SUPERIOR COURT
COUNTY OF NORFOLK

COMMONWEALTH OF MASSACHUSETTS,	:	
	:	
-against-	:	Docket No. 2382CR00313
AIDAN KEARNEY,	:	
Defendant.		

MEMORANDUM OF LAW IN SUPPORT OF MOTIONS TO DISMISS THE INDICTMENTS

Mark A. Bederow
Law Office of Mark A. Bederow, P.C.
Carnegie Hall Tower
152 West 57th Street
8th Floor
New York, New York 10019
212.803.1293
mark@bederowlaw.com

Timothy J. Bradl
Law Office of Timothy J. Bradl, P.C.
88 Broad Street
Suite 101
Boston, Massachusetts 02110
617.523.9100
TBradl@bradllaw.com

September 17, 2025

ARGUMENT

POINT I

The Indictments Must Be Dismissed Because the Commonwealth Impaired the Integrity of the Grand Jury Presentation

A. The Applicable Law

An indictment must be dismissed where the integrity of the grand jury proceeding has been impaired by an unfair and misleading presentation. *Commonwealth v. O'Dell*, 392 Mass. 446, 446-47 (1984). If the Commonwealth knowingly uses false testimony to procure an indictment, the integrity of the grand jury proceeding has been impaired, and the indictment must be dismissed. *Commonwealth v. Mayfield*, 398 Mass. 615, 620 (1986). A prosecutor's reckless disregard for the truth that leads to the admission of false or deceptive evidence may also warrant dismissal of an indictment. *Commonwealth v. Barlow-Tucker*, 493 Mass. 197, 208-09 (2024); *Mayfield*, 398 Mass. at 621.

Dismissal of an indictment requires a finding that the false or deceptive evidence "probably was significant" and that it was presented to the grand jury "with the intention of seeking an indictment." *Mayfield*, 398 Mass. at 621; *Commonwealth v. Brown*, 490 Mass. 171, 185 (2022) (improper evidence resulting from "the prosecutor's design" is more

problematic than evidence received in response to a grand juror's question).

A prosecutor's introduction of part of a defendant's statement but which excludes a favorable part, which changes the context of the admitted portion, may impair the integrity of the grand jury proceeding. *Mayfield*, 398 Mass. at 620; *O'Dell*, 392 Mass. at 447; *see also*, *Commonwealth v. Bleakney*, 2025 WL 2490553, * 3, Mass.App.Ct. (August 29, 2025).

The "clearly undesirable" admission of uncharged crimes or alleged "bad acts" of the defendant before the grand jury may impair the integrity of the grand jury proceeding. *Commonwealth v. Freeman*, 407 Mass. 279, 282-83 (1990). The "serious risk of prejudice"—which requires dismissal of the indictment—increases where improper evidence of uncharged bad acts is "offered gratuitously by the police or by the prosecutor" rather than admitted in response to a grand juror's question. The risk of prejudice is also increased by a prosecutor's failure to "curtail the line" of improper questioning or by a "blatant attempt to whet the jurors' appetite" with the uncharged evidence. *Id.* at 283; *Commonwealth v. Rakes*, 478 Mass. 22, 31-32 (2017) (prosecutor's "clear and relatively

contemporaneous instruction" mitigated prejudice caused by introduction of unrelated bad acts).

B. The Impairment of the Integrity of the Grand Jury Proceeding

The facts which establish that the Commonwealth impaired the integrity of the grand jury are straight-forward. The critical issue for the grand jury's determination was whether Aidan Kearney intended to intimidate witnesses. But rather than let the grand jury—the exclusive judge of the facts—resolve this key issue through its evaluation of accurate and truthful evidence, special prosecutor Kenneth Mello intentionally misled the grand jury with false and misleading testimony and evidence and introduced evidence of uncharged crimes to smear Mr. Kearney and increase the likelihood that he would be indicted.

As an initial matter, Mr. Mello and Massachusetts State Police ("MSP") Detective Lieutenant ("DL") Brian Tully didn't mince words, making it clear to the grand jury that they expected an indictment: both expressly stated their belief that Mr. Kearney intimidated witnesses (s*ee* Affidavit of Mark A. Bederow, dated September 17, 2025 ("Bederow aff.," ¶¶ 232-33, 236, 249-50, 252, 268); December 19, 2023 transcript, p.7; December 20, 2023 transcript, pp. 4, 8-9). Without more, Mr. Mello's and

DL Tully's blatant attempt to improperly influence the grand jury impaired the integrity of the grand jury proceeding by exploiting their prominent status as a "special prosecutor…here on a special case"[1] and the lead investigator. November 28, 2023 transcript, p. 3; *see* *Commonwealth v. Williams*, 450 Mass. 894, 905-06 (2008) (improper for prosecutor to "place full force of his office behind" witness' credibility by providing unsworn testimony).

Mr. Mello bolstered his and DL Tully's improper opinions of Mr. Kearney's guilt by intentionally and repeatedly eliciting false and misleading testimony from DL Tully (*see* Bederow aff., ¶¶ 198-201, 242-45, 254-66; exhibit VV). ***28 separate times*** Mr. Mello and DL Tully misled the grand jury by giving it the false impression that Mr. Kearney's video episodes were "admissions" of his alleged witness intimidation (*see* Bederow aff., chart in ¶ 245).

