

RECEIVED & FILED

2023 NOV 16 PM 2:14

COMMONWEALTH OF MASSACHUSETTS

CLERK OF THE COURTS
NORFOLK COUNTY

SUPERIOR COURT DEPARTMENT
NO. 2282-CR-00117

COMMONWEALTH OF
MASSACHUSETTS,
Plaintiff

V.

KAREN READ,
Defendant

**DEFENDANT’S MOTION FOR ORDER PURSUANT TO MASS. R. CRIM. P. 17
DIRECTED TO JENNIFER MCCABE, TROOPER MICHAEL PROCTOR, AND
ELIZABETH PROCTOR**

Now comes the defendant, Karen Read (“Ms. Read”), by and through her counsel of record, Werksman Jackson & Quinn LLP, and respectfully moves this Honorable Court to issue a summons for the following individuals to deliver the described records to the Clerk of the Court in advance of trial:

1. To: Jennifer McCabe

Seeking: All communications, including but not limited to records of calls, text messages, Facebook messages, Instagram messages, any other third party messaging applications, and/or email correspondence between Jennifer McCabe (on the one hand) and Elizabeth Proctor and/or Trooper Michael Proctor (on the other hand) between January 29, 2022, and present.

2. To: Trooper Michael Proctor

Seeking: A. All communications, including but not limited to records of calls, text messages, Facebook messages, Instagram messages, any other third party messaging applications, and/or email correspondence between Trooper Michael

Proctor (on the one hand) Jennifer McCabe (on the other hand) between January 29, 2022, and present.

B. All communications, including but not limited to records of calls, text messages, Facebook messages, Instagram messages, any other third party messaging applications, and/or email correspondence between Trooper Michael Proctor (on the one hand) and Brian and/or Nicole Albert (on the other hand) between January 29, 2022, and February 18, 2022.

3. To: Elizabeth Proctor

Seeking: All communications, including but not limited to records of calls, text messages, Facebook messages, Instagram messages, any other third party messaging applications, and/or email correspondence between Elizabeth Proctor and Jennifer McCabe between January 29, 2022, and present.

I. SUPPORTING FACTS

1. Ms. Read stands charged with the following crimes arising out of the death of her late-boyfriend, John O'Keefe ("O'Keefe"): Murder in the Second Degree in violation of M.G.L. c. 265, s. 1 (Count One); Manslaughter while under the Influence of Alcohol in violation of M.G.L. c. 265, s. 13 ½ (Count Two); and Leaving the Scene of Personal Injury and Death in violation of M.G.L. c. 90, s. 24(2)(a ½)(2) (Count Three).

2. O'Keefe was found unresponsive just after 6:00 a.m. on January 29, 2022, in the front yard of Boston Police Officer Brian Albert. O'Keefe suffered two swollen black eyes, a cut above his right eye, a cut to the left side of his nose, an approximately two-inch laceration to the back of his head, lacerations and puncture wounds to his right arm extending from his biceps to his forearm, and deep bruising consistent with defensive wounds on the back of his right hand. The Commonwealth's theory of the case is that Ms. Read became suddenly angry with O'Keefe after arriving outside the home of Boston Police Officer Brian Albert and reversed into him with her vehicle, shattering her taillight and somehow causing injury to *only* his head, face, and arm, before fleeing the scene. For the Commonwealth's theory of the case to make any sense, Mr. O'Keefe would necessarily have been incapacitated and bleeding on Brian Albert's front lawn

(mere feet from the roadway and yards from the front door of the house) from the moment the Commonwealth claims Ms. Read hit him with her car until his body was discovered just after 6:00 a.m. on January 29, 2022—some five-and-a-half hours.

3. However, no witness suggests that they observed Ms. Read strike Mr. O’Keefe with her vehicle, injure him in any way, or otherwise drive erratically on the night in question. Moreover, despite seven individuals—Jennifer McCabe, Matthew McCabe, Brian Higgins, Sarah Levinson, Julie Nagel, Caitlin Albert, and Colin Albert—leaving the Albert Residence in the early morning of January 29, 2022, not one of these people observed Mr. O’Keefe’s 217 lb. body conspicuously sprawled in Brian Albert’s front yard mere feet from the very roadway every one of them would have driven on to leave.¹ As set forth in more detail in prior filings, Ms. Read vehemently disputes the Commonwealth’s theory of the case and has uncovered significant evidence supporting a third party culpability defense, implicating Jennifer McCabe and Brian Albert in O’Keefe’s death.²

