 26” reports and the associated video

recordings, that would document the individuals who were being monitored by any member of the Youth Violence Strike Force on Snapchat between August 1, 2017 and July 31, 2018; Notice of the total number of people being monitored on Snapchat by the Youth Violence Strike Force between August 1, 2017 and July 31, 2018; the Commonwealth was ordered to direct the Boston Police Officers who conducted Snapchat surveillance between August 1, 2017 and July 31, 2018 to review any documentation, photos, videos, or data accessible through the Snapchat application regarding dates the officers used undercover accounts to “friend” particular individuals, in order to determine who they were monitoring on Snapchat between August 1, 2017 and July 31, 2018; the Commonwealth was ordered to direct each officer to disclose in writing the initials, perceived race, gender, and age of each individual they monitored during the relevant time period, and identify with reasonable specificity the sources of information from which they derived their conclusions for each individual. On September 13, 2021 the Commonwealth was finally able to complete compilation of the discovery ordered on June 24, 2021, including the initials and perceived age, race and gender of every person the YVSF followed on snapchat during the relevant time period. While the Commonwealth was in the process of compiling this discovery, the defendant filed another discovery motion on May 7, 2021, Defendant’s Motion for Additional Discovery: Snapchat User Icon/Bitmoji and Username, asking for the account photos (bitmojis) and the account usernames, a request that had previously been denied. The Commonwealth again objected citing that the defendant had failed to raise a viable equal protection claim, the defendant had failed to meet his burden for equal protection discovery, and that the information was protected by both the surveillance and informant privilege. On June 24, 2021 the Court allowed the defendant’s motion, finding

no confidential informant or surveillance privilege. In the findings of fact and law, the Court specifically found that disclosure of this information “does not raise a concern with the physical safety of an informant or police officers”, and that “the police technique of secretly infiltrating Snapchat accounts is an infinitely renewable resource”. On November 29, 2021 the Commonwealth received an affidavit from Detective Brian Ball explaining why disclosure of the additional information in the March 30<sup>th</sup> order, specifically the usernames and bitmojis, would in fact jeopardize the safety of both confidential informants and police officers, and why these undercover snapchat accounts are not infinitely renewable surveillance locations. On December 3, 2021 the Commonwealth filed a motion to reconsider the Court’s order to disclose the account usernames and bitmojis. On December 8, 2021, the Court denied the Commonwealth’s motion to reconsider.

The Commonwealth filed a 211 3, seeking appellate review of the Court’s order to disclose the account usernames and Bitmojis. On March 31, 2022, the Single Justice, Georges, J., denied that request without a hearing with the following Order, again declining to engage the question substantively:

This matter came before the Court, Georges, J., on a petition pursuant to G. L. c. 211, § 3, filed by the Commonwealth. The Commonwealth seeks relief from orders of the Suffolk Superior Court dated June 24, 2021, allowing the defendant's motion for discovery of snapchat user icon/bitmoji and username, in docket numbers 1884CR00453 and 1884CR00469. After careful review of the petition and opposition, it is ORDERED that the petition be, and the same hereby is, DENIED without hearing.

The Commonwealth has regularly communicated and coordinated with members of the Boston Police Department who have spent hours compiling the discovery ordered over the Commonwealth’s objection in this case. The Department has been steadfast in their opposition to disclosing the bitmojis and usernames. As stated in the attached

affidavit BPD believes that disclosure of this information will put confidential informants at risk and will render all of the undercover accounts useless, hindering the ability of the Boston Police to combat gun violence in the City of Boston.

#### Argument

Initially, as demonstrated by the attached affidavit, the Commonwealth cannot comply with this Court's order because such compliance would put the safety of confidential informants and police officers at risk. To the extent that this Court finds that constitutes a discovery violation, this Court must decide what, if any, remedy must be applied. Such remedy should be "tailored to cure any prejudice to the defendant resulting from a discovery violation, and are remedial, not punitive, in nature." *See Commonwealth v. Carney*, 458 Mass. 418 (2010). For example, this Court may dismiss the indictment, exclude evidence, or limit the scope of testimony of witnesses. *See Commonwealth v. Giotzis*, 47 Mass.App.Ct. 456-462 (1999). Dismissal and exclusion of evidence are two of the most severe sanctions the Court has at its disposal. However, where a Defendant has not suffered any prejudice, dismissal and exclusion of evidence serves no remedial purpose.

Moreover, the defendant has legally suffered no prejudice. The defendant's main argument for needing such discovery is to explore a motion to suppress pursuant to *Commonwealth v. Lora*, 451 Mass. 425 (2008) and *Commonwealth v. Long*, 485 Mass. 711 (2020). However, as cited in the Commonwealth's numerous prior memoranda, the defendant has no viable equal protection motion and has failed to meet his burden for the requested discovery. Further, the defendant has been provided with an abundance of discovery which could be used to attempt to meet his burden for an equal protection motion, should a Court find

that he has standing to do so. Because the defendant suffers no prejudice no remedy is necessary, and sanctions are not appropriate. If some sanction is deemed necessary, it should be minimal. Remedial action in this instance would be for the defendant to attempt to litigate his claims in accordance with the law.

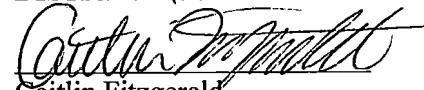
Conclusion

The Commonwealth requests that this Court impose no sanctions.

Respectfully Submitted  
For the Commonwealth,

KEVIN HAYDEN  
DISTRICT ATTORNEY

by:

  
Caitlin Fitzgerald  
Assistant District Attorney

Dated: May 24, 2022

## COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT DEPARTMENT  
NO.

COMMONWEALTH

v.

