**COMMONWEALTH OF MASSACHUSETTS**

**NORFOLK, SS:**

**SUPERIOR COURT DEPARTMENT**
**CRIMINAL DOCKET NO. 2482CR00043**
**2382CR00313**

**COMMONWEALTH**

**v.**

**AIDAN KEARNEY**

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# DEFENDANT'S MOTION TO COMPEL RULE 14 DISCOVERY AND FOR ISSUANCE OF RULE 17 SUMMONS

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Now comes Mr. Aidan Kearney, defendant herein, and respectfully requests that the Court order the production of statements referenced herein below and further authorize the clerk-magistrate to issue a Mass. R. Crim. P. Rule 17 summons to Apple, Inc., via email as requested by Apple to: LawEnforcement@Apple.com (the designated address for Court orders) for:

1. Any and all emails or text messages sent or received beginning on August 10, 2023 to the present, associated with the Apple iphone and /or "icloud" account assigned to private subscriber Michael Morrissey, Norfolk County District Attorney ("the subscriber") be provided (subscriber's personal email address to be provided under separate cover to be filed under preliminary impoundment subject to Court's order);
2. Further, that the Norfolk Superior Court Clerk's Office receive and retain the information under impoundment;

3. Further, that the Court appoint a special master[1] independent from, but at the expense of the Norfolk County District Attorney to review the content provided to the Court and provide to the parties all Rule 14 discoverable statements (a) between and among the subscriber and any civilian witnesses or law enforcement witnesses or alleged victims, and (b) any ex parte statements to the judiciary concerning the defendant herein or any other witness or person connected to the defense of the above captioned cases or the pending case in Dedham District Court involving the same complainant; and
4. That DA Morrissey be personally ordered to provide any other Rule 14 discovery in his possession, custody or control whether on paper, storage devices, personal or office devices, and wherever situated, including but not limited to the readable, accessible, full extraction from Mr. Kearney's phone referenced in the communications.

As grounds, the defendant states that the subscriber Morrissey is the chief law enforcement officer of Norfolk County and the ultimate authority over all Norfolk County assistant prosecutors, whether designated assistant or special assistant district attorneys. As such, he is part of and in fact the leader of the prosecution teams in the above captioned matters, ethically prohibited like any other attorney from engaging in ex parte communications with justices on pending matters. Likewise, and equally axiomatic, any written or substantially verbatim recorded statements he receives or participates in from civilian or police witnesses or alleged victims are statements that must be disclosed to the defense under Rule 14 of the Massachusetts Rules of Criminal Procedure.

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[1] The District Attorney is incapable of policing his own employees where he himself is engaging in improper communications and skirting discovery and public records requirements, necessitating a special master. See *Graham v. District Attorney, Hampden District*, 493 Mass. 348 (2024) (Appointing special master to investigate and review discovery violations and concealment of documents.)

Here, the defense team has received and publicly shared whistleblower information that DA Morrissey has personally communicated in an ex parte fashion with the then-Chief Justice of the District Court, the then-presiding Justice of the Stoughton District Court, and other high-level court personnel disparaging the defendant therein, through the use of a private "burner" email account, with the obvious intent to avoid scrutiny from the public through public records requests. See ex. B to October 17, 2024 letter to special prosecutor Cosgrove from co-counsel Bederow, attached hereto in its entirety as exhibit A. DA Morrissey's communication to the Court personnel also contained a screenshot of a partial communication (i.e. rule 14 discoverable statement) from an alleged victim listed in one of the indictments against Mr. Kearney. Id. (DA Morrissey complaining about "leaks" of public information to defendant Kearney according to "a number of witnesses in this matter" and appending one such statement in his personal possession in the ex parte communication.) Morrissey's illicit communication literally solicits responses from the justices and refers to additional statements, justifying the defense inquiry for further documents and communications.

To the extent the District Attorney or his agents have gathered such undisclosed statements from a "number of witnesses", and/or communicate with such persons on their personal devices, the entirety of such statements are discoverable under Rule 14 and the use of a personal device does not sanitize these communications from discovery. See *Friedman v. Div. of Ad. Law Appeals*, 106 Mass. App. Ct. 806, 811 n. 6, (Appeals Court noting and leaving undisturbed successful request for agency employees personal cell phone usage where public matters discussed). Further, the plain language of Rule 14 makes no distinctions as to the locations of discoverable statements, and is focused instead on their possession, custody or control. See Mass. R. Crim P. 14, generally. If a prosecutor brings a written witness statement

or a medical examiner's paper copy of a report home from the office it does not change the equation, and as we evolve into the digital age, their choice to receive, create and store statements with witnesses or other discovery on their personal electronics equally carries no weight as far as Rule 14 is concerned. Instead, the Court should be focused on the obvious attempt to elude discovery obligations, sanction such actors when discovered, and make broad findings and pronouncements that such communications must be routinely disclosed, and when they are not, sanctions will be applied.

DA Morrissey's ex parte communication was a complaint to the presiding judge sitting on Mr. Kearney's case attributing negative conduct to Mr. Kearney's on a private email. This knowing and willful violation begs the question whether there were equally discoverable responses from the judiciary, and if so, did Morrissey cover them up or delete them. The other obvious issue raised is whether there are other discoverable communications memorialized and hidden away on his personal devices.