//

//

¹ Notably, on September 19, 2022, Defendant Karen Read filed a Rule 17 Motion requesting cell phone records relating to all the individuals who were present at the Albert residence on the night in question. In support of that request, counsel argued: “[A]t least six individuals claim to have left the Albert residence in the early morning of January 29, 2022, after Ms. Read had left the Fairview Residence and returned home: Jennifer McCabe and Matthew McCabe purportedly drove Julie Nagel and an unnamed female home at 1:30 a.m.; Brian Higgins supposedly went to complete “administrative work” at the Canton Police Department around 1:30 a.m.; and Colin Albert supposedly returned home to his parents’ residence at approximately 12:30 a.m. Yet, none of these individuals—not one—claims to have seen Mr. O’Keefe’s body sprawled in Brian Albert’s front yard, mere feet from the very roadway all of them would have driven on.” (*See* Docket No. 27.) This argument was reiterated vigorously in court at the hearing on the Rule 17 Motion on October 3, 2022. Remarkably, *two days* after the defense made these facts known the Court and Attorney Lally in a public hearing, on October 5, 2022, at 11:00 a.m., Trooper Michael Proctor claims to have interviewed partygoer Julie Nagel *for the first time*. (Exhibit A, Trooper Proctor’s October 12, 2022, Report of Interview with Julie Nagel.) In that unrecorded interview, Trooper Proctor reported the *never-before-revealed statement* by Julie Nagel that she “observed a dark object in the white snow by the flagpole” as they left 34 Fairview Road on January 29, 2022, seven months prior. (*Id.*)

² The facts set forth in Defendant’s Motion Pursuant to Mass. R. Crim. P. 17 Directed to Brian Albert, Verizon, and AT&T are incorporated herein by reference.

A. **Facts Relating to Trooper Proctor's Longtime Relationship with the Alberts and McCabes**

4. Since the inception of this case, the defense has challenged the neutrality and objectivity of the lead detective assigned to investigate this case, Massachusetts State Police Trooper Michael Proctor ("Trooper Proctor"). Despite the Commonwealth being on notice that photographic and other evidence establishes a close personal relationship between Trooper Proctor and the third party culprits implicated in O'Keefe's murder (i.e. the Alberts and the McCabes), the Norfolk County District Attorney's Office has steadfastly ignored the existence of any conflict of interest and has refused to remove Trooper Proctor from this case or take any other steps to address the clear evidence of impropriety. Indeed, on August 25, 2023, Norfolk County District Attorney Michael Morrissey took the extraordinarily unusual (and unethical) step of issuing a video-recorded statement to the press in which he falsely instructed the public that Ms. Read's defense should not be believed because, **"Trooper Proctor would have no motive [to plant evidence]: Trooper Proctor had no close personal relationship with any of the parties involved in the investigation, had no conflict, and had no reason to step out of the investigation. Every suggestion to the contrary is a lie."** (Exhibit B, Transcript of Norfolk County District Attorney Michael Morrissey's August 25, 2023, Statement to the Press.) Mr. Morrissey's public lip service personally vouching for Trooper Proctor's credibility, asserting that Trooper Proctor is conflict-free, and professing that Trooper Proctor has no relationship with any of the parties, is unavailing, patently and provably false, and places Trooper Proctor's neutrality squarely at issue in this case.

5. In fact, Ms. Read has uncovered numerous photographs and social media posts establishing a longstanding relationship between Trooper Proctor, the Alberts, and the McCabes. Attached hereto as Exhibit C are numerous (yet non-exhaustive) examples of Trooper Proctor's longstanding close familial relationship with the Alberts and the McCabes: (1) from left to right, a photograph of Trooper Proctor's mother Karen Barsamian Proctor (white shirt); implicated witness Colin Albert (white t-shirt); Trooper Proctor's sister, Courtney Proctor Elburg (cardigan); implicated witness Chris Albert (blue polo); and implicated witness Jennifer McCabe's daughter (blue headband) at a birthday party dated July 15, 2016; (2) a photograph showing Colin Albert and Trooper Proctor *in his sister's wedding party*, dated April 21, 2012; (3) a photograph of Trooper Proctor dancing with implicated witness Colin Albert at his sister's

wedding dated April 21, 2012; (4) a photograph of Trooper Proctor seated at the same table as implicated witness Colin Albert, implicated witness Chris Albert, and implicated witness Julie Albert at his sister's wedding dated April 21, 2012; (5) a photograph of Trooper Proctor with Jennifer and Matthew McCabe's daughters, dated August 20, 2017; and (6) a Facebook post by Trooper Proctor's mother, Karen Barsamian Proctor, in which she refers to Chris, Julie, and Colin Albert as her "second family." Trooper Proctor not only failed to disclose his longstanding relationship with Colin Albert, Chris Albert, Julie Albert, and Jennifer McCabe before interviewing them in connection with this case, he also *falsely* suggested in his reports that he had never met them. For example, in the February 21, 2022, Massachusetts State Police report memorializing Trooper Proctor's interview of Julie and Chris Albert, the report states: "***Following formal introductions***, Julie Albert . . . provided her cell phone number . . . Chris Albert . . . stated his cell phone..." (Exhibit D, February 21, 2022, Interview with Chris and Julie Albert). Law enforcement's claim that Trooper Proctor *formally introduced* himself to Chris and Julie Albert—individuals he has known for at least a decade and that he *literally sat next to at his sister's wedding*—is disturbing, and falsely suggests to the reader that Trooper Proctor has never met and did not know Chris and Julie Albert.³ As shown in the attached photographs, that suggestion is a lie. (See Exhibit C.)