Specifically, Mr. Mello elicited patently false testimony from DL Tully which inaccurately suggested to the grand jury that Mr. Kearney's innocuously named hours-long episodes (in which he discussed numerous

[1] Mr. Mello informed the grand jury that he was appointed by the Norfolk County District Attorney as a special prosecutor and that he "came up here on a special case" and then emphasized the high-profile nature of cases involving "Karen Read, Aidan Kearney,Turtleboy." *See* November 28, 2023 transcript, p. 3.

topics unrelated to his interactions with witnesses in the Karen Read case) were little more than brief statements about his interactions and/or commentary about the witnesses, which he named in a manner evincing his intent to intimidate witnesses. Mr. Mello and DL Tully knew prior to the grand jury proceeding that none of this was true (*id.* at ¶¶ 198-208).

What the grand jury didn't know was that the exhibits introduced by Mr. Mello and described by DL Tully as Mr. Kearney's "episodes" were, in fact, edits of Mr. Kearney's actual episodes created by DL Tully at the behest of Katherine Peter, an "enemy" of Mr. Kearney whose atrocious credibility included at least two instances (in 2020 and 2023) where she literally manufactured and forged evidence to harm him (Bederow aff., ¶¶ 116-44, 148-52, 163-67, 177-83, 187-93; exhibit NN, ¶ 4).

Following Ms. Peter's guidance, DL Tully "clipped" what she flagged as "relevant" portions of Mr. Kearney's episodes, renamed his edits so they sounded as if Mr. Kearney created them to emphasize his purported intent to intimidate witnesses, and placed most of them in an "intent" folder he created. In other words, DL Tully created a folder containing edited clips of what ***Ms. Peter*** believed constituted evidence of Mr. Kearney's intent to intimidate witnesses. These edited and

nefariously renamed videos depicting Ms. Peter's and DL Tully's biased opinions were the exhibits presented to the grand jury ostensibly as Mr. Kearney's "episodes" and as proof of his intent to intimidate witnesses (exhibit NN, ¶ 4).

Before DL Tully described this misleading "evidence" to the grand jury, Mr. Mello and DL Tully twice expressed their opinion that Mr. Kearney intended to intimidate witnesses. December 19, 2023 transcript, p. 7; December 20, 2023 transcript, p. 4. Without telling the grand jury that he created and named the "intent" folder with Ms. Peter's input, DL Tully misleadingly informed the grand jury ***14 separate times*** that these videos were maintained in a folder of Mr. Kearney's episodes named "intent" (Bederow aff., chart in ¶ 245, lines 7, 11, 17-28).

Mr. Mello exploited DL Tully's crafty testimony by purposefully not introducing Mr. Kearney's actual episodes into evidence, which further misled the grand jury by concealing the complete substance and context of Mr. Kearney's statements, the admission of which would have diluted the impact (and exposed the falsity of) DL's Tully's testimony, in addition to providing the grand jury with the accurate context of Mr. Kearney's statements and intent, which would have been favorable to him.

Mr. Mello further bolstered his and DL Tully's misconduct at the conclusion of the grand jury proceeding by marshaling already admitted and distorted evidence. First, Mr. Mello (again) informed the grand jury that he and DL Tully believed that Mr. Kearney intimidated witnesses. He then instructed DL Tully to replay three of the most prejudicial and misleading videos that DL Tully edited from Mr. Kearney's actual episodes, and (again) told the grand jury these exbibits came from the "intent" folder (Bederow aff., chart in ¶ 245, lines 7 and 23, lines 10 and 19, lines 11 and 27; ¶¶ 251-54); December 20, 2023 transcript, pp. 4-6.

Mr. Mello ended his presentation of evidence by having DL Tully play and describe an irrelevant video of Mr. Kearney discussing his disappointment with the O'Keefe family. Just like Mr. Mello's presentation of the alleged wiretapping evidence, *infra*, pp. 12-15, this edited "evidence" was nothing more than an uncharged "bad act," as there were no allegations before the grand jury regarding the alleged witness intimidation of any member of the O'Keefe family. This prejudicial evidence clearly was introduced to make Mr. Kearney look bad and to generate sympathy for Mr. O'Keefe and his family shortly before the

grand jury began its deliberations (Bederow aff., ¶¶ 257-67); December 20, 2023 transcript, p. 6.

Lest there be any doubt that Mr. Mello expected the grand jury to return a true bill, immediately before he formally sought Mr. Kearney's indictment, Mr. Mello (again) "testified" as an unsworn witness, unequivocally instructing the grand jury that "we believe that evidence has been presented to you that would allow you to make [the] determination" that Mr. Kearney intended to intimidate witnesses (Bederow aff., ¶ 268); December 2023 transcript, pp. 8-9.