Where DA Morrissey obviously engaged in a scheme to avoid discovery and public record scrutiny of his attempt to influence justices against Mr. Kearney, he cannot now be trusted to simply agree and comply with the court's order to provide all such communications, when he has already been caught. He has displayed a brazen proclivity to skirt public records and discovery rules. As such, he has shed himself of any presumption of compliance with the rules. The appointment of a special master to ensure compliance with a strong and broad discovery order is appropriate in these circumstances.

Part of such an order must include a Rule 17 summons to the source and the receptacle for all such communications, Apple, Inc. Apple, Inc. is a separate, neutral third party that can

provide some measure of confidence that the items have actually been provided. In this respect, given DA Morrissey's subterfuge, there is no other trustworthy source to obtain the materials.

"Before ordering that a summons issue for such records, a judge hearing a rule 17(a)(2) motion must evaluate whether the *Lampron* requirements of relevance, admissibility, necessity, and specificity have been met." *Commonwealth v. Dwyer*, 448 Mass. 122, 418 (2006). Specifically, Rule 17(a)(2) requires that "[t]he party moving to subpoena documents to be produced before trial must establish good cause, satisfied by a showing (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. Dwyer*, 448 Mass. 122, 140-141 (2006) (quoting *United States v. Nixon*, 418 U.S. 683, 699-700 (1974)) (internal quotations omitted).

To satisfy the first of the four requirements set out in *Dwyer*, the defendant must "make a factual showing that the documents sought are relevant and have evidentiary value and that potential relevance and conclusory statements regarding relevance are insufficient…" *Dwyer*, 448 Mass. at 141-142. Under Rule 17 (a)(2), "the defendant must show that the documentary evidence sought has a rational tendency to prove or [disprove] an issue in the case." *Commonwealth v. Lampron*, 441 Mass. 265, 270 (2004) quoting (*Commonwealth v. Fayerweather*, 406 Mass. 78, 83 (1989)) (internal quotations omitted). The second requirement imposes on the moving party an affirmative obligation to show that no other source likely exists for the desired records. *Dwyer*, 448 Mass. at 142. The third and fourth requirements of the rule

serve as a reminder that the limited purpose of Rule 17(a)(2) is to authorize a court "to expedite the trial by providing a time and place before trial for the inspection of the subpoenaed materials." *Dwyer*, 448 Mass. at 142.

Here, the statements and discovery sought are potentially exculpatory and reasonably expected to provide evidence shedding light on prosecution bias and improper ex parte communications prejudicing Mr. Kearney to the Court. Where DA Morrissey personally possessed and used witness statements, an order for him to personally provide all such undisclosed statements is warranted. In the circumstances, the defense is amply justified in asking for any and all information concerning statements and ex parte communications from the involved parties for cross-examination--all relevant, powerfully exculpatory evidence.

The information in the records is not obtainable in any alternative trustworthy and admissible manner, and prior inspection is necessary for a fair trial. The information request is based on the personal knowledge of the undersigned after viewing the aforementioned whistleblower information attached hereto. Finally, the records sought are not a "general fishing expedition" into immaterial areas. See *Commonwealth v. Lampron*, 441 Mass. 265 (2004) (setting forth requirements for summons for third party records). Rather, the bias and potential bad faith of investigators and their collusion with witnesses for improper purposes is always relevant and admissible.

For the foregoing reasons, the defendant asks the Court to authorize the clerk magistrate to issue a Rule 17 subpoena compelling the production of the records as listed above, and for entry of a Rule 14 order as requested.

Dated:

Respectfully Submitted
AIDAN KEARNEY
Defendant
By his attorney,

**TIMOTHY J. BRADL /S/__________**
Timothy J. Bradl, Esq. BBO #561079
Law Office of Timothy J. Bradl, P.C.
88 Broad St. Suite 101
Boston, MA 02110
(617) 523-9100

CERTIFICATE OF SERVICE

I, Timothy J. Bradl, do hereby certify that on the foregoing date I served this document in hand by first class mail by email on all counsel of record.

**TIMOTHY J. BRADL /S/____**
Timothy J. Bradl

AFFIDAVIT OF COUNSEL

I, Timothy J. Bradl, on oath do hereby depose and state under the pains and penalties of perjury, that the foregoing facts stated and/or documents proffered are true and accurate to the best of my knowledge, information and belief.

Signed on the foregoing date under pains and penalties of perjury:

**TIMOTHY J. BRADL /S/____**
Timothy J. Bradl

**COMMONWEALTH OF MASSACHUSETTS**

**NORFOLK, SS:**

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**v.**

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**COURT ORDER FOR RULE 17 SUMMONS**

It is hereby ordered that Apple, Inc., at LawEnforcement@Apple.com (the designated address for Court orders) provide the following records to the Clerk-Magistrate of this Court, upon service of a Rule 17 subpoena issued by the said Clerk Magistrate, within 30 days of receipt of this order:

Certified copies of any and all email messages sent or received beginning on August 10, 2023 to the present associated with the "icloud" email account ______________________, assigned to private subscriber Michael Morrissey, Norfolk County District Attorney ("the subscriber") be provided within 30 days.

SO, ORDERED.

BY THE COURT:

______________________, J
JUSTICE, SUPERIOR COURT