B. Facts Relating to Trooper Proctor's Undocumented, Surreptitious Meetings with Longtime Family Friends and Third Party Culprits Jennifer McCabe and Brian Albert

6. In spite of being placed on notice regarding this obvious conflict and Ms. Read's third party culpability defense, Trooper Proctor apparently remains undeterred from pursuing his personal relationship with the witnesses in this murder investigation. For example, at 6:00 p.m. on September 25, 2023, Trooper Proctor and his wife, Elizabeth Proctor, were caught meeting with Jennifer McCabe at Trooper Proctor's personal residence. (See Exhibit E, Detective Lieutenant Brian Tully's Report in Support of Arrest Warrant for Aiden Kearney, at pp. 7-8; Exhibit F, Photograph Capturing Jennifer McCabe at Trooper Proctor's Personal Residence on

³ Notably, the following witnesses in this case are all members of the same family: Brian Albert, Nicole Albert, Brian Albert, Jr. (Brian and Nicole Albert's son), Caitlin Albert (Brian and Nicole Albert's daughter), Jennifer McCabe (Nicole Albert's sister), Matthew McCabe (Brian Albert's brother-in-law), Julie Albert, Chris Albert (Brian Albert's brother), and Colin Albert (Julie and Chris Albert's son).

September 25, 2023.) This remarkable discovery bears repeating: The lead investigator assigned to this case along with his wife hosted implicated witness Jennifer McCabe *at his home*.

Unfortunately for Trooper Proctor and Ms. McCabe, a passerby observed Jennifer McCabe's White Jeep Wrangler parked outside Trooper Proctor's home and photographed the sighting. (See Exhibit E, at pp. 7-8; Exhibit F.) This photograph was immediately provided to an individual who has reported significantly on this case. According to police reports, mere hours later, another interested citizen and law enforcement agency employee (outside the Massachusetts State Police) ran the plates of the three vehicles that were parked at Trooper Proctor's residence and confirmed that the vehicles were registered to, respectively, Matthew McCabe (Jennifer's husband), Trooper Proctor, and Elizabeth Proctor. (Exhibit E, at p. 8.)

7. Rather than discipline Trooper Proctor for further undermining public confidence in these proceedings, the Massachusetts State Police undertook an investigation to identify the individuals responsible for "outing" this incredibly unethical and unprofessional conduct engaged in by Trooper Proctor. (See Exhibit E.) On September 26, 2023, Lieutenant John Fanning of the Massachusetts State Police conducted a CJIS audit and confirmed that someone in law enforcement (outside MSP) had queried the license plates of the three vehicles observed outside the Proctor residence on September 25, 2023, which came back to: (1) a White Jeep registered to Matthew McCabe; (2) a vehicle registered to Michael Proctor; and (3) a vehicle registered to Michael Proctor's wife, Elizabeth Proctor. (Exhibit E, at p. 8.) **Jennifer McCabe subsequently admitted to Detective Lieutenant Brian Tully that she went to Trooper Proctor's personal residence for what she described as a social visit with Trooper Proctor's wife, Elizabeth Proctor, on September 25, 2023.** (Exhibit E, at p. 9.) Jennifer McCabe gave a self-serving three-sentence statement, claiming she was visiting with Elizabeth Proctor because they have "bonded" over this case (which, alone, is shocking and wildly inappropriate). However, photographs from that night clearly show Trooper Proctor was home, and his vehicle was parked in the driveway. It is worth noting that on October 3, 2022, Assistant District Attorney Lally represented to this Court that the Commonwealth "fully vetted" Trooper Proctor and "does not believe that there is a conflict of interest" because "[t]hese are not people that socialize together, these are not people that know each other, these are not people that Trooper

Proctor has been over to their home[.]”⁴ (Exhibit G, Transcript of October 3, 2022 Hearing, at pp. 23-24.) This representation by the Commonwealth to the Court has not aged well. Indeed, even ADA Lally recognized that it would be completely inappropriate and present a debilitating conflict of interest should it be the case that Trooper Proctor and his wife socialized with Jennifer McCabe, and, for instance, spent time at one another’s homes. (See Exhibit G, at pp. 23-24.) Except that is exactly what the facts have borne out here.

8. Similarly, recently produced photographs of the bags containing the items of evidence retrieved in connection with this case establish that in the month following O’Keefe’s death, Trooper Proctor made numerous undocumented trips, *by himself*, to Brian Albert’s personal residence located at 34 Fairview Road. (Exhibit H, Photographs of Bags Containing Evidence Retrieved from Brian Albert’s Residence.) According to the original police reports, law enforcement recovered pieces of taillight from Brian Albert’s front yard over the course of two searches on January 29, 2022, at 5:45 p.m., and on February 3, 2022. However, photographs of the bags purportedly containing the taillight pieces recovered in connection with this case—which were not produced to the defense in discovery until July 19, 2023—revealed that law enforcement actually conducted *five* additional undocumented visits to the Albert residence in February 2022. (See Exhibit H; Exhibit I, Notice of Discovery XIX.) According to notations on the evidence bags in this case, Trooper Proctor personally traveled to Brian Albert’s home, by himself, on February 8, 2022, February 11, 2022, and February 18, 2022, to collect pieces of taillight from 34 Fairview Road. (Exhibit H.) The only reason the defense was even made aware of Trooper Proctor’s purported “searches” on these dates is because when Trooper Proctor logged those taillight pieces into evidence, he had to write his name, the date, and the location where he recovered the items of evidence. (See Exhibit H.) On September 15, 2023, this Court ordered law enforcement to produce all notes, reports, and photographs associated with these undocumented searches to the defense no later than September 29, 2023 (hereafter “September