RICHARD DILWORTH

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**AFFIDAVIT OF DETECTIVE BRIAN BALL REGARDING THE USE OF SNAPCHAT  
AS AN INVESTIGATIVE TOOL**

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1. I am a Boston Police Detective, currently assigned to the Youth Violence Strike Force. I have been a Boston Police Officer since 2003, when I graduated from the Boston Police Academy. I was promoted to Detective in June of 2015. I have completed a 4-week (160 hours) Detective Training Course which was held at the Boston Police Academy. The focus of the Detective training included search warrant training, crime scene collection training, interview and interrogation, and crime scene evidence procedures, which included photographs, fingerprinting and fuming. Upon being rated Detective I was assigned to District B2, which covers the Roxbury and Dorchester sections of Boston. In May of 2016, I was reassigned to the Youth Violence Strike Force.
2. Prior to being promoted to Detective, I was assigned to the Boston Police Youth Violence Strike Force from 2008 to 2015. The YVSF is a city wide unit that is primarily responsible for responding to and dealing with firearm and gang related activity in the City of Boston. Prior to being assigned to the YVSF I was assigned to District B3, which covers the Mattapan and Dorchester sections of Boston. As a District Detective assigned to B2, my responsibilities included responding to and processing crime scenes, collecting and analyzing evidence, interviewing victims, suspects and witnesses and using search warrants and subpoenas to further investigate criminal cases.
3. I have also participated in numerous state and federal investigations that have resulted in the seizure of firearms and drugs. During my career, I have worked in conjunction with special agents from the Bureau of Alcohol, Tobacco and Firearms (ATF), the Drug Enforcement Agency (DEA), the Federal Bureau of Investigations (FBI), the United States Marshal Service (USMS) and the Immigration and Naturalization Services (INS). These investigations have required the use of confidential informants, electronic monitoring equipment,

surveillance and search warrants. During the course of these investigations I have testified in both state and federal court, and as a result these investigations and subsequent testimony have led to numerous convictions in both state and federal court for individuals charged with various firearm and drug related offenses. I am federally deputized as a United States Marshal and am a Task Force Officer with the United States Marshal Service.

4. The vast majority of my career as a Police Officer has been focused on gang related investigations. My initial assignment at District B3, apart from my basic patrol duties, was an introduction into Boston street gangs. I became aware of gang conflicts, primarily in the Dorchester and Mattapan neighborhoods. I learned the basics of gang structures, territories, conflicts and rituals as they pertain to gangs in those neighborhoods. This work led me into daily contact with gang members and also led to an understanding of relationships within the group, their allies and their perceived rivals. My assignment to the Youth Violence Strike Force, commonly referred to as the "Gang Unit", allowed me to participate in longer term firearm and drug gang investigations throughout the City of Boston and Commonwealth of Massachusetts. While assigned to the YVSF as a Patrolman, I participated in short term and long-term gang and firearm-based investigations. I handled confidential informants and conducted numerous interviews of gang members throughout these investigations. My assignment as a patrolman in the YVSF gave me further insight as to how individual gangs are structured, the basis for their alliances and conflicts and their methods of making money collectively.
5. My initial assignment after my promotion to Detective was to District B2 in the Roxbury neighborhood of Boston. Though I took part in general investigations, I was often assigned gang investigations related to shootings, robberies and homicides. These investigations, from the initial call, through the subsequent investigation and to the eventual grand jury and court proceedings gave further insight into gang dynamics. Specifically, it often allowed me unique insight from the perspective of the victim and witness of these gang related incidents. This experience offered a different viewpoint into gangs than I was previously exposed to in the more enforcement focused role in the YVSF.
6. This cumulative experience has aided me in my current role as a Detective in the YVSF. My primary duty is to initiate and coordinate gang-based firearm and illegal drug investigations within the Boston Police Department and partner State and Federal Agencies. These investigations are almost always initiated as a response to violent acts committed by gang associates. Many of these investigations have involved me utilizing electronic recording equipment, Confidential Witnesses and Cooperators and Undercover Police Officers. These resources have allowed me to monitor "real-time" gang activity, often from within the gang itself and take directed action as a result.

### *Gang Experience*

7. It has been my experience that Boston street gangs have evolved in structure, identifiers, hierarchies and methods of making money throughout the last 16 years. For instance, my initial gang encounters were with individuals who routinely stayed in a constant area as a means of protecting their "turf". Oftentimes they would regularly wear distinctive clothing that signified their membership in a particular gang. Gang members would often self-admit their membership in a particular gang and would openly disparage their rivals, often times to police officers in casual encounters. These outward indicators have been far less common throughout the last 10 years. Recognizing that gang intelligence gathered by police and prosecutors has often led to enhancements in criminal cases has made gang members more wary of showing their allegiances and associations to gangs. Gang members are far less likely to self-admit to police officers that they are members of a gang as they would years earlier.
  
8. This relatively new-found reluctance has not been true with social media. It is my experience that gangs use social media to promote their gangs, disparage their rivals and brag about criminal acts they have taken part in. Initially social media was used to connect with other individuals associated with the gang and their allies and members would post individual and group photos, often in gang attire and in their respective gang "turf". This has evolved into social media being used to initiate acts of violence, often with a gang member taunting a rival by posting videos and images of themselves in rival gang areas, often with firearms. The common display of firearms is essential in that it shows their allies that they are willing to commit acts of violence on behalf of themselves and the group and warns enemies that they are armed and should be considered a threat. This is often done to give the individual "street cred" and re-affirms their allegiance to their respective gang. I have been involved in many investigations where a gang member informed rivals that he was planning to shoot them or their associates. This has given us the opportunity to interrupt this intended act of violence and, in many cases, arrest the offender for firearm related offenses. It is similarly common to see gang associates brag on social media about past acts of violence committed by the gang. This has been true in fatal and non-fatal shootings. In some cases, groups of gang associated individuals have re-enacted specific acts of violence. Often details of these incidents are not commonly known, lending credibility to the belief that the group's statement that they were responsible for the respective act of violence is true. This has been helpful on gathering intelligence on gang related feuds and has aided investigations and subsequent court proceedings. The reluctance to display gang attire or self-admit to gang membership is also not shared on social media. It is common to see gang members either submit written and video posts where they re-affirm their gang membership and appear in hats, shirts and homicide memorial pins that are associated with a particular group. It has been common for Gang Unit Officers to view a social media posting where a member outwardly displays his allegiance

and membership to a gang, through spoken and typed words and clothing attire, and then deny it in an encounter with police. In my experience in gang investigations, through observations of and/or interviews with gang associates, that while the fear of being labeled a gang member by police is a concern, the need to display certain behaviors to maintain or further their role within the group is greater.