In these circumstances, Mr. Mello's pervasive introduction of false and misleading evidence, which he bolstered with his own improper and unsworn opinion, wasn't made in good faith or otherwise "accidental." *See Mayfield*, 398 Mass. at 620-21. Mr. Mello's conduct was antithetical to his obligation to act as the legal advisor to the grand jury with a duty of fair dealing to Mr. Kearney. Mr. Mello abandoned this duty in furtherance of his specific aim to mislead the grand jury in furtherance of seeking an indictment. *See Commonwealth v. Walczak*, 463 Mass. 808, 836 (2012) ("before the grand jury the prosecutor has the dual role of

pressing for an indictment and being the grand jury's advisor. In the case of conflict, the latter duty must take precedence").

There is irrefutable evidence that Mr. Mello and DL Tully knew they repeatedly misled the grand jury by concealing their collaboration with Ms. Peter before DL Tully sliced and diced Mr. Kearney's episodes into out of context exhibits to support their view of his intent. For months before the grand jury proceeding commenced, they were familiar with the actual names, length and content of Mr. Kearney's episodes. Mr. Mello justified his "discounted" invoice by explaining that he spent hundreds of hours "reviewing some 8 months" of Mr. Kearney's online content. DL Tully accurately described some of Mr. Kearney's episodes in the charging documents he signed and filed in court (Bederow aff., ¶¶ 198-209); exhibits NN, UU, VV.

Nevertheless, Mr. Mello and DL Tully relied upon Ms. Peter's guidance to assemble evidence for the grand jury. For no discernible purpose other than to mislead the grand jury, DL Tully edited and renamed these episodes, and then misleadingly told the grand jury they came from a folder of Mr. Kearney's episodes named "intent" (*see* exhibit NN, ¶ 4).

There was no legitimate reason for DL Tully to edit and rename Mr. Kearney's episodes—or for Mr. Mello to conceal from the grand jury the full context and substance of Mr. Kearney's statements—unless they intended to keep the grand jury ignorant "of circumstances which undermine the credibility of evidence that is likely to have affected their decision to indict." *Commonwealth v. Connor*, 392 Mass. 838, 854 (1984); *see Commonwealth v. Fernandes*, 483 Mass. 1, 7-8 (2019); *O'Dell*, 392 Mass. at 447 ("withholding of a portion of the defendant's statement distorted the portion that was repeated to the grand jury in a way that so seriously tainted the presentation to that body that the indictment should not have been allowed to stand") *cf. Barlow-Tucker*, 493 Mass. at 208-10 (grand jury wasn't misled by negative content in portion of blog post read to grand jury where prosecutor entered complete and accurate copy of blog as an exhibit for grand jury to evaluate prior to deliberations).

The circumstances here are worse than in *Bleakney*, 2025 WL 2490553 at *2, where a few weeks ago, the court dismissed an indictment for multiple rapes of a child under the age of 14 because the prosecution misled the grand jury about the full context of the defendant's

statements. There, the prosecutor admitted a portion of the defendant's statement and introduced into evidence a flash drive containing a copy of the defendant's entire statement. The prosecutor didn't play the full recording before the grand jury, but the flash drive was available for the grand jury during its deliberations. The Court dismissed the indictments, holding that the prosecutor intentionally misled the grand jury by attempting to conceal the full context of the defendant's statement by hiding it in plain sight. *Id*. at 3.

Mr. Mello's conduct was far more egregious than the deception that required dismissal of the indictment in *Bleakney*. Mr. Mello and DL Tully didn't just "hide the ball" like the prosecutor in *Bleakney*, they distorted the actual evidence and then "destroyed the ball." Mr. Mello introduced ***only*** cherry-picked, out of context statements from edits of Mr. Kearney's actual episodes which ensured it was impossible for the grand jury to consider the accurate context of Mr. Kearney's full statements and his episodes even if it desired to do so.

Mr. Mello's and DL Tully's subterfuge tricked the grand jury into believing that the statements DL Tully edited from Mr. Kearney's episodes with Ms. Peter's assistance provided the full context of Mr.

Kearney's statements, such that it even appeared Mr. Kearney used the content of DL Tully's edited clips to name his episodes before he filed them in a folder named "intent" when they knew the exact opposite was true. *Commonwealth v. Hunt*, 84 Mass.App.Ct. 643, 655 (2013); *O'Dell*, 392 Mass. at 447 (withholding of the completeness of defendant's statement "distorted" the evidence, "tainted" the presentation and required dismissal).

Short of literally instructing the grand jury that as a matter of law it must find that Mr. Kearney intended to intimidate witnesses (a line Mr. Mello approached with his unsworn testimony), it is hard to fathom a more compelling example of how a prosecutor's misconduct impaired the integrity of a grand jury proceeding on the critical issue for the grand jury determination's than Mr. Mello did regarding Mr. Kearney's alleged intent to intimidate witnesses. *See Fernandes*, 483 Mass. at 7-8; *Mayfield*, 398 Mass. at 620-22, *Connor*, 392 Mass. at 854 (1984); *O'Dell*, 392 Mass. at 448-49.