⁴ Notably, despite this unprofessional and unethical behavior, Trooper Proctor has suffered no consequences and remains the lead investigator on this case. Conversely, immediately following the revelation of this exculpatory information, the Massachusetts State Police arrested Aidan Kearney, the individual responsible for publicly exposing the photographs of Jennifer McCabe at Trooper Proctor’s house for, *inter alia*, Conspiracy to Commit Intimidation of a Witness for, in Detective Tully’s words “obtain[ing] sensitive information to be used in blog posts and videos intended to harass, intimidate, and cause emotional harm on [sic] Jennifer McCabe and Elizabeth Proctor.”

15, 2023, Discovery Order”). To date, the Commonwealth has failed to produce any photographs, notes, or other information concerning Trooper Proctor’s seemingly random solo trips to Brian Albert’s residence on February 8, 2022, February 11, 2022, and/or February 18, 2022, to “collect” evidence. Instead, in clear violation of this Court’s September 15, 2023, Discovery Order, on November 10, 2023 (a full month after the court-ordered compliance deadline), the Commonwealth produced a single report dated November 4, 2023, which merely reiterates the scarce information that was written on the bags of evidence concerning the five additional undocumented searches and *contains no information regarding the precise location of the items of evidence that were recovered, and/or the individual(s) that called law enforcement to the crime scene to collect the newly-discovered additional evidence.* (See Exhibit J, Trooper Proctor’s November 4, 2023, Report Regarding Undocumented Searches.)

C. **Facts Relating to Trooper Proctor’s False Statements and Material Omissions, Which Exculpate Ms. Read and Implicate His Close Family Friends**

9. Trooper Proctor’s relationship, allegiance, and connection to the third party culprits in this case has infected this case from the start. Aside from Trooper Proctor’s inherent bias and failure to meaningfully investigate his close family friends in connection with O’Keefe’s murder, Trooper Proctor has repeatedly made materially false statements and omissions in police reports and under oath in an effort to deny Ms. Read and her defense team access to exculpatory information, which would otherwise implicate his longtime friends, the Alberts and the McCabes.

10. For example, on February 3, 2022, Trooper Proctor claimed that he spoke with Town of Canton employee Michael Trotta, who told him that *no snowplows* were dispatched to the area of 34 Fairview on the night in question. (Exhibit M, March 15, 2022, Report Regarding Trooper Proctor’s Interview with Michael Trotta.) Trooper Proctor’s March 15, 2022, report memorializing his unrecorded conversation with Michael Trotta reads as follows:

Michael assists with coordinating plow and sanding trucks during storms. Michael stated Canton uses town equipment to treat the roads with the exception of one company. Michael stated a company called “By the Yard” is used to assist with plowing the roadways. Michael stated drivers met at 140 Bolivar Street at 2:30 a.m. on January 29th and then left from there to clear the roadways. The company “By the Yard” was not called in until 3:30 a.m. that morning. **Michael stated trucks**

were out sanding earlier but only concentrate on major roadways in Canton and would *not* travel down Fairview Road.

(Exhibit M.) This statement is patently false. Defense investigator Paul Mackowski independently spoke with Michael Trotta by telephone on February 14, 2022, regarding whether any snow-plow drivers plowed the roadway adjacent to Brian Albert's home on January 29, 2022. (Exhibit K, Affidavit of Paul Mackowski, at ¶3.) During that conversation, Mr. Trotta instructed Mr. Mackowski to contact Bill Walsh, the Highway Department Supervisor, regarding plow routes on the night in question because Mr. Walsh was responsible for dealing with day-to-day operations and dispatch. (*Id.*) On February 15, 2022, Mr. Mackowski interviewed Bill Walsh, Operations Manager of the Canton Department of Public Works ("DPW"), who reported that plow driver Brian "Lucky" Loughran was dispatched to plow the roadway adjacent to 34 Fairview Road in the early morning of January 29, 2022. (*See id.* at ¶¶4-5.) Clearly, Trooper Proctor did not want the defense to locate exculpatory witness, Mr. Loughran. A recitation of Mr. Loughran's interview, detailed below, reveals why.