9. Though my experience has been primarily on investigating Boston based gangs, I have taken part in numerous State and Federal gang investigations. I have seen that gangs differ between project-based gangs, neighborhood-based gangs, street-based gangs and, more recently, social-media based gangs. These groups differ individually in structure and hierarchy. They do not all share the same method of making money or their ability to successfully elude law enforcement intervention. Some street gangs will only recruit new members that are from a particular housing project or specific set of streets in an effort to stymie attempts from rival gangs and/or law enforcement to gather intelligence on the group. This is often successful in that regard but restricts the group's ability to recruit new members. Other street gangs are less likely to place such restrictive requirements on admission to the group in an effort to add to the numbers of the group and develop a larger hierarchy within the group. This allows the gang to add younger, more easily influenced individuals that can carry out the established member's orders and insulate them from exposure. The negative component to this strategy is that it makes it easier to be compromised by law enforcement efforts and rival gangs that routinely plant lower level individuals in and around the gang. Recently there has been an increase in gangs that are extremely active on social media. These gangs conduct a large amount of their gang and drug activity on social media platforms but have proven to be as violent as "traditional" gangs. Many shootings have been committed as a result of a social media posting where a rival is insulted or ridiculed. Because these posts are often public, there is often a violent response to these posts. It has become common for these acts to be broadcast, sometimes live, on social media. It is imperative in gang culture that public insults be retaliated against and the detection of Law Enforcement is outweighed by the perceived need to be seen as not having been "punked" by a rival.

### ***Social Media Based Investigations***

10. The use of social media information has evolved substantially over the last 10 years. In the past, social media was primarily used to corroborate group affiliations and gang identifiers such as hats and clothing indicating allegiance to a particular gang. The intelligence gained was considered corroborative in nature rather than actionable intelligence. This has shifted exponentially throughout the years to the point where gang members routinely communicate their intentions to carry out acts of violence through social media platforms, most commonly Facebook and Snap Chat.

11. The role of social media in facilitating acts of firearm and gang related violence became more apparent in the follow up investigations of these incidents. It became clear to Investigators that many of these acts of violence were often imitated by social media activity. This was commonly done through direct threats posted to social media pages. These threats were routinely followed up by a retaliatory act of violence. It became obvious that social media had become the new method of posting derogatory digital graffiti in a rival gang's turf.
12. It has also become common for gang members to carry out acts of violence and then take credit on social media after the act had been committed. This is done in an attempt to let other gang members, both foes and allies, know that the particular gang is active and committed to acts of gang violence. Boasts about being up on the "scoreboard" after a rival is shot or killed are now frequently observed by Investigators.
13. Based upon this change in gang activity, Investigators began to proactively monitor social media accounts of individuals believed to be active in firearm activity and gang related violence. This adjustment has proven essential in preventing many acts of violence before they are committed. This is done either through directly intercepting an armed individual, often in a rival gang area, or the use of saturation patrols in a particular area with the intention of deterring the intended act of violence.
14. This method of proactive policing has also allowed Investigators the ability to direct firearm related investigations toward individuals known to be actively carrying firearms. This has led to the recovery of hundreds of firearms from individuals known to carry out acts of violence. In addition to the benefit of reducing acts of violence by gang members, it has allowed Investigators to focus their efforts on the violent members of a particular gang rather than lesser involved individuals.
15. This Affiant has interviewed hundreds of active Boston gang members during the course of conducting these investigations. The assertion that social media activity is the driving factor in gang violence in the City of Boston has been corroborated by the individuals directly involved in these incidents. It has been stated in numerous, recent interviews that it is increasingly common for a shooting to be predicated by a social media post, often where a gang member will explicitly taunt a rival. Often times, individuals in rival gangs will pre-plan an act of violence with rivals. Meet spots and times will be arranged and a "shoot on sight" rule will be set. Often times these individuals are aware that law enforcement will be monitoring this public interaction but the common sentiment is that fear of detection by Law Enforcement is dwarfed by the need to be perceived as unafraid of their rivals and the willingness to be publicly supportive of their respective gang. Publicly backing down from a rival, referred to as "taking a short", results in ridicule and shame from friend and foe alike.

16. This directed policing has greatly minimized negative encounters with the public because the police are acting with a greater level of tangible intelligence and not just on a “hunch” that an individual is of unlawful design. This has resulted in a marked decrease in situations where an individual may be stopped by the police and feels a level of harassment in the encounter. The fact the police were acting in good faith is often of little consolation to an individual who feels they were unjustly stopped by police. Intelligence based policing, often aided with information gained through social media, has guided the police in investigative stops and minimized encounters with citizens who have no connection to gang activity or violence.