But Mr. Mello engaged in additional misconduct to make sure he secured Mr. Kearney's indictment for witness intimidation. He dedicated the entire first day of the grand jury proceeding to a topic that had

nothing to do with alleged witness intimidation: smearing Mr. Kearney with irrelevant and prejudicial allegations of uncharged "bad acts." Mr. Mello examined three witnesses, introduced an unauthenticated and unreliable recording provided to DL Tully by Ms. Peter and bolstered Stephen Scanlon's irrelevant testimony by having Sergeant ("Sgt.") Yuri Bukhenik regurgitate Mr. Scanlon's testimony by reading into evidence the full contents of his hearsay interview with him, all for the purpose of making the grand jury aware of an uncharged wiretapping allegation against Mr. Kearney (*see* Bederow aff., ¶¶ 213-23); November 28, 2023 transcript, pp. 8-9, 14-15, 18-19, 23-30.

Rather than conform his conduct to what was required from the legal advisor to the grand jury, Mr. Mello was so out of control that he instructed DL Tully to read the full text of the wiretapping statute into evidence, including the portion which states that a violation is punishable by up to five years imprisonment. Presumably to make sure the grand jury was acutely aware of the seriousness of the uncharged wiretapping allegation, Mr. Mello himself read the definition of wiretapping to the grand jury at the conclusion of his presentation of this uncharged evidence. November 28, 2023 transcript, pp. 8-9, 30-31.

Standing alone, Mr. Mello's obvious intent to smear Mr. Kearney through the introduction of uncharged bad acts was flagrant misconduct that impaired the integrity of the grand jury proceeding and compels dismissal. There is no reasonable view of Mr. Mello's presentation of the uncharged wiretapping evidence that enables the Court to conclude that its admission was "inadvertent." *See* *Commonwealth v. Jenks*, 426 Mass. 582, 587 (1998); *Brown*, 490 Mass. at 185. *See also*, *Freeman*, 407 Mass. at 281-82 (no fatal prejudice where uncharged crimes evidence was admitted in response to a grand juror's question and the prosecutor issued a curative instruction).

Quite the contrary, Mr. Mello's intent to prejudice Mr. Kearney with uncharged "bad act" evidence couldn't have been any clearer. Mr. Mello spent an entire day on this irrelevant issue. He called three witnesses, including the civilian who allegedly was wiretapped. He bolstered that witness' testimony with rank hearsay from his interview with the MSP. He introduced unreliable electronic evidence in support of the allegation. He didn't provide any instructions to the grand jury explaining the purported relevance of the evidence. He didn't caution the grand jury about how to consider the evidence and its limitations. He

didn't instruct the grand jury to disregard the uncharged evidence when considering the charges against Mr. Kearney. The ***only*** instructions he provided on the uncharged evidence were having the text of the wiretapping statute read to the grand jury twice, one of which involved him purposefully alerting the grand jury about the prison sentence associated with a violation of the uncharged crime.

At bottom, there is no reasonable explanation for why Mr. Mello introduced all of this uncharged bad act evidence, without any cautionary instructions but ***did not*** seek an indictment[2] for wiretapping other than he meant to influence the grand jury by prejudicing Mr. Kearney with an uncharged and irrelevant "bad act" so that the grand jury would have a negative opinion of Mr. Kearney while it considered whether to indict him for unrelated acts of witness intimidation.

Given these irrefutable facts, Mr. Mello's brazen introduction of uncharged "bad acts" impaired the integrity of the grand jury proceeding, substantially prejudiced Mr. Kearney, and considered alone or cumulatively with his other prejudicial misconduct, *see* Bederow aff., ¶¶

[2] At a minimum, Mr. Mello should be compelled to explain under oath why this Court shouldn't conclude that his pervasive misconduct was intentional and for the purpose of seeking Mr. Kearney's indictment.

230-69, requires dismissal of the indictments. *See* *Brown*, 490 Mass. at 186; *Rakes*, 478 Mass. at 32; *Jenks*, 426 Mass. at 587; *Freeman*, 407 Mass. at 282-83.

C. The Cumulative Prejudice Caused Mr. Kearney Requires Dismissal

Put simply, Mr. Mello, who vouched for his own credibility by telling the grand jury that he was designated to present a "special case" made such a mockery of his responsibility as the legal advisor to the grand jury with his pervasive misconduct that the entire proceeding was a sham. *See* November 28, 2023 transcript, p. 3. Accordingly, the indictments must be dismissed because the cumulative impact of Mr. Mello's impairment of the integrity of the grand jury proceeding "probably" influenced the grand jury's decision to indict Mr. Kearney. *Brown*, 490 Mass. at 185*;* *Mayfield*, 398 Mass. at 622.

As noted above, Mr. Mello intentionally admitted the prejudicial evidence for the purpose of gaining Mr. Kearney's indictment and at no time did he attempt to mitigate the prejudice he caused by even providing a single cautionary instruction. *See* *Brown*, 490 Mass. at 186; *Rakes*, 478 Mass. at 32; *Jenks*, 426 Mass. at 587; *Freeman*, 407 Mass. at 283. If anything, Mr. Mello's "instructions" to the grand jury did the exact

opposite and caused ***more prejudice***, as did his bolstering of his misconduct with improper "evidence" that he, DL Tully and other witnesses believed Mr. Kearney's intent was to intimidate witnesses (*see* Bederow aff., ¶¶ 213-69).