11. On February 15, 2022, defense investigator Paul Mackowski met and interviewed Mr. Loughran. (*Id.* at ¶5.) During that interview, Mr. Loughran explained that he has been the person responsible for plowing the area that includes 34 Fairview Road for three years. (*Id.*) According to Mr. Loughran, he arrived at the DPW yard at 2:00 a.m. on January 29, 2022, and left the yard in his snowplow truck by 2:15 a.m. (*Id.*) He indicated that his route took him down Fairview Road with 34 Fairview Road (Brian Albert's residence) located on his left as he plowed toward Cedarcrest Road during his first pass. Mr. Loughran indicated that he made two or three passes down Fairview Road on the early morning of January 29, 2022, and had good visibility from the truck cab because it was not snowing very heavily when he first started his shift. (*Id.*) Mr. Loughran repeatedly stated that if there was a body in the front yard of 34 Fairview Road, then he absolutely would have seen it. (*Id.*) In a separate statement, Mr. Loughran acknowledged that he was also interviewed by investigators from the Federal Bureau of Investigation ("FBI"), who indicated to him that GPS data from the plow trucks established that he passed 34 Fairview Road at 2:30 a.m. on January 29, 2022.

12. As set forth in Mr. Mackowski's affidavit, Mr. Loughran was also asked if he recalled anything unusual at 34 Fairview Road during his early morning shift. (*Id.* at ¶6.) Mr. Loughran indicated that sometime between 3:30 a.m. and 4:00 a.m., when he was plowing Cedarcrest

Road, he looked toward Fairview Road and observed a Ford Edge parked on the right side of the street in front of 34 Fairview Road. (*Id.*) He indicated that the vehicle's lights were off, and he could not see whether anyone was inside. (*Id.*) When asked why the Ford Edge stood out to him, he explained that he was surprised to see that a vehicle had parked in front of the residence because it was after 3:30 a.m., it was snowing, and he hadn't seen any other moving or parked vehicles on that road during his prior passes through the area. (*Id.*) Mr. Loughran further indicated that he did not want to "plow in" the Ford Edge, so he continued driving down Cedarcrest rather than turning onto Fairview Road as he had planned. (*Id.*) Mr. Loughran indicated that he did not pass by 34 Fairview Road again (after seeing the Ford Edge) until sometime after 6:30 a.m. on January 29, 2022, at which point emergency vehicles had already left the area. (*Id.*) Thus, Mr. Loughran is unequivocal that O'Keefe's body was *not* lying in Brian Albert's front yard when Mr. Loughran passed by 34 Fairview Road at least two times between 2:15 a.m. and 3:30 a.m. on January 29, 2022. (*Id.*)

13. It is hard to imagine a more exculpatory statement. Mr. O'Keefe's bleeding and injured body sprawled on the lawn near the street would have been on obvious display if Ms. Read struck him with her vehicle and left him to die on Brian Albert's front lawn. Lucky Loughran drove his DPW-issued brightly lighted snowplow past 34 Fairview Road on January 29, 2022, multiple times between 2:00 a.m. and 3:00 a.m., before any snow had accumulated, and O'Keefe's body was not there. (*Id.*, at ¶5.) To be clear, Mr. Loughran consistently reiterated to law enforcement that if O'Keefe had been lying unresponsive in Brian Albert's front yard, then he would have seen it. Similarly, as noted *supra* none of the seven witnesses who left Brian Albert's residence after midnight on January 29, 2022, observed Mr. O'Keefe's injured body in the snow mere feet from the road they drove on to leave. Indeed, none of the individuals who collectively passed by 34 Fairview Road multiple times (Mr. Loughran [twice], Jennifer McCabe, Matt McCabe, Julie Nagel, Brian Higgins, Colin Albert, Caitlin Albert, or Sarah Levinson) observed an injured Mr. O'Keefe lying in Brian Albert's front lawn during the early morning hours between 12:30 a.m. and 3:30 a.m. on January 29, 2022. But notably, a Ford Edge was parked directly in front of where O'Keefe's body was found after approximately 3:30 a.m. that morning.

14. Shockingly, according to law enforcement records obtained pursuant to a recent Freedom of Information Act ("FOIA") request obtained from the Bridgewater State University

Police Department, Colin Albert, who was present at Brian Albert's house on the night in question drove at the time a 2018 Ford Edge.⁵ (Exhibit L, Responsive Documents Obtained from Bridgewater State University Police Department, at 1.) **Thus, a vehicle matching the description of Colin Albert's car was moved and parked in front of Brian Albert's residence at 3:30 a.m. on January 29, 2022, in the exact location that would effectively hide where Mr. O'Keefe's body was found mere hours later.** (See Exhibit K, at ¶6; Exhibit L.) As shown in the photographs attached hereto in Exhibit C, Colin Albert is Trooper Proctor's close family friend.