### *Use of Social Media Accounts*

17. Often times the intelligence gained from these investigations is gathered through use of an “undercover” social media account. This is commonly done through activating a social media account using a fake, often generic, name. The name chosen has no connection to any real people and is often times a descriptive title with no actual name attached. A generic photo is sometimes used but it is more common currently to use a cartoon “bit-emoji” image with no relation to any particular person. These steps are taken to prevent an individual from associating the account with anyone known to them and ensure they are not tricked into interacting with a social media account with a friend, associate or family member.
18. Once the social media account is set up, the Investigator will commonly send friend requests to specific individuals. These requests are based upon the Investigators knowledge of an individual’s connection to criminal activity, most commonly gang and firearm related violence. The Investigators do not interact with or communicate with these individuals with the exception of cases of exigent circumstances. Directed, long term investigations may involve some level of communication with a particular target. This is extremely uncommon and is not the practice of Investigators conducting routine firearm and gang investigations. It is this Affiant’s understanding that Investigators involved in human trafficking investigations will interact with suspected pimps as it is necessary to set up an encounter with a Victim of human trafficking. This is done with the intention of removing the Victim, often times a juvenile, from a situation where she is being abused and exploited. It has also proven useful in identifying victims of these crimes and has aided in locating them and preventing exploitation and sexual assaults.
19. As stated, this Affiant has had extensive experience in firearm and gang investigations where social media was the nexus for the criminal acts. In these investigations, no messages are sent to targets and all messages from targets are ignored. Essentially, the Investigator acts as an observer, viewing posts that the target posts to his or her page. These posts are sent to the targets friend’s group

and are seen by the undercover account along with the other hundreds and thousands of other individuals the target chooses to share his or her postings with.

20. The targets of these investigations are chosen based upon the Investigator's prior knowledge of the Suspect or his/her associates. This is almost always based upon the target's connection to criminal activity. In most cases, the law enforcement account will send a friendship request to the account of the individual suspected of criminal activity. As stated earlier, the law enforcement account does not have any connection to or resemblance to any known individual. No interaction, other than the act of requesting a user's friendship, takes place. In many cases, the law enforcement account will receive invitations from the friends of the target once the connection between the two accounts is made.
21. It should be noted that Snapchat gives user accounts a number based upon the accounts activity. This activity includes social media postings, messages to and from accounts and number of friends, resulting in a higher activity number. A high activity number is often considered to be a status symbol for Snapchat users. It should also be noted that Snapchat account names are very rarely a user's actual "real life" name and is often a slang style name with no connection to the user's actual name. This often results in Snapchat users sending and receiving friend requests from individuals that are unknown to them. This is in contrast to social media platforms such as Facebook, where account names contain the actual name of the account user. It is believed that this is one reason why Snapchat is the preferred social media platform to conduct gang activity and drug distribution as there is a higher level of anonymity and helps in avoiding detection by Law Enforcement.
22. It is increasingly common to use information gained from a human confidential informant or undercover officer and corroborate that information from intelligence gleaned from social media postings. This has the benefit of corroborating the human source's information as accurate and truthful. Often the targets of gang and firearm investigations are violent individuals. It has been this Affiant's experience that gang members will actively seek out and assault and/or kill individuals that they perceive to be cooperating with law enforcement. The use of social media intelligence, combined with human source intelligence, allows Investigators the ability to minimize interactions between the target and the human source. This combined use method is often disclosed in court hearings. As is the case in the majority of court proceedings, the identity of the human source is not disclosed for fear of grave harm befalling the confidential source. The disclosure of the social media account in these hearings would allow the target of the investigation the ability to narrow down the inevitable list of individuals believed to have cooperated with law enforcement. The disclosure of the account details, such as the user name and description of the account's profile picture, would instantly jeopardize other investigations conducted with similar tactics.

23. The disclosure of an account name or specific account details would undoubtedly render that account useless in future investigations. It has become commonplace for suspected Law Enforcement undercover accounts to be publicly exposed when discovered. In many cases, individuals that will post screen shots of the undercover account and will urge his or her followers to share the image. In one case, a YVSF Detective's picture and name was attached to the warning. This posting was widely shared and resulted in the Detective receiving a number of death threats. The exposure of undercover accounts will also cause potential harm to undercover officers and confidential informants as many investigations use a combination of social media accounts and human intelligence. These investigations are extremely complex and dangerous; revealing the "identity" of an undercover account would prove to be as harmful to undercover officers and informants and would necessitate the termination of any ongoing investigation connected to that account.
24. Snapchat in particular has become an essential investigative tool for a number of reasons. Snapchat postings allow the viewer to identify with a greater level of certainty when a specific incident took place. The images and videos are given a "camera roll" designation, indicating the posting was a previously saved video or image and the time it was recorded cannot be determined with absolute certainty. Other images or videos are given a specific timestamp, such as "just now", "10min", "2hrs" etc. This timestamp gives the Investigator specific information as to when an individual may have been armed or when they plan to carry out an intended attack. It has also proven useful in cases where individuals post videos of acts of gang related violence in that corroborative video can be recovered from an independent camera or identify witnesses. This has proven useful in numerous acts of violence, including homicide investigations. This evidence has also been increasingly beneficial in court proceedings. The Court now regularly has the benefit of viewing evidence on motive (threatening rivals with violence) and means of attack (display of a firearm) in cases where individuals are charged in violent incidents.
25. Often times these individuals will display illegal firearms or post images or videos depicting acts of gang violence or threats to a rival. When these observations are made, the Investigator will preserve the video or image using a second phone. This is done by using the video function of the second phone to record the video or image being played on the first phone. The recording is also time stamped by the Investigator.
26. If the Investigator observes a criminal act, such as a person unlawfully possessing a firearm or an individual with intention to commit an immediate act of violence, attempts are made to act on that information. If an individual is criminally charged as a result of this investigation, the social media observations are

documented and this documentation, along with the corresponding video evidence, is brought before the respective court as evidence.