The prejudice caused by the cumulative impact of Mr. Mello's impairment of the integrity of the grand jury proceeding easily satisfies the "probably influenced the grand jury" standard. It is hard to comprehend how the grand jury couldn't have been improperly influenced by Mr. Mello's and DL Tully's (and Ms. Peter's) opinions of Mr. Kearney's intent, which was bolstered and marshalled by DL Tully's false and misleading testimony regarding evidence from an "intent folder," which grossly distorted the evidence of the names, length, content and context of statements purportedly indicative of Mr. Kearney's criminal intent.

Combined with the shocking amount of uncharged "bad act" evidence introduced against Mr. Kearney at the beginning and end of the presentation, there can be little doubt that the Commonwealth's intentional or reckless misconduct impaired the integrity of the grand

jury proceeding to the extent that it "probably influenced" the grand jury's decision to indict. *Mayfield*, 398 Mass. at 620-22.

POINT II

The Indictments Should Be Dismissed Due to the Commonwealth's Failure to Properly Disclose Specifically Requested Exculpatory and Automatically Discoverable Evidence

A. The Applicable Law

It is axiomatic that due process entitles a criminal defendant to disclosure of all "favorable" or exculpatory evidence in the possession, custody or control of the prosecution. *Brady v. Maryland*, 373 U.S. 83 (1963). This includes "impeachment evidence" or other evidence that may impair the credibility of a prosecution witness. *Giglio v. United States*, 405 U.S. 150 (1972).

An individual prosecutor has "a duty to learn" of any favorable evidence known to the prosecution as a whole, including the police. Thus, the prosecution is obligated to disclose any exculpatory evidence in the possession, custody or control of the police and/or prosecutor's office even if any individual prosecutor may be unaware of its existence. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

The prosecution has an affirmative obligation to disclose exculpatory evidence, irrespective of whether it is alerted to its existence by the defense. However, courts are less forgiving to the prosecution when it fails to disclose exculpatory evidence in response to a "specific" defense request for *Brady* material. *See* *In the Matter of a Grand Jury Investigation*, 485 Mass. 641, 648-49 (2020) (standard of materiality review in *Brady* claim less stringent to defense where specific request made).

When a prosecutor is uncertain whether evidence may or may not be favorable to the defense, the prosecutor must "err on the side of caution and disclose it." *Id.* at 650. The prosecution's "duty of inquiry" and subsequent failure to disclose evidence is based on an objective standard. *Commonwealth v. McFarlane*, 493 Mass. 385, 392-93 (2024); *Commonwealth v. Diaz*, 100 Mass.App.Ct. 588, 594-95 (2022).

In addition to its constitutional obligation to disclose evidence favorable to the defense, the Commonwealth is required under Rule 14 of the Massachusetts Rules of Criminal Procedure ("Rule 14") to "automatically" disclose to the defense in a timely manner certain evidence in its possession, custody or control. Prior to March 2025, this

obligation included mandatory disclosure of "any written or recorded statements made by the defendant," "any facts of an exculpatory nature," "material and relevant police reports…and statements of persons the party intends to call as witnesses." Rule 14(a)(1).

In March 2025, Rule 14 was amended to expand the prosecution's obligation to disclose any evidence in the possession, custody or control of the "prosecution team" (which includes persons who have investigated the case or evaluated it and reported to the prosecution). The amended rule also mandates disclosure of any "written or recorded statements" of persons the prosecutor ***may*** call as a witness and any notes of interviews of these witnesses and all relevant "video and audio recordings." Rule 14(a) and (b).

The new rule explicitly defines "favorable" evidence to include information that "establishes a defense theory," "corroborates the defense version of facts," "calls into question the prosecution's version of facts," and regarding a possible prosecution witness, "any information reflecting bias or prejudice against the defendant." Rule 14(b).

A court has the inherent power to issue sanctions, including up to dismissal of the indictments, if the prosecution fails to comply with its

obligation to timely provide discovery to the defense. *Commonwealth v. Cronk*, 396 Mass. 194, 198 (1985). Dismissal is appropriate where (a) the defendant is prejudiced by the nondisclosure of evidence to the extent he has suffered "irremediable harm" or (b) the prosecutorial misconduct is "so egregious, deliberate and intentional" that it gives rise to a presumption of prejudice. *Bridgeman v. District Attorney for Suffolk District*, 476 Mass. 298, 316 (2017); *see Commonwealth v. Dilworth*, 494 Mass. 579, 592 (2024).

B. The Commonwealth's Failure to Disclose Evidence

Since Mr. Kearney's 2023 indictment, the Commonwealth has exhibited breathtaking indifference to its constitutional and statutory obligations to disclose evidence to the defense. This has included Mr. Mello's patently false representations about the state of discoverable evidence and his failure to comply with a court order to complete discovery by May 8, 2024, which is consistent with his extensive history of being disciplined for neglecting his professional obligations (Bederow aff., ¶¶ 112-13, 272-73, 275; exhibits R, S, ZZ, AAA).