15. In spite of the fact that Trooper Proctor's longtime family friend, Colin Albert, was present at Brian Albert's home in the early morning of January 29, 2022, Trooper Proctor made sure Colin Albert's name was never mentioned in any of the police reports initially produced to the defense in connection with this case. **Indeed, Trooper Proctor omitted Colin Albert's name from every single initial report notwithstanding that he was told by numerous witnesses that Colin Albert was present on the night in question.** For example, according to Trooper Proctor's handwritten notes memorializing his interview with witness Juliana Nagel on October 5, 2022—which were only produced following this Court's recent order compelling the production of all handwritten notes on September 29, 2023—Juliana Nagel told Trooper Proctor that the following individuals were at 34 Fairview Road for Brian Albert, Jr.'s birthday, "Brian, Juliana, Mary Kent, Emily Fabiano, Courtney Alba, **Colin Albert**, and Sara Levinson." (Exhibit M, Trooper Proctor's October 12, 2022, Handwritten Notes Memorializing Juliana Nagel's Interview.) Yet, in Trooper Proctor's October 12, 2022, police report memorializing his interview with Juliana Nagel, which was produced to defense counsel, Trooper Proctor omitted Colin Albert's name from the list of people present at 34 Fairview Road on the night in question, instead, writing "Brian, Mary Kent, Emily Fabiano, and Sara Levinson were at the house that night . . . Mary, Emily, and Courtney left around 11:00 p.m. prior to the arrival of [Brian's parents]." (Exhibit A, October 12, 2022, Police Report Re Interview with Juliana Nagel.) Significantly, law enforcement declined to interview Colin Albert in connection with this case until August 9, 2023—one year and eight months after O'Keefe's death. On August 9, 2023,

⁵ On August 20, 2022 (mere months after Mr. O'Keefe's death), Colin Albert was pulled over by law enforcement in a black 2018 Ford Edge, which is registered to his mother, Julie Albert. (Exhibit L.)

Trooper Proctor personally conducted an *unrecorded* interview of his longtime family friend, Colin Albert, in connection with this case—by himself, with no other law enforcement officers present. (Exhibit N, August 9, 2023, Trooper Proctor Interview with Colin Albert.)

Unsurprisingly, Trooper Proctor’s report makes no mention whatsoever of his longstanding relationship with Colin Albert. (*See Exhibit N.*) Instead, Trooper Proctor’s report memorializing his belated, unrecorded interview with Colin Albert, merely states that there was “never any animosity between him and John” and that Colin left 34 Fairview Road before John arrived. In sum, Trooper Proctor’s bias and prejudice against Ms. Read and in favor of the Commonwealth’s case permeates this case. (*Id.*) Trooper Proctor has demonstrated a willingness to be dishonest and/or omit critical information absent a court order. Thus, the instant Motion is necessary to vindicate Ms. Read’s constitutional right to confront and cross-examine the prosecution’s witnesses at her trial.

II. ARGUMENT

1. Under *Commonwealth v. Lampron*, 441 Mass. 265 (2004), a court may issue a pretrial summons for records in the possession of third parties if the party seeking the summons shows that (1) the documents are evidentiary and relevant; (2) the documents are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) the party cannot properly prepare for trial without inspection of the records before trial and that the late disclosure of the records might unreasonably delay trial; and (4) the application is made in good faith and is not intended as a general “fishing expedition.” *Lampron*, 441 Mass. at 269. As explained below, the categories of records sought by this motion meet all four prongs of the *Lampron* test.

A. THE REQUESTED RECORDS ARE EVIDENTIARY AND RELEVANT

2. To satisfy the first requirement of *Lampron*, the defendant must make a factual showing “that the . . . evidence sought has a ‘rational tendency to prove [or disprove] an issue in the case.’” *Com. v. Jones*, 478 Mass. 65, 68 (2017), quoting *Lampron*, 441 Mass. at 269-270. To meet this standard, “the defendant need not make a showing that the records *actually* contain information that carries, for example, the potential for establishing the unreliability of either the criminal charge or a witness on whose testimony the charge depends.” *Com. v. Sosnowski*, 43 Mass. App. Ct. 367, 373 (1997). Rather, the defendant must only advance, in good faith, at least some factual basis indicating how the records are likely to be relevant to an issue in the case. *See*

id. Relevance is a “broad concept” and “any information which tends to establish or at least shed light on an issue is relevant.” *Adoption of Carla*, 416 Mass. 510, 513 (1993); *see also Com. v. Tucker*, 189 Mass. 457, 467 (1905) (explaining evidence is relevant and admissible if, in connection with other evidence, “it helps a little”).

3. The requested communications have a rational tendency to prove Trooper Proctor’s bias and personal relationship with the witnesses (and third party culprits) in this case. Indeed, the right of a criminal defendant to cross-examine a prosecution witness to show bias is guaranteed by the Sixth Amendment and article 12 of the Massachusetts Declaration of Rights. *Commonwealth v. Tam Bui*, 419 Mass. 391, 400 (1995). As explained by the Supreme Judicial Court, “[a] defendant has the *right* to bring to a jury’s attention any “circumstance which may materially affect” the testimony of an adverse witness which might lead the jury to find that the witness is under an “influence to prevaricate.”” *Commonwealth v. Aguiar*, 400 Mass. 508, 513 (emphasis in original) (citing *Commonwealth v. Haywood*, 377 Mass. 755, 760 (1979) and *Commonwealth v. Redmond*, 357 Mass. 333, 338 (1970)). “A judge may not restrict cross-examination of a material witness by foreclosing inquiry into a subject that could show bias or prejudice on the part of the witness.” *Id.* (citing *Commonwealth v. Martinez*, 384 Mass. 377, 380 (1981))