27. It is increasingly common for gangs to commit an act of violence and then brag about it immediately on social media. This information is crucial to law enforcement in their efforts to hold the offenders responsible for these acts and prevent future acts of violence. It also aids police supervisors in deploying Officers in specific areas as a preventive measure based upon information gleaned from social media investigations. Police are obligated to take preventive measures when they receive information from the community or confidential informants regarding future acts of violence. Not collecting this intelligence and taking appropriate action would amount to an act of negligence in this digital age.
28. Taking police action with a greater level of intelligence, gained by merely viewing a video that is often available to hundreds or thousands of other individuals, has proven effective in focusing law enforcement efforts on specific individuals or groups rather than uninvolved, innocent parties. This has reduced the perception that law enforcement is casting a "wide net" and basing police action on uninformed and baseless intelligence. Often this intelligence is gained from one single friend request and making observations of a known individuals activity. This method has proven to be the safest method and far less intrusive than the use of a confidential informant, electronic surveillance such as pole cams or wire intercepts or undercover officers. This has framed intelligence based policing, allowing Law Enforcement the ability to focus only on the individuals suspected of committing violent crimes and has greatly minimized unnecessary encounters with community members that have no connection to criminal activity.

Respectfully submitted,

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## COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
CRIMINAL ACTION  
NO. 1884-CR-00453  
NO.1884-CR-00469

COMMONWEALTH

vs.

RICHARD DILWORTH

**MEMORANDUM OF DECISION AND ORDER**  
**ON DEFENDANT'S MOTIONS TO DISMISS**

Since August 2018, the defendant, Richard Dilworth (“Dilworth”), has been seeking various records of the Boston Police Department (“BPD”) in an effort to establish an equal protection claim that BPD discriminated against Black men and other people of color in BPD’s use of Snapchat social media as an investigative tool. See Paper # 7 in Docket No. 18-453, and subsequent pleadings. The current procedural posture of the case is that the Commonwealth and BPD have refused to produce discovery ordered by Superior Court Judge Peter B. Krupp on June 24, 2021 in both above-captioned cases (the “June 2021 Order”) (Paper # 52 in Docket No. 18-453; Paper # 54 in Docket No. 18-469), and the Commonwealth has not appealed the ruling. Instead, the Commonwealth and BPD have each filed a Notice of Non-Compliance with the ruling in each case, setting forth purported reasons why the court-ordered discovery cannot or should not be provided (Papers # 57-58 in Docket No. 18-453; Papers # 60-61 in Docket No. 18-469). Because the refusal to produce court-ordered discovery needed to support a core defense in these related cases is a deliberate discovery violation that prejudices Dilworth’s right to a fair trial, his motion to dismiss the cases will be **ALLOWED**, without prejudice to the Commonwealth’s right to proceed if the June 2021 Order is vacated by the Supreme Judicial Court (“SJC”) or the Appeals Court.

### **PROCEDURAL HISTORY**

In January 2019, in Docket No. 18-453, this Court issued Memorandum of Decision and Order on Defendant's Motions for Discovery on Alleged Selective Prosecution, which allowed certain of defendant's discovery requests under Mass. R. Crim. P. 17. See Commonwealth v. Dilworth, 35 Mass. L. Rptr. 365, 2019 WL 469356 (Jan. 18, 2019) (the "January 2019 Order"). This Court ordered BPD to produce demographic information on individuals whose Snapchat accounts were infiltrated and monitored by BPD during the one-year period from August 1, 2017 through July 31, 2018, including the accounts used to monitor Dilworth. The Commonwealth appealed this ruling to a Single Justice of the Supreme Judicial Court ("SJC"). A Single Justice denied interlocutory review of this Court's decision. The Single Justice's denial was upheld by the full court in June 2020. See Commonwealth v. Dilworth, 485 Mass. 1001 (2020) (rescript).

In October 2020, pursuant to the January 2019 Order, BPD produced 21 Form 26 police reports regarding Snapchat surveillance. These reports did not contain race or demographic information about the individuals monitored on Snapchat. Thereafter, Dilworth filed another discovery motion, seeking six additional categories of information to support his equal protection claim. Among other objectives, Dilworth sought to identify the total population of people whose Snapchat accounts had been monitored, not only those who had been arrested. Judge Krupp ordered that some but not all of the requested discovery be provided. See Memorandum and Order on Defendant's Motion for Equal Protection Discovery or for a Rule 17 Summons (Mar. 30, 2021) (Paper # 45 in Docket No. 18-453; Paper # 49 in Docket No. 18-469) (the "March 2021 Order"). Discovery provided pursuant to the March 2021 Order indicated that, of roughly 125 persons being monitored on Snapchat by the BPD officer who monitored Dilworth,<sup>1</sup> more

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<sup>1</sup> It is unclear from the record what time period is covered by this information, and whether the 125 persons include all individuals whose Snapchat accounts were monitored by BPD during that time period.<sup>3</sup>

than 110 were Black, at least seven were Hispanic, and only one was identified as white non-Hispanic. See Paper # 56 in Docket No. 18-453 at 10; Paper # 59 in Docket No. 18-469 at 10. In response to this production, Dilworth filed a discovery motion seeking the user icons, bitmojis, and user names used by BPD officers to monitor Snapchat accounts between August 1, 2017 and July 31, 2018 (Paper # 49 in Docket No. 18-453; Paper # 51 in Docket No. 18-469).

On June 24, 2021, Judge Krupp issued the June 2021 Order, the discovery order that is directly at issue in the pending motion to dismiss (Paper # 52 in Docket No. 18-453; Paper # 54 in Docket No. 18-469). The ruling ordered the Commonwealth to disclose all “user icons or bitmojis, and the user names” used by BPD officers to infiltrate and monitor Snapchat accounts between August 1, 2017 and July 31, 2018.

The Commonwealth did not produce any of the discovery ordered in the June 2021 Order, nor did it appeal the ruling. Instead, on December 3, 2021, the Commonwealth filed motions to reconsider in both cases (Paper # 53 in Docket No. 18-453; Paper # 56 in Docket No. 18-469.) Judge Krupp denied these motions in endorsed Orders on December 8, 2021.

The Commonwealth filed notices of appeal, indicating an intent to appeal the June 2021 Order, but did not pursue an appeal. On May 24, 2022, Dilworth moved to dismiss both cases as a sanction for the Commonwealth’s refusal to produce court-ordered discovery (Paper # 56 in Docket No. 18-453; Paper # 59 in Docket No. 18-469). In response, the Commonwealth and BPD filed notices of non-compliance with the June 2021 Order. (Papers # 57-58 in Docket No. 18-453; Papers # 60-61 in Docket No. 18-469). The notices of non-compliance included an undated, unsigned affidavit of BPD Detective Brian Ball, who has worked on gang-related investigations during almost all of his 19 years with BPD. See Paper # 57 in Docket No. 18-453; Paper # 61 in Docket No. 18-469. The Commonwealth subsequently filed an opposition to the

dismissal motions in both cases, on June 8, 2022 (Paper # 59 in Docket No. 18-453; Paper # 62 in Docket No. 18-469). The Court heard oral argument on June 9, 2022.

### DISCUSSION

In response to the Commonwealth's violation of a discovery order, a court may order any remedial action "it deems just under the circumstances." Mass. R. Crim. P. 14 (c) (1). Sanctions for the violation of discovery obligations are limited to measures that are remedial in nature; they should not be punitive. Commonwealth v. Carney, 458 Mass. 418, 428 (2010); Commonwealth v. Frith, 458 Mass. 434, 442 (2010). Dismissal of criminal charges may be an appropriate sanction. See, e.g., Commonwealth v. Washington W., 462 Mass. 204, 214-15 (2012). However, "dismissal of a criminal case is a remedy of last resort because it precludes a public trial and terminates criminal proceedings." Commonwealth v. Mason, 453 Mass. 873, 877 (2009). Dismissal will be upheld "only where there is egregious prosecutorial or police misconduct and prejudice to the defendant's right to a fair trial, and where the dismissal is necessary to cure the prejudice." Washington W., 462 Mass. at 215. See also Commonwealth v. Hernandez, 421 Mass. 272, 277-78 (1995).

In essence, it is dispositive of the dismissal motions that the Commonwealth and BPD have neither appealed the June 2021 Order nor made any attempt to comply. Indeed, the Commonwealth and BPD have expressly stated that they do not intend to comply with the June 2021 Order. See *supra* at 3. The Court considers deliberate non-compliance to be an egregious discovery violation. At the hearing on this motion, when the Court asked the Commonwealth what alternative it was offering to dismissal, the Commonwealth candidly responded that the alternative was to let the case go forward in disregard of the June 2021 Order, and if Dilworth is convicted he can raise on appeal the Commonwealth's failure to provide the court-ordered

discovery. Contrary to the Commonwealth's suggestion, the Court should not and will not allow the case to proceed as if the June 2021 Order never issued.

The Commonwealth's opposition brief argues that this Court should follow Mason, in which a dismissal order was reversed, and distinguish Washington W., in which a dismissal order was upheld. Neither argument is persuasive. In Mason, the egregious police misconduct was withholding information from a county jail that resulted in a delay in the defendant's release. The SJC held that dismissal of the case was not an appropriate remedy because the delay in the defendant's release on bail did not prejudice his right to a fair trial. 453 Mass. at 877. Here, in contrast, the discovery that the Commonwealth and BPD have refused to provide goes directly to a core defense in the case, i.e., that Dilworth's prosecution is the result of unconstitutional police action.

The Commonwealth seeks to distinguish Washington W. from this case in two ways, both of which fall short. First, the Commonwealth notes that here, in contrast to Washington W., the Commonwealth has provided extensive discovery related to Dilworth's equal protection claim. See Paper # 59 at 3-4. However, it is not for the Commonwealth or BPD to decide how much discovery the defendant needs to pursue his defense; that is for the court to decide. Second, the Commonwealth notes that its reason for not producing discovery in Washington W. was prosecutor and police burden, whereas here the reason is weightier, i.e., concern about compromising ongoing investigations. *Id.* at 4.<sup>2</sup> However, the Commonwealth has neither factually supported this argument nor taken any of the measures available to protect such information consistent with seeking to comply with a court order. The (unsigned, undated) affidavit of Detective Ball contains conclusory statements that disclosure of the icons, bitmojis

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<sup>2</sup> BPD has also cited potential risk to the safety of police officers and confidential informants. See Ball Affidavit, ¶¶ 22-23.

and user names used by BPD would imperil the safety of confidential informants and/or undercover officers, and impede ongoing investigations. See Ball Affidavit, ¶¶ 22-23. The affidavit and non-compliance notices do not include a single example of particular circumstances suggesting that disclosure of the icons, bitmojis and user names used by BPD between August 1, 2017 and July 31, 2018 would imperil the safety of confidential informants and/or undercover officers or impede ongoing investigations.<sup>3</sup> One or more examples of such circumstances could have been disclosed using generic, protective language, or redactions. An affidavit could have been submitted *in camera*. None of this was done. Without factual information, this Court cannot accept the argument that revealing *anything* about icons, bitmojis and user names deployed by BPD four-to-five years ago would imperil the safety of confidential informants and/or undercover officers and impede ongoing investigations.

The Court recognizes that the Commonwealth has substantive arguments against the equal protection discovery orders issued in these cases, arguments that have not yet been addressed by the Appeals Court or the SJC. It appears that the Commonwealth wishes to have these arguments heard sooner rather than later. The Court understands the Commonwealth's interest in having the Appeals Court or SJC resolve these issues. It has given the Court no reasonable alternative to dismissal as the preclude to such review.

### **CONCLUSION AND ORDER**


For the above reasons, Defendant's Motion to Dismiss with Prejudice as Sanction for Commonwealth's Refusal to Produce Court Ordered Discovery for Mr. Dilworth's Equal Protection Claim (Paper # 56 in Docket No. 18-453; Paper # 59 in Docket No. 18-469) is

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<sup>3</sup> The only specific example described by Detective Ball involved disclosure of a BPD detective's actual name and photo, not an icon, bitmoji or user name. *Id.* ¶ 23.

**ALLOWED** to the extent that the cases are dismissed, without prejudice to the Commonwealth's right to proceed if the June 2021 Order is vacated by the Supreme Judicial Court or the Appeals Court.

Dated: June 27, 2022



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Robert U. Ullmann  
Justice of the Superior Court

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUFFOLK SUPERIOR COURT  
DOCKET NO. 1884CR00453/  
1884CR00469

COMMONWEALTH

V.

RICHARD DILWORTH

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COMMONWEALTH'S NOTICE OF APPEAL

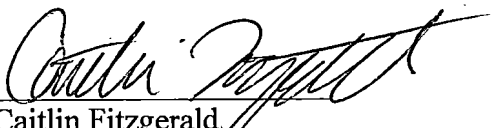
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Now comes the Commonwealth, pursuant to Mass. R. Crim. P. 15; and, Mass. R. App. P. 3 and 4, and hereby gives notice of its appeal of this Court's Order granting the defendant's Motion to Dismiss.

2022 JUN 27 PM 12:05

Respectfully Submitted,  
For the Commonwealth

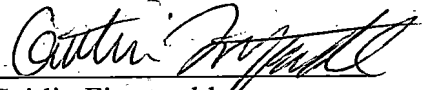
KEVIN HAYDEN  
DISTRICT ATTORNEY

  
Caitlin Fitzgerald  
Assistant District Attorney  
One Bulfinch Place  
Boston, MA 02114  
(617) 619-4129

DATED: June 27, 2022

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify under the pains and penalties of perjury that I have made service on counsel for the defendant by providing him a copy of this notice via e-mail on this date.



Caitlin Fitzgerald  
Assistant District Attorney  
One Bulfinch Place  
Boston, MA 02114  
(617) 619-4129

Dated: June 27, 2022

04

## COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
CRIMINAL ACTION  
NO. 1884-CR-00453 ✓  
NO. 1884-CR-00469

COMMONWEALTH

vs.

RICHARD DILWORTH

**AMENDED MEMORANDUM OF DECISION AND  
ORDER ON DEFENDANT'S MOTIONS TO DISMISS**

Since August 2018, the defendant, Richard Dilworth ("Dilworth"), has been seeking various records of the Boston Police Department ("BPD") in an effort to establish an equal protection claim that BPD discriminated against Black men and other people of color in BPD's use of Snapchat social media as an investigative tool. See Paper # 7 in Docket No. 18-453, and subsequent pleadings. The current procedural posture of the case is that the Commonwealth and BPD have refused to produce discovery ordered by Superior Court Judge Peter B. Krupp on June 24, 2021 in both above-captioned cases (the "June 2021 Order") (Paper # 52 in Docket No. 18-453; Paper # 54 in Docket No. 18-469). The Commonwealth and BPD have each filed a Notice of Non-Compliance with the ruling in each case, setting forth purported reasons why the court-ordered discovery cannot or should not be provided (Papers # 57-58 in Docket No. 18-453; Papers # 60-61 in Docket No. 18-469). Because the refusal to produce court-ordered discovery needed to support a core defense in these related cases is a deliberate discovery violation that prejudices Dilworth's right to a fair trial, his motion to dismiss the cases will be **ALLOWED**, without prejudice to the Commonwealth's right to proceed if the June 2021 Order is vacated by the Supreme Judicial Court ("SJC") or the Appeals Court.

### PROCEDURAL HISTORY

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On June 24, 2021, Judge Krupp issued the June 2021 Order, the discovery order that is directly at issue in the pending motion to dismiss (Paper # 52 in Docket No. 18-453; Paper # 54 in Docket No. 18-469). The ruling ordered the Commonwealth to disclose all “user icons or bitmojis, and the user names” used by BPD officers to infiltrate and monitor Snapchat accounts between August 1, 2017 and July 31, 2018.

On December 3, 2021, the Commonwealth filed motions to reconsider in both cases (Paper # 53 in Docket No. 18-453; Paper # 56 in Docket No. 18-469.) Judge Krupp denied these motions in endorsed Orders on December 8, 2021.

On February 3, 2022, the Commonwealth filed a petition seeking interlocutory review pursuant to G.L. c. 211, § 3, asking to vacate the June 2021 Order. Commonwealth v. Dilworth, SJ-22-0049. The Commonwealth advanced arguments about the merits of the discovery order regarding the surveillance location and confidential informant privilege, which had also been raised and rejected on reconsideration before Judge Krupp. The petition for relief from the June 2021 Order was denied without a hearing on March 31, 2022 (Georges, J.), and the trial court order allowing the Bitmoji and username discovery remained in force. The Commonwealth chose not to seek further review of this discovery order pursuant to Supreme Judicial Court Rule 2:21.

On May 24, 2022, the Commonwealth and BPD filed notices of non-compliance with the June 2021 Order. (Papers # 57-58 in Docket No. 18-453; Papers # 60-61 in Docket No. 18-469). That same day, Dilworth moved to dismiss both cases as a sanction for the Commonwealth's refusal to produce court-ordered discovery (Paper # 56 in Docket No. 18-453; Paper # 59 in Docket No. 18-469). The notices of non-compliance included an undated, unsigned affidavit of BPD Detective Brian Ball, who has worked on gang-related investigations during almost all of his 19 years with BPD. See Paper # 57 in Docket No. 18-453; Paper # 61 in Docket No. 18-469). The Commonwealth subsequently filed an opposition to the dismissal motions in both cases, on June 8, 2022 (Paper # 59 in Docket No. 18-453; Paper # 62 in Docket No. 18-469). The Court heard oral argument on June 9, 2022.

### **DISCUSSION**

In response to the Commonwealth's violation of a discovery order, a court may order any remedial action "it deems just under the circumstances." Mass. R. Crim. P. 14 (c) (1). Sanctions for the violation of discovery obligations are limited to measures that are remedial in nature; they should not be punitive. Commonwealth v. Carney, 458 Mass. 418, 428 (2010); Commonwealth v. Frith, 458 Mass. 434, 442 (2010). Dismissal of criminal charges may be an appropriate sanction. See, e.g., Commonwealth v. Washington W., 462 Mass. 204, 214-15 (2012). However, "dismissal of a criminal case is a remedy of last resort because it precludes a public trial and terminates criminal proceedings." Commonwealth v. Mason, 453 Mass. 873, 877 (2009). Dismissal will be upheld "only where there is egregious prosecutorial or police misconduct and prejudice to the defendant's right to a fair trial, and where the dismissal is necessary to cure the prejudice." Washington W., 462 Mass. at 215. See also Commonwealth v. Hernandez, 421 Mass. 272, 277-78 (1995).

In essence, it is dispositive of the dismissal motions that the Commonwealth and BPD have not made any attempt to comply with the June 2021 Order. Indeed, the Commonwealth and BPD have expressly stated that they do not intend to comply with the June 2021 Order. See *supra* at 3. The Court considers deliberate non-compliance to be an egregious discovery violation. At the hearing on this motion, when the Court asked the Commonwealth what alternative it was offering to dismissal, the Commonwealth candidly responded that the alternative was to let the case go forward in disregard of the June 2021 Order, and if Dilworth is convicted he can raise on appeal the Commonwealth's failure to provide the court-ordered discovery. Contrary to the Commonwealth's suggestion, the Court should not and will not allow the case to proceed as if the June 2021 Order never issued.

The Commonwealth's opposition brief argues that this Court should follow Mason, in which a dismissal order was reversed, and distinguish Washington W., in which a dismissal order was upheld. Neither argument is persuasive. In Mason, the egregious police misconduct was withholding information from a county jail that resulted in a delay in the defendant's release. The SJC held that dismissal of the case was not an appropriate remedy because the delay in the defendant's release on bail did not prejudice his right to a fair trial. 453 Mass. at 877. Here, in contrast, the discovery that the Commonwealth and BPD have refused to provide goes directly to a core defense in the case, i.e., that Dilworth's prosecution is the result of unconstitutional police action.

The Commonwealth seeks to distinguish Washington W. from this case in two ways, both of which fall short. First, the Commonwealth notes that here, in contrast to Washington W., the Commonwealth has provided extensive discovery related to Dilworth's equal protection claim. See Paper # 59 at 3-4. However, it is not for the Commonwealth or BPD to decide how

much discovery the defendant needs to pursue his defense; that is for the court to decide.

Second, the Commonwealth notes that its reason for not producing discovery in Washington W. was prosecutor and police burden, whereas here the reason is weightier, i.e., concern about compromising ongoing investigations. *Id.* at 4.<sup>2</sup> However, the Commonwealth has neither factually supported this argument nor taken any of the measures available to protect such information consistent with seeking to comply with a court order. The (unsigned, undated) affidavit of Detective Ball contains conclusory statements that disclosure of the icons, bitmojis and user names used by BPD would imperil the safety of confidential informants and/or undercover officers, and impede ongoing investigations. See Ball Affidavit, ¶¶ 22-23. The affidavit and non-compliance notices do not include a single example of particular circumstances suggesting that disclosure of the icons, bitmojis and user names used by BPD between August 1, 2017 and July 31, 2018 would imperil the safety of confidential informants and/or undercover officers or impede ongoing investigations.<sup>3</sup> One or more examples of such circumstances could have been disclosed using generic, protective language, or redactions. An affidavit could have been submitted *in camera*. None of this was done. Without factual information, this Court cannot accept the argument that revealing *anything* about icons, bitmojis and user names deployed by BPD four-to-five years ago would imperil the safety of confidential informants and/or undercover officers and impede ongoing investigations.

The Court recognizes that the Commonwealth has substantive arguments against the equal protection discovery orders issued in these cases, arguments that have not yet been

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<sup>2</sup> BPD has also cited potential risk to the safety of police officers and confidential informants. See Ball Affidavit, ¶¶ 22-23.

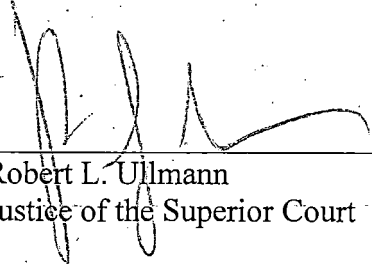
<sup>3</sup> The only specific example described by Detective Ball involved disclosure of a BPD detective's actual name and photo, not an icon, bitmoji or user name. *Id.* ¶ 23.

addressed by the Appeals Court or the SJC. It appears that the Commonwealth wishes to have these arguments heard sooner rather than later. The Court understands the Commonwealth's interest in having the Appeals Court or SJC resolve these issues. It has given the Court no reasonable alternative to dismissal as the preclude to such review.

**CONCLUSION AND ORDER**

For the above reasons, Defendant's Motion to Dismiss with Prejudice as Sanction for Commonwealth's Refusal to Produce Court Ordered Discovery for Mr. Dilworth's Equal Protection Claim (Paper # 56 in Docket No. 18-453; Paper # 59 in Docket No. 18-469) is **ALLOWED** to the extent that the cases are dismissed, without prejudice to the Commonwealth's right to proceed if the June 2021 Order is vacated by the Supreme Judicial Court or the Appeals Court.

Dated: July 22, 2022

  
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Robert L. Ullmann  
Justice of the Superior Court

COMMONWEALTH OF MASSACHUSETTS  
APPEALS COURT

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NO. 2023-P-0042

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COMMONWEALTH OF MASSACHUSETTS,  
Appellee

v.

RICHARD DILWORTH,  
Appellant

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COMMONWEALTH'S  
RECORD APPENDIX

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SUFFOLK COUNTY

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