18 months after the court-ordered deadline, the Commonwealth still hasn't satisfied its *Brady* and Rule 14 obligations even though since

2023, numerous of its agents have had actual possession of undisclosed favorable and discoverable evidence, including, but not limited to, Robert Cosgrove, Mr. Mello, DL Tully, Sgt. Bukhenik, Lieutenant ("Lt.") John Fanning, other members of the MSP, and ADA Adam Lally (*see* Bederow aff., ¶¶ 148-60, 163-71, 173-97).

Irrespective of whether Rule 14 required disclosure of any of this evidence before March 1, 2025,[3] any evidence in the Commonwealth's possession, custody or control which was favorable to Mr. Kearney substantively or with respect to undermining the credibility of Ms. Peter, other witnesses or the prosecution's case against him was required to be disclosed as a matter of ***constitutional law*** as "*Brady* material." Indeed, the U.S. Supreme Court has noted that evidence which tends to support a defense attack on the competence or bias of the investigation is favorable to the defense. *Kyles*, 514 U.S. at 446-47.

[3] Evidence related to Ms. Peter and Jennifer McCabe's Facebook messenger messages required disclosure under the old Rule 14. The Peter-related materials included statements made by Mr. Kearney, statements made by Ms. Peter which may have included substantive exculpatory evidence and certainly constituted exculpatory evidence given their content and her history of manufacturing evidence and her clear motive to falsely accuse Mr. Kearney of crimes. Ms. McCabe's messages with either Mr. Kearney or others on his behalf (as she alleged) which she provided to the Commonwealth as proof of his witness intimidation clearly were discoverable. *See* December 5, 2023 transcript, pp. 35-36.

In addition to demands for discovery on February 23 and March 19, 2024, the defense made three extraordinarily specific and well-sourced demands for discovery, *Brady* material and *Giglio* material prior to the March 1, 2025 amendment of Rule 14 (exhibits RR, XX, YY, CCC, DDD).

The Commonwealth's response to these demands of September 12, October 8 and October 17, 2024, was to shrug its shoulders even though the demands couldn't have been more specific as to the information being sought, including exculpatory and discoverable material related to Ms. Peter, DL Tully, Sgt. Bukhenik, and Ms. McCabe.

C. The Specific Demands for Exculpatory & Discoverable Evidence

On September 12, 2024, the defense laid bare for the Commonwealth the basis for our contention that Ms. Peter, Lindsey Gaetani, Leigha Genduso, Mr. Mello, DL Tully and possibly others conspired to have Mr. Kearney's bail revoked by luring him into "intimidating" Ms. Gaetani after they made her a "witness." This conspiracy resulted in the 2024 indictment (exhibit CCC, pp. 5-8, 12-13). As it turns out, Mr. Mello was so personally involved in this plot, that the Court disqualified Mr. Mello from that matter because it agreed with the defense that he was a likely trial witness.

On October 8, 2024, in a 15-page demand outlining what the defense knew about the bizarre relationship between Ms. Peter, Mr. Mello and the MSP, the defense detailed extensive concerns about the Commonwealth's failure to disclose any evidence about Ms. Peter under *Brady*, *Giglio* and Rule 14. The demand referred to Ms. Peter's "direct role in the prosecutions against Mr. Kearney," documented her shocking admissions that she spoke to Mr. Mello on [redacted] of her contacts with him, that she spoke to Mr. Mello "[redacted]" and explained why her communications were "discoverable and favorable" to the defense (exhibit RR, pp. 7-10, 12-15).

This demand included "all evidence and information, in whatever form, Ms. Peter furnished to the Commonwealth and/or MSP involving the investigation or prosecution of Mr. Kearney." It demanded all of Ms. Peter's communications with the Commonwealth or MSP about Mr. Kearney as well as any evidence regarding statements she made to the Commonwealth or MSP, including any "audio or video recordings" (*id*. at 2-3).

On October 17, 2024, after acquiring information from a third party, the defense demanded additional evidence regarding our growing discovery of the nature of the working relationship between and among Ms. Peter, Mr. Mello, DL Tully and others associated with the DA or MSP (exhibit DDD, pp. 5-7).

On March 29, 2025, the defense sent another specific demand to the Mr. Cosgrove, noting that it had been more than five months since the first specific demand, but the Commonwealth still hadn't disclosed ***any*** evidence related to Ms. Peter. This demand referenced the recent amendments to Rule 14 and the Commonwealth's obligations in connection with the new rule (exhibit EEE). Among the information sought was any evidence indicative of Ms. Peter's relationship in the investigation against Mr. Kearney, including evidence of her "interactions and communications" with the "Kearney prosecution team," and the "Read prosecution team," which included at least DA Morrissey, ADA Lally, Laura McLaughlin, Hank Brennan, Mr. Cosgrove, Mr. Mello, any victim advocates, DL Tully, Sgt. Bukhenik, Lt. Fanning, Mr. Proctor and other members of the DA and MSP.

Although the Commonwealth externally ignored these specific demands, internally Messrs. Cosgrove and Mello were acutely aware of the significance of these demands. On December 16, 2024, Mr. Mello forwarded some of his email communications with Ms. Peter and DL Tully to Mr. Cosgrove (exhibits OO, PP, QQ). These emails were entirely favorable to Mr. Kearney: they confirmed that Ms. Peter worked directly with Mr. Mello and DL Tully. They confirmed that Ms. Peter frequently sought input from Mr. Mello and that he assigned tasks to her, including just two days before the grand jury proceeding commenced. They confirmed that Ms. Peter attached private links and discoverable material to Mr. Mello and DL Tully that have not been provided to the defense, and now, on information and belief, have been deleted by Ms. Peter (*see* Bederow aff., ¶¶ 187-90, 297).

Yet the Commonwealth failed to disclose these favorable communications which conclusively prove the prominent role Ms. Peter played in the grand jury investigation, until July 7, 2025—which was ***more than six months*** after Mr. Mello provided them to Mr. Cosgrove. The emails didn't include access to the links Ms. Peter sent to Mr. Mello and DL Tully (Bederow aff., ¶¶ 289-90).

Other than sheer indifference to its discovery obligations, the only possible explanation for this inexcusable delay is that the Commonwealth intentionally suppressed this evidence under a strained interpretation of the old Rule 14 and without regard to the fact that they were obligated to promptly disclose these communications under *Brady* and *Giglio* irrespective of its subjective belief in the reliability of the evidence. *See* *McFarlane*, 493 Mass. at 392-93; *Matter of Grand Jury Investigation*, 485 Mass. at 650; *Diaz*, 100 Mass.App.Ct. at 594-95.

In July 2025—***almost two years*** after the Commonwealth knew it had actual possession of favorable and discoverable evidence which the defense had specifically requested for almost one year, the Commonwealth disclosed a modest number of additional materials. But discoverable and favorable evidence remains undisclosed and in certain cases, has been deleted or destroyed (*see* Bederow aff., ¶¶ 152-53, 155, 168, 180, 184, 187-95, 269).

D. The Commonwealth's Nondisclosure Has Prejudiced Mr. Kearney

Given the Commonwealth's pervasive misconduct and inexplicable years-long failure to comply with its constitutional and statutory

discovery obligations, dismissal of the indictments is appropriate under both bases articulated in *Bridgeman*, 476 Mass. at 316.

Mr. Kearney's defense has suffered "irremediable harm" due to the Commonwealth's unjustifiable failure to disclose favorable evidence, which combined with Ms. Peter's apparent deletion of exculpatory and discoverable evidence in the Commonwealth's actual possession since September and October 2023, has left the defense without an opportunity to acquire important evidence that favors Mr. Kearney's defense. At a minimum, the prosecution knew (or should have known) in 2023 that much of the still undisclosed and now destroyed evidence was favorable "*Giglio* material" because it undermined Ms. Peter's credibility, demonstrated her bias against Mr. Kearney, and supported the defense's theory that the shoddy, bad faith investigation relied upon a civilian who despised Mr. Kearney and had a documented history of falsifying evidence against him. *See Kyles*, 514 U.S. at 446-47; (Bederow aff., ¶¶ 116-44).

As a consequence of Ms. Peter's deletion of evidence she provided to the Commonwealth via email[4]—which wouldn't matter if the prosecution had preserved and disclosed it as it should have—it is unknown whether Ms. Peter tampered, edited or altered any evidence, which if she did is favorable to the defense, and would be consistent with her track record (Bederow aff., ¶¶ 116-41). Any proof that she provided tampered evidence to the Commonwealth, which is now likely unprovable because of the Commonwealth's complete indifference to its disclosure obligation, is favorable to Mr. Kearney and devastating to the prosecution.

The loss of critical evidence destroyed by Ms. Peter is irremediable, as it is hard to envision what satisfactory penalty the Court could impose upon the prosecution for its deliberate failure to disclose specifically requested evidence that would severely discredit Ms. Peter and the investigation itself. It is not known when Ms. Peter destroyed this

[4] The Commonwealth hasn't provided the defense with a single email sent by DL Tully to Ms. Peter even though she sent him several messages (*see* exhibit NN, ¶ 4(a)(i)). Notably, the defense informed Messrs. Mello and Cosgrove on September 12, 2024, that the purportedly "complete" extraction of Ms. Gateani's phone provided to the defense was "missing Ms. Peter's responses to Ms. Gaetani's messages describing her interactions with DL Tully and Mr. Mello" which "inexplicably disappear[ed] from the extraction report on December 14, 2023, ***after*** Ms. Gaetani texted Ms. Peter [redacted]" (exhibit CCC, pp. 6-7) (emphasis in original).

evidence, what else she may have deleted, and what, if anything, Mr. Mello and DL Tully know about this. Given her past record of dishonesty, there is no basis to assume that Ms. Peter will tell the truth about this issue. Either way, now appears impossible for the defense to review discoverable evidence that would answer these important questions entirely because of the Commonwealth's failure to disclose exculpatory and discoverable evidence in its actual possession.

Consequently, the defense has been deprived of the ability to present a detailed chronological timeline to demonstrate to a jury that a woman with dreadful credibility, who despises Mr. Kearney and has a penchant for falsifying evidence against him helped orchestrate the criminal case against him with the blessing of the Commonwealth. *See* *Dilworth*, 494 Mass. at 593 (dismissal appropriate where nondisclosure deprived defense of opportunity "to evaluate and present" a specific defense). The fault for the loss of favorable evidence due to the prosecution's inexcusable indifference and intentional misconduct must be assigned to the Commonwealth.

The undue delay caused by the Commonwealth's ongoing failure to disclose evidence also has prejudiced Mr. Kearney. In addition to

prolonging this case which has dragged on for two years and counting, and requiring the defense to file demand after demand for what should have been disclosed prior to May 8, 2024, the Commonwealth's unjustifiable nondisclosure and delay in producing the limited evidence it has, is precisely what enabled Ms. Peter to successfully delete discoverable and favorable evidence that otherwise would be in the defense's possession.

The Commonwealth's delay in disclosing the limited disclosure they have provided also has prejudiced Mr. Kearney in that it resulted in the defense filing its first motion to dismiss the indictments while the prosecution kept the defense deliberately kept ignorant of powerful evidence that would have supported that motion and instead is included in the instant motion to dismiss the indictments due to the prosecution's impairment of the grand jury proceeding. The need for a second motion due to the prosecution's inactivity has created further delay and comes at great expense to Mr. Kearney. And to be blunt, considering all that has happened in the grand jury and with respect to the Commonwealth's failure to satisfactorily comply with *Brady* and Rule 14, there is no reason to be confident that the defense has received all the discoverable

materials that would further support the second motion to dismiss and the defense generally.

The Court should also dismiss the indictments by presuming prejudice due to the Commonwealth's above-described "egregious, deliberate and intentional" misconduct both in the grand jury proceeding and regarding the proper disclosure of evidence. *Bridgeman*, 476 Mass. at 316.

The Court can't ignore the fact that throughout this matter, Mr. Mello and DL Tully have engaged in pervasive misconduct, which included the intentional presentation of false and misleading testimony to the grand jury. Nor can it be ignored that Mr. Mello violated a court order instructing him to complete discovery by May 8, 2024 (exhibit ZZ) or that on July 10, 2024, the Commonwealth assured the Court and defense that it "recognized its obligation to provide exculpatory evidence" (exhibit BBB).

Yet it took ***16 months*** and too many to count discovery demands for the Commonwealth to sheepishly admit that undisclosed and discoverable evidence in their actual possession was lost or destroyed by Ms. Peter. And they still haven't disclosed all the discovery in their

possession, custody or control. All of this could have been prevented or explained more than a year ago if the prosecution simply honored its "duty of inquiry" and investigated, spoke to DL Tully and others and complied with its obligation to make themselves aware of discoverable evidence and to disclose it. *Kyles*, 514 U.S. at 437; *McFarlane*, 493 Mass. at 392-93.

The Commonwealth's years-long indifference to its constitutional and statutory rights to disclose evidence to Mr. Kearney warrants a finding that it's nondisclosure (and loss) of evidence was "egregious, deliberate and intentional." Accordingly, the Court should presume that Mr. Kearney was prejudiced, strive to "create a climate adverse to repetition of that misconduct that would not otherwise exist" and dismiss the indictments, *Bridgeman*, 476 at 316-17, or at a minimum, order an evidentiary hearing to determine whether the Commonwealth and its agents intentionally suppressed or delayed disclosure, or caused the loss or destruction of, specifically demanded exculpatory and discoverable evidence.

* * *

The Commonwealth's pervasive misconduct before the grand jury and their years-long failure to disclose specifically requested exculpatory and discoverable evidence deserves no judicial approbation. Nor should the Court avert its eyes from the fact that the Commonwealth's misconduct and blatant disregard for obvious conflicts of interest have thoroughly discredited the investigation and prosecution of Mr. Kearney.

The Commonwealth's misconduct has fueled its misguided obsession to "get Turtleboy." It has stained the Norfolk DA's Office, Mr. Mello, and the MSP, all of whom have been directed and/or influenced by civilians upset with the fact that Mr. Kearney's reporting has exposed their alleged involvement in the death of John O'Keefe. The Commonwealth's overzealousness clouded its judgment to the point that it allowed itself to be guided by Ms. Peter, notwithstanding her recent documented history of fabricating evidence to harm Mr. Kearney. Everything about the way the Commonwealth has conducted itself here has contributed to an ongoing crisis that has led the public to lose confidence in Norfolk County law enforcement.

In these circumstances, the indictments cannot stand and should be dismissed.

CONCLUSION

For the reasons stated herein and the affidavit of Mark A. Bederow, dated September 17, 2022, and its accompanying exhibits, the Court should dismiss the indictments against Mr. Kearney, or in the alternative, grant an evidentiary hearing on the motions.

Dated: September 17, 2025
New York, New York

/s/ Mark A. Bederow

Mark A. Bederow
Law Office of Mark A. Bederow, P.C.
Carnegie Hall Tower
152 West 57th Street
8th Floor
New York, New York 10019
212.803.1293
mark@bederowlaw.com

/s/ Timothy J. Bradl

Timothy J. Bradl
Law Office of Timothy J. Bradl, P.C.
88 Broad Street
Suite 101
Boston, Massachusetts 02110
617.523.9100
TBradl@bradllaw.com