4. For example, in *Commonwealth v. Aguiar, supra*, 400 Mass. 508 (hereafter “*Aguiar*”), defendant sought to impeach a material witness for the prosecution through both the cross-examination of the witness himself and through extrinsic evidence. In that case, the trial court disallowed the defendant from attacking the witness’ credibility by admitting evidence that the witness had a motive to lie because the witness (and victim) were drug dealers and that the defendant had threatened to turn them in to the police. *Id.* at 512. The trial court excluded admission of this evidence on the basis that the witness and victim had never been convicted of any crimes involving drug dealing, and thus, the admission of such evidence was improper and inadmissible. In reversing defendant’s conviction and remanding the case for a new trial, the Supreme Judicial Court made clear:

The relationship between the defendant and the witness and the victim is clearly relevant to impeach the credibility of the witness. **The evidence that the defendant sought to introduce could show a bias or prejudice on the part of the witness in relation to the defendant. The defendant had the right to have the whole**

relationship [between the witness and the victim and the defendant] presented to the jury.

Id. at 514-515. The Supreme Judicial Court further held that bias may be introduced through cross-examination or extrinsic evidence. *Id.* (citing *Commonwealth v. Brown, supra*, 394 Mass. 394, 397 (1985)).

5. Here, like in *Aguiar*, communications establishing the nature and extent of Trooper Proctor's relationship with material witnesses in this case is evidentiary and relevant, and establishes Trooper Proctor's bias against Ms. Read and in favor of his close family friends, the McCabes and Alberts. *See id.* at 513-515. Indeed, extrinsic evidence establishing a relationship between Trooper Proctor, Trooper Proctor's wife, and the prosecution's material witnesses in this case, namely Jennifer McCabe, Colin Albert, Brian Albert, Chris Albert, and Julie Albert is clearly relevant to impeach the Commonwealth's lead investigating officer and establish bias and prejudice against Ms. Read and in favor of the prosecution witnesses (who the defense, notably, alleges are third party culprits). Furthermore, as explained in *Aguiar*, Trooper Proctor's "whole relationship" with the prosecution witnesses is evidentiary and relevant and may be presented to the jury through extrinsic evidence. *See id.*

6. Indeed, despite being placed on notice regarding Trooper Proctor's preexisting relationship with the McCabe family, the Commonwealth, through ADA Lally, represented to this Court that they have no relationship with one another, don't socialize with one another, and have never been to one another's homes. Apparently, like numerous other representations to this Court by the Commonwealth, that was a lie. As discussed above in Section 1.B. at ¶¶6-7, *supra*, on September 25, 2023, Trooper Proctor was caught surreptitiously meeting with the Commonwealth's seminal witness, Jennifer McCabe, ***at his personal residence for what Jennifer McCabe described as a "social visit."*** Clearly, there are communications between Jennifer McCabe, Trooper Proctor, and Elizabeth Proctor that were never produced to the defense and will further establish the existence of a relationship between Trooper Proctor and Jennifer McCabe. For Jennifer McCabe to even know where Trooper Proctor's residence was located, there would *have* to be communications in furtherance of that after-hours in-person meeting at Trooper Proctor's personal residence. Furthermore, any communications between and among Jennifer McCabe, Trooper Proctor, and his wife, Elizabeth Proctor, between January 29, 2022, and present (which, by virtue of their surreptitious meeting on September 25, 2023, must

exist) directly bear on Trooper Proctor's bias and relationship with prosecution witness Jennifer McCabe and possibly others, including Matt McCabe. The requested records will shed light on the nature and extent of their relationship, which Ms. Read is constitutionally entitled to investigate and present in her defense at trial.

7. Similarly, as discussed, *supra*, in Section I.B. at ¶8, Trooper Proctor failed to document and/or otherwise report three separate searches of Brian and Nicole Albert's home located at 34 Fairview Road, which he purportedly conducted by himself, on February 8, 2022, February 11, 2022, and February 18, 2022, respectively. Any communications between and among Trooper Proctor (on the one hand), and Brian and Nicole Albert (on the other hand), during the relevant time period, which may provide context and information regarding these undocumented searches of the Albert Residence, is necessary and relevant to Ms. Read's defense.

8. As set forth above, the requested communications constitute (1) extrinsic evidence further establishing Trooper Proctor's bias and prejudice against Ms. Read and in favor of the prosecution witnesses because of his longstanding (and continued) relationship with them; and/or (2) statements of material witnesses.

B. THE REQUESTED RECORDS ARE NOT OTHERWISE PROCURABLE REASONABLY IN ADVANCE OF TRIAL BY EXERCISE OF DUE DILIGENCE

9. Second, *Lampron* requires that the requested records "are not otherwise procurable reasonably in advance of trial by exercise of due diligence." *Lampron*, 441 Mass. at 269.

10. Defendant has no way of obtaining the requested communications from Trooper Proctor, Jennifer McCabe, and/or Elizabeth Proctor absent an order of this Court. As discussed in Section I.C., *supra*, Trooper Proctor has demonstrated an unwillingness to provide exculpatory information absent an explicit order from this Court. Similarly, Jennifer McCabe has contested the discovery of all information sought by the defense. The requested communications only exist in a form available to the defense on these individuals' personal cell phones, which are in their exclusive control. As explained in prior Rule 17 motions before this Court, cell phone providers do not maintain records of substantive communications such as text messages and iMessages. Moreover, Facebook and other social media companies will not release electronic

communications absent a warrant from law enforcement. Accordingly, unless this Court grants the instant request for issuance of a summons for production of these communications from the respective parties, Ms. Read cannot obtain these critical records.

C. THE DEFENSE CANNOT EFFECTIVELY PREPARE FOR TRIAL WITHOUT THESE RECORDS AND THE FAILURE TO OBTAIN THIS INFORMATION MAY UNREASONABLY DELAY TRIAL

11. Third, *Lampron* requires that the party seeking the records show that he or she cannot properly prepare for trial without inspection of the records before trial and that the late disclosure of the records might unreasonably delay trial. *Lampron*, 441 Mass. at 269.

12. Here, Ms. Read needs access to this information well in advance of trial in order to conduct further investigation regarding Trooper Proctor's continued personal relationship with the Commonwealth's witnesses in this case. Ms. Read needs access to the requested communications in order to effectively prepare her cross-examinations of Trooper Proctor, Jennifer McCabe, Colin Albert, Chris Albert, Julie Albert, and Brian Albert. Moreover, as discussed in detail above, Trooper Proctor was caught having a *surreptitious meeting* with a material prosecution witness in this case (namely, third party culprit Jennifer McCabe) at his personal residence. Thus, the requested communications surrounding this (and other meetings) may reveal information necessitating further pretrial motions, including a motion to dismiss based on extraordinary governmental misconduct. Moreover, the requested communications (i.e. communications between Trooper Proctor, Brian Albert, and Nicole Albert regarding the subsequent discovery of additional pieces of taillight, the details of which were never properly documented) may reveal the existence of additional witnesses whom the defense will need to interview in advance of trial. As such, Ms. Read cannot effectively prepare for trial without obtaining the records in advance of trial and the late disclosure of the records will delay trial.

D. THE INSTANT REQUEST IS NOT A FISHING EXPEDITION

13. Fourth, *Lampron* requires a party seeking a summons to show that the application is made in good faith and not merely as a "fishing expedition." *Lampron*, 441 Mass. at 269.

14. The instant request is not a fishing expedition. Here, Ms. Read's request is narrow and targeted to records and information that is known by the defense to be in the

possession of Jennifer McCabe, Trooper Proctor, and Elizabeth Proctor. As discussed in detail in the 15 pages above, Trooper Proctor was caught surreptitiously meeting with the Commonwealth's seminal witness, Jennifer McCabe on September 25, 2023, *at his personal residence for what Jennifer McCabe described (after being caught) as a "social visit"*. Clearly, there are communications between Jennifer McCabe, Trooper Proctor, and Elizabeth Proctor that were never produced to the defense and will further establish the existence of a relationship between Trooper Proctor and Jennifer McCabe, thereby further establishing a debilitating bias by the lead investigator in this case. For Jennifer McCabe to even know where Trooper Proctor's residence was located, there would *have* to be communications in furtherance of that after-hours in-person meeting at Trooper Proctor's private home. Jennifer McCabe *has conceded* a personal relationship with Trooper Proctor and his wife. The defense already has significant evidence establishing that Trooper Proctor and the McCabes were family friends long before this case. The defense is entitled to communications that establish the nature (and extent) of their relationship following O'Keefe's death. Furthermore, the defense has made a narrow and targeted request for communications between Trooper Proctor (on the one hand), and Brian Albert and Nicole Albert (on the other hand) between January 29, 2022, and February 18, 2022, which will shed light on the coordination and execution of Trooper Proctor's three separate undocumented searches of the Albert residence in February 2022.

15. Accordingly, as set forth above, the defense has satisfied its burden under *Lampron*. As such, Ms. Read respectfully requests that this Court issue the Order attached hereto and require Trooper Proctor, Elizabeth Proctor, and Jennifer McCabe to produce the requested records to the criminal Clerk's Office in advance of trial.

//

//

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



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

David Yannetti

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

November 16, 2023

CERTIFICATE OF SERVICE

I, Attorney Elizabeth Little, hereby certify that I served the "Defendant's Motion for Order Pursuant to Mass. R. Crim. P. 17 Directed to Jennifer McCabe, Trooper Proctor, and Elizabeth Proctor" upon the Commonwealth by emailing a copy on November 16, 2023, to Norfolk County Assistant District Attorney Adam Lally at adam.lally@mass.gov.

11/16/2023

Date



Elizabeth S